



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

**CASE OF REGNER v. THE CZECH REPUBLIC**

*(Application no. 35289/11)*

JUDGMENT

STRASBOURG

19 September 2017

*This judgment is final but it may be subject to editorial revision.*



**In the case of Regner v. the Czech Republic,**

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Guido Raimondi, *President*,  
Linos-Alexandre Sicilianos  
Robert Spano  
Mirjana Lazarova Trajkovska  
Khanlar Hajiyev  
Luis López Guerra  
András Sajó  
Işıl Karakaş  
Erik Møse  
Aleš Pejchal  
Krzysztof Wojtyczek  
Egidijus Kūris  
Mārtiņš Mits  
Georges Ravarani  
Pere Pastor Vilanova  
Alena Poláčková  
Georgios Serghides, *judges*,

and Johan Callewaert, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 19 October 2016 and on 10 May 2017,

Delivers the following judgment, which was adopted on the last-mentioned date:

**PROCEDURE**

1. The case originated in an application (no. 35289/11) against the Czech Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Czech national, Mr Václav Regner (“the applicant”), on 25 May 2011.

2. The applicant was represented by Mr L. Trojan, a lawyer practising in Prague. The Czech Government (“the Government”) were represented by their Agent, Mr Vít A. Schorm, of the Ministry of Justice.

3. Relying on Article 6 § 1 of the Convention, the applicant complained of the unfairness of administrative proceedings in which he had been unable to have sight of decisive evidence regarded as classified information and made available to the courts by the defendant.

4. On 6 January 2014 the President of the former Fifth Section, to which the application had been allocated (Rule 52 § 1 of the Rules of Court) decided to communicate it to the Government. On 26 November 2015

a Chamber of that Section composed of Angelika Nußberger, President, Boštjan Zupančič, Ganna Yudkivska, Vincent De Gaetano, André Potocki, Helena Jäderblom and Aleš Pejchal, judges, and Milan Blaško, Deputy Section Registrar, delivered its judgment in which it unanimously declared the application admissible and concluded, by a majority, that there had been no violation of Article 6 § 1 of the Convention. The partly dissenting opinion of Judge Jäderblom and the concurring opinion of Judge Pejchal were annexed to the judgment.

5. On 11 February 2016 the applicant requested, in accordance with Article 43 of the Convention, the referral of the case to the Grand Chamber. On 2 May 2016 the panel of the Grand Chamber granted that request.

6. The composition of the Grand Chamber was determined in accordance with Article 26 §§ 4 and 5 of the Convention and Rule 24.

7. The applicant and the Government each filed supplementary written observations (Rule 59 § 1) on the merits of the case. Observations were also received from the Government of the Slovak Republic, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 19 October 2016 (Rule 59 § 3).

There appeared before the Court:

(a) for the Government

Mr V.A. SCHORM, *Agent,*

Mr V. PYSK, Office of the Government Agent,  
Ministry of Justice,

Mrs L. ZAHRADNICKÁ, Office of the Government Agent,  
Ministry of Justice,

Mrs H. BONČKOVÁ, *Advisers;*

(b) for the applicant

Mr M. BILEJ, *Counsel,*

Mrs D. KÁŇOVÁ,

Mrs A. KUKRÁLOVÁ, *Advisers.*

The Court heard addresses by Mr Bilej and Mr Schorm and replies to the questions from the Court.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1962 and lives in Prague.

10. On the basis of a contract signed on 2 November 2004 and governed by the provisions of the Labour Code, the applicant became an employee of the Ministry of Defence.

11. On 27 December 2004, the Ministry's authorised representative requested the National Security Authority (*Národní bezpečnostní úřad* – “the Authority”) to issue the applicant with security clearance (*osvědčení*) giving him access to State classified information in the “secret” category (*tajné*) in accordance with the duties to be carried out by him.

12. On 1 January 2005 the applicant took up his duties as director of the Department of administration of the Ministry's property (*Sekce správy majetku Ministerstva obrany*).

13. On 19 July 2005 the Authority issued the applicant with security clearance, valid until 18 July 2010, confirming that he had access to State classified information in the “secret” category.

14. During the year 2006 the applicant was appointed deputy to the first Vice-Minister of Defence (*zástupce Prvního náměstka ministra obrany*), while continuing to carry out his duties as director of the Department of administration of the Ministry's property.

15. On 7 October 2005 the Authority received confidential information from the intelligence service, classified “restricted” (*vyhrazené*) and dated 5 October 2005. It started an investigation in order to verify the information received. In the course of that investigation the intelligence service provided the Authority with other information, dated 21 March 2006, classified “restricted” and annexed to the security file (*bezpečnostní spis*) under number 77. On the basis of that information the Authority revoked the security clearance on 5 September 2006. There were two unrelated reasons for that decision: firstly, the applicant had failed to indicate, as he should have done when applying for security clearance, that he held directorships in a number of companies and accounts in foreign banks; and secondly, the applicant was considered to pose a national security risk, within the meaning of section 14(3)(d) of Law no. 412/2005. With regard to that risk, the decision did not however indicate which confidential information it was based on, as this was classified “restricted” and could not therefore legally be disclosed to the applicant. The decision indicated that the facts established in respect of his conduct, as documented in the information received by the Authority on 7 October 2005, cast doubt on his suitability for security clearance and his ability not to be influenced and to keep sensitive information secret, and thus indicated that he was no longer trustworthy.

16. On an administrative appeal (*rozklad*) by the applicant, the director of the Authority, after obtaining an opinion from the appeals board, confirmed on 18 December 2006 the Authority's decision of 5 September 2006, but on partly different grounds. He dismissed as unfounded the complaint that the applicant had failed to disclose certain information prior to being issued with security clearance. However, he agreed with the Authority's conclusions regarding the existence of a security risk, which had transpired from the investigation carried out by the Authority and from the classified documents.

17. In the meantime, on 4 October 2006, the applicant had asked to be discharged, for health reasons, from his duties as deputy to the first Vice-Minister of Defence, and from those of director of the Department of administration of the Ministry's property. He was removed from office on the same day under Article 65 § 2 of the Labour Code (see paragraph 26 below). On 20 October 2006 he signed an agreement, under Article 43 of the Labour Code, terminating his contract by mutual consent with effect from 31 January 2007.

18. On 19 January 2007 the applicant lodged an application with the Prague Municipal Court (*městský soud*) for judicial review of the decision revoking his security clearance. He and his lawyer were permitted to consult the file, but the parts classified as confidential were excluded. However, the documents containing information about the existence of a risk, including the confidential documents, had been sent by the Authority to the court, which had access to them. At the public hearing the applicant was given the opportunity to make his submissions and to state what he thought were the reasons for revoking his security clearance. He stated that he believed the information in question had been provided by a military intelligence service which had sought to take revenge on him for his refusal to accept a proposal to co-operate in a manner exceeding his statutory obligations.

19. In a judgment of 1 September 2009 the court dismissed the application for judicial review. It observed that in a procedure revoking security clearance the relevant authority could only disclose reasons for revoking clearance that were based on non-classified documents and that as regards grounds based on classified documents it had to confine itself to referring to the relevant documents and their level of confidentiality. It found that the approach taken by the Authority, which had not disclosed to the applicant the contents of the information on the basis of which the security clearance had been revoked, had not been illegal as disclosure of such information was prohibited by law. It added that the applicant's rights had been sufficiently respected because the court had power to obtain knowledge of the classified information and assess whether it justified the decision taken by the Authority.

20. In a judgment of 15 July 2010 the Supreme Administrative Court (*Nejvyšší správní soud*) dismissed an appeal on points of law (*kasační*

*stížnost*) lodged by the applicant as unfounded. It considered that the classified documents in question had shown beyond any doubt that the applicant did not satisfy the statutory conditions to be entrusted with secret information. It observed that the risk in his regard concerned his conduct, which affected his credibility and his ability to keep information secret. The Supreme Administrative Court added that disclosure of the classified information could have entailed the disclosure of the intelligence service's working methods, the revelation of its information sources or the risk of influencing possible witnesses. It explained that there was a statutory prohibition on indicating where exactly the security risk lay and on specifying the considerations underlying the conclusion that such a risk existed, the reasons and considerations underlying the Authority's decision being based exclusively on classified information. Accordingly, the reasons for the decision had to be limited to a reference to the documents on which it was based and the level of confidentiality of the information used. It went on to observe that, owing to the special nature of proceedings where classified information was concerned, not all the applicant's procedural rights could be guaranteed but that the non-disclosure of the exact reasons underlying the decision to revoke security clearance was counterbalanced by the guarantee that the administrative courts had unlimited access to the classified documents. The Supreme Administrative Court pointed out that the report on the result of the investigations carried out by the intelligence service, included in the file under no. 77, contained specific, comprehensive and detailed information concerning the conduct and lifestyle of the applicant on the basis of which the court was satisfied in the present case as to its relevance for determining whether the applicant posed a national security risk. It observed, further, that the information did not in any way concern the applicant's refusal to co-operate with the military intelligence service.

21. On 25 October 2010 the applicant lodged a complaint with the Constitutional Court (*Ústavní soud*), complaining of the unfairness of the proceedings. In a judgment of 18 November 2010 the court dismissed his complaint as manifestly ill-founded. Referring to its earlier case-law on the subject, it observed that given the special nature and the importance of decisions adopted in respect of classified information where national security interests were manifest, it was not always possible to apply all the guarantees relating to fairness of proceedings. It considered that in the present case the courts' conduct had been duly justified and the reasoning in their decisions comprehensible and in conformity with the Constitution; that they had not departed from procedural standards and constitutional rules to an inordinate degree; and that the Constitutional Court was not therefore required to intervene in their decision-making procedure.

22. On 16 March 2011 the prosecution service lodged a bill of indictment against the applicant and 51 other persons on charges of

influencing the award of public contracts at the Ministry of Defence from 2005 to 2007. The applicant was indicted for participation in organised crime (*účast na zločinném spolčení*); aiding and abetting abuse of public power (*pomoc k trestnému činu zneužívání pravomoci veřejného činitele*); complicity in illegally influencing public tendering and public procurement procedures (*pomoc k trestnému činu pletich při veřejné soutěži a veřejné dražbě*); and aiding and abetting breaches of binding rules governing economic relations (*pomoc k trestnému činu porušování závazných pravidel hospodářského styku*).

In a judgment of 25 March 2014 the České Budějovice Regional Court (*krajský soud*) found the applicant guilty and sentenced him, *inter alia*, to three years' imprisonment. In a judgment of 27 May 2016 the Prague High Court (*Vrchní soud*) upheld the first-instance judgment convicting the applicant, but suspended execution of his prison sentence for a two-year probationary period. That judgment became final.

## II. RELEVANT DOMESTIC LAW

### A. The Charter of fundamental rights and freedoms (Law no. 2/1993)

23. By virtue of Article 26 § 2 of the Charter (*Listina základních práv a svobod*), which has the rank of constitutional law, the right to exercise certain professions or activities may be subject to certain conditions or restrictions.

### B. Legislation governing the status of public servants and labour law

24. The Czech State Civil Service was codified for the first time by the Civil Service Act (*zákon o státní službě*) (Law no. 234/2014), which came into force on 1 January 2015. Although, in 2002, Parliament had passed Law no. 218/2002 on State employees in administration offices and their remuneration and that of other employees in the administration (Service Act), that Act had never come into force and was replaced by the aforementioned Act (Law no. 234/2014).

25. Accordingly, State employees recruited prior to the entry into force of the Civil Service Act were in a private-law relationship with their employer, governed by the Labour Code (Law no. 65/1965, in force until 31 December 2006), with no special status.

26. Article 65 § 2 of the Labour Code provides that employees appointed or elected to a post may be removed from office or relinquish their duties. Under Article 65 § 3, removal from office or relinquishment of duties does not have the effect of terminating employment and the employer



will reach an agreement with the employee regarding a future appointment corresponding to his or her qualifications.

27. The exhaustive list of grounds on which an employee may be dismissed with notice or with immediate effect can be found in Articles 46 and 53 of the Labour Code respectively.

28. Article 64 of the Labour Code provides that an employee may bring legal proceedings challenging the lawfulness of his or her dismissal within two months of that dismissal.

### **C. Protection of Classified Information Act (Law no. 148/1998)**

29. Security clearance was issued to the applicant under the Protection of Classified Information Act (Law no. 148/1998 – “the 1998 Act”) (*zákon o ochraně utajovaných skutečností*).

30. Section 17 of that Act, which was repealed by Law no. 413/2005 on the amendment of laws in the framework of the enactment of the law on the protection of State classified information and access thereto (*zákon o změně zákonů v souvislosti s přijetím zákona o ochraně utajovaných informací a o bezpečnostní způsobilosti*), provided, in particular, that an individual could only have sight of classified information where he or she needed that information in order to carry out his or her activities and was in possession of security clearance, possession of which constituted a prerequisite for exercising a profession that required knowledge of classified information.

31. Section 7(1) of the 1998 Act set up the National Security Authority.

32. By virtue of section 41, an employee’s immediate superior could request the Authority to issue security clearance to his or her employee.

33. Section 5 classified the data as “restricted” (*vyhrazené*), “confidential” (*tajné*), “secret” (*důvěrné*) or “top secret” (*přísně tajné*) information.

34. Anyone seeking to obtain security clearance for one of those categories of information had to be a Czech citizen, of full legal capacity, an adult, of irreproachable character, and trustworthy both in terms of personality and from the point of view of national security. A person who had been convicted of a criminal offence related to the protection of State, economic or professional secrets was regarded as untrustworthy. Furthermore, the law regarded as untrustworthy anyone who, following psychological vetting, had character traits, attitudes or personal relations capable of casting doubt on his or her ability to keep secrets.

35. At the relevant time the 1998 Act did not provide for any judicial review of decisions refusing to grant security clearance.

**D. Law no. 412/2005 on the protection of State classified information and access thereto (version in force until 23 May 2007)**

36. Law no. 412/2005 on the protection of classified information and suitability for security clearance (*zákon o ochraně utajovaných informací a o bezpečnostní způsobilosti*) and Law no. 413/2005, amending Law no. 148/1998, came into force on 1 January 2006. The conditions for issuing security clearance were identical to those contained in the earlier Act, but with a slight difference in definition.

37. Under section 4, State classified information was divided into the following categories: a) “top secret”, where disclosure to an unauthorised person or unlawful use could very seriously harm the interests of the Czech Republic; b) “secret”, where disclosure to an unauthorised person or unlawful use could seriously harm the interests of the Czech Republic; c) “confidential”, where disclosure to an unauthorised person or unlawful use could harm the interests of the Czech Republic; and d) “restricted”, where disclosure to an unauthorised person or unlawful use could be disadvantageous for the interests of the Czech Republic. In respect of the latter category, section 3(5) provided that the disclosure of classified information to an unauthorised person or unlawful use thereof could be disadvantageous for the Czech Republic if it was liable to

a) disrupt the activities of the armed forces of the Czech Republic, NATO or one of its Member States or a Member State of the EU;

b) thwart, complicate or endanger an investigation into criminal offences other than particularly serious offences, or facilitate the perpetration thereof;

c) adversely affect major economic interests of the Czech Republic or the EU or one of its Member States;

d) disrupt major commercial or political negotiations between the Czech Republic and a foreign power; or

e) disrupt security or intelligence operations.

38. Sections 6 to 10 of the Law defined the conditions of access of individuals to classified information in the “restricted” category. Under section 6(1), an individual could be granted access to such classified information where absolutely necessary in order to carry out his or her function, professional or other activities, provided that he or she obtained a document (*oznámení*) certifying that he or she satisfied the conditions for access to classified information in the “restricted” category. That document was issued either by the individual’s hierarchical superior or the National Security Authority according to the case in question.

39. Sections 11-14 of the Law defined the conditions of access of individuals to classified information in the “top secret”, “secret” and “confidential” categories (which were stricter than for access to information in the “restricted” category).

40. Under section 11(1), an individual could be granted access to such classified information where absolutely necessary in order to carry out his or her function, or professional or other activities, provided that he or she had obtained valid security clearance for the necessary category of information and had received appropriate instructions.

41. Section 12(1) defined the conditions for granting security clearance to an individual as follows:

“The Authority shall issue security clearance to individuals who

- a) are nationals of the Czech Republic, of a Member State of the EU or of NATO;
- b) satisfy the conditions laid down in section 6(2) [full legal capacity, aged 18 or over, no criminal record];
- c) are of trustworthy character;
- d) are trustworthy from the point of view of national security.”

42. Pursuant to section 12(2), the individual in question had to satisfy the conditions laid down in 12(1) throughout the entire period of validity of the security clearance.

43. Section 13(1) provided that an individual could be deemed to be of trustworthy character if he or she did not suffer from a disorder liable to adversely affect his or her trustworthiness or ability to keep information secret. In accordance with section 13(2), this was to be certified by a statement that the individual concerned was of trustworthy character and, where required by law, also by an expert report.

44. Section 14(1) provided that anyone who did not pose a security risk was deemed trustworthy from the point of view of national security.

Under section 14(2), the following were deemed to pose a national security risk:

- a) any serious or recurrent activity contrary to the interests of the Czech Republic, or
- b) any activity consisting in suppressing fundamental rights and freedoms, or supporting any such activity.

45. Section 14(3) listed the factors which could be deemed to pose a national security risk. Under letter (d), this could be conduct which affected a person’s trustworthiness and ability not to be influenced and to keep information secret.

46. Under section 58(1)(e), taken in conjunction with sub-section 2, from the date of their appointment and throughout the exercise of their functions, and in so far as necessary for the exercise thereof, all judges had access to all categories of classified information, even where they did not have security clearance for individuals.

47. Law no. 412/2005 introduced a new section IV, entitled “Security vetting procedure” (*bezpečnostní řízení*), which applies to the procedure for

both issuing and revoking security clearance, and is divided into two phases: the administrative stage and the judicial stage. The fourth chapter is devoted more particularly to the judicial stage.

48. Under section 89(7), a party to the vetting procedure for issuing or revoking security clearance and his or her representative are entitled, prior to adoption of the decision, to consult the file and make notes, except for the documents containing classified information.

49. Pursuant to section 101(1), the Authority must bring proceedings to revoke security clearance in respect of anyone who can reasonably be suspected of no longer satisfying the conditions for issuing the relevant public certificate. In accordance with section 101(2), the Authority will revoke security clearance in respect of anyone who no longer satisfies those conditions.

50. Section 107(4) provides that the intelligence services shall, at the Authority's request, submit a report on the results of the investigation carried out by them.

51. Section 122(3) provides that the reasons given in a decision taken under the Act must state the grounds for adopting the decision, the evidence on which the decision is based and the reasoning adopted by the Authority when assessing that evidence and applying the regulations. Where some of the reasons constitute classified information, the decision must contain only a reference to the evidence on which it is based and the degree of confidentiality. The reasoning adopted by the Authority in support of its assessment and the reasons for adopting the decision must only be referred to in so far as they do not constitute classified information.

52. Under section 133(1), judicial review may be sought of the director of the Authority's decision. Section 133(2) provides that on a judicial review the court will take the evidence in such a way as to comply with the duty to protect the confidentiality of the information yielded as a result of the investigation or contained in the records of the intelligence services or the police. The information in question cannot be examined at a hearing unless the person bound by the duty of confidentiality is exempted from that duty. An exemption cannot be granted where this may endanger or seriously compromise the activity of the intelligence services or the police. This also applies to evidence taken other than at a hearing.

53. In accordance with section 133(3), the Authority specifies the information referred to in sub-section 2 which, in its view, cannot be the subject of an exemption from the duty of confidentiality. Where there is a risk of endangering or seriously compromising the activity of the intelligence services or the police, the president of the chamber dealing with the case will decide that the parts of the file having a connection with that information shall be excluded; those parts of the file cannot be consulted by the person seeking judicial review or his or her representative.

### **E. The Code of Administrative Justice (Law no. 150/2002)**

54. In accordance with Article 45 § 3 of the Code of Administrative Justice, whenever a document is filed the administrative authority always indicates the parts of the document that contain classified information. The president of the chamber excludes these parts from consultation. This provision applies, *mutatis mutandis*, to court files. Under Article 45 § 4, however, consultation of the parts of the file to be used as evidence in court cannot be prohibited. Nor is it possible to prohibit consultation of the parts of the file which a party to the dispute had been authorised to consult before the administrative authority.

55. Pursuant to Article 45 § 6, prior to consultation of the file the president of the chamber must inform anyone needing to consult a file containing classified information, as provided for by a special law, of the criminal consequences of breaching the confidentiality of that information. By signing a document certifying that he or she has been informed accordingly, the person thus warned becomes a “designated person”, having a need to know the classified information in question.

56. Under Article 77 § 2, subject to a contrary provision in a special law on the scope and method of taking evidence, the courts may re-examine the evidence or, in this context, request evidence in addition to that previously produced by the administrative authority.

### **III. RELEVANT DOMESTIC PRACTICE**

57. Law no. 148/1998 and Law no. 412/2005 have given rise to major developments in the case-law.

58. On 12 July 2001 the Constitutional Court, sitting in plenary, adopted judgment no. Pl. ÚS 11/2000 on Law no. 148/1998 which in principle prohibited the Authority from communicating to the person concerned the reasons for not issuing security clearance. While acknowledging the legitimate interests of the State in keeping certain information and investigation methods secret, the Constitutional Court nevertheless held that even in those specific cases it was not possible to waive the protection of the individual’s fundamental rights. It concluded that it was incumbent on the legislature to enact new legislation providing an appropriate means of reflecting and reconciling private interests and the general interest.

59. The Supreme Administrative Court, in judgment no. 6 As 14/2006 of 31 January 2007, and subsequently the Constitutional Court, in judgment no. II. ÚS 377/04 of 6 September 2007, while observing that the granting of security clearance was an “extraordinary privilege”, considered that the decisions taken by the authorities in this area were amenable to judicial review. They did, however, find that it was “certainly not possible to oblige the Authority, on the pretext of fully respecting the procedural rights of

a party to the proceedings, to refer in its decisions to facts which could endanger the State's interests, the effectiveness of the work of the intelligence services or the police, or the security of their staff or third parties" and held as follows: "extra special care should be taken to ensure that these aims are not pursued to the detriment of the principles of the rule of law or of the individual's fundamental rights. According to the Constitutional Court's case-law ... on a review of a decision having the direct consequence of limiting the possibility of holding a particular post, the public interest in confidentiality cannot justify excluding that decision from the scope of ... Article 6 § 1 of the Convention guaranteeing the right to judicial protection".

60. In judgment no. I. ÚS 828/09 of 22 September 2009 the Constitutional Court observed, in particular, that the right to freely choose one's profession did not include the right to obtain security clearance or the right to practise a specific profession, the exercise of which was moreover strictly limited in the interests of the State. It rejected the complainant's argument that a decision revoking security clearance for the "secret" category had infringed his fundamental right to freely choose his profession, within the meaning of Article 26 of the Charter. It observed that that right could be construed not as enshrining everyone's right to a specific profession but only the right to choose the profession one wished to practise. It added that in order to enter into a particular employment relationship or to carry on a specific independent activity, the person concerned had to satisfy the detailed statutory conditions for exercising that profession or activity, in accordance with Article 26 § 2 of the Charter.

61. In judgment no. 5 As 44/2006 of 30 January 2009 the Supreme Administrative Court held that, in interpreting the expression "risk for national security", the evidence gathered had to be examined in the light of a possible security risk. Thus, a mere suspicion of a national security risk sufficed to conclude that the person concerned was not trustworthy from a national security point of view.

62. The Supreme Administrative Court also referred to the connection between holding a particular post and issuing security clearance. Referring to the drafting history of the Law, it observed that access to classified information must only be granted to persons necessarily requiring access for the purposes of exercising their profession or function. That was also the position taken by the Constitutional Court, which, in judgment no. I. ÚS 828/09 of 22 September 2009, held that it was not possible to infer from the right to freely choose one's profession the right to obtain security clearance, which was neither guaranteed by the Charter of Fundamental Rights and Freedoms nor by the instruments of infra-constitutional rank.

63. A judgment delivered by the seventh chamber of the Supreme Administrative Court on 9 April 2009 (no. 7 As 5/2008) stated, among other things, that in the particular area in question, where the authorities decided

not to disclose to the interested party the specific factual reasons for which he or she was considered untrustworthy from a security point of view, they were nonetheless obliged, in order for their decision to stand up to a judicial review, to make it entirely possible for those reasons to be verified – particularly as to the facts – by a court. In its view, this meant that the information underlying the relevant decision had to be included in the National Security Authority's file and that the court had to re-examine of its own motion the relevance thereof. The judgment added that accordingly the National Security Authority could only base its conclusions on the information included in the file.

By using the term “information”, the judgment in question indicated fairly clearly that the file submitted by the National Security Authority necessarily had to include all the information that had served as a basis for an administrative decision, and thus even their sources, but remained silent as to verification of the authenticity and veracity of those sources.

64. In a subsequent judgment, of 25 November 2011 (no. 7 As 31/2011), the seventh chamber of the Supreme Administrative Court examined the question of the veracity of the information and its sources. It referred *expressis verbis* to the judgment delivered in respect of the applicant, stating that in that case the court had not mentioned the specific information on which it had based its decision on grounds of an interest in concealing that information, which meant that the party concerned, not having been advised of its contents, could not make informed submissions on the relevance of the circumstances observed. It concluded that in such a situation the court had to step into the applicant's shoes and review the relevance of the classified information from every standpoint that appeared to be *a priori* important for deciding the dispute.

The judgment acknowledged that the administrative courts could not examine the authenticity and veracity of the documents and information provided by the intelligence service and that this was an exception to the ordinary powers of the administrative courts in assessing the evidence produced before them. It added that, with regard to information received from the intelligence service, absolute certainty and truth were not required and it was sufficient that the conclusions drawn from the facts set out in the information thus provided constituted the most plausible explanation. It added that this did not mean that the court was thus deprived of the possibility of examining the credibility and force of the information provided by the intelligence service, pointing out that the reports drawn up by the intelligence service should not be limited to reflecting the opinion of their authors without it being possible for the courts to verify the relevant facts set out in the file.

65. In a judgment of 30 September 2015 (no. 1 As 146/2015), the Supreme Administrative Court observed, *inter alia*, that, according to the provisions of section 133 of Law no. 412/2005, the court (the president of

the chamber) had the task of deciding whether to remove a document from the file, on condition that it had concluded that the statutory conditions allowing the exclusion of certain information and restriction of access thereto were satisfied. It stated that, in providing thus, Law no. 412/2005 did not associate the application of the procedure provided for in section 133(3) only with information classified at a particular level, but that the procedure was generally applicable to any information classified as confidential (from restricted to top secret) yielded by an investigation or contained in the records held by the intelligence services or the police, where its disclosure was liable to endanger or disrupt the activities of the intelligence services or of the police, while being identified by the authorities as requiring that confidentiality be maintained (see judgment no. 9 As 9/2010 of 15 July 2010 of the Supreme Administrative Court).

66. Sitting in its extended composition, the Supreme Administrative Court held, on 1 March 2016 (no. 4As 1/2015-40), that information did not automatically have to remain inaccessible throughout the judicial proceedings and nor did it have to be automatically excluded from the process of examining evidence. It stated that this was only the case if the judge concluded that the exclusion of such information was legal. It found, on the question of the assessment of the quality of information underlying a decision to revoke clearance and of its sources, that neither the National Security Authority nor the administrative courts verified the truth of information emanating from those services in the same way as in ordinary administrative proceedings. However, it added that information from the intelligence services could not take the form of a mere opinion of the author, without being supported by sufficient evidence included in the file and capable of being verified by the court. In the court's view, the National Security Authority and the administrative courts should have the possibility of assessing the truthfulness and persuasiveness of intelligence information and its relevance for the security vetting procedure.

#### IV. COMPARATIVE LAW AND JUDICIAL PRACTICE

67. In the light of the comparative information available to the Court concerning thirty member States, protection of national security is a matter of concern in every State whose legislation was examined. Whilst the concept of "national safety" or "national security" is not uniformly defined, the legislation in each member State allows the executive, in particular the authorities responsible for national security, to restrict access to classified information, including in judicial, criminal and administrative proceedings, where this is deemed necessary to protect the State's interests. The authorities enjoy a wide discretion in this regard.



68. A large majority of States, however, entrust the courts with a power of scrutiny concerning justification for the classification of documents. Most of the States entrust the courts with the power to examine not only the formal lawfulness of a decision classifying documents, but also the specific justification for classifying as confidential information gathered by the intelligence services. Certain States invest all judges with this power, while others provide for a vetting procedure for judges required to examine such information and documents. In some member States the judicial examination is conducted in the absence not only of the public and the press, but also the parties to the proceedings and their lawyers.

69. The scope of that judicial review is not uniformly regulated. The only consensus is in considering that the non-disclosure of classified information during the judicial proceedings does not in itself constitute a violation of the fundamental rights of the person. Whilst non-disclosed documents cannot be used in a criminal trial, the use of classified information and non-disclosed documents is allowed in administrative proceedings in certain States.

70. With regard more specifically to the refusal or the withdrawal of security clearance granting courts access to confidential documents, certain States exclude any judicial review while others provide for a judicial review conferring variable powers on judges, ranging from merely reviewing the formal lawfulness of the relevant decision to examining the justification on the merits with an analysis of the documents underlying the decision.

## V. CASE-LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

71. On 4 June 2013 the Court of Justice of the European Union (CJEU) gave a preliminary ruling in the case *ZZ v. the United Kingdom* (case C-300/11). The request for the ruling concerned the interpretation of Article 30(2) of the amending Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, read in particular in the light of Article 47 of the Charter of Fundamental Rights of the European Union. The context was a dispute between a person with dual French and Algerian nationality and the United Kingdom immigration authorities regarding the latter's decision refusing him admission, on public security grounds, to the United Kingdom. The CJEU replied, in substance, that where, in exceptional cases, a national authority refused, on grounds of State security, to provide precise and full disclosure to the person concerned of the grounds which constituted the basis of a decision refusing entry, it was necessary for a court to be entrusted with verifying whether those reasons stood in the way of precise and full disclosure of the grounds on which the decision in question was

based and of the related evidence. With regard to proof that State security would in fact be compromised by disclosure to the person concerned of those grounds, it observed that there was no presumption that the reasons invoked by a national authority existed and were valid (§ 61 of the judgment). It observed, further, that if the court in question concluded that State security did not preclude disclosure to the person concerned of the precise and full grounds on which a decision refusing entry was based, it gave the competent national authority the opportunity to disclose the missing grounds and evidence to the person concerned. If that authority did not authorise their disclosure, the court proceeded to examine the legality of such a decision on the basis of solely the grounds and evidence which had been disclosed (§ 63) and if it turned out that State security did stand in the way of disclosure of the grounds to the person concerned, judicial review of the legality of a decision taken must be carried out in a procedure which struck an appropriate balance between the requirements flowing from State security and the requirements of the right to effective judicial protection whilst limiting any interference with the exercise of that right to that which was strictly necessary. It held in particular:

“65. In this connection, first, in the light of the need to comply with Article 47 of the Charter, that procedure must ensure, to the greatest possible extent, that the adversarial principle is complied with, in order to enable the person concerned to contest the grounds on which the decision in question is based and to make submissions on the evidence relating to the decision and, therefore, to put forward an effective defence. In particular, the person concerned must be informed, in any event, of the essence of the grounds on which a decision refusing entry ... is based, as the necessary protection of State security cannot have the effect of denying the person concerned his right to be heard and, therefore, of rendering his right of redress ineffective ... .

66. Second, the weighing up of the right to effective judicial protection against the necessity to protect the security of the Member State concerned – upon which the conclusion set out in the preceding paragraph of the present judgment is founded – is not applicable in the same way to the evidence underlying the grounds that is adduced before the national court with jurisdiction. In certain cases, disclosure of that evidence is liable to compromise State security in a direct and specific manner, in that it may, in particular, endanger the life, health or freedom of persons or reveal the methods of investigation specifically used by the national security authorities and thus seriously impede, or even prevent, future performance of the tasks of those authorities.

67. In that context, the national court with jurisdiction has the task of assessing whether and to what extent the restrictions on the rights of the defence arising in particular from a failure to disclose the evidence and the precise and full grounds on which the decision ... is based are such as to affect the evidential value of the confidential evidence.

68. Accordingly, it is incumbent upon the national court with jurisdiction, first, to ensure that the person concerned is informed of the essence of the grounds which constitute the basis of the decision in question in a manner which takes due account of the necessary confidentiality of the evidence and, second, to draw, pursuant to

national law, the appropriate conclusions from any failure to comply with that obligation to inform him.”

72. In the case of *Commission and Others v. Kadi* (No. C-584/10 P, 18 July 2013), the CJEU carried out a similar balancing exercise between the requirements relating to the right to effective judicial protection, in particular respect for the principle of an adversarial process, and those flowing from the security of the European Union or its Member States (see, in particular, paragraphs 111 and 125-129).

## THE LAW

### ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

73. The applicant complained of the unfairness of the proceedings he had brought to challenge the decision revoking his security clearance. In his submission, the administrative courts had refused him access to decisive evidence, classified as confidential, which had been made available to them by the defendant. He relied on Article 6 § 1 of the Convention, the relevant part of which reads as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

#### A. The Chamber judgment

74. The Chamber first examined the plea of inadmissibility raised by the Government and based on the inapplicability of Article 6 of the Convention. It noted in that regard that Czech law recognised that anyone to whom security clearance had been granted had a special right entitling him or her to obtain a review of any subsequent decision revoking that clearance with a view to ensuring that the decision was justified according to the statutory criteria for issuing clearance (see paragraph 53 of the judgment).

75. With regard to the civil nature of the right, the Chamber applied the *Vilho Eskelinen* test (see *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, § 62, ECHR 2007-II) and considered that the applicant was a public servant. However, it distinguished the present case from *Vilho Eskelinen* on the grounds that the labour dispute had not been directly decisive for the applicant, as he had not been removed from office as a result of the revocation of his security clearance and the proceedings in issue had not concerned his dismissal. In the Chamber’s view, even though the revocation of security clearance had not resulted in the automatic termination of the applicant’s employment contract with the Ministry of Defence, it had been decisive for the choice of posts available to him (see

paragraph 55 of the judgment). Accordingly, the decision revoking the applicant's security clearance and the subsequent proceedings had affected his civil rights and, consequently, Article 6 § 1 of the Convention was applicable (see paragraphs 57-58 of the judgment).

76. On the merits, the Chamber found that the reasons for the decision not to disclose the document in question to the applicant had been based on national security interests because, according to the authorities, disclosure could have had the effect of revealing the working methods of an intelligence service and its information sources or have led to attempts by the applicant to influence possible witnesses. According to the Chamber, the decision-making procedure had "as far as possible" complied with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the applicant's interests, with the result that there had been no violation of Article 6 § 1 of the Convention (see paragraphs 72, 75-76 and 79 of the judgment).

## **B. Preliminary objections raised by the Government**

### *1. The parties' submissions*

#### **(a) The Government**

##### *(i) Victim status of the applicant*

77. In reply to a question put to them by the Grand Chamber regarding the victim status of the applicant, the Government submitted that the outcome of the domestic proceedings had not been directly decisive for the applicant's right to continue carrying out his duties. They pointed out that it was the applicant himself who had asked to be removed from office and that he had not said that his request was motivated by the revocation of his security clearance or otherwise connected with that revocation. Moreover, removal from office had not terminated his employment relationship as such. In other words, there was nothing to suggest that the measure in question, namely, the revocation of the applicant's security clearance, had had any bearing on his employment relationship with the Ministry of Defence. Accordingly, the applicant could not be regarded as a victim, within the meaning of Article 34 of the Convention, of a violation of his right to a fair trial.

##### *(ii) Applicability of Article 6 § 1 of the Convention*

78. The Government did not contest the fact that the present case concerned a "dispute" between the applicant as a former holder of security clearance and the National Security Authority, a central authority responsible for decisions regarding security clearance. They agreed with the Chamber that the main subject of the dispute had been the reliability of the

applicant from a security point of view (see paragraph 50 *in fine* of the Chamber judgment).

79. However, unlike the Chamber, which had considered that the subject of the dispute had been the applicant's right to obtain a review of the decision revoking his security clearance (see paragraph 53 of the Chamber judgment), the Government submitted that the present dispute concerned the question whether the applicant should continue to be regarded as reliable from a security point of view, that is, whether he had a substantive right, or rather a privilege, allowing him to keep the security clearance that gave him access to classified information.

80. The Government added that in the present case the dispute did not concern the right not to be unfairly dismissed, as the applicant had himself asked to be removed from office and had agreed to the termination of his employment relationship.

81. With regard to the question whether the dispute concerned a right recognised under domestic law, the Government noted first of all that no right of access by individuals to classified information could be inferred from the relevant provisions of domestic law. They pointed out that, according to the case-law of the higher domestic courts, Czech law did not provide for a "right" to be issued with security clearance. They referred in that connection to domestic case-law according to which issuing security clearance to a particular individual was an extraordinary privilege granted by the Authority and the decision whether or not to grant that privilege to the person concerned was left to the full discretion of that authority.

82. According to the Government, the above-mentioned considerations applied, *mutatis mutandis*, to revocation of a person's security clearance.

83. They observed that the Authority enjoyed a wide margin of appreciation in determining the conduct or activities that could raise suspicion regarding a security risk and thus cast doubt on a person's reliability from a security point of view. Relying on the general principles established by the Court, the Government submitted that where the subject of the domestic proceedings was a decision as to whether the applicant should continue to enjoy a certain privilege, an unfettered discretion or even a wide margin of appreciation on the part of the Authority was a factor indicating that no "right" to such a privilege was recognised under the domestic law (they referred to *Mendel v. Sweden*, no. 28426/06, § 44, 7 April 2009).

84. They added that once a doubt regarding a person's reliability from a national security point of view had been established, the Authority had no further discretion, the law then imposing immediate measures requiring the revocation of that person's security clearance. The Government stressed in that regard that as a reasonable doubt or a mere suspicion constituted reasonable grounds for revoking security clearance, the Authority had

hardly any leeway in its decision-making (they referred to *Wolff Metternich v. the Netherlands* (dec.), no. 45908/99, 18 May 1999).

85. With regard to the civil nature of the right in question within the meaning of Article 6 § 1 of the Convention, the Government maintained that the question whether or not a State should regard as reliable from a national security point of view a person working within its central administration concerned the core of public authority prerogatives and State sovereignty.

86. The Government also pointed out that a tenuous connection between the dispute and the civil rights in issue or remote consequences for those rights did not suffice for Article 6 § 1 to be applicable. A civil right or obligation had to be the subject of the “dispute” and, at the same time, the outcome of the proceedings had to be directly decisive for that right (they cited the case of *Smagilov v. Russia* (dec.), no. 24324/05, § 54, 13 November 2014).

87. In the present case the Government stressed that, apart from stating that he was no longer allowed to continue in his post, the applicant had never claimed that the Authority’s decision or the subsequent proceedings had had an impact on any of his civil rights; nor had he in any way demonstrated the slightest adverse effect on his civil rights. The Government also pointed out that the applicant’s monthly income during the period prior to the revocation of his security clearance had in fact been almost identical to the income received subsequently.

88. The Government observed that no “civil right” of a public servant to be authorised to hold a certain public office in the State administration could be inferred from the Convention (they cited the case of *Houbal v. the Czech Republic*, no. 75375/01, § 70, 14 June 2005). Likewise, at the relevant time it had not been possible to infer the existence of a subjective right to the undisturbed performance of public office where a person had already been appointed to the post in question because, by law, a public servant could be removed from office at will by the person empowered to appoint him or her, which did not mean, however, that the employment relationship with the employer was thus terminated, as only the job position changed.

89. Those considerations were of even greater application, in the Government’s submission, if, under Article 26 § 2 of the Charter of Fundamental Rights and Freedoms, for the performance of a specific public office, the law stipulated special requirements that the official concerned had ceased to satisfy. The Government therefore shared the view of the Supreme Administrative Court that there was no right to hold such public office because the person concerned could not have any legitimate expectation of not being removed from office if he or she no longer satisfied the requirements for the proper performance of that office (see paragraph 59 above).

90. The Government concluded that the present dispute mainly concerned the question whether the applicant had remained reliable from a security point of view and could accordingly keep the security clearance which gave him access to State secrets. That prerogative could hardly be considered as a “right”, still less a civil right. Accordingly, in their submission, Article 6 § 1 of the Convention did not apply in the present case.

**(b) The applicant**

*(i) Victim status of the applicant*

91. The applicant submitted that his removal from office and the subsequent termination of his employment relationship had been the consequences of prior unlawful measures and erroneous decisions taken by the National Security Authority which he had challenged in administrative and judicial proceedings and before the Constitutional Court.

92. Considering the psychological pressure that had been exerted on him, he had had no choice but to leave his post and then his employment as well.

*(ii) Applicability of Article 6 § 1 of the Convention*

93. The applicant submitted that a decision granting or revoking the security clearance giving access to classified information had not then and did not now depend on an assessment by the Authority but had to be granted where the statutory conditions were met and that, accordingly, Czech law provided for a right of access to classified information where the statutory conditions were satisfied.

94. He stated that his application did not only concern the revocation of his security clearance as such, but also the procedural measures taken by the administrative authorities and the courts which had led to his clearance being revoked.

95. The applicant also indicated that the revocation of his security clearance had had the effect of making it impossible for him to continue carrying out his duties. As deputy to a vice-minister of Defence and director of the Department of administration of the Ministry’s property, the applicant had regularly dealt with classified information, which had become impossible without security clearance. Therefore, he had had to stop working at the Ministry of Defence. He added that he had been unable to carry out other duties requiring security clearance. He concluded that the case had concerned his civil rights and that, consequently, Article 6 § 1 of the Convention applied in the present case.

## 2. *The Court's assessment*

### (a) **Whether the applicant was a victim**

96. The Court observes at the outset that the Government are not estopped from disputing the applicant's victim status for the first time before the Grand Chamber, especially as the latter put a question to the parties of its own motion on the subject (see *Blečić v. Croatia* [GC], no. 59532/00, §§ 63-67, ECHR 2006-III).

97. The Grand Chamber notes that it can, like the Chamber, under Article 35 § 4 *in fine* of the Convention, "reject any application which it considers inadmissible ... at any stage of the proceedings". Thus, even at the merits stage and subject to Rule 55 of the Rules of Court, the Grand Chamber may reconsider a decision to declare an application admissible where it concludes that it should have been declared inadmissible for one of the reasons given in the first three paragraphs of Article 35 of the Convention (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and others, § 56 and further references cited in the judgment, 25 March 2014).

98. In the light of the particular circumstances of the instant case, the applicant's victim status is closely linked to the substance of his complaint under Article 6 § 1 of the Convention. The Court therefore considers it justified to join this question to the examination of the applicability of Article 6 § 1 of the Convention.

### (b) **Applicability of Article 6 § 1 of the Convention**

#### (i) *The principles*

99. The Court reiterates that for Article 6 § 1 to be applicable under its "civil" limb, there must be a "dispute" regarding a "right" which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether it is protected under the Convention. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play.

100. With regard firstly to the existence of a right, the Court reiterates that the starting-point must be the provisions of the relevant domestic law and their interpretation by the domestic courts (see *Masson and Van Zon v. the Netherlands*, 28 September 1995, § 49, Series A no. 327-A; *Roche v. the United Kingdom* [GC], no. 32555/96, § 120, ECHR 2005-X; *Boulois v. Luxembourg* [GC], no. 37575/04, § 91, ECHR 2012; *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, § 97, ECHR 2016, and further references cited in the judgment; *Baka v. Hungary*



[GC], no. 20261/12, § 101, ECHR 2016; and *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, § 71, ECHR 2016 (extracts), and further references cited in the judgment). Article 6 § 1 does not guarantee any particular content for “rights and obligations” in the substantive law of the Contracting States: the Court may not create by way of interpretation of Article 6 § 1 a substantive right which has no legal basis in the State concerned (see, for example, *Fayed v. the United Kingdom*, 21 September 1994, § 65, Series A no. 294-B; *Roche*, cited above, § 119; and *Boulois*, cited above, § 91).

101. In that connection the Court observes that the rights thus conferred by the domestic legislation can be substantive, or procedural, or, alternatively, a combination of both.

102. There can be no doubt about the fact that there is a right within the meaning of Article 6 § 1 where a substantive right recognised in domestic law is accompanied by a procedural right to have that right enforced through the courts. The mere fact that the wording of a legal provision affords an element of discretion does not in itself rule out the existence of a right (see *Camps v. France* (dec.), no. 42401/98, 24 October 2000, and *Ellès and Others v. Switzerland*, no. 12573/06, § 16, 16 December 2010; and, conversely, *Boulois*, cited above, § 99, and *Miessen v. Belgium*, no. 31517/12, § 48, 18 October 2016). Indeed, Article 6 applies where the judicial proceedings concern a discretionary decision resulting in interference in an applicant’s rights (see *Pudas v. Sweden*, 27 October 1987, § 34, Series A no. 125-A; *Obermeier v. Austria*, 28 June 1990, § 69, Series A no. 179; and *Mats Jacobsson v. Sweden*, 28 June 1990, § 32, Series A no. 180-A).

103. However, Article 6 is not applicable where the domestic legislation, without conferring a right, grants a certain advantage which it is not possible to have recognised in the courts (see *Boulois*, cited above, § 90, which concerned a prison board’s refusal to grant a prisoner prison leave, with no possibility of appeal to an administrative court). The same situation arises where a person’s rights under the domestic legislation are limited to a mere hope of being granted a right, with the actual grant of that right depending on an entirely discretionary and unreasoned decision of the authorities (see *Masson and Van Zon*, cited above, §§ 49-51; *Roche*, cited above, §§ 122-25; and *Ankarcrona v. Sweden* (dec.), no. 35178/97, ECHR 2000-VI).

104. There are also cases where the domestic legislation recognises that a person has a substantive right without at the same time, for one reason or another, there being a legal means of asserting or enforcing the right through the courts. This is the case, for example, of jurisdictional immunities provided for in the domestic law. Immunity is to be seen here not as qualifying a substantive right but as a procedural bar on the national courts’ power to determine the right (see *Al-Adsani v. the United Kingdom*

[GC], no. 35763/97, § 48, ECHR 2001-XI, and *Cudak v. Lithuania* [GC], no. 15869/02, § 57, ECHR 2010-III).

105. In some cases, lastly, national law, while not necessarily recognising that an individual has a subjective right, does confer the right to a lawful procedure for examination of his or her claim, involving matters such as ruling whether a decision was arbitrary or *ultra vires* or whether there were procedural irregularities (see *Van Marle and Others v. the Netherlands*, 26 June 1986, § 35, Series A no. 101, and, *mutatis mutandis*, *Kök v. Turkey*, no. 1855/02, § 36, 19 October 2006). This is the case regarding certain decisions where the authorities have a purely discretionary power to grant or refuse an advantage or privilege, with the law conferring on the person concerned the right to apply to the courts, which, where they find that the decision was unlawful, may set it aside. In such a case Article 6 § 1 of the Convention is applicable, on condition that the advantage or privilege, once granted, gives rise to a civil right.

106. With regard to the civil nature of the right in question, the Court observes first of all that an employment relationship under the ordinary law, based on an employment contract concluded between an employee and an employer, gives rise to civil obligations for both parties, which are, respectively, to carry out the tasks provided for in the contract and to pay the stipulated salary.

An employment relationship between a public-law entity, including the State, and an employee may be based, according to the domestic provisions in force, on the labour-law provisions governing relations between private individuals or on a body of specific rules governing the civil service. There are also mixed systems, combining the rules of labour law applicable in the private sector with certain specific rules applicable to the civil service.

107. With regard to public servants employed in the civil service, according to the criteria established in *Vilho Eskelinen and Others*, cited above, the respondent State cannot rely before the Court on the applicant's status as a civil servant to exclude the protection embodied in Article 6 unless two conditions are fulfilled. First, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State's interest. In order for the exclusion to be justified, it is not enough for the State to establish that the civil servant in question participates in the exercise of public power or that there exists a special bond of trust and loyalty between the civil servant and the State, as employer. It is also for the State to show that the subject matter of the dispute in issue is related to the exercise of State power or that it has called into question the special bond. Thus, there can in principle be no justification for the exclusion from the guarantees of Article 6 of ordinary labour disputes, such as those relating to salaries, allowances or similar entitlements, on the basis of the special nature of the relationship between the particular civil servant and the State

in question. There will, in effect, be a presumption that Article 6 applies. It will be for the respondent State to demonstrate, first, that a civil-servant applicant does not have a right of access to a court under national law and, secondly, that the exclusion of the rights under Article 6 for the civil servant is justified (*ibid.*, § 62, and *Baka*, cited above, § 103).

108. The Court reiterates further that the criteria set out in the *Vilho Eskelinen and Others* judgment have been applied to many types of dispute concerning civil servants, including those relating to recruitment or appointment (see *Juričić v. Croatia*, no. 58222/09, §§ 54-58, 26 July 2011), career or promotion (see *Dzhidzheva-Trendafilova* (dec.), no. 12628/09, § 50, 9 October 2012), transfer (see *Ohneberg v. Austria*, no. 10781/08, § 24, 18 September 2012) and termination of service (see *Olujić v. Croatia*, no. 22330/05, §§ 33-34, 5 February 2009, and *Nazsiz v. Turkey* (dec.) no. 22412/05, 26 May 2009). More explicitly, the Court held in *Bayer v. Germany* (no. 8453/04, § 38, 16 July 2009), which concerned the removal from office of a State-employed bailiff following disciplinary proceedings, that disputes about “salaries, allowances or similar entitlements” were only non-exhaustive examples of “ordinary labour disputes” to which Article 6 should in principle apply under the *Eskelinen* test. In the *Olujić* judgment (cited above, § 34) it held that the presumption of applicability of Article 6 in the *Eskelinen* judgment also applied to cases of dismissal (see *Baka*, cited above, § 105).

109. Specifically, the Court applied Article 6 § 1 in a case concerning refusal to issue security clearance to the applicant, who was thus dismissed from his post as border guard (see *Ternovskis v. Latvia*, no. 33637/02, §§ 9 and 10, 29 April 2014). It noted that although a right of access to State secrets was not guaranteed by the Convention, the refusal to issue security clearance had led to the applicant’s dismissal, resulting in clear pecuniary repercussions for him. Indeed, the link between the decision not to grant the applicant security clearance and his loss of income was “certainly more than tenuous or remote” (*ibid.*, § 44). The Court concluded that Article 6 was applicable, adding that domestic law had not excluded access by the claimant to a court (*ibid.*, §§ 46-50).

110. Article 6 of the Convention was also held to be applicable in two cases concerning revocation of a licence to carry firearms, the applicants having been listed in a database containing information on persons deemed to be a potential danger to society (see *Pocius v. Lithuania*, no. 35601/04, § 40, 6 July 2010, and *Užkauskas v. Lithuania*, no. 16965/04, § 34, 6 July 2010). The applicants had brought legal proceedings challenging the listing of their names by the police and had sought to have their names removed from the database. The courts had rejected their request, basing their decision on evidence produced by the police and classified secret that it was thus impossible to disclose to them. The Court concluded that Article 6 was applicable, on the grounds that the inclusion of the applicants’

names in the database had affected their reputation, their private life and their job prospects (see *Pocius*, §§ 38-46, and *Užukauskas*, §§ 34-39, both cited above).

111. The Court also concluded that Article 6 was applicable in a case concerning judicial review of the appointment of a court president (see *Tsanova-Gecheva v. Bulgaria*, no. 43800/12, §§ 84-85, 15 September 2015). Whilst recognising that Article 6 did not guarantee the right to be promoted or to occupy a post in the civil service, the Court observed, however, that the right to a legal and fair recruitment or promotion procedure or to equal access to employment and to the civil service could arguably be regarded as rights recognised under domestic law, in so far as the domestic courts had recognised their existence and had examined the grounds submitted by the persons concerned in this regard.

112. Lastly, Article 6 of the Convention was applied recently in a case in which the applicant complained of having been unable to challenge before the courts her dismissal from the National Security Service (see *Miryana Petrova v. Bulgaria*, no. 57148/08, §§ 30-35, 21 July 2016). In that case the Court found that what was at stake was not access to State secrets, which was not guaranteed by the Convention, but rather the applicant's rights which had been affected as a consequence of the refusal to issue her security clearance. In the Court's view, that refusal had had a decisive impact on the applicant's personal situation as in the absence of the required clearance, she had been unable to continue to work in the position in which she had served for years, and this had had clear pecuniary repercussions for her. The link between the decision not to grant the applicant security clearance and her loss of income had therefore been "more than tenuous or remote" (*ibid.*, § 31).

(ii) *Application of the above-cited principles to the present case*

(α) Existence of a right

113. In order to determine whether the applicant had a right in the present case the Court must first analyse the actual nature of his complaint.

114. The applicant complained of the unfairness of the proceedings before the administrative courts which he had brought following the revocation, by the National Security Authority, of the security clearance issued to him to enable him to carry out his duties at the Ministry of Defence (see paragraphs 11-14 above). In his submission, he had lost his function and subsequently his employment as a result of the decision revoking his security clearance (see paragraphs 93-95 above).

115. It is clear from the provisions of domestic law and their interpretation by the domestic courts that the possession of security clearance is a necessary prerequisite for exercising professional activities requiring the persons concerned to have knowledge of or to handle State

classified information (see paragraphs 30 and 40 above). Security clearance is not an autonomous right but a condition *sine qua non* for the exercise of duties of the type carried out by the applicant. Accordingly, the loss of the applicant's security clearance had a decisive effect on his personal and professional situation preventing him from continuing to carry out certain duties at the Ministry of Defence (see, *mutatis mutandis*, *Helmut Blum v. Austria*, no. 33060/10, § 65, 5 April 2016).

116. The Court must therefore first examine whether the applicant could rely on a right or whether he was in a situation in which he aspired to obtain a mere advantage or privilege which the competent authority had a discretion to grant or refuse him without having to give reasons for its decision.

117. Access to employment and, still further, to the functions performed by the applicant in the present case, constitutes in principle a privilege that can be granted at the relevant authority's discretion and cannot be legally enforced.

This is not the case regarding the continuation of such an employment relationship or the conditions in which it is exercised. In the private sector labour law generally confers on employees the right to bring legal proceedings challenging their dismissal where they consider that they have been unlawfully dismissed, or unilateral substantial changes have been made to their employment contract. The same applies, *mutatis mutandis*, to public-sector employees, save in cases where the exception provided for in the above-mentioned judgment *Vilho Eskelinen and Others* applies.

118. In the present case the applicant's ability to carry out his duties was conditional on authorisation to access classified information. The revocation of his security clearance therefore made it impossible for him to perform his duties in full and adversely affected his ability to obtain a new post in the civil service.

119. In these circumstances the Court considers that the link between the decision to revoke the applicant's security clearance and the loss of his duties and his employment was more than tenuous or remote (see, *mutatis mutandis*, *Ternovskis*, cited above, § 44, and *Miryana Petrova*, cited above, § 31). He could therefore rely on a right to challenge the lawfulness of that revocation before the courts.

(β) Civil nature of the right

120. With regard to the civil nature of the right within the meaning of Article 6 § 1, whilst it is true that the present case does not concern a dispute between the applicant and his employer concerning the alleged unlawfulness of the former's dismissal, but the revocation of his security clearance, regard must be had to the fact that the revocation prevented him from continuing in his function with the Vice-Minister of Defence. What was therefore at stake for the applicant was not the right to have access to

classified information, but rather his duties and his employment affected by the revocation of his security clearance. In the absence of the requisite security clearance, he was no longer able to work in his former position. The Court will now examine whether the right in question is a civil right.

121. As has already been mentioned above, the employment relationship between the applicant and the Ministry of Defence was based on the provisions of the Labour Code, which did not contain any specific provisions applicable to functions performed within the State administration, so that at the material time there was no civil service, in the traditional sense of the term, conferring on public servants obligations and privileges outside the scope of the ordinary law. Specific legal provisions governing the status of civil servants have only existed since the Civil Service Act (Law no. 234/2014) came into force on 1 January 2015.

Employment disputes, especially those concerning measures terminating employment in the private sector, concern civil rights within the meaning of Article 6 § 1 of the Convention.

122. On the basis of the above-mentioned considerations it can be concluded that the decision revoking the applicant's security clearance and the subsequent proceedings affected his civil rights.

123. That being so, even assuming that the applicant were to be regarded as having been a civil servant whose status was governed by legal provisions outside the scope of the ordinary law, the Court reiterates that, according to its case-law, disputes between the State and its civil servants fall in principle within the scope of Article 6 except where both the cumulative conditions referred to in paragraph 107 above are satisfied.

124. In the instant case it cannot but be observed that the first of these conditions was not satisfied. Czech law made provision for persons with an interest in bringing proceedings to apply for judicial review of the National Security Authority's decisions (see paragraphs 52-56 above). That possibility was available to the applicant, and he did indeed make such an application. It follows that Article 6 applies to the present case under its civil limb.

125. That provision therefore required that the applicant had access to a judicial body competent to determine his civil rights and obligations in accordance with the guarantees of Article 6 § 1 (see *Veeber v. Estonia* (no. 1), no. 37571/97, § 70, 7 November 2002).

126. Moreover, having regard to the conclusion that the applicant could rely on a civil right within the meaning of Article 6 § 1 of the Convention, the Court considers that he can claim to have victim status for the purposes of Article 34 of the Convention.

127. Accordingly, the preliminary objections raised by the Government must be rejected.

## C. The merits of the case

### 1. *The parties' submissions*

#### (a) **The applicant**

128. The applicant argued that it was not possible for the courts to properly examine the justification or non-justification of the Authority's decision to refuse to grant or to revoke security clearance on the basis of indirect and inauthentic evidence, namely, a report submitted by an intelligence service. He observed that the report on which the courts had based their decision in the present case had amounted only to indirect and incomplete information emanating from a third party which they had been unable to verify or compare with his own statements, given that the report had not been disclosed to him at any stage in the proceedings. In his submission, the only means of verifying that information was to assess the facts referred to in it, and a court was unable to do this if a party targeted in the report was absent. Domestic case-law authority according to which a judicial review must also, in order to comply with the provisions of section 133 of Law no. 412/2005, be carried out beyond the grounds relied on by one of the parties to the proceedings, did not alter anything in this respect as the courts could not verify the truth and accuracy of the contents of the evidence. He referred in this context to judgment no. 4 As 1/2015 of 1 March 2016 of the Supreme Administrative Court, sitting as an extended chamber.

129. The applicant submitted that the principle of equality of arms was infringed where one of the parties to administrative proceedings had not had an opportunity to fully acquaint him or herself with all the evidence that had served as the main basis for an unfavourable decision. He conceded that in some circumstances State security interests defined by law took precedence over the interests of a person seeking protection from the courts in proper adversarial proceedings. He observed that in the present case, however, his right to a fair trial or to a position of equality before the law should not have been restricted because the statutory conditions under Czech law for such a procedure to be followed had not been met. The author of document no. 77, which the applicant had not been allowed to consult, had classified the report and the information contained in it in the lowest category of secrecy, namely, "restricted". In the light of section 3(5)(e) of Law no. 412/2005, the author of the report had considered that information thus classified compromised certain intelligence operations in progress. However, under section 133(3) of that Law, in order for the courts to be able to exclude part of a document from examination by a party, there had to be a risk of interference in the activities of the intelligence services and that interference had to pose a major risk, as evidenced by the terms "endanger or seriously compromise", which, by virtue of the law, required it to be

classified at least in the “secret” category. According to the applicant, the legislature had sought to limit the application of the special procedure strictly to situations in which facts were referred to that had to be kept secret. In his view, the statutory conditions for limiting his procedural rights indicated in section 133(3) of Law no. 412/2005 had not been met because the information appearing in the report could not be such as to justify recourse to the special procedure.

130. He observed in this context that the courts had not had the documents in the intelligence service’s file or even part of those documents in their possession as these had not even been disclosed to the Authority or the administrative courts. He concluded that the only basis for the courts’ decisions had therefore been the report in which the contents of the file had been summarised. According to him, the courts and their decisions could not be deemed to be independent and impartial where they were not in a position to verify the authenticity and accuracy of evidence produced by the parties. Even if the courts reviewed the facts of the case exercising their “full jurisdiction”, that did not in itself guarantee a fair hearing because even the most unbiased judge could be manipulated in a situation where he could not objectively assess the relevant evidence. Consequently, in his view, the balance between his right to a fair trial and the State’s interest in keeping certain information confidential had not been maintained, contrary to section 133(3) of Law no. 412/2005, in so far as the report that had served as the basis of the unfavourable decision had been classified in the lowest category of confidentiality.

**(b) The Government**

131. The Government submitted that the overwhelming majority of domestic laws allowed the parties access to classified documents, irrespective of their security level and without the need to declassify them, where they were to be used as evidence. A different approach had been adopted for certain very specific proceedings whose salient feature was a close link to the vital interests of national security. That approach applied to judicial review proceedings in such fields as cross-border trade with military equipment, entrance to aerodrome premises subject to increased protection and to proceedings issuing and revoking security clearance. For those proceedings the principles concerning a party’s access to confidential documents applied *mutatis mutandis*. Only exceptionally, as a last resort, where intelligence services’ or the police’s activities could otherwise be jeopardised or seriously disrupted, did the law permit the application of more restrictive rules providing that, in extreme cases, a party could be completely denied access to such evidence. Moreover, in those exceptional cases the judicial authorities were required to be particularly vigilant and compensate effectively any disadvantage caused to the



opposing party by their own course of action so as to forestall any arbitrariness or abuse of process in the authorities' decision-making.

132. The Government submitted that the States enjoyed greater latitude regarding restrictions on parties' procedural rights in respect of proceedings concerning civil rights and obligations than those concerning criminal proceedings (they referred to the case of *Gillissen v. the Netherlands*, no. 39966/09, § 50(d), 15 March 2016). Whilst it was clear that the present case needed to be judged according to different standards of protection from those applicable in criminal cases, the proceedings in question could not be treated as conventional administrative proceedings either. Rather, they were *sui generis* proceedings whose legal framework, characteristics, object and purpose were necessarily factors preventing any such comparison.

133. The fact that there were legal grounds in the present case justifying the Authority's decision not to disclose the contents of the intelligence service's report to the applicant had been confirmed by all the domestic courts dealing with the case. Accordingly, the Government were fully satisfied that the non-disclosure of evidence, in the special circumstances of the present case, had not been an arbitrary decision.

134. The Government were also convinced that the judicial proceedings had provided as many safeguards as practicable to protect the applicant's interests. Firstly, the applicant's security file, including the classified documents, had been submitted to the administrative courts at two levels of jurisdiction and to the Constitutional Court. Given that the judges had *ex lege* access to classified information, regardless of the security level, the nine judges who had been called upon at the different stages of the proceedings to protect the applicant's interests had been duly apprised of the contents of the intelligence service's report. The Government added that the applicant had not called into question the independence and impartiality of the judges.

135. The Government also noted that limiting the courts' powers to addressing only the points raised by the complainant did not apply in such cases because the party to the proceedings could not effectively claim that the findings were unlawful when he or she did not even know their contents. Since in such a situation the position of the party to the proceedings and his or her ability to argue against the decision effectively was necessarily weakened, the courts were obliged *proprio motu* to "stand in" for the party's procedural activity and duly examine the procedure followed and the grounds for the decision being challenged in their entirety, that is, over and above the points raised by the complainant.

136. In performing their supervisory function in relation to the Authority's decisions, the administrative courts were called upon to assess whether the legal grounds relied on for implementing an exceptional procedure allowing access to confidential documents to be refused to the defendant party were justified. The Government submitted that in the

present case the two administrative courts, which had had full jurisdiction, had proceeded as outlined above when they had concluded that the disclosure of the confidential part of the applicant's security file would endanger or seriously compromise the activity of the intelligence services or of the police and, accordingly, they had considered that the decision to exclude that part from the consultation was justified.

137. The Government added that the file kept by the intelligence service or documents from it were not directly sent to the Authority and subsequently to the courts, but rather the relevant contents of the file were summarised in the report. However, the domestic courts' settled case-law set out numerous requirements that had to be met by the classified documents underlying the Authority's decisions, in particular the reports on the outcome of the investigations carried out by the intelligence services, in order to be used in the subsequent judicial review. They had to contain very specific information, or a summary thereof, enabling the court to verify effectively the relevance and information value of the intelligence services' conclusions, and in particular that the information established by them was credible, balanced and related to issues that were decisive for the security vetting procedure. Moreover, the intelligence service had to indicate, in abstract terms, from which source the information had been obtained, including a description of the circumstances and the reasons why the intelligence services regarded the information as credible. The courts' function in the security proceedings was not to re-examine the authenticity and veracity of the reference documents kept by the intelligence services, but to verify whether there existed a well-founded suspicion of a possible security risk. To that end, the assessment of the credibility, plausibility and relevance of the information gathered was, in the Government's submission, an appropriate criterion.

138. With regard to the applicant's submission regarding whether the conditions of application of section 133(3) of Law no. 412/2005 had been satisfied, the Government considered that that provision did not make the possibility of denying access to classified evidence conditional on a high security level. Nor did the law confine that procedure to situations where there was a greater risk of jeopardising or disrupting the activities of the intelligence services or the police.

139. The Government submitted that in the present case there was no reason to doubt that if the courts had considered the information in the report on the outcome of the investigation to be incomplete, irrelevant, insufficiently detailed or not credible, they would have set aside the decision in question and ordered the Authority to supplement its factual findings by further evidence.

140. In the light of the Court's case-law, the Government argued that there had been a significant subsidiary guarantee of protection of the applicant's interests, namely, that he had been given the opportunity to

provide the court with a detailed description of the events preceding the report on the outcome of the intelligence service's investigation, its presumed contents as well as the possible motivation of its author to seek revocation of the applicant's security clearance. They submitted that the applicant had thus had an opportunity to challenge the credibility of the report in the eyes of the judges who had protected his interests in the proceedings. That had also ensured that the judges made their decision in full knowledge of the matter, taking into account the applicant's concerns and objections. The Government added that the fact that the Constitutional Court had also examined the applicant's case constituted an additional guarantee that his interests were protected.

141. The Government were convinced that in the present case the right to a fair hearing and, in particular, the principle of adversarial proceedings and equality of arms, for the purposes of Article 6 § 1 of the Convention, had not been infringed since there had been no arbitrariness or abuse of process in the limitation of the applicant's procedural rights and that limitation had been sufficiently counterbalanced by the procedures followed by independent and impartial judicial authorities which had played an active role in the proceedings and thus provided not only adequate safeguards to protect the applicant's interests but also struck a fair balance between the State's interests and those of the applicant.

**(c) Submissions by the third-party intervener**

142. The Slovak Government argued that where secrecy on grounds of national security was concerned the State enjoyed a broad margin of appreciation in determining which information was so sensitive that its disclosure would threaten the fundamental rights of persons or the protection of an important public interest. The disclosure of classified information concerning the internal workings and methods of the security services or law-enforcement bodies could seriously disrupt the activities of those services. The authorities therefore had a legitimate interest in keeping that information secret.

143. The Slovak Government observed that the right to disclosure of all relevant evidence was not absolute and could be subject to restrictions designed to protect the rights of third parties or an important public interest such as national security. They noted that the Slovakian legal regulations were, in substance, similar to the Czech legal regulations: security clearance issued by the National Security Authority or by another security department – the Slovak intelligence service or military intelligence service – was a prerequisite to gaining access to classified information. Classified information was also excluded from court files and neither the parties to the proceedings nor their legal representatives could claim access to it unless they had the appropriate authorisation.

144. The National Security Authority or any other security department had the power to revoke the security clearance of a person failing to meet the relevant statutory conditions. Such a decision was amenable to appeal before a committee of the National Council of the Slovak Republic, established by a special law. Subsequently, an appeal lay against the final decision of that appeal body to the administrative courts. In the judicial proceedings the Authority was required to provide the court with all the administrative files concerning the case in question, including all classified information. The judges thus had unlimited access to the classified information contained in those files.

145. Both the Slovak Republic and the Czech Republic had made provision for the decision in question to be examined by courts having full jurisdiction. The courts were therefore required to examine of their own motion not only the lawfulness of the decision and of the conduct of the security department, but also the factual and legal assessment of the matter by the security department, over and above the objections raised during the proceedings. The Slovak Government submitted that those legal regulations were justified and adequately satisfied the requirements of adversarial proceedings and the equality of arms.

## 2. *The Court's assessment*

### (a) **The principles established in the Court's case-law**

146. The Court reiterates that the adversarial principle and the principle of equality of arms, which are closely linked, are fundamental components of the concept of a "fair hearing" within the meaning of Article 6 § 1 of the Convention. They require a "fair balance" between the parties: each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent or opponents (see *Avotiņš v. Latvia* [GC], no. 17502/07, § 119 and other references, ECHR 2016).

147. However, the rights deriving from these principles are not absolute. The Court has already ruled, in a number of judgments, on the particular case in which precedence is given to superior national interests when denying a party fully adversarial proceedings (*Miryana Petrova*, cited above, §§ 39-40, and *Ternovskis*, cited above, §§ 65-68) The Contracting States enjoy a certain margin of appreciation in this area. However, it is for the Court to determine in the last instance whether the requirements of the Convention have been complied with (see, for example, *Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom*, 10 July 1998, § 72, *Reports of Judgments and Decisions* 1998-IV; *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 44, ECHR 2001-VIII; and *Devenney v. the United Kingdom*, no. 24265/94, § 23, 19 March 2002).

148. The Court reiterates, moreover, that the entitlement to disclosure of relevant evidence is not an absolute right either. In criminal cases it has found that there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the party to the proceedings. However, only measures restricting the rights of a party to the proceedings which do not affect the very essence of those rights are permissible under Article 6 § 1. For that to be the case, any difficulties caused to the applicant party by a limitation of his or her rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (see, *mutatis mutandis*, *Fitt v. the United Kingdom* [GC], no. 29777/96, § 45 with other references, ECHR 2000-II, and *Schatschaschwili v. Germany* [GC], no. 9154/10, § 107, ECHR 2015).

149. In cases where evidence has been withheld from the applicant party on public interest grounds, the Court must scrutinise the decision-making procedure to ensure that, as far as possible, it complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the person concerned (see *Fitt*, cited above, § 46).

**(b) Application of the above-mentioned principles to the instant case**

150. In the instant case the Court observes that, in accordance with the requirements of Czech law in the event of legal proceedings challenging a decision refusing to issue or revoking security clearance, the proceedings brought by the applicant were restricted in two ways with regard to the rules of ordinary law guaranteeing a fair trial: first, the classified documents and information were not available either to him or to his lawyer, and second, in so far as the decision revoking security clearance was based on those documents, the grounds for the decision were not disclosed to him. The Court accordingly has the task of examining whether those restrictions infringed the very essence of the applicant's right to a fair trial.

151. In carrying out that examination the Court will have regard to the proceedings considered as a whole and will determine whether the restrictions on the adversarial and equality-of-arms principles, as applicable in the civil proceedings, were sufficiently counterbalanced by other procedural safeguards.

152. In that connection the Court notes the powers conferred on the domestic courts, which have the necessary independence and impartiality; this is not disputed as such by the applicant who rather limits himself to calling into question the capacity of the judges to adequately assess the facts of the case, given that they did not have full access to the relevant documents (see paragraph 130 above).

First, the courts have unlimited access to all the classified documents on which the Authority has based itself in order to justify its decision. They

then have power to carry out a detailed examination of the reasons relied on by the Authority for not disclosing the classified documents. They can assess the reasons given for not disclosing classified documents and order disclosure of those that they consider do not warrant that classification. Moreover, they are empowered to assess the merits of the Authority's decision revoking security clearance and to quash, where applicable, an arbitrary decision of the Authority.

153. Moreover, the jurisdiction of the courts examining the dispute encompasses all the facts of the case and is not limited to an examination of the grounds relied on by the applicant, who has been heard by the judges and has also been able to make submissions in writing. It is true that, on this point, Czech law could have made provision, to the extent compatible with maintaining the confidentiality and proper conduct of investigations regarding an individual, for him to be informed, at the very least summarily, in the proceedings, of the substance of the accusations against him. In the present case the applicant would thus have been able to mount a clear-sighted and focused defence and the courts dealing with the case would not have had to compensate for the lacunas of the defence.

154. However, the Court observes that the courts duly exercised the powers of scrutiny available to them in this type of proceedings, both regarding the need to preserve the confidentiality of the classified documents and regarding the justification for the decision revoking the applicant's security clearance, giving reasons for their decisions with regard to the specific circumstances of the present case.

155. Accordingly, the Supreme Administrative Court considered, having regard to the need to preserve the confidentiality of the classified documents, that their disclosure could have had the effect of disclosing the intelligence service's working methods, revealing its sources of information or leading to attempts to influence possible witnesses. It explained that it was not legally possible to indicate where exactly the security risk lay or to indicate precisely which considerations underlay the conclusion that there was a security risk, the reasons and considerations underlying the Authority's decision originating exclusively in the classified information. Accordingly, there is nothing to suggest that the classification of the documents in question was carried out arbitrarily or for a purpose other than the legitimate interest indicated as being pursued.

156. Regarding the justification of the decision revoking the applicant's security clearance, the Supreme Administrative Court held that it was unequivocally clear from the classified documents that the applicant no longer satisfied the statutory conditions for being entrusted with secrets. It observed that the risk in his regard concerned his conduct, which affected his credibility and his ability to keep information secret. It noted further that the confidential document emanating from the intelligence service contained specific, comprehensive and detailed information concerning the conduct

and lifestyle of the applicant on the basis of which the court was satisfied in the present case as to its relevance for determining whether the applicant posed a national security risk (see paragraph 20 above).

157. In this connection the Court notes that in March 2011 the applicant was prosecuted for participation in organised crime; aiding and abetting abuse of public power; complicity in illegally influencing public tendering and public procurement procedures; and aiding and abetting breaches of binding rules governing economic relations (see paragraph 22 above). It finds it understandable that where such suspicions exist the authorities consider it necessary to take rapid action without waiting for the outcome of the criminal investigation, while preventing the disclosure, at an early stage, of suspicions affecting the persons in question, which would run the risk of hindering the criminal investigation.

158. It would appear, moreover, in the light of the information in the Court's possession, that the domestic courts did not make use of their power to declassify certain documents. Whilst they did examine the classified documents, they expressly stated that these could not be disclosed to the applicant. It is therefore not possible for the Court to rule on the thoroughness of the review carried out by the domestic courts. They did not make a distinction in that respect regarding the level of classification – confidential, secret, top secret – of the documents produced, as the Supreme Administrative Court expressly found (thus rejecting a ground raised by the applicant) that the degree of classification was irrelevant as concerned the scope and thoroughness of the review to be carried out by the court. That being said, having regard to the confidentiality of the documents, recognised as such by the various judicial bodies examining the case, the latter could hardly, in their respective decisions, have explained in detail the extent of the review they had carried out without compromising the secrecy of the information in their possession.

159. The Court acknowledges that the intelligence service's report, which served as a basis for the decision revoking the applicant's security clearance, had been classified in the lowest category of confidentiality, namely, the "restricted" category (see paragraphs 15 and 38 above). However, it considers that that fact did not deprive the Czech authorities of the right not to disclose the contents to the applicant. It can be seen from the Supreme Administrative Court's case-law, although it postdates the judgment in the present case (see paragraph 65 above), that, contrary to the applicant's submission, Law no. 412/2005, and particularly section 133(3) of that Law, is applicable to any information classified as confidential and not limited to data of a higher degree of confidentiality. Accordingly, the application of section 133(3) of Law no. 412/2005 by the domestic courts does not appear to be arbitrary or manifestly unreasonable.

160. Nonetheless, it would have been desirable – to the extent compatible with the preservation of confidentiality and effectiveness of the

investigations concerning the applicant – for the national authorities, or at least the Supreme Administrative Court, to have explained, if only summarily, the extent of the review they had carried out and the accusations against the applicant. In that connection the Court notes with satisfaction the positive new developments in the Supreme Administrative Court’s case-law (see paragraphs 63-64 above).

161. Having regard to the proceedings as a whole, to the nature of the dispute and to the margin of appreciation enjoyed by the national authorities, the Court considers that the restrictions curtailing the applicant’s enjoyment of the rights afforded to him in accordance with the principles of adversarial proceedings and equality of arms were offset in such a manner that the fair balance between the parties was not affected to such an extent as to impair the very essence of the applicant’s right to a fair trial.

162. Consequently, there has been no violation of Article 6 § 1 of the Convention.

## FOR THESE REASONS, THE COURT

1. *Rejects*, by fifteen votes to two, the preliminary objections raised by the Government;
2. *Holds*, by ten votes to seven, that there has been no violation of Article 6 § 1 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 19 September 2017.

Johan Callewaert  
Deputy to the Registrar

Guido Raimondi  
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) Concurring opinion of Judge Wojtyczek;
- (b) Joint partly dissenting opinion of Judges Raimondi, Sicilianos, Spano, Ravarani and Pastor Vilanova;
- (c) Joint partly dissenting opinion of Judges Lazarova Trajkovska and López Guerra;
- (d) Partly dissenting opinion of Judge Serghides;
- (e) Dissenting opinion of Judge Sajó.

G.R.  
J.C.



## CONCURRING OPINION OF JUDGE WOJTYCZEK

(Translation)

1. Whilst I fully agree with the operative provisions of the judgment, I would nonetheless like to include some qualifications in the reasoning.

2. The difficulty in the present case stems from the complexity of the legal positions governed by the administrative decisions granting or withdrawing security clearance. Security clearance is a condition *sine qua non* not only for gaining access to protected information, but also for holding certain posts in the civil service requiring access to that information. At the same time access to protected information is not in itself a civil (subjective) right within the meaning of Article 6 of the Convention. In order to address the question of the applicability of Article 6 in the present case we have to examine whether the withdrawal of security clearance affects civil rights or obligations for the purposes of that Article of the Convention.

The reasoning in the judgment refers several times to the nature of the rights in question and the consequences of the revocation of security clearance for those rights. In paragraph 115 the majority express their view of the matter in the following terms:

“Security clearance is not an autonomous right but a condition *sine qua non* for the exercise of duties of the type carried out by the applicant. Accordingly, the loss of the applicant’s security clearance had a decisive effect on his personal and professional situation preventing him from **continuing to carry out certain duties** at the Ministry of Defence” (emphasis added).

In paragraph 118, the consequences of the revocation of the security clearance are presented as follows:

“In the present case the applicant’s ability to carry out his duties was conditional on authorisation to access classified information. The revocation of his security clearance therefore made it impossible for him **to perform his duties in full** and adversely affected his ability to obtain a new post in the civil service” (emphasis added).

It is noteworthy that while in paragraph 115 it is a matter of being unable to carry out certain duties, in paragraph 118 the emphasis is on the inability to carry out duties in full.

In paragraph 119 the Court sets out its conclusions regarding the existence of a right with reference to the link between the revocation of the security clearance and the loss of the applicant’s duties:

“In these circumstances the Court considers that the link between the decision to revoke the applicant’s security clearance and the loss of his duties and his employment was **more than tenuous or remote** (see, *mutatis mutandis*, *Ternovskis*, cited above, § 44, and *Miryana Petrova*, cited above,

§ 31). He could therefore rely on a right to challenge the lawfulness of that revocation before the courts” (emphasis added).

According to that wording, it is the loss of one’s duties which justifies the right to challenge the lawfulness of revocation of the security clearance before the courts.

In paragraph 120 the Court appears to return to the wording used in paragraph 115:

“What was therefore at stake for the applicant was not the right to have access to classified information, **but rather his duties and his employment affected by the revocation of his security clearance**. In the absence of the requisite security clearance, he was no longer able to **work in his former position**” (emphasis added).

3. The various differences in wording used reflect the Court’s hesitation in assessing the applicant’s legal position. The majority do not precisely define the civil (subjective) right in issue. The various phrases referred to above suggest that it is the applicant’s right to keep his duties.

Revocation of security clearance is a decision that directly concerns the legal position of the individual in question. It closes access to certain posts in the civil service and directly affects the employment relationship within that service. In the present case the revocation of security clearance had a direct impact on the employment relationship established by the applicant and in particular on his ability to perform his obligations under the employment contract concluded with his employer. Withdrawal of security clearance therefore directly affects civil rights. After it had been withdrawn, the applicant was not fully deprived of the possibility of carrying out his duties but the nature and scope of those duties had substantially changed. The matter in issue concerns the applicant’s rights and obligations under his employment contract and particularly his ability to perform the tasks specified in that contract. It is important to add here that Czech law protects the employee not only from the employer but also – at least to an extent – from third parties and, among other things, from interference resulting from arbitrary withdrawal of security clearance.

It should also be noted here that it was the applicant who decided to resign. The possibility cannot be ruled out that the parties could have adjusted those duties to adapt them to the applicant’s new legal position and entrusted him with tasks that did not require access to protected information. Accordingly, it is difficult to speculate as to the connection between the decision withdrawing the applicant’s security clearance and the loss of his duties and his employment. That connection remains problematical. In the present case the loss of employment cannot be the decisive argument in favour of concluding that a civil right is at stake. It is therefore difficult to agree with the position set out in paragraph 119.

Whether the applicant lost or kept his employment, his civil rights were in any event at stake. In my view, it is the wording used in paragraph 118 which best summarises the complex legal position of the applicant.

4. The judgment very briefly sets out, in paragraphs 146 to 149, the principles of a fair trial established in the Court’s case-law. Proceedings in which the State authorities rule on civil rights or obligations are very varied and encompass not only civil proceedings, but also judicial administrative proceedings. Given the fundamental differences between civil proceedings and judicial administrative proceedings, it is difficult to establish universal principles applicable to both types of proceedings. Furthermore, the situation of the parties in proceedings based on the principle of adversarial process and on the parties’ activity is very different from that in proceedings based on the inquisitorial principle and the active role of the court.

In my opinion, the principles of procedural justice, set out in the Court’s case-law on Article 6, fail to take sufficient account of the specific nature of judicial administrative proceedings in a certain number of States. Compliance with the parties’ rights in judicial administrative proceedings has to be assessed in the light of the fundamental principles governing those proceedings at domestic level.

It should be noted here that the judgment rightly highlights the active role of the Czech administrative courts as a factor which offsets a certain inequality between the parties to the proceedings (see paragraph 152). It can be generally stated that the principle of inquisitorial proceedings, based on the active role of the courts, is an important factor which offsets – to a certain extent – the inequalities between the parties. Of course, certain forms of “inequality of arms” cannot be offset in this way.

JOINT PARTLY DISSENTING OPINION OF JUDGES  
RAIMONDI, SICILIANOS, SPANO, RAVARANI AND  
PASTOR VILANOVA

*(Translation)*

Much to our regret, we are unable to subscribe to the finding by our colleagues in the majority that there has been no violation of Article 6. That finding was based on their conclusion that, having regard to the proceedings as a whole and to the nature of the dispute, the restrictions curtailing the applicant's enjoyment of the rights afforded to him in accordance with the principles of adversarial proceedings and equality of arms were offset in such a manner that the fair balance between the parties was not affected to such an extent as to impair the very essence of the applicant's right to a fair trial.

We agree with our colleagues in the majority that Article 6 § 1 is applicable to the facts of the present case.

We also share the majority's view that the procedure applicable under Czech law to legal proceedings challenging a decision withdrawing security clearance is surrounded by substantial guarantees designed to achieve a balance between the requirements of a fair trial and those pertaining to State security, the most important factor being the possibility for the courts to know the reasons for withdrawing security clearance and to have unlimited access to all the case-file materials assembled by the authorities with a view to withdrawing clearance.

That being said, and this is the point on which we disagree with the majority, there is a flaw in the proceedings which appears secondary at first sight but, on closer examination, has such major practical implications that it affects the fairness of the proceedings as a whole.

This is the *total* lack of communication to the interested party throughout the entire proceedings of the reasons leading to the decision to withdraw security clearance.

Czech law prohibits the administrative body – the National Security Authority – and the judicial bodies – the administrative courts – from informing the person concerned, even in substance, of the reasons underlying the decision to withdraw his or her security clearance and from giving him or her access to the documents on which that decision is based where such disclosure and access are liable to compromise State security. Admittedly, the courts can allow the person concerned access to certain

documents and to certain pieces of information, but only in so far as they consider that these are not confidential.

Whilst it is true that full communication of the reasons underlying the decision withdrawing security clearance and access to all the documents in the file does appear problematical and would be liable to jeopardise the work of the secret services, it is our view that a total lack of information, added to denial of access to the case-file materials, appears unnecessary in fact and problematical in law.

From a practical point of view, if a person whose security clearance has just been withdrawn is for example informed that he is suspected of corruption or of having contacts with terrorists, does that really lay bare the investigation methods of the secret services or their information sources? This is hardly conceivable. The only consequence of such disclosure is that the person concerned will know that he is suspected of a particular offence or particular conduct. He will thus be forewarned and on his guard. How likely is it that simply withdrawing his security clearance without telling him why will not arouse his suspicions that he has been unmasked (always supposing that he really is implicated as suspected)? He will be just as much on his guard. Thus, in actual fact, disclosing to a person whose security clearance has been withdrawn the substance of the misconduct of which he is suspected will not have a tangible effect on the investigation into his suspected misdeeds or on the work of the secret services. It would therefore appear that it cannot reasonably be maintained that fully concealing the reasons underlying a decision to withdraw security clearance is necessary in the interests of State security.

From a legal point of view regarding fairness of proceedings, first of all, total non-disclosure to the person concerned of the reasons underlying the decision withdrawing his security clearance makes the organisation of his defence almost impossible. He will not know what he has to defend himself against. His defence will in a way be conducted blind. Admittedly, it would appear that in the present case referred to the Grand Chamber the applicant, who was subsequently prosecuted for corruption, must have been aware of the reasons why his security clearance had been withdrawn.<sup>1</sup> That is not the issue, however. The Grand Chamber considers generally, and in abstract terms, that non-disclosure, even summarily, of the reasons for withdrawing clearance does not affect the fairness of the proceedings.<sup>2</sup> The issue needs to be addressed as to what the position would be if the strong suspicions

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1. § 155 of the judgment.

2. § 150 of the judgment.

against the official concerned were unfounded, or even based on fabricated evidence.

The reply will be that the disadvantage of not knowing the reasons for withdrawing security clearance would be offset by the power of the courts to examine the reasons underlying the withdrawal of security clearance and to obtain sight of all the materials in the case file.

That argument does not hold, for two reasons:

- firstly, in doing so, the court is in a way being transformed into the applicant's advocate: it must itself mount the applicant's defence, detect any possible flaws in the case and formulate the applicant's submissions. It will thus assume a role that certainly does not belong to it;
- more troublingly still, since it is the secret services themselves which provide the documents in the case file and the applicant does not have access to them, the former have almost total command of the contents. Admittedly, the courts have a right and a duty to verify the authenticity of those documents. It is also true that the Czech courts have become increasingly demanding in that respect. Reference can be made to the judgment of the extended composition of the Czech Supreme Administrative Court, cited in paragraph 64 of the judgment, which found, regarding the assessment of the quality of the information underlying a decision withdrawing security clearance and its sources, that neither the National Security Authority nor the administrative courts had checked the veracity of the information provided by the intelligence services in the same way as in ordinary administrative proceedings. However, according to that case-law the information received from the intelligence services cannot take the form of a mere opinion of the author without being supported by adequate documentation contained in the file which can be verified by the court. Attention should nonetheless be drawn to the fact that the standard of proof applied is very far below the ordinary requirements in adversarial proceedings. Furthermore, the documents included in the file are often taken from only unofficial information obtained from informants and are thus mere (often fairly vague) suspicions. We can therefore hardly speak of authenticity. If the person concerned does not know what he is suspected of, he cannot make a riposte and provide a detailed explanation such as to enable the courts to examine the documents submitted to them from a critical and more clearly focused perspective.

We regret, moreover, that the Grand Chamber judgment fails to match the progress in this area that can be seen in the case-law of the Court of Justice of the European Union, or in the case-law of certain domestic courts.

In a case about entry into and residence in the territory of a Member State in which issues arose as to State security requirements liable to undermine the right to a fair trial, the CJEU observed, among other things, that in principle there was no presumption in favour of the existence and merits of State security grounds relied on by a national authority and that where a national authority refused, on grounds of State security, to provide precise and full disclosure to the person concerned of the grounds on which the decision in question was based, it was incumbent on the national court to ensure that the person concerned was informed of the essence of the grounds which constituted the basis of the decision in question in a manner which took due account of the necessary confidentiality of the evidence.<sup>3</sup>

With regard to the national courts, mention should be made in the context of the present case of a judgment of the Supreme Court of the United Kingdom delivered in 2011<sup>4</sup> concerning the information to be provided to an immigration officer whose security clearance had been withdrawn on the basis of intelligence provided by the British secret services. The officer was appointed a special advocate who was allowed access to a number of documents, but the officer himself was not allowed to consult them for the purposes of mounting his defence. He accordingly complained that the proceedings were unfair. It should be pointed out that he had been informed in the judicial proceedings that his cousin had been arrested for terrorist activities and he was therefore potentially vulnerable to an approach to obtain information about security measures at border posts or to smuggle in prohibited items. The entire discussion among the judges of the Supreme Court, reproduced in its judgment, concerned not the question whether the appellant should be provided with information about the reasons for withdrawing his security clearance, but whether he had been given sufficient information to enable his lawyers to defend him properly or whether full disclosure of all the relevant material in the file should be made. The Supreme Court concluded, by a majority – but not, interestingly enough, unanimously – that the appellant had been provided with sufficient information to defend himself effectively.

We would reiterate that the applicable procedure in Czech law in cases involving the withdrawal of security clearance is surrounded by a certain number of guarantees intended to protect the interests of the victim of that

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3. CJEU 4 June 2013, Case C-300/11, *ZZ v. Secretary of State for the Home Department*, cited in paragraph 69 of the judgment of the Grand Chamber.

4. *Home Office v. Tariq* 13 July 2011, UKSC 35, [2012] 1 AC 452.

withdrawal. However, having regard to the foregoing considerations, we think that non-disclosure to the person concerned of the essence of the reasons that have led to the decision he is challenging in the courts prevents him from defending himself properly, with the result that he will not have a fair hearing. Consequently, the mechanism currently existing in Czech law infringes Article 6 § 1 of the Convention.



## JOINT PARTLY DISSENTING OPINION OF JUDGES LAZAROVA TRAJKOVSKA AND LÓPEZ GUERRA

We agree that there has been no violation of Article 6 of the Convention in this case. But, in contrast to the majority, we believe that the finding of no violation results from the fact that the Convention's fair-trial guarantees of Article 6 do not apply in the present case.

The applicant complains that he was not given a fair hearing concerning the revocation of his security clearance, which led to his being discharged from his civil-service posts as Vice-Minister of Defence and Director of the Department of administration of the Ministry's property.

Under Article 6 of the Convention, everyone is entitled to a fair and public hearing in the determination of their civil rights. As a result, where that Article is in issue the first question to address is whether any civil right was actually at stake in the proceedings concerning the applicant's claims before the domestic courts.

A "civil right" is not merely any pretension, aspiration, convenience or desire, but a legitimate claim, grounded in law, to some concrete legal result. In this case, the dispute over the security clearance affected a specific legal situation of the applicant, that is, his posts as Vice Minister and Director in the Ministry of Defence. But the facts of the case show that under the applicable law the applicant did not have any legally grounded claim to hold and continue in those specific posts without being relieved of his duties by the competent authorities. Certainly, under his employment contract and subject to the Labour Code, the applicant was an employee of the Ministry of Defence and had the right to remain as such pursuant to the Labour Code's provisions. But, as the Czech Government pointed out, the applicant's employment contract did not give him any legitimate claim to a specific post in the Ministry. Article 65 of the Labour Code (see paragraph 26 of the judgment) provides that employees can be relieved of their duties, or may relinquish them, without terminating the employment relationship, since the employee would then be assigned to another function.

Therefore, in this case and within the existing legal framework, the applicant did not have any legally grounded right to continue in his administrative posts when the authorities relieved him of his duties. Furthermore, and also within that legal framework, it does not seem unreasonable or arbitrary that the competent authorities had the power to decide the appropriate distribution of posts among the Ministry's employees, and that those authorities, when deciding on that distribution, in addition to considerations of efficiency and trust, were also bound by a duty to observe security requirements.

In conclusion, the revocation of the applicant's security clearance did not affect his non-existent right to hold a specific administrative post. Concerning his (certainly existing) right to continue in an employment

relationship with the Ministry, under his employment contract, this was in no way affected by the revocation of his security clearance. His employment with the Ministry was ultimately terminated by mutual consent. As for the alleged effects that the revocation of his security clearance might have on the applicant's prospects for holding future ministerial posts, reducing the range of opportunities and affecting his position as State employee, they remain purely hypothetical. The applicant did not provide any evidence of those alleged consequences, and, furthermore, left his employment in the State civil service voluntarily.

In view of the above, we consider that the proceedings in the Czech courts did not involve any of the applicant's civil rights and thus the fair-trial requirements laid down in Article 6 were not applicable in this case, as we believe the Grand Chamber should have decided.

## PARTLY DISSENTING OPINION OF JUDGE SERGHIDES

1. I agree with the finding in the judgment that the preliminary objections by the Government must be rejected and that the applicant could rely on a civil right within the meaning of Article 6 § 1 of the Convention and can therefore claim to have victim status for the purposes of Article 34 of the Convention.

2. However, I feel unable to share the opinion of my learned colleagues leading them to the conclusion that there has been no violation of Article 6 § 1 of the Convention in the present case.

3. This case concerns the applicant's complaint, based on Article 6 § 1 of the Convention, that the proceedings he had brought before the administrative courts were unfair. Those proceedings had been brought before the Prague Municipal Court, the Supreme Administrative Court and the Constitutional Court in order to challenge the decision of the National Security Authority revoking the security clearance issued to him to enable him to carry out his duties at the Ministry of Defence.

4. As an extensive statement of facts and allegations appears in the introductory part of the judgment, I am spared the task of going into them all over again.

### **I. CZECH CONSTITUTION – PRECEDENCE OF CONVENTION PROVISIONS OVER ORDINARY DOMESTIC LEGISLATION**

5. The three domestic courts which dealt with the applicant's complaint based their judgments mainly on section 133(3) of Law no. 412/2005 on the protection of classified information and suitability for security clearance, which provides as follows:

“(3) The Authority shall mark factors set out in paragraph 2 in respect [of which] it claims that nobody can be released from the obligation to maintain confidentiality, and the judge presiding over the case shall decide that parts of the file to which these factors apply, will be separated if the activities of the Intelligence Services or of the Police could be endangered or seriously affected; separated parts of the file cannot be inspected by the participant in the Procedure, by his/her representative as well as by [another] person participating in the Procedure. Provisions of the special legal regulation relating to the evidence, marking of parts of the file and its inspection shall be without prejudice to any other rights than those limited above” (translation by the National Security Authority of the Czech Republic carrying a legal disclaimer).

6. An issue as to whether a Convention provision, in this case Article 6 § 1, takes precedence over ordinary Czech legislation, and more specifically section 133(3) cited above, may arise where that section gives the presiding judge power, or even obliges him or her in certain cases to uphold confidentiality in respect of any part of the classified information and the judge decides to exercise that power, and if we were to accept, of course, that such a possibility is not compatible with the right to a fair trial.

7. The Czech Republic signed the Convention on 21 February 1991 and ratified it on 18 March 1992. The Convention entered into force in respect of the Czech Republic on 1 January 1993 with no reservations and no declaration regarding Article 6 of the Convention.

8. The Constitution of the Czech Republic (no. 1/1993 Coll. adopted on 16 December 1992, as amended by Constitutional Acts No. 347/1997 Coll., No. 300/2000 Coll., No. 395/2001 Coll., No. 448/2001 Coll., No. 515/2002 Coll., No. 319/2009 Coll., No. 71/2012 Coll. and No. 98/2013 Coll), contains certain provisions which clearly show that the Convention takes precedence over any Czech legislation. The provisions of the Constitution, cited in English below, are taken from the translation done by the Chamber of Deputies, Parliament of the Czech Republic – available at the website <http://www.psp.cz/en/docs/laws/constitution.html> – and the emphasis indicated in italics in certain provisions is mine:

#### **“Article 1**

(1) The Czech Republic is a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens.

(2) *The Czech Republic shall observe its obligations resulting from international law.*” (emphasis added).

...

#### **“Article 10**

Promulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form a part of the legal order; *if a treaty provides something other than that which a statute provides, the treaty shall apply.*” (emphasis added).

...

#### **“Article 87**

(1) The Constitutional Court has jurisdiction:

i) to decide on the measures necessary *to implement a decision of an international tribunal which is binding on the Czech Republic*, in the event that it cannot be otherwise implemented” (emphasis added).

...

#### **“Article 95**

(1) *In making their decisions, judges are bound by statutes and treaties which form a part of the legal order*; they are authorized to judge whether enactments other than statutes are in conformity with statutes or with such treaties.” (emphasis added).

9. The case-law of the the Czech Constitutional Court is well settled in that the Convention provisions take precedence over the ordinary Czech legislation (see, *inter alia*, no. III. ÚS 3749/13, II. ÚS 862/10, and II. ÚS 1135/14). In those cases the Czech Constitutional Court declared that the domestic courts, including itself, were bound by the Convention (which is part of the Czech legal order) and by the case-law of the European Court of Human Rights, in accordance with Articles 1 (1), 10, 87 (1) i) and 95 (1) of the Czech Constitution, thus all the Articles referred to above.

## II. JUSTIFICATION OF MY DISSENT

### A. Summary of my reasons for dissenting

10. At the outset, I submit that the total failure of the national judicial authorities to inform the applicant of the substance of the report on the basis of which his security clearance had been revoked and containing accusations against him violated his right to a fair hearing. More specifically, that total failure directly or indirectly violated the following rights of the applicant: (a) the right to be informed of the accusations on the basis of which his security clearance was revoked, so as to enable him to challenge them in court; (b) the right to participate *effectively* at the hearing and handle his case properly; (c) the right to equality of arms (procedural equality); and (d) the right to an adversarial trial.

11. I also hold the view that there has in addition been a violation of the right of the applicant under Article 6 § 1 of the Convention to obtain a reasoned judgment, since none of the three judgments of the administrative courts revealed the evidence on which the judgment was based.

12. Lastly, there has been a violation of the applicant's right to be tried by objectively independent and impartial courts, as provided for in Article 6 § 1 of the Convention, since all the administrative courts which heard his requests took over his role regarding the handling of the substantive part of his case, leaving him mystified and facing a blackout of information, and thus objectively casting serious doubts on the requisite appearance of independence and impartiality on their part.

### B. The right to a fair hearing

#### 1. Restrictions on the applicant's right to a fair trial

13. The applicant's rights before the three administrative courts, namely the Prague Municipal Court, the Supreme Administrative Court and the

Constitutional Court, were restricted, in my humble view, in the following ways:

(a) The applicant was not permitted to learn the contents of a classified report that had served as the basis for the decision of the National Security Authority invalidating his security clearance and was detrimental to him. More specifically, there was no possibility for the applicant to test the authenticity of that fundamental evidence and the accuracy of its content by way of cross-examination, or to confront and challenge it with evidence that he would have been able to produce before the court had he known the contents of the classified report. He did not know in relation to which specific facts he was supposed to express an opinion and assist the courts. Hence, he was prevented from defending himself in respect of that key evidence.

(b) The applicant was deprived of the procedural means of properly defending himself; instead, the courts stood in for him or his lawyer in terms of procedural measures, yet even the grounds for their decision were not disclosed to him. The Supreme Administrative Court, giving judgment in another case and referring to its judgment delivered in respect of the applicant, concluded that in such a situation the court had to “step into the applicant’s shoes and review the relevance of classified information” (see paragraph 64 of the judgment).

(c) The applicant was deprived of a trial by courts with the necessary appearance of independence and impartiality.

14. I will not deal separately with the applicant’s right to be informed of the accusations against him, nor will I deal with his right to participate *effectively* at the hearing and handle his case properly. Those issues will be covered in the following points.

## **2. The principles of equality of arms and adversarial proceedings**

15. I have no better words to describe the significance of a fair trial than in the following words of Georghios M. Pikis, former President of the Supreme Court of Cyprus and former judge of the Hague International Criminal Court (President of Section) (see Georghios M. Pikis, *Justice and the Judiciary*, Leiden-Boston, 2012, § 145, p. 63):

“145. Assurance of a fair trial is a fundamental human right, the emblem of restorative justice. A fair trial constitutes a fundamental right of man and, correspondingly, a principal duty of the State to secure in all circumstances. No derivation or shortfall of a fair trial should be countenanced. The norms of a fair trial are fashioned to the needs of justice. It is the inexhaustible duty of the Court to do justice according to the norms of a fair trial. In its absence, freedom of man is muted and man’s hypostasis undermined. A fair trial can appropriately be labelled as the bedrock of human rights.”

The right to a fair hearing incorporates a number of aspects of the due process of law, the most fundamental of which are: (a) access to court, (b) equality of arms (*égalité des armes*), (c) adversarial proceedings, and (d) a reasoned judgment. Lord Woolf, in his report “Access to Justice – Final Report to the Lord Chancellor on the Civil Justice System in England and Wales”, London, 1996, at p. 2, in his enumeration of the principles which the civil justice system should uphold in order to ensure access to justice, included the principle to “be fair in the way it treats litigants”.

16. As also stated in the judgment, the principle of equality of arms means that “each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent or opponents ...” (see paragraph 146 of the judgment). But the applicant in the present case was not afforded a reasonable opportunity to present his case and the restrictions imposed on him, resulting in his remaining ignorant of the accusations against him, placed him at a disadvantage vis-à-vis his opponent, the respondent State. Put another way, the absolute prohibition of access by the applicant to the classified information on which the withdrawal of his clearance certificate was based, which was the subject of his application to the administrative courts, amounted to a violation of the principle *audi alteram partem* (see F.A.R. Bennion, *Bennion on Statutory Interpretation: a Code*, fifth edition, London, 2008, section 341, p. 1111 et seq.), which literally means “hear the other party or side” and of course the principle of equality of arms, as has been said above. Of relevance also is the ancient Greek rule of fairness and equality “μηδενί δίκην δικάσεις, πριν αμφοίν μύθον ακούσεις”, which can be translated into English as “you cannot judge before you hear what both parties have to say”. As Bennion observes, “Coke\* [\*6 Co Rep 52] took from Seneca’s *Medea* the saying that *qui aliquid statuerit parte inaudita altera, aequum licet dixerit, haud aequum fecerit* (he who decides a thing without the other side having been heard, although he may have said what is right, will not have done what is right)” – see Bennion, cited above, section 341 at p. 1112. From this Latin maxim, and especially the words *haud aequum fecerit*, one can see how important it is for the judge to hear both sides even if what that judge says is right.

17. The principle of adversarial proceedings was very well explained by Lord Mansfield in the form of a maxim in *Blatch v. Archer*, [1774] 1 Cowper’s Report, 63 at p. 65: “It is certainly a maxim that all evidence is to be weighted according to proof which it was in the power of one side to have produced and in the power of the other to have contradicted.” In my view, this principle was not applied in the present case either. Pill L. J. expressed himself as follows in *Dyason v. Secretary of State for the Environment* (1998) 75 P & CR 506, which is also important here: “... the statutory right to be heard is nullified unless, in some way, the strength of what one party says is not only listened to by the tribunal but is assessed for

its own worth in relation to opposing contentions”. Bennion, cited above (section 341 at p. 1115), expressed himself as follows regarding the principle of adversarial proceedings, which is exactly the opposite of what happened in the present case:

“The principle of open court requires that the parties should be aware of all that influences the decision-maker. In order to conform to natural justice, the decision-maker must not act on representations from one party which the other has not seen and had a chance to comment on\* [\**R. v. Manchester Legal Aid Committee, ex p. R A Brand & Co Ltd* [1952] 2 QB 413 at 429; *Errington v Minister of Health* [1935] 1 KB 249 at 2800]. A party must be given ‘a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice\* [\**De Verteuil v. Knagges* [1918] AC 557 at 560].”

**(a) Procedural fairness and arbitrariness**

18. In paragraph 86 of his written observations, the applicant’s complaint concerning the procedural injustice he had suffered is presented as follows:

“The applicant did not have practically any guarantees that would allow him to protect his interests, because no fundamental evidence existed in his case, and said evidence could not have been subjected to the test of its authenticity and content accuracy. In no way could the applicant identify with the opinion according to which the courts should stand in for the applicant’s own procedural activity. Even in this case, it should not be omitted that they are contradictory proceedings. The fact that the applicant could express his opinion in his answer to the government and during the oral hearing, as mentioned by the Court, is considered irrelevant by the applicant when he could not have fully expressed his opinion in any case, because he did not know in relation to what specific facts he was supposed to have expressed his opinion. Therefore, he could only present his assumptions to courts concerning said report and not the facts. The applicant’s right to defend himself was taken away when he could not have presented the assertions stated in the classified report which led to the removal of his security clearance, to a broader context and specifically express his opinion of the nature of the relationship to a certain person or events which led to the conclusion that the applicant presents a security risk, because such information was not made available to him. For this reason (*sic*), the applicant did not have the opportunity to present evidence which would refute the assertions of the National Security Authority, or intelligence service resulting in the decision to cancel the validity of the Applicant’s clearance to deal with classified information. Only if this was allowed to the applicant, the courts would actually and objectively, with knowledge of all relevant information, assess the justifiability of the decision of the National Security Authority on the withdrawal of the security clearance. However, the courts cannot sufficiently review the contested decision in a situation when they do not have at their disposal the relevant opinion of the participant of proceedings related to factual circumstances connected with the relevant evidence directly concerning the participant; therefore., they cannot subject it to a ‘test of its authenticity and content accuracy’. The procedural defence of one of the parties, which in addition, does not have – unlike the other party – the necessary information, cannot be replaced with a review of the deciding authority. ...”

19. Undoubtedly, the right to a fair hearing under Article 6 § 1 of the Convention guarantees the absence of arbitrariness in the administration of



justice and due process of law, which, by definition, ought to be proper and just. In procedural justice, fairness is equated in my mind with procedural equality as well as with natural justice (see, on this topic, David J. Mullan, “Natural Justice and Fairness – Substantive as well as Procedural Standards for the Review of Administrative Decision-Making” [1982] 27, *Revue de Droit de McGill*, 250 et seq.).

20. In *Malone v. the United Kingdom* (2 August 1984, § 67, Series A no. 82), the Court rightly observed that “[e]specially where a power of the executive is exercised in secret, the risks of arbitrariness are evident ...” That was what happened, in my view, in the present case. The absolute refusal of the authorities to inform the applicant of the accusations against him was not only arbitrary, but also unjust, as it adversely affected his defence, violating, as has been argued, also the principle of adversarial proceedings and the principle of equality of arms. So, with due respect, I am in total disagreement with the view submitted by the Government (see paragraph 141 of the judgment) that “there had been no arbitrariness or abuse of process in the limitation of the applicant’s procedural rights”.

21. Since a fair trial cannot be envisaged other than in the context of adversarial proceedings and equality of arms, an applicant should have the liberty to handle and present his case or to defend himself, either in person or with the assistance of his lawyer, without the court acting on his behalf in any way. Only then will there be procedural equality with the opposing party, the Government. Although the minimum rights provided for in Article 6 § 3 (b), (c) and (d) of the Convention, namely, the right to have adequate facilities for the preparation of one’s defence, the right to defend oneself and the right to examine or to have examined witnesses respectively, apply whenever someone is charged with a criminal offence, they may nevertheless also apply, *mutantibus mutandis*, in civil or administrative cases, since these minimum rights are aspects of the right to a fair hearing and therefore inevitably come under the same general umbrella of protection of Article 6 § 1 of the Convention, which covers inextricably and inseparably all civil, administrative and criminal cases. Nuala Mole and Catharina Harby argue, rightly in my view, in favour of the view that “guarantees similar to those detailed in Article 6 §§ 2 and 3 may under certain circumstances also apply to civil proceedings”, and that the right under Article 6 § 3 (b) to have adequate time and facilities for the preparation of one’s defence “also applies in some civil cases as part of the general fairness requirement” (see N. Mole and C. Harby, *The Right to a Fair Trial – A guide to the implementation of Article 6 of the European Convention on Human Rights* – Human Rights Handbooks, No. 3, 2<sup>nd</sup> edition, Strasbourg-Belgium, 2006, pp. 5 and 59 respectively).

22. However, even without paragraphs 2 and 3 of Article 6, those guarantees would be included in the provisions of Article 6 § 1 of the Convention.

23. One must not forget that although the applicant in the proceedings before the national administrative courts was a complainant and not a defendant, he nevertheless, due to the *sui generis* nature of the case, was in a way acting as a defendant or accused, since he was trying to defend himself against the allegedly unlawful withdrawal of his security clearance. The authorities withdrew that clearance without informing him of the reasons for their decision. Of course this implied that there was something reprehensible about his behaviour, thus stigmatising him in some way which he wanted to fend off by having the withdrawal of his security clearance set aside by a court judgment. So, by analogy, Article 6 § 3 (a) of the Convention could also apply in the present case since the applicant had a right to know the nature and cause of the accusations against him (see, by analogy, Directive 2012/13/EU of the European Parliament and the Council of 22 May 2012 on the right to information in criminal proceedings, § 29 of the preamble and Article 7 § 3).

24. Professor Eva Brems and Laurens Lavrysen, in their article entitled “Procedural Justice in Human Rights Adjudication: The European Court of Human Rights” in *Human Rights Quarterly*, 35 (2013) 176 et seq., deal with the benefit of exploring procedural justice criteria, namely “participation”, “neutrality”, “respect” and “trust”, with frequent references, among other authors, to the work of Tom R. Tyler (namely, his article “Procedural Justice and the Courts” (2007) 44 *Court Review*, 26, at pp. 30-31) and to some joint articles written by him and other authors. Brems and Lavrysen remark: “In human rights cases, the stakes are by definition very high. When human rights are invoked, a fundamental sense of (in)justice is involved” (ibid., at p. 184). They rightly explain how closely connected human dignity is to procedural justice (ibid., at pp. 184 and 188) and that “by providing procedural justice human-rights bodies can create a ‘reservoir of good will’” (ibid., at p. 183). What is extremely important in their article and relevant in the present case is what they say about the Court and the need to address procedural justice (ibid., at p. 185):

“As a supranational body, the ECtHR needs to address procedural justice at two closely connected levels. First, the Court should be a champion of procedural justice in its own proceedings and judgments. The Court should deliver procedural justice in order to improve applicant’s satisfaction and self-worth and to gain compliance and strengthen its legitimacy. This is all the more important because one can presume that the legitimacy of the Court – the most visible human rights actor in Europe – is inextricably linked to the legitimacy of human rights in Europe.

Second, the Court could be a watchdog of procedural justice in human rights matters at the domestic level. A lack of procedural justice, whether administered by the police, the courts, or administrative authorities, constitutes harm in itself. We submit that the

ECtHR should take this harm systematically into account in assessing whether an infringement of a human right constitutes a violation.”

See also a very recent article by Professor Eva Brems: “The ‘Logics’ of Procedural-Type Review by the European Court of Human Rights” in (eds) J. Genarids and E. Brems, *Procedural Review in European Fundamental Rights Cases*, Cambridge, 2017, p. 17 *et seq.*

25. Professor Tom R. Tyler (cited above, at p. 31) rightly argues that “[a]uthorities can provide evidence that they are listening to people and considering their arguments by giving people a reasonable chance to state their case, by paying attention when people are making their presentation, and by acknowledging and taking account of people’s needs and concerns when explaining their decisions”. For me, this would be the duty of all authorities in a democratic State. But in the present case the applicant was not given a reasonable chance to state his case, because he was not provided with the evidence against him, and nor did the judicial authorities explain their decisions to him.

26. Professor Michael S. Moore considers “procedural fairness” to be one of the rule of law virtues. What he says about “procedural fairness”, which is cited below, may specifically apply to the facts of the present case and strongly support my argument (see Michael S. Moore, “A Natural Law Theory of Interpretation” in: *Southern California Law Review*, 58, p. 277 *et seq.* at pp. 317-18; the same also in Fernando Atria and D. Neil MacCormick (ed), *Law and Legal Interpretation*, Ashgate/Dartmouth, 2003, Part I, [5], p. 113 *et seq.*, at pp. 153-4):

“v. *Procedural fairness*: Procedural fairness, the fifth rule of law virtue, is achieved by a legal system if it has processes of adjudication that are themselves fair. Suppose that judges could reach and quicker results if they did not listen to arguments of opposing counsel and did not have to rationalize their ‘hunches’ with bothersome opinions. The idea of procedural fairness would constrain them from this kind of decision making because it does not allow citizens fair access to the adjudicatory process. Such access is good – procedurally fair – quite apart from any argument that it produces better outcomes; even it does not, it is good to allow citizens a way to participate in those government agencies (courts) that have such an immediate say in their lives.

Lon Fuller argued that such ‘participatory adjudication’ requires that there be a *standard* which parties can meaningfully argue\* [\*Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978)]. If this is right, then procedural fairness constrains judges to make decisions with reference to standards to which the parties themselves have access. In terms of theory of interpretation, this means one should frame the theory so as to allow litigants the maximal access to the interpretive tools needed to argue for their point of view. Secret or hidden materials are worse, on such a view, because they deny the access litigants need to argue their case. Any theory of interpretation making such materials relevant to a judge’s decision would accordingly offend the idea of procedural fairness.”

27. An applicant’s hearing cannot be “fair” if he has to present his case in complete blindness or a blackout as regards the accusations against him.

It is clear from the judgment of the Supreme Administrative Court that the applicant's defence was based on his suspicion that the withdrawal of his security clearance related to his earlier refusal to cooperate with the military intelligence service because he considered their actions illegal. As is also clear from the judgment of the court, replying to its comment that he had not presented any evidence in support of that contention, the applicant argued that, since he did not know the contents of the confidential report, he could not even challenge its veracity with evidence to refute the facts stated therein. Yet again the court did not give the applicant any information about the report. This, with all respect, reminds me of the game "hide and seek" where one player hides and has to be found by one or more seekers. But a fair trial should not take this form. I agree with what the applicant says in paragraph 21 of his request for referral, namely that "[i]t is easy to make an accusation, and it is very difficult to refute it, especially in the situation when the participant does not have knowledge of evidence, because in this case it is impossible in effect". In his oral submissions, which are available on the Court's website, the applicant very vividly and persuasively presented his case by telling a hypothetical story endeavouring to show how easily, arbitrarily and for reasons that are irrelevant or entirely non-existent the National Security Authority may withdraw a person's security clearance.

28. It did not help his blindness about the issue that the applicant had not ever been warned or had his attention drawn to any reprehensible conduct of his. What was said in the above extract from the article by Michael S. Moore, namely "[s]ecret or hidden materials are worse, on such a view, because they deny the access litigants need to argue their case", is absolutely relevant and applicable in the present case.

29. The national administrative courts in the present case were aware of the accusations against the applicant and it was not their place or task to assume the role of the applicant's advocate. Even if they were not to be perceived as assuming the role of the applicant's advocate, and yet the applicant was unable to defend his case, again there would be a procedural injustice. But the judicial authorities, by acting as they did, and not informing the applicant of the accusations against him, I am afraid to say greatly impaired, if not fully extinguished, his right. To put it in a more general way, where the national judicial authorities cause a party to suffer a "procedural handicap" (if I may use this expression) regarding the defence at trial, that party's right to a fair hearing is in essence eliminated.

30. Furthermore, the national court's knowledge of the accusations against the applicant did not assist him in conducting his defence; nor did it help the court to be assisted by submissions from the applicant putting forward his arguments in the knowledge of at least the gist of those accusations. Only if he knew the evidence against him could the applicant prepare his case and decide which witnesses to call and examine. Hence, I do not subscribe to the view of my eminent colleagues that this did not

“impair the very essence of the applicant’s right to a fair trial” (see paragraph 161 of the judgment).

31. Absolute, blanket and secret restrictions on rights, as was the nature of the restriction in the present case, disrespect the human dignity which is behind every human right, including the right to a fair hearing, as in the present case (see also paragraph 24 above on this point).

32. The procedural injustice that occurred as a result of the deprivation of the applicant’s rights to equality of arms and adversarial proceedings was exacerbated by the ineffective procedure used by the domestic courts to examine the evidence before them and which was not compatible with the principle of adversarial proceedings (see also paragraph 104 below). The rule *affirmanti, non neganti, incumbit probatio* (see Wharton’s Law Lexicon, 30, 9 Cushing’s Mass. Reports 535), meaning he who affirms, not he who denies, must bear the burden of proof, which is used in several instances in the case-law of the Court (see, *inter alia*, *Hassan v. the United Kingdom* [GC], no. 29750/09, § 49, ECHR 2014), found no application in the present case, since this maxim applies only in adversarial proceedings.

33. In the present case there is no complaint as such of a violation of the applicant’s right of access to court, but the Court’s case-law regarding this right may also apply regarding the applicant’s right to participate *effectively* at the hearing and handle his case properly, which of course implies access to the court. Both of those rights are based on the principle of effective protection or principle of effectiveness. According to the Court’s case-law, for the right of access to a court to be effective, an individual must have a clear and practical opportunity to challenge an act that is an interference with his or her rights (see, *inter alia*, *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, § 86, ECHR 2016 (extracts); *Nunes Dias v. Portugal* (dec.), nos. 2672/03 and 69829/01, ECHR 2003-IV; and *Bellet v. France*, 4 December 1995, Series A no. 333-B). Also according to the case-law, the right of access to a court includes not only the right to institute proceedings, but also the right to obtain a determination of the dispute by a court (see, *inter alia*, *Lupeni Greek Catholic Parish and Others*, cited above, § 86; *Fălie v. Romania*, no. 23257/04, §§ 22 and 24, 19 May 2015; and *Kutić v. Croatia*, no. 48778/99, § 25, ECHR 2002-II). In the present case the deprivation of the applicant’s rights to equality of arms and adversarial proceedings deprived him of a clear and practical opportunity to challenge the withdrawal of his security clearance, an act which was an interference with his right under Article 6 § 1 of the Convention.

34. Procedural fairness may operate as a shield for substantive fairness; so when a litigant, due to procedural unfairness, is prevented from presenting and arguing his or her case properly, his or her right under Article 6 § 1 of the Convention may not have the required shield to protect it and the case may also end in substantive unfairness. I believe that if the

procedural means to pursue a right are taken away, this unavoidably destroys the end result, namely, the protection of its essence - *qui adimit medium dirimit finem* (see Coke on Littleton, 161.a), meaning “he who takes away the means destroys the end”. T. R. S. Allan said that “we insist on fair procedures because we attach importance to the fair treatments of individuals, in terms of ... burdens imposed by the state ...” (see T. R. S. Allan, “Procedural Fairness and the Duty of Respect”, [Autumn, 1998] 18, *Oxford Journal of Legal Studies*, 497 at p. 511). He ended his article as follows: “The value of fair procedures finally consists in the combination of our commitment to substantive justice and our uncertainty about what that means in the circumstances of any particular case, a matter on which the person or persons most closely affected can often cast valuable light, and also, and above all, in our desire to commend the outcome to a fellow-citizen who must suffer for the common good.” (ibid., at p. 515)

35. In my view, the administrative trial was flawed on account of a grave procedural error which was detrimental to the applicant and accordingly affected the overall fairness of the trial. This could, in my humble view, have been ascertained by the two higher administrative courts and our Court, but a finding of no violation of Article 6 § 1 of the Convention was made instead.

**(b) Wide interpretation of the right to a fair hearing and restrictive interpretation of any implied exception to it – no scope for absolute prohibitions**

36. The principle of effectiveness, which is inherent in the Convention system and is the most defining element of its DNA, requires that a right under the Convention, and of course Article 6 § 1, be given its proper weight and effect according to its object and purpose, and that it be construed widely and any limitations or exceptions to it construed strictly and narrowly. This is all the more true where the exception is implied and not expressed, such as when dealing with Article 6 § 1. Otherwise, the level of protection of the right to a fair trial would not be maintained. In what follows I will endeavour to support, by citing authorities, what I consider to be self-evident and obvious.

37. In the case of *Delcourt v. Belgium* (17 January 1970, § 25, Series A no. 11), the Court held:

“In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 para. 1 (art. 6-1) would not correspond to the aim and the purpose of that provision ...”

38. Likewise, in *Perez v. France* ([GC], no. 47287/99, § 64, ECHR 2004-I), the Court held:

“... In this respect the Court notes that the right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting Article 6 § 1 restrictively.”

39. The above is supported by the words of Professor Rudolf Bernhardt, a former President of the Court (see Rudolf Bernhardt, “Evolutive Treaty Interpretation, Especially of the European Convention of Human Rights”, *German Yearbook of International Law*, 42 (1999), 11 at p. 14):

“Treaty obligations are in case of doubt and in principle not to be interpreted in favor of State sovereignty. It is obvious that this conclusion can have considerable consequences for human rights conventions. Every effective protection of individual freedoms restricts State sovereignty, and it is by no means State sovereignty which in case of doubt has priority. Quite to the contrary, the object and purpose of human rights treaties may often lead to a broader interpretation of individual rights on the one hand and restrictions on State activities on the other.”

40. Arguing in favour of the strict interpretation of the exceptions to rights guaranteed in the Convention, Dr Gerhard van der Schyff (see Gerhard van der Schyff, *Limitations of Rights – A study of the European Convention and the South Africa Bill of Rights*, Nijmegen, the Netherlands, 2005, at pp. 169-71, § 136) said the following:

“The interpretation of the Convention must evidence a keen regard for the protection of the freedom it guarantees. This is so because the rights guaranteed by the Convention can only be *secured* to everyone within the jurisdictions of the member states, as required by article 1, were the protection of freedom to be approached in a serious light. The Convention can only be a worthwhile instrument were its rights to be tangible and not simply a collection of ideas not being given actual content. This is usually referred to as the principle of *effectiveness of rights*. For example, the Court held in *Airey v. Ireland* that ‘the Convention is intended not to guaranteed right that are theoretical or illusory but rights that are practical and effective’. This implies that the deprivation of freedom under the Convention is a serious matter and should be treated accordingly, otherwise the guarantees may be rendered ineffectual thereby robbing the Convention of its purpose as an instrument of fundamental rights protection. This awareness usually crystallises as the principle of *strict interpretation* of limitation provisions. In other words, limits amount to exceptions to freedom and should therefore be interpreted strictly in order to ensure the effectiveness of the rights limited. Limitation provisions are not simply to be viewed as instruments with which to limit rights, but more correctly as instruments with which to secure the effective protection of rights by requiring interferences with their protected conduct and interests to be properly justified.

This principle of strict interpretation is also to be deduced from article 17, which provides that any guaranteed right may not be limited ‘to a greater extent than is provided for in the Convention.’”

41. Any restrictive interpretation of a right guaranteed by the Convention contradicts the principle of effectiveness and is not part of international law (see Hersch Lauterpacht, “Restrictive Interpretation and Effectiveness in the Interpretation of Treaties”, XXVI, *BYIL* (1949), 48 at pp. 50-51, 69, and Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, Oxford 2008, repr. 2013, at p. 414).

42. The wider the interpretation given to a right and the stricter the interpretation of any exceptions to it, the wider will be the extent of its protection. The same should apply to the right guaranteed by Article 6 of the Convention, the purpose of which does not allow a restrictive interpretation.

43. Furthermore, taking into account that Article 6 § 1 of the Convention does not expressly provide for exceptions, if there was an implied exception in the present case this could have been neither strict nor of course absolute in the sense of not giving any details of the investigations and the reasons for revoking his security clearance and therefore making it impossible for the applicant to defend himself.

44. No implied exceptions should have been allowed to apply, in my view, in the form of an absolute prohibition invading the core of the right to a fair trial with the effect of negating it completely and rendering the principle of equality of arms and principle of adversarial proceedings completely ineffective. It would be against the nature and scope of the Convention as a human rights treaty to allow absolute restrictions to impeach rights protected therein.

45. According to the Court's case-law, there may be implied exceptions to the right of access to a court. But this right is an implied or ancillary or secondary right deriving from the right to a fair trial, which is expressly provided for in the Convention (see *Golder v. the United Kingdom*, 21 February 1975, Series A no. 18). Regarding that right of access to a court, the Court's case-law recognises that there may be implied exceptions since by its very nature the right calls for regulation by the State, which enjoys a certain margin of appreciation in this regard (see *Yabansu and Others v. Turkey*, no. 43903/09, § 58, 12 November 2013; *Howald Moor and Others v. Switzerland*, nos. 52067/10 and 41072/11, § 71, 11 March 2014; and *Urechean and Pavlicenco v. the Republic of Moldova*, nos. 27756/05 and 41219/07, § 13, 2 December 2014). This is a reasonable explanation.

46. However, I do not personally hold the view that the Convention does allow implied exceptions to the rights specifically mentioned in the Convention. I nevertheless respect and feel bound by the case-law of the Court, which considers that Article 6 § 1 is not an absolute right.

47. With all due respect, I do not share the Court's approach in taking it for granted in the present case that there was an implied exception under Article 6 § 1 of the Convention applied in absolute terms, thus accepting the Government's submission (see paragraph 98 of the Government's observations) that "Article 6 § 1 of the Convention is not applicable to security proceedings". Where it was the intention of the drafters of the Convention to provide an exception to the right in question they did so expressly, and, what is more, some of the exceptions contained in Articles 8 to 11 of the Convention, in paragraph 2 of each of these Articles, make provision for issues which are similar to those usually sought to be



kept secret and protected in security proceedings, namely the “interests of national security, public safety ... of the country ... prevention of disorder or crime”. Although, as I have said, I follow the case-law of the Court, I am not prepared to accept that the right to a fair hearing, which, according to the wording of Article 6 § 1 of the Convention, is not subject to any exceptions (unlike the rights under Articles 8 to 11 of the Convention), can be extinguished by an implied restriction taking the form of absolute national secrecy, and yet argue that there is no violation of that provision. In other words, I do not share the view that the right to a fair trial can be undermined to the extent of being abolished, contrary to the wording and aim of the said provision of the Convention and contrary to the principle of effectiveness which is inherent in the Convention system.

48. With due respect, such an approach appears to contradict the three principles of logic well described by Professor Mireille Delmas-Marty in “The Richness of Underlying Legal Reasoning” in M. Delmas-Marty – C. Chodkiewicz, *The European Convention for the Protection of Human Rights: International Protection Versus National Restrictions*, Dordrecht-Boston-London, 1992, 319, at p. 320:

“The Europe/State relationship indeed escapes in many ways the principles of formal bivalent logic:

1. the principle of identity, since partial conformity of the national rule to the European norm appears sufficient;
2. the principle of *tiers exclu* (meaning there is no valid outcome other than compliance or non-compliance) since the national rule which departs from [*sic*] a European norm is not necessarily excluded;
3. the principle of ‘non-contradiction’ since a national rule can at once and the same time be both different from the European rule and yet nonetheless compatible with the Convention, meaning it can be at the same time European and non-European.”

49. By following the case-law of this Court, in accordance with which “only measures restricting the rights of a party to the proceedings which do not affect the very essence of those rights are permissible under Article 6 § 1 of the Convention” (see paragraph 148 of the judgment), an absolute restriction directed and applied to the very essence of a right may inevitably, as happened in the present case, eliminate it and render unfair the proceedings as a whole.

50. Under no circumstances is the role of an exception to a right under the Convention to render the right ineffective, still less to extinguish it, and no one, including the State, can invoke an exception in order to destroy a right. This is prohibited by Article 17 of the Convention, which provides:

“Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction or any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”

51. Article 18 of the Convention, which provides as follows, may also be relevant:

“The restrictions permitted under the Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.”

52. It is obvious that Article 18 deals with express restrictions and that its wording leaves no room for implied restrictions. However, it is very difficult to imagine how an implied exception, the context and purpose of which are unknown to an applicant and the present Court, as in the present case, can be in line with Article 18 which emphasises the prescribed and limited purpose of exceptions.

53. Lastly, it follows from the wording of Article 1 of the Convention, which entrusts the member States with an obligation to secure “to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention”, and particularly from the phrase “defined in”, that the determination of the ambit of the rights and freedoms is exclusively and exhaustively made in Section 1 (and, of course, the additional Articles in the Protocols). It is not the aim of an express exception to a right provided in the Convention to intervene with its core or essence; its aim is rather to limit or restrict the realisation of that right in certain cases, by following the proportionality test. Two legal Latin maxims are relevant in this respect: *exceptio probat regulam* (see 11 Coke’s *Reports*, 41), meaning “an exception proves the rule”; *exceptio quæ firmat legem, exponit legem* (see 2 Bulstrode’s *Reports* 189), meaning “an exception which confirms the law, expounds the law”. On the other hand, an absolute or blanket exception or restriction or ban goes right to the core of a right. So, it cannot be said that it confirms or expounds the right, but it merely annihilates it and renders it ineffective by removing the foundation on which it lies. Here the general Latin maxim *sublato fundamento cadit opus* (Jenkin’s *Centuries or Reports* 106), meaning “remove the foundation, the work falls” may also be relevant. Were the proceedings criminal rather than civil or administrative, such a blanket and absolute restriction would probably violate the presumption of a person’s innocence.

**(c) Departure from previous case-law**

54. At paragraph 26 of his request for referral to the Grand Chamber the applicant complained that the Chamber had not examined, and therefore had not followed *Užkauskas v. Lithuania* (no. 16965/04, 6 July 2010), although that case had been referred to and presented to the Court very emphatically by the applicant. His submission was that the present case was “factually and legally quite similar” to *Užkauskas*. My view is that he is right in saying this. In that case a firearms licence was seized from the applicant on the basis that he was listed in a police database. In the ensuing proceedings the applicant unsuccessfully contested that fact. The courts obtained

information recorded in the police database in confidence, but as that information was a State secret the applicant did not have access to it. The applicant complained under Article 6 § 1 of the Convention that the proceedings before the administrative courts had been unfair in that the principles of equality of arms and adverse proceedings had not been respected. The Court in that case held as follows:

“48. Turning to the instant case, the Court observes that the Government do not dispute the fact that the content of the operational records file, on the basis of which the courts found against the applicant, was never disclosed to him. The Court is not insensitive to the goals which the Lithuanian law-enforcement authorities pursued through their operational activities. Likewise, the Court shares the Government’s view that documents which constitute State secrets may only be disclosed to persons who possess the appropriate authorisation. And yet the Court notes that Lithuanian law and judicial practice provide that such information may not be used as evidence in court against a person unless it has been declassified, and that it may not be the only evidence on which a court bases its decision (see paragraphs 20-22 above).

49. It appears that the undisclosed evidence in the present case related to an issue of fact decided by the Lithuanian courts. The applicant complained that his name had been listed in an operational records file without proper reason and asked the courts to consider whether the operational file on him should be discontinued. In order to conclude whether or not the applicant had indeed been implicated in any kind of criminal activity, it was necessary for the judges to examine a number of factors, including the reason for the police operational activities and the nature and extent of the applicant’s suspected participation in alleged crime. Had the defence been able to persuade the judges that the police had acted without good reason, the applicant’s name would, in effect, have had to have been removed from the operational records file. The data in this file was, therefore, of decisive importance to the applicant’s case (see, albeit with regard to criminal proceedings, *Lucà v. Italy*, no. 33354/96, § 40, ECHR 2001-II).

50. More importantly, as transpires from the decisions of the Lithuanian courts, the operational records file was the only evidence of the applicant’s alleged danger to society. The Court notes that on numerous occasions the applicant asked for the information to be disclosed to him, even in part. However, the domestic authorities - the police and the courts - denied his requests. Whilst, before dismissing the applicant’s case, the Lithuanian judges did examine, behind closed doors and in their chambers, the operational records file, they merely presented their conclusions to the applicant. It was not, therefore, possible for the applicant to have been apprised of the evidence against him or to have had the opportunity to respond to it, unlike the police who had effectively exercised such rights (see, *mutatis mutandis*, *Gulijev v. Lithuania*, no. 10425/03, § 44, 16 December 2008).

51. In conclusion, therefore, the Court finds that the decision-making procedure did not comply with the requirements of adversarial proceedings or equality of arms, and did not incorporate adequate safeguards to protect the interests of the applicant. It follows that there has been a violation of Article 6 § 1 in the present case.”

55. The judgment in the present case merely cites *Užkauskas*, without any discussion of the case. It refers to it in paragraph 110 of the judgment together with another judgment, namely *Pocius v. Lithuania* (no. 35601/04, 6 July 2010, to which it briefly alludes. The reference made to *Užkauskas*

is to paragraphs 34-39, which deal with the admissibility of the application and not its merits. The relevant paragraphs on the merits of *Užukauskas* are those cited above. The reference to *Pocius* is to paragraphs 38-46, which also deal with admissibility and not with the merits of the case. It is noteworthy that in section C of the judgment dealing with the merits of the case there is no reference to the above two cases. The reference to those cases in paragraph 110 of the judgment is in section B dealing with the preliminary objections raised by the Government and in the subsection containing the Court's assessment of the applicability of Article 6 § 1 of the Convention.

56. With due respect, I believe that the judgment in the present case departs from the *ratio decidendi* of *Užukauskas* without giving any reasons. To my mind, and for the reasons stated in this opinion, the precedent of *Užukauskas* is sound and just and should have been followed by my learned colleagues in the majority.

57. Furthermore, the Court in the present case did not follow *Dağtekin and Others v. Turkey* (no. 70516/01, §§ 32-35, 13 December 2007), where it was held that the non-disclosure of the security investigation report had infringed the applicants' right to a fair trial:

“32. The Court further reiterates that the principle of equality of arms, which is one of the elements of the broader concept of fair trial, requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent (see *Nideröst-Huber v. Switzerland*, judgment of 18 February 1997, *Reports* 1997-I, p. 107, § 23). It further notes that the right to adversarial proceedings means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, with a view to influencing the court's decision (see *Lobo Machado v. Portugal*, judgment of 20 February 1996, *Reports* 1996-I, pp. 206-07, § 31).

33. Turning to the facts of the case, the Court notes that the applicants earned their living by cultivating the fields that had been leased to them pursuant to Law no. 3083. The Court further observes that it is undisputed between the parties that the result of the security investigation, which led to the annulment of their lease contracts, was never communicated to the applicants. It is also common ground that these documents, although explicitly requested by the Gaziantep Administrative Court, were not submitted to the domestic court upon the order of the Ministry of Agriculture for national security reasons.

34. The Court considers that the result of this security investigation had important consequences for the applicants yet at no stage of the domestic proceedings were they given an opportunity to learn the reason as to why their contracts had been annulled or given an effective opportunity to challenge the lawfulness of the annulment of their right holder status. The Court is mindful of the security considerations at stake in the south-east of Turkey and of the need for the authorities to display the utmost vigilance. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved. There are techniques that can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice (see *Chahal v. the United Kingdom*, judgment of 15 November

1996, *Reports of Judgments and Decisions* 1996-V, § 131). The Court observes that as in the instant case, the conclusions of the security investigation were not revealed to the applicants or to the domestic courts, the applicants were deprived of sufficient safeguards against any arbitrary action on the part of the authorities.

35. In view of the foregoing, the Court concludes that the non-disclosure of the security investigation report infringed the applicants' right to a fair hearing within the meaning of Article 6 § 1 of the Convention. Accordingly, this provision has been violated."

58. Jacobs, White & Ovey, in their book *The European Convention on Human Rights*, 4<sup>th</sup> edition, Oxford, 2010, pp. 261-62, say the following, also referring to *Dağtekin*:

"In order for the adversarial process to work effectively, it is important, in civil and criminal proceedings, that relevant material is available to both parties. Security considerations will not justify blanket restrictions on the availability of such evidence where it affects the interest of a litigant, since there are means which can accommodate legitimate security concerns while offering a substantial measure of procedural justice to a litigant."

59. Also of relevance is *F.R. v. Switzerland* (no. 37292/97, §§ 36-39, 28 June 2001), where the importance of the right of the litigants to have knowledge of and comment on all evidence was stressed:

"36. Nevertheless, the concept of fair trial also implies in principle the right for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed (see the *Lobo Machado v. Portugal* and *Vermeulen v. Belgium* judgments of 20 February 1996, *Reports* 1996-I, p. 206, § 31, and p. 234, § 33, respectively)".

"39...However, the parties to a dispute should in cases such as the instant one, be given the possibility to state their views as to whether this is the case and whether or not a document calls for their comments. What is particularly at stake here is litigants' confidence in the workings of justice, which is based on, *inter alia*, the knowledge that they have had the opportunity to express their views on every document in the file (see the *Nideröst-Huber* judgment cited above, p. 108, § 29)."

60. In *Al-Nashif v. Bulgaria* (no. 50963/99, §§ 119-123, 20 June 2002), the Court held, *inter alia*, that the national authorities must not be granted unfettered power in areas affecting fundamental rights since this is against the rule of law:

"119... In addition, there must be *a measure of legal protection* in domestic law *against arbitrary interferences by public authorities* with the rights safeguarded by the Convention. It would be *contrary to the rule of law* for the legal discretion granted to the executive in areas affecting fundamental rights to be expressed in terms of *an unfettered power*. Consequently, the law *must indicate* the scope of any such discretion conferred on the competent authorities and the manner of its exercise *with sufficient clarity*, having regard to the legitimate aim of the measure in question, *to give the individual adequate protection against arbitrary interference* (see *Amann v. Switzerland* [GC], no. 27798/95, ECHR 2000-II, §§ 55 and 56, *Rotaru v. Romania* [GC], no. 28341/95, ECHR 2000-V, §§ 55-63, *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, ECHR 2000-XI, and the *Klass and Others v. Germany* judgment of 6 September 1978, Series A no. 28)." (emphasis added).

...

“123. *Even where national security is at stake*, the concepts of *lawfulness* and the *rule of law* in a *democratic society* require that measures affecting fundamental human rights *must be subject to some form of adversarial proceedings* before an *independent* body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information (see the judgments cited in paragraph 119 above).” (emphasis added).

61. *Al-Nashif* is the only case I have come across in which the Court speaks about procedural limitations on the use of classified information. But this does not run counter to the approach of the present opinion because the above-cited passage deals only with the case where national security is at stake (which did not seem to be the case here) and yet says that measures affecting human rights must be subject to some form of adversarial proceedings (which did not happen in the present case) and any procedural limitations on the use of classified information must be necessary (“if need be”) and “appropriate” (and not arbitrarily absolute as in the present case). In any event, in *Al-Nashif* the Court found a violation of Article 8. After examining whether the deportation of the three applicants had been “in accordance with the law”, it decided that “... deportation [had been] ordered pursuant to a legal regime that [did] not provide the necessary safeguards against arbitrariness. The interference with the applicants’ family life [could not] be seen, therefore, as based on legal provisions that me[t] the Convention requirements of lawfulness” (§ 128).

62. In *Rotaru v. Romania* ([GC], no. 28341/95, § 59, ECHR 2000-V), to which the Court referred in *Al-Nashif*, clarifies the position as follows:

“59. The Court must also be satisfied that there exist adequate and effective safeguards against abuse, since a system of secret surveillance designed to protect national security entails the risk of undermining or even destroying democracy on the ground of defending it ...”

**(d) No room for absolute prohibitions generally in the case-law of the Court**

63. According to the case-law of the Court (see, *inter alia*, *Saadi v. Italy* [GC], no. 37201/06, §§ 137-149, ECHR 2008), under no circumstances may a person be ill-treated, even on the suspicion that he or she is a terrorist. Although this case-law does not concern the right to a fair trial but the right to be free of ill-treatment under Article 3 of the Convention, it is, nevertheless, important, because it shows that if the fight against terrorism cannot justify reduced guarantees of rights guaranteed in the Convention, then nor can State secrets.

64. Owing to its decisively destructive impact on the essence of the right, the restriction in the present case operated, in effect, by way of derogation from Article 6 § 1 of the Convention.

65. However, it is clear from Article 15 of the Convention that, whatever the public danger or threat is, whether it be terrorism or another risk from

which a State may wish to protect the public by way of secrecy of proceedings, one cannot derogate from any of the Convention provisions, unless Article 15 is applicable and its *strict* requirements – procedural and substantive – are satisfied. But in the present case Article 15 was not applicable and therefore no issue arose in that regard.

66. Of relevance in this respect are the profound words of Benjamin Franklin in his Reply to the Governor in the Pennsylvania Assembly on 11 November 1755, namely, that “those who would give up essential liberty, to purchase a little temporary safety, deserve neither liberty nor safety”. The same words, expressed differently, are also attributed to him as follows: “He who would put security before liberty deserves neither”. In the same vein, Nicolas Hervieu is on record as having said: “To pursue the fight against terrorism while upholding fundamental rights is not a luxury, but a condition of effectiveness and compelling necessity. Any renouncement of our democratic values would only lead to defeat. And terrorists would be the winners” (referred to by the former President of the European Court of Human Rights, Dean Spielmann, in his speech given on the occasion of the opening of the judicial year, 30 January 2015 – see Annual Report 2015 prepared by the Registry of the Court (Strasbourg 2016), 30, at p. 36).

67. Having said that, Article 6’s aim was not to contain or imply a restriction which would amount to a derogation from the right to a fair hearing outside the provisions of Article 15 of the Convention or to a blind and blanket restriction or ban amounting to deprivation of the right *per se*.

68. It is clear from the case-law of the Court that it does not accept absolute restrictions which could have a disproportionate effect on the right which they counterbalance. Just two examples will suffice.

69. The first example is *Hirst v. the United Kingdom (no. 2)* ([GC], no. 74025/01, §§ 72-85, ECHR 2005-IX), in which the Court decided that a blanket ban on prisoners’ rights to vote amounted to a violation of Article 3 of Protocol No. 1 to the Convention, which guarantees the right to free elections.

70. The other example consists of a group of similar cases, including *Katkaridis and Others v. Greece*, 15 November 1996, §§ 44-51, *Reports of Judgments and Decisions* 1996-V, and *Tsomtsos and Others v. Greece*, 15 November 1996, §§ 35-42, *Reports* 1996-V, in which the Court held that a provision of Greek legislation – providing that whenever a major road is widened there is an irrebuttable presumption of benefit to the owners of property bordering the road and subject to partial expropriation – was contrary to Article 1 of Protocol No. 1 to the Convention. Due to this irrebuttable presumption of benefit, the owners of the properties bordering the road were prevented from obtaining compensation for the part of their land which was expropriated. This presumption was held by the Court to be manifestly without reasonable foundation. The national courts had not had the power to examine the particular circumstances of each case and to

decide whether there had indeed been a benefit to the owners of the remaining land, and, if there was, to offset that benefit against the compensation to which the owners were entitled.

71. In view of the above, I humbly propose that the case-law should not have changed direction in the present case, thus giving too much legal status to an absolute restriction at the expense of the effective protection of the right to fair hearing. Otherwise, our reading and understanding of the Convention would be different. Until now we have known that the Convention makes provision for some absolute rights, but not for absolute restrictions. An absolute restriction leads to the death of a right or to no right at all.

**(e) Balancing test and transparency**

72. In the concluding paragraph 161 of the judgment, the Court refers to “the margin of appreciation enjoyed by the national authorities”, and considers that “the restrictions curtailing the applicant’s enjoyment of the rights afforded to him in accordance with the principles of adversarial proceedings and equality of arms were offset in such a manner that the fair balance between the parties was not affected to such an extent as to impair the very essence of the applicant’s right to a fair trial.” With due respect, I disagree with this conclusion for the following reasons.

73. A blanket and absolute application of security restrictions does not provide guarantees and transparency for the balancing test and the application of the principle of proportionality, a prerequisite for a fair trial. In the present case the contents of the restriction were secret and neither the applicant nor the Court had knowledge of the factual basis of the restriction. So it is not possible for this Court to carry out any transparent balancing test between the individual and general interest in the present case, in which the general interest is unknown to the applicant, the public and the Court and the applicant did not have the opportunity to challenge it. That happened because, regrettably, the margin of appreciation of the national authorities was unfettered. In the words of F. Matscher, “[t]he principle of proportionality thus acts as a corrective and restriction of the margin of appreciation doctrine” (see F. Matscher, “Methods of Interpretations of the Convention” in *The European System for the Protection of Human Rights*, ed. R. St. J. Macdonald, F. Matscher, H. Petzold, Dordrecht-Boston-London, 1993, 63 at p. 79). This is absolutely correct, but that principle was not applied in the present case.

74. Hence, in the present case there has been only one transparent side of the judicial scale: the applicant’s right to a fair trial; the other side, the supposed general interest, being unknown. I therefore believe that the Court should not have accepted the need for a restriction, supposedly serving the general interest, without knowing its context. The secrecy of the restriction precluded the Court from properly fulfilling its judicial task, namely



carrying out a balancing test and applying the principle of proportionality. It was unfortunate to sacrifice the procedural rights of the applicant on the altar of a blanket and mysterious “general interest”. The principle of proportionality and the balancing test in terms of Article 6 § 1 of the Convention are based on the notion of equality and of course are democratic principles. Furthermore, the domestic courts could not have been in a position to carry out a proper balancing test and exercise their discretion fairly, without following an adversarial procedure and applying the principle of equality of arms.

75. An overarching disagreement I have with the majority is, lastly, what we consider to be the “very essence”, or very substance or core of the right to a fair trial, which of course needs protection. And this is because the majority decided that there had been no impairment of the “very essence of the applicant’s right to a fair trial” whereas I consider that there has been complete destruction of the right to a fair trial. I must of course reiterate that I agree with the majority that the applicant had a right within the meaning of Article 6 § 1 of the Convention. Dr Jonas Christoffersen (see J. Christoffersen, *Fair Balance: Proportionality, and Primarity in the European Convention on Human Rights*, Leiden-Boston, 2009) observes that “[t]he traditional description of the proportionality principle includes protection of the very essence of the rights of the ECHR” (ibid, at p. 135), and that “[i]n order to understand the proportionality principle, the crucial question is how the very essence is delimited, and how the means of delimitation interact with the other elements inherent in the proportionality assessment” (ibid, at p. 137). I cannot see in the judgment any explanation as to why the very essence of the right of the applicant to a fair trial has not been impaired. As I have explained, in my opinion, there has been an impairment of the very essence of this right, since the applicant was stripped of his rights to equality of arms and adversarial proceedings and was left in the dark as to all the evidence against him and the reasons on which the judgments against him were based.

76. A trial cannot be fair, in my view, without the just and transparent exercise of a balancing test. As Ioannis Sarmas, a Greek Supreme Court judge and former Member of the European Court of Auditors, rightly observed “[j]ustice can prevail only within order and order cannot be built without equilibrium as one of its components” (see I. Sarmas, *The Fair Balance – Justice and Equilibrium Setting Exercise, Athens-Thessaloniki*, 2014, p. 106). He also made the following profound comment (ibid., at p. 285) on reflective equilibrium and transparent and non-arbitrary reasoning, which was lacking in the present case:

“A quest for *reflective equilibrium* underlies the balancing exercise. Various kinds of decision solving the problem of justice are tested by verifying successively their consistency with the order of values in which it will be integrated, their consequences when applied to the real world having regards to the risks which they may generate

and finally their acceptability by all stakeholders. Human discretion plays a prime role in weighting of the various elements in play. Here as well, discretion goes hand in hand with guarantees against arbitrary decisions and the reflective equilibrium ensures that the decision selected is not arbitrary but based on transparent reasoning in which all crucial elements coming into play have been identified and duly assessed.”

77. Judge Giovanni Bonello, as he was then, in his concurring opinion in *Van Geyseghem v. Belgium* ([GC], no. 26103/95, ECHR 1999-I) said: “In practice, I cannot foresee any case where, in a search for equilibrium between society’s interests and this particular fundamental right of the accused (even were any balancing legitimate), the latter should ever succumb to the former”. Although the issue was different in that case the same comment applies in the present case and in any case where the Court is in search of an equilibrium between the general and the individual interest.

78. Although the Czech Supreme Administrative Court and the Czech Constitutional Court acknowledged that in the present case not all the procedural guarantees had been met – because according to them that was not possible – they nevertheless decided that the availability of an administrative review of the impugned administrative decision before independent courts provided sufficient guarantees of the right to a fair trial. With due respect, I do not share that view; nor, of course, do I agree with the Government’s submission (see paragraph 141 of the judgment) that “the limitation of the applicant’s procedural rights had been sufficiently counterbalanced by the procedures followed by independent and impartial judicial authorities which had played an active role in the proceedings and thus provided not only adequate safeguards to protect the applicant’s interests but also struck a fair balance between the State’s interests and those of the applicant”.

79. In my view, for the right to a fair hearing under the Convention to be protected it is not sufficient that there merely be a legislative provision enabling a person to request a review of an administrative decision. There must also be a procedure which does not deprive an applicant of his or her right to equality of arms and to an adversarial trial. Where those two rights are not respected there cannot be a fair balance between the State’s interests and the individual’s interests.

**(f) The rule of law**

*(i) Importance of the rule of law*

80. The rule of law is one of the pillars and fundamental principles of a democratic society and a rampart against tyranny. Its most important aim is to afford adequate protection of human rights, and without it there will be chaos. As Neil MacCormick said in *Rhetoric and the Rule of Law – A Theory of Legal Reasoning*, Oxford, 2005 at p. 238, “[o]ne of the most

strongly advertised merits of the Rule of Law is that, where it flourishes, legal certainty flourishes also, as part of it”. I maintain that the opposite is also true, and that where the rule of law is undermined or is not properly respected, there is no legal certainty and consistency, but only legal blindness. Fairness is a stranger to such circumstances. In one of his opinions Professor Aharon Barak, the former President of the Supreme Court of Israel, rightly said that “[t]he struggle for the law is increasing” and that “[t]he need to watch over the rule of law exists at all times”. He then added: “Trees that we have nurtured for many years may be uprooted with one stroke of the axe. We must never relax the protection of the rule of law ...” (see H.C. 5364/94, *Velner v. Chairman of the Israeli Labor Party*, 49(I), P.D. 758, 808; see also A. Barak, “A Judge on Judging: The Role of a Supreme Court in a Democracy”, [2002] *Harvard Law Review* vol. 116: 16, 19, at pp. 37-38).

(ii) *Requirement of the rule of law in the present case for effective compliance with Article 6 § 1 of the Convention*

81. Since its ratification by the Czech Republic, the Convention has become part of the domestic law, taking precedence over all other domestic legislation. The rule of law, to which the Preamble of the Convention also refers, and which is one of the most important principles of the Convention, requires effective compliance with each and every provision of the Convention, including of course Article 6 § 1. The Court is the guardian of the Convention and the rule of law.

82. Article 26 of the Vienna Convention on the Law of Treaties of 1969 (VCLT), headed by the Latin maxim *pacta sunt servanda*, provides that: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith”. Under Article 27 of the VCLT, “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty...”.

83. Furthermore, as has been observed above (see paragraphs 7-9 above), the national administrative courts were obliged under Articles 1, 10, 87 and 95 of the Czech Constitution to give precedence to the provisions of Article 6 § 1 of the Convention over the provisions of section 133(3) of Law no. 412/2005 by interpreting the latter in a manner compatible or harmonious with the former and thus respecting and following the principle of equality of arms and the principle of adversarial proceedings. However, in my view, they did not do this.

84. It must be remembered that, apart from the Court, all the national authorities – judicial, legislative and executive – are guardians of the Convention provisions. As has been seen, Article 1 of the Convention lays down the obligation for the States to “secure to everyone within their jurisdiction the rights and freedoms defined in Section I” of the Convention.

Hence, all Czech authorities – legislative, executive and judiciary – should have protected the rights of the applicant guaranteed by the Convention.

85. Section 133(3) of Law no. 412/2005 does not expressly provide for an absolute prohibition based on confidentiality. On the contrary, it gives a discretion to the presiding judge to decide whether part of the information can be exempted from the duty of confidentiality. This discretion would have made it easier for the administrative courts to fulfil their task of making a compatible interpretation of this provision with Article 6 § 1 of the Convention, had they realised the need to do so. After all, the classified report on the basis of which the applicant's security clearance was withdrawn was protected by the lowest security level, while he possessed security clearance of a higher level of classification: "secret".

86. However, as is clear from the judgment of the Constitutional Court and the two administrative courts, it was decided that considering the specifics and importance of decision-making in matters of classified information, where the emphasis is on the State's security interest, it is not always possible to guarantee all the regular procedural guarantees of a fair trial. On the other hand, as it also held, such a restriction imposed by classified information cannot have the effect of waiving the protection of the right to a fair trial, provided that there is a statutory guarantee of review of administrative decisions by an independent judicial body. As I understand it, the Constitutional Court took it for granted that there had been no procedural injustice for the applicant as a result of the limited guarantees of his right to fair trial under Article 6 § 1 of the Convention, since this was counterbalanced by the independence of the administrative courts which decided his case. It would also appear from the judgments of the administrative courts that it was not possible for them in the circumstances to exempt any part of the classified information from confidentiality. The following extract from the judgment of the Constitutional Court may be relevant:

*"The Supreme Administrative Court focused on the nature and content of the information stated in the classified part of the file and concluded that the legal conditions for the procedure under the provision of Section 133 of the Classified Information Protection Act were met. The considered information was marked as circumstances whose confidentiality had to be maintained, but [also as being of a] nature that ... access to [it by] the applicant could really endanger or seriously breach the activity of intelligence services or the police. The Supreme Administrative Court deduced that in view of the nature and content of said information, access [to] this information [by] the applicant would most probably result in revealing the methods of work of the intelligence service, disclosure of the information would also result in revealing information sources or influencing any witnesses. Therefore according to the Supreme Administrative Court the Municipal Court did not err if it proceeded in accordance with the provision of Section 133 of the Classified Information Protection Act and if it reviewed the justification of the defendant in the intentions stated in the provision of Section 122 (3) of the stated Act."* (translation

from Czech submitted by the Czech Government to the Grand Chamber together with the full text of all the relevant decisions of the national courts – emphasis added).

87. The applicant suggested in his oral submissions that he could at least be provided with the conclusions of the investigations without disclosure of information related to the operational activities and investigation procedures of the intelligence services. This suggestion is in line with *Dağtekin and Others*, cited above, § 34, in which the Court held, citing *Chahal v. the United Kingdom* (15 November 1996, *Reports* 1996-V), that “there are techniques that can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice ...” (see paragraph 57 above).

88. I hold the view that the Court could not decide *in abstracto* whether disclosing part of the confidential information to the applicant would still result in a violation of Article 6 § 1 of the Convention. That would depend, of course, on what substantive information were to be given to the applicant and what information were to remain confidential, and, of course, on whether the information given to the applicant were to enable him to conduct his defence properly with due respect for the principle of equality of arms and the principle of adversarial proceedings. However, in the present case no part of the confidential information was given to the applicant, and, in my view, there is no question but that this absolute restriction resulted *per se* in a violation of Article 6 § 1 of the Convention.

89. In any event, this Court is not aware of the contents of the confidential report and we do not know what materials were produced before the domestic courts. I believe that the Court has a duty to exercise its supervisory jurisdiction when the respondent State imposes an absolute prohibition, without examining whether or not the national authorities could do otherwise. As has been said above, an absolute restriction or impossibility for the applicant to have access to evidence that concerned him may deprive him of his defence completely.

90. In view of the above, I would argue that the rule of law was not respected by the national authorities in the present case. In my humble view, they overstepped the margin of appreciation afforded them by Article 6 § 1 of the Convention. Accordingly, in my view there has been a violation of that provision.

91. Having expressed my view on the issue, I will now turn to some relevant comments made in the judgment which, in my humble view, support my opinion rather than the line of reasoning followed in the judgment.

92. In paragraph 153 of the judgment it is said that: “It is true that, on this point, the Czech law could have made provision, to the extent compatible with maintaining the confidentiality and proper conduct of investigations regarding an individual, for him to be informed, at the very

least summarily, in the proceedings, of the substance of the accusations against him.” It goes on to say: “In the present case the applicant would thus have been able to mount a clear-sighted and focused defence and the courts dealing with the case would not have had to compensate for the lacunas of the defence”. Similarly, in paragraph 160, towards the end of the judgment, it is stated: “Nonetheless, it would have been desirable – to the extent compatible with the preservation of confidentiality and effectiveness of the investigations concerning the applicant – for the national authorities, or at least the Supreme Administrative Court, to have explained, if only summarily, the extent of the review they had carried out and the accusations against the applicant. In that connection the Court notes with satisfaction the positive new developments in the Supreme Administrative Court’s case-law ...”.

93. It is clear from those two paragraphs that the judgment acknowledges that it would have been possible, without endangering the investigations, for the authorities to have informed the applicant in summary form of the accusations against him. That could have been done, as stated in the judgment, either by a statutory provision (see paragraph 153) or by the Supreme Administrative Court in its decision (see paragraph 160). My comment on this is that the Czech constitutional provisions have always required that section 133(3) of Law no. 412/2005 be interpreted in conformity with Article 6 § 1 of the Convention, and that it was possible in the present case for the domestic courts to proceed with such a compatible interpretation. This would be in line with *Dağtekin and Others*, cited above, and the new practice of the Supreme Administrative Court, which is noted with satisfaction by the Grand Chamber in the present case as a positive new development.

94. When dealing with the fairness test under Article 6 § 1 of the Convention, my honourable colleagues in the majority rightly acknowledge that there was something lacking on the part of the Government. However, they did not describe it as “arbitrariness”. They did not even describe it directly, but only indirectly saying “it would have been desirable” for the applicant to be informed “if only summarily” (see paragraph 160 of the judgment). Put more directly, in the negative, this would mean that what was lacking was legally “undesirable”.

95. But in my view the national authorities’ failure to inform the applicant even summarily of the accusations against him can only be described as arbitrary and unjust. With due respect, in my humble opinion, in examining whether there has been a fair hearing under Article 6 § 1 of the Convention there is no room for distinctions similar to those made between *de lege lata* and *de lege ferenda* legislation, referring to what is or what is not desirable for future legislation. The notion of fairness and the mechanism of the balancing test under the Convention provision are concerned only about what is just and logical and exclude what is unjust and

arbitrary, and they do not have to be concerned with what is desirable or not. In the present case, however, what has been described by the majority as “would have been desirable” was in fact what was not done by the national court, in breach of the right of applicant to a fair trial, and was therefore both arbitrary and unjust.

**(g) The principle of democracy**

96. I submit that the principle of democracy was not respected in the present case.

97. Democracy requires effective guarantees of human rights and the Preamble to the Convention rightly acknowledges that fundamental freedoms are best maintained by an effective political democracy. Though not dealing with the right under Article 6 § 1 of the Convention, but with the right to vote, Gerhard van der Schyff (“The Concept of Democracy as an Element of the European Convention”, *Comparative and International Law Journal of Southern Africa*, vol. 38, no. 3 (November 2005), 355, at 362), appropriately said that “[t]he value in democracy lies in participation ...” The same applies to all rights, however, including of course Article 6 on the basis of which participation in the judicial proceedings is extremely important; otherwise the principles of equality of arms and adversarial proceedings would have no meaning.

98. Where express restrictions are provided for, as in paragraph 2 of Articles 8 to 11 of the Convention, these, as stipulated, must be necessary in a democratic society and pursue a legitimate aim specifically provided for in the said provision. So, restrictions which are in no way meant to be absolute are imposed with respect for democratic values and only when necessary in a democratic society, and certainly not when the exception is implied and the provision in question, as in the case of Article 6 § 1 of the Convention, does not contain even one express restriction on fair trial. So, with due respect, it would not be a sound or reasonable interpretation to apply an implied exception to the right under Article 6 § 1 of the Convention and for that exception not to be deemed necessary in a democratic society in terms of the proper participation of the applicant in the judicial proceedings.

**(h) Correlation between the present case and criminal proceedings against the applicant**

99. In paragraph 157 of the judgment, under the section dealing with the principles applied to the instant case, the Grand Chamber notes that “in March 2011 the applicant was prosecuted for organised crime, aiding and abetting abuse of public power ...” and “finds it understandable that where such suspicions exist the authorities consider it necessary to take rapid action without waiting for the outcome of the criminal investigation, while preventing the disclosure, at an early stage, of suspicions affecting the persons in questions which would run the risk of hindering the criminal

investigation.” The judgment also refers to the subsequent criminal proceedings against the applicant in the facts section, and more specifically under the section on the circumstances of the case (see paragraph 22). This *ex post facto* argument was raised emphatically by the Government in paragraphs 13-15, 95 and 124 of their written observations and in their address at the oral hearing, but it was answered by the applicant in his oral address in saying, *inter alia*, that the “criminal proceeding absolutely does not relate to this proceeding before the Court”. He also said that “the criminal proceeding has not yet been finalised and it can be anticipated that it will be reviewed by the European Court of Human Rights.”

100. I respectfully disagree with making any connection at all between the guarantees of Article 6 § 1 of the Convention in the national proceedings in the present case and other subsequent national proceedings which may or may not have taken place and addressing these in the judgment under the section dealing with the principles applied to the instant case. Had the subsequent criminal proceedings against the applicant ended with an acquittal, would that have made a difference as regards any correlation with the present case? I do not believe so, since that would also not be relevant. By the same logic, a person cannot be arrested and detained indefinitely without being informed of the reasons for his arrest and detention and without being tried and able to have a proper defence. Hence, whatever the outcome of a subsequent set of proceedings, one should avoid the *post ergo propter hoc* fallacy, meaning “after this therefore because of this”.

### **3. Appearance of independence and impartiality of the domestic courts**

101. In his request for referral to the Grand Chamber the applicant called into question the independence and impartiality of the national courts which had tried his case. He cited the following two reasons:

(a) “As a fundamental argument, the Court has used work of ‘independent and impartial courts’ through activities of which the applicant’s right to a fair hearing should have been sufficiently guaranteed” (see paragraph 13 of the request for referral).

(b) “... It is not clear how decision-making of the courts in the relevant situation could be objective and independent when they have to follow only an intelligence report which they, moreover, may not review, in the situation when they do not have the statement of a participant to a proceeding to whom this report relates and the file from which this report arises” (see paragraph 19 of the request for referral).

102. In paragraph 152 of the judgment it is said that the applicant does not dispute the necessary independence and impartiality of the domestic courts and reference is made only to the second reason given above – which is considered to relate rather to the capacity of the judges to assess the facts,



failing, however, to address and discuss the first reason (which was repeated in paragraph 39 of the applicant's written observations as well as in his oral address at the hearing).

103. As to the second reason given above, it is stated in the judgment (see paragraph 152) that the applicant "rather limits himself to calling into question the capacity of the judges to adequately assess the facts of the case, given that they did not have full access to the relevant documents ..." Whilst I agree that to a certain extent this refers to the capacity of the judges to adequately assess the facts, I disagree that it does not also objectively affect their independence and impartiality. In the judgment (see paragraph 64) reference is made to a subsequent judgment of the Supreme Administrative Court which sheds light on the proceedings before that court. It was acknowledged that the administrative courts "could not examine the authenticity and veracity of the documents and information provided by the intelligence service and that this was an exception to the ordinary powers of the administrative courts in assessing the evidence produced before them ... absolute certainty and truth were not required and it was sufficient that the conclusions drawn from the facts set out in the information thus provided constituted the most plausible explanation" (*ibid.*). In view of the above, and since the present case has been shrouded in mystery, no objective observer, including the Court and the applicant, could be in a position to know exactly what materials the national courts had before them and what exactly they took into account in reaching their judgment. But it is clear that the domestic courts did not see or examine the informants or people connected with the classified information. The domestic courts assumed a role which was incompatible with their objective independence and impartiality. So, all the above factors affected the appearance of their independence and impartiality.

104. Now, regarding the first reason given above, which is stronger than the second one, I agree with the applicant and let me put it as simply as this: every time a court deprives a litigant of his or her right to equality of arms and to adversarial proceedings and stands in for the litigant's own lawyer in terms of procedural measures, any appearance of independence and impartiality is weakened, if not erased. Such an appearance of independence and impartiality is diminished, or even swept away, each time the court fails to allow an applicant to properly handle his case by himself or herself.

105. Those two reasons taken together can make the appearance of independence and impartiality of the domestic courts even weaker. Not only did the domestic courts deprive the applicant of his right to adversarial proceedings and equality of arms, they also examined and assessed the evidence before them while themselves applying standards that failed to guarantee adversarial proceedings.

106. Both the subjective and the objective impartiality of a court are important for its legitimacy and are vital for upholding the rule of law and

the separation of powers which are characteristics of and conditions for a democratic society (on the subjective and objective test of impartiality, see Harris, O' Boyle & Warbrick, *Law of the European Convention on Human Rights*, 3<sup>rd</sup> edition, Oxford, 2014, pp. 450-51).

107. In *Incal v. Turkey*, 9 June 1998, § 71, *Reports of Judgments and Decisions* 1998-IV, the Court said: “In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public ...” (see also *Fey v. Austria*, 24 February 1993, § 30, Series A no. 255-A). The appearance of impartiality of the court is not only important for the national courts but also for this Court. Article II of the Resolution on Judicial Ethics, adopted by the Plenary Court on 23 June 2008, and entitled “Impartiality”, provides: “Judges shall exercise their function impartially and ensure the appearance of impartiality...”

108. A judge who has knowledge of evidence adduced by one party without the other party having knowledge of it and who bases his or her decision on that evidence and yet does not refer to it in the judgment cannot be considered to be objectively independent. A judge must refrain from any conflict between the parties and not give the impression that he or she is associated in any way with the subject matter or with one of the parties, even if his or her intention is to protect that party.

109. By leaning towards one or other side in these circumstances, any appearance of independence and impartiality of the domestic courts can be diminished or swept away: The domestic courts leaned (a) towards the side of the executive – since (i) they based their judgment on evidence provided by the Government which was detrimental to the applicant, without ever revealing that evidence to him, and (ii) deprived him of his right to equality of arms and to adversarial proceedings – and (b) towards the side of the applicant since they assumed the role of his advocate, although they left him in the dark as regards the circumstances of the case.

110. If a judge is to appear independent and impartial, he or she cannot assume the role of the advocate of one party while leaving that party in the dark about the accusations against him or her and rendering the lawyer's handling of the case meaningless, as happened in the present case. A judge who does this risks violating the right to an adversarial trial and the principle of equality of arms as well as the right to be tried by an independent and impartial court.

111. Should a judge lean towards the side of the executive, this may result in a possible violation of the principle of the separation of powers.

112. The separation of powers presupposes that each branch – judicial, executive and legislative – is independent within its sphere, provided of course that it acts lawfully. Georghios M. Pikis had this, among other things, to say about the separation of powers (see G. M. Pikis, “Human Rights and the Doctrine of Separation of Powers – Two Dominant Aspects

of the Cyprus Constitution”, *Mishpat Umimshal*, Vol. 5, 2000, Appendix, p. III):

“The concept of separation of powers is deeply rooted in the history of law. Aristotle was the first to identify the need for the separation of powers of the State as a necessary element of a balanced government. Symmetry in this, as in other areas, was perceived by Aristotle as essential for a healthy rule. In such a system of government it is important that the judiciary should be identified with the neutrality of the law.”

#### **4. The right to have a reasoned judgment**

113. A fair trial ends with the delivery of the court’s judgment, and so it cannot be fair if at the end of the entire proceedings the judgment given is not reasoned. Although the applicant had recourse to three domestic courts, none gave a reasoned judgment on the substance of his request.

114. The justification for the requirement of a reasoned judgment is of course the litigant’s interest in knowing that his or her arguments have been properly examined, but it is also the interest of the public in a democratic society claiming public scrutiny of the administration of justice (see *Tatishvili v. Russia*, no. 1509/02, § 58, ECHR 2007-I, and *Hirvisaari v. Finland*, no. 49684/99, § 30, 27 September 2001). In the present case neither the applicant’s nor the public’s interest in the administration of justice can have been satisfied, even though it was on the altar of the public or general interest that the individual interest was sacrificed.

#### **5. Conclusion**

115. If security considerations were able to provide a blanket or an absolute restriction on the right to a fair trial, as has been decided in the present case, I am afraid to say that such a finding would be catastrophic for human rights. This could be the opening of Pandora’s box and the protection of every human right – not only the right to fair trial – would be bankrupt. To borrow an expression used by then Justice Benjamin N. Cardozo (though in another context), such an approach “would carry us to lengths that have never yet been dreamed of” (concurring in *Hamilton v. Regents of the University of California*, 293 United States Reports 245 (1934) – see also A. L. Sainer (ed.), *Law is Justice – Notable Opinions of Mr. Justice Cardozo* New York 1999, repr. New Jersey, 2014, 360, at p. 362).

116. Furthermore, such an approach could lead to giving ample room to the authorities to restrict human rights or even to encouraging them to abuse human rights, hiding behind the pretext of security and confidentiality. This problem could be intensified if, as in the present case, apart from not providing procedural justice, the authorities are given a wide margin of

appreciation and unfettered power to decide not to disclose any of the confidential information in their possession, which may affect the very essence of a person's right.

117. As the Court has decided that the national authorities, on the pretext of security considerations, can fully conceal information affecting a person's right to a fair trial, I, with due respect, fear that this will in future discourage people whose right to a fair trial has been adversely affected in similar ways to the present case from bringing an application before the Court. This would probably affect the effectiveness, credibility and prestige of the Court as well as the very existence of the Council of Europe's system for the protection of human rights, the rule of law, democratic stability and peace in the world.

118. I cannot but absolutely agree with what the applicant says in paragraph 14 of his request for referral, namely that "to assess arguments of both parties with complete knowledge of relevant evidence, written or other, definitely strengthens public trust". The words of Professor Tom R. Tyler (cited above, p. 26) are pertinent here:

"Finally, the courts want to retain and even enhance public trust and confidence in the courts, judges and the law. Such public trust is the key to maintaining the legitimacy of the legal system".

119. In the light of all the above considerations, I am of the view that there has been a violation of Article 6 § 1 of the Convention.

### **III. LEGAL COSTS AND JUST SATISFACTION**

120. Whilst I believe that the applicant, as a victim of a violation of Article 6 § 1 of the Convention, would be entitled to just satisfaction and to have his legal costs paid by the respondent Government, I will not go into any further discussion of those issues, since, being in the minority, these would be purely theoretical.

## DISSENTING OPINION OF JUDGE SAJÓ

1. Equality of arms is a fundamental principle underpinning the right to a fair hearing under Article 6 § 1. In accordance with that principle, each party to civil proceedings must be given a reasonable opportunity to present their case under conditions that do not place them at a substantial disadvantage vis-à-vis their opponent.

2. This case involves a decision by the Czech national security authorities to strip the applicant of his security clearance – and, as a result, of a high-level government post which he could no longer hold. As the information on which the allegations against him were based was deemed classified, the applicant was denied access to it, and thereby deprived of knowledge of the charges against him. Furthermore, he was denied knowledge of the reasons for the decision to revoke his clearance.

3. It is clear that, in violation of the principle of equality of arms, the applicant was denied the possibility of fully defending his case before the courts as he personally lacked full knowledge (or any knowledge for that matter) of the case against him. It is true that under the Convention member States enjoy a certain margin of appreciation to restrict access to classified information, including in administrative or judicial proceedings, where such restrictions are deemed necessary to ensure “national security” or “national safety”. However, in such cases, where a party’s effective right to equality of arms is interfered with, judicial safeguards of the right to a fair hearing are all the more important.

4. Under Czech law, where, for reasons of national security, administrative decisions affecting a party’s individual rights are taken on the basis of classified information, domestic courts must perform an independent review of *all adverse evidence* against the accused. Unfortunately, that safeguard did not function effectively in this instance, as the domestic reviewing courts never received the information which served as the basis for the decision against the applicant<sup>1</sup>. Nor did the courts make clear what degree of review they had performed in the applicant’s case, as required by Czech law and by the Convention.

5. The majority purport to find no violation of Article 6 § 1 on the grounds that the “very essence” of the applicant’s right to a fair hearing was not impaired. I cannot accept this conclusion, for several reasons. First, the “very essence” test has never before been applied to the principle of equality of arms, but only where an applicant’s access to court was interfered with.

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<sup>1</sup> Furthermore, the Government added that “the file kept by the intelligence service or documents from it were not directly sent to the Authority and subsequently to the courts, but rather the relevant contents of the file were summarised in the report” (see paragraph 137 of the judgment). The distinctly Kafkaesque flavour of these events is not an artefact of Prague-like stereotyping; in fact, the Czech superior courts themselves later developed and articulated a robust standard of review, a standard unmet in the present case.

Second, that test was conceived as a *limitation* upon State action, *not* as *carte blanche* for State intrusions that stop short of impairing the “very essence” of rights (see paragraph 14, below). Third, it is illogical to claim, in application of that test, that a limitation that affects the “very essence” of a right can be counterbalanced by subsequent judicial procedures. In the absence of a clear statement of the review performed by the domestic courts of the applicant’s case, such counterbalancing procedures were in any case non-existent.

6. Lastly, this case is not only about the right to a fair trial under Article 6; also at stake is the individual right to access data related to one’s private life within the meaning of Article 8, and the duty of this Court to ensure that effective safeguards exist against potential abuse of the State’s national-security prerogatives.

7. Today, the majority tell us that even where an individual is denied all knowledge of the charges against him, and where domestic courts fail to question the conclusions of national security authorities, the requirements of adversarial proceedings and the principle of equality of arms have not been breached. I cannot accept this conclusion. Whatever the reasons for the withdrawal of the applicant’s security clearance in the present case, his Article 6 § 1 right to equality of arms was violated. To my regret, the Court today fails to recognise a clear violation of the principle of equality of arms, and I therefore respectfully dissent from the Court’s opinion.

## **I. The principle of equality of arms**

8. Under the Convention, equality of arms, or a fair balance, must be preserved between the parties in adversarial civil proceedings (see *Feldbrugge v. the Netherlands*, 29 May 1986, § 44, Series A no. 99). Each party must be afforded a reasonable opportunity to present their case – including their evidence – under conditions that do not place them at a substantial disadvantage vis-à-vis their opponent (see *Kress v. France* [GC], no. 39594/98, § 72, ECHR 2001-VI, and *Dombo Beheer B.V. v. the Netherlands*, 27 October 1993, § 33, Series A no. 274). It entails additional rights, such as the right to present arguments and adduce evidence in support of these, and the right to challenge hostile evidence (see *Ruiz-Mateos v. Spain*, 23 June 1993, § 63, Series A no. 262).

9. According to our current case-law, the admissibility of evidence is primarily a matter for regulation by national law and, as a general rule, it is for the national courts to assess the evidence before them (see *Elsholz v. Germany* [GC], no. 25735/94, § 66, ECHR 2000-VIII). The task of this Court under the Convention is, instead, to ascertain whether the domestic proceedings as a whole were fair, including in assessing whether a “fair balance” was maintained between the opposing parties

(see *Ankerl v. Switzerland*, 23 October 1996, § 38, *Reports of Judgments and Decisions* 1996-V)<sup>2</sup>.

10. I acknowledge that under very particular circumstances, such as where an applicant has been deemed untrustworthy to be given full access to confidential information, or where there are compelling (for example national security) reasons to protect sources, the right to a fair hearing may not be deemed to be compromised by a restriction on direct access to evidence. Nevertheless, in cases where, for whatever reason, it is impossible to ensure the effective right to equality of arms, the domestic courts must intervene and carefully scrutinise all relevant information and its sources in the applicant's stead, conducting a proper examination of the submissions, arguments and evidence adduced by the parties (see *Van de Hurk v. the Netherlands*, 19 April 1994, § 59, Series A no. 288). It is the task of this Court to ascertain whether the decision-making procedure applied in each case complied, as far as possible, with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused (see *Edwards and Lewis v. the United Kingdom* [GC], nos. 39647/98 and 40461/98, § 46, ECHR 2004-X).

11. The Court's assessment begins by stating that the rights deriving from the adversarial principle and the principle of equality of arms are not absolute (see paragraphs 147-48 of the judgment). However, the cases that the majority have cited do not support that conclusion. These cases state only that the *right of access to court* under Article 6 § 1 is not absolute. Where restrictions on access exist, the Court must be satisfied that these do not restrict or reduce the access left to the individual in such a way or to such an extent that the *very essence of the right is impaired*. A limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, among other authorities, *Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom*, 10 July 1998, § 72, *Reports* 1998-IV, and *Baka v. Hungary* [GC], no. 20261/12, § 120, ECHR 2016). This misapplication of the case-law on access to court is what leads the majority to wrongfully apply the "very essence" test in an equality-of-arms context (see paragraph 14, below).

12. The majority go on to cite two of this Court's cases in support of their conclusion that the applicant's "entitlement to disclosure of relevant evidence" (I think that "right" – not "entitlement" – would be a more appropriate term) can be limited without violating the principle of equality of arms (see *Fitt v. the United Kingdom* [GC], no. 29777/96, § 47, *in fine*, ECHR 2000-II, and *Schatschaschwili v. Germany* [GC], no. 9154/10,

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<sup>2</sup> This reflects a *de facto* departure from the case-law, one of those instances where, instead of giving at least some reasons, the Court tries to claim "business as usual"..

§§ 92 and 152, ECHR 2015; and see paragraph 148 of the judgment). However, these cases are inapposite because neither contemplates an applicant being completely denied access to evidence: in both *Fitt* and *Schatschaschwili* the applicants were prevented from cross-examining witnesses, but they were provided with fully transcribed copies of witness testimony. This is not so in the present case, where none of the incriminating evidence, not even a summary of the *substance* of the charges, was communicated to the applicant. As a result, the level of interference with the applicant’s right to a fair hearing is all the more serious, and goes far beyond that contemplated in *Fitt* and *Schatschaschwili*.

13. What is worse, the majority wrong-headedly claim to derive from these two cases a “very essence” test with regard to the standards of Article 6 § 1 of the Convention and the principle of equality of arms. They conclude that “the fair balance between the parties was not affected to such an extent as to impair the very essence of the applicant’s right to a fair trial” (see paragraph 161 of the judgment, and also paragraphs 146 and 148). However, this Court has never before applied the “very essence” test in equality-of-arms cases,<sup>3</sup> and neither *Fitt* nor *Schatschaschwili* makes mention of the concept (whether explicitly or implicitly). Indeed, these cases support only the uncontroversial proposition that limitations upon access to evidence must be counterbalanced, *not* that the finding of a violation of Article 6 requires an impairment of the “very essence” of such rights.

14. What is more, the “very essence” test was always intended to be a firewall against impermissible State interference with fair-trial rights, not as an excuse for condoning such interference where this stops short of impairing the “very essence” of those rights. While a State has a certain margin of appreciation when limiting Article 6 § 1 rights for certain legitimate ends, “[n]onetheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired” (see *R.P. and Others v. the United Kingdom*, no. 38245/08, § 64, 9 October 2012). It is an odd grammatical and logical misconstruction to interpret this assertion to mean that just because a measure does not affect the very essence of the right, it is automatically acceptable.

15. Furthermore, even if the “very essence” test were an appropriate standard here, and even if this test were not misapplied, it would be illogical to claim, as the Court does, that “[such limitation] must be sufficiently counterbalanced by the procedures followed by the judicial authorities”

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<sup>3</sup> Under this Court’s case-law, the “very essence” test has been applied almost exclusively in the context of cases relating to the right of access to a court (see *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, § 129, ECHR 2016; *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, § 99, ECHR 2016 (extracts); and *R.P. and Others v. the United Kingdom*, no. 38245/08, § 65, 9 October 2012).



(see paragraph 148 of the judgment). I fail to see how a limitation that affects the very essence of a right can be counterbalanced by other procedures followed by the judicial authorities. Our case-law does not, and should not, support such an assertion.

16. It is of no small importance that *Fitt* itself relies on an improbable reading of two other cases decided by this Court to circumscribe the Court’s duties of review. As recently as 1997, this Court held that only such measures restricting the rights of one party as were *strictly necessary* were permissible under Article 6 § 1 (see *Van Mechelen and Others v. the Netherlands*, 23 April 1997, § 58, *Reports* 1997-III). *Fitt*, citing *Van Mechelen*, substituted it with a much less demanding test, holding that interferences with the equality of arms were acceptable provided that these were “sufficiently counterbalanced” (§ 45). It should be clear then that *Fitt* wrongly permitted this Court to cast off the burden of assessing whether there were other less restrictive means of preserving the secrecy of classified information (for instance, via use of the institution of the “special advocate”, as is found in several countries<sup>4</sup>). *Fitt* also stated that when analysing limitations imposed on the principle of equality of arms, the Court should refrain from deciding whether or not such non-disclosure was strictly necessary since, as a general rule, it is for the national courts to perform such an assessment (*ibid.*, § 46). Yet, in fact, the case from which this rule supposedly derives says only that the Court should not “substitute its own assessment of the facts for that of the domestic courts”, *not* that the Court should not perform a strict necessity test (see *Edwards v. the United Kingdom*, 16 December 1992, § 34, Series A no. 247-B).

17. Lastly, even if the Court, without admitting it, has changed its applicable standard to a “very essence *only*” test, I fail to see how the present case does not amount to a violation of Article 6 § 1 under this new test.<sup>5</sup> As has been said before, it is impossible to assess from the domestic judgments whether or not the domestic courts actually exercised these powers of oversight and to what extent; in view of the Government’s admission that the domestic courts only had access to a summary of the investigation’s conclusions (see paragraph 22, below), such uncertainty cannot be deemed satisfactory.

18. On another note, the majority also look to the case-law of the CJEU with a view to demonstrating that the domestic courts met the necessary standards of fairness applicable where an interested party is denied access to pertinent information on account of the necessary confidentiality of such

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<sup>4</sup> Other jurisdictions around the world are progressively implementing this institution as an independent party able to challenge evidence that is withheld from the accused for reasons of national security; see, for example, *Tinnelly*, cited above, in the UK, and Canada, to name but two.

<sup>5</sup> Changing a test of the Court implicitly and without good reason is open to strong criticism.

information (see paragraphs 71-72). But these cases do not provide support for such a conclusion either. In *ZZ v. the United Kingdom*, the CJEU held that the adversarial principle required that “the person concerned [be] informed, in any event, of *the essence of the grounds on which a decision ... is based*”. Not even “the necessary protection of State security” could have “the effect of denying the person concerned his right to be heard and, therefore, of rendering his right of redress ineffective” (Case C-300/11, § 65, emphasis added). Likewise, in *Kadi*, the CJEU reiterated that while “the right to have access to the file [is] subject to legitimate interests in maintaining confidentiality [of classified information] ... the person concerned *must be able to ascertain the reasons upon which the decision taken in relation to him is based ...* to make it possible for him to defend his rights in the best possible conditions” (*European Commission and Others v. Yassin Abdullah Kadi*, joined cases C-584/10 P, C-593/10 P and C-595/10, §§ 99-100, emphasis added). These standards – the effective enjoyment of the right to be heard and to defend one’s rights in the best possible conditions – were certainly not met in the present instance, as the applicant was never even informed of the “essence of the grounds” upon which his security clearance was revoked.

19. These precedents strongly suggest that an applicant’s right to be informed *at least of the essence of the charges against him* is central to the principle of equality of arms and cannot be dispensed with, even where the Court subsequently examines the pertinent evidence. In other words, where an applicant is kept completely in the dark as to the charges against him, no court review could suffice to remedy such an impairment of the applicant’s right to equality of arms.

20. Nevertheless, even under a lower threshold that tolerates a denial of access to evidence and information constituting the essence of the charges against him (such as that provided for in Czech law), it is necessary for the domestic courts to fully review the evidence substantiating the opposing party’s allegations and provide a reasoned judgment following that review. Neither of these requirements was met in the present case.

21. According to the requirements clearly provided for under recent (and welcome) developments in Czech case-law: 1) where specific factual reasons are not given to an interested party who has been deemed untrustworthy for security reasons, the National Security Authority must submit to a reviewing court all the information, and the sources of such information, underlying the administrative decision; and 2) the reviewing court must re-examine, of its own motion, the relevance of all the information submitted to it (decision of the Supreme Administrative Court of 9 April 2009 (no. 7 As 5/2008), cited at paragraph 63 of the judgment). Furthermore, where an applicant is unable to make informed submissions on the relevance of information deemed confidential by the National Security Agency, the domestic case-law provides that the reviewing court has to step

into the applicant's shoes and determine the relevance of classified information from every standpoint that it considers important for deciding the dispute (decision of the Supreme Administrative Court of 25 November 2011 (no. 7 As 31/2011), cited at paragraph 64 of the judgment).

22. Yet in the present case the Municipal Court reviewed only a *summary* of the information gathered by the intelligence services, which did not include the file with the full investigation and evidence against the applicant. Indeed, the Government have admitted that document no. 77, upon which the charges against the applicant were based, contains not the full file of the investigative agency, but only a summary with its conclusions (Remarks by the Respondent Government, Grand Chamber Hearing, 19 October 2016). The level of review performed by the Municipal Court thus failed to meet the procedural requirements required under Czech law and there was nothing to “counterbalance” the essential violation of the right.

23. It is clear, then, that even under the lowest standards of the principle of equality of arms there has been a violation of Article 6 § 1 in this case.

## II. The right to a reasoned judgment

24. The majority claim that it would have been “*desirable*” for the authorities or the domestic courts to have explained the extent of the review carried out and the accusations against the applicant (see paragraph 160 of the judgment). This is incorrect. As a general matter, such an explanation was in fact *necessary*.

25. This is so, first, as part of the right to a reasoned decision, which is well established in our case-law. This Court has understood the proper administration of justice to require that judgments of courts and tribunals should adequately state the reasons on which they are based (see *Ibrahimov and Others v. Azerbaijan*, nos. 69234/11 and 2 others, § 103, 11 February 2016, and *García Ruiz v. Spain* [GC], no. 30544/96, § 26, ECHR 1999-I).

26. Even more pertinently, such a review was essential as the *sole* procedural safeguard available under Czech law to the applicant (see paragraph 21, above), who was otherwise denied the possibility to respond to the charges against him.

27. In past cases involving applicants who were denied full equality of arms in judicial proceedings, this Court has laid down a clear standard, requiring courts to perform a proper review of the evidence on which such decisions were based (see *Van de Hurk*, cited above, § 59). In *Tinnelly* (cited above, § 73), in which an applicant's security clearance had been

revoked by a decision of the Secretary of State<sup>6</sup>, the Court found a violation of Article 6 § 1, observing as follows:

...

“at no stage of the proceedings was there any independent scrutiny by the fact-finding bodies set up under [the law] ... The primary fact-finding body ... was [not] able to determine whether there existed a basis in fact for refusing Tinnelly security clearance... [In fact,] any substantive review of the grounds motivating the issue of the certificate [withdrawing security clearance] would have been impaired in any event on account of the fact that [the reviewing court] did not have sight of all the materials on which the Secretary of State had based his decision.”

The Court’s concern, as is clear, was the absence of full judicial review of the factual basis on which the Secretary of State’s decision rested. This case not only overrules *Tinnelly*, without good reason or at least justification, but does so without even considering that the decision in *Tinnelly* is being overruled. The Court simply disregards *Tinnelly* and the cases that follow it (cited in paragraph 147 of the judgment). In the present case, of course, the procedural guarantees afforded the applicant were even more circumscribed than in *Tinnelly* – for instance, the relevant authorities were not even heard by the judge!

28. The Court explained that it was “naturally mindful of the security considerations at stake in the instant case” (see *Tinnelly*, cited above, § 76). Yet it explicitly rejected the claim that national security grounds could justify displacing a full and independent judicial review of an administrative decision:

“The Court would observe that ... a complaint can properly be submitted for an independent judicial determination even if national security considerations are present and constitute a highly material aspect of the case. The right guaranteed to an applicant under Article 6 § 1 of the Convention to submit a dispute to a court or tribunal in order to have a determination of questions of both fact and law cannot be displaced by the *ipse dixit* of the executive.” (ibid., § 77)<sup>7</sup>

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<sup>6</sup> In *Tinnelly*, the issue was framed as a right of access to court under Article 6 § 1 as the core facts pertained to the unreviewability of certain decisions. Given the factual similarity to the present case, the principles concerning the absence of full judicial review are of equal applicability.

<sup>7</sup> It is ironic that the majority cite *Tinnelly*, a case factually identical to the present one, as the source for the finding that in cases “in which precedence is given to superior national interests when denying a party fully adversarial proceedings ... the rights deriving from [the equality of arms and the adversarial principle] are not absolute” (see paragraph 147 of the judgment). *Tinnelly* involved a refusal to grant the applicant, a contracting firm based in Northern Ireland, a government contract for the demolition of a factory, and a subsequent decision by the Secretary of State to bar court review of this decision, based on the alleged threats posed by the applicant to security. A violation of Article 6 § 1 was found as the result of the domestic courts’ failure to examine the underlying factual basis for the decision, and because the court lacked access to all relevant documents underlying the decision not to award the contract (see *Tinnelly*, cited above, §§ 77-78).

29. Similarly, in a case involving lustration proceedings where the applicant had not been permitted to confront the evidence against him the Court found a violation of Article 6 § 1 on account of the domestic courts' failure to provide the applicant with a reasoned judgment explaining the level of review performed in his case (see *Karajanov v. "the Former Yugoslav Republic of Macedonia"*, no. 2229/15, 6 April 2017). The Court said: "it [cannot] be readily inferred [from the reviewing courts' reasoning] to what extent the courts substantively examined either the actual records about the applicant allegedly held by the security bodies or, importantly, the evidence adduced by the applicant himself" (§ 57). In those circumstances, the Court went on to say: "Article 6 of the Convention require[s] the domestic courts to provide a more substantial statement of their reasons" (§ 57).

30. Lastly, according to the case-law cited in today's judgment, "whether the domestic courts provided detailed reasoning as to why they considered that evidence to be reliable" was a relevant factor in assessing the fairness of a trial (see, for example, *Schatschaschwili*, cited above, § 126 and references).

31. In the light of these precedents, the majority's conclusion that "there is nothing to suggest" that the administrative decision "was carried out arbitrarily, wrongfully, or for a purpose other than the legitimate interest indicated" (see paragraph 155 of the judgment) is unwarranted. Where an applicant's right of access to evidence is restricted – or, as in the present case, entirely denied (see paragraph 12, above) – it falls to this Court to assess whether that restriction was properly counterbalanced by a full and independent review by the domestic courts. Unfortunately, the domestic courts left behind no clear written record to suggest that they had performed such a review. As a result, for this Court to show such unhesitating confidence in the grounded and reasonable nature of the national security authorities' decision is a clear abdication of our duty of review.

### **III. Relevance of Article 8 to the present case**

32. This case is not only about the right to a fair trial under Article 6; at stake here is also the right of an applicant to access data related to his private life within the meaning of Article 8 under its procedural limb (see *Roche v. the United Kingdom* [GC], no. 32555/96, ECHR 2005-X, and *Rotaru v. Romania* [GC], no. 28341/95, ECHR 2000-V). Where a State possesses, and refuses on grounds of security risks, to divulge such information to an individual, the Court must satisfy itself that there exist adequate and effective safeguards against abuse, since a system of secret surveillance designed to protect national security entails the risk of undermining or even destroying democracy on the ground of defending it (see *Rotaru*, cited above, § 59).

33. Unlike in *Leander*, in which the Swedish Government were able to provide a list of some twelve procedural safeguards against the misuse of classified information relating to an individual (see *Leander v. Sweden*, 26 March 1987, §§ 62-67, Series A no. 116), here, the sole applicable procedural safeguard – judicial review – was performed in such a manner as to fail to meet even the domestic standards (see paragraph 14, above). This omission is all the more serious as it deprived the applicant of the possibility of effectively presenting his case regarding employment, which this Court has repeatedly held directly affects the Article 8 rights of the persons concerned (see *Rotaru*, cited above, § 46; *Leander*, cited above, § 48; *Rainys and Gasparavičius v. Lithuania*, nos. 70665/01 and 74345/01, § 35, 7 April 2005; *Turek v. Slovakia*, no. 57986/00, § 110, ECHR 2006-II (extracts); *Sidabras and Others v. Lithuania*, nos. 50421/08 and 56213/08, § 49, 23 June 2015; and *Karajanov*, cited above).

34. Under the guise of finding that the right to a fair hearing is satisfied, the Court effectively undermines all the vital case-law developed in the above-cited cases, thus depriving the individual of procedural protection – the only practical protection – against the towering power of the secret services. All this is done as if no such judgments and principles had ever been recognised and cherished for many years and without giving reasons for such disregard!

#### IV. Conclusion

35. Where individuals accused of civil or criminal offences may be kept completely unaware of the basis of the charges against them, and where national security authorities may make decisions without proper reasons and justification before the domestic courts, citizens remain unprotected from arbitrary State abuse. The applicant was deprived of elementary access to the grounds of the administrative decision to revoke his security clearance and left with no possibility of challenging the allegations against him in court. Further, the domestic courts were unable or unwilling to determine whether that administrative decision lacked arbitrariness. In this case, I cannot but find a clear violation of the principle of equality of arms, and therefore a violation of the right to a fair trial.

36. The Court is missing an opportunity today to clarify its own case-law on the matter. If anything, today's judgment does exactly the opposite. Furthermore, while praising new developments in the domestic case-law that appear to raise the standards according to which an impairment of the principle of equality of arms can be counterbalanced, the majority are impermissibly lenient towards the domestic courts, instead of reinforcing those domestic developments which should serve as the basis of European

standards<sup>8</sup> (already confirmed in the case-law of the Court). In cases like this, in which the reviewing courts (intentionally or not) leave behind unclear judgments, individuals are left absolutely in the dark when faced with State authorities making decisions that impact on their lives. Such a state of affairs, as it stands, cannot be condoned by this Court. The applicant's right to equality of arms and access to a court have been violated. I therefore respectfully dissent.

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<sup>8</sup> It is often argued that the Court safeguards *minimum* European standards. The Convention is about "further realisation of human rights." The common understanding is not minimal understanding, and human rights cannot be minimal but must be universal with the same meaning for each Convention right in each and every member State.