Intrekking veiligheidsmachtiging ambtenaar op grond van niet-geopenbaarde veiligheidsrapporten. Toepasselijkheid art. 6 lid 1 EVRM. Geschil over burgerlijke rechten en verplichtingen. Voldoende procedurele waarborgen. Fair balance niet verstoord. Geen schending art. 6 lid 1 EVRM

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Art. 6 EVRM

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Grote Kamer. Intrekking veiligheidsmachtiging ambtenaar op grond van niet-geopenbaarde veiligheidsrapporten. Toepasselijkheid art. 6 lid 1 EVRM. Geschil over burgerlijke rechten en verplichtingen. Voldoende procedurele waarborgen. Fair balance niet verstoord. Geen schending art. 6 lid 1 EVRM.

Klager, Václav Regner, treedt in 2004 in dienst bij het Tsjechische Ministerie van Defensie en ontvangt een veiligheidsmachtiging. In 2006 wordt deze ingetrokken omdat de klager een veiligheidsrisico vormt. De geheime informatie waarop dit besluit berust wordt niet gedeeld omdat dit wettelijk niet is toegestaan.

Na uitdiensttreding gaat klager in beroep tegen het intrekkingsbesluit van zijn machtiging door de Nationale Veiligheidsautoriteit. Tijdens de procedure kunnen klager en zijn advocaat het dossier inzien, met uitzondering van de geheime stukken. Deze worden wel aan de rechtbank ter beschikking gesteld.

De klachten van Regner tegen deze gang van zaken falen in (hoger) beroep omdat bekendmaking van de geheime informatie onder de wet verboden is en hiermee de werkwijze en bronnen van de veiligheidsdiensten zouden worden blootgegeven alsook beïnvloeding van mogelijke getuigen zou worden geriskeerd. In 2011 wordt de klager vervolgd en veroordeeld voor beïnvloeding van een toewijzingsprocedure van publieke contracten.

Regner dient een klacht in Straatsburg in waarbij hij zich beroept op art. 6 lid 1 EVRM. Daartoe stelt hij beslissend bewijsmateriaal, dat als geheim geclassificeerd is, niet ingezien te kunnen hebben in de bestuursrechtelijke procedure tegen het intrekkingsbesluit.

Het Hof stelt eerst vast dat art. 6 lid 1 EVRM van toepassing is. Weliswaar betrof de procedure de intrekking van een veiligheidsmachtiging en daarmee niet direct een geschil over een naar nationaal recht voldoende vaststaand burgerlijk recht. Het beschikken over een dergelijke machtiging was echter noodzakelijk om toegang te houden tot geheime informatie. Als gevolg daarvan maakte de intrekking ervan het voor klager onmogelijk om zijn werkzaamheden volledig voort te zetten en had deze negatieve invloed op zijn mogelijkheden om een nieuwe ambtelijke functie te verkrijgen. Daarmee was er een voldoende direct verband tussen de procedure en zijn mogelijkheden om zijn werkzaamheden voort te zetten.

Het Hof overweegt vervolgens dat de nationale rechterlijke instanties die de zaak behandeld hadden de noodzakelijke onafhankelijkheid en onpartijdigheid bezaten. De rechters hadden ongelimiteerde toegang tot alle geheime documenten die ten grondslag lagen aan het intrekkingsbesluit en waren bevoegd een gedetailleerd onderzoek uit te voeren naar de redenen waarom de documenten niet openbaar gemaakt werden. De nationale rechters mochten deze motivering beoordelen en vervolgens besluiten vertrouwelijke documenten alsnog openbaar te maken. Ook waren zij bevoegd het intrekkingsbesluit inhoudelijk te beoordelen en wanneer noodzakelijk te vernietigen.

Verder concludeert het Hof dat de nationale rechters bevoegd waren kennis te nemen van alle feiten die de zaak omvat en in hun beoordeling niet beperkt waren tot de rechtsgronden aangevoerd door de klager. Wel had klager een meer heldere en gerichte verdediging kunnen voeren wanneer een wettelijke bepaling bestond die het mogelijk maakt ten minste een summiere inhoudelijke beschrijving te ontvangen van de beschuldigingen. Dan hadden de nationale rechters die de zaak behandelden de lacunes in de verdediging niet hoeven compenseren.

Het Hof overweegt dat de nationale rechters de beschikbare onderzoeksbevoegdheden op de juiste manier hebben uitgeoefend. Zowel met betrekking tot de noodzaak geheime documenten vertrouwelijk te behandelen, als tot de gegeven verantwoording voor het intrekkingsbesluit. Zij hebben daarbij inzicht verschaft in hun overwegingen in het licht van de omstandigheden van de zaak van Regner.

De hoogste nationale bestuursrechter overwoog dat het openbaren van de gevoelige informatie de werkwijze en bronnen van de veiligheidsdiensten zou blootgeven en beïnvloeding van mogelijke getuigen riskeerde. Het was juridisch niet mogelijk aan te geven waar het veiligheidsrisico uit voortvloeide, noch waarop deze conclusie gebaseerd was. De beslissing van de Veiligheidsautoriteit daaromtrent was namelijk geheel gebaseerd op vertrouwelijke informatie. Om die reden bestaat volgens de Grote Kamer geen aanleiding aan te nemen dat de documenten arbitrair of ten behoeve van een illegitiem doel vertrouwelijk waren gemaakt.

Omtrent de verantwoording voor het intrekkingsbesluit, concludeerde de hoogste nationale be-

stuursrechter dat ontegenzeggelijk duidelijk was uit de vertrouwelijke documenten dat de klager niet meer aan de wettelijke voorwaarden voldeed voor het beschikken over geheime informatie. Het handelen van Regner had zijn geloofwaardigheid en vermogen om geheimen te bewaren aangetast. Daarnaast bevatten de stukken waarop het intrekkingsbesluit zich baseerde 'specific, comprehensive and detailed information' omtrent het handelen en de levensstijl van Regner. Nu Regner na zijn ontslag vervolgd werd voor een aantal misdrijven, is volgens de Grote Kamer begrijpelijk dat nationale autoriteiten bij het bestaan van deze vermoedens eerder onverwijld actie moesten ondernemen zonder de uitkomst van de strafprocedure af te wachten. Het niet openbaren van welke personen de procedure betrof was volgens het Hof evenzeer begrijpelijk, het tegendeel zou het strafrechtelijk onderzoek kunnen schaden.

Dat de documenten die ten grondslag lagen aan het intrekkingsbesluit in de laagste beveiligingscategorie vielen, doet volgens het Hof niet af aan de rechtmatigheid van de keuze van de Tsjechische regering om de inhoud van de rapporten niet aan klager te openbaren. De nationale wettelijke grondslag ziet op alle vertrouwelijke documenten, zonder onderscheid te maken tussen de verschillende gradaties van vertrouwelijkheid. Toepassing van deze regels door nationale rechters lijkt volgens het Hof niet arbitrair of kennelijk onredelijk.

De hele procedure overziend concludeert de Grote Kamer dat de beperkingen op de beginselen van contradictoire procedures en 'equality of arms' voldoende gecompenseerd zijn. De fair balance tussen partijen is niet zodanig beïnvloed dat de kern van het recht op een eerlijk proces van de klager is aangetast. Het Hof is met tien stemmen tegen zeven van oordeel dat geen schending heeft plaatsgevonden van het recht op een eerlijk proces, zoals gegarandeerd door art. 6 lid 1 EVRM.

Regner,
tegen
Tsjechië.

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/Finland* [GC], 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/Sweden*, 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/the Netherlands* (dec.), 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/Russia* (dec.), 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/the Czech Republic*, 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/Croatia* [GC], 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/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/the Netherlands*, 28 September 1995, § 49, Series A 327-A; *Roche/the United Kingdom* [GC], 32555/96, § 120, ECHR 2005-X; *Boulois/Luxembourg* [GC], 37575/04, § 91, ECHR 2012; *Al-Dulimi and Montana Management Inc./Switzerland* [GC], 5809/08, § 97, ECHR 2016, and further references cited in the judgment; *Baka/Hungary* [GC], 20261/12, § 101, ECHR 2016; and *Lupeni Greek Catholic Parish and Others/Romania* [GC], 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/the United Kingdom*, 21 September 1994, § 65, Series A 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/France* (dec.), 42401/98, 24 October 2000, and *Ellès and Others/Switzerland*, 12573/06, § 16, 16 December 2010; and, conversely, *Boulois,* cited above, § 99, and *Miessen v. Belgium*, 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/Sweden*, 27 October 1987, § 34, Series A 125-A; *Obermeier/Austria*, 28 June 1990, § 69, Series A 179; and *Mats Jacobsson/Sweden*, 28 June 1990, § 32, Series A 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/Sweden* (dec.), 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/the United Kingdom* [GC], 35763/97, § 48, ECHR 2001-XI, and *Cudak/Lithuania* [GC], 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/the Netherlands*, 26 June 1986, § 35, Series A 101, and, *mutatis mutandis, Kök/Turkey*, 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/Croatia*, 58222/09, §§ 54–58, 26 July 2011), career or promotion (see *Dzhidzheva-Trendafilova* (dec.), 12628/09, § 50, 9 October 2012), transfer (see *Ohneberg/Austria*, 10781/08, § 24, 18 September 2012) and termination of service (see *Olujić/Croatia*, 22330/05, §§ 33–34, 5 February 2009, and *Nazsiz/Turkey* (dec.) 22412/05, 26 May 2009). More explicitly, the Court held in *Bayer/Germany* (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/Latvia*, 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/Lithuania*, 35601/04, § 40, 6 July 2010, and *Užukauskas/Lithuania*, 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/Bulgaria*, 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/Bulgaria*, 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/Austria*, 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 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/Estonia (1)*, 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 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 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 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 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 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 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/the Netherlands*, 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 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/Latvia [GC], 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/the United Kingdom*, 10 July 1998, § 72, *Reports of Judgments and Decisions* 1998-IV; *Prince Hans-Adam II of Liechtenstein/Germany* [GC], 42527/98, § 44, ECHR 2001-VIII; and *Devenney/the United Kingdom*, 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/the United Kingdom* [GC], 29777/96, § 45 with other references, ECHR 2000-II, and *Schatschaschwili/Germany* [GC], 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 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 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.

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.

Noot

1. Met deze uitspraak toont de Grote Kamer van het Hof zowel haar meer progressieve als haar meer conservatieve gezicht. Als het gaat om de toepasselijkheid van art. 6 lid 1 EVRM onder de civiele poot is het Hof ruimhartig. Veel terughoudender is het Hof waar het gaat om de te stellen procedurele eisen in een procedure over een besluit dat is gebaseerd op geheime stukken. Op beide punten wordt hierna ingegaan. Geëindigd wordt met een kort uitstapje naar de rechtsbescherming in Nederland in dit soort zaken.

2. Eerst de toepasselijkheid van art. 6 lid 1 EVRM onder de civiele poot. Dat het Hof die zou aannemen was niet zeker. Immers daarvoor moet het gaan om een geschil over burgerlijke rechten en verplichtingen die naar nationaal recht voldoende vaststaan. Het is de vraag of de procedure over de onderhavige intrekking van een veiligheidsmachtiging als zodanig kwalificeert. Duidelijk is dat de machtiging op zichzelf niet een burgerlijk recht betreft. De vraag is of er een voldoende direct verband bestaat tussen de intrekking daarvan en de mogelijkheden voor klager om zijn werkzaamheden voort te zetten en/of het recht om deze werkzaamheden voort te zetten voldoende vaststaat. Ondanks een *dissent* van twee rechters stapt de meerderheid over deze vragen heen en neemt aan dat de intrekking van de machtiging het voor klager onmogelijk maakte om zijn werkzaamheden in overheidsdienst volledig voort te zetten en dat deze negatieve invloed had op zijn mogelijkheden om een nieuwe ambtelijke functie te verkrijgen. Daarmee was er volgens de meerderheid een voldoende direct verband tussen de procedure en zijn mogelijkheden om zijn werkzaamheden voort te zetten en dus was art. 6 lid 1 EVRM van toepassing. Ondanks de ruime meerderheid is dit toch een belangrijke stap. In het verleden was het Hof immers strenger als het op het aannemen van deze toepasselijkheid aankwam. Hier zou mogelijk een rol kunnen spelen dat het HvJ EU op basis van art. 47 EU Grondrechtenhandvest kan werken met een meer algemeen recht op toegang tot de rechter en een eerlijk proces (zonder de beperking van de 'vaststelling van burgerlijke rechten of verplichtingen'; vgl. bijv. de ruimere benadering die het Luxemburgse Hof kiest in de zaak *Berlioz* (HvJ EU 16 mei 2017, C-482/15, *AB* 2017/256, m.nt. Neve), terzake van de toegang tot de rechter voor betrokkenen in zaken betreffende transnationale uitwisseling van belastinggegevens, dan zijn Straatsburgse collega in EHRM 16 juni 2015, *Othymia/Nederland*, 75292/10; zie nader L. Neve, *Review of European Administrative Law 2017*, p. 95-119). Hoe dit ook zij, het is een goede zaak dat het Hof het toepassingsbereik van art. 6 EVRM ruim — en steeds ruimer — uitlegt. Het is immers niet (goed) te rechtvaardigen wanneer in deze zaak de eisen van een eerlijk proces niet hadden gegolden en de naleving ervan niet kon worden gecontroleerd door het Hof. Het is te hopen dat het Hof deze soepele benadering nog verder uitbreidt bijvoorbeeld naar het terrein van het asielrecht en belastingrecht, gebieden die nu nog uitgezonderd zijn van de toepasselijkheid van art. 6 lid 1 EVRM onder de civiele poot.

3. Veel meer omstreden binnen het Hof is de conclusie dat in casu voldaan is aan de eisen van een eerlijk proces en in het bijzonder de *equality of arms*. Maar liefst zeven van de tien rechters zijn het daarmee niet eens. Grootste kritiekpunt van de minderheid is dat de meerderheid ermee akkoord gaat dat klager niet op de hoogte hoeft te worden gebracht van de redenen van de intrekking. Gevolg daarvan is dat betrokkene zich niet (adequaat) kan verdedigen en in feite moet vechten tegen spoken, aldus de minderheid. Dit terwijl er vanuit veiligheidsoogpunt en bronnenbescherming geen rechtvaardiging bestaat daarvoor, omdat het zakelijk weergeven van de redenen de bronnen niet hoeft te onthullen en als betrokkene inderdaad echt een veiligheidsrisico zou vormen hij net zo zeer wordt gewaarschuwd door een kale intrekking van een machtiging als door een intrekking met een zakelijke onderbouwing daarvan. Dat is een juiste benadering. Bovendien pleit de praktijk van het HvJ EU ook voor een dergelijke benadering. Deze rechter eist ook dat betrokkene kennis moet kunnen nemen van de kern en hoofdlijnen van de beschuldiging jegens hem (HvJ EU 4 juni 2013, *ZZ/Secretary of State*, *AB* 2013/374, m.nt. Reneman).

Een alternatief of aanvulling daarop zou kunnen zijn de invoering van de figuur van de *special advocate* die anders dan zijn cliënt wel van de onderliggende geheime stukken kennis zou kunnen nemen en aldus daarop de verdediging kan baseren. De benadering die de meerderheid van het Hof kiest, legt — ondanks alle waarborgen die worden genoemd — op de keper beschouwd de verdediging van betrokkene in handen van de rechter en als deze verzaakt of onvoldoende kritisch is, hebben de geheime diensten in feite vrij spel. Dat is een resultaat waarop slechts kritiek past.

4. In Nederland kunnen deels vergelijkbare problemen spelen als het gaat om de rechtsbescherming tegen weigeringen, dan wel intrekkingen van verklaringen van geen bezwaar voor het vervullen van bepaalde veiligheidsfuncties. De betrokken (beoogde) functionarissen kunnen zich uit de aard der zaak lastig verdedigen tegen dergelijke weigeringen, c.q. intrekkingen die gebaseerd zijn op geheime AIVD-informatie. Vaak tasten zij in het duister over de gronden van de afwijzing, nu de betrokken minister vanwege de staatsveiligheid de motivering van het besluit deels of geheel achterwege kan laten (zie Schilder, Loof & Sparrius, 'Vechten tegen spoken in de mist? Over veiligheidsonderzoeken voor vertrouwensfuncties en rechtsbescherming', *NJB* 2013/240). In de rechtspraak lijken hier wel de scherpste kantjes van te worden afgeslepen. Zo heeft de Afdeling bestuursrechtspraak van de Raad van State in een zaak aangegeven dat de minister zich niet in redelijkheid op het standpunt heeft kunnen stellen dat vanwege de aard van de gegevens in het geheel geen motivering kon worden gegeven voor de weigering van een verklaring van geen bezwaar (ABRvS 29 augustus 2012, ECLI:NL:RVS:2012:BX5966; zie nader Schreuder-Vlasblom, *Rechtsbescherming en bestuurlijke voorprocedure*, Deventer 2017, p. 843-858). Dat lijkt ons een juiste benadering en wat ons betreft zou Straatsburg deze koers (die dus in lijn is met de eerder genoemde Luxemburgse jurisprudentie) ook moeten volgen. De Afdeling heeft eerder overigens al terecht uitgemaakt dat uiteindelijk de rechter moet kunnen beoordelen of er op grond van art. 8:29 Awb op gerechtvaardigde wijze een beroep wordt gedaan op beperkte kennisneming van onderliggende stukken (ABRvS 30 november 2011, *AB* 2012/142, m.nt. Barkhuysen en Van Emmerik).

5. Deze uitspraak is ook gepubliceerd in *EHRC* 2017/219, m.nt. Hagens.

T. Barkhuysen en M.L. van Emmerik

AB 2018/53

AFDELING BESTUURSRECHTSPRAAK VAN DE RAAD VAN STATE
10 januari 2018, nr. 201704543/1/R6
(Mrs. W.D.M. van Diepenbeek, J.E.M. Polak, J.A.W. Scholten-Hinlopen)
m.nt. J. Gundelach*

Art. 3.5, 3.8 lid 1 Wnb; art. 2.2aa aanhef en onder b en art. 6.10a Bor

ECLI:NL:RVS:2018:12

Flora- en fauna-activiteit haakt niet aan, als Wnb-ontheffingsaanvraag voor omgevingsvergunningaanvraag of -verlening is ingediend, uitleg essentiële foerageergebieden en essentiële vliegroutes, voortzetting jurisprudentie Flora- en faunawet onder Wnb.

Naar het oordeel van de Afdeling geven de op 18 november 2016 aan de RVO gezonden stukken onvoldoende inzicht in de precieze aard en omvang van de beschikking die wordt gevraagd. Anders dan het college acht de Afdeling de verwijzing naar die stukken dan ook ontoereikend om te kunnen spreken van een aanvraag om een ontheffing als bedoeld in art. 3.8 lid 1 Wnb. De Afdeling wijst in dit verband erop dat niet alleen uit de door VWG en NMF overgelegde mail, maar ook blijkens een opmerking in het namens de Minister van Economische Zaken opgestelde ontwerpbesluit van 1 september 2017 de zogenoemde conceptaanvraag en de aanvullingen daarop niet als definitieve aanvraag in behandeling zijn genomen. Eerst later, kennelijk na 26 mei 2017, is besloten om — gelet op hetgeen kennelijk met toezending van die stukken en de aanvullingen erop was beoogd — deze stukken en de aanvullingen erop alsnog als aanvraag om een ontheffing als bedoeld in art. 3.8 lid 1 Wnb te behandelen. De Afdeling concludeert dan ook dat, anders dan het college meent, niet alleen op de datum waarop de aanvraag voor omgevingsvergunning voor het (doen) vellen van houtopstanden in deelgebied G is gedaan maar ook op de datum waarop op die aanvraag is beslist, geen aanvraag voor een ontheffing als bedoeld in art. 3.8 lid 1 Wnb voorlag. Nu het college ten tijde van het nemen van het besluit dat ziet op deelgebied G evenmin beschikte over een verklaring van geen bedenkingen, moet worden vastgesteld dat dit besluit niet in overeenstemming is met het bepaalde in art. 2.2aa aanhef en onder b Bor en ook niet voldoet aan het bepaalde in art. 6.10a lid 1 Bor en daarom moet worden vernietigd. (...)

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