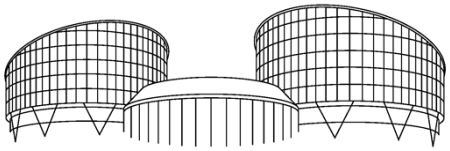

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF TERNOVSKIS v. LATVIA

(Application no. 33637/02)

JUDGMENT

STRASBOURG

29 April 2014

FINAL

29/07/2014

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Ternovskis v. Latvia,

In the case of Ternovskis v. Latvia,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Päivi Hirvelä, *President,*
Ineta Ziemele,
George Nicolaou,
Ledi Bianku,
Vincent A. de Gaetano,
Paul Mahoney,
Faris Vehabović, *judges,*

and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 1 April 2014,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 33637/02) against the Republic of Latvia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Latvian national, Mr Andris Ternovskis ("the applicant"), on 2 September 2002.

2. The applicant was represented by Ms A. Dāce, a lawyer practising in Riga. The Latvian Government ("the Government") were represented by their Agent, Mrs I. Reine, who was subsequently replaced by Mrs K. Līce.

3. The applicant complained that the Riga Regional Court had held a hearing in his absence on 23 January 2002, thereby depriving him of his right to a fair trial. He also alleged that the procedure available under Latvian law for disputing a refusal of security clearance did not offer any guarantees of fairness.

4. On 14 December 2010 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1956 and lives in Dobele. He was employed by the State Border Guard Service as a border guard from 1992.

6. On 20 January 1997 the applicant was promoted to head of the Jelgava section. On 5 October 1998 a certification commission (*atestācijas komisija*) deemed him suitable for his new position.

7. After the Law on State Secrets (see paragraphs 30 to 34 below) came into force on 1 January 1997 and the adoption of Regulation no. 225 of the Cabinet of Ministers, entitled "Regulations for the Protection of State Secrets" (see paragraph 36 below) on 25 June 1997, the applicant was invited to apply for security clearance for work with State secrets. He filled in a questionnaire on 23 September 1997. According to a letter sent to the Government Agent by the Constitution Protection Bureau (*Satversmes aizsardzības birojs*, hereinafter "the SAB"), one of the Latvian intelligence services responsible, *inter alia*, for issuing security clearances, he had been invited to attend a "discussion" (*pārrunas*) on 20 April 1998 in respect of his application. The Government provided a copy of additional written explanations submitted by the applicant the same day. Therein he had explained that he had been a reserve lieutenant in the Soviet Army and a member of the Latvian Communist Party until approximately 1990. He denied having had any links with foreign secret services, and in that regard referred to a prior interview he had apparently had with the Security Police.

8. On 19 January 1999 the head of the Border Guard Service showed the applicant a letter from the SAB, which indicated that he had been refused the first category security clearance. The letter did not contain any motivation of the refusal apart from a reference to section 9(3)(4) of the Law on State Secrets (see paragraph 32 below).

9. The applicant presumed that clearance had been refused because he had been suspected of past collaboration with the State Security Committee of the former USSR (*Комитет государственной безопасности* in Russian, hereinafter – "the KGB"). He accordingly made use of the remedy available under the domestic system to have the question of his alleged collaboration adjudicated in court. As a result, in a judgment of 19 May 1999, the Dobele District Court established that the KGB archives contained a document which indicated that on 30 July 1991 the applicant had been recruited as a KGB "agent" and given a codename. His recruiter had been a KGB operative, V.P. The court, however, went on to note that there was no indication that the applicant had ever submitted any reports in his alleged capacity as a KGB agent. Moreover, the court considered that there was no evidence to suggest that the applicant had been aware that he had been an "informer" of the KGB. Accordingly, the court concluded that the applicant had not knowingly collaborated with the KGB. That judgment was not appealed against and became final on 30 May 1999.

10. However, prior to the completion of the inquiry into the applicant's alleged collaboration with the KGB, and after he had refused to leave his job voluntarily, an order was made by the head of the Border Guard Service on 11 March 1999 to dismiss him from service with effect from 16 March

1999. The reasons given for the termination of his employment were the letter of the SAB and section 39(1)(8) of the Law on Border Guard Service (*Robežsardzes likums*), which provided that border guards were to be retired from service if they were deemed unsuitable for their duties. Another border guard, Major G.K., was appointed to fill the applicant's position.

11. In July 1999 the applicant wrote to the SAB, seeking a review of the decision concerning his clearance. On 8 September 1999 the SAB responded, refusing to change the "findings of the Security Police of the Ministry of the Interior, in accordance with which it is impossible to issue Andris Ternovskis the first category special clearance on the basis of section 9(3)(6) of the Law on State Secrets". Section 9(3)(6) provided that clearance would not be issued to persons suffering from alcoholism, drug addiction, mental illness or who were otherwise deemed unsuitable for work with State secrets (see paragraph 32 below). It was some two years later that the applicant discovered that on 16 December 1999 the director of the SAB had changed the legal basis of the refusal of the clearance from section 9(3)(4) to section 9(3)(6) of the relevant law.

12. The applicant then appealed against the SAB's decision to the Prosecutor General. On 21 December 1999 the latter issued a decision, upholding the refusal to issue him clearance on the basis of section 9(3)(6) while referring to:

> "circumstances that attest to [the applicant's] personal and professional characteristics which give rise to legitimate doubts as to [his] ability to preserve State secrets – [the applicant's] frequent contact with the former ... KGB employee [V.P.], his hiding of information concerning the involvement of officers of the Jelgava section of the State Border Guard Service in illegal activities and needless and dangerous brandishing of a firearm in the presence of other employees of the Border Guard Service while intoxicated."

13. Section 11(5) of the Law on State Secrets provided that the Prosecutor General's decision was final and not amenable to further appeal, either in court or elsewhere.

14. The applicant then attempted to obtain access to the materials in the investigation file on the basis of which he had been refused clearance. On 23 February 2001 he was informed by the SAB that the materials were confidential (in accordance with the regulation no. 226 of the Cabinet of Ministers; see paragraph 35 below) and not accessible to the person subject to the investigation. However, on 14 June 2004 the applicant received permission to access some parts of the file and obtained copies of several documents contained therein. One of the documents contains excerpts from a report by a border guard, officer G.K. (who was promoted to head of the Jelgava section following the applicant's dismissal, see paragraph 10 above) to the deputy director of the SAB containing intimations that the information the applicant had disclosed about his former collaboration with the KGB had been inaccurate. Another report (which did not contain any

indication of its source) indicated that the applicant, while intoxicated, "had behaved aggressively with a service weapon, threatening to either shoot himself or [G.K.]". The third document was a report by G.K. reciting information supposedly provided by third parties concerning the applicant's former collaboration with the KGB and concerning "the covering up of extraordinary incidents of alcohol use and smuggling in the Jelgava section".

15. The applicant complained about his dismissal from service to three levels of courts of general jurisdiction. In a judgment of 19 September 2001 the Riga City Latgale District Court noted the change that had been made to the legal basis on which refusals of clearance had been made; however, it did not find it necessary to analyse that issue, since the judgment of the Dobele District Court had not refuted the fact that the applicant had been an "agent" of the KGB, and that section 9(3)(4) of the Law on State Secrets provided that clearance should not be issued to former "agents" of, *inter alia*, the KGB, irrespective of how active their involvement had been. The applicant had also asked the first-instance court to renew the procedural time-limit for appealing against the refusal to issue him security clearance. The court rejected this request by noting that the applicant had already made use of the procedure for appealing against the refusal.

16. An appeal hearing took place on 23 January 2002 at the Riga Regional Court but the applicant did not attend. Two days prior to the hearing, he had informed the court that he was ill and that a doctor had ordered him to stay in bed (*"gultas režīms"*). The case file contains a copy of a medical certificate, dated 21 January 2002, which states that the applicant had been put on sick leave until 25 January 2002. The certificate is made out on a pre-typed form and contains no specific details of the applicant's medical condition. Under the heading "the reason for a temporary inability to work" the doctor preparing it has ticked "other reasons", as opposed to being infected with tuberculosis, having an occupational disease or having had an accident at the workplace. The court considered that the applicant had not submitted any evidence in support of his claim that his health condition had prevented him from attending the hearing. Neither had he substantiated his claim that he had been ordered to stay in bed.

17. The court considered that his arguments had been fully expressed in his written appeal and on that basis had decided to proceed with the hearing in his absence. The applicant was not fined for failure to attend the hearing without a justified reason. As summarised by the appeal court, the applicant in his appeal had complained, among other things, that he had been dismissed from service even before the appeal procedure against the refusal to issue security clearance had been completed.

18. The applicant was not represented by counsel. A representative of the State Border Guard Service, the respondent in the proceedings, was

present at the hearing and in his oral observations before the court endorsed the validity of the judgment of the first-instance court and disagreed with the applicant's claim and appeal.

19. As to the merits of the appeal, the appellate court in its judgment of 23 January 2002 indicated that the first-instance court had not adequately analysed the arguments of the parties and had exceeded the scope of its competence. It nevertheless decided to dismiss the applicant's claim. It held that the order of 11 March 1999 discharging the applicant from service could not be deemed to be a restriction of his rights, since he had already been aware of the SAB's refusal to issue him security clearance since January of that year. In any event, the court considered that it was impossible to reinstate the applicant to his position, since the position required him to obtain security clearance, which had been refused by a final decision of the Prosecutor General, which was not amenable to appeal. The appeal court also held that there were no legal grounds to renew the time-limit for appealing against the decision to refuse the applicant a security clearance and that in any case the applicant had exhausted the appeal procedure legally available to him.

20. The applicant lodged an appeal on points of law. On 10 April 2002 the Senate of the Supreme Court adopted a judgment dismissing his appeal. It dismissed his complaint concerning the fact that the appellate court had conducted the hearing in his absence. The Senate noted that the appellate court had regarded the applicant's reason for having failed to appear at the hearing as unjustified, but said that it was a question of fact which the Senate, being a level of jurisdiction which deals with alleged violations of procedural and substantive law and not with the re-evaluation of facts, was not competent to review. As regards the merits of the case, the Senate agreed with the conclusions of the appellate court.

21. The applicant then submitted a complaint to the Human Rights Bureau (*Cilvēktiesību birojs*, the predecessor of the Ombudsman). On 10 October 2002 he received a response, in which the Bureau expressed doubts as to the constitutionality and compatibility with the Convention of the process for appealing refusals of security clearance, given that such appeals could only be made to the director of the SAB and to the Prosecutor General.

22. The applicant then lodged a complaint of unconstitutionality with the Constitutional Court, alleging firstly that there had been no opportunity for him to address his complaint concerning a refusal of security clearance to a court, and secondly that he had been denied access to the investigation file on the basis of which the refusal had been made. On 23 April 2003 the Constitutional Court adopted a judgment in which it declared the legal provisions in question constitutional. Two of the seven judges dissented (see paragraphs 27 and 28 below).

23. The majority considered that the right of access to a court guaranteed by the Constitution did not include a right to resolve in a court every issue that might be of importance to an individual. Accordingly it started its analysis by questioning whether the disputed legal norms concerned the applicant's rights or lawful interests. Firstly, it was noted that the freedom to obtain information did not incorporate access to State secrets, since there were legitimate grounds for restricting access to such information. Secondly, refusing the applicant security clearance had restricted his right to employment and equal access to employment in public service. Nevertheless, it concluded that such a restriction had been legitimate, since it had occurred for reasons related to national security.

24. Despite finding that the refusal did not impinge upon the applicant's constitutional rights, the majority of the Constitutional Court proceeded to analyse the question whether the appeal process involving the director of the SAB and the Prosecutor General was sufficient to satisfy the requirement of access to a court. In that regard it was firstly pointed out that the Prosecutor General could not be understood to be a "court" for the purposes of the right of "access to a court". Secondly, the court referred to the Strasbourg Court's judgments in the cases of *Golder v. the United Kingdom* (21 February 1975, § 38, Series A no. 18) and *Fogarty v. the United Kingdom* ([GC], no. 37112/97, § 33, ECHR 2001-XI), in which it was held that the right to access to a court was not absolute and was subject to limitations. The court then went on to analyse whether the impossibility of disputing the validity and legality of a refusal of security clearance before a court pursued a legitimate aim, and whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. It considered that the legitimate aim was the need to protect the confidentiality of materials contained in the investigation file regarding the person in question's suitability for security clearance. As concerns the issue of proportionality, the Constitutional Court took into account the fact that the legislation provided at least one possible method of disputing a refusal of clearance before an independent authority, namely by way of an appeal to the Prosecutor General.

25. With regard to the adequacy of the appeal process, the court noted that the domestic legislation did not contain any details of the decision-making process involved in refusing clearance or of the subsequent appeal procedure. In particular, the observance of the *audiatur et altera pars* principle was not guaranteed. That led the Constitutional Court to conclude that:

> "in a country governed by the rule of law it is possible to provide for a more thought-out mechanism which would permit, in the course of deciding upon whether to issue a special clearance, to take into account, in so far as is possible, both interests of State security and the individual interests of each person under consideration."

To illustrate that point, the court referred to the system in Germany as an example, where security clearance candidates were given an opportunity to make representations concerning facts relevant to the decision and to be represented by a lawyer, save in cases where a personal interview could significantly harm State security. The Constitutional Court then went on to conclude that Latvian legislation did not, in principle, prevent the competent authorities from implementing the *audiatur et altera pars* principle, particularly if the legislation were to be interpreted in the light of the Constitution. It followed that the limitation of the rights of security clearance candidates was proportionate to the legitimate aim of protecting State security.

26. As regards the fact that the applicant had been denied access to the investigation file, the Constitutional Court viewed it as a restriction of the right to respect for private life. Referring to the European Court of Human Rights' judgment in the case of *Leander v. Sweden* (26 March 1987, § 59, Series A no. 116), it noted that interests of national security could justify such an interference with private life and concluded that in the applicant's particular situation such an interference had been justified.

27. Judge Anita Ušacka in her dissenting opinion focused on the fact that the process for appealing a refusal of security clearance to the director of the SAB and the Prosecutor General did not ensure an adequate implementation of the *audiatur et altera pars* principle. She criticised the majority's reliance on the assumption that the applicable legislation would be interpreted broadly and in accordance with the Constitution so as to implement the principle of hearing both parties' arguments because "the practice shows that in transitional legal systems, such as Latvia, the principle of hearing all parties is not implemented unless it is provided for in the law, which is a fact borne out by the present case".

28. Judge Andrejs Lepse in his dissenting opinion pointed out that in certain situations the Prosecutor General could be considered to be a "tribunal". However, taking into account the fact that in the circumstances of the case there existed no procedural rules concerning the review of the validity of a refusal of clearance, and that as a result the competent authorities were taking their decisions arbitrarily, their decisions and actions had to be amenable to appeal in ordinary courts.

29. After gaining partial access to his investigation file (see paragraph 14 above), and acting on the advice of the Human Rights Bureau, the applicant, relying on new information, applied for the proceedings concerning the alleged illegality of his dismissal to be reopened. On 13 October 2004 the Supreme Court dismissed his application, finding that the new information related to the reasons for the refusal of security clearance, the illegality of which had not been the subject matter of the original proceedings. The applicant then missed the time-limit for submitting an ancillary complaint against the Supreme Court's decision. In

a final decision of 12 January 2005 the Senate of the Supreme Court refused to accept the applicant's belated ancillary complaint.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Security clearance legislation

30. The Law on State Secrets came into force on 1 January 1997. At the time the applicant was refused security clearance it provided, in so far as is relevant, as follows.

31. In section 2(1) of the Law, a State secret was defined as information the loss or illegal disclosure of which could cause harm to the security, economic or political interests of the State.

32. The criteria for obtaining access to State secrets were set out in section 9, the first paragraph of which limited access to persons who required it for the fulfilment of their official duties and who had obtained a special permit. Section 9(3) listed the following relevant categories of persons who could not obtain access:

> "[9(3)](4) [any person] who is or has been a staff or non-staff employee of the security service (intelligence or counterintelligence service) of the USSR, Latvian [Soviet Socialist Republic] or a foreign state, or an agent, resident or safe-house keeper thereof;
>
> ...
>
> [9(3)](6) [any person] who is under observation [*atrodas uzskaitē*] of medical institutions due to alcoholism, addiction to toxic or narcotic substances or due to a mental illness or whose personal or professional characteristics give raise to legitimate doubts as to the ability [of that person] to observe the requirements of a regime of secrecy".

33. Section 11(5) provided that an appeal against a decision to refuse security clearance could be made to the director of the SAB. An appeal against the director's decision could then be made to the Prosecutor General, whose decision was final. The Law did not contain any further details concerning the appeal procedure.

34. Lastly, paragraph 2 of the transitional provisions provided that within three months of the Law coming into force (that is, until 1 April 1997) persons already working with State secrets had to obtain security clearance or else would be transferred to positions not involving work with State secrets.

35. On 25 June 1997 the Cabinet of Ministers adopted regulation no. 226, entitled "List of State Secret Objects" (*Valsts noslēpuma objektu saraksts*). The third paragraph of Chapter XIV of the regulation listed "investigation files" among the information which was classified as "top secret", "secret" or "confidential".

36. On the same day the Cabinet of Ministers also adopted regulation no. 225, entitled "Regulations for the Protection of State Secrets" (*Valsts noslēpuma aizsardzības noteikumi*). The regulation provided that the first (top) level security clearance, which was required for persons serving in the Border Guard Service in similar positions to that held by the applicant, was to be issued by the SAB. In order to apply for clearance a person had to submit, among other things, an autobiography and a completed questionnaire. The questionnaire was to be filled in on a standard form, which, along with asking for personal details and biographical data, required disclosure of any prior encounters with foreign security services, medical information relating to alcoholism, addiction to toxic or narcotic substances or mental illness, as well as "any other information that the person wishes to provide about himself". The signature at the end of the questionnaire was preceded by the following pre-typed text:

> "I attest with my signature that I have become aware of the legal acts that govern work with State secrets and that I have been informed that the information I have provided may be verified in accordance with the procedure provided for by the law. I have completed this document knowing that any deliberate (intentional) false statement or misrepresentation of fact constitutes a sufficient basis to deprive me of access to State secrets."

37. On 17 October 2005 the Constitutional Court adopted a judgment (case no. 2005-07-01) in which it found section 11(6) of the Law on State Secrets constitutional. This provision as of 5 December 2002 provided that a decision concerning security clearance for access to classified information of foreign countries, international organisations and their institutions was to be taken by the director of the SAB and was not amenable to further appeal. The Constitutional Court found that the restriction of the right of access to a court was undoubtedly established by law and it also served a legitimate aim. With regard to the latter, the court paid particular attention to the obligations that Latvia had as a NATO member state, namely, the obligation to ensure that NATO classified information was protected in accordance with the minimum standards set down by NATO. In view of this, the Court came to an interim conclusion that:

> "access to State secrets ... is not a right available to every person but is instead a specific right which can be acquired for a limited time and the acquisition of which is related to both the basic duty of the State – guaranteeing national security – and to guaranteeing the security of other NATO member states."

38. The Constitutional Court further emphasised that the State had "exclusive property rights" over State secret information, the corollary of which was a wide margin of appreciation given to the State in deciding how State secrets are protected. The Court proceeded by referring to systems in place in other countries, many of which did not appear to provide for any appeals beyond the highest official of the State security services, while others (such as Bulgaria, the Czech Republic, France, Italy, Portugal and

Spain) do not provide an appeal procedure against decisions concerning security clearance at all.

39. As to the proportionality of the limitation of the right of access to a court, the Constitutional Court considered it pertinent that operational measures (*operatīvās darbības pasākumi*) are used when gathering information about security clearance candidates. The Court's opinion was that disclosing the gathered information to the candidates would unduly prejudice the confidentiality of the agents involved in gathering of the information, and that such a risk greatly outweighed the limitation placed on certain persons to appeal against the decision not to grant them security clearance, which is why it was necessary to put in place "an alternative procedure which would allow the person to protect their rights at the highest possible level".

40. The Constitutional Court found that the procedure provided for in section 11(6) of the Law on State Secrets corresponded to that requirement. It held that considerations of fairness dictated that a person about whom a decision is to be made has a right to be heard or at least to submit his or her observations in writing. In this regard, the Constitutional Court referred to a recently introduced Cabinet regulation, which had in the meantime replaced "Regulations for the Protection of State Secrets" and which provided for an oral interview with security clearance candidates. The Constitutional Court drew a comparison between the Latvian and German systems, noting that in Germany the law on security clearance (*Gesetz über die Voraussetzungen und das Verfahren von Sicherheitsüberprüfungen des Bundes*) provided that the person subject to a background check was to be given an opportunity to make representations concerning facts relevant to the decision. In the opinion of the Constitutional Court, the fact that the recently adopted Cabinet of Ministers regulation provided that a person subject to a background check would be heard before a decision concerning his security clearance was adopted meant that the Latvian system also corresponded to the right to be heard. Therefore section 11(6) of the Law on State Secrets was found to be constitutional.

B. Attendance of hearings in civil proceedings

41. Section 9 of the Civil Procedure Law (as in force at the material time) provided for equality between parties to a civil case and the courts' obligation to ensure that the parties had equal opportunity to set out their position.

42. Section 10 set down the principle of the adversarial nature of proceedings, in accordance with which the parties were to be given an opportunity to submit explanations and evidence, to participate in the examination of witnesses and experts, to participate in hearings and to perform other procedural actions. A corollary of the adversarial principle

was section 15, which provided that proceedings were to be held predominantly in oral form. To ensure the presence of parties and other participants at hearings, section 156 authorised courts to fine persons failing to appear without any reason or for a reason which was not considered to be justified. If the court considered the reason for the absence of a party justified, it was obliged to postpone the hearing (section 209(2)). Section 210(1) gave courts discretionary power to postpone a hearing if a party to a case had failed to attend court for reasons which were unknown.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

43. The applicant complained that on 23 January 2002 the Riga Regional Court had examined his appeal in his absence, thereby depriving him of his right to a fair trial. He further complained that the Latvian procedure for disputing a refusal of security clearance did not correspond to the requirements of the Convention, since persons to whom such clearance had been denied were unable to find out the reasons for the refusal or to dispute the refusal before a "tribunal". He relied on Articles 6 and 13 of the Convention. The applicant's complaints were communicated to the respondent Government under Article 6 § 1 of the Convention, which in so far as relevant reads as follows:

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

44. At the outset, the Court emphasises that what is at stake for the applicant in the present case is not a right to access State secrets, which is, as such, not guaranteed by the Convention, but rather the applicant's rights that were affected as a consequence of a refusal to issue him clearance for such access. The Court notes that the refusal had a decisive impact on the applicant's personal situation – in the absence of the required clearance, he was unable to continue to work in the position in which he had served for seven years, which undeniably had clear pecuniary repercussions for him. The link between the decision not to grant the applicant security clearance and his loss of income was certainly more than tenuous or remote (see *Boulois v. Luxembourg* [GC], no. 37575/04, § 90, ECHR 2012).

45. The Court will examine the applicant's complaints jointly since it considers that they are different aspects of the same issue, namely that of the right to a fair trial. The applicant brought his case to the civil courts and to the Constitutional Court with a view that the dispute concerning his work in the Border Guard Service would be assessed by an independent tribunal.

A. Admissibility

46. The Government argued that the applicant's complaints were incompatible *ratione materiae* with the provisions of the Convention. In particular, they insisted that the dispute examined by the Regional Court had not concerned the applicant's "civil rights", citing the Court's conclusions in the case of *Pellegrin v. France* [GC] (no. 28541/95, § 65, ECHR 1999-VIII).

47. The applicant argued that the limitations to the scope of Article 6 § 1 deriving from the Court's judgment in the *Pellegrin* case were not applicable in his case.

48. The Court notes that the criteria deriving from the Government-cited *Pellegrin* judgment were developed further by the Grand Chamber on 19 April 2007 (*Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, §§ 50-64, ECHR 2007-II). In the *Vilho Eskelinen* case, it was concluded that two conditions must be fulfilled for the respondent State to be able to exclude litigation involving civil servants from the scope of Article 6 § 1 of the Convention. Firstly, the State in its national law must have expressly excluded access to a court for the post or category of staff in question, and secondly, the exclusion must be justified on objective grounds in the State's interest (*ibid*., § 62).

49. The Court will apply the *Vilho Eskelinen* criteria in the present case, as it has done in various other cases lodged with the Court before the adoption of that judgment but decided after that date (see, for example, *Dovguchits v. Russia*, no. 2999/03, § 24, 7 June 2007; *Redka v. Ukraine*, no. 17788/02, § 25, 21 June 2007; *Rizhamadze v. Georgia*, no. 2745/03, § 27, 31 July 2007; *Ştefanescu v. Romania*, no. 9555/03, § 20, 11 October 2007; and *Vanjak v. Croatia*, no. 29889/04, § 32, 14 January 2010). This approach is consistent with the Court's well-established approach to the Convention as a living instrument which must be interpreted in the light of present-day conditions (see, for example, *Marckx v. Belgium*, 13 June 1979, § 41, Series A no. 31, and *Johnston and Others v. Ireland*, 18 December 1986, § 53, Series A no. 112), a principle which reflects the general rule that the interpretation of international treaties requires consideration of the evolution of the relevant legal norms and concepts (see *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 153, ECHR 2008; and *Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, [1971] International Court of Justice Reports 16, pp. 31-32, § 53)

50. It has not been argued in the present case that the Latvian legislature has ever expressly or implicitly excluded access to a court in cases concerning the dismissal from service of border guards. Furthermore, it is evident that the domestic courts did examine the applicant's claim on the

merits (see paragraphs 15-19 above), which attests to the existence of an actionable dispute (see also *Dzidzheva-Trendafilova v. Bulgaria* (dec.), no. 12628/09, §§ 47-50, 9 October 2012). Therefore Article 6 § 1 is applicable in relation to the proceedings in which the applicant sought to challenge the legality of his dismissal from the Border Guard Service. The fact that the domestic courts ultimately dismissed his claim cannot affect this position (see *A.B. v. Slovakia*, no. 41784/98, § 48, 4 March 2003). Neither is this conclusion altered by the principles set down in the Constitutional Court's judgment that was adopted more than a year later (paragraphs 22-28 above; see also *Juričić v. Croatia*, no. 58222/09, § 52, 26 July 2011).

51. In the alternative, the Government argued that the applicant's complaint, in so far as it pertained to the possibility to appeal against a refusal to issue a security clearance, had been submitted out of time within the meaning of Article 35 § 1 of the Convention. The Government claimed that the final domestic decision had been the Prosecutor General's decision of 21 December 1999. The application had not been submitted to the Court until 2 September 2002, thus after the expiry of the six-month time limit. The Government alleged that the applicant's subsequent claim before the courts of general jurisdiction had to be regarded as an attempt to use an extraordinary remedy, which, as a general rule, should not be taken into account when calculating the six-month time limit.

52. The applicant, among other things, referred to the conclusion of the Riga Regional Court that the dispute concerning the termination of his service was closely linked with the issue of his security clearance (see paragraph 19 above). In addition, the applicant referred to the proceedings in the Constitutional Court, the precise object of which had been to challenge the compatibility with the Latvian Constitution and the Convention of the procedure available under Latvian law for disputing a refusal of security clearance.

53. The Court reiterates its conclusion that by pursuing the civil proceedings concerning his dismissal the applicant was attempting to reverse the consequences of the refusal to issue a security clearance. In any case, the Court observes that the Government have failed to explain why the applicant's attempt to challenge the constitutionality of the provisions of domestic legislation at issue in this case was to be disregarded for the purposes of calculating the start date of the six-month period. In several cases brought against Latvia the Government have insisted that the applicants should have challenged the legal provisions invoked in the Constitutional Court. The Court has indeed accepted that this is a remedy for the purposes of the Convention where the applicant calls into question a provision of Latvian legislation or regulations as being contrary, as such, to the Convention, and the right relied on is among those guaranteed by the Latvian Constitution (see, for example, *Grišankova and Grišankovs*

v. Latvia (dec.), no. 36117/02, ECHR 2003-II (extracts), and *Latvijas Jauno Zemnieku Apvienība v. Latvia* (dec.), no. 14610/05, 17 December 2013, §§ 44-53).Therefore the constitutional proceedings in question are not an example of "misconceived applications to bodies or institutions which have no power or competence to offer effective redress" (see *Beiere v. Latvia*, no. 30954/05, § 38, 29 November 2011, with further references) and therefore the decision of the Constitutional Court of 23 April 2003 must be considered as the final decision for the purposes of calculating the six-month time-limit. The Government's objection thus has to be dismissed.

54. The Court further considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. No other ground for declaring it inadmissible has been established. The Court thus declares this complaint admissible.

B. Merits

1. Submissions of the parties

55. The applicant referred to the arguments made in his original application to the Court (for a summary see paragraph 43 above).

56. In addition, the applicant argued that in the absence of control by courts of the legitimacy of a refusal of security clearance, the alternative procedure provided for this purpose had to provide two principal guarantees. Firstly, the person concerned had to have a right to comment on all the issues relevant to his or her case and, secondly, all the pertinent information had to be disclosed to that person in so far as the disclosure did not jeopardise confidential sources or State secrets.

57. According to the applicant, these principles were not observed in his case. While he had indeed been given an opportunity to submit additional information (see paragraph 7 above), that procedure had been meaningless, since no information about allegations made against him had been disclosed and the decision had been taken using rules and procedures that were inaccessible to him. In summary, the opportunity to appeal to the Prosecutor General was merely illusory. The applicant was only able to gain access to part of his investigation file in 2004, long after the proceedings concerning his application for clearance and concerning his request to be reinstated had ended.

58. The Government noted that at the material time the Civil Procedure Law provided for an oral hearing before the appellate court. However, the parties' attendance at appeal hearings was not compulsory, and courts were free to proceed with the examination of cases in the absence of one or both

of the parties, unless the parties had not been adequately informed of the time and the place of the hearing or had given valid reasons for their absence (sections 156 and 209 of the Civil Procedure Law cited at paragraph 42 above). The Government argued that the Court had previously found that similar provisions in Russian law were not, in themselves, incompatible with the fair trial guarantees of Article 6 § 1 (citing *Yakovlev v. Russia*, no. 72701/01, § 20, 15 March 2005).

59. The Government observed that Latvian procedural law gave the courts absolute discretion to decide whether to adjourn a hearing on account of one or both of the parties failing to appear. In this regard, the Government pointed out that it was primarily for the domestic courts to interpret and apply the procedural rules (relying upon *Miholapa v. Latvia*, no. 61655/00, § 24, 31 May 2007). According to the Government, in assessing whether the reasons for a party's absence from a hearing were justified, the courts adopted a "substantive rather than formalistic approach".

60. The Government sought to differentiate the present case from two comparable cases against Latvia where the Court had found a violation of Article 6 § 1 (*Andrejeva v. Latvia* [GC], no. 55707/00, ECHR 2009, and *Miholapa*, cited above), seeking instead to assimilate it to the case of *Gorou v. Greece (no. 4)* (no. 9747/04, 11 January 2007), in which the Court had declared a complaint concerning the applicant's absence from a hearing before an appellate court manifestly ill-founded, emphasising that the applicant in that case had been a civil party in criminal proceedings, whose procedural rights in that capacity were not the same as those of a prosecutor and an accused (ibid., § 26).

61. According to the Government, in the cases of *Andrejeva* and *Miholapa* there was a right for the applicants to participate in the respective hearings from which they had been absent, while in the present case the decision whether to adjourn the hearing from which the applicant was absent had been left to the discretion of the appellate court. It was the Government's view therefore that "there were no objective reasons for the applicant to believe that having received a medical certificate, the appellate court would definitely adjourn the hearing". The second difference was that in *Andrejeva* and *Miholapa* the applicants had been unable to attend hearings because of the negligence of the domestic authorities, while in the present case the applicant had been informed in a timely manner of the appellate court hearing, and had himself failed to invest sufficient effort and diligence in ensuring that his interests would be represented.

62. The Government submitted that the Court had to assess the fairness of the proceedings as a whole, instead of adopting a formalistic approach to a refusal to adjourn proceedings on account of one of the parties being absent. In the Government's opinion, such a refusal did not violate

Article 6 § 1 unless the national authorities had acted in a manifestly arbitrary manner.

63. With regard to the subject-matter of the domestic proceedings the Government emphasised that neither the Convention nor the Latvian Constitution guaranteed the right for an individual to obtain security clearance. In this regard the Government referred to the Constitutional Court's conclusions in cases no. 2002-20-0103 (see paragraphs 22 to 28 above) and 2005-07-01 (see paragraphs 37 to 40 above), in which the Constitutional Court had considered that disputes concerning security clearance could potentially concern a person's constitutional rights but certainly not their civil rights, notwithstanding the possible pecuniary consequences of a refusal of clearance. The Government further relied on the Constitutional Court's conclusion in case no. 2005-07-01 that in the area of protection of national security States enjoyed a wide margin of appreciation.

64. The Government also relied on the Constitutional Court's conclusion in case no. 2002-20-0103 that section 11(5) of the Law on State Secrets did not in principle prevent the national authorities responsible for issuing security clearance from applying the *audiatur et altera pars* principle. Turning to the specific facts of the case, the Government stressed that on 20 April 1998 the applicant had been invited to a discussion concerning his application for security clearance (see paragraph 7 above), during which he had allegedly been given an opportunity to comment on a number of issues of potential relevance to his clearance for work with State secrets. For the Government this was sufficient to conclude that the procedure as a whole had complied with the *audiatur et altera pars* principle.

2. Assessment of the Court

65. The Court reiterates that the right to a fair trial, guaranteed under Article 6 § 1 of the Convention, presumes the observance of the principle of equality of arms, which requires each party to proceedings to be given a reasonable opportunity to present its case under conditions that do not place it at a substantial disadvantage *vis-à-vis* its opponent (see *Krčmář and Others v. the Czech Republic*, no. 35376/97, § 39, 3 March 2000). That principle, or indeed Article 6 § 1 of the Convention more generally, does not guarantee an absolute right to personal presence before a civil court (see *Larin v. Russia*, no. 15034/02, § 35, 20 May 2010). What is decisive is whether both parties have had a substantially comparable opportunity to present their case to the court.

66. Moreover, the Court reiterates that the right to a fair trial comprises, *inter alia*, the right of the parties to the proceedings to present the observations which they regard as pertinent to their case. As the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective, this right can be regarded as effective only if

the applicant is in fact "heard", that is, his observations are properly examined by the courts. Article 6 § 1 of the Convention places the courts under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision (see *Koski v. Finland* (dec.), no. 53329/10, § 31, 19 November 2013, with further references).

67. The Court has previously held that in proceedings under Article 6 relating to the determination of guilt of a criminal defendant, there may be restrictions on the right to a fully adversarial procedure where those are strictly necessary in the light of a strong countervailing public interest, such as national security or the need to keep certain methods of police investigation secret. There will not be a fair trial, however, unless any difficulties caused to the defendant by a limitation on his rights are sufficiently counterbalanced by the procedures followed by the judicial authorities (see, for example, *Fitt v. the United Kingdom* [GC], no. 29777/96, § 45, ECHR 2000-II; *Jasper v. the United Kingdom* [GC], no. 27052/95, §§ 51-53, 16 February 2000; *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 205, ECHR 2009; and *Leas v. Estonia*, no. 59577/08, § 78, 6 March 2012). The Court has also held that a similar approach applies in the context of civil proceedings (see *Kennedy v. the United Kingdom*, no. 26839/05, § 184, 18 May 2010).

68. More generally, the Court has described that what is required from the domestic authorities is to set up a procedure, regardless of the framework used, which would allow an adjudicator or tribunal fully satisfying the Article 6 § 1 requirements of independence and impartiality to take complete cognisance of all relevant evidence, documentary or other, and the merits of the submissions of both sides (see *Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom*, 10 July 1998, § 78, *Reports of Judgments and Decisions* 1998-IV).

69. Turning to the present case, the Court notes that at the hearing of 23 January 2002 the respondent was present and was given an opportunity to make oral submissions to the appellate court. The applicant was absent from the hearing of the appellate court, having informed the court that he could not appear at the hearing on medical grounds. The appellate court regarded the applicant's reasons for not appearing at the hearing not to be justified. The Court is therefore called to examine whether, taking into account what was at stake for the applicant, the proceedings as a whole were rendered unfair (see *A.B. v. Slovakia*, cited above, § 55).

70. The Court notes that the medical certificate which was presented to the Riga Regional Court did not allow that court to establish with sufficient clarity the reasons why the applicant had been temporarily incapable of work. It therefore remains to be determined whether this court, which under the Latvian law (Chapter 30 of the Civil Procedure Law) was the last instance with full jurisdiction to examine all questions of fact and law, had a

duty to ensure that the applicant benefitted from sufficient procedural safeguards in the special circumstances of the present case.

71. It is not for the Court to speculate what arguments the applicant would or would not have put forward at the appeal hearing, had he been present. The Court notes that the respondent was present at the hearing and made oral submissions in a case in which the judges did not have before them crucial elements of written evidence (such as the investigation file concerning the applicant's security clearance or portions thereof). In fact, only the respondent had access to all the relevant documents and evidence.

72. Moreover, the Court cannot overlook the fact that the Prosecutor General's decision-making process with regard to the applicant's security clearance did not comply with the requirements to provide adversarial proceedings and equality of arms and did not incorporate adequate safeguards to protect the applicant's interests (see *Leas v. Estonia*, cited above, § 79). The Court notes in this regard the fact that the first traces of any reasoning for refusing the applicant's application for clearance appear in the final and non-appealable decision of the Prosecutor General (see paragraph 12 above). That, coupled with the fact that at the time the applicant had absolutely no access to the information contained in the investigation file meant that he did not have an opportunity to respond to the evidence against him in any proceedings and especially since the Regional Court decided to proceed with the hearing in the absence of the applicant and thus placed him at a substantial disadvantage with respect to the respondent (see, *mutatis mutandis*, *Užukauskas v. Lithuania*, no. 16965/04, § 50, 6 July 2010).

73. Turning to the Government's argument that the applicant had been summoned to a discussion and had been given an opportunity to submit additional written information on 20 April 1998, the Court is bound to observe that this interview was not conducted by a tribunal, even in the broadest sense of the word. In addition, it appears from the way the applicant's additional submissions were worded that he had not been given an opportunity to comment on allegations that he had links with a former KGB employee, had been involved in the cover-up of illegal activities of border guards, and had brandished a firearm while drunk. From the wording of the Prosecutor General's decision it appears that it was these allegations, and not the applicant's rank in the Soviet Army or his prior membership in the Communist Party that served as the reason why his application for security clearance was refused. It has not been disputed by the Government that the applicant was never asked for any further information, either by the director of the SAB or by the Prosecutor General. Therefore the Court concludes that the applicant did not benefit from a fully adversarial procedure with only such limitations as are strictly necessary in the light of a strong countervailing public interest.

74. Taking these considerations into account, the Court comes to the conclusion that the appeal court's failure to determine the validity of the reasons given for the applicant's absence from the hearing and the subsequent decision to declare the applicant's absence unjustified and to hold the hearing in his absence rendered the proceedings as a whole unfair, in that the applicant was unable to benefit, as much as is possible in the specific context of access to State secrets, from an adversarial procedure.

75. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

76. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

77. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage.

78. The Government argued that the applicant's claims that he had experienced anguish and hardship as a result of the alleged unfairness of the domestic proceedings were not supported by evidence that would prove the existence of a causal link between the violations alleged and the non-pecuniary damage claimed. In any case the Government considered the applicant's claim to be excessive and invited the Court to conclude that the finding of a violation in itself would constitute adequate and sufficient compensation or, alternatively, to award the applicant no more than EUR 2,000, which had been previously awarded by the Court in cases that were, according to the Government, comparable to the present.

79. Taking into account the nature and the extent of the violations found, the Court awards the applicant EUR 5,000 in respect of non-pecuniary damage.

B. Costs and expenses

80. The applicant did not submit any claims in respect of costs and expenses.

C. Default interest

81. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the application admissible;

2. *Holds* by six votes to one that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* by six votes to one
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 29 April 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Päivi Hirvelä
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate partly dissenting opinion of Judge De Gaetano is annexed to this judgment.

P.H.
F.A.

SEPARATE PARTLY DISSENTING OPINION OF JUDGE DE GAETANO

1. I regret that I cannot agree with the finding of a violation of Article 6 § 1 as proposed by the majority, and consequently likewise cannot agree with the third head of the operative part of the judgment (the award of just satisfaction).

2. While there is something that could possibly be said in terms of some provisions of the Convention as regards the law and the administrative procedure for obtaining "security clearance" (see paragraphs 11 to 13 and 21 to 28 of the judgment) and the applicant's dismissal from the Border Guard Service, the majority's decision hinges *on one particular aspect* of the proceedings before the Riga Regional Court, namely that court's dismissal of a request for an adjournment because of the alleged inability of the applicant to appear in court (see paragraphs 16 to 18). This is clear from paragraphs 69 and 70, and then again from paragraph 74, where it is stated that "the appeal court's failure to determine the validity of the reasons given for the applicant's absence from the hearing and the subsequent decision to declare the applicant's absence unjustified and to hold the hearing in his absence rendered the proceedings as a whole unfair, in that the applicant was unable to benefit, as much as is [*recte*: was] possible in the specific context of access to State secrets, from an adversarial procedure".

3. There is a synecdochic element in this line of reasoning. It suggests that, had the Riga Regional Court adjourned the hearing of 23 January 2002, thereby allowing the applicant to be present at some subsequent hearing, then in that case there would have been no violation of Article 6 § 1. However, as is rightly pointed out in paragraph 71, it is highly speculative to suggest that the applicant's presence on 23 January 2002 would have made any difference. In other words, even if one takes into consideration the fact that that court, at the hearing of 23 January 2002, "was the last instance with full jurisdiction to examine all questions of fact and law" (see paragraph 70), the problem did not really lie with the procedural decision not to adjourn; *if* – which I do not believe to be the case – there was a problem of fairness or of access to a court, this lay elsewhere.

4. As pointed out in paragraph 42 of the judgment, the Civil Procedure Law as then in force contained provisions on the non-appearance of parties and on adjournment of proceedings which are similar to those found in many other jurisdictions. If the court considered the reason for the absence of a party justified, then, in accordance with section 209(2), it was *obliged* to postpone the hearing. It was therefore up to the party alleging that he or

she was not able to attend the hearing to prove to the satisfaction of the court that there was a valid reason for staying away – otherwise parties could deliberately delay proceedings on the flimsiest of excuses. Not only did the certificate provided by the applicant fail to give any reasons why he could not attend the hearing on 23 January 2002, but there was also nothing to support the applicant's claim (presumably made in the application for adjournment, to which the certificate was attached) that he had been told "to stay in bed" for a number of days (see paragraph 16). It is true that what was at stake for the applicant in the case before the Riga Regional Court was of considerable importance, but that in itself, if anything, increased the burden upon the applicant to explain properly to the court why he could not attend the hearing – it was a burden that he could have easily discharged by submitting a medical certificate detailing his medical condition(s) instead of the pre-typed form presumably used for obtaining or registering for sick leave from one's place of work. There is nothing in the majority judgment to suggest that this was not procedurally possible.

5. In short, I am unable to find anything wrong with the way in which the Riga Regional Court proceeded in dismissing the applicant's application for an adjournment on 23 January 2002. Moreover, even taking the proceedings as a whole, I cannot detect any procedural unfairness. Before the Riga Regional Court the applicant's arguments "had been fully expressed in his written appeal" (see paragraph 17); that court had re-examined the arguments of both parties (see paragraph 19) and the same had been done by the Senate of the Supreme Court (albeit within the limited competence of this latter court) (see paragraph 20). The applicant, therefore, had been "heard" in the sense that "his observations [had been] properly examined by the courts" (see paragraph 66).