



**No violation of right to fair hearing of senior public official
whose security clearance had been withdrawn
on the basis of confidential information**

The case concerned an administrative decision withdrawing the security clearance which was a prerequisite for Mr Regner to hold a senior post in the Ministry of Defence.

Mr Regner complained that he had not had a fair hearing because he had been unable to have sight of decisive evidence, regarded as classified information, during the proceedings he had brought to challenge the decision withdrawing his security clearance.

In today's **Grand Chamber** judgment¹ in the case of [Regner v. the Czech Republic](#) (application no. 35289/11) the European Court of Human Rights held, by ten votes to seven, that there had been **no violation of Article 6 § 1 (right to a fair hearing)** of the European Convention on Human Rights.

The Court decided to examine the proceedings as a whole and to determine whether the restrictions on the adversarial and equality-of-arms principles, as applicable in the civil proceedings, had been sufficiently counterbalanced by other procedural safeguards.

It found, among other things, that the domestic courts had had the necessary independence and impartiality; had had unlimited access to all the classified documents; had been able to assess the reasons justifying the non-disclosure of the classified documents and order disclosure of those that did not warrant classification; had been able to assess the merits of the decision withdrawing security clearance and to quash, where applicable, an arbitrary decision; that their jurisdiction had encompassed all the facts of the case and had not been limited to the grounds relied on by the applicant; that they had 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 withdrawing the security clearance, giving reasons for their decisions with regard to the specific circumstances of the present case.

Accordingly, 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 considered that the restrictions curtailing Mr Regner's enjoyment of the rights afforded to him in accordance with the principles of adversarial proceedings and equality of arms had been offset in such a manner that the fair balance between the parties had not been affected to such an extent as to impair the very essence of Mr Regner's right to a fair trial.

Principal facts

The applicant, Vaclav Regner, is a Czech national who was born in 1962 and lives in Prague.

In September 2006 the National Security Authority decided to withdraw the security clearance that had been issued to Mr Regner to enable him to carry out his duties as deputy to a Vice-Minister of Defence, on the ground that he posed a national security risk. The decision did not mention the confidential information on which it was based, disclosure of confidential information not being a statutory condition. Consequently, Mr Regner was removed from office on 4 October 2006 and on

1. Grand Chamber judgments are final (Article 44 of the Convention).

All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

20 October 2006 he signed an agreement terminating his contract by mutual consent with effect from 31 January 2007.

In January 2007 Mr Regner sought judicial review in the Prague Municipal Court of the decision withdrawing his security clearance. He and his lawyer were permitted to consult the file, except for the confidential documents which had been sent to the court. In September 2009 the court dismissed Mr Regner's application for judicial review, finding that the Authority not disclosing to the applicant the information on the basis of which the security clearance had been withdrawn had not been illegal, as disclosure of such information was prohibited by law.

In July 2010 the Supreme Administrative Court dismissed an application on points of law lodged by Mr Regner, finding that disclosure of the classified information could have entailed the disclosure of the intelligence service's working methods, the revelation of its information sources or the risk of influencing possible witnesses. The applicant unsuccessfully lodged a complaint with the Constitutional Court, complaining of the unfairness of the proceedings.

In March 2011 the prosecution service charged the applicant and 51 other persons with influencing the award of public contracts at the Ministry of Defence from 2005 to 2007. In March 2014 the České Budějovice Regional Court sentenced Mr Regner to three years' imprisonment. The Prague High Court upheld that judgment, but suspended execution of his prison sentence for a two-year probationary period.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right to a fair hearing) of the Convention, Mr Regner complained that he had been unable to have sight of decisive evidence, regarded as classified information, during the proceedings he had brought to challenge the decision withdrawing his security clearance. The application was lodged with the European Court of Human Rights on 25 May 2011.

In its Chamber judgment of 26 November 2015 the Court held, by a majority, that there had been no violation of Article 6 § 1 of the Convention. On 22 February 2016 the applicant requested that the case be referred to the Grand Chamber under Article 43 of the Convention (referral to the Grand Chamber). On 2 May 2016 the panel of the Grand Chamber accepted that request. A hearing took place on 19 October 2016.

The Government of the Slovak Republic had been given leave to intervene in the written procedure as a third party.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Guido **Raimondi** (Italy), *President*,
 Linos-Alexandre **Sicilianos** (Greece),
 Robert **Spano** (Iceland),
 Mirjana **Lazarova Trajkovska** ("The former Yugoslav Republic of Macedonia"),
 Khanlar **Hajiyev** (Azerbaijan),
 Luis **López Guerra** (Spain),
 András **Sajó** (Hungary),
 Işıl **Karakaş** (Turkey),
 Erik **Møse** (Norway),
 Aleš **Pejchal** (the Czech Republic),
 Krzysztof **Wojtyczek** (Poland),
 Egidijus **Kūris** (Lithuania),
 Mārtiņš **Mits** (Latvia),
 Georges **Ravarani** (Luxembourg),
 Pere **Pastor Vilanova** (Andorra),

Alena Poláčková (Slovakia),
Georgios Serghides (Cyprus),

and also Johan Callewaert, *Deputy Grand Chamber Registrar*.

Decision of the Court

Article 6 (right to a fair hearing)

The Court observed that the proceedings brought by Mr Regner to challenge the withdrawal of his security clearance had been restricted in two ways with regard to the rules of ordinary law guaranteeing a fair trial. Firstly, the classified documents and information had not been available either to him or to his lawyer, and secondly, in so far as the decision withdrawing security clearance had been based on those documents, the grounds underlying the decision had not been disclosed to him.

In determining whether the very essence of Mr Regner's right to a fair hearing had been infringed, the Court decided to have regard to the proceedings considered as a whole and ascertain whether the restrictions on the adversarial and equality-of-arms principles, as applicable in the civil proceedings, had been sufficiently counterbalanced by other procedural safeguards.

Firstly, the Court noted the powers conferred on the domestic courts, which had the necessary independence and impartiality. It found that the courts had unlimited access to all the classified documents on which the Authority based itself in order to justify its decision. They then had power to carry out a detailed examination of the reasons relied on by the Authority for not disclosing the classified documents. They could assess the reasons given for not disclosing classified documents and order disclosure of those that they considered did not warrant that classification. Moreover, they had power to assess the merits of the Authority's decision revoking security clearance and to quash, where applicable, an arbitrary decision of the Authority.

Secondly, the jurisdiction of the courts examining the dispute encompassed all the facts of the case and was not limited to an examination of the grounds relied on by the applicant, who had been heard by the judges and had also been able to make submissions in writing. It was true that, on that 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 Mr Regner 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.

Thirdly, the Court observed that the courts had 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 withdrawing Mr Regner's security clearance, giving reasons for their decisions with regard to the specific circumstances of the present case.

With regard to the need to preserve the confidentiality of the classified documents, the Supreme Administrative Court had considered that their disclosure could have entailed the disclosure of the intelligence service's working methods, the revelation of its information sources or attempts to influence possible witnesses. It had 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 was nothing to suggest that

the classification of the documents in question had been carried out arbitrarily or for a purpose other than the legitimate interest indicated as being pursued.

Regarding the justification of the decision withdrawing the applicant's security clearance, the Supreme Administrative Court had found that it was unequivocally clear from the classified documents that the applicant no longer satisfied the statutory conditions for being entrusted with secrets. It had observed that the risk in his regard concerned his conduct, which affected his credibility and his ability to keep information secret. It had noted, further, that the confidential document emanating from the intelligence service had contained specific, comprehensive and detailed information concerning Mr Regner's conduct and lifestyle, on the basis of which the court had been satisfied in the present case as to its relevance for determining whether he posed a national security risk. In that connection the Court noted that in March 2011 Mr Regner had been 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. It found it understandable that where such suspicions existed the authorities considered 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.

Fourthly, the Court observed that the intelligence service's report, which had served as a basis for the decision withdrawing Mr Regner's security clearance, had been classified in the lowest category of confidentiality, namely, the "restricted" category. However, it considered that that fact had not deprived the Czech authorities of the right not to disclose the contents to Mr Regner. It could be seen from the Supreme Administrative Court's case-law, although it postdated the judgment in the present case, that, contrary to the applicant's submission, Law no. 412/2005, and particularly section 133(3), was applicable to any information classified as confidential and not limited to data of a higher degree of confidentiality. Accordingly, the application of section 133(3) of Law no. 412/2005 by the domestic courts did not appear to be arbitrary or manifestly unreasonable. Nonetheless, it would have been desirable – to the extent compatible with the preservation of confidentiality and effectiveness of the investigations concerning Mr Regner – 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 him. In that connection the Court noted with satisfaction the positive new developments in the Supreme Administrative Court's case-law.

Accordingly, 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 considered that the restrictions curtailing Mr Regner's enjoyment of the rights afforded to him in accordance with the principles of adversarial proceedings and equality of arms had been offset in such a manner that the fair balance between the parties had not been affected to such an extent as to impair the very essence of Mr Regner's right to a fair trial. **Consequently, there had not been a violation of Article 6 § 1 of the Convention.**

Separate opinions

Judge Wojtyczek expressed a concurring opinion. Judges Raimondi, Sicilianos, Spano, Ravarani and Pastor Vilanova expressed a joint partly dissenting opinion. Judges Lazarova Trajkovska and López Guerra expressed a joint partly dissenting opinion. Judge Serghides expressed a partly dissenting opinion. Judge Sajó expressed a dissenting opinion. These opinions are annexed to the judgment.

The judgment is available in English and French.

This press release is a document produced by the Registry. It does not bind the Court. Decisions, judgments and further information about the Court can be found on www.echr.coe.int. To receive the Court's press releases, please subscribe here: www.echr.coe.int/RSS/en or follow us on Twitter [@ECHRpress](https://twitter.com/ECHRpress).

Press contacts

echrpess@echr.coe.int | tel.: +33 3 90 21 42 08

Inci Ertekin (tel: + 33 3 90 21 55 30)

Tracey Turner-Tretz (tel: + 33 3 88 41 35 30)

Nina Salomon (tel: + 33 3 90 21 49 79)

Denis Lambert (tel: + 33 3 90 21 41 09)

The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.