2005/04/26 - PL. ÚS 11/04: JUDICIAL REVIEW OF SECURITY CLEARANCES

HEADNOTES

Although the case of judicial review of security clearances involves an area which permits a certain limitation of fundamental rights, the Constitutional Court points out that this subject matter must be viewed in terms of requiring the constitutional prohibition of discrimination (Art. 1 par. 1 of the Constitution of the Czech Republic, Art. 1 and Art. 3 par. 1 of the Charter), which gives rise to, at a minimum, the right to review whether the conduct and results of a security clearance, which is fully in the hands of the executive power, with broad discretion, were not discriminatory and whether they were not marked by arbitrariness. In addition to the right to a free choice of profession, modified per the foregoing, with some categories of persons subject to clearance, Art. 21 par. 4 of the Charter also undoubtedly applies, which provides that "Citizens shall have access, on an equal basis, to any elective and other public office."

The constitutional order of the CR (Art. 81 and 82 of the Constitution of the Czech Republic) provides that the judicial power is exercised only by independent and impartial courts, that is, independent and impartial judges, who are guided by the fundamental rules of a fair trial (Art. 1 par. 1 of the Constitution, Chapter Five of the Charter). These provisions can be interpreted as institutional guarantees of the substantively understood exercise of the judicial power, and therefore, in terms of the right to a fair trial, it is not necessary for a court under § 36 par. 2 of the Charter to be, in all cases, exclusively a body within the system of general courts, but it must be an independent body whose members are independent and impartial in their decision making. It must also have unconditional access to review all relevant aspects of a matter (factual and legal), while observing the fundamental principles of a fair trial (e.g. the principal that no one may be a judge in his own case or the principle that both sides must be heard), and an executable decision can not be reversed by another act by a state power (the definition of the judiciary in a substantive sense).

Independence and impartiality are ideals which can never be fulfilled absolutely - we can only approach them - which comes from their social nature. Independence means ruling out the possibility of affecting the free formation of the will of judges; impartiality (independence from the parties) is the absence of a leaning by the court toward one of the parties, where the concept party to a proceedings can be understood on a general and specific level. Independence is a category of relationship which is closely tied to the concept of power understood as the opportunity of forcing one's will on others (Weber, M., Autorita, etika a společnost [Authority, Ethics and Society], Mladá Fronta, 1997, p. 49; originally in Wirtschaft und Gesellschaft, Tübingen, JCB Mohr Siebeck 1972, p. 541-544). The long-term legal and political development of liberal democracies was generated by experience with the indicators of independence and impartiality from which one can form objectivized criteria for evaluating whether the elements independence and impartiality have been met, because at the subjective level of the psychological (conscious or unconscious) state of

the decision making entity (it is at this level that the undesirable influencing of free judgment occurs), they can not be captured by legal instruments. At an objective level, impartiality and independence are generally evaluated in terms of the relationship to other components of power (the principle of separation of powers), in terms of the ability of persons (with a potential interest in a particular outcome or course of a dispute) to influence the creation, duration and termination of the office of a member of judicial body (tribunal). Therefore, judges and members of judicial-type bodies must have a sufficiently independent status to rule out the possibility that their decision making activity can be directly or indirectly influenced. The existence of protection against external pressures is evaluated, e.g., in terms of the existence of a potential opportunity to influence a judge's career, or the opportunity to bring about the termination of his office. A guarantee of financial independence is also undoubtedly part of an independent status. Only then does the formal order not to be guided by the orders of others receive material content, and only thus are neutrality and distance from the parties ensured.

In evaluating impartiality and independence one can not completely ignore the appearance aspect of the matter, where the appearance independence and impartiality for third parties is also considered a valid criterion, because this aspect is also important for ensuring confidence in judicial decision making. This criterion too reflects the social nature of judicial decision making, which indicates that, even if realistic grounds for doubts about impartiality and independence does not in fact exist (both subjectively and objectively), one can not overlook the possible existence of a collective belief that such grounds exist.

The general sociological concept known as Thomas's theorem (see, e.g. in Collective of Authors, Velký sociologický slovník [Big Dictionary of Sociology], I., Prague, Karolinum, 1996, p. 171) also applies to the justice system; the theorem says that if a particular situation – here, the non-existence of independence or impartiality – is defined by people as real, then it also has real consequences – there is a lack of general trust that a decision is a fair one by an independent and impartial tribunal. Confidence in the law is among the fundamental extra-legal attributes of a law-based state.

CZECH REPUBLIC

CONSTITUTIONAL COURT

JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

The Plenum of the Constitutional Court, composed of JUDr. Stanislav Balík, JUDr. František

Duchoň, JUDr. Vojen Güttler, JUDr. Pavel Holländer, JUDr. Ivana Janů, JUDr. Dagmar Lastovecká, JUDr. Jiří Nykodým, JUDr. Pavel Rychetský, JUDr. Miloslav Výborný, JUDr. Eliška Wagnerová (judge rapporteur) and JUDr. Michaela Židlická, decided on 26 April 2005 on a petition from the Regional Court in Brno seeking the annulment of § 77 k par. 6 of Act no. 148/1998 Coll., on Protection of Classified Information, in the wording in effect on 30 September 2004, as follows:

The provision § 77k par. 6 of Act no. 148/1998 Coll., on Protection of Classified Information and Amending Certain Acts, as amended by later regulations, is annulled as of the day this judgment is promulgated in the Collection of Laws.

REASONING

I. (Recapitulation of the Petition and its Admissibility)

In the petition, delivered to the Constitutional Court on 19 February 2004, the Regional Court in Brno requested, through the procedure under Art. 95 par. 2 of the Constitution of the Czech Republic, annulment of § 77k par. 6 of Act no. 148/1998 Coll., on Protection of Classified Information, in the wording in effect as of 30 September 2003 (the "APCI"), because, while deciding the matter of a complaint from Ing. P.P. against the Collegium in the department of protection of classified information at the Supreme Public Prosecutor's Office (the "Collegium"), under file no. 36 Ca 9/2003, it concluded that the provision in question is inconsistent with the constitutional order of the Czech Republic. The Regional Court maintained its petition, despite the fact that in the interim, since it interrupted proceedings in order to submit the matter to the Constitutional Court, that part of the Act on the Public Prosecutor's Office which prescribed evaluation of the professional qualification of state prosecutors (part nine of Act no. 283/1993 Coll., in the wording then in effect), was annulled; the existence of that part had been the primary reason for filing the petition to open proceedings under § 64 par. 3 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations (the "Act on the Constitutional Court"). According to the Regional Court, it can not now be claimed that evaluation of a state prosecutor's professional qualification can have an effect on the progress of his career; nevertheless there are other reasons (also stated in the original petition). Moreover, in the present matter the Collegium made its decision under the original legislative provisions.

The Constitutional Court first stated that the petition was filed by an authorized person in accordance with § 64 par. 3 of the Act on the Constitutional Court, and that it is an admissible petition (§ 66 of the Act on the Constitutional Court per eliminationem).

The essence of the Regional Court's petition are its doubts about the Collegium, as an independent, impartial tribunal, capable of conducting a fair trial under Art. 6 par. 1 the

Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention") and Art. 36 par. 2 of the Charter of Fundamental Rights and Freedoms (the "Charter"). The Collegium rules on appeals against decisions of the director of the National Security Office (the "NSO"), of the Minister of the Interior, the Director of the Intelligence Service, or the President of the Police (§ 77a of the APCI), decisions on complaints from persons undergoing security clearances about non-issuance (or termination of validity) of a clearance or certification (§ 75 and § 76 and their par. 1, 2 and 5 of the APCI) on meeting conditions permitting access to classified information of a given classification level. The original legal framework did not allow at all the possibility of review of these decisions by an independent body. Only after intervention by the Constitutional Court was their explicit reservation for court review first annulled (judgment of 12 July 2001, file no. Pl. ÚS 11/2000, published in Collection of Decisions of the Constitutional Court of the Czech Republic – "CDCC" - vol. 23, p. 105, in the Collection of Laws as no. 322/2001, in electronic form on www.judikatura.cz, "judgment Pl. ÚS 11/2000"). Subsequently, the APCI was amended by Acts no. 151/2002 Coll. and no. 310/2002 Coll., which, on one hand, established the right to contest a decision not to issue a clearance through a complaint (§ 73 par. 2 APCI), and, on the other hand, to also contest that decision (together with other decisions cited above) through an appeal to the Collegium (§77a to §77k. of the APCI). Under § 77k par. 6 of the APCI a final decision of the Collegium is not subject to judicial review. These legislative measures created a very unclear situation, particularly as regards the possibility of independent review of a decision not to issue a clearance (§ 75 par. 5 of the APCI), which can probably be contested by a complaint in the administrative judicial system (§ 73 par. 2 of the APCI) and by an appeal to the Collegium (§77a of the cited Act); all decisions of the Collegium (including decision on appeals against other decisions, as described above) are expressly not subject to judicial review (§ 77k par. 6 of the cited Act). Moreover, according to the Regional Court, the situation is complicated by lack of clarity on the issue of whether a complaint can be used to contest a final administrative decision issued on the basis of § 75 par. 1 and 5 of the Act on Protection of Classified Information, because only this individual administrative act, issued in the matter of issuance of a clearance, can be considered a decision – no decision is issued to not issue a clearance.

The Regional Court pointed to the decision of the European Court of Human Rights (the "ECHR") in the matter Incal v. Turkey, where, doubts were expressed about the independence of military judges, regardless of legislative bans on interfering in their authority. There were also doubts concerning their four-year renewable mandate. In conclusion, the Regional Court pointed to the above-mentioned Constitutional Court judgment, which stated the need to permit the implementation of appropriate guarantees for protection by a court (or impartial tribunal), even if, per the nature of the matter and taking into account the relevant position, this involved considerably unusual and differentiated protection.

Proceedings on the petition were interrupted by resolution of the Plenum of the Constitutional Court of 23 March 2004, because the Constitutional Court did not have a sufficient number of judges. The obstacle to reviewing the petition was removed on 16 June 2004, when the President of the Republic appointed the twelfth judge to the

Constitutional Court. On 22 June 2004 the Constitutional Court continued the proceedings, and the judge rapporteur, in accordance with § 42 par. 4 and § 69 par. 1 of the Act on the Constitutional Court, as amended by later regulations, requested statements from both chambers of the Parliament of the Czech Republic and statements from the person whose rights were affected by application of the provision sought to be annulled.

II. (Recapitulation of Statements)
A) The Chamber of Deputies of the Parliament of the Czech Republic, represented by its Chairman PhDr. Lubomír Zaorálek, in its statement of 26 July 2004, said that it can not agree with the petitioner's arguments. First it proposed for consideration whether the petitioner acted in accordance with Art. 95 par. 2 of the Constitution of the Czech Republic, which can be used only if a general court concludes that a statute which is to be applied is inconsistent with the constitutional order. The concept of constitutional order is defined exhaustively in the Constitution of the Czech Republic and does not include international agreements. However, the petitioner repeatedly asks for evaluation of the question whether the Collegium meets the requirements imposed by the Convention. Regardless of the foregoing, however, the Chamber of Deputies does not agree with the petitioner's conclusion that the Collegium is not an impartial and independent tribunal, as meant by Art. 6 of the Convention. According to the Chamber of Deputies, ECHR case law judges the independence of a particular tribunal according to individual circumstances, and any conclusions can not be applied generally, which is also supported by the case cited by the petitioner, Incal v. Turkey, where a narrow majority of judges concluded that a court composed of active army officers, which judged acts committed by civilians, was insufficiently independent. The Chamber of Deputies stated that there is no reason to doubt the subjective independence of the Collegium members, and that the Collegium also meets the criteria of objective independence.

Even if the evaluation of professional qualification were not deleted from the Act on the Public Prosecutor's Office, one could not conclude that the mechanism of performing that evaluation violated the Collegium's independence. Fulfillment of the tasks of a Collegium member could not be subject to the evaluation of professional qualification. The statutory formulation, under which performance of the office of a Collegium member is considered to be performance of the office of a state prosecutor, is to be understood "only as a statutory guarantee of recognition of the activity performed by a state prosecutor in the Collegium. If this formulation did not exist, a state prosecutor would be forced to perform the office of a Collegium member in his free time." The Chamber of Deputies pointed to the non-existence of professional subordination of a Collegium member in relation to the supreme state prosecutor (in particular § 7a par. 4 of the Act on the Public Prosecutor's Office). The criteria of independence of the tribunal, formulated by the ECHR, can not be applied mechanically. The mere fact of appointment by an executive body can not be considered to endanger the Collegium's independence and impartiality. In the end, the selection and appointment of judges is also ensured and performed by executive bodies.

It is true that the term of office of Collegium members is two years, which could be interpreted as a sign of the existential and decision-making dependence of its members. In the specific example of Collegium members that is not so. Its members, as state

prosecutors working at the Supreme Public Prosecutor's Office, are persons enjoying general respect, with stable employment independent of performance of their role in the Collegium. The performance of the office does not bring any material advantages or other benefits. A member has no material incentive to remain in the office; on the contrary membership means additional work burdens, and limitations on the ability to work on one's usual duties. If a Collegium member performs this office, "he does so only from a sense of responsibility for fulfilling the Act on Protection of Classified Information". The Chamber of Deputies emphasized that it fundamentally rejects the idea that in individual cases there could be pressure applied by the executive branch on Collegium members to decide a particular way. There is no way to apply effective pressure on a Collegium member to decide in a particular way. Possible failure to extend a member's term of office does not injure a member in any way; on the contrary, if anything, he is relieved of some of his work burden. Membership in the Collegium is more a moral choice than an act which would improve one's career or material status. One can not reasonably think that a Collegium member would let himself be influenced in performing his role or would submit to any pressure. Therefore, we can not speak of objectively justified doubts about the Collegium's independence, as required by ECHR case law.

In the conclusion of his statement, the Chairman of the Chamber of Deputies added that the current legal framework has features of being temporary, as the very existence of the Collegium depends on the decisions of individual state prosecutors to become members, or to remain in the Collegium, which they can not be forced to do. At the time it was passed, this framework was not expected that to be permanent. The Act was to go out of effect on 31 December 2003, and at present it has been extended until 30 June 2005. The temporary framework addressed the situation which arose after issuance of judgment Pl. ÚS 11/2000, where, after annulment of part of the APCI, the government was to be given sufficient time to prepare a completely new legal framework for protection of classified information and the process of security clearances. For that reason too the term of office of Collegium members was two years. Despite possible substantive inadequacies, the Chamber of Deputies does not share the opinion that the regulation of the Collegium's status and proceedings before it are not consistent with the constitutional order, or with Art. 6 of the Convention.

B) The Senate of the Parliament of the Czech Republic, represented by its Chairman, JUDr. Petr Pithart, in its statement of 30 July 2004, said that in the Senate, which was well acquainted with Constitutional Court of the CR judgment file no. Pl. ÚS 11/2000, the opinion ultimately prevailed that the proposal to introduce an appeal to the Collegium is a legally adequate and purposeful solution to the conflict of interest in security and the guarantees of due process. The proponents of that opinion dispersed some doubts about the suitability of that solution by pointing to the fact that the statute had limited period of validity, and in the given period of a year and a half, the construction in question could be perfected or replaced by another. The Senate returned the draft act to the Chamber of Deputies for other reasons.

The Senate pointed out peripherally that the criteria for evaluating the degree of independence and impartiality of a court (tribunal), established by constitutional law

theory, ECHR case law, and by the Constitutional Court, consider the basis of judicial independence to be a democratic environment, division of powers, and essential existential (material) security for judges. The independence of judges is guaranteed through their exclusive appointment without fundamental influence from the government and the legislative branch (in the Czech Republic, by the president), the multi-year (unlimited) judicial mandate, guaranteeing resistance against the possibility of receiving instructions for how to perform the judicial position (non-recallability, non-transferability, etc.). The impartiality of judges is tied to ruling out prejudice (to persons and matters). incompatibility of the office with other offices and other employment activity and with guarantees that rule out all legitimate doubts about impartiality. On the subjective level of impartiality, trustworthiness and autonomous decision making are always required (in the judicial oath the judge promises to decide according to his "knowledge and conscience"). Externally, impartiality is ensured by a ban on endangering it (e.g., by a ban on sending petitions to courts). Comparing these criteria with the framework of requirements for ensuring the independence and impartiality of the Collegium and the status of state prosecutor in the Supreme Public Prosecutor's Office as a Collegium member, the Senate did not find any quantitatively significant differences. According to the Senate, a certain qualitative inadequacy in the Collegium's independence lies in the appointment being in the jurisdiction of the government, and the structural inclusion in the relationships of the state prosecutor's office, and therefore the executive, "although in the other contexts considered this requirement can be somewhat relativized."

The Senate pointed out that under the Constitutional Court's case law, the Charter contains some fundamental rights which are, by their nature, social values that tend to function as type categories that express ultimate aims. The right to a free choice of profession is one of these rights. While the rights to security, life and health are fundamental rights without anything further, it is presumed that the right to a free choice of profession will be made more specific by statute. The Senate takes this point of view on the restriction of access to the general courts in matters of constitutionally consistent, if a right which is a higher value which can be protected in this way. The characteristics of this subject matter are not compatible with ordinary court practice. A security clearance is not always based on undoubtable evidence; it often arises on the basis of very loose deliberation under the rule of "applying doubts to the disadvantage of the evaluated person." Review of the decision is primarily supposed to rule out rough subjectivism or ill intent "in the essence of the decision." Classified information evaluated during the review must simultaneously be effectively protected. The Senate pointed out, that insofar as the ECHR found violation of Art. 6 par. 1 of the Convention in the area of requirements for judicial independence and impartiality, this basically always concerned criminal courts or bodies which applied criminal law (cf. Incal v. Turkey, Findlay v. United Kingdom). Review of the decision to not issue a clearance for work with classified information is not on a comparable level of gravity.

C) Ing. P.P., whose rights were affected by application of the contested provision, and whose matter also defined the specific subject matter for proceedings before the Constitutional Court, was also called on to make a statement. In his statement, Ing. P. said that he had to have a level II security clearance to perform his profession as a soldier, and, when he did not obtain it, his commission was not renewed, and as it was impossible to

obtain a position corresponding to his qualifications, he was released from service in the Army of the Czech Republic as of 31 December 2003.

D) The director of the National Security Office Mgr. Jan Mareš also sent a statement to the Constitutional Court, without being asked to do so, or on the basis of the activity of the Chamber of Deputies. The Constitutional Court is aware, from the proceedings in the matter file no. Pl. ÚS 41/02, that the government of the Czech Republic puts the preparation of draft legislation in the area of classified information in the hands of the NSO (see, e.g. the draft of the new legislative framework sent to the Constitutional Court in the matter Pl. ÚS 41/02, or government resolution no. 88 of 22 January 2003, file no. 615/2003-NSO/80, or no. 293 of 31 March 2004, see the document portal www.vlada.cz - thus, the NSO's opinions have an important influence in the comment proceedings). In view of these circumstances, the Constitutional Court considered it relevant to also consider this un-requested statement as well. The NSO Director primarily stated that the petitioner erroneously considers the Collegium to be an administrative body. The Collegium is an independent body, and therefore judicial review of its decisions appears superfluous. The Collegium is, to the greatest possible degree, independent both of the executive administrative apparatus (whether the NSO, its director, or the intelligence services), and of other state bodies, which must include the Supreme Public Prosecutor's Office. This guarantees the objectivity of its decision making, and it prevents the possibility that a person who is the subject of a decision, or that person's legal representative, could have access to classified information. Protection of classified information is balanced in relation to the procedural status of the person who is the subject of a decision. If the "classification principle" were denied, classified information could be presented to an unauthorized person. There could be both violation of international cooperation in the area of intelligence services and investigative bodies, and theoretically direct endangerment of the life of, e.g. intelligence agents, witnesses, etc. This is inconsistent with the international obligations of the CR. "The standard court proceedings in matters of security clearances, including presentation of evidence, poses the danger of serious disclosure of classified information. Theoretically, it could even be possible that a court case would be conducted by certain persons purely for the purpose of discovering classified information through legal means.

In another part of his statement, the NSO director presented similar arguments applied in the proceedings in the matter of judgment Pl. ÚS 11/2000, which ended by annulling the ban on judicial review of decisions in matters of security clearances. According to the NSO, deciding to issue or not issue a clearance does not result in any interference in the area of fundamental rights. In any case, he says that even the Constitutional Court did not conclude that such decision-making directly violated the right to a free choice of profession. A clearance, as a positive result of a security review, is nothing more than demonstration of a particular special qualification. There is no legal entitlement to access to classified information; the holder of a clearance may be, again only in cases where there is a reason for it, designated for access to classified information. Only the state decides what is and what is not classified information, and "therefore, it should be only the state (i.e. the state administration) that permits access to such information." Only the state should evaluate the suitability of a person who is to be given this access. The Collegium is a kind of super-structure above the state administration, and replaces the

position of a court. The NSO also stated, that the Constitutional Court partly (sic) considered the conflict between the level of national security and the level of human rights in its judgment file no. Pl. ÚS 11/2000, where it granted that a very clear security interest of the state can be a legitimate justification for a certain degree of interference in the rights of an individual. However, according to the NSO, the Constitutional Court only touched this conflict very lightly, rather, it only stated its existence, and did not provide a deeper theoretical analysis of it. The NSO believes that the Collegium resolves the conflict. In contrast, it raises a fundamental objection to judicial review, because under § 45 par. 5 of Act no. 150/2002 Coll., the Administrative Procedure Code, as amended (the "APC") classified information will be disclosed to a person whom the state does not considerable suitable to have access to classified information (§ 45 par. 5 of the APC: "The parts of the file which were not excluded from viewing may be viewed only by the party and his legal representative, or a person who presents a clearance for the appropriate level of classification of facts being adjudicated"; § 45 par. 4 of the APC: "Parts of the file which the court has used or will use to present evidence can not be excluded from viewing. In addition, those parts of the file which the party had a right to view in proceedings before the administrative body also can not be excluded from viewing.") This situation is prevented by § 36 par. 8 of the APCI ("If any of the reasons for not issuing or revoking a clearance are classified information, the notice shall contain only a reference to the documents on which the Office relied."). According to the NSO, in that case classification is legitimate.

Legislation on clearances of natural persons is reserved exclusively to national legislation in EU and NATO countries. Nevertheless, the NSO pointed out that full judicial review is not usual. Even where the highest review body is a court, the affected individual and his representative are not permitted to have access to the results of the investigation which was the basis for not issuing a clearance, or even a decision to terminate a clearance. In France a court is not permitted access to classified information. If they were the basis for a decision, that is simply stated, without anything further. In Denmark a matter is reviewed by the Ministry of Justice, and the individual is not given an opportunity to become acquainted with sensitive information. A court complaint is not permitted. In the Dutch two-level court proceedings the procedural rights of a person undergoing security clearance are fundamentally restricted. Only the judge has access to classified or sensitive information. The Slovak framework includes judicial review (analogously to the previous situation in the CR, under chapter five of the Civil Procedure Code) without full jurisdiction and without reviewing the matter on the merits. Only the legality of the process is reviewed, without the court being familiarized with classified information. The Lithuanian framework limits procedural rights, just like the Dutch regulations.

In Turkey and Spain the person subject to clearance has no opportunity to intervene in the clearance process in any way, has no opportunity to learn the grounds for the decision "and, of course, has no opportunity to raise any objections or to appeal." A similar trend is now happening in Italy. These countries are also bound by the Convention, and they also have provisions analogous to Art. 36 par. 2 of the Charter. In these countries it was accepted that the relevant legal regulations are not inconsistent with the right to a fair trial guaranteed by the Convention. The NSO pointed out that one can not get a

comprehensive international comparison of this subject, but in Europe the principle indicated in the cited Constitutional Court judgment, limiting the individual's procedural rights with the (allegedly) clear priority of protecting classified information is generally considered legitimate. There are differing approaches to this subject. The developments in western democracies historically did not result in fundamental lack of confidence in the state administration, or the activities of security bodies, that is, citizens do not, as a result of differing opinions on the correctness of official decisions, demonstrate mistrust in an area as important as security, which is documented by the number of appeals. In the united Kingdom, France or Belgium, statistically there are a few appeals a year (up to ten); in the CR last year there were about a hundred. In conclusion the NSO stated that it considers § 77k par. 6 of the Act to be consistent with the constitutional order and with international agreements by which the CR is bound.

The Constitutional Court asked the NSO director to state (1.) whether there have already been cases where the Collegium decided on an appeal (§§ 77a-77k of the APCI) differently than a general court decided on a complaint in the same matter filed under § 73 par. 2 of the APCI, and (2.) if it has happened, how the NSO then proceeded, that is, which decision it accepted. The answer to the first question was that so far this has happened in one case, where the court annulled a decision, while the Collegium denied the appeal. In four other cases the court denied the complaint. However, the NSO also protested that here the court "did not respect the obstacle of lis pendens," as it considers the Collegium to be an impartial and independent judicial-type body. In the case of differing decisions, the NSO does not know which one to follow. The NSO could not answer the second question, because the decision which led to the divergence has not yet been delivered to it. However, it pointed out that it is expressly bound by decisions of the Collegium, by law (§ 77j par. 1 of the APCI). Without further arguments, it also pointed out that annulling the contested provision will open the door to damaging the interests of the CR in cryptography. In closing, it cleared up procedural issues concerning a security interview from which a protocol is made. The person subject to clearance, or his legal representative, is told the grounds for not issuing a clearance. The NSO stated that it basically makes no difference which body will review a decision; however, the person subject to clearance and his representative must not be given access to classified information, and it is desirable for the proceedings to occur by a fixed deadline. It also noted that the lower the number of persons who have had access to the material in the file during review, the lower the risk and the lower the costs of maintaining secrecy

The Constitutional Court asked the parties to the proceedings for consent to waive a hearing (§ 44 par. 2 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations), because further clarification of the matter could not be expected from a hearing. After that it could turn to review of the matter on the merits.

III. (Constitutionality of the Legislative Procedure and Legislative History of the Reviewed Statute)

Before the Constitutional Court turned to reviewing the content of the contested statutory provision in terms of its consistence with constitutional laws, it was required, under § 68 par. 2 in fine, of the Act on the Constitutional Court, to review whether formal requirements for passage of the legal norm had been met. However, the Constitutional Court had already found the legislative process of passing Act no. 310/2002 Coll., to be constitutional in its judgment of 28 January 2004, file no. Pl. ÚS 41/02 (in Collection of Decisions, vol. 32, p. 61, no. 98/2004 Coll.).

The provision of § 77k par. 6 was added to the Act on Protection of Classified Information by Act no. 310/2002 Coll., which arose as an initiative by parliamentary deputies in response "to practical problems which have appeared in connection with the application of the Act so far, specifically the impossibility of independent inspection, or review of a negative decision by the National Security Office as part of a clearance taking place under the Act" (background report of 10 July 2001). In the course of discussing the draft, on 12 July 2001 Constitutional Court judgment file no. Pl. ÚS 11/2000 was issued, which, with effect as of 30 June 2002 annulled the original wording of § 73 par. 2 of the APCI, which prohibited judicial review. The deputies' draft, by inserting § 77a to § 77k into the APCI, addressed the problem of the lack of independent review by establishing the Collegium and defining procedural rules for proceedings before it. After the draft was approved by the Chamber of Deputies on 27 March 2002, the Senate on 3 May 2002, returned it to the Chamber of Deputies with amending proposals, one of which proposed annulling the judicial review which had been created in the interim (cf. let. C of Senate resolution no. 372 of 3 May 2002). By its resolution of 13 June 2002, the Chamber of Deputies retained the original draft of the act, which was published in the Collection of Laws on 12 July 2002, and went into effect on the same day.

In the interim, the government presented to the parliament a draft act which amended certain acts in connection with the passage of the Administrative Procedure Code (Act no. 151/2002 Coll.) This Act (the Chamber of Deputies approved it on 15 February 2002, the Senate on 12 March 2002, and it was published in the Collection of Laws on 17 April 2002) inserted into the APCI § 73 par. 2, under which a complaint can be filed against a decision to not issue a clearance within 15 days from delivery of the decision, when proceedings on the complaint do not permit the participation of persons involved in the proceedings. This regulation went into effect on 1 January 2003. However, on 27 September 2002 the Collection of Laws was distributed in which, on the basis of authority contained in Act no. 310/2002 Coll., the Prime Minister promulgated the full text of the Act on Protection of Classified Information, under number 418/2002, in which § 73 was not divided into paragraphs and the possibility of judicial review was not mentioned.

IV. (Definition of the Subject Matter of the Proceedings)

The petition being reviewed by the Constitutional Court arose from proceedings before a general court, in which a person undergoing an NSO clearance filed an administrative complaint against the Collegium's decision. The complaint objects that § 77k par. 6 of the

Act on Protection of Classified Information is virtually identically with the wording of § 73 par. 2 of the Act, annulled by the Constitutional Court. On 1 January 2003 the new wording of § 73 par. 2 of the Act went into effect, which permits judicial review of a decision to not issue a clearance.

The Constitutional Court has already considered the effects of security clearances on the area of fundamental rights and freedoms several times (cf. judgments file no. Pl. ÚS 44/02, Pl. ÚS 36/01, and I. ÚS 577/01, I. ÚS 752/02 or II. ÚS 241/01, II. ÚS 28/02 and II. ÚS 142/03). Primarily, in judgment Pl. ÚS 11/2000 it stated that it "respects the fact that, in view of the specifics and importance of decisions in matters of classified information, where there is a very clear state security interest, it is not always possible to guarantee all the usual procedural guarantees of a fair trial (e.g. public proceedings). Nevertheless, even in this kind of proceedings it is the task of the legislature to make possible, through statutory means, the implementation of appropriate guarantees for protection by a court (or another independent and impartial tribunal under Art. 6 par. 1 of the Convention) even if – according to the nature of the matter and taking into account the nature of the office – it is a protection considerably unusual and differentiated." (cf. in Collection of Decisions, vol. 23, p. 105, in the Collection of Laws as no. 322/2001, or the electronic version of the judgment at www.judikatura.cz).

In the cited judgment, the Constitutional Court annulled as constitutionally inconsistent the statutory exclusion of judicial review for decisions by bodies of the executive branch in matters of security clearances. The legislature responded to the resulting situation by permitting general judicial review (§ 73 par. 2 of the APCI) and by introducing proceedings before a review body sui generis, which was the Collegium (§ 77a to § 77k of the APCI). The adjudicated matter concerns the right to verification of the relevant procedure, not the "right to receive a security clearance," which, of course, is not guaranteed.

The Constitutional Court's case law indicates that, from the point of view of protection of fundamental rights and freedoms, the public interest in preserving secrecy can not, in review of a decision which has the direct consequence of limiting the opportunity to practice a particular profession, be grounds for excluding that decision from application of Art. 36 par. 2 of the Charter and Art. 6 par. 1 of the Convention, which enshrine the right to judicial protection. Although the Constitutional Court acknowledged that judicial review of security clearances is a unique situation, nonetheless, when reviewing the constitutionality of § 77k par. 6 of the APCI, it is necessary, in addition to Art. 4 par. 4 of the Charter, to also take into account Art. 1 par. 1 of the Constitution, which declares the Czech Republic to be a democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens, whereby it sets both the fundamental manner in which public power is exercised and the principal attributes of the right to judicial protection. Although the case of judicial review of security clearances involves an area which permits a certain limitation of fundamental rights, the Constitutional Court points out that this subject matter must be viewed in terms of requiring the constitutional prohibition of discrimination (Art. 1 par. 1 of the Constitution of the Czech Republic, Art. 1 and Art. 3 par. 1 of the Charter), which gives rise to, at a minimum, the right to review

whether the conduct and results of a security clearance, which is fully in the hands of the executive power, with broad discretion, were not discriminatory and whether they were not marked by arbitrariness. In addition to the right to a free choice of profession, modified per the foregoing, with some categories of persons subject to clearance, Art. 21 par. 4 of the Charter also undoubtedly applies, which provides that "Citizens shall have access, on an equal basis, to any elective and other public office."

V. (Can the Collegium Be Considered a Court?)

A) The contested § 77 k par. 6 of the APCI, which prohibits judicial review of Collegium decisions, is inconsistent with § 73 par. 2 of the APCI, which guarantees judicial review. The Regional Court in Brno submitted the matter to the Constitutional Court on the basis of concluding that the relationship between these two mutually inconsistent provisions without stating which proceedings are to take place first creates lack of clarity, and the relationship between a Collegium decision and a court decision is not addressed, even for a situation where these decisions do not correspond. Before evaluating the consequence of the conflict of the two provisions, we had to answer the question of what the nature of the Collegium is.

The constitutional order of the CR (Art. 81 and 82 of the Constitution of the Czech Republic) provides that the judicial power is exercised only by independent and impartial courts, that is, independent and impartial judges, who are guided by the fundamental rules of a fair trial (Art. 1 par. 1 of the Constitution, Chapter Five of the Charter). These provisions can be interpreted as institutional guarantees of the substantively understood exercise of the judicial power, and therefore, in terms of the right to a fair trial, it is not necessary for a court under § 36 par. 2 of the Charter to be, in all cases, exclusively a body within the system of general courts, but it must be an independent body whose members are independent and impartial in their decision making. It must also have unconditional access to review all relevant aspects of a matter (factual and legal), while observing the fundamental principles of a fair trial (e.g. the principal that no one may be a judge in his own case or the principle that both sides must be heard), and an executable decision can not be reversed by another act by a state power (the definition of the judiciary in a substantive sense). The existing Constitutional Court case law mentioned independence and impartiality as essential attributes the fulfillment of which is typically guaranteed in the case of the judicial power, and can not be fulfilled by various executive bodies (cf. e.g., the judgment of 23 November 1999, file no. Pl. ÚS 28/98 in Collection of Decisions, vol. 16, p. 185, 2/2000 Coll., in relation to the nature of a decision by the National Audit Office, or the judgment of 17 January 2001, file no. Pl. ÚS 9/2000, in Collection of Decisions, vol. 21, p. 55, no. 52/2001 Coll. – in relation to a police decision on an offense). The Constitutional Court spoke concerning the content of the attributes of independence in particular in cases where it reviewed statutes governing the organization of the judicial power (see, e.g. judgment of 18 June 2002, file no. 7/02 in Collection of Decisions., vol. 26, p. 273, no. 349/2002 Coll.) The Plenum of the Constitutional Court is for the first time comprehensively reviewing the impartiality and independence of a tribunal sui generis,

although it does so with the natural support provided by the Constitutional Court decisions cited below, as well as decisions of the European Court of Human Rights (also cited below).

Independence and impartiality are ideals which can never be fulfilled absolutely – we can only approach them – which comes from their social nature. Independence means ruling out the possibility of affecting the free formation of the will of judges; impartiality (independence from the parties) is the absence of a leaning by the court toward one of the parties, where the concept party to a proceedings can be understood on a general and specific level. Independence is a category of relationship which is closely tied to the concept of power understood as the opportunity of forcing one's will on others (Weber, M., Autorita, etika a společnost [Authority, Ethics and Society], Mladá Fronta, 1997, p. 49; originally in Wirtschaft und Gesellschaft, Tübingen, JCB Mohr Siebeck 1972, p. 541-544). The long-term legal and political development of liberal democracies was generated by experience with the indicators of independence and impartiality from which one can form objectivized criteria for evaluating whether the elements independence and impartiality have been met, because at the subjective level of the psychological (conscious or unconscious) state of the decision making entity (it is at this level that the undesirable influencing of free judgment occurs), they can not be captured by legal instruments. At an objective level, impartiality and independence are generally evaluated in terms of the relationship to other components of power (the principle of separation of powers), in terms of the ability of persons (with a potential interest in a particular outcome or course of a dispute) to influence the creation, duration and termination of the office of a member of judicial body (tribunal). Therefore, judges and members of judicial-type bodies must have a sufficiently independent status to rule out the possibility that their decision making activity can be directly or indirectly influenced. The existence of protection against external pressures is evaluated, e.g., in terms of the existence of a potential opportunity to influence a judge's career, or the opportunity to bring about the termination of his office. A guarantee of financial independence is also undoubtedly part of an independent status. Only then does the formal order to not be guided by the orders of others receive material content, and only thus are neutrality and distance from the parties ensured.

For completeness, we must add that the prohibition on affecting judicial decision making (forcing another to do something, omit to do it, or tolerate it) is supported both by limiting the right to petition and the right to assembly where implementing them might influence judicial decision making, and at the criminal law level, where such acts are defined as a crime (§ 169a of the Criminal Code) The absence of independence or impartiality can be found both at a general (type) level and at a specific level (the relationship of a particular judge to a particular matter or person). Therefore, procedural regulations provide the possibility of raising an objection of prejudice, if one of the parties has doubts about impartiality, or impose mandatory exclusion of a judge from handling a matter due to a relationship to the matter or to the parties, which ensures impartiality where there are already justifiable doubts on the basis of specific facts.

In the case of the administrative judiciary, which most often decides disputes between the executive branches of the state and private law entities, which is also the case in the present matter, the maxims of independence and impartiality require the existence of effective and persuasive guarantees that any potentially undesirable ties to the executive power are broken; this is guaranteed in the case of judges by, among other things, making holding the position of a judge incompatible with a wide range of activities which are of a type presumed to affect free judgment, because the conduct of these activities pursues an interest which is incompatible with the ability to fairly decide a dispute in which each of the parties defends an opposing interest. In evaluating impartiality and independence one can not completely ignore the appearance aspect of the matter, where the appearance of independence and impartiality for third parties is also considered a valid criterion, because this aspect is also important for ensuring confidence in judicial decision making. This criterion too reflects the social nature of judicial decision making, which indicates that, even if realistic grounds for doubts about impartiality and independence does not in fact exist (both subjectively and objectively), one can not overlook the possible existence of a collective belief that such grounds exist (cf. the ECHR decision of 23 June 1981, Le Compte, Van Leuven and de Meyere v. Belgium, no. 6878/75, cited below). The general sociological concept known as Thomas's theorem (see, e.g. in Collective of Authors, Velký sociologický slovník [Big Dictionary of Sociology], I., Prague, Karolinum, 1996, p. 171) also applies to the justice system; the theorem says that if a particular situation – here, the non-existence of independence or impartiality – is defined by people as real, then it also has real consequences – there is a lack of general trust that a decision is a fair one by an independent and impartial tribunal. Confidence in the law is among the fundamental extra-legal attributes of a law-based state (see also, e.g. judgment of 11 November 2003, file no. IV. ÚS 525/02 in Collection of Decisions, vol. 31, p. 173).

B) The Constitutional Court turned to analysis of the Collegium's independence and impartiality in the area of protection of classified information, established at the Supreme Public Prosecutor's Office.

The Constitutional Court states that (from a formal viewpoint) a Collegium decision is prima facie not a judicial decision. The Public Prosecutor's Office is constitutionally classified with the executive power (Art. 80 of the Constitution places it in Chapter Three, which defines the executive power) and it is constitutionally established to represent criminal complaints. In view of the uniqueness of the area of security clearances, the Constitutional Court considered the question whether the Collegium can be considered a court in a substantive sense. We must agree with the objections that the Act on the state Prosecutor's Office really does contain guarantees of the independence of Collegium members. However, it is necessary to further review whether these formal guarantees are also fulfilled substantively, that is, whether they are sufficient for protection against potential external pressures and whether they are capable of creating a general belief in independence.

It can not be overlooked that membership in the Collegium is accessorily tied to appointment to the Supreme Public Prosecutor's Office; appointment is decided by the Minister of Justice (§ 19 par. 2 of the Act on the Public Prosecutor's Office). The Supreme

Public Prosecutor, to whom members of the Supreme Public Prosecutor's Office are subordinate (see § 18 par. 2 of Act no. 283/1993 Coll., on the Public Prosecutor's Office, as amended, the "Act on the Public Prosecutor's Office") is also appointed and, without having to give reasons (sic!), recalled by the government (§ 9 par. 1 and 2 of the Act on the Public Prosecutor's Office). Collegium members must have a security clearance from the NSO (§ 7a par. 2 third sentence of the Act on the Public Prosecutor's Office); the clearance is limited to a period of five years (§ 37 par. 1 let. d) APCI) and subject to removal at any time (§ 37 par. 2 let. b) of the APCI). The relationship of the NSO director to the government is defined the same way as with the supreme state prosecutor (§ 7 par. 2 and 3 of the APCI). The NSO director is directly responsible to the Prime Minister, who is his superior and supervises the office's activities (§ 7 par. 3 of the APCI). A proposal to open disciplinary proceedings against a state prosecutor appointed to the Supreme Public Prosecutor's Office is filed by the Supreme Public Prosecutor or the Minister of Justice (§ 8 par. 3 let. a) of Act no. 7/2002 Coll., as amended). These legal instruments objectively create a line which permits the potential influencing of the free judgment of Collegium members, which can not be changed by the guarantees of formal independence contained in the law.

The mandate of Collegium members is for two years (which, according to the Chamber of Deputies, was tied to the fact that the regulation was considered to be temporary). Collegium members are approved ad hoc by the government at the proposal of the Minister of Justice (see, e.g. government resolution no. 704 of 14 July 2004, in which the government approved a candidate for Chairman of the Collegium, which decision was changed by resolution no. 898 of 15 September 2004, when it approved a different chairman – see www.vlada.cz). In any case, the Chamber of Deputies said in its statement that "the very existence of the Collegium depends on the decision of individual state prosecutors to become members, or to remain in the Collegium, which they can not be forced to do." From that point of view, the Collegium falls short of the requirements for the relative permanence of its composition, which is supposed to make it impossible to influence the results of its decision making through a change in the Collegium's composition, which implies that it can not meet the requirements for stability of a decision making body which were expressed in the principle of a judge (Art. 38 par. 1 of the Charter).

It must also be considered an important fact that Collegium members must have a security clearance, and that this decision can be changed (§ 36 par. 5 and 7 of the APCI). Thus, the selection of members of a body which inspects the proper conduct of security clearances can be very effectively interfered in by the NSO, whose activities they are to inspect, not to mention the fact that the selected structure creates the potential threat of an uninterrupted line of selection which is completely in the hands of an executive body. The view that there is no effective opportunity to exert pressure is inconsistent with the very concept of clearances, which determine, among other things, whether there are any circumstances through which an unauthorized person could influence the future decision making of the persons subject to clearance /being cleared. In a situation where the statute stands on a presumption of defect-free work of administrative bodies (here, the NSO) which has not been verified through experience, we can not, in view of the principles of

checks and balances in proceedings to review norms, overlook the fact that the NSO, as an executive body, has, thank to a concentration of sensitive information of a personal nature, remarkable potential power. This only increases the urgency of truly independent inspection, which permits verification of both the proper exercise of powers in security background checks and, e.g. determining whether facts are classified which do not need to be (i.e. whether the taxonomy of classification is not overly strict and whether the limitation of rights is really necessary).

In the context of the adjudicated matter, which is viewed in terms of the necessary balancing of the public interest in security with the protection of individual rights and freedoms, we can not overlook the fact that state prosecutors are personally bound, by statute and by oath, to protect the public interest (§ 18 par. 3 of the Act on the Public Prosecutor's Office), which can lead to legitimate doubts about their impartiality in evaluating the conflict of fundamental rights and freedoms with the public interest in security, protected in this case by classifying information. In any case, state prosecutors in criminal proceedings (in particular in preliminary proceedings and custody) procedurally benefit from classification, because, unlike the defense, they also have access to those parts of the file which are classified. Their position on success and the degree of secrecy is not neutral. In the case of judges, these aspects of the possible conflict of interest are routinely eliminated by applying the principle of conflict of interest with the office. With tribunals sui generis a composition of the tribunal is ensured whose heterogeneity neutralizes the application of various, largely unconscious, interests (in this country, e.g. § 5 of Act no. 7/2002 Coll. on Proceedings in the Matter of Judges and Public Prosecutors).

The background report on Act no. 310/2002 Coll. also indicates that review by the Collegium was not included in the Act in order to ensure judicial review of administrative decisions issued in the course of security clearances of individuals, but to increase the trustworthiness and objectivity of executive security clearances: "a negative decision by the NSO has very serious effects on the professional and personal life of the person subject to clearance; the proposers are convinced that it is necessary to introduce in the entire system of security clearances an external inspection element in the form of an independent appeals body which will be authorized to review NSO decisions. Moreover, establishing an independent inspection body will bring to the process of security clearances a higher degree of trustworthiness and objectivity than has existed thus far, without at the same time complicating the entire process in terms of time or otherwise." (Background report to the draft of deputies F. Ondruš, P. Nečas and I. Langer of 10 July 2001; see also Šimíček V., "Přezkum rozhodnutí o nevydání bezpečnostního osvědčení" [Review of Decisions to Not Issue Security Clearances] in Dančák, B., Šimíček,V., Bezpečnost České republiky [The Security of the Czech Republi], MPÚ, Brno, 2002, p. 150).

In view of the foregoing, the Constitutional Court had to give a negative answer to the question whether the Collegium is a body which is, even while observing the specific requirements of security background checks, still capable of conducting a fair trial. (Therefore, the Constitutional Court found it unnecessary to consider the quality of procedural guarantees in proceedings before the Collegium). We can not say that doubts

about the independence and impartiality of the Collegium composed of state prosecutors are not legitimate. Collegium embers do not have institutionally created conditions for the appropriate distance from bodies of executive power. This conclusion is objectively valid, and it is not necessary to prove specifically how effective pressure could be brought to bear on Collegium members. For completeness, we must add that the decision making freedom of Collegium members is not supported by the same criminal law protection as is the case with judges (§169a of the Criminal Code). If the Senate and the Chamber of Deputies consider review by the Collegium to be sufficient (or the NSO considers judicial review to be unnecessary), we must point out that Art. 36 par. 2 of the Charter guarantees the review of administrative decisions by the court, which need not in all cases be institutionally included in the court system, but they must be institutions which meet the fundamental guarantees of impartiality and independence, and which observe the principles of a fair trial. However, the Collegium can not be consider a court, even substantively, when doubts about its independence arise structurally, on the objective level, which, however, at the same time in no way casts doubt on the independence of state prosecutors performing the roles of public prosecution, not does it in any way cast doubt on the professional and human qualities of current or past Collegium members.

VI. (Is Judicial Review Necessary?)

A) The Constitutional Court then considered the arguments of the NSO that judicial review of executive decision making in the area of security clearances is not usual, which the NSO supported by pointing to foreign regulations. Therefore the Constitutional Court also used comparative methods of analysis and reviewed the approach to judicial review of security clearances in countries which have gone through similar legal development and have assumed the same international legal obligations to protect classified information as has the Czech Republic.

The Constitutional Court of the Slovak Republic, in its judgment of 11 February 2004, annulled those parts of the Act on Protection of Classified Information (Act no. 241/2001 Coll., on Protection of Classified Information), which permitted judicial review of a decision to terminate security clearances, but without the affected person being able to request judicial review on the basis of knowing the specific reasons, i.e. terminating a security clearance without a result statement, and it also annulled the provision where limited the affected person in requesting judicial review of the termination of validity of a result statement (see the electronic version of the Judgment of the Constitutional Court of the Slovak Republic of 11 February 2004 file no. Pl. ÚS. 15/03 available on www.concourt.sk). The Constitutional Court of the SR stated that it recognizes the centrality of state security interests, and also recognize the means which the Act on Protection of Classified Information selected for achieving that aim, but it did not agree with achieving the aim of that Act by denying the principle of a law based state or at the expense of the fundamental rights of the individual. According to the Constitutional Court of the Slovak Republic, it is a component of a law based state to subject the interference by a body of public power into the rights of an individual to effective inspection, which

must be ensured, at least in the final instance, by he judicial power, as it provides the best guarantees of independence, impartiality and regularity of proceedings (p. 15 of the judgment). The Constitutional Court allowed a certain limitation on reviewability (p. 16 of the judgment), but only so as to guarantee a real, an only fictional, implementation of the fundamental right to judicial protection and to create sufficient guarantees of protection against arbitrariness (p. 17 and 18 of the judgment). The Constitutional Court of the Slovak Republic thus reached the clear conclusion that even the interest in security can not be grounds for denying the right to review before an independent and impartial court, which results from the fact that the person subject to clearance does not know at least basic information about the reasons for the decision. For completeness, we should add that the Constitutional Court of the Slovak Republic refused to subordinate the matter under the application of the right to free choice of profession, with which two judges disagreed in their dissenting opinions. One judge did not agree with denying review of the matter from the point of view of the right to information.

Similarly, the Constitutional Court of the Polish Republic, in its judgment of 10 May2000, annulled that part of the Act on Protection of Classified Information (ustawa z 22 stycznia 1999 r. o ochronie informacji niejawnych), which did not permit judicial review of decision on security clearances, due to inconsistency with the constitutional right to access to a court and with the right to access to the civil service, as well for inconsistency with Art. 13 of the Convention (see the electronic form of the decision of 10 May2000, Sygn. K. 21/99, available at http://www.trybunal.gov.pl). The Polish Constitutional Court said that security clearances themselves, as well as their results, can directly interfere in the fundamental rights and freedoms of individuals (p. 36 of the judgment).

Trybunal Konstytucyjny, on the basis of analysis of its administrative case law, ECHR case law (p. 25-27 and 29 of the judgment), and on the basis of a comparison of foreign legal regulations submitted by a legal expert (p. 24-25 of the judgment), stated, with reference to its settled interpretation of the right to a fair trial (p. 33-35), that the rights of persons subject to security clearance, in the context of a guarantee of the right to equal access to the civil service (Art. 60 of the Constitution of the Polish Republic), are subject to the constitutional prohibition on denying access to the courts (Art. 77 par. 2 of the Constitution of the Polish Republic), because they fall into the framework of constitutionally protected rights and freedoms. Therefore the provision of the Act on Protection of Classified Information (§ 42 par. 1) which limited review by the Supreme Administrative Court without simultaneously expressly entrusting these matters to the authority of the general courts was found to be inconsistent with Articles 45 par. 1 and 77 par. 2 of the Constitution of the Polish Republic, which enshrine the right to judicial review of decisions interfering with fundamental rights and freedoms (p. 38 of the judgment). The Polish Constitutional Court stated that international standards of the guarantee of the right to access to courts are minimal standards, which are lower in this area than the standards of Polish law (p. 29 of the judgment).

The Constitutional Court could not agree with the NSO's objection that the foreign comparison indicates that judicial review of security clearances is not usual. In any case,

the NSO itself provided examples of countries in which such review is possible (the Netherlands, Lithuania). We must add to the absolute figures of the numbers of appeals which the NSO stated, that without an approximate statement of the number of positions which require a clearance these data are irrelevant.

B) The Regional Court also based its petition on the case law of the European Court of Human Rights, although the statements submitted doubted its relevance. Primarily, one can not accept the objection based on stating that the Convention on the Protection of Human Rights and Freedoms is not part of the constitutional order of the Czech Republic and it is thus not appropriate to argue on the basis of ECHR case law, which gives binding analyses of the Convention. The Constitutional Court has already, in its judgment of 25 June 2002, file no. Pl. ÚS 36/01, (see Collection of Decisions, vol. 26, p. 317 or the Collection of Laws no. 403/2002), as well as in other judgments (se. Pl. ÚS 19/02 in Collection of Decisions vol. 29, p. 279, or 403/2002 Coll., Pl. ÚS 44/02 in Collection of Decisions, vol. 30, p. 417, 210/2003 Coll., or Pl. ÚS 41/02 in Collection of Decisions vol. 32, p. 61, 98/2004 Coll.), stated that the Convention has acquired a firm place in the constitutional order of the Czech Republic. Moreover, in each individual case the nature of the contested provision comes into conflict with the safeguards guaranteed by the Convention, which takes precedence over statutes in application. Moreover, the Regional Court also claimed that there was violation of Art. 36 par. 2 of the Charter, and the Constitutional Court, taking into consideration the development which led to expansion of domestic standards for judicial protection, sees no reason why the guarantees of a fair trial, tied to Art. 6 par. 1 of the Convention, should not also apply on the basis of Art. 36 par. 2 of the Charter. We also can not agree with the objection that the case Incal v. Turkey (decision of the Grand Chamber of 9 June 1998, available in electronic from under file no. 22678/93 in the official database of the ECHR, HUDOC, at http://www.echr.coe.int) can not be used as an argument because evaluation of impartiality and independence must reflect the individual circumstances of the case and the ECHR's conclusion therefore has limited applicability. Here the Constitutional Court points out, only peripherally, that accepting such a general approach to case law would de facto make it impossible to use it in analysis, and would result in lowering legal certainty, because it would, above all, open the door to the court themselves to make differing decisions in cases which are in principal the same, that is to arbitrariness in decision making. The courts, if they are to decide fairly, must judge the same cases the same way. We must also point out that a court decision is a court decision regardless of the majority by which it was passed. In any case, the same principle is applied in relation to other decisions by the state powers (the Parliament, the government, etc.), i.e. obtaining the majority set by the Constitution or by statute.

The Constitutional Court believes that the ECHR has already spoken on a number of aspects which are highly relevant in evaluating the human rights dimension of security clearances.

In the case Incal v. Turkey (see this decision in HUDOC at http://www.echr.coe.int, § 65, § 67-8; note, all electronic versions of ECHR decisions cited in this judgment were obtained in the English version, divided into numbered paragraphs) there was a positive answer to the question whether doubts about the impartiality of judges can exist in terms of their

institutional relationship to the subject matter of a dispute, and whether judges had, in professional terms, a special relationship to the protection of the public interest whose violation they were to evaluate, that is, where they were disposed to primarily protect the state interest in security rather than to dispense justice. The Constitutional Court also states that the principle applied by the ECHR in the Incal case, under which evaluation of independence can not be content with formal guarantees, is so firmly tied to the idea of fair decision making that it can not be limited only to criminal proceedings. In any case, this principle is also firmly connected to our constitutionality, which is based on the concept of a substantively law based state (see, e.g. the judgment of 21 December 1993, file no. Pl. ÚS 19/03 in Collection of Decisions, vol. 1, p. 1, 14/1994 Coll.). The Senate objected that, insofar as the ECHR found violation of Art. 6 par. 1 of the Convention in the area of requirements for independence and impartiality of courts, this always basically involved criminal courts or bodies applying criminal law. Review of a decision not to issue a certification for work with classified information is not at a comparable level of gravity. However, the frequent citing of this decision in other cases decided by the ECHR also indicate that the Incal case has become one of the leading cases, and therefore the principles in it can not be overlook by reference to the fact that they were expressed in evaluating a criminal matter. However much it is legitimate to distinguish the gravity of interference in fundamental rights, the Constitutional Court also can not overlook the fact that it also in the past considered a statutory exception to judicial review in matters of trivial offenses, subject to a fine of up to CZK 2,000 to be a violation of the "right to a court" (see the judgment of 17 January 2001, file no. Pl. ÚS 9/2000 in Collection of Decisions, vol. 21, p. 55 no. 52/2001 Coll.).

The ECHR also applied (and found violation of) Art. 6 par. 1 of the Convention in the case of review of a decision by an administrative body (decision of the plenum of 22 October 1984, Sramek v. Austria , 8790/79: § 34). The concept of a court was analyzed substantively, and in evaluation independence and impartiality the ECHR also held up as an important criterion an impression which can create doubts about independence, when it is necessary to have a guarantee of protection against external pressures (§ 42 of the decision, or also Berger, V.: Judikatura Evropského Soudz pro Lidska Práva [Case Law of the European Court of Human Rights], Prague, IFEC, 2003, p. 193, or Sudre, F.: Mezinárodní a evropské právo lidských práv [International and European Human Rights Law], Brno, MU, 1997, p. 177 or Čapek, J.: Evropský soud a Evropská komise pro lidská práva [The European Court and European Commission for Human Rights], Prague, Linde, 1995, p. 395). Mrs. Sramek's matter was decided by a tribunal one of whose members was hierarchically subordinate to one of the parties, which violated Art. 6 par. 1 of the Convention. The ECHR proceeded the same way in the case Tinnelly & Sons and Others v. Great Britain (decision of the Grand Chamber of 10 July 1998, 20390/92: § 72 and 78), where the right to access to the court, which was to verify the fairness of awarding a public contract in Northern Ireland, was restricted on the grounds of public interest in security. The court applied the proportionality test to this limitation (§ 76 of the decision) and decided that Art. 6 par. 1 of the Convention gave the plaintiffs the right to access to the courts.

The Constitutional Court stated in the matter Pl. ÚS 11/2000 that the ECHR, in the case of special groups of state employees, recognized (only) that in the case of the special group of state employees, disputes of state employees "whose employment is typified by specific activities of public administration in the extent to which that administration acts as a holder of public power, entrusted with protection the general interests of the state or other public societies. Obvious examples of such activities are the armed forces and the police" are taken out of the sphere of jurisdiction of Art. 6 par. 1 of the Convention (see the decision of the Grand Chamber of the ECHR of 8 December 1999, Pellegrin v. France no. 28541/95: § 66; also Reports of Judgments and Decisions of the European Court of Human Rights no. 1/2000, p. 7 et seq., or Berger, op. cit., p. 280). The ECHR also looked to previous case law, which did not question certain reservations of discretion to the state administration, but pointed out that exceptions to the application of Art. 6 par. 1 of the Convention must continue to be interpreted narrowly.

However, in the case Wille v. Liechtenstein (decision of the Grand Chamber of 28 October 1999, 28396/95: § 41) the ECHR stated that the right of recruitment to the civil service was deliberately omitted from the Convention. Consequently, the refusal to appoint a person as a civil servant cannot as such provide the basis for a complaint under the Convention. This does not mean, however, that a person who has been appointed as a civil servant cannot complain of being dismissed if that dismissal violates one of his or her rights under the Convention. Civil servants do not fall outside the scope of the Convention. In Articles 1 and 14, the Convention stipulates that "everyone within [the] jurisdiction" of the Contracting States must enjoy the rights and freedoms in Section I "without discrimination on any ground". Moreover, Article 11 § 2 in fine, which allows States to impose special restrictions on the exercise of the freedoms of assembly and association by "members of the armed forces, of the police or of the administration of the State", confirms that as a general rule the guarantees in the Convention extend to civil servants (see the decision of the plenum of 28 August 1986, Glasenapp and Kosiek v. Germany, 9228/80: § 49, or 9704/82: § 5 or Berger, op. cit., p. 518; or the decision of the Grand Chamber of 26 September 1995, Vogt v. Germany, 17851/91: § 43 or Berger, op. cit., p. 521).

The ECHR does not interpret the concept of citizens' rights and obligations, contained in Art. 6 par. 1 of the Convention, narrowly, but includes under them all proceedings with a result which is definitive for private rights and obligations (see decision of the plenum of 28 June 1978, König v. Germany, 6232/73: § 90; also Sudre, op. cit., p. 174, or Berger, op. cit., p. 270). Where the decisions taken by administrative bodies which decide on citizen's rights and obligations themselves do not meet the requirements of Art. 6 of the Convention, it is necessary for such decisions to be subject to the subsequent review of a judicial body with full jurisdiction, which provides a guarantee of protection of this article (for all, see decision of the plenum of 23 June 1981, Le Compte, Van Leuven and de Meyere v. Belgium, 6878/75, § 41 et seq., or Berger, op. cit. p. 185). In the case Kingsley v. Great Britain (senate decision of 7 November 2000, 35605/97, which was confirmed as to the merits on 28 May 2002 by decision of the Grand Chamber), an administrative decision on revoking a license to operate casinos was classified under Art. 6 par. 1 of the

Convention (§ 15 a § 45 decision of the small senate, or §18 of the decision of the Grand Chamber) and the ECHR clearly classified under the concept of full jurisdiction the right of a court cancel an administrative court decision and assign the matter to an impartial court for a decision (in the event that there are doubts about a tribunal's impartiality (Kingsley v. Great Britain: § 32 of the decision of the Grand Chamber). In deciding whether a particular body can be considered independent of the executive power, one must take into account the manner of appoint and length of mandate of its members, the existence of guarantees against external pressures and whether the body creates the appearance of independence (see Le Compte § 55 or the senate decision of 28 June 1984, Campbell and Fell v. UK, 7819/77: § 78; or Sudre, op. cit., p. 176). Naturally, the ECHR does not consider appointment of judges by decision or recommendation of bodies of state power or the Parliament to be a fact which casts doubt on their independence, without anything further. In the case of Campbell & Fell the Prison Board of Visitors (whose heterogeneous composition is ensured both professionally and in terms of relationship to the executive branch, as well as in other aspects – cf the decision, § 32), was found capable of conducting a fair trial (cf. Čapek, op. cit., p. 395).

We can not overlook the fact that the ECHR also, in case of a conflict of fundamental rights with the interest in security, often points out the necessity of ensuring an opportunity to refute possible untrue information about private life, even if it involves secret information (senate decision of 26 March 1987, Leander v. Sweden, 9248/81: § 48), when it is necessary to ensure impartial supervision, which is best ensured by a court, as was stated in the decision Rotaru v. Romania (decision of the Grand Chamber of 4 May 2000, 28341/95 § 43, § 46 and § 72, available in Czech in Sbírka soudních rozhodnutí Evropského soudu pro lidská práva ve Štrasburku [Collection of Decisions of the European Court of Human Rights in Strasbourg] 1/2003). The ECHR stated that it is necessary to be convinced that there exist adequate and sufficient guarantees against the misuse of collected untrue information, because the system of secret surveillance, intended to protect national security, carries the risk of subverting, even destroying democracy, with the justification that it is protecting it (cf. decision of the plenum of 6 September 1978, Klass and Others v. Germany, 5029/71: §§ 49-50 or Berger, op. cit., p. 449-450). For the system of secret surveillance to be compatible with Art. 8 of the Convention, it must contain statutorily required guarantees which also apply to inspection of the activities of the relevant services. Inspection procedures must as much as possible respect the values of a democratic society, primarily the exclusive status of the law, which is expressly cited by the preamble of the Convention. "The rule of law implies, inter alia, that interference by the executive authorities with an individual's rights should be subject to effective supervision, which should normally be carried out by the judiciary, at least in the last resort, since judicial control affords the best guarantees of independence, impartiality and a proper procedure" (see Klass and Others v. Germany, § 55, cited in Rotaru § 59).

The Constitutional Court states that ECHR case law devotes special attention to the need to ensure an independent and impartial inspection of classified information about an individual. (We also can not fail to note the fact that although the Swedish government was successful in the Leander dispute, and the court gave priority to the public interest, after the archives were opened it was found – contrary to the assurances given to the ECHR

by the Swedish government – that the secret information concerned only the complainant's political activities, and not national security. In 1997 the Swedish government publicly apologized to the complainant and provided compensation (Töllborg D. in Greenwood, D., Huisman, S.: Transparency and Accountability of Police Forces, Security Services and Intelligence Services, George C. Marshall Association, Sofia, 2004, p. 119, or Mendel, T.: Freedom of Information: A Comparative Legal Survey, UNESCO 2003, p. 11-12). We must also point out that the Constitutional Court also, in the matter Pl. ÚS 11/2000, confirmed (just as the Polish constitutional court), that the standard of judicial protection provided by the Constitution and the Charter is broader in this area. Fundamental rights other than those considered in the Pellegrin case can also be affected in connection with the conduct and result of security clearances, because the potential interference in the right to information about one's self, the right not to be discriminated against, or the right to protection of privacy exceed the framework of a labor law dispute, which was also confirmed by the Leander case (§ 76), where the ECHR also evaluated the matter in terms of Art. 13 of the Convention, which recognizes the right to an effective appeal (cf. also how this decision is used as a basis for arguments in ECHR case law).

VII. (The Interim Nature of the APCI)

In proceedings before the Constitutional Court, the interim nature of the Act on Protection of Classified Information was repeatedly pointed out, which was apparently meant to explain its inadequacies.

Act no. 310/2002 Coll. provided in Art. IX.: "Act no. 148/1998 Coll., on Classified Information, ceases to be in effect on 31 December 2003." Because the amending proposal of the parliamentary committee for defense concerning Act 310/2002 Coll. (resolution no. 206 of 15 March 2002, which the chamber accepted on 25 March 2001) contained the sentence: "This Act goes into effect on the day it is promulgated and ceases to be in effect on 31 December 2003" (see Chamber of Deputies publication 1000/4), one can justifiably assume that the original intent was only to limit the validity of the amendment to the APCI, which was a response to Constitutional Court judgment Pl. ÚS 11/2000 (cf. a statement in debate in the Chamber on 22 March 2002)." The Act on Protection of Classified Information contains a number of other problematic places, and it will be absolutely necessary to revise them thoroughly after the elections. Therefore, the committee proposes to limit the validity of this amendment to 31 December 2003, and thus motivate the next government to expedited work on a very thorough amendment (in www.psp.cz - the Chamber of Deputies: 1998 - 2002: Chamber of Deputies publication 1000: conduct of discussions), although the wording of Act no. 310/2002 Coll. as passed limited the validity of the entire Act on Protection of Classified Information (likewise Šimíček V, p. 150). Subsequently the legislature, in Act no. 436/2003 Coll., Amending the Act on the Prison Service and Judicial Guard of the Czech Republic and Amending Certain Other Acts, with effect as of 1 January 2004 extended the validity of the Act on Protection of Classified Information to 30 June 2004. This was a proposal which passed on the basis of a resolution of the Chamber of Deputies Committee for Defense and security (no. 89 of 1

October 2003). It was stated in debate in the chamber that there is a real danger that as of 1 January 2004 the legal order of the CR would, at least for a certain time, have no legal regulation of protection of classified information (see the record of the chamber of deputies debate on 22 October 2003). Finally, by Act no. 386/2004 Coll., the legislature, with effect s of 29 June 2004, postponed the expiration of the Act on Protection of Classified Information by one year, to 30 June 2005, with this justification: "a draft new act on protection of classified information and security qualification was prepared. The Government's Legislative Council, at its meeting on 12 February 2004, decided to return the submitted material to the proposers for revision according to the intentions of its position. This revision will take some time. Subsequently, the draft is again supposed to be submitted to the legislative process, which would create a real danger that as of 1 July 2004 the legal order would contain no regulation for the protection of classified information. To make it possible to responsibly revise both the original proposals according to the comments from the Government´s Legislative Council, and also ensure the existence of a legal regulation governing the issue of protection of classified information after 30 June 2004" (see background report to Act no. 386/2004 Coll.).

The Constitutional Court, whose plenum is now reviewing Act no. 148/1998 Coll. for the third time, was always assured that a new regulation would be passed soon. However, this continually did not happen. The draft act prepared by the NSO at the request of the government was presented to the Chamber of Deputies on 27 January 2005. On 30 March 2005 the Chamber of Deputies extended the validity of the Act on Classified Information to 31 December 1005 (resolution no.1619, 42nd meeting of the Chamber of Deputies, Chamber of deputies publication 735; editorial note: in the interim from the decision of the plenum to promulgation of this judgment, this Act was also approved by the Senate at its 5th meeting – see resolution no. 113 of 28 April 2005). The Constitutional Court states that the uncertainty connected to the extension of this provisional state serves neither protection of fundamental rights and freedoms nor the interest in state security. On the other hand, it is certain that the draft act presented to the Chamber of Deputies really has not yet been passed, and that the provisional state will continue.

VIII. (Conclusion)

After it was found that the Collegium does not meet the requirements for a substantively understood court as foreseen in Art. 36 par. 2 of the Charter, the Constitutional Court, according to the intent of the submitted draft act, reviewed the relationship of § 73 par. 2 of the APCI, which permits judicial review of a decision in the area of security clearances, with § 77k par. 6 of the APCI, which removes Collegium decisions from the framework of judicial review. In terms of Art. 36 par. 2 of the Charter, it appears that Collegium decisions should be subject to judicial review.

The possibility of procedural parallels suggested by the statute creates uncertainty in the question of which means for protecting his rights the affected person must exhaust before turning to a general court. This creates an undesirable uncertainty which is incompatible

both with the principles of a fair trial and with general principles on which the legal regulations of every law based state must be based. From that point of view the very existence of § 77k par. 6 is undesirable. The NSO director's arguments that Collegium decisions are res iudicata is unsustainable from a constitutional viewpoint. The regulation violates the constitutional principles of legal certainty and foreseeability of law.

The Constitutional Court states that the prohibition of judicial review provided by the still-valid § 77k par. 6 of the Act on Protection of Classified Information is inconsistent with the constitutional order, because it conflicts with the constitutionally guaranteed right to judicial protection (Art. 36 par. 2 of the Charter) and also conflicts with the principles of legal certainty and foreseeability of law which follow from the concept of a law based state (Art. 1 par. 1 of the Constitution of the Czech Republic). This statement is not an expression of underestimating the security interests of the Czech Republic, the ensuring of which, after all, makes possible the peaceful implementation of the fundamental rights and freedoms, but is an expression of respect to the fundamental rights and freedoms, among which the right to judicial protection plays an irreplaceable role. It is not the Constitutional Court's role to participate in the legislative process, and it can not predict the form of the regulation which will go into effect after 31 December 2005; nevertheless, in view of the objections contained in the statements of the parties, it will recapitulate some of the reasons (apart from those mentioned above) which led it to issue its previous judgments.

In the matter Pl. ÚS 16/99 the Constitutional Court stated that the Convention "clearly requires that a court, or body similar to a court, decide on the law (i.e., about the matter itself, and not just about the lawfulness of the foregoing administrative act). Thus, in our framework a court may remove only an unlawful decision, but not one which is substantively defective. In other words, at this time the administrative consideration of a dependent body can not be replaced by independent judicial consideration. If that is so in matters of 'civil rights and obligations' and 'administrative punishment' under the Convention, that state of affairs is unconstitutional; in other matters it will stand" (in Collection of Decisions, vol. 22, p. 329, no. 276/2001 Coll.).

The Constitutional Court is aware of the delicacy of the problem, and to a certain degree understands the NSO fear of marring the purpose of the APCI, which is protecting the security of the Czech Republic. In any case, in the matter file no. Pl. ÚS 11/2000 it was found that the area of security clearances is sufficiently unique that "even from a constitutional law viewpoint it is not possible to guarantee all the procedural rights of these person in such a degree as with other professions and the labor disputes of their employees. On the other hand, however, even the unique aspects of protection of classified information can not lead to a conscious resignation of constitutional protection fo the rights of the persons subject to clearance. Thus, insofar as Art. 36 par. 1, 2 of the Charter and Art. 6 par. 1 of the Convention guarantee everyone the fundamental right to a fair trial and if review of decisions concerning fundamental rights and freedoms under the Charter can not be excluded from judicial review, in this case too the legislature must guarantee, in this case too, review of administrative decisions by an independent judicial

body, although a non-ordinary type of proceedings which will sufficiently differentiate individual cases can not be ruled out. The current legal framework has the consequence that in the process of conducting a security clearance there is considerable concentration of power in one body of the executive branch, and its decision can palpably affect the individual sphere of the person subject to clearance." (in Collection of Decisions, vol. 23, p. 105, no. 322/201 Coll.). However, the proceedings before the Collegium which were later introduced did not meet these requirements. In view of the comment form the Regional Court in Brno, the Constitutional Court considers it appropriate to add that the notice of non-issuance of certification, or notice of revocation of clearance, must be considered a decision which can be contested by an administrative complaint (analogously, judgment of 25 November 2003, file no. I. ÚS 577/01 in Collection of Decisions, vol. 31, p. 223). In the matter file no. II. ÚS 28/02 it was stated that "The NSO's deciding that a cleared person ceased to meet the conditions provided in § 18 of Act no. 148/1998 Coll. is, by its nature, also a decision which concerns Art. 26 par. 1 of the Charter." (judgment of 25 June 2003, Collection of Decisions, vol. 30, p. 447).

As regards the NSO's concerns about expanding the circle of persons who become acquainted with classified information in court proceedings, we can state that in the matter Pl. ÚS 41/02 (cf. judgment of 28 January 2004 in Collection of Decisions, vol. 32, p. 61, no. 98/2004 Coll.) the question of giving access to classified information to the defendant and his defense counsel was addressed in great detail. The Constitutional Court pointed out the way this question was addressed in the Civil Procedure Code and the Administrative Procedure Code, and did not find any reason why these regulations should not apply to all court proceedings. At the same time, it is indisputable that a judge too must maintain confidentiality, and therefore one can not speak of a a violation or endangerment of security if a judge becomes acquainted with classified information during proceedings.

The Constitutional Court has no reason to diverge from these conclusions, and it states that it considers judicial review of the process of security clearances to be compatible with the interest in the security of the CR and with the interest in its international trustworthiness; one can imagine a regulation which, while limiting access to classified information in judicial review in accordance with the principle of proportionality, chooses a differentiated approach, so that the scope of any limitation of a fundamental right in a particular case will correspond as much as possible to the degree of gravity of the protected interest. Classified information reviewed during judicial review must also be effectively protected, but one can hardly make a rule that makes classified information inaccessible to judicial review.

IX. (obiter dictum)

It remained to evaluate whether proceedings before the Collegium are necessary, only as obiter dicta, usable in the already ongoing parliamentary process of passing the government draft act on protection classified information and on security qualification

(Chamber of Deputies publication no. 880 - see www.psp.cz Parliament of the Czech Republic, Chamber of Deputies from 2002). Thus, it was necessary to apply the test of proportionality to §§ 77a to 77k of the APCI.

The Constitutional Court has considered the test of proportionality, which in continental and Anglo-Saxon law is one of the standard instruments used by the courts in evaluation the conflict of a public interest with individual rights or freedoms in many of its judgments (see also decisions of the Polish and Slovak constitutional courts, as well as numerous decisions of the ECHR). In its judgment of 13 August 2002, file no. Pl. ÚS 3/02, the Constitutional Court, with reference to the preamble and first article of the Constitution of the Czech Republic, stated that in cases of conflict between fundamental rights or freedoms with a public interest, or with other fundamental rights or freedoms, "it is necessary to evaluate the purpose (aim) of that interference in relation to the means used, and the measure for this evaluation is the principle of proportionality (in the wider sense), which can also be called a ban on excessive interference in rights and freedoms. This general principle contains three criteria for evaluating the admissibility of interference. The first of these is the principle of the capability of meeting the purpose (or suitability), under which the relevant measure must be capable of achieving the intended aim, which is the protection of another fundamental right or public good. Next is the principle of necessity, under which it is permitted to use, out of several possible ones, only the means which most preserve the affected fundamental rights and freedoms. The third principle is the principle of proportionality (in the narrower sense), under which detriment in a fundamental right may not be disproportionate in relation to the intended aim, i.e. the negative consequences of measures limiting fundamental human rights and freedoms may not, in cases of conflict between a fundamental right or freedom with a public interest, exceed the positive benefits represented by the public interest in these measures" (in Collection of Decisions, vol. 27, p. 177, Collection of Laws no. 405/2002).

The Constitutional Court also states that ensuring the security of the state is certainly a legitimate aim. However, the constituted proceedings before the Collegium do not meet the requirements of the criteria of capability of meeting the aim (or suitability), under which the relevant measure must be capable of achieving the intended aim, which is protection of another fundamental right or a public interest. Although it permits achieving protection of the interest in security, it is not able to meet the requirements of Art. 36 par. 2 of the Charter and ensuring judicial protection to rights which could be affected in connection with security clearances. This aim can best be achieved by judicial review, whose role a review conducted by the Collegium is not capable of replacing.

In a situation where a Collegium decision must be subject to judicial review, it is evident that proceedings before the Collegium will also not hold up in terms of the criteria of necessity, because they must be further reviewed by a court, and implementation of these proceedings only increases the number of persons who become acquainted with both classified information (similarly, see the above mentioned answer to the submitted questions from the NSO director), and with private data about the person undergoing clearance (Art. 10 par. 2 and 3 of the Charter). We must add that Art. 7 par. 1 of the

Charter, guaranteeing the inviolability of privacy, also gives rise to both the maxim of limiting the number of person who have access to information about the person undergoing clearance (often of a highly intimate nature) and the necessity of ensuring independent review of the entire process. Under the principle of necessity, only the most sparing – in relation to the affected fundamental rights and freedoms – of several possible means may be used. Proceedings before the Collegium are not such a means. Because the Constitutional Court concluded that proceedings before the Collegium do not meet the criteria of suitability and purposefulness, there was no point in reviewing whether the proceedings would meet the principle of proportionality in the narrow sense. The Constitutional Court only points out that according to NSO information, from November 1998 to February 2002 security clearances affected 15,352 individuals and 563 "organizations" (see resolution no. 274 of the National Security Council of 27 March 2002, available at www.vlada.cz). Proceedings before the Collegium are superfluous, and in view of their failure to meet the criteria of proportionality, it can not be said that this superfluity is harmless.

For all the foregoing reasons the Constitutional Court annulled § 77k par. 6 in Act no. 148/1998 Coll., on Protection of Classified Information and Amending Certain Acts, as amended by later regulations as of the day this judgment is promulgated. In view of the fact that another provision in the Act serves the purpose of the deleted provision, and the Act itself will cease to be in effect on 30 June 2005, the Constitutional Court found no reason to postpone the execution of this judgment.

Notice: Decisions of the Constitutional Court cannot be appealed (§ 54 par. 2 of the Act on the Constitutional Court).

Brno, 26 April 2005