DECISION

No. 5
Sofia, 03 January 2006

IN THE NAME OF THE PEOPLE

The Supreme Administrative Court of the Republic of Bulgaria - Fifth Division, in a court sitting on the fourteenth of November in the year two-thousand and five, in a panel composed of:

PRESIDING JUDGE: VANYA ANCHEVA
PANEL MEMBERS: YULIA KOVACHEVA, IVAN RADENKOV

in the presence of court stenographer Iliana Ivanova, and with the participation of prosecutor Nikolay Nikolov, heard the report by Presiding Judge VANYA ANCHEVA on Administrative Case No. 4268 of 2005**.**

These proceedings were held pursuant to Art. 33 et seq. of the Supreme Administrative Court Act (SACA). The case was initiated by a cassation appeal by Krasimir Stoyanov, chief secretary of the president of the Republic of Bulgaria, against a decision of 28 February 2005 on Administrative Case No. 1380/2004 by the Sofia City Court (SCC).

The decision under appeal repealed as unlawful an refusal with outgoing No. 31-00-9 of 09 March 2004 by the chief secretary of the president, in which, on the basis of Art. 37, Para. 1, Item 1 of the APIA, Zoya Dimitrova Ivanova, a journalist from *Monitor* newspaper, was refused access to a report prepared jointly by the National Intelligence Service (NIS) and the National Security Service (NSS) on the orders of the president and concerning "the participation of Bulgarian individuals and corporations in the oil trade with Iraqi companies or state bodies or representatives during the regime of Saddam Hussein."

The cassation appeal claims that the decision by the SCC under appeal is invalid – under the cassation grounds in Art. 218b, Para. 1, letter "b" of the Civil Procedure Code (CPC), in conjunction with Art. 11 of the SACA. Arguments are introduced regarding the judgment's incorrectness due to violations of the substantive law and fundamental violations of the rules of court procedure – which are grounds for repeal under Art. 218b, Para. 1, letter "c," the first and second propositions.

The claimed inadmissibility of the SCC decision under appeal is based on the contention that refusal No. 31-00-9 of 09 March 2004 was not subject to appeal, since it was made by the chief secretary under authority explicitly delegated to him by the president, whose acts, according to Art. 3, Item 1 of the Administrative Procedure Act (APA) are not subject to appeal. He claims that the legal right for demanding access to the requested information was lacking, as was the right to appeal the refusal to provide access to it. In this way the conclusion is supported that the decision of the court of first instance, which involves an appeal against that refusal, is inadmissible. As a third basis for its inadmissibility, it is emphasized that the court of first instance

in its decision ruled on an request that was never presented, in not limiting the boundaries of the appeal's subject matter to requiring the president to present a refusal to the requested information, but rather returning the file to the chief secretary for new processing.

Eventually in his arguments about the admissibility of the disputed court ruling, the cassation appellant complains that the SCC decision was incorrect to do a fundamental violation of the rules of court procedure in the form of the absence of motivation for rejecting arguments made by him. He finds that violations of the material law were committed, reflected in the citation of a nonexistent normative act, which is not in accordance with the provisions of Art. 15, Para. 3 of the APA, which does not distinguish information according to its material carrier, as well as the court's conclusion that the refusal under appeal was not motivated to do the failure to cite the legal text that served as the basis for the classification of the requested information.

In a court sitting on 14 November 2005, the cassation appellant was represented by legal counselor Leskovska, who defended the cassation appeal and requested that the decision under appeal be repealed as inadmissible and overturned is incorrect. She submitted written notes that reproduced the arguments set out in the cassation appeal.

The respondent to the appeal, through her authorized legal representative, contests the cassation appeal and requests that the SCC decision under appeal be left in force. She disputes the arguments set out in the cassation appeal, emphasizing that acts by the chief secretary of the president are subject to appeal on general grounds. She claims that under Art. 41, Para. 3 of the APA the court is not restricted to rule only on the subject matter of the complaint, but is required to conduct a judicial review on the legality of an act under appeal. She agrees with the conclusion reached by the court of first instance that the appealed refusal was not motivated in accordance with the requirements in Art. 38 of the APIA. Written notes were submitted which develop and support this viewpoint.

The representative of the Supreme Administrative Prosecutor's Office finds the appeal justified. He considers the decision under appeal inadmissible due to the lack of a justified legal interest, stemming from the nature of the requested information as classified under the force of the law.

The Supreme Administrative Court (SAC), Fifth Division, has established that the cassation appeal was submitted in the timeframe under Art. 33, Para. 1 of the SACA, against a court ruling that is subject to cassation appeal by the proper party, who has a legal right to appeal; thus, it is procedurally admissible.

Examined on its merits, the appeal is justified.

Given the factual context established by the SCC, which is not disputed by the parties, the present court of cassation finds the decision under appeal incorrect because of a fundamental violation of the rules of court procedure. The argument introduced in the cassation appeal is justified that the court did not offer motivations as to why could not accept the arguments and the legal conclusions of the respondent in the court of first instance. From the facts of the case is clear that the parties made contradicting claims regarding the character of information to which access was being requested. In

violation of the principle of the judicial basis of the administrative process, which require the court to conduct a full check of the legality of the administrative act under appeal, the SCC did not exercise its authority under Art. 41, Para. 3 and 4 of the APIA to check the security stamp marking on the requested information. This check would have provided an answer to the basic disputed question between the parties and what if confirmed or refuted the legality of the appealed refusal. Indeed, in the wording of the law of this hypothesis is seen only as a legal possibility for the court (which is clear from the phrase "can…"), but in cases where the question is not clarified by the factual aspects, the use of this authority should be included in the scope of the check under Art. 41, Para. 3 of the APA and becomes a requirement for the court. The fact that the SCC did not research this basic question constitutes a violation of the rules of court procedure, which influenced the contents of the final court ruling. For this reason it is a fundamental violation which provides grounds for the repeal of the decision.

Irregardless of this result, for the sake of the clarity of the explanation, the text below will briefly comment on the remaining arguments by the cassation appellant, with which the present judicial panel does not agree.

First, it must be noted that the appeal against the refusal by the chief secretary to provide access to request a public information is justified. In his capacity as a public law subject, the president of the republic is an applied subject under the APIA on the basis of Art. 3, Para. 2, Item 1 of the law, irregardless of the fact that he is not a body of the executive power. This being the case, if the refusal had been issued by the president himself, it would not be subject to appeal, since the procedure for appeal should follow the APA or the SACA) (Arg.: Art. 40 of the APIA); however, Art. 3 of the APA explicitly excludes the appeal of acts by the president, while the exhaustive list in Art. 5 of the SACA does not include such acts. In the present case, however, the appealed refusal was issued by the chief secretary of the president, whom such authority is been delegated, as subject to appeal an independent legal basis. Unlike an authorization in which "the authorized party acts in the name and on the account of the represented party… in the case of the delegation, the activity is made in the name of the body to which the authority was delegated" (TP No. 4 of the SAC) and the appealed act must be evaluated according to the legal status of the body that issued it, and not according to the status of the body that delegated such authority. In a concrete case, the chief Secretary acted in his own name and exercised his own competency, since the conditions for the admissibility of the appeal against refusal No. 31-00-9 of 09 March 2004 should be evaluated with respect to the chief secretary, and not with respect to the president. In practice this means that the interdiction in Art. 3, Item 1 of the APA is not applicable in this case, since it concerns "acts by the President of the Republic," and not acts within the competency of the president that were issued by another body in its own name.

Second, the claim by the cassation appellant is unjustified that the court ruled out a request that was not in its purview. As was discussed above, in the process of administrative case the court must conduct a complete judicial review of the act under appeal; it is not restricted to the arguments introduced in the appeal they can exercise its rights under Art. 42 of the APA, without needing the corresponding request from the appellant and can rule on grounds not indicated by the account. Thus, the court is subordinate only to law and acts in accordance with its internal conviction,

irregardless of the appellant's requests and the arguments that support them.

The court cannot agree with the claim made in the appeal regarding the lack of legal right to seek the requested information, since that information constitutes "a state secret or another secret protected by the law." In this respect, the citation of Item 9 of Section II of Appendix No. 1 to Art. 25 of the Protection of Classified Information Act (PCIA) is unjustified. That legal text is not relevant to the current case, because it refers to "reports… concerning the operative work of the security services," while this case the subject of the request for access was not the operative work of those services, but only the results of it. Even if we held that the risk of revealing information protected by Item 9 might arise from the distribution of the result, this risk could be avoided by the provision of partial access according to Art. 37, Para. 2 of the APIA. Furthermore, here once again the question arises of the legality of defining the information as classified, which, in violation of the principle of the judicial basis of the administrative process, was not investigated by the court of first instance.

The cassation appellant's arguments regarding violations of the material law must also be rejected.

The citation of a nonexistent law on the part of the SCC is due to an obvious factual mistake. It does not negate the formed will the court, whose content to unambiguously be understood from the context of the motivations expressed.

There are two fundamental precisions in the claim by the cassation appellant that "the lawgiver did not provide an opportunity to evaluate whether or not the information object to fight in a report by the security services and classified in the stipulated manner constitutes confidential information such as a state secret. This is so under the force of the law." First, there is no data suggesting that the information was classified in the stipulated manner, and the fact of its classification and the legality of that procedure are based solely on the claims made by the body refusing access. As noted above, this viewpoint that the information should be considered classified under the force of law is based on an incorrect interpretation of Item 9 of SectionII of the Appendix No. 1 to Art. 25 of the APIA and is not shared by the current judicial panel. Second, if the proper classification information has not been proved, the lawmakers explicitly give the court to positively to evaluate legality – Art. 41, Para. 3 and 4 of the APIA.

the distinction between information and its material carrier does not affect the exactness of the request for access and its suitability to be satisfied by the subject obliged under the APIA, since from the text that is unambiguously clear exactly what public information is being requested. This sense is reflected in the constant practice of the SAC (see, for example, Decision No. 2113 of 09 March 2004 on Administrative Case No. 38/2004, five-member panel).

The court of first instance's conclusion that in cases under Art. 37, Para. 1, Item 1 of the APIA the refusal for access to information must be motivated by an indication of the legal as well as factual grounds does not constitute a violation of the material law. The cassation appellant was unjustified in assuming that the provisions in Art. 15, Para. 3 of the APA or applicable in this case. There exists an explicit provision in a

specialized law (Art. 38 of the APIA), which stipulates indication of the factual basis as well in the case of a refusal. In so far as one of the hypotheses for a refusal is precisely the classified status of the information, which is stipulated in the preceding legal text (Art. 37, Para. 1, Item 1 of the APIA), the explicit will of the lawgiver is for the factual basis to be indicated in such a case as well. The priority of specialized legislation over general legislation excludes the possibility to apply Art. 15, Para. 3 of the APA in this case.

Given the existing factual context and with respect to the arguments set out, the president judicial panel finds that in order to make the correct decision on the legal dispute raised in this case, it is necessary to clarify the question of the nature of the requested information in the legality of its classification. The Court of first instance did not fulfill its procedural requirements to investigate and collect facts in this regard, which constitutes a fundamental violation of the rules of court procedure. For this reason the appeal decision must be repealed and returned for examination by another panel of the SCC, which will conduct the necessary investigation in the case.

In light of the above-mentioned considerations and on the basis of Art. 40, Para. 2, пр. 1-во of the SACA, the Supreme Administrative Court, Fifth Division

HEREBY RULES:

TO REPEAL the decision of 28 February 2005 on Administrative Case No. 1380/2004 by the Sofia City Court, Division III-z.

TO RETURN the case to the Sofia City Court for new examination by another panel according to the instructions given in the present decision.

The decision is not subject to appeal.

True to the original,

PRESIDING JUDGE: (signature) Vanya Ancheva
PANEL MEMBERS: (signature)Yulia Kovacheva, (signature) Ivan Radenkov