# GUARANTEES EQUIVALENT TO THE RIGHT TO A FAIR TRIAL IN THE MATTER OF CHALLENGES TO THE WITHDRAWAL OF SECURITY CERTIFICATES ISSUED BY THE OFFICE OF THE NATIONAL REGISTER OF STATE SECRET INFORMATION

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**Abstract**

*Documents of a classified nature may be of a contentious nature, the paper focusing on those concerning the service relationships of active officers.*

*In the event of a dispute arising, the question arises as to the extent to which a plaintiff is able to mount an effective defence if he cannot know their content and whether he can be granted guarantees equivalent to respect for the right to a fair trial.*

*Restricting the lawyer's access to important documents in a case affects to a large extent the represented party.*

*In the European countries, the situation regarding conditional access to classified documents from the point of view of lawyers and parties against whom such documents are issued is similar, in that it is recognised that the principle of adversarial proceedings and the rights of the defence must be limited because of the need to protect national security.*

*From a procedural point of view, it is important that the general principles of adversarial proceedings, equality, orality, non-disclosure and publicity are respected in every dispute.*

*In this context, noting the difficulties that arise in the work of the court due to restricted access to classified documents, I have tried to identify guarantees equivalent to respect for the right to a fair trial in the cases referred to in the title of the paper, analysing national case law, that provided by the ECtHR and studies of doctrine.*

*In accordance with these, I have developed equivalent guarantees compatible with Romanian law: the possibility of challenging the classification of the document, the request for declassification of classified information, the right of the interested party to be assisted by an ORNISS-certified lawyer and the possibility for the accused to participate in proceedings which reveal the content of classified documents.*

**Keywords:** *classified documents, fair trial, equivalent guarantees, access, defence.*

## 1. Introduction

Classified documents are subject to a special regime in view of the areas to which they relate and the need to protect the information they contain.

However, there are situations in which they become contentious, such as those relating to the service relationships of officers in the Ministry of National Defence, the Ministry of the Interior, the Romanian Intelligence Service and others.

In the event of a dispute arising, the question arises as to the extent to which a plaintiff is able to mount an effective defence if he cannot know their content and whether he can be granted guarantees equivalent to respect for the right to a fair trial.

Restricting the lawyer's access to important documents in a case affects to a large extent the represented party, who has to bear the consequences of this impediment and can thus only provide a poor defence, as the charges against him are based on evidence which is classified material.

In the European countries, the situation regarding conditional access to classified documents from the point of view of lawyers and parties against whom such documents are issued is similar, in that it is recognised that the principle of adversarial proceedings and the rights of the defence must be limited because of the need to protect national security.

From a procedural point of view, it is important that the general principles of adversarial proceedings, equality, orality, non-disclosure and publicity are respected in every dispute.

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In this context, noting the difficulties that arise in the work of the court due to restricted access to classified documents, I have tried to identify guarantees equivalent to respect for the right to a fair trial in the cases referred to in the title of the paper, analysing national case law, that provided by the ECtHR and studies of doctrine.

In accordance with these, I have developed equivalent guarantees compatible with Romanian law: the possibility of challenging the classification of the document, the request for declassification of classified information, the right of the interested party to be assisted by an ORNISS-certified lawyer and the possibility for the accused to participate in proceedings which reveal the content of classified documents.

## 2. Contents

Classified documents in Romania are divided in two classes, according to art. 15 of Law no. 182/2002 on the protection of classified information, namely state secrets and service secrets. In turn, according to art. 15 letter (f) of Law no. 182/2002 on the protection of classified information, state secret information has three levels, as follows: strictly secret of particular importance, being information whose unauthorised disclosure is likely to cause exceptionally serious damage to national security; strictly secret, being information whose unauthorised disclosure is likely to cause serious damage to national security; and secret, being information whose unauthorised disclosure is likely to cause damage to national security. A special category of information is represented by service secrets, which, according to art. 15 letter (e) of Law no. 182/2002 on the protection of classified information, are information whose disclosure is likely to cause damage to a public or private legal person.

According to art. 28 para. (1) of the Law no. 182/2002 on the protection of classified information, access to state secret information is allowed only on the basis of a written authorization issued by the head of the legal entity holding such information, after prior notification to the Office of the National Register of State Secret Information.

If, extrajudicially, the existence of objective limits on access to the content of classified documents is justified by the sensitive area to which they relate (national defence, communications systems, geospatial products, national mineral reserves, aerophotogrammetric records, systems and plans for the supply of electricity, heat, water and other agents necessary for the operation of objectives classified as state secrets, monetary policy, foreign relations, scientific research in the field of nuclear technologies, as provided for in art. 17 of Law no. 182/2002 on the protection of classified information), when the same documents are to be submitted as evidence in a dispute, the question arises as to the balance to be maintained between restricted access to these documents and the right to a fair trial.

According to art. 53 of the Romanian Constitution, restriction of the exercise of certain rights, such as the right of access to evidence on which the opposing party bases its defence, may be recognised, but only if all the conditions imposed by the constitutional norm are verified. Thus, the restriction of the exercise of certain rights must be imposed only by law, must pursue a legitimate aim, i.e. it must be necessary for the protection of national security, public order, public health or morals, the rights and freedoms of citizens; the conduct of criminal investigations; the prevention of the consequences of a natural disaster, a disaster or a particularly serious disaster; it must be necessary in a democratic society; and the measure must be proportionate to the situation which gave rise to it, it must be applied in a non-discriminatory manner and without prejudice to the existence of the right or freedom.

In the particular case under consideration, restricted access to documents containing classified information is established by law, namely Law no. 182/2002 on the protection of classified information, the restriction of the right of access pursues a legitimate aim, namely the protection of the areas described in art. 17 of Law no. 182/2002 on the protection of classified information, the measure is necessary and proportionate.

As a general rule, any interest in classified documents is subject to the need-to-know principle.

The principle is presumed to be verified only in respect of certain persons involved in the performance of the act of justice. Thus, judges[1], prosecutors and assistant judges of the High Court of Cassation and Justice,

[1] The need to recognise the judge's access to classified information, by virtue of the office he or she holds, was dictated by the imperative to respect the principle of random assignment. In this regard, Romanian doctrine has shown that, otherwise, the files assigned to a judge who does not have an ORNISS certificate or access authorisation would have been obliged to forward the file administratively to another court that has the legal clearance. M. Jebelean, *Classified information. Commented judicial practice,* Hamangiu Publishing House, Bucharest, 2022, p. 168.

under article 7 para. 4 of Law no. 182/2002 on the protection of classified information, have guaranteed access to classified information, only with the simple reservation of appointment and oath and with an underlying condition that such information be related to files in progress, which is another facet of the need-to-know principle.

The legislative solution has been criticised in the literature, arguing that „*the criteria for appointment as a magistrate cannot be equated with those required to obtain authorisations for access to classified information*"[2]. Although the authors' premise is correct, the possible consequences they foresee are not very plausible, *i.e.*, the possibility of a leak of information in the event that the magistrate's professional probity is questionable. I consider that in this case the party has access to the classic procedural guarantees, namely the formulation of a request for recusal, which prevents the magistrate from having access to classified information until the resolution of the incidental request. Obviously, if it is rejected, the presumptions of impartiality and independence are reinforced. On the other hand, magistrates do not have general access to all classified documents, but only to those relating to a case in progress, by virtue of the need-to-know principle.

The law ignores the situation of court auxiliary staff, of judges' assistants at tribunals[3], specialised tribunals and courts of appeal appointed under the terms of Law no. 393/2003, and of the defenders of parties involved in this type of litigation. While for the first two categories of persons the lack of access to classified information as of right generates only problems relating to the internal organisation of the court and the management of the act of justice, for the last category of persons there are major inconveniences relating to the impossibility of organising the defence effectively.

Art. 7 of Law no. 182/2002 on the protection of classified information has been the subject of numerous complaints of unconstitutionality[4], but the CCR practice was unanimous in rejecting the invoked exceptions, on the ground that[5] „*the strict regulation of access to classified information, including the establishment of conditions to be met by persons who will have access to such information, does not have the effect of effectively and absolutely blocking access to information essential to the resolution of the case, but creates precisely the regulatory framework in which two conflicting interests - the private interest, based on the fundamental right of defence, and the general interest of society, based on the need to defend national security - coexist in a fair balance which satisfies both legitimate interests, so that neither is affected in substance.*"

Undoubtedly, restricted access cannot equate to lack of access to classified information, but the time required to go through the legal procedures can sometimes have negative consequences that are difficult to remove in terms of the conduct of a trial, whether civil or criminal, especially from the perspective of the parties involved.

From the perspective of compliance with art. 6 ECHR, in addition to access to an independent and impartial court, it must be verified that the parties have benefited from procedural fairness, in other words, whether the evidence has been administered fairly, whether they have had access to the evidence on which the opposing party is building its defence.

The fact that the courts hearing a particular case have unlimited access to classified information is not such as to remove the obligation to produce evidence to the opposing party. However, in this case, in addition to the right to information, which is part of the right to a fair trial guaranteed by art. 31 para. (1) of the Romanian Constitution, there is also an active obligation to protect national security. In this hypothesis, although they are not binding[6], even for the signatory states[7], the Johannesburg Principles offer a way of acting.

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[2] M. Mareș, D. Lupașcu, *Protection of Classified Information. Lawyers' access to classified information in criminal proceedings*, Law Journal no. 6/2017.

[3] Access to classified information is also conditional for registrars and clerks involved in the work of the Classified Documents Department. The same conditions apply to the related staff of this department.

[4] CCR dec. no. 84 /18.02.2020, published in the Official Gazette of Romania no. 639/21.07.2020; CCR dec. no. 199/24.03.2021, published in the Official Gazette of Romania no. 640/30.06.2021; CCR dec. no. 810/07.12.2021, published in the Official Gazette of Romania no. 190/25.02.2022; CCR dec. no. 805/07.12.2021, published in the Official Gazette of Romania no. 247/14.03.2022; CCR dec. no. 183/31.03.2022, published in the Official Gazette of Romania no. 868/02.09.2022; CCR dec. no. 310/19.05.2022, published in the Official Gazette of Romania no. 922/20.09.2022; CCR dec. no. 498/02.11.2022, published in the Official Gazette of Romania no. 39/12.01.2023; CCR dec. no. 546/24.10.2023, published in the Official Gazette of Romania no. 140/19.02.2024.

[5] CCR dec. no. 546/24.10.2023, para. 15, published in the Official Gazette of Romania no. 140/19.02.2024.

[6] Protection of Classified Information, Practical Guide developed by the Romanian Intelligence Service, available online at *www.sri.ro*, p. 8, 9.

[7] V. Ojog, *Access to Information and Protection of Classified Information*, Moldoscopie, 2012, no. 4 (LIX), p. 40.

*Principle 15: General rule on disclosure of secret information „No person shall be punished on national security grounds for disclosure of information if (1) the disclosure of the information has not in fact caused injury and is not likely to harm the legitimate interest of national security, or if (2) the public interest in knowing the information outweighs the injury caused by its disclosure".*

The rule outlined above is certainly compatible with the principles of the rule of law, but it is vulnerable because of its high degree of abstraction. Thus, the absence of damage cannot always be assessed at the time when the secret information was disclosed. In addition to possible instantaneous damage, additional damage may occur over time, the magnitude of which may be much greater than the primary damage. Similarly, the probability of the degree of damage to national security is only an estimated and uncertain criterion, since what is improbable at one point in time may become certain at a later point in time. There is also a lack of concrete criteria to verify whether the public interest in knowing the information outweighs the harm caused by its disclosure, and the application of this principle on a case-by-case basis can be arbitrary.

In current judicial practice, in order to respect the right to a fair trial, courts have tried to identify adequate procedural safeguards to ensure an effective degree of access. The jurisprudential orientation was more accentuated after Romania was condemned at the ECtHR for not respecting the right to a fair trial, so that the courts no longer limited themselves to a very brief analysis of the application, but tried to explain in fact and in law the solution they opted for[8].

Thus, the claimant must be informed that he/she has the right to be assisted or represented by a lawyer who holds a security certificate and, if he/she wishes to do so, the UNBR may be requested to provide a list of lawyers who meet these conditions. Also, where the lawyer of the party concerned does not have an ORNISS certificate, he or she may be given the time necessary to obtain it by postponing the case. It is true that, even if the representative's approach were successful, he would be bound by the obligation not to disclose classified information to authorised persons, including his client. However, a qualified defence is not limited to the mere presentation of evidence, and the lawyer has the right and the obligation to propose to his client legal strategies, in relation to the charge made against him, which are likely to achieve his legal interest.

An attempt to improve lawyers' access to evidence representing classified documents took place in 2015, when a protocol was concluded between UNBR and ORNISS, the objective of which was to facilitate access to obtaining access authorisations. However, as the information gathered showed, in reality the situation of lawyers has improved only slightly. The local bar associations, to which the lawyers concerned belong to, collect the documents needed to obtain access authorisations from said lawyers and submit them to the UNBR. From there, the documents are sent to the ORNISS, which carries out all the checks required by the relevant legislation, and finally an opinion is issued[9]. If the opinion is positive, the National Union of Romanian Bars and Law Societies can issue an access authorisation, valid for 4 years.

As long as the same steps are required for the issuance of the access authorisation as for the issuance of the security certificate, the only positive aspect of the protocol remains the inclusion of the UNBR and local bar associations in the document circuit, which results in easier access to procedures for lawyers.

The interested party may also request the declassification of classified information.

According to art. 24 para. 4 of Law no. 182/2002 on the protection of classified information, state secret information may be declassified by Government decision, at the reasoned request of the issuer, in three generic situations referred to in art. 20 para. (1) of GD no. 585/2002 for the approval of the National Standards for the protection of classified information in Romania, i.e. the expiry of the classification period, the absence of damage caused by the disclosure of the information to national security, defence of the country, public order, or of the interests of the public or private persons holding the information; if the character of a classified document has been assigned by a person not empowered by law.

In the present analysis, the claims of interested persons should take into account the second hypothesis, the other two being in reality particular cases in which the claimant is unlikely to find himself. Thus, the classification periods are long, *i.e.*, 100 years for information classified strictly secret of particular importance, 50 years for information classified strictly secret and 30 years for information classified secret, as provided for in

[8] Regarding this matter, CA Alba Iulia, dec. no. 148/2024, Case 312/85/2021, CA Ploiești, dec. no. 46/2024, Case 6614/2/2018**, CA Alba Iulia, dec. no. 203/2023, Case 1436/97/2019*, accessed through rejust.ro application.

[9] *www.avocatura.com*, article date 13.08.2015.

art. 12 para. (2) of GD no. 585/2002 approving the National Standards for the Protection of Classified Information in Romania, and may even be extended under the terms of art. 12 para. (3) of the same Act.

The negative effects of withdrawing a safety certificate are immediate and it is hard to believe that the interest of the interested party can persist for so long. The interest to take legal action against an allegedly abusive action becomes actual as soon as the security certificate holder is notified of the withdrawal of the security certificate, at which point the service relationship changes due to the denial of access to classified information.

As regards the last hypothesis, although it may arise, no concrete situations have been identified in practice.

In the case of secret service information, its declassification is the responsibility of the heads of the units that issued it, in accordance with art. 23 para. (2) of the same Act.

We can see that the initiative for declassification lies with people who have no direct interest in the process. However, any delay or administrative silence may be sanctioned by the interested party by bringing a separate dispute, subject to proof of interest, i.e. that classified information is needed in another dispute.

However, as this is an administrative dispute, the conditions laid down by Law no. 554/2004 must be complied with: the preliminary procedure must be completed in accordance with art. 7 of Law no. 554/2004 and the specific time limits must be complied with. Obviously the dispute will go through two levels of jurisdiction, which will generate delays in clarifying the main dispute.

It should be emphasised that under no circumstances may the interested party directly request the court to declassify classified information, nor may the court automatically request the issuer of classified information to change the classification or declassify it. Such a legal remedy was briefly provided for in art. 352 para. 11 CPP, in, but it was declared unconstitutional by CCR dec. no. 21/2018[10]. It is therefore up to the applicant to initiate this dispute if the administrative action is not successful, *i.e.*, if, following a request to the issuer of the classified document, the latter refuses, implicitly or explicitly, to take legal steps to declassify or change the classification level.

It is also possible to challenge the necessity of classifying documents, as domestic law expressly provides for this remedy in art. 20 of Law no. 182/2002 on the protection of classified information, which stipulates that an appeal may be lodged against the classification of information, the duration for which it has been classified, and the manner in which one or other level of secrecy has been assigned, while respecting the procedural forms required by administrative litigation. However, the procedural rules imposed by Law no. 554/2004 have a dilatory effect on the process in which these documents are introduced as evidence.

A final remedy identified to give the complainant an effective opportunity to defend himself in the event of the withdrawal of his ORNISS certificate is the right to be heard on the charges made against him.

In this respect, before the ORNISS certificate is withdrawn, the holder is re-examined[11], including an interview to confirm or not the security-related suspicions it has raised. From the questions that the issuer of the certificate asks the interviewee, it is possible to identify, indirectly, the allegations that are made and thus an effective defence can be achieved. For example, if the interviewee is asked if he/she has been to certain places at a certain time, if he/she knows certain people, how he/she spends his/her free time, it is possible to identify security risks attributed to a certain person.

## 3. Conclusions

The right to a fair trial must be respected in all cases, even where there is evidence that is classified material.

However, the adversarial principle and the right to equality of arms may be subject to limitations, provided these are justified by the need to protect national security. In this case, however, the interested party must be provided with equivalent safeguards, this being the whole ECtHR practice, which confirms „the particular case in which overriding national interests are given priority in order to deny a party a fully adversarial procedure (Miryana Petrova, para. 39-40, and Ternovskis, para. 65-68)”[12]. It should be pointed out that Romanian courts, regardless of the level of jurisdiction, have unconditional access to classified information and can directly assess its relevance and merits in relation to the accusation made against the complainant.

[10] Published in the Official Gazette of Romania no. 175/23.02.2018.

[11] According to art. 167 para. (1) letter d) of GD no. 585/2002, revalidation may be carried out at the request of the unit in which the person carries out his activity, or of ORNISS, when security risks arise in terms of compatibility of access to classified information.

[12] *Regner v. Czech Republic*, para. 147. In the same sense, *Corneschi v. Romania*, *Muhammad and Muhammad v. Romania*.

I consider that the equivalent safeguards identified, namely the right of the party to be assisted by a lawyer who has access to classified information, the possibility to request declassification of classified information or to challenge its classification, the possibility to request unclassified extracts from documents or the right of the interested party to be heard on the allegations against him at the administrative stage, are capable of making up for the restrictions on classified documents.

The nominal identification of the equivalent safeguards described above may be of real help to legal practitioners and may constitute a starting point for further studies, given that to date, as has emerged from the material analysed, safeguards equivalent to due process in the matter of challenging the withdrawal of security certificates issued by the ORNISS have been briefly described in doctrinal studies.

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