Chancellor’s Year in Review 2022/2023

Security

The Chancellor of Justice regularly checks the work of those agencies that organise interception of phone calls and conversations, surveillance of correspondence, and otherwise covertly collect, process and use personal data. In other words, the Chancellor monitors that surveillance and security agencies (the Estonian Internal Security Service, the Police and Border Guard Board) do not violate people’s rights when collecting personal data. The Chancellor carries out this supervision on the basis of complaints, but also checks the activities of surveillance and security agencies on her own initiative. Under the law, the Chancellor has access to closed surveillance files. That is, she does not intervene in ongoing surveillance.

The Chancellor’s supervision focuses on whether covert measures were justified, whether they were carried out in compliance with the law and in a manner that respects people’s fundamental rights. Such control offers people a sense of security that no one is wiretapped or followed randomly and without justification and that no mass covert surveillance of people takes place in Estonia.

During the last reporting year, the Chancellor’s advisers verified how the Estonian Internal Security Service and the police stations of the Police and Border Guard Board had respected the fundamental rights of individuals when carrying out surveillance. The activities of the Military Police were also checked. No major problems were observed. The Military Police have not carried out any surveillance in recent years as there has been no need for this. Lack of practice is compensated through continuing education in cooperation with other surveillance agencies.

Since the work of the Chancellor of Justice is greatly influenced by events and crises in society, the Chancellor has received many petitions motivated by the war started by Russia against Ukraine and its effects. People who have fled Ukraine to Estonia have approached the Chancellor with various questions. People mostly seek assistance in dealing with the Police and Border Guard Board, but also in solving other vital issues.

The Chancellor has been contacted by a number of people who were denied a visa to enter Estonia due to sanctions imposed by the Estonian government. Due to the border crossing ban imposed by Estonia, many Russian citizens were unable to fulfil their obligations related to real estate located in Estonia or to take the necessary action for this purpose. This has also put apartment associations here in a difficult situation, since utility bills for apartments owned by Russian citizens have not been paid. There were also problems with students who came to Estonia from Russia and wanted to continue their studies in Estonia, but were unable to apply for a residence permit due to sanctions. Amendments to the regulation adopted by the Estonian government on 18 May 2023 helped to alleviate this situation.

Many people were concerned about delay in resolving applications for residence permits. Although, by law, an application for a residence permit must be examined within two months and this period can be extended by two months at a time, sometimes the deadlines were extended by three or four months. At the same time, people sometimes remained uninformed because they were not notified about the extension of the deadline. People were also concerned about the PBGB booking system. Namely, for a certain period the PBGB suspended the possibility of booking new time slots to apply for a residence permit. This, in turn, prevented people from accessing the procedure.

Covert processing of personal data

Supervision must help to ensure that all covert measures are carried out in accordance with applicable rules and by respecting fundamental rights. Even when the actions of the relevant agencies are formally lawful, the Chancellor tries to ensure that people’s fundamental rights are always reckoned with.

The Chancellor’s advisers checked how the Estonian Internal Security Service and the police stations of the Police and Border Guard Board (PBGB) had respected the fundamental rights of individuals when carrying out surveillance. The activities of the Military Police were also checked, with a focus on cases where data is gathered covertly.

Detailed summaries of inspection visits to surveillance agencies are not public since they contain information classified for internal use only. These summaries are sent to supervised agencies as well as public authorities (e.g. the court, as well as the Security Authorities Surveillance Select Committee of the Riigikogu) which are responsible for the legality of activities of surveillance and security agencies.

Inspection of police stations' surveillance files

The Chancellor's advisers carried out 16 inspection visits to PBGB police stations. Surveillance files opened in 2020−2022 were examined for which active proceedings had ended by the time of inspection. During that period, a total of 77 surveillance files were opened in police stations, of which 72 files were inspected.

During the inspections, the Chancellor's advisers assessed the guarantee of fundamental rights and interests of those persons who became objects of covert data collection (i.e. a surveillance measure) in the course of criminal proceedings either as suspects or as 'third parties' (e.g. by chance). Information contained in paper files as well as in the surveillance information system was examined and compared, and interviews with surveillance officials were also carried out. The assessment focused primarily on whether, in each specific case, conducting the surveillance measure while collecting information about a criminal offence had been lawful, unavoidable and necessary, and how the surveillance agencies complied with requirements to notify people about a surveillance measure.

With a view to ensuring more effective protection of the fundamental rights of individuals, the Chancellor made several proposals to the PBGB and the prosecutor's office to improve the organisation of surveillance. All proposals were based on specific circumstances identified in surveillance files and from interviews with officials.

Surveillance authorisations

A surveillance measure is lawful only if the prosecutor's office or the court has issued an authorisation meeting the statutory requirements, i.e. the requirements of form and reasoning. Authorisations for surveillance contained in the surveillance files examined were generally justified. They demonstrated that surveillance was indeed necessary to verify suspicion of a criminal offence in particular cases.

As regards comparison of the police station files inspected this year and in previous years, in conclusion it may be noted that the reasoning of surveillance authorisations has improved

year by year. Special mention should be made of those authorisations containing reasons for the necessity of a surveillance measure in line with the principle of *ultima ratio*, i.e. the existence of an overriding need for surveillance, as well as the impact of measures on the subject of surveillance and third parties linked to them.

However, not all surveillance authorisations were properly substantiated: some authorisations issued both by a court as well as a prosecutor's office were found where insufficient reasoning was given to justify an overriding need to carry out surveillance. Typically, the problem was that the *ultima ratio* reasoning was too general and did not meet the standards adopted in case-law.

In the case of unsubstantiated authorisations, it is striking that they are predominantly very voluminous and contain a comprehensive overview of prior information collected confirming suspicion of a criminal offence. However, those authorisations fail to fulfil their main function: to justify the overriding need to carry out surveillance in a particular case and in respect of a particular person.

In terms of fundamental rights protection, it is important that the authorising authority should assess and justify why it is necessary to carry out surveillance in a particular case and in relation to a particular person. The authorising authority must, in essence, weigh up the overriding need for surveillance and justify why, in a particular case, the public interest outweighs protecting the privacy or inviolability of a home or the confidentiality of communications.

Organisation of surveillance measures

Surveillance measures were generally carried out purposefully and with authorisation by a court or prosecutor's office issued in advance. Nevertheless, there were also cases where surveillance (in one case covert collection of reference material, in the other cases covert surveillance) was carried out regardless of the fact that the prosecutor's authorisation did not directly allow it. In those cases, the authority in charge of proceedings had wrongly assumed the existence of an authorisation or had failed to comply precisely with the conditions laid down in the authorisation.

The Chancellor of Justice has continually stressed that a surveillance agency must always follow the specific surveillance authorisation and its scope when carrying out any surveillance measure. In addition to compliance with deadlines, the conditions imposed on a measure by the authorising authority must be observed very carefully. If necessary, the authorising

authority can amend or clarify those conditions (e.g. by issuing a new authorisation).

Pärnu and Viljandi police stations deserve recognition for an effective and well-considered surveillance procedure. The surveillance files of both stations mostly demonstrated that surveillance proceedings had been carefully planned and justified. This testifies to the fact that all the options available to the investigating authority have been effectively used to ascertain the truth in a criminal case. The police stations in the West Prefecture excelled at drawing up files in a clear and concise manner.

However, inspection of some surveillance files raised doubts as to whether applying the surveillance measure (opening the file) was well-considered and justified in the specific case. Most problems were identified in surveillance files in Jõhvi and Narva police stations. At the same time, interviews with officials in Lääne-Harju and Ida-Harju police stations revealed that, since officers often lack theoretical preparation or experience, they do not know how to plan surveillance measures at the required level or keep surveillance files.

Examination of surveillance files revealed that not every surveillance measure had been accompanied by a substantive summary in the file. Although the situation has improved from year to year, some files did not contain a summary at all, or the summary was limited to a laconic statement that the data obtained had been transmitted to the authority in charge of proceedings digitally or added to the police database. In those cases, exhaustive assessment of whether surveillance had been lawful and justified was not possible on the basis of the surveillance file.

Notifying a surveillance measure

Under the Code of Criminal Procedure, a surveillance measure is notified to people with respect to whom the surveillance measure was carried out, as well as people identified during the proceedings whose private or family life was significantly interfered with by the measure. Notification may be postponed or waived only in specific circumstances set out by law if permission for this has been given by a prosecutor or the courts.

People were generally informed of surveillance activities on time. This gave people caught in the sphere of influence of surveillance a possibility to effectively protect their rights. Only at Jõhvi police station was notification delayed in some cases. One person was notified of surveillance more than a year later than the prescribed time limit, while in the other four cases notice was sent to people with a delay of 3.5 to 8 months.

However, the wider problem was that the notice sent to people did not meet the statutory requirements: for example, instead of the period of surveillance, the notice indicated the period of validity of the authorisation. Some notices did not clearly indicate what kind of surveillance was actually carried out. Sometimes no distinction was drawn as to whether notification was sent to the person directly subject to surveillance or a person whose right to inviolability of family or privacy was significantly affected by surveillance. A misleading notice does not enable the recipient to understand the circumstances of surveillance concerning them or to decide whether and how they need to protect their rights.

Inspection of Estonian Internal Security Service surveillance files

The Chancellor's advisers examined the surveillance files opened in 2020–2022 at the Estonian Internal Security Service and, on the basis of these, assessed whether surveillance had been carried out lawfully.

When inspecting the surveillance files, the advisers focused on the justification for opening a surveillance file as well as justification for authorising a particular surveillance measure, and whether surveillance had been carried out in accordance with authorisation granted by a judge or prosecutor and within the time limit specified in the authorisation. Also monitored were whether the fundamental rights of third parties were protected and whether all the requirements for notification of surveillance and presentation of the collected material were met. Additionally assessed was whether the Chancellor's previous comments and proposals had been taken into account and to what extent surveillance files had been checked by the prosecutor's office.

Opening of all the surveillance files examined had been justified. Processing the files had been in compliance with the requirements of the Code of Criminal Procedure and other legislation. Based on the files, it may be concluded that without surveillance and without interfering with people's fundamental rights it would indeed have been complicated to gather the necessary evidence to prove suspicion of a criminal offence.

Surveillance had been carried out under authorisation by a prosecutor and a preliminary investigation judge and by complying with the conditions and time limits set out in the authorisation. The surveillance authorisations provided reasoning as to the circumstances under which a particular surveillance measure was authorised. In general, the authorisations complied with the rules adopted in case-law, i.e. they set out in sufficient detail why

surveillance was absolutely necessary. In only one file were some authorisations found where the reasoning given by the preliminary investigation judge was too scant and too general. Why it was absolutely necessary to carry out each specific measure authorised had not been justified in the operative part.

All the surveillance files of the Estonian Internal Security Service contained substantive summaries of surveillance measures, enabling an overview as to the persons in respect of whom and to what extent surveillance had been carried out.

The summaries also reflected whether and what evidence or other relevant information was obtained through the measures. Including such summaries in the file is extremely important in terms of fundamental rights protection since it enables retroactive – and without having to re-examine the materials in the criminal case – assessment of the effectiveness of the surveillance measure, the intensity of instances of interference involved in it, and other essential facts.

People were notified of surveillance in a timely manner. Everyone who so wished was also enabled to access data collected on them in the course of surveillance. Timely notification and access to surveillance material ensures effective protection of the fundamental rights of persons caught in the sphere of influence of surveillance. Inter alia, this provides the right to contest the lawfulness of surveillance measures for suspects and the accused.

Inspection visit to the Military Police

The Chancellor's advisers familiarized themselves with the legislation governing surveillance of the Military Police and interviewed the chief of the investigating division.

While at the time of the previous inspection the Military Police lacked proper regulation offering guidelines for planning and conducting surveillance and for internal control, these shortcomings have now been remedied in line with recommendations by the Chancellor of Justice.

The Military Police have not carried out surveillance in recent years, mainly because there has been no need for these measures. Despite the absence of practice, the Military Police considers it very important for officers to still have the necessary preparation to carry out surveillance.

Among other things, opportunities are being sought for further training of officers.

Resolution of applications

Besides the Chancellor's own-initiative and regular supervision of surveillance agencies, she also resolves complaints concerning surveillance measures. If necessary, the Chancellor will also verify publicly raised allegations (e.g. in the media) about illegal or insufficiently reasoned surveillance.

The impact of sanctions against Russia

In connection with the war started by Russia in Ukraine, the Estonian government, together with other European Union Member States, has imposed a number of sanctions against Russia and its ally Belarus, thus limiting interaction by individuals, organisations and companies with citizens of those countries and legal entities operating there.

The Chancellor of Justice has received a number of petitions concerning these restrictions. People have complained that they have been denied a residence permit or visa or have not been allowed to enter the country. When resolving these petitions, it has been found that people subject to exemptions established by the Estonian government have also been refused visas. For example, visas were refused to people who have in Estonia a spouse with Estonian citizenship and minor children or elderly parents living in Estonia; as well as people with whom minor children were being raised jointly, etc. Problems were also caused by the fact that the exceptions do not cover all situations protected by the constitutional right for family life. For example, an exception was made for situations where the inviting person has a long-term residence permit in Estonia or if the inviting person is the spouse. At the same time, the exception does not extend to those who are staying in Estonia on the basis of a temporary residence permit or if the registered partner is a person of the same sex. In several cases, a situation has also arisen where, under the exception, a person is issued a visa, but their family member is left without a visa.

The Chancellor of Justice was approached by a citizen of the European Union whose partner with Russian citizenship was not granted an Estonian visa. A representative of the Embassy of the Republic of Estonia in Moscow had told the petitioner that only the spouse of a citizen of the European Union, and not a registered partner, could apply for a visa. The petitioner found the situation to be discriminatory.

The Chancellor explained that it is possible for a registered partner of a citizen of the European Union to apply for a visa despite the fact that the government has imposed sanctions on Russian citizens. According to the government regulation, sanctions do not apply to people who apply for a visa and who enjoy the right to free movement under European Union law. The legal status of a citizen of the European Union and their family member is regulated by the Citizen of the European Union Act. Under this law, the registered partner of a citizen of the European Union is also considered to be their family member.

Although the foreign representation subsequently accepted the visa application, the registered partner of the citizen of the European Union was refused a visa.

The Chancellor was also approached by several Russian citizens who were unable to apply for a residence permit due to the sanctions, but who wanted to continue their studies in Estonia or had already lived in Estonia for a long time before the sanctions were imposed.

The Chancellor explained that both imposition and application of sanctions must comply with the Constitution and the general principles of law. The Constitution lays down the principles of legal certainty and legitimate expectations. If someone has started acquiring higher education, then, in line with the principle of legitimate expectations, they should, as a general rule, be able to complete their studies at the level already started, provided that they have fulfilled all the obligations related to their studies. This means that a foreigner may stay in the country on the basis of a residence permit until completion of their studies. The principle of equal treatment must also be observed.

The Aliens Act also provides for the possibility to exceptionally grant a person a residence permit if obliging the person to leave Estonia would clearly be too burdensome for them, if the foreigner does not have the opportunity to obtain a residence permit in Estonia on another basis, and the foreigner does not pose a threat to public order and national security (§ 210^3 of the Aliens Act). The Chancellor explained that if a person is afraid to return to the country of citizenship because they may be persecuted there, it is possible to apply for

international protection in Estonia.

For many people, the situation was alleviated by amendments to the regulation adopted by the Estonian government on 18 May 2023. According to the amendments, the sanctions will no longer apply to those citizens of Russian Federation and Belarus who have obtained a long-term visa or a temporary residence permit for studying, or who have the right to stay in Estonia temporarily due to the expiry of the residence permit and who have completed their studies on the basis of a curriculum in Estonian or who can speak Estonian at least at the B2 level.

Visa procedure

When resolving petitions submitted to the Chancellor, it was revealed that the PBGB automatically refuses to issue a visa to a person if the Estonian Internal Security Service has declined to approve their visa application. The PBGB also denied the challenge lodged against the visa decision solely because the Estonian Internal Security Service did not consider it justified to change its position.

Under the Aliens Act, the PBGB is entitled to decide domestically on the issue of visas. The law stipulates that issue of a visa must be coordinated with the authority designated by the Minister of the Interior, which is the Internal Security Service. The Chancellor explained to the PBGB that under the Aliens Act the term coordination/approval (*kooskõlastamine* in Estonian) is understood in the sense of expressing an opinion. Thus, if the Estonian Internal Security Service fails to coordinate/approve a visa application, the PBGB must ascertain the reason for the position of the Service, but may then make a decision regardless of that position, while having regard to all the circumstances of submission of the application. Thus, the current practice of the PBGB is not in line with the Constitution or the Aliens Act.

It transpires from § 82(2) of the Aliens Act that refusal to approve a visa application cannot automatically constitute grounds to refuse to issue of a visa. The PBGB as the competent body must itself decide on the issue of a visa and, while examining a challenge filed against a visa decision, ascertain all the essential facts and resolve the objection by having regard to those circumstances.

Of course, a visa may not be issued to someone who may pose a threat to Estonia's security. However, security risk is an undefined legal concept and an administrative authority enjoys a broad margin of appreciation in interpreting it. When making that decision, the level of

security risk and the probability of its actually occurring should be assessed, as well as the circumstances why the person is applying for a visa to stay in Estonia. This is particularly important if a visa applicant has compelling family reasons for staying in Estonia.

Examination of applications for a residence permit

People also expressed dissatisfaction with proceedings for resolving applications for residence permits, as these proceedings often take too long. When resolving the petitions, it was found that PBGB officials extended procedural deadlines repeatedly and for long periods at a time.

Under the legislation, an application for a residence permit must generally be examined within two months, and the deadline may be extended by up to two months at a time (§ 34(2) of the Aliens Act, § 26 of the regulation of the Minister of the Interior). However, PBGB officials extended procedural deadlines, for example, immediately by three or four months at a time.

The Chancellor was also approached by a person who was unable to submit an application for a residence permit because for the next two months all the time slots for submitting an application had been booked. The PBGB also did not offer people new times because it was waiting for a decision on the immigration quota for 2023. At the same time, it was also impossible to obtain time slots for people whose application for a residence permit was not subject to the immigration quota. This shows that although, according to the legislation, the PBGB should generally resolve an application for a residence permit within two months, it might not even be possible to submit an application for a residence permit during this period. Thus, through its booking system the PBGB prevents people's access to the procedure.

Real estate of foreigners in Ida-Viru County

The Chancellor has been approached by several Russian citizens with a complaint that, due to the border crossing ban imposed by Estonia, many Russian citizens were unable to fulfil their obligations related to real estate located in Estonia or to take the necessary action to that end.

Due to restrictions, a situation has arisen in Ida-Viru County where apartment owners living in Russia have not been able to cover the management costs of their apartments and have incurred large debts. According to the Ministry of Internal Affairs, about 4500 people were affected by the ban in 2022.

The Estonian government imposed a border-crossing ban by Regulation No 42 of 8 April 2022 "Imposition of sanctions by the Government of the Republic in connection with the aggression of the Russian Federation and the Republic of Belarus in Ukraine". The regulation imposed a restriction on the granting of visas, short-term employment in Estonia and granting temporary residence permits for employment, study or business to citizens of the Russian Federation and the Republic of Belarus.

The regulation applies to all citizens of the Russian Federation who apply for a visa. No exception has been made for people owning real estate in Estonia.

On 8 September 2022, the Estonian government passed order No 247 on "Temporary Restriction on the Crossing of the State Border by Citizens of the Russian Federation", restricting entry into Estonia of Russian citizens on a short-term visa. The order also sets out exceptions but these do not concern owners of real estate.

The order was established under § 17(1) clause 1 of the State Borders Act. Under that provision, in the interests of national security, in order to ensure public order, prevent and resolve a situation which may endanger public health, as well as at the request of a foreign state, the Government may temporarily restrict or suspend crossing of the state border.

Although the Riigikogu has declared the Russian regime as terrorist and the Russian Federation as a country supporting terrorism, and the Estonian government has imposed a border-crossing ban, the Legal Assistance Agreement between the Republic of Estonia and the Russian Federation still applies and enjoys primacy over national laws and European Union legislation. The conditions for application of the agreement on legal assistance are met if the owner of real estate is a citizen of the Russian Federation.

As a measure of last resort, some apartment associations in Ida-Viru County have had recourse to the court to collect debts. Estonian courts have found that, under Article 21(1) of the Legal Assistance Agreement, an Estonian court has no jurisdiction to hear a claim brought against a Russian citizen residing in Russia.

A situation where a person has an apartment in Estonia and fails to bear the management costs thereof, but it is not possible to file a claim against them in an Estonian court, burdens other apartment owners. Unfortunately, at the moment the laws do not stipulate how the acquisition of real estate by citizens of the Russian Federation could be limited and how subsequent debts incurred by apartment associations could be resolved. For this reason, several apartment associations have applied to the court for assistance in appointing a guardian for such real estate.

Section 18 of the General Part of the Civil Code Act regulates conservatorship of a person's property. The court may place a person's property under conservatorship if the person is missing, as well as if for some reason a person is unable to attend to, or make disposals concerning, their property. Under § 516(1) clause 1 of the Code of Civil Procedure, in that case the court appoints a conservator for property.

In the opinion of the Chancellor of Justice, if a person is not staying in Estonia and does not bear the management costs of their apartment, it can be assumed that it is necessary to set up conservatorship of the person's property. The conservator must manage property prudently and guarantee its preservation. The courts have repeatedly applied conservatorship at the request of apartment associations. In more complicated cases, the court has also given consent to transfer of apartment ownership, because the value of some apartments in Ida-Viru County often does not even cover the debts incurred.