Paper presented at the International symposium on national security and the ECHR (Sweden)
December 2008

Belgian remedies against an unreliable reliability-check

As in most if not all countries, in Belgium also the names of tens of thousands of people are screened every year through the intelligence services' databases. Not in order to carry out strategic analyses, but to check on the reliability of people or organizations wishing to obtain some permit or admission or to take up a particular job. Does a security problem arise when you have to enter a classified information area, as occurred to Leander[1]? Do we have to re-examine your residence status, as happened to Lupsa[2]? Are you allowed to compete for a government contract if national security is involved, as in the case of the Tinnellys and the McElduffs[3]? Can we allow you onto the airport tarmac, as was the issue with the Swedish cook Jonasson[4]? The same questions apply in Belgium. But there are many other situations. Are you allowed to buy or sell weapons? Do you qualify for Belgian citizenship? Would you pose a potential problem as a prison chaplain? Are you likely to abuse your position as an interpreter with the Immigration Service? These are just a handful of the vast number of situations that give rise to a 'security check' whereby information is obtained from Belgian State Security and our military intelligence service.

But what if this information is out of date, incomplete, irrelevant, out of context or just plain wrong? Or what if there has been a switch of identity? The consequences are generally severe: your application for a permit, admission or a job will be rejected, which may be detrimental to your career and private life.

Now, it would be wrong to over-dramatize. The vast majority of the tens of thousands of people who are checked each year are 'not known' and those few 'hits' do not necessarily lead to a negative assessment.[5] But what if your name does raise doubts? Is this negative assessment of your reliability always reliable itself? We all know that the quality of the information kept in government files is sometimes less than perfect[6] and does not always give a very accurate picture of people. It is therefore a matter of knowing what to do. If you are enterprising, then you might have had the data on you checked in advance and, if necessary, rectified. In Belgium there are two ways of doing this.

Firstly, under the terms of the Public Information Act of 11 April 1994 you could have requested the intelligence service to disclose any document relating to you. You could then have proven the information from the service to be incorrect or

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1 ECHR, Leander v. Sweden, 26 March 1987.

2 ECHR, Lupsa v. Romania, 6 Juin 2006.

3 ECHR, Tinnelly & Sons Ltd and others and McElduff and others v. The United Kingdom, 10 July 1998.

4 ECHR, Jonasson v. Sweden, 30 March 2004 (admissibility decision).

5 In Belgium no overall figures are available on this issue. Only glimpses of the scale of the issue can be found. So out of the 10,000 checks for access to protected zones around airports carried out in 2001, some 200 people were known to State Security, which in turn led to five negative assessments.

6 The French *Commission nationale de l'informatique et des libertés* (CNIL) observed that in 44% of the cases checked, incorrect or outdated data were contained in some judicial files. For data from the former French intelligence service, *Renseignements Généraux*, in 12 out of 109 cases the data required some form of correction (Commission nationale de l'informatique et des libertés, *26th activity report 2005*, 22, www.cnil.fr.).

incomplete and simply asked for it to be rectified. At least, in principle, as the right to disclosure can be refused on the grounds of national security or defence of the country. The intelligence service must always be able to justify any refusal in concreto, but it goes without saying that they can easily make use of these grounds of exception. And in any event, such access does not apply to classified information.

If this first option did not provide a solution, then you could still have applied to the Data Protection Commission.[7] However, this Commission offers few possibilities. You cannot consult your personal data yourself; a member of the Commission – who does not know you at all – does that for you. He cannot discuss the contents of the files with you and he can only 'recommend' to the intelligence service that certain elements be rectified or deleted.

But you were not enterprising, or – and this is just as likely – the two legal options did not suffice to rectify the incorrect information and one day you are faced with a negative assessment from the authorities. Bewildered, you read the grounds stated in the assessment. Apparently you are a danger to national security… Luckily, all is not lost. Depending on the administrative decision, you still have one or more legal remedies: for example, you can bring your case before the Standing Committee I[8], before the Council of State[9] or before the civil courts.[10] But this contribution will deal exclusively with another remedy: the jurisdictional appeal that can be made to the 'Appeal Body on Security Clearances, Certificates and Advice'. The operation of this body will be outlined in light of the European Convention on Human Rights (ECHR). This choice is justifiable on a number of grounds. First of all, because for almost all screenings in which the Belgian intelligence services are involved, an appeal to this body can be made. Furthermore, this Belgian solution seems quite unique. As far as we know no other country has a similar system. What is more, we believe that the appeal procedure takes adequate account of the requirements of the ECHR and that the interests of both the individual and the State are well balanced.

This appeal body has only been operational since 2000. Therefore, we cannot say that our legislator was so concerned by the findings of the European Court in the Leander case at the end of the 1980s that they rushed to set up a solid legislative framework. The Court had perhaps not set the bar very high in all aspects of that case. But in Belgium there was at that time no statutory arrangement whatsoever for the execution of security investigations; refusals were not motivated; those affected could not appeal, etc. What is more, this situation was not limited to security clearances. For many other checks in which the intelligence services were involved, there was either no or only very partial regulations in place.

If it was not Leander who awakened Belgian awareness, who or what was it? Well, our 'Leanders' were called Cuddell and Wicart, two courageous military who refused to undergo a security investigation. One of them was even put through disciplinary proceedings by the army command. And this was 1995, not prehistory. The disputes were settled by the Council of State, which decided in favor of the two

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7 This is more or less the Belgian counterpart of the Swedish Data Inspection Board.

8 This is the equivalent of the Swedish Commission on Security and Integrity Protection. It controls, on behalf of the Parliament, the two Belgian intelligence services (see for more details: www.comiteri.be).

9 This is our supreme administrative court.

10 See for more details about these remedies: Van Laethem, W., "The Belgian civil intelligence service: roles, powers, organisation and supervision", *EJIS*, Volume 2 (2008), 27-29 and *www.comiteri.be* under 'links'.

soldiers in all respects. The authorities were caught out because there was no adequate statutory framework to carry out such investigations. At this point, action was taken. A statutory regulation was drawn up for the investigation of persons working with classified information and the Standing Committee I was set an additional assignment: it was to serve as the administrative court if security clearances were refused or withdrawn. The regulation came into force in 2000.[11]

But naturally that did not settle everything. Security clearances are only part of the problem. For the tens of thousands of other assessments where information from the intelligence services was used, the situation remained unchanged up until 2005. That year a general statutory framework was established for the so-called 'security certificates' and 'security advice'. These assessments or verifications are only based on data taken from specific government files.[12] No additional investigation is allowed. The appeal body (that was partially withdraw from the Standing Committee I - see further) became competent for all disputes regarding these verifications.

We will not go into the manner in which these security investigations or checks are carried out or how administrative assessments and decisions are reached.[13] We will limit ourselves to the procedure for the appeal body.

Which disputes can be brought before this appeal body? The jurisdiction of the body is contained in its name: the 'appeal body on security clearances, certificates and advice'. Firstly, there is the refusal or withdrawal of a security clearance or, in other words, of access to classified information. Most cases handled by the appeal body relate to this. Secondly, there is the refusal or withdrawal of a security certificate. Certain authorities can require this certificate if a person wants access to places where a specific threat arises.[14] Lastly, there is the possibility for a security advice. This is undoubtedly the broadest category. Such advice can be requested by any administrative authority, which wishes to assess the reliability of any person before appointing him or her to a position or granting a permit. The only real condition is that the inappropriate use of the position or permit could be contrary to certain basic national interests. A negative assessment can be appealed.

But the appeal body has one more very important power. It can also take action against the decision of an authority to request security certificates or advice for a given sector, location or event. For such appeals, it is not the individual refusal that is considered but the regulatory decision by the authority to subject everybody in a given situation to verification. The intention of the legislator was to put a brake on possible abuses of the system. It was needed because security advice can be requested

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11 Act of 11 December 1998 establishing an appeal body for security clearances (www.comiteri.be).

12 The information contained in the files of State Security and the military intelligence service, certain police-information, and the information contained in a number of government files that give a view of the legal, administrative and family situation of the person concerned.

13 See for more details about these investigations or checks: Van Laethem, W., "The Belgian civil intelligence service: roles, powers, organisation and supervision", *EJIS*, Volume 2 (2008), 8-12 and 19-20 and *www.comiteri.be* under 'links'. We can conclude that the statutory framework and the manner in which the Belgian services in general perform security investigations, comply with the requirements of article 8 ECHR. There is however one exception. The law states that, in addition to the powers set out in legislation, the intelligence service can, carry out 'any investigation and collect any information required for that investigation'. Such a general disposition does not meet the requirement for 'foreseeability' (See the comparison with the system in Portugal and its appraisal by the European Court in het case of Antunes Rocha versus Portugal of 31 May 2005).

14 On the basis of this procedure, for example, everybody who wants access to a European summit in Brussels (participants, visitors, catering and reception staff, journalists, etc.) is screened.

rather easily. The appeal body is yet to rule on such a case, proving perhaps that people are not sufficiently aware of this possibility.[15]

Lets turn now to a few important aspects which the European Court has addressed in recent years concerning controls over security checks, such as the independence of the control body, the procedural aspects relating to a fair trial and the equality of arms, the powers which the body has to 'effectively scrutinize' the case and the ability to take a 'legally binding decision'.

The appeal body is composed of the chairmen of three institutions, which work mainly on behalf of Parliament: the Standing Committee I, the Standing Committee P (which reviews the Belgian police services) and the Data Protection Commission. The three chairmen are all magistrates and were all appointed by Parliament. This body can therefore not be accused of not being independent and impartial. The Belgian Constitutional Court already came to that conclusion few years ago.[16] It was called on to rule on a few questions from a citizen who had taken proceedings before the appeal body. He disagreed with the fact that he was only allowed access to part of his file. This brings us to a second – very important – issue: the right to access your dossier.

In principle the entire dossier that formed the basis for the decision of the authority should be disclosed to the complainant and his or her lawyer, even when this dossier contains classified information. Belgium does not know the system of the 'security screened advocate'. In principle he applicant and his layer are allowed to see all information. But there are – of course - exceptions. At the request of the intelligence service the president of the appeal body may decide that certain information must remain secret and will not be disclosed. He may take such a decision if there is a danger that the protection of sources, the privacy of third parties or the fulfillment by the service of its statutory tasks would be compromised. As a result, the complainant and his lawyer have less information available to them than the authorities and the appeal body. Here again, the Constitutional Court did not see any problem, even in view of Article 6 ECHR. It ruled that the right to have access to all elements of the file can be limited under strict conditions, e.g. when national security requires it.[17] We believe this judgment by the Constitutional Court to be completely in line with the recent judgments of the European Court in the cases Turek v. Slovakia[18] and C.G. and others v. Bulgaria.[19] Moreover, it must be noted that the appeal body handles this power circumspectly. If it is applied, it generally concerns data, which is not immediately relevant for the appraisal of the case, such as the name of a staff member of State Security who carried out a given investigation. Furthermore, the complainant can see which and how many passages have been removed and the appeal body can always question the applicant on the omitted information.

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15 The appeal body does not handle cases covering issues such as an infringement on the 'honour and reputation' that can result from a negative assessment, as in the case of Turek versus Slovakia of 14 February 2006. Such disputes must be taken before the civil courts.

16 Constitutional Court, 25 January 2006, 14/2006, published in the o*fficial Belgian Gazette* of 23 March 2006.

17 The Court ruled that this interference in the right of defence is only justified if it is strictly proportionate with the importance of the objectives and if it is paired with a procedure in which an independent and impartial judge is in a position to investigate the legality of the procedure.

18 ECHR, Turek v. Slovakia, 14 February 2006.

19 ECHR, C.G. and others v. Bulgaria, 24 July 2008.

The Constitutional Court has, however, not ruled on a case in which the Belgian intelligence service makes use of data originating from a foreign counterpart. In that event the Belgian intelligence service itself must decide on the disclosure. This statutory embedding of the third party rule proves to be more problematic. In the Turek case the Court did indicate that the existence of the power of intelligence services to rule itself on disclosure is not consistent with the fairness of the proceedings. However, this situation has not yet arisen. So apart from this last aspect, we feel able to conclude that proceedings before the appeal body offer adequate guarantees for a fair hearing, particularly now that the complainant will be heard upon request, that he may be assisted by his lawyer and that they can put forward written conclusions.

Another important requirement from the ECHR was clearly addressed in the Lupsa case[20] and the case of C.G. and others: the complainant – as the Court ruled – '*must be able to have the measure in question scrutinised (…) to review all the relevant questions of fact and law*'. Does the Belgian appeal body meet this criterion? Does it have adequate powers in this respect? Can it go beyond a 'purely formal examination' of the case?

Well, the powers of the three presidents to 'scrutinise' the decision of the authority are substantial. Firstly they have the entire dossier available to them. But they can also call for the submission of any additional item and can summon any members of the intelligence services who have worked on the security investigation or check. They are in principle required to answer all questions. For security clearances, the appeal body can require the authorities to conduct further investigations.

Furthermore the appeal body does not restrict itself to a marginal examination of the administrative decision. Although this is not common for a jurisdictional body that is examining a decision of an authority, it will reach its own balance of interests and examine whether the measure was proportionate.

Finally it is important to stress that the appeal body can take 'legally binding decisions' and provide 'appropriate relief'. If the appeal body adjudges that the security clearance or certificate was improperly refused, it orders the authorities to grant the clearance or certificate immediately. In almost half of the cases the complainants get satisfaction. Moreover, the cases are settled within a 'reasonable time', that is within 15 to 60 days from the application. We must however make one small remark. If the appeal is directed against a negative advice then the appeal body can convert it to a positive advice. But it will still only be an advice. The authority that requested it is not obliged to follow it. As far as we know, this situation has not yet occurred, but if so the complainant would be able to take his case to the Council of State. In all other cases no appeal is possible against the decisions of the appeal body. But Article 6 §1 ECHR makes no provision for a right of appeal.

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20 ECHR, Lupsa v. Romania, 8 June 2006.

21 The points of view expressed in this article reflect the personal opinion of the author and do not in any way represent an official position of the Standing Intelligence Agencies Review Committee (Standing Committee I).

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