Constitutional judgment 3-4-1-9-10

JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT

No. of the case	3-4-1-9-10
Date of judgment	4 April 2011
Composition of court	Chairman Märt Rask, members Jüri Ilvest, Peeter Jerofejev, Henn Jõks and Jüri Põld
Court Case	Request of the Tallinn Circuit Court to declare § 94(1) of the Imprisonment Act to be in contradiction with the Constitution
Basis of proceeding	Tallinn Circuit Court judgment of 30 September 2010 in administrative matter no. 3-09-1840
Hearing	Written proceeding
DECISION	**To dismiss the request of the Tallinn Circuit Court.**

FACTS AND COURSE OF PROCEEDINGS

1. Marek Võrk was taken into custody on 24 January 2007. The Harju County Court declared him guilty by a decision of 13 January 2009. The Tallinn Circuit Court reviewed the appeal in a session on 22 April 2009 and dismissed it by a judgment of 11 May 2009. The Supreme Court refused to accept the appeal in cassation by a ruling of 20 July 2009. The judgment of conviction entered into force on 20 July 2009. M. Võrk was transferred from the status of a person in custody to the status of a prisoner on 28 August 2009 when the Tallinn Prison received the Harju County Court notification on the entry into force of the judgment and an entry was made in the information system of the Imprisonment Register.

2. M. Võrk filed on 21 August 2009 an action with the Tallinn Administrative Court requesting establishment of the unlawfulness of the Tallinn Prison decision of 29 April 2009. By the contested decision the Tallinn Prison had refused to permit M. Võrk to receive a long-term visit from his wife. On 2 November 2009 M. Võrk filed with the Tallinn Administrative Court an action for annulment of the Tallinn Prison letter of 21 August 2009 and decision on challenge of 22 October 2009. Also in those acts the Tallinn Prison had dismissed his request for the receipt of long-term visits. The Tallinn Administrative Court joined the administrative matters commenced based on these actions into one proceeding.

3. The Tallinn Administrative Court dismissed the action of M. Võrk by a judgment of 29 March 2010. M. Võrk filed with the Tallinn Circuit Court an appeal against that judgment.

4. The Tallinn Circuit Court found in a judgment of 30 September 2010 that § 94(1) of the Imprisonment Act (IA) is in contradiction with the Constitution, did not apply the provision and satisfied the appeal of M. Võrk. The circuit court judgment was received by the Supreme Court on 4 October 2010.

5.-27. [Not translated.]

PROVISION DECLARED UNCONSTITUTIONAL

28. § 94(1) of the Imprisonment Act (RT I 2000, 58, 376) provides:

(1) "A person in custody shall be permitted to receive short-term visits of personal, legal or commercial interest in matters which the person in custody cannot conduct through third persons."

OPINION OF THE CHAMBER

29. The Chamber first identifies the relevant provision (I, II), then the infringed fundamental right (III) and the legitimate objective of the infringement (IV). Finally, the Chamber assesses the proportionality of the infringement (V, VI).

I

30. The Chamber deems § 94(1) of the IA relevant in the part it does not enable persons in custody to receive long-term visits. Since the provision does not provide the receipt of long-term visits, it means that persons in custody are not intended to receive long-term visits. Precisely this was the provision that precluded the administrative court from satisfying the action of M. Võrk. If this provision would be unconstitutional, the action of M. Võrk could have been satisfied, i.e. it would have been possible to decide differently than in case of its constitutionality.

31. A prerequisite for a concrete norm control initiated by the court is the relevance of the provision submitted for verification (the first sentence of § 14(2) of the CRCPA). According to the case-law of the Supreme Court, relevant is a provision that is of decisive importance in adjudication of the matter (as of the Supreme Court *en banc* judgment of 22 December 2000 in matter no. 3-4-1-10-00, para. 10). Relevance has been furnished by the Supreme Court as follows: "A provision is of decisive importance if in case of its unconstitutionality the court would decide differently than in case of its constitutionality." (First in the Supreme Court *en banc* judgment of 28 October 2002 in matter no. 3-4-1-5-02, para. 15.)

32. The dispute heard in the circuit court was initiated by the refusal of the Tallinn Prison to permit M. Võrk to receive long-term visits from his wife first on 29 April 2009 – after the session in the Tallinn Circuit Court but before making of a judgment in the matter. For the second time M. Võrk requested a visit on 21 August 2009. A judgment of conviction with respect to M. Võrk had entered into force on 20 July 2009 but he was transferred from the status of a person in custody to the status of a prisoner only on 28 August 2009 when the Tallinn Prison received the Harju County Court notification on the entry into force of the judgment and an entry was made in the State register concerning prisoners, persons in detention after service of the

sentence, detained persons and persons in custody (§ 5^1(1)2) and 4) of the IA).

33. A person in custody pending trial shall be subject to the restrictions provided by law (the first sentence of § 4^1(2) of the IA). Whereas, the provisions applicable to prisoners, i.e. convicted offenders who are serving a sentence of imprisonment in a prison, together with the specifications provided for in the provisions regulating custody pending trial apply to the serving of custody pending trial (§ 90(1) of the IA). The provisions concerning custody pending trial are included in the section "Visits received by persons in custody" (§ 94 of the IA). Thus, the provisions regulating visits received by prisoners which are general provisions with respect to provisions regulating custody pending trial cannot be applied to persons in custody. § 94 of the IA bears the title "Visits received by persons in custody" and pursuant to that is intended to regulate all types of visits – both short-term and long-term. Visits received by persons in custody are regulated exhaustively in that provision. Since the provision does not mention long-term visits, persons in custody lack the right to receive those visits.

34. Not enabling persons in custody to receive long-term visits which is included in § 94 of the IA is a "restriction provided by law" which the freedom of persons in custody is subject to for the purposes of the first sentence of § 4^1(2) of the IA. § 94 of the IA therefore provides "a specific restriction" on long-term visits for the purposes of the second sentence of § 4^1(2) of the IA. Thus, the prison cannot forbid or permit persons in custody to receive long-term visits based on the right of discretion in the second sentence of § 4^1 (2) of the IA.

35. Taking account of the aforementioned, § 94(1) of the IA shall be interpreted so that it prohibits persons in custody from receiving long-term visits. Therefore, not mentioning long-term visits explicitly does not mean that the issue has not been regulated and that a legislation of general application has not been issued. The other subsections of § 94 of the IA regulate visits from consular officers and the procedure for short-term visits. Options not provided in them do not directly result in any prohibitions, for which reason these provisions cannot be deemed relevant.

The same has been earlier found by the Administrative Law Chamber of the Supreme Court (the Administrative Law Chamber of the Supreme Court (ALCSC) judgment of 19 November 2009 in matter no. 3-3-1-62-09, para. 17).

36. The Tallinn Circuit Court thus interpreted § 94 of the IA correctly by finding that namely this provision does not grant persons in custody the right to receive long-term visits.

37. Based on the aforementioned, there is no doubt that M. Võrk was a person in custody when the Tallinn Prison decision of 29 April 2009 was made, and § 94(1) of the IA is a relevant provision in that respect.

II

38. § 94(1) of the IA is a relevant provision also regarding making of the Tallinn Prison decision of 21 August 2009 on refusing to permit the receipt of a long-term visit because M. Võrk was regarded as a person in custody also during that time.

39. M. Võrk was detained for the purposes of a preliminary investigation as of 24 January 2007. A judgment of conviction entered into force on 20 July 2009 because the Supreme Court refused to accept his appeal in cassation. It must be stressed that, for the purposes of the Imprisonment Act, entry into force of a judgment of conviction does not mean that a person in custody – pursuant to § 4 of the IA, a person who is taken into custody, as a preventive measure, and who is serving custody pending trial in a ward prescribed for custody pending trial in a maximum-security prison or in a house of detention – would automatically become a prisoner.

40. Due to the entry into force of the judgment, it was possible to deem M. Võrk as of 20 July 2009 guilty as charged. Whereas, M. Võrk had been taken into custody, as a preventive measure, pursuant to the definition of a person in custody provided for in § 4 of the IA, i.e. he was serving custody pending trial in a maximum-

security prison.

Unlike a person in custody serving custody pending trial, a prisoner means a convicted offender who is serving a sentence of imprisonment in a prison (§ 2 of the IA). A person is a prisoner if, firstly, a judgment of conviction imposing a prison sentence has entered into force with respect to the person, and, secondly, if the person is serving the prison sentence in a prison. A judgment of conviction had entered into force on 20 July 2009 with respect to M. Võrk, but the sentence imposed on him had not yet been enforced at the time of the filing of the second request for the receipt of a long-term visit. § 411(4) of the Code of Criminal Procedure (CCP) provides that if a court decision is enforced, the county court or the state authority appointed by the Minister of Justice shall send a copy of the decision to the body executing the court decision; the court shall make a notation concerning the entry into force of the court judgment or ruling on the copy. § 13 of the IA also refers to formalities concerning the transfer to the status of a prisoner – a person is received into a prison on the basis of a copy of a court judgment or court ruling entered into force and the identity document. Judgments entered into force and notifications on entry into force of judgments belong to the first part of a prisoner's personal file (§ 28(2)1)–2) of the internal procedure rules of the prison).

41. For that reason, M. Võrk was still regarded as a person in custody pending trial after the conviction on 20 July 2009 until the transfer to the status of a prisoner on 28 August 2009. He filed on 30 July 2009 with the prison a request for the receipt of a long-term visit from his wife which the Tallinn Prison dismissed three weeks later, on 21 August 2009. The refusal was justified by the status of a person in custody of the person requesting the visit.

III

42. Not enabling the receipt of long-term visits by persons in custody in § 94(1) of the IA affects adversely, i.e. infringes the right to the inviolability of family life provided for in § 26 of the Constitution.

43. § 26 of the Constitution prescribes the right to the inviolability of family and private life. These are two independent legal rights, scopes of protection of which may overlap in part. Whereas, regarding the personal scope of protection they are the rights of each and every person, and regarding the material scope of protection, family life includes various aspects of relationships between the members of the family, above all, the right to live together to satisfy each other's emotional and social needs. As defined by the Supreme Court, "family members have a legitimate expectation that the state will not raise unlawful and excessive difficulties for family members to live together" (the ALCSC judgment of 13 October 2005 in matter no. 3-3-1-45-05, para. 16). Therefore, the right to the inviolability of family life provided for in § 26 of the Constitution means, among other, the right to maintain family ties in their broadest sense.

44. Arrest means subjecting the entire way of life to the prison for a certain period of time, and this restricts the exercise of several fundamental rights, including the right to the inviolability of family life. Whereas, interfering with the right to the inviolability of family life is, in essence, a part of the status of a person in custody. In the case Messina no. 2 (*Messina v Italy* no. 2, judgment of 28 September 2000, request no. 25498/94, para. 61) the European Court of Human Rights also found that any detention, including lawful detention in the light of Article 5 of the European Convention of Human Rights and Fundamental Freedoms (the Human Rights Convention), results in restrictions on family and private life. The European Court of Human Rights has specifically found that by regulating the number, duration and supervision of the visits, the state infringes the persons' right to respect for private and family life provided in Article 8 of the Human Rights Convention (*Moiseyev v Russia*, judgment of 9 October 2008, request no. 62936/00, para. 246; *Ciorap v Moldova*, judgment of 19 June 2007, request no. 12066/02, para. 111).

45. In brief, the issue in the current constitutional review matter is whether regarding arrest it is justified to infringe the inviolability of family life by not permitting the receipt of long-term visits.

IV

46. § 94(1) of the IA, not providing for the persons in custody the right to receive long-term visits, interferes with the right to the inviolability of family life guaranteed by § 26 of the Constitution for the purposes of preventing evasion from criminal proceedings and continuous commission of criminal offences, including destruction, alteration and falsification of evidence and influencing of witnesses. According to the second sentence of § 26 of the Constitution, these purposes are permitted as an infringement of the inviolability of family life.

47. Interference by an authority of the state with the right of the person who filed the action to the inviolability of family life provided in § 26 of the Constitution does not mean, however, a breach of that right. Legislation of general application infringing a fundamental right does not breach the fundamental right if it is constitutional, i.e. if it is in conformity with the Constitution both formally and in the substantial sense (the Constitutional Review Chamber of the Supreme Court (CRCSC) judgment of 13 June 2005 in matter no. 3-4-1-5-05, para. 7).

48. § 94(1) of the IA is formally constitutional.

49. State agencies, local governments, and their officials may interfere with the right of every person to the inviolability of family life guaranteed by § 26 of the Constitution in the cases and pursuant to the procedure provided by law to protect health, morals, public order, or the rights and freedoms of others, to combat a criminal offence, or to apprehend a criminal offender (substantial special requirements). The second sentence of § 26 of the Constitution represents a fundamental right with a qualified reservation by law, in case of which the lawfulness of an infringement of family life depends on restricting prerequisites which are generally listed exhaustively in the provision. At the same time, the broad interpretation of the definitions listed in the provision has allowed to deem various reasons for restrictions as a listed justification (see, for example, the CRCSC judgment of 3 May 2001 in matter no. 3-4-1-6-01, para. 18).

50. § 94(1) of the IA does not provide for persons in custody to receive long-term visits in order to establish what the alleged offender has committed, bring him or her to justice and ensure the administration of justice. Also according to the explanatory memorandum of the draft legislation of the Imprisonment Act (SE 103), the regulatory framework for visits received by persons in custody differs from the corresponding regulatory framework regarding prisoners due to the need to ensure the course of preliminary investigation. Administration of justice is interested in preventing evasion from criminal proceedings and continuous commission of criminal offences, including destruction, alteration and falsification of evidence and influencing of witnesses. The said aims are interference possibilities listed in the second sentence of § 26 of the Constitution to protect public order and the rights and freedoms of others, combat a criminal offence and apprehend a criminal offender, and thus, the legitimate aims of the infringement of § 26 of the Constitution.

51. The circuit court found similarly that the aim of restring the receipt of long-term visits consists of the interest to ensure the establishment of the truth in criminal proceedings and the administration of justice (para. 13 of the judgment). The Riigikogu is also of the opinion that the aim of the infringement is the protection of the rights and freedoms of others and the prevention of new criminal offences.

V

52. In assessing the moderation, the Chamber distinguishes not enabling a person in custody to receive long-term visits until the entry into force of a judgment of conviction, and not enabling the same after the entry into force of a judgment of conviction to a person who has not been transferred to the status of a prisoner yet and who is still regarded as a person in custody. Therefore the Chamber addresses separately the justification on the basis of the Constitution of the infringement of the inviolability of the family life of a person in custody by § 94(1) of the IA in connection with the second decision not enabling the receipt of a long-term visit made after the entry into force of the judgment of conviction with respect to M. Võrk (VI).

53. The Chamber finds that until the entry into force of a judgment of conviction, not enabling the receipt of

long-term visits is an intensive interference with the inviolability of family life, but it has been established for achieving the significant aims of preventing evasion from criminal proceedings and commission of continuous criminal offences, including destruction, alteration and falsification of evidence and influencing of witnesses.

Thus, not enabling the receipt of long-term visits for the said purposes is a suitable, necessary and moderate infringement of § 26 of the Constitution.

54. The European Human Rights Convention is an international treaty ratified by the Riigikogu which is an integral part of the Estonian legal order and which has, pursuant to § 123(2) of the Constitution, priority over Estonian laws and other legislation (see the Supreme Court *en banc* judgment of 6 January 2004 in matter no. 3-1-3-13-03, para. 31). Therefore it needs to be verified whether the Human Rights Convention requires enabling the receipt of long-term visits by persons in custody.

55. By applying Article 8 of the Convention, the European Court of Human Rights has found that it does not give rise to the right of prisoners (persons in custody and prisoners) to receive long-term visits. In the case Aliev v Ukraine (judgment of 29 April 2003, request no. 41220/98) the court found that an infringement of Article 8 cannot be considered if it is not enabled or the state's legislation does not provide for prisoners (serving a life sentence in this case) to receive long-term visits from close relatives or to have an intimate relationship with the spouse (para. 187 of the judgment), adding that although many European countries enable the receipt of long-term visits, it does not mean that not enabling them in other countries would be contrary to Article 8 of the Convention (para. 188 of the judgment). In the case Dickson v United Kingdom (judgment of 4 December 2007, request no. 44362/04, para. 81), the Grand Chamber of the European Court of Human Rights noted that more than half of the countries in the Council of Europe enable the receipt of long-term visits by prisoners, adding that the court still does not interpret the Convention so that it would oblige the member states to enable the receipt of long-term visits.

56. To the knowledge of the Chamber, similarly to Estonia, Croatia, Lithuania and the Czech Republic, the Grand Duchy of Luxembourg, several cantons in the Swiss Confederation and Georgia permit persons in custody to receive only short-term visits, duration of which is almost the same as in Estonia (about one hour in a week on the average). The Constitutional Court of Latvia also found, based mostly on the opinion of the European Court of Human Rights and, among other, also directly on the regulatory framework in Estonia and Lithuania, that the Constitution of Latvia does not require enabling prisoners to receive long-term visits (judgment of 23 April 2009 no. 2008-42-01).

Unlike the aforementioned, for example, Canada, the Kingdom of Norway and the Federal Republic of Germany have provided prisoners with the right to long-term visits.

57. Adopted only as a recommendation of the Committee of Ministers of the Council of Europe (Rec (2006) 2), "the provisions of the recommendation "European Prison Rules"" which "are not legally binding to Estonia", but which "should be considered as aims and principles, achievement of which should be pursued and which, when possible, should be the basis of interpretation and application of the Estonian legislation" (the ALCSP ruling of 5 February 2009 in matter no. 3-3-1-95-08, para. 9) deem it necessary that persons in custody and prisoners should have equal rights in communication with the outside world if the court has not imposed a special restriction on a person for a certain period of time (para. 99). Concerning prisoners, para. 24.1 of the European Prison Rules notes that they should be enabled the receipt of as many visits from their families as possible. According to para. 24.2, restrictions may be imposed on the visits if it is necessary in the interests of, for example, preliminary investigation. Pursuant to para. 24.4, the visits shall enable to maintain in a normal way family relationships of the prisoners. The explanatory memorandum of the Prison Rules specifies that visits from families should, if possible, last longer, for example 72 hours, as in many Eastern European countries.

58. The obligation to ensure the inviolability of family life can be restricted by law if upon imposing of the restriction the aim mentioned in the Constitution and the proportionality principle have been followed – such

restrictions shall be necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted (the second sentence of § 11 of the Constitution). The restrictions shall not harm an interest or a right protected by law more than is justifiable by a legitimate aim of the provision. Also the legislators, not only those who apply the law, must take the proportionality principle into consideration (see the CRCSC judgment of 28 April 2000 in matter no. 3-4-1-6-00, para. 13). Conformity with the said principle is verified by the court on three consecutive levels - first the suitability of the measures, then the necessity and, if necessary, also the proportionality in a narrower sense, i.e. the moderation. In case of an obviously unsuitable measure the necessity or the moderation of the measure need not be verified. A suitable measure is such which favours the achievement of the aim of the restriction. With respect to suitability, disproportionate is indisputably a measure that in no case favours the achievement of the aim of the restriction. (The CRCSP judgment of 6 March 2002 in matter no. 3-4-1-1-02, para. 15.)

The justification of an interference with the inviolability of family life shall be weighed for the purposes of preventing evasion from criminal proceedings and continuous commission of criminal offences, including destruction, alteration and falsification of evidence and influencing of witnesses.

59. Not enabling persons in custody to receive long-term visits is a suitable measure for the purposes of preventing evasion from criminal proceedings and continuous commission of criminal offences insofar as longer unsupervised visits from spouses may favour escape and continuous commission of criminal offences, including destruction, alteration and falsification of evidence and organisation of influencing of witnesses.

60. Regarding persons in custody, it is not possible to achieve the aims of preventing evasion from criminal proceedings and continuous commission of criminal offences, including destruction, alteration and falsification of evidence and influencing of witnesses by means of another measure which is less burdensome on persons but as effective as not enabling the receipt of long-term visits.

61. For the aforementioned purposes, the measures provided in the Imprisonment Act, such as surveillance of correspondence and telephone calls of persons in custody, examination of packages, also security measures such as search and surveillance activities performed by surveillance agencies under the Surveillance Act may not be as effective and less burdensome on persons as not enabling the receipt of long-term visits. A measure as effective to achieve the aims of preventing evasion from criminal proceedings and continuous commission of criminal offences, including destruction, alteration and falsification of evidence and influencing of witnesses is not also granting a body conducting the proceedings the right to permit persons in custody to receive long-term visits.

62. To determine the moderation of a measure, the extent and intensity of the interference with a fundamental right, on the one hand, and the importance of the aim of the restriction, on the other hand, have to be weighed. The more intensive the infringement of the fundamental right is, the more substantial the reasons for its justification shall be (the CRCSC judgment of 6 March 2002 in matter no. 3-4-1-1-02, para. 15).

63. The inviolability of family life of persons in custody is a significant value, with respect of which in criminal matters in the interests of administration of justice as little restrictions as possible shall be applied, regardless that the persons in custody may have committed a criminal offence. On the one hand, there is the presumption of innocence with regard to persons in custody (§ 22(1) of the Constitution); on the other hand, it may be necessary, on the basis of § 20(2)1) or 3) of the Constitution, to keep a person in the cases and pursuant to the procedure provided by law in custody as a preventive measure which is accompanied by an intensive interference with family life due to not enabling the receipt of long-term visits.

64. Since the deprivation of liberty is a serious restriction on the right to liberty, the law prescribes arrest as a preventive measure in terms of the Constitution for extreme cases (*ultima ratio*). The Code of Criminal Procedure provides other means of securing criminal proceedings which are relatively less restricting on the rights and freedoms of persons (see Chapter 4 § 128, §§ 141–142, also § 135 of the CCP). Arrest is

permitted, pursuant to § 20(2)3) of the Constitution, if there is reasonable doubt that a criminal offence will be committed, if it is reasonably deemed necessary to prevent commission of an offence or if it is necessary to prevent escape after commission of a criminal offence in a situation where a person's offence has not been proven yet but there is reasonable doubt regarding possibility thereof (see also the European Court of Human Rights judgment of 30 August 1990 *Fox, Campbell and Hartley v United Kingdom*, requests no. 12244/86, 12245/86 and 12383/86, para. 32).

Arrest is a preventive measure which is applied with regard to a suspect, accused or convicted offender and which means deprivation of a person of his or her liberty on the basis of a court ruling (§ 130(1) of the CCP). According to § 130(2) of the CCP, a suspect or accused may be arrested (i.e. there are grounds for applying the preventive measure) if he or she is likely to abscond from the criminal proceeding or continue to commit criminal offences (see also § 20(2)3) of the Constitution). The accused who has been prosecuted and is at large may be arrested on the basis of a ruling of a city, county or circuit court if he or she has failed to appear when summoned by the court and may continue absconding from the court proceeding (§ 130(4) of the CCP).

§ 20(2)1) of the Constitution adds the objective of securing the execution of a judgment of conviction, in the interests of which the court may arrest an accused who is at large in order to ensure execution of imprisonment imposed by a judgment of conviction (§ 130(4^1) of the CCP) and a convicted offender who is at large in order to secure execution of a judgment of conviction (§ 130(5) of the CCP, procedure for arrest is provided for in § 429).

65. Upon choosing arrest as a preventive measure and deciding on application thereof, the moderation of the infringement of the family life of the person in custody caused by not enabling the receipt of long-term visits is weighed from the aspect of preventing evasion from criminal proceedings and continuous commission of criminal offences, including destruction, alteration and falsification of evidence and influencing of witnesses.

The considerations upon assessing the existence of grounds for arrest are, for instance, the behaviour of the suspect in its entirety, his or her previous career, and personal, family and financial relationships, but also the social environment surrounding him or her in freedom (the Criminal Chamber of the Supreme Court (CCSC) judgment of 11 December 2006 in matter no. 3-1-1-103-06, para. 16). Thus, already upon ascertaining the grounds for arrest it is possible to take account of family life. This means that a person is not arrested due to the lack of grounds for arrest because his or her family life allows to presume that he or she will not evade the proceeding or commit new criminal offences.

Pursuant to § 127(1) of the CCP, a preventive measure shall be chosen taking into account the probability of absconding from the criminal proceeding or execution of the court judgment, continuing commission of criminal offences, or destruction, alteration and falsification of evidence, the degree of the punishment, the personality of the suspect, accused or convicted offender, his or her state of health and marital status, and other circumstances relevant to the application of preventive measures, before the (preliminary investigation) judge applies arrest as a preventive measure at the request of the prosecutor under § 130(2), (4), (4^1) or (5) of the CCP. On the basis of § 127(1) of the CCP, choosing a preventive measure therefore includes weighing how various preventive measures interfere with a person's family life. Taking the latter into account may result in deciding in favour of another preventive measure. When deciding to apply arrest, it has been assessed that the objectives of arrest cannot be achieved by more lenient preventive measures. Such a regulatory framework shall be considered moderate in the interests of ensuring the inviolability of family life.

66. In addition, the Code of Criminal Procedure prescribes an option to contest arrest, and if the arrest has lasted more than six months, the body conducting the proceedings is also required to verify the arrest himself or herself (§ 137(1) and (4) of the CCP).

If the court is of the opinion that the arrest has become unjustified, it has to be terminated, or if necessary, replaced by another preventive measure. If the grounds for arrest have ceased to exist, the person shall be released immediately pursuant to § 131(5) of the CCP. But if the court finds that the arrest is still justified, it

considers also the consequences, i.e. limitation of visits from family members.

67. Regarding the duration of keeping under arrest, the law provides that a suspect or accused shall not be kept under arrest for more than six months (the first sentence of § 130(3) of the CCP); § 130(31) of the CCP prescribes that in the case of particular complexity or extent of a criminal matter or in exceptional cases arising from international cooperation in a criminal proceeding, a preliminary investigation judge may extend the term for keeping under arrest for more than six months at the request of the Chief Public Prosecutor.

The Minister of Justice has claimed in his opinion that longer arrests are rather an exception than a rule, and has pointed out the statistics that persons released from arrest in 2008 were kept under arrest for 5,2 months on the average, including in pre-trial investigation 3,9 months and in court proceeding 2,9 months on the average.

68. However, the Chamber stresses that regardless of the duration of the time kept under arrest, the infringement of the right to the inviolability of family life arising from § 26 of the Constitution caused by not enabling the receipt of long-term visits while being kept under arrest is moderate if it is justified by significant aims of preventing evasion from criminal proceedings and continuous commission of criminal offences, including destruction, alteration and falsification of evidence and influencing of witnesses. Since keeping under arrest in a criminal matter arises from the interests of administration of justice, the extent and manner of the communication allowed to the person in custody arises, above all, from the interest of preventing escape and evidence of quality, including testimonies of witnesses, i.e. establishing the truth in the criminal proceeding. Regarding the duration of arrest and the accompanied restriction on the receipt of long-term visits, an issue may rise concerning the continuous justification of the application of the preventive measure, i.e. conformity with § 130(2), (4), (4^1) or (5).

69. Upon mutual weighing of the aims of preventing evasion from criminal proceedings and continuous commission of criminal offences, including destruction, alteration and falsification of evidence and influencing of witnesses, and the interests of family life, it must be kept in mind that as a result of long-term visits without constant supervision (§ 25(2) of the IA, § 41(1) of the internal procedure rules of the prison), the suspect or accused could plan and organise his or her escape and commission of criminal offences. The suspect or accused could, during a long-term visit, for example, contact through his or her spouse possible witnesses by influencing the spouse either himself or herself or through other persons to address witnesses – or victims – and to influence them either to give a false testimony or to prevent their appearance, i.e. to commit in pre-trial and court proceedings offences against the rights of people prohibited by §§ 317, 322 and 323 of the Penal Code (PC). Further, during a long-term visit from, among other, a spouse it is possible to organise better destruction, alteration and falsification of evidence, i.e. offences prohibited by § 316 of the PC. On the other hand, no one shall be compelled to testify against himself or herself, or against those closest to him or her pursuant to § 22(3) of the Constitution. Therefore, if a suspect or accused uses the assistance of those closest to him or her to obstruct administration of justice in a criminal matter, it would not be legally possible to compel that person (§ 71(1) of the CCP) to admit to the preliminary investigator, the prosecutor and the court the obstruction of the proceeding and the establishment of the truth in administration of justice.

The European Court of Human Rights found similarly in the court case Messina no. 2 (2000) that the security measures preventing close contact between persons during short-term visits from family members were justified in order to decrease the risk of maintaining contact with organised crime in case of members of a mafia family (para. 66 of the judgment).

70. In the opinion of the Chamber, in case of the lack of the possibility to receive long-term visits, maintaining family relationships is facilitated by the possibility to communicate with the family upon short-term visits (§ 94(1) of the IA), the right of correspondence and use of telephone (§ 96(1) of the IA), the possibility to receive packages (§ 98(1) of the IA), and the short-term – for up to one day – prison leave under essential and urgent personal circumstances which require the personal attendance of the person in

custody (§ 99(1) of the IA).

71. Thus, it cannot be concurred with the circuit court that § 94(1) of the IA which does not enable the receipt of long-term visits by persons in custody is in contradiction with the right to the inviolability of family and private life provided for in § 26 of the Constitution.

VI

72. Not enabling the receipt of long-term visits by persons who have not yet been transferred to the status of a prisoner after the entry into force of a judgment of conviction and who are still regarded as persons in custody is also constitutional in the opinion of the Chamber.

73. The Chamber weighs the constitutionality of not permitting the receipt of long-term visits during the period between the entry into force of a judgment of conviction and the enforcement of a sentence of imprisonment.

74. The Code of Civil Procedure does not regulate separately the enforcement of a court judgment which has entered into force in the case the convicted person is kept under arrest during the proceedings (see § 414).

Since the appeal in cassation of M. Võrk was not accepted, the appeal in cassation and the Supreme Court ruling were annexed to the criminal file which was returned to the Harju County Court on 21 August 2009. A court judgment of a court of appeal which has entered into force shall be enforced by the county court which made the first court decision in the same criminal matter (§ 411(2) of the CCP), in this case the Harju County Court who, in order to enforce the decision, sent a copy thereof to the body executing the court decision – the Tallinn Prison (§ 411(4) of the CCP). In a criminal matter upon filing of an appeal or an appeal in cassation, a judgment of conviction shall be enforced within three days after the rejection of the criminal matter by the court of appeal or court of cassation (§ 412(2) of the CCP). There is no separate term for rejection of a criminal matter by the Supreme Court or the circuit court (§ 412(2) of the CCP) but it would be practical to provide it.

75. Therefore, if the state authorities act within the limits prescribed by law, a delay is also possible, in principle, in enforcing a court judgment which has entered into force, among other, with respect to persons who are still regarded as persons in custody. Presumably, the period of time between the entry into force of a judgment of conviction imposing a prison sentence and the enforcement of the sentence of imprisonment is generally not long.

Regarding M. Võrk, such a period of time lasted from 20 July 2009 until 28 August 2009, i.e. nearly 40 days. The Chamber is of the opinion that the constitutionality of legislation of general application and the lawfulness and reasonableness of the actions of state authorities shall be distinguished, and the Supreme Court has the final competence to assess the former, and the administrative courts have the competence to assess the latter.

76. Regarding persons who have not been transferred to the status of a prisoner after the entry into force of a judgment of conviction and who are still regarded as persons in custody, the objectives of the prohibition on long-term visits are no longer prevention of evasion from criminal proceedings in the matter and continuous commission of criminal offences, including destruction, alteration and falsification of evidence and influencing of witnesses. In such a situation the legitimate aims, corresponding to the second sentence of § 26 of the Constitution, of not permitting the receipt of long-term visits are the protection of public order and the rights and freedoms of others in prison, and also combating criminal offences. Not permitting the receipt of long-term visits by the persons mentioned above serves the purpose of preventing a potential threat in prison to public order and others which arises from long-term visits, and of combating possible criminal offences.

77. Not permitting the receipt of long-term visits by persons who have not been transferred to the status of a prisoner after the entry into force of a judgment of conviction and who are still regarded as persons in

custody is a suitable and necessary measure for the purposes of protecting public order and others in prison, and also of combating criminal offences.

78. Namely, the prison deciding the placing of a person (§ 2(1) of the Minister of Justice regulation of 25 March 2008 no. 9 "Treatment plan" – the treatment plan) first assesses within two weeks after the entry into force of a judgment of conviction imposing a prison sentence the risks related to the person (§ 2 of the Minister of Justice regulation of 14 May 2008 no. 21 "Instructions for the preparation of individual treatment programmes of prisoners and for the implementation thereof" – the instructions for the preparation of the ITP) and upon enforcement of the judgment considers, among other, the characteristics of the person upon deciding his or her placement (§ 11(1) of the IA). The choice of the prison where a person in custody is placed depends on the location of the court hearing the matter (§ 3 of the treatment plan). However, the decision regarding in which prison the prisoner shall serve the sentence depends on his or her place of residence or/and the type of the criminal offence, the length of the sentence or the threat he or she presents and the risk of recurrence, obtaining of vocational education, addictions, age or sex (§ 5 and § 6(2) of the treatment plan).

79. After the judgment of conviction imposing a prison sentence has been enforced, the person who was regarded as a person in custody is placed in a reception ward of the prison. In the reception ward, the biographical data of a prisoner shall be verified, his or her socio-psychological prognosis shall be defined and other information necessary for the preparation of an individual treatment programme for the prisoner shall be ascertained (§ 14(3) of the IA).

A prisoner who is staying in the reception ward of a prison shall also not be allowed to receive long-term visits (§ 25(3) of the IA), but application for such visits are processed. Prisoners shall not stay in a reception ward for more than three months (§ 14(4) of the IA).

80. In case of a person in custody – unlike in case of a prisoner – other data characterizing the person or his or her relationships outside of the prison are also not collected (see § 28(4) of the internal procedure rules of the prison, § 91(1) and § 17(2) of the IA). An individual treatment programme which is prepared for prisoners whose actual term of imprisonment exceeds one year (§ 16(1) of the IA) shall be annexed to the personal file of the prisoner (§ 17(1) of the IA).

An individual treatment programme is a programme for executing the sentence of a prisoner which includes measures for decreasing the criminal threat which the prisoner presents and an application schedule thereof (§ 1(1) of the instructions for the preparation of the ITP), and which shall, according to § 1(3)5)–7) of the instructions for the preparation of the ITP, include, among other, information regarding the threat the prisoner presents and the danger he or she is in upon release; information on the characteristics of the prisoner and the risks arising from his or her behaviour; actions for managing risks and a schedule thereof. Pursuant to § 2 of the instructions for the preparation of the ITP, the process of preparing a treatment plan consists of assessment of the criminal threat which the prisoner presents, preparation of the programme, approval thereof and signature by the prisoner.

An individual treatment plan shall be prepared at the latest within four weeks after the placement within the prison. Whereas, the time from the start of the initial risk assessment until the approval of the treatment plan shall not exceed two months; however, the time between the risk assessment and the placement within the prison shall not be included in the time of the preparation of the treatment plan. (see § 2 of the instructions for the preparation of the ITP.)

81. Therefore, the threats to public order and others arising from the person in custody, and the general threat he or she presents, including the risk of commission of new criminal offences, have not been assessed in case of persons in custody. In a situation where the threat presented by a person still regarded as a person in custody has not been ascertained yet, not permitting the receipt of long-term visits by persons who are not transferred to the status of a prisoner facilitates the normal functioning of public order and the protection of the rights and freedoms of others in prison, and also combating criminal offences. For achieving the said

objectives there are no other measures as effective as prohibiting the receipt of long-term visits. For example, it would not be replaced by the discretion by case of a prison servant assigned by the director of the prison when deciding on applications for the receipt of long-term visits.

82. Insofar as the period of time between the entry into force of a judgment of conviction imposing a prison sentence and the enforcement of the imprisonment is generally not too long, and other means of communication with family (see para. 70 of the judgment) and significant interests of the protection of public order and the rights and freedoms of others in prison, also of combating criminal offences which justify not enabling the receipt of long-term visits have been ensured, the interference with the right of every person to the inviolability of family life guaranteed by § 26 of the Constitution is not non-moderate.

83. Based on the aforementioned, the Supreme Court dismisses, under § 15(1)6) of the CRCPA, the request of the Tallinn Circuit Court to declare § 94(1) of the IA to be in contradiction with the Constitution.

A dissenting opinion of the justice of the Supreme Court Jüri Põld on the Constitutional Review Chamber judgment in matter no. 3-4-1-9-10

1. I am of the opinion that the regulatory framework which without the right of discretion precludes the receipt of long-term visits by persons kept under arrest for a long time is a disproportionate (unnecessary) interference with the right to family life guaranteed by § 26 of the Constitution. Unlike the majority of the Chamber, I do not see such risks which would justify total prohibition on the receipt of long-term visits by persons in custody. Threats to criminal proceedings could be avoided if the body conducting the proceedings would have the option to apply § 143^1(1)1) of the Code of Criminal Procedure (CCP), pursuant to which a body conducting the proceedings may, by a ruling, restrict or totally prohibit the right to long-term visit with regard to a suspect or accused. Conceivable would be a regulatory framework, according to which a body conducting the proceedings in a criminal matter would in every single case have the right to decide, based on the application of a person in custody, whether to allow or prohibit a long-term visit. Naturally, the final decision would have to be made by the director of the prison or another person authorised for that purpose, regardless of which option for allowing long-term visits the legislator chooses.

I note that upon imposing § 143^1(1)1) of the CCP, the legislator has proceeded from the fact that a person in custody has the right to receive long-term visits and the body conducting the proceedings is able to, by way of discretion, prevent the risks that accompany the enabling of long-term visits in criminal proceedings. The problem has probably arisen from the fact that the existence of § 143^1(1)1) of the CCP was forgotten upon the passing of the Imprisonment Act.

2. I also deem unconstitutional the continuance of the prohibition on the receipt of long-term visits by a person who after the entry into force of a judgment of conviction remains, for some reason, in the status of a person in custody for an unreasonably long time. I cannot find a justification for such a prohibition.

3. For the reasons pointed out in the part VI of the judgment of the Chamber, I deem constitutional the prohibition on the receipt of long-term visits by prisoners who are held in the reception ward of a prison. However, I am of the opinion that those justifications are not relevant in this matter.

4. As to M. Võrk, he was in the status of a person in custody for an extraordinarily long time before the entry into force of a judgment of conviction. M. Võrk remained in the status of a person in custody for an extraordinarily long time also after the entry into force of a judgment of conviction. He remained a person in custody for nearly 40 days after the entry into force of a judgment of conviction. During the lastly mentioned period, M. Võrk was not in the reception ward of a prison where, pursuant to § 25(3) of the Imprisonment Act, it is prohibited to receive long-term visits.

According to § 412(2) of the CCP, a judgment of conviction shall be enforced within three days after the entry into force of the judgment or rejection of the criminal matter by the court of appeal or court of

cassation. It is true that there is no separate term for rejection of a criminal matter by the Supreme Court or the circuit court. This, however, cannot make lawful the continuance of the status of a person in custody for an unreasonably long time after the entry into force of a judgment of conviction. Such a prolonged continuance of the status of a person in custody is clearly unlawful in my opinion. The continuance of the status of a person in custody of M. Võrk after the entry into force of a judgment of conviction was unlawful because the judgment of conviction was not rejected by the Supreme Court within a reasonable time.

The part VI of the judgment discusses whether the objectives of the prohibition on the receipt of long-term visits by a person remaining in the status of a person in custody after the entry into force of judgment of conviction are legitimate and whether the prohibition is proportionate (para. 76 and the following). I would not discuss the issue.

I do not understand how can a regulatory framework which allows or prohibits the receipt of long-term visits and which proceeds from the presumption that a person is in custody unlawfully be constitutional. Or in other words, it is not possible to impose constitutionally a legal regulatory framework in order to establish a regulatory framework allowing or prohibiting receipt of long-term visits by a person in unlawful custody; it is not constitutional to build a regulatory framework for long-term visits on the fact that a person is in the status of a person in custody unlawfully.

The legislator has not imposed a prohibition on the receipt of long-term visits for the case of unlawfully long continuance of the status of a person in custody. The legislator has proceeded from the fact that a person is quickly transferred after the entry into force of a judgment of conviction to the reception ward of a prison where the receipt of long-term visits is prohibited.
