



RIIGIKOHUS

Published on *The Estonian Supreme Court* (<https://www.riigikohus.ee>)

Home > Constitutional judgment 3-4-1-5-10

Constitutional judgment 3-4-1-5-10

JUDGMENT OF THE CONSTITUTIONAL REVIEW CHAMBER OF THE SUPREME COURT

No. of the case	3-4-1-5-10
Date of judgment	18 June 2010
Composition of court	Chairman Märt Rask, members Henn Jõks, Ott Järvesaar, Julia Laffranque and Priit Pikamäe
Court Case	Request of the Tallinn Circuit Court to declare § 251–256 and § 318(3)3) of the Code of Criminal Procedure (CCP) unconstitutional
Basis of proceedings	Ruling of the Tallinn Circuit Court of 10 March 2010 in criminal matter no. 1-09-17489
Hearing	Written proceedings.
DECISION	To declare the regulations regarding summary proceedings unconstitutional in the part in which they fail to ensure effective right of defence.

FACTS AND COURSE OF PROCEEDINGS

1. By the judgment of the Harju County Court of 30 October 2009, Allan Palmkroon was convicted according to § 349 of the Penal Code (PC) for giving an identity card issued in his name for use to Jaan-Joosep Luik with the objective that the latter could present the document to the security staff and would acquire the right to enter a night-club. A pecuniary punishment in the amount of sixty days' wages, i.e. 3000 kroons, was imposed on him. A. Palmkroon was ordered to pay compensation levies in the amount of 6525 kroons and the fee of a counsel in the amount of 420 kroons as procedural expenses.

2. A. Palmkroon filed an appeal against the county court ruling in which he contested the decision ordering him to pay the procedural expenses, especially the fee of a counsel.

3. The Tallinn Circuit Court annulled the judgment of the county court and terminated criminal proceedings pursuant to § 199(1)1) of the CCP. The Circuit Court also refused to apply § 251–256 and § 318(3)3) of the CCP and declared these provisions to be unconstitutional. The Court ascertained that § 251–256 of the CCP are in conflict with Articles 6(3)b) and 6(3)c) of the Convention for the Protection of Human Rights and Fundamental Freedoms (CPHRFF) and that § 318(3)3) of the CCP is in conflict with § 24(5) of the Constitution.

OPINIONS OF CIRCUIT COURT AND PARTICIPANTS IN PROCEEDINGS

4. The Tallinn Circuit Court has found the following in its judgment.

4.1. The Tallinn Circuit Court took the position that the complaint of A. Palmkroon regarding failure to provide legal aid to him was justified. Although the Prosecutor's Office sent a copy of the statement of charges to the appointed counsel as required pursuant to § 252(2) of the CCP, the accused did not have the corresponding information and, therefore, he did not have the possibility to contact the counsel and neither was counsel able to provide advice to the person being defended. The decision of the judgment of the county court which ordered the person to pay the fee of a counsel in the amount of 420 kroons contained the only reference to the participation of the counsel in proceedings.

4.2. The Circuit Court referred to the practice of the European Court of Human Rights (ECHR) according to which the right of defence must be real and not illusory. Restrictions on the right of defence must have reasons which explain and justify the restrictions. Additionally, the Circuit Court also referred to the European Court of Justice which has stated that ensurance of the right of defence in any proceedings initiated against a person where a decision may be made which would damage the interests of the person, especially in proceedings which may lead to the imposition of a punishment, constitutes a founding principle of the law of the Community.

4.3. The Circuit Court found that a situation where a counsel had no contact with the accused and the accused did not have any information about the counsel appointed to him – the latter was considered essentially important by the court – constitutes violation of Article 6(3)b) of the Convention for the Protection of Human Rights and Fundamental Freedoms which provides for the right to have adequate time and facilities for the preparation of one's defence, and violation of Article 6(3)c) which provides for the right to defend oneself in person or through legal assistance of one's own choosing or, if one has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

4.4. The Tallinn Circuit Court found that § 318(3)3) of the CCP which precludes the filing of appeals against a court judgment made by way of summary proceedings is in conflict with § 24(5) of the Constitution according to which everyone has the right of appeal to a higher court against the court judgment in his or her case pursuant to procedure provided by law. The Circuit Court found that differently from settlement proceedings where the restriction of the right of appeal has a legitimate objective, there is no such objective in summary proceedings. In settlement proceedings, the participation of the counsel is compulsory until completion of the court proceedings (§ 241, § 244, § 245, § 247 of the CCP), in summary proceedings, the role of the counsel is limited to the receipt of the statement of charges from a prosecutor (§ 252(2) of the CCP). The Circuit Court did not consider it possible to identify the right of the accused to request that the court hear the criminal matter pursuant to the general procedure within ten days as of the receipt of a court judgment provided for in § 254(6) of the CCP with the right of appeal.

5. The counsel of A. Palmkroon, Rein Kiviloo, held on to his statements presented before and agreed with the opinion of the Bar Association. According to the counsel, the economy of summary proceedings does not outweigh the infringement of the right of defence, and the right of defence is not ensured in summary proceedings.

6. The following is the opinion of the Public Prosecutor's Office.

6.1. The Public Prosecutor's Office finds that the contested regulations are in conformity with the Constitution. The Public Prosecutor's Office admits, in the case of the right of defence, the relevance of the fact that such regulations which could ensure a greater degree of participation of the counsel in court proceedings are non-existent and, upon assessment of the relevance of the non-existence of the regulations, considers important the conception of how the right of defence should be ensured in summary proceedings. The Public Prosecutor's Office explains that the participation of the counsel is mandatory as of examination of the criminal file in pre-trial proceedings, regardless of the type of court proceedings later (§ 45(3) and § 223(3) of the CCP), the counsel receives a copy of the criminal file (§ 223(3) and § 224(1) of the CCP), and through the counsel, the suspect or accused can also examine the file (§ 35(1) of the CCP), requests may be submitted to the Prosecutor's Office within ten days as of the date of submission of the criminal file (§ 225(1) and § 225(2) of the CCP). The Public Prosecutor's Office states that Acts regarding proceedings do not regulate on whose initiative the person being defended and the counsel communicate, but concludes on the basis of § 47(2) of the CCP and § 44(1)2) of the BAA, that the obligation is imposed on the counsel. As the permanent residence of the accused and also the temporary location of the accused during service in the Defence Forces were set out in the statement of charges, the counsel had failed to perform his obligations arising from law. According to the Public Prosecutor's Office, the right of defence is ensured when the counsel commences the provision of legal aid already upon completion of pre-trial proceedings and advises the person being defended until a decision requesting annulment of a court judgment is made.

6.2. As regards the right of appeal, the Public Prosecutor's Office finds that § 318(3)3) of the CCP is relevant as it precludes the filing of appeals against court judgments made in summary proceedings. The direct filing of an appeal against a court judgment made in summary proceedings would be problematic as it would mean that the first hearing of the matter occurs only in a circuit court. Upon disagreement with summary proceedings, a decision made in general proceedings can be contested pursuant to the general procedure. Although, application of § 318(3)3) of the CCP may, in sum, extend the period of proceedings, it is balanced by the possibility to contest a single issue by the filing of an appeal against a court ruling, e.g. as regards expenses relating to a criminal proceeding.

7. The opinion of the Riigikogu was presented by the Constitutional Committee and the Legal Affairs Committee.

7.1. As regards the right of defence, the Constitutional Committee and the Legal Affairs Committee find that in addition to the decisions of the European Court of Human Rights and the European Court of Justice, the right of defence can also arise from the principle of § 24 of the Constitution which provides for the right to be heard. The Committee finds that in the provisions of § 251–256 of the CCP regarding summary proceedings, the right of defence is illusory to a great extent and effective right of defence is not ensured. In the opinion of the Committee, no time has been prescribed for the counsel for examining the statement of charges and no right to file a request for the conduct of proceedings pursuant to the general procedure has been prescribed either. Substantially, the counsel does not have the right to participate in court proceedings before court judgment is made, and the counsel and the accused can substantially present their positions only after a court judgment is made. The Constitutional Committee finds that the speed, economy and effectiveness of proceedings do not outweigh the infringement of the right of defence and the summary proceedings provided for in § 251–256 of the CCP are not necessarily be in conformity with § 15 and 24 of the Constitution.

7.2. The Constitutional Committee of the Riigikogu holds the opinion that the right of appeal is a part of the general right of recourse to courts and the right of defence, the objective of which is to ensure the verification of court decisions in order to prevent mistakes and errors. The Committee implies that the right of appeal arises from § 24(5) of the Constitution and Article 2 of Protocol No. 7 to the CPHRFF. The restriction on the right of appeal in settlement proceedings and summary proceedings are not comparable as effective right of defence is ensured in settlement proceedings and, in some cases, the right of appeal is also

ensured. The Constitutional Committee finds that although the accused has the right to request the hearing of the matter pursuant to the general procedure within ten days after the receipt of the court judgment made by way of summary proceedings and, in this way, exercise his or her right of appeal, no effective right of defence is ensured to the accused in the proceedings and, arising from different provisions regarding summary proceedings in their conjunction, § 318(3)3 of the CCP is not necessarily in conformity with § 24(5) of the Constitution.

7.3. The Legal Affairs Committee of the Riigikogu finds that the provisions regarding summary proceedings are in conformity with the Constitution. The right of appeal is ensured through § 254(6) of the CCP as, after the receipt of the court judgment made by way of summary proceedings, the accused can request hearing of a criminal matter pursuant to the general procedure. Submission of a request does not require profound legal knowledge from the accused. Nevertheless, the Legal Affairs Committee accepts that, in regulations regarding summary proceedings, specification of the obligations of the counsel should be considered in order to avoid a situation where, in reality, the right of defence proves to be illusory, where there is no real and functioning right of defence and, therefore, the convicted offender might not exercise the right to request hearing of the criminal matter by way of the general procedure.

8. The following is the opinion of the Chancellor of Justice.

8.1. The Chancellor of Justice finds that § 318(3)3 of the CCP is relevant and infringes the right of appeal, i.e. § 24(5) of the Constitution in conjunction with § 15(1) of the Constitution. The Chancellor of Justice finds that the economy of proceedings is the legitimate objective of the restriction. An appeal is a regular, complete, devolutive and reformatory complaint filed with a court, proceedings regarding which do not differ from proceedings in the first instance pursuant to the general procedure not so much to the formal extent of proceedings but as regards the objective to ensure verification of the correctness of court decisions. In the opinion of the Chancellor of Justice, material violation of criminal procedural law or an obvious misapplication of material penal law should be sufficient in order for an appeal to be filed; the objective to ensure the economy of proceedings would be reversed also if the accused would be obliged to undergo the whole general procedure in the first instance. The Chancellor of Justice holds the opinion that § 318(3)3 of the CCP is in conflict with the Constitution in the part in which it does not allow to file an appeal in the case of an obvious misapplication of material penal law or material violation of criminal procedural law.

8.2. The Chancellor of Justice has, as regards the regulations on the right of defence, taken the position that the possibility to interpret a regulation as constitutional should have an impact on the permissibility of the review of regulations. As regards communication of the ruling on the appointment of a counsel to an accused at trial, the Chancellor of Justice has pointed out that according to § 145(6) of the CCP, the person who issues the ruling must, in the cases provided for in the Code of Criminal Procedure, submit the reasoned ruling for examination to the participants in the proceedings; communication of the ruling on the appointment of a counsel is not prescribed by any law. Regardless of the absence of an explicit obligation, § 8(1)2 and § 8(1)3 of the CCP in conjunction with § 45(2) of the CCP should be interpreted so that the ruling on the appointment of a counsel must be communicated to the suspect or the accused. It is the prosecutor's discretionary decision where the prosecutor should, if a person has no information on his or her counsel, communicate the information to the accused. The Chancellor of Justice found that due to the possibility to interpret the Code of Criminal Procedure and the State Legal Aid Act so that they conform to the Constitution, there is no relevant regulation in the matter of communication of a ruling on the appointment of a counsel to the accused at trial, but he considers it necessary that the Supreme Court would provide an explanation regarding the constitutionality of the discretionary decision to submit the ruling on the appointment of a counsel for examination to the accused, on which future practise could be based.

8.3. The Chancellor of Justice finds that although § 254(4) of the CCP does not prohibit a judge from communicating a court judgment made in summary proceedings to the counsel, the regulation must be considered, taking account of the general specifics of criminal proceedings, the minimal nature of summary proceedings and the comparison with other procedural provisions, relevant in the part in which it does not prescribe the obligation to communicate the court judgment made in summary proceedings also to the

counsel. The Chancellor of Justice finds that § 151 of the Constitution must be considered as the general fundamental right to receive legal aid and that § 254(5) of the CCP infringes the right as it fails to ensure the participation of the counsel in no stage of court proceedings. The legitimate objective of the restriction would be the economy of proceedings. The Chancellor of Justice compares the role of the counsel in summary proceedings with his or her role in other types of proceedings and finds that summary proceedings are built so that, substantially, the aid of the counsel is needed the most in order to decide, pursuant to § 254(6) of the CCP, within ten days whether to request the hearing of the matter pursuant to the general procedure or not. It is possible only when the court judgment made in summary proceedings is communicated to the accused at trial and to his or her counsel at the same time. In the opinion of the Chancellor of Justice, § 254(5) of the CCP is in conflict with § 151 of the Constitution in the part in which it fails to prescribe the obligation to communicate the court judgment to the counsel of the accused.

8.4. The Chancellor of Justice considers the request of the Tallinn Circuit Court non-permissible as regards § 251–253, § 254(1)–(4) and § 254 (6)–(7) and § 255–256 of the CCP pursuant to § 11(3) of the Constitutional Review Court Procedure Act (CRCPA), as there is no reasoning from the court which initiated the constitutional review matter.

9. The Minister of Justice presented the opinion below.

9.1. The Minister of Justice finds that the prohibition on the filing of an appeal provided for in § 318(3)3) of the CCP is justified as an accused has, within ten days as of receipt of the court judgment made in summary proceedings, the right to request hearing of the criminal matter pursuant to the general procedure and the accused has the right to file an appeal against a court judgment made pursuant to the general procedure according to § 318(3)3) of the CCP. The Minister of Justice finds that filing of an appeal in settlement proceedings and summary proceedings are not comparable as in settlement proceedings the consent of the accused is necessary, but the accused cannot contest application of the summary proceedings. In summary proceedings regarding a criminal matter, oral hearing is not used in court but the accused can request hearing of the matter pursuant to the general procedure. In the opinion of the Minister of Justice, it is not justified to grant the accused the right to file an appeal and a request for the hearing of the matter pursuant to the general procedure at the same time. In appeal proceedings, a circuit court judge has no other possibility than to send the matter to a new substantial hearing to a court of first instance. This is directly permitted by § 254(6) of the CCP.

9.2. As regards the right of defence, the Minister of Justice finds that, arising from § 45(3) and § 45(4) of the CCP, a counsel is involved in criminal proceedings as of the time when the Prosecutor's Office declares the pre-trial proceedings to be completed according to § 223(3) of the CCP. Thereby the counsel is aware of the content of the criminal file, including also of the information about the suspect before the criminal file is sent to a court. Pursuant to § 252(2) of the CCP, a copy of the statement of charges shall be sent to the counsel and thereby, in the opinion of the Minister of Justice, it is ensured that the counsel is aware of the content of the charges brought against the accused and of the fact that the Prosecutor's Office requests application of summary proceedings. The Minister of Justice finds that the rights of defence of the suspect and of the accused are ensured in summary proceedings by § 46(3) and § 46(4), § 223(3) and § 252(2) of the CCP.

10. The following is the opinion of the Bar Association.

10.1. The Estonian Bar Association finds as regards the constitutionality of the right of appeal that the material area of protection of § 24(5) of the Constitution is broader than the right of appeal in criminal matters provided for in Article 2(2) of the Additional Protocol 7 to the CPHRFF, which need not be ensured in the case of offences of a minor character in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal. In the opinion of the Bar Association, § 318(3)3) of the CCP infringes the fundamental right to receive effective legal protection provided for in the first sentence of § 15(1) of the Constitution in conjunction with the right of appeal provided for in § 24(5) of the Constitution. The Bar Association points out that § 318(3) of the CCP

prescribes, *expressis verbis*, the possibility to file an appeal against a court ruling in the part which concerns procedural expenses related to the court judgment and in the present matter, the accused has contested precisely the ordering of payment of procedural expenses. Therefore, the right of appeal is ensured at least as regards the procedural expenses and the regulation is constitutional.

10.2. The Bar Association holds the opinion that although the appeal was submitted only as regards procedural expenses and not as regards the substantial part of the judgment, the Circuit Court was entitled to extend the boundaries of hearing the matter on its own initiative and establish a material violation of the CCP, on the basis of § 331(3) and § 390(1) of the CCP in their conjunction.

10.3. The Bar Association implies that the Supreme Court has earlier deducted the principle of ensuring the right of defence from the Constitution and the CPHRFF, which is directed primarily to officials responsible for the course of criminal proceedings, including the Bar Association. The Bar Association refers to the principle of fair trial derived from the practise of the ECHR, the sub-principle of which is the right of the accused to be heard. The obligation of the body which conducts proceedings to introduce the results of pre-trial proceedings to the accused with the participation of the counsel and provision of a possibility to the accused or his or her counsel to form an opinion on the basis of the results, and the obligation of the judge to inform the accused of the right of defence and, in the case of an obviously insufficient right of defence, to take steps to ensure the right, correlate with the right of the accused to be heard. The Bar Association concludes that, arising from the fact that the Convention is binding, the right of defence of the accused must be considered as a fundamental right. The right of defence must be real, not illusory.

10.4. The Bar Association admits that problems regarding ensuring the right of defence exist in summary proceedings but doubts whether they can be considered in the framework of this matter as the substantial judgment was not contested. The Bar Association considers it a problem that the counsel can use the copy of the statement of charges communicated to the counsel for nothing and the counsel has no role of a participant in proceedings until the court judgment is made. The actual possibility to exercise the right of defence in summary proceedings arises after the court judgment is made, but the counsel will not be informed thereof.

10.5. The Bar Association notes that, according to the CPHRFF, fair court hearing is ensured when, after written proceedings, it is possible to request hearing of the matter pursuant to the general procedure, but the Bar Association considers § 24(5) of the Constitution broader. According to the ideology of summary proceedings, the right of defence is not ensured by the summary proceedings themselves but by the possibility to request the hearing of the matter pursuant to the general procedure, analogously with a default judgment in civil proceedings. The problem with the law in force is that it does not allow consultations between the accused and the counsel to be held at an appropriate moment and with appropriate preparation, and the counsel is not ensured the possibility to perform his or her duties at proper time. Therefore, the counsel and the accused must be informed of each other's details in good time. This should be the duty of the Prosecutor's Office. The Bar Association considers the regulations regarding summary proceedings to be in conflict with § 24(5) of the Constitution.

CONTESTED PROVISIONS

11. § 251–256 and § 318(3)3) of the Code of Criminal Procedure:

"§ 251. Grounds for application of summary proceedings

(1) If the facts relating to a subject of proof are explicit in the case of a criminal offence in the second degree and the prosecutor considers application of a pecuniary punishment as the principal punishment, the court may adjudicate the criminal matter by way of summary proceedings at the request of the Prosecutor's Office.

(2) Summary proceedings shall not be applied if the suspect is a minor.

[RT I 2004, 46, 329 – entered into force 1.07.2004]

§ 252. Main part of statement of charges in summary proceedings

(1) In summary proceedings, the Prosecutor's Office shall prepare a statement of charges the main part of which shall set out:

- 1) the facts relating to the criminal offence;
- 2) the legal assessment of the criminal offence;
- 3) the nature and extent of the damage caused by the criminal offence;
- 4) the evidence in proof of the charges;
- 5) a proposal concerning the type and the category or term of the punishment.

(2) A statement of charges and the materials of the criminal matter shall be sent to the court and copies of the statement of charges to the accused and his or her counsel.

[RT I 2004, 46, 329 – entered into force 1.07.2004]

§ 253. Court decisions in summary proceedings

Upon receipt of a criminal matter by the court, the judge shall verify the jurisdiction over the criminal matter and make one of the following decisions:

- 1) a court judgment in summary proceedings pursuant to § 254 of this Code;
- 2) a ruling on termination of the criminal proceeding if the grounds provided for in clauses 199 (1) 1)–5) of this Code become evident;
- 3) a ruling on refusal to apply summary proceedings and on the return of the criminal file to the Prosecutor's Office.

[RT I 2004, 46, 329 – entered into force 1.07.2004]

§ 254. Court judgment in summary proceedings

(1) If a judge consents to the conclusions presented in a statement of charges concerning the proof of the charges and the category or term of the punishment, he or she shall prepare a court judgment.

(2) The introduction of a court judgment made by way of summary proceedings shall set out:

- 1) that the court judgment is made on behalf of the Republic of Estonia;
- 2) the date and place of making the court judgment;
- 3) the name of the court which made the judgment and the name of the judge;
- 4) the name, residence or seat and address, personal identification code or, in the absence thereof, date of birth and the place of work or educational institution of the accused;
- 5) the criminal record of the accused.

(3) The main part of a court judgment made by way of summary proceedings shall set out:

- 1) the facts relating to the criminal offence;
- 2) the legal assessment of the criminal offence;
- 3) the nature and extent of the damage caused by the criminal offence;
- 4) the reasons for the punishment to be imposed on the accused..

(4) The conclusion of a court judgment made by way of summary proceedings shall set out:

- 1) the conviction of the accused pursuant to the corresponding section, subsection or clause of the Penal Code;
- 2) the category or term of the punishment;
- 3) a decision concerning the expenses relating to the criminal procedure;
- 4) the procedure and term for appeal against the summary judgment.

(5) A copy of a court judgment made by way of summary proceedings shall be delivered to the accused and the Prosecutor's Office in accordance with the provisions of subsections 164 (3) and (6) of this Code within three days as of the making of the judgment.

[RT I 2008, 19, 132 – entered into force 23.05.2008]

(6) Within ten days as of the receipt of a court judgment made by way of summary proceedings, the accused has the right to request that the court hear the criminal matter pursuant to the general procedure.

(7) If the accused does not request that the court hear the criminal matter pursuant to the general procedure, the court judgment made by way of summary proceedings shall enter into force.

[RT I 2004, 46, 329 – entered into force 1.07.2004]

§ 255. Contestation of court judgment made by way of summary proceedings and court hearing pursuant to general procedure

(1) If a convicted offender contests a court judgment made by way summary proceedings and requests that the court hear the criminal matter pursuant to the general procedure, the judge shall prepare a ruling on the return of the criminal file to the Prosecutor's Office and the ruling shall serve as a basis for preparation of a new statement of charges pursuant to § 154 of this Code and for continuation of the proceeding pursuant to the general procedure.

(2) A court hearing shall be conducted pursuant to the general procedure in accordance with the provisions of Chapter 10 of this Code.

§ 256. Commencement of summary proceedings during court hearing

(1) In the cases provided for in clause 269 (2) 2) of this Code, a prosecutor may submit a request for application of summary proceedings to the court and make a proposal concerning the category or term of the punishment to be imposed on the accused.

(2) If a request is satisfied, the court shall conduct the summary proceedings pursuant to §§ 253 and 254 of this Code. (3) If a request is dismissed, the court hearing shall be continued pursuant to the general procedure.

[---]

§ 318. Right of appeal

[---]

(3) An appeal shall not be filed:

[---]

3) against a judgment made by way of summary proceedings;”.

OPINION OF CHAMBER

12. The provisions which were not applied in the Circuit Court can be divided into two: a provision which, in the opinion of the Court, is in conflict with the Constitution due to preclusion of the right of appeal, and provisions which are in conflict with the Constitution as they do not ensure the right of defence to an accused in summary proceedings. First, the Chamber will assess the relevance and constitutionality of § 318(3)3) of the CCP (I) and thereafter the relevance and constitutionality of other provisions (II).

I

13. According to § 14(2) of the CRCPA, a provision the constitutionality of which is assessed by the Supreme Court must be relevant upon resolution of the main dispute. According to the practice of the Supreme Court, a provision is relevant if it is of decisive importance upon adjudication of a matter. A provision is of decisive importance if, upon adjudication of the matter, the court would decide differently if a regulation were not in conformity with the Constitution than in the case if it conformed to the Constitution (last, judgment of the Constitutional Review Chamber of 22 December 2009 in case no. 3-4-1-27-09, paragraph 15).

14. The Prosecutor's Office and the county court conducted summary proceedings in respect of A. Palmkroon. § 318(3)3) of the CCP precludes the filing of appeals against court judgments made in summary proceedings. A. Palmkroon filed an application to the Tallinn Circuit Court in which he expressed his dissatisfaction that he was ordered payment of procedural expenses and that the help of a counsel was in fact not ensured to him. This reprimand is considered as an appeal as regards violation of a regulation of criminal proceedings. At a preliminary hearing of the Circuit Court, the appointed counsel of A. Palmkroon, R. Kiviloo, submitted the positions to the court as his response in which he found that the right of defence of the person being defended was violated in pre-trial proceedings and that the court of first instance had applied substantive law incorrectly. If § 318(3)3) of the CCP is declared to be in conflict with the Constitution and invalid, the court should have reviewed the request of the person by way of appeal procedure. The positions of the counsel can also be interpreted as a wish to file an appeal. This means that the court should, in the case of the constitutionality of § 318(3)3) of the CCP, have resolved the matter

differently than in the case of the unconstitutionality thereof. Consequently, the regulation is relevant.

15. Next, the fundamental right, the area of protection and infringement thereof must be ascertained. § 24(5) of the Constitution provides that everyone has the right of appeal to a higher court against the judgment in his or her case pursuant to procedure provided by law. Article 2(1) of Protocol 7 to the CPHRFF provides that everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law. According to Article 2(2), this right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal. Thus, both the Constitution and Protocol 7 to the CPHRFF provide for the right of appeal. Differently from Protocol 7 to the CPHRFF, a provision of the Constitution of the Republic of Estonia does not prescribe a possibility to make exceptions, but allows to provide by law only for the procedure for appeal. Thus, the material area of protection of the right of appeal provided for in § 24(5) of the Constitution is broader than the right arising from the Convention and, therefore, the Chamber verifies only whether the restriction conforms to the Constitution of the Republic of Estonia.

16. The core of the right of appeal is that an initial judgment made regarding a person must be reviewable and in a higher court. The necessity of this fundamental right is caused primarily by the fact that a judge can make mistakes and, therefore, verification of the correctness of a court decision must be guaranteed. § 318(3)3) of the CCP precludes the filing of appeals against court judgments made in summary proceedings. The hindrance to the recourse to a higher court constitutes infringement of the right of appeal provided for in § 24(5) of the Constitution.

17. In addition to the right of appeal, one more fundamental right must be taken into account. According to § 15(1) of the Constitution, everyone has the right, while his or her case is before the court, to request that any relevant law, other legislation or procedure be declared unconstitutional. The legislator has created summary proceedings so that the court does not hear the accused and the accused or his or her counsel cannot file requests in the course of the proceedings. Therefore, verification of the constitutionality of regulations also cannot be requested in the framework of summary proceedings. After a court judgment made in summary proceedings, a person has the right to request hearing of the matter pursuant to the general procedure on the basis of § 254(6) of the CCP. This does not mean verification in summary proceedings, i.e. the legality of the summary proceedings will not be discussed in the course of this – a court of first instance has no competence therefor. Also, summary proceedings are later not verified in the course of appeal or cassation proceedings. Therefore, in court proceedings, a person cannot request verification of the constitutionality of regulations concerning summary proceedings.

18. The Constitution foresees that, while his or her case is before a court, a person must have the possibility to request that only a relevant regulation be declared unconstitutional. Arising therefrom, it must be ascertained whether the regulations concerning summary proceedings are relevant within the meaning of the second sentence of § 15(1) of the Constitution.

19. It has been indicated previously that, arising from the practise of the Supreme Court, a provision is relevant if the court would decide differently if a regulation were not in conformity with the Constitution than in the case if it conformed to the Constitution. In the opinion of the Chamber, assessment of the relevance of procedural provisions cannot be based only on whether upon unconstitutionality or invalidity of a regulation a court should have made a different judgment, i.e. a judgment with a different conclusion. Summary proceedings are a type of simplified proceedings. Simplified proceedings provided for in Chapter 9 of the CCP allow Prosecutor's Offices and courts to adjudicate matters more quickly and more economically than in the case of proceedings pursuant to the general procedure. Although, upon absence of regulations regarding summary proceedings, other simplified proceedings will be applied or proceedings regarding the matter will be conducted pursuant to the general procedure, these regulations constitute regulations actually applied in respect of a person – on the basis of the regulations regarding summary proceedings, a statement of charges is sent to a court and a person is convicted (§ 252(2), § 254(1)-(4) of the

CCP). If we take the position that a specification of a conclusion is of decisive importance, then it would be impossible to verify the constitutionality of several procedural rules in the course of the particular review of regulations – upon absence of these regulations, other procedural provisions would be applied and the same final conclusion would be reached. Therefore, if the procedural provisions are relevant, the decision must be based on whether these procedural provisions were to be applied in the particular proceedings in order to reach a court judgment.

20. Taking account of the abovementioned, a person should have the possibility to request verification of the constitutionality of regulations concerning summary proceedings while his or her case is before the court. It is not at all possible to file requests in summary proceedings. In the absence of the right of appeal, it is impossible to file a request for verification of the constitutionality later. Therefore, § 318(3)3 of the CCP also infringes the fundamental right provided for in the second sentence of § 15(1) of the Constitution.

21. As regards formal constitutionality, it must be assessed whether a restriction has been established with an appropriate legal instrument which has been established in accordance with the procedural provisions and whether a provision is legally clear. § 24(5) of the Constitution provides that everyone has the right of appeal to a higher court against the judgment in his or her case pursuant to procedure provided by law. This constitutes a fundamental right without reservation of the law which means that this fundamental right may be restricted in order to protect another right or value arising from the Constitution and the restriction must be provided by law. The right to request verification of the constitutionality of any relevant regulation provided for in the second sentence of § 15(1) of the Constitution also constitutes a fundamental right without reservation of the law. In the present case, regulations established by law are under dispute and, therefore, the restriction is formally in conformity with the Constitution in this respect. Otherwise, there is no reason to doubt in the formal constitutionality of the provision.

22. In order to assess the substantive constitutionality of an infringement, a legitimate objective due to which the fundamental right is infringed must be found. First, the Chamber considers the legitimate objective of the fundamental right provided for in § 24(5) of the Constitution and thereafter the legitimate objective of the fundamental right provided for in the second sentence of § 15(1) of the Constitution.

23. As referred to above, in the case of § 24(5) of the Constitution, another fundamental right or value arising from the Constitution must be the legitimate objective of the restriction. Summary proceedings were added to the legal order upon entry into force of the current version of the Code of Criminal Procedure on 1 July 2004. In the explanatory memorandum to the draft Act, we find no justification why filing of appeals is precluded in summary proceedings.

24. § 254(6) of the CCP allows to request hearing of a criminal matter pursuant to the general procedure within ten days after the receipt of a judgment, i.e. a judgment made in summary proceeding is not necessarily final. This means that, instead of an appeal, proceeding may be continued by hearing the matter pursuant to the general procedure in a court of first instance. Proceedings pursuant to the general procedure in a court of first instance are more extensive than appeal proceedings where a judgment of a court of first instance is reviewed. The purpose of this is to ensure to a person more extensively the right to be heard. The right to be heard arises from § 24(2) of the CCP. This constitutes a legitimate objective.

25. The Chancellor of Justice finds that the legitimate objective of preclusion of the right of appeal is the economy of the proceedings. The Chamber agrees with the Chancellor of Justice as regards the objective but not as regards the justifications therefor. The Chancellor of Justice finds that the economy of summary proceedings means that summary proceedings terminate with a judgment of a court of first instance. Although, summary proceedings as such really terminate with a judgment made in the first instance, it is possible to continue proceedings by hearing the matter pursuant to the general procedure. Therefore, in the opinion of the Chamber, termination of proceedings with a judgment made in summary proceedings cannot be considered the objective of preclusion of appeals.

26. In the opinion of the Chamber, the economy in summary proceedings arises, as an objective of the

restriction on the right of appeal, from the possible proceedings which follow the judgment made in summary proceedings. If an appeal could be filed against a judgment made in summary proceedings then, arising from the fact that a judgment made in summary proceedings is more concise as compared to a judgment of a court of first instance made pursuant to the general procedure (compare § 254(2)-(4) and § 311–313 of the CCP), a court of appeal should most probably send the matter to a court of first instance for a new hearing. The preclusion of appeals and the possibility to file a request for hearing of a matter pursuant to the general procedure in the first instance precludes the movement of a court matter back and forth between different instances. This helps to save both money and time. The Constitutional Review Chamber has found that guaranteeing the efficiency of the judicial system is a constitutional legal value expressed in Chapter XIII of the Constitution (judgment of 9 April 2008 in case no. 3-4-1-20-07, paragraph 19).

Arising from the aforementioned, the legitimate objective of the restriction on the right of appeal is also the economy of proceedings.

27. As regards the restriction on the right provided for in the second sentence of § 15(1) of the Constitution, the Chamber finds that this has no legitimate objective. A restriction established without a legitimate objective is in conflict with the Constitution. Still, § 318(3)3) of the CCP cannot be declared to be unconstitutional – if a person had the right to file a request for the verification of the constitutionality of a relevant provision in the first instance or upon hearing the matter pursuant to the general procedure after the judgment has been made in summary proceedings, this would not constitute violation of a fundamental right provided for in the second sentence of § 15(1) of the Constitution.

Therefore, the Chamber finds that the regulations regarding criminal procedure are in conflict with the Constitution in the part in which they do not allow the person to request, while his or her case is before the court, that relevant regulations regarding summary proceedings be declared unconstitutional.

The Chamber discusses the relation between the filing of a request for the declaration of regulations relevant in one's matter unconstitutional and the right of defence in paragraph 61 of this judgment.

28. Next, the Chamber verifies the proportionality of the restriction on the right of appeal. In order for an appeal to be proportional, it must be appropriate, necessary and moderate for achieving the objective.

Preclusion of the right of appeal and conducting proceedings regarding a matter in the first instance pursuant to the general procedure are appropriate manners to ensure the right to be heard. At the same time the restriction is necessary as there are no other proceedings in the course of which a person is heard to the same extent as during proceedings in the first instance pursuant to the general procedure.

Preclusion of the right of appeal and conduct of proceedings regarding the matter in the first instance pursuant to the general procedure are appropriate manners also in order to ensure the economy of the proceedings. The Chamber will consider the necessity of the restriction more closely from the aspect of the economy of the proceedings.

29. When considering the moderation of the economy of proceedings in respect of the restriction on the right of appeal, the Chancellor of Justice takes the position that upon material violation of the criminal procedural law and the obvious misapplication of material penal law, it should be possible to file an appeal as, by forcing the accused to undergo the whole proceedings pursuant to the general procedure, the objective of summary proceedings – economy – would be turned upside down. The Chamber finds that this argumentation concerns assessment of the necessity of the restriction, and the Chamber substantially does not consent to the position. Upon restriction of the right of appeal, the economy of summary proceedings is not the issue – summary proceedings as such terminate with a judgment made in the court of first instance. The issue is assessment of the restriction on the right of appeal on the basis of the economy of proceedings and, as regards necessity, primarily two situations can be compared: whether in the case of the possibility to file appeals, the proceedings were more economical than in the case when the possibility to file appeals was precluded. As stated above, the legislator has, upon preclusion of appeals, substantially prescribed

postponement of appeals – before the filing of an appeal, the matter must be heard pursuant to the general procedure. Above, it has also been discussed that, arising from absence of court hearing in summary proceedings and the conciseness of the court judgment which is made, the court of appeal probably has no other possibility than to refer the matter to a court of first instance for a new hearing pursuant to § 399 of the CCP. As preclusion of appeals prevents the needless back and forth movement of a matter, the restriction is necessary.

30. Upon assessment of the moderation of restriction of the right of appeal, it should be reviewed whether the legitimate objective outweighs the restriction which has been provided for. First, the Chamber weighs the restriction on the basis of the objective to ensure the right to be heard.

31. Preclusion of the filing of appeals does not mean that a court judgment made in summary proceedings is final in each case. If the accused requests hearing of the matter pursuant to the general procedure pursuant to § 254(6) of the CCP after a court judgment has been made in summary proceedings, he or she has the right to contest the court judgment made pursuant to the general procedure in a higher court. Therefore, a new hearing of the matter also in a higher court is ensured to the person. Although, law prescribes, first, an obstacle to take direct recourse to a higher court, the situation may be considered even more favourable to the person from the aspect of the right to be heard. As a result, the time of the proceedings becomes extended, but, after a court judgment is made in summary proceedings, two subsequent reviews of the matter and, thus, also the hearing of the person are guaranteed – first, pursuant to the general procedure, again in a county court and thereafter, by way of appeal procedure, in a circuit court. Acceptance of an appeal in cassation will be decided in the case of court proceedings which commenced as summary proceedings or proceedings pursuant to the general procedure each time, taking account of the circumstances. Therefore, if summary proceedings are applied in respect of a person, the person has, after the first court judgment made in summary proceedings, the possibility to be heard twice (pursuant to the general procedure in the first instance and in appeal proceedings), but if at once proceedings pursuant to the general procedure are applied in respect of the person, he or she gets one more possibility to be heard, i.e. in appeal proceedings. Arising from the aforementioned, we must adopt the position that the restriction provided for in § 318(3)3 of the CCP is moderate from the aspect of the right to be heard.

32. Assessment of the moderation of a restriction from the aspect of the economy of the proceedings cannot be based on whether the legislator has prescribed summary proceedings in the most purposeful or economical manner, but it must be assessed whether the restriction is proportionate to the objective of the restriction.

33. In order to exercise the right of appeal, a person must, first, undergo hearing of the matter pursuant to the general procedure. Hearing of a matter pursuant to the general procedure constitutes ordinary criminal proceedings. Arising from the Constitution, a person has the right that his or her court case be heard within a reasonable period of time (last, the judgment of the full panel of the Criminal Chamber of the Supreme Court of 14 April 2010 in case no. 3-1-1-119-09, paragraph 11), but he or she has no right to proceedings which are faster or simpler than usual. The legislator may create faster and simpler proceedings and develop also different appeal proceedings for them but, arising from the Constitution, the legislator has no obligation to do this. As the restriction obliges the person to undergo ordinary proceedings in order to exercise his or her right of appeal, the restriction on the right of appeal is moderate in the opinion of the Chamber. Therefore, § 318(3)3 of the CCP does not violate the right of appeal arising from 24(5) of the Constitution.

II

34. Next, the Chamber assesses the relevance and constitutionality of other regulations regarding summary proceedings.

A provision is relevant when, upon adjudication of the matter, the court would decide differently if a regulation were not in conformity with the Constitution than in the case if it conformed to the Constitution or if, in particular proceedings, these procedural provisions were to be applied in order to reach the court

judgment. Above, the Chamber found that § 318(3)3) of the CCP is in conformity with the Constitution, therefore, at first glance, it seems as the Circuit Court should not have accepted the case and, consequently, the decision should not have depended on these regulations. At the same time, the Chamber took the position that regulations regarding summary proceedings are in conflict with the Constitution in the part in which summary proceedings do not allow to request declaration of a relevant regulation unconstitutional. As the person could not request verification of the constitutionality of relevant regulations in the first court instance, the Circuit Court still had to accept the case.

35. In respect of A. Palmkroon, summary proceedings were applied, a statement of charges was brought, a court judgment was made and forwarded and it entered into force pursuant to § 251–253, § 254(1)-(4) and (7) of the CCP. If these provisions were unconstitutional and invalid, other procedural provisions should have been applied and, therefore, § 251–253, § 254(1)-(4) and (7) of the CCP must be considered relevant.

36. The Circuit Court declared § 254(5)-(6) and § 255 and § 256 of the CCP which regulate the contesting of court judgments made in summary proceedings and the commencement of a court hearing pursuant to the general procedure to be in conflict with the Constitution. A. Palmkroon did not contest the court judgment made in summary proceedings and a court hearing was not commenced in the case pursuant to the general procedure. With the aim of guaranteeing legal clarity, the provisions which are closely related to the contested regulation and which may – when they remain in force – create ambiguity as to the legal reality, are to be regarded as relevant, too (see judgment of the Constitutional Review Chamber of the Supreme Court of 1 October 2007 in case no. 3-4-1-14-07, paragraph 12). If § 251–253, § 254(1)-(4) and (7) of the CCP are declared to be in conflict with the Constitution and invalid, § 254(5)-(6) and § 255 and § 256 would also become meaningless as they regulate the continuation of summary proceedings which would not exist any more in that case. Therefore, these regulations are also relevant.

37. In addition to that, summary proceedings are regulated by § 49(1)2) of the Code of Criminal Procedure, which provides for the specifications of the basis for removal of judges regarding a preliminary investigation judge who participated in summary proceedings; § 339(1)10) which provides that absence of the minutes of a court session is not a material violation of criminal law; § 408(3) which regulates the entry into force of a court judgment made in summary proceedings. If summary proceedings are declared to be invalid, all these provisions would become non-applicable. Therefore, the regulations below are also relevant due to their close connection with other contested regulations.

The part of the sentence “and summary” in § 49(1)2) of the Code of Criminal Procedure.

The part of the sentence “, with the exception of the matters heard by way of summary proceedings” in § 339(1)10) of the Code of Criminal Procedure.

§ 408(3) of the Code of Criminal Procedure:

"§ 408. Entry into force of court judgments and rulings

[---]

(3) A court judgment made by way of summary proceedings enters into force upon expiry of the term for submission of requests for court hearing of the judgment by way of the general procedure."

38. Next, the Chamber will ascertain the fundamental right, its area of protection and the infringement of the right.

In the opinion provided by the Chancellor of Justice, he made a proposal to treat § 151 of the Constitution as a general fundamental right to receive legal aid. § 151 of the Constitution prescribes that the rules of court procedure regarding representation, defence, state prosecution, and supervision of legality shall be provided by law. Although, the deduction of fundamental rights from other provisions of the Constitution outside of the Chapter of Fundamental Rights, Freedoms and Duties is not precluded, the Chamber does not agree with the proposal of the Chancellor of Justice at least in the context of the right of defence where § 151 of the Constitution means only that the right of defence must be regulated by law.

The second sentence of § 21 of the Constitution provides, without prescribing reservations, that a person

suspected of a criminal offence shall also be promptly given the opportunity to choose and confer with counsel. § 21 of the Constitution is a fundamental right without a reservation of the law which may be restricted only in order to protect another fundamental right or value arising from the Constitution.

39. Article 6(3)b) of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that everyone charged with a criminal offence has the right to have adequate time and facilities for the preparation of his defence, and Article 6(3)c) provides that everyone charged with a criminal offence has the right to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require. Arising therefrom and from § 21 of the Constitution, the Supreme Court has stated earlier the validity of the principle of the right of defence in the Estonian public order (ruling of the Criminal Chamber of the Supreme Court of 29 January 2002 in case no. 3-1-1-3-02, paragraph 7.1) and holds on to the statement.

40. The Circuit Court has ascertained that a counsel was appointed to A. Palmkroon but he was not informed of the counsel and neither were his contact details communicated to the counsel. The regulations do not prescribe that the details of the appointed counsel have to be communicated to the accused or the suspect and the communication of contact details in the opposite direction is not provided for either. Therefore, this constitutes infringement of the right of defence.

41. According to § 254(5) and (6) of the CCP, a court judgment made by way of summary proceedings is not delivered to the counsel and he or she cannot request that the court hear the criminal matter pursuant to the general procedure. Arising from § 47(2) of the CCP, a counsel is required to use all the means and methods of defence which are not prohibited by law in order to ascertain the facts which vindicate the person being defended, prove his or her innocence or mitigate his or her punishment, and to provide other legal assistance necessary in a criminal matter to the person being defended. This means that a counsel participates in proceedings in the interests of the person being defended. If the right of appeal of the counsel is precluded, then thereby the right of the person being defended to benefit from effective defence is also restricted. Thus, § 254(5) and (6) of the CCP also restrict the right of defence.

42. In the opinion of the Chamber, the restriction is formally in conformity with the Constitution. The restriction has been established by an Act, there are no reprimands to the proceedings regarding the restriction or to the legal clarity of the restriction.

43. Next, the Chamber will ascertain the legitimate objective of the restriction. As mentioned above, § 21 of the Constitution is a fundamental right without a reservation of the law which may be restricted only in order to protect another fundamental right or value arising from the Constitution. Summary proceedings were added to the legal order upon entry into force of the current version of the Code of Criminal Procedure. In the explanatory memorandum to the draft Act, we cannot find any justifications as to why presentation of opinions to the court by the counsel is precluded. The economy of the proceedings may be considered the objective – the expenses of such written proceedings regarding a matter are smaller and proceedings are faster. As set out in paragraph 26 of this judgment, the economy of the proceedings can be derived from the Constitution. Thus, the economy of the proceedings is a legitimate objective for the restriction of the right of defence.

44. Next, the Chamber assesses the proportionality of the restriction on the right of defence in respect of the economy of the proceedings – appropriateness, necessity and moderation.

The restriction on the right of defence is appropriate in order to achieve the economy of the proceedings as proceedings are conducted with less procedures and faster. The restriction is also necessary as there were no other possibilities to shorten and simplify proceedings in the same extent.

45. As regards moderation of the restriction, the Chamber finds the following:
A counsel is involved in summary proceedings as follows. Pursuant to § 45(3) of the CCP, the participation

of a counsel in a pre-trial proceeding is mandatory as of presentation of the criminal file for examination pursuant to the procedure provided for in § 223 (3) of the CCP. If, by that time, the person does not have a counsel, the counsel will be appointed to him or her pursuant to § 43(2)2) of the CCP. According to § 223(3) and § 224(1) of the CCP, a copy of the criminal file shall be given to the counsel against signature. Arising from § 35(2) of the CCP, a suspect or an accused has the right to examine the copy of the criminal file sent to his or her counsel. Pursuant to § 225(1) of the CCP, the counsel, inter alia, may submit requests to the Prosecutor's Office within ten days as of the date of submission of the criminal file to the participants for examination. Pursuant to § 252(2) of the CCP, a copy of the statement of charges shall be sent, inter alia, to the counsel.

46. The appointment of a counsel is more specifically regulated by the State Legal Aid Act. Pursuant to § 11(1) of the SLAA, a suspect who is a natural person and in whose criminal matter the participation of a criminal defence counsel is required pursuant to § 45 of the Code of Criminal Procedure and who has not chosen a defence counsel by agreement is not required to submit an application to receive state legal aid in the criminal matter. According to the first sentence of § 15(3) of the SLAA, the grant of state legal aid to a suspect or an accused in criminal proceedings shall be decided by an investigative body or a Prosecutor's Office who issues a ruling to that effect. Arising from the first sentence of § 18(1) of the SLAA, the Bar Association shall, at the request of a court, Prosecutor's Office or an investigative body, promptly appoint an advocate providing state legal aid. If, pursuant to § 12(1)2) of the SLAA, upon submission of an application, the person must, in addition to the address, indicate also his or her telecommunications numbers, then, as regards the counsel, the submission of information is not regulated in greater detail. Neither is the communication of the ruling on the appointment of a counsel to the person being defended prescribed.

47. In the matter which forms the basis for the present matter, the Tallinn Circuit Court has set out the following in its ruling:

"[---] although the copy of the statement of charges was sent to the appointed counsel, [---] the accused did not have this information, due to which he or she did not have the possibility to contact the counsel and vice versa – the counsel practically also did not have the possibility to advise the person being defended thereby. The only statement implying that the counsel had participated in criminal proceedings in the charges brought against A. Palmkroon was contained in the decision of the judgment of the county court according to which the accused had been ordered to pay the procedural expenses, including the fee of a counsel in the amount of 420 kroons." In the opinion of the Chamber, it does not completely correspond to the reality.

48. A copy of the file was delivered to the counsel against signature on 19 October 2009. On the same day, the appointed counsel has filed a request for determination of the state legal aid fee and on the same day, the Northern Circuit Prosecutor's Office has made a ruling to grant state legal aid and to compensate for the expenses relating to the criminal proceedings by which it has ordered that the fee paid to the counsel be compensated for. The ruling is based on § 15(3) and § 18 of the SLAA and § 189(1) and § 190 of the CCP, neither of which prescribes an obligation to communicate the ruling to the suspect or the accused. A copy of the statement of charges was communicated to A. Palmkroon but it contains no reference to the counsel or to the appointment of the counsel. Therefore, it must be true that A. Palmkroon had no information as regards appointment of the counsel or the details of the counsel.

49. It is impossible to agree with the statement that the counsel has no possibility to provide advice to the person being defended. In compliance with the requirements, a copy of the criminal file was delivered to the counsel against signature. In the file, several procedural documents set out the home address of the person being defended and the contact details set out in the interrogation record of the suspect also include the mobile phone number. The statement of charges which was communicated also to the counsel indicates the battalion where the person being defended was in compulsory military service. The Chamber finds that this information could have allowed the counsel to contact the person being defended.

The fact that the contact details of the person being defended are set out in the procedural documents in the file is not accidental - § 76(1)1) of the CCP obliges to set out in the interrogation record of the accused and § 153(1)4) of the CCP obliges to set out in the summary of pre-trial proceedings, inter alia, the residence or

seat and address, and the place of work or educational institution of the suspect. Thus, it is ensured by law that upon receipt of a copy of the file, the counsel also receives the details of the person being defended.

50. The third sentence of § 18 of the SLAA provides that an advocate appointed by the Bar Association is obliged to commence promptly the provision of legal aid and to organise his or her activities so that he or she would be able participate in procedural acts in timely manner. § 44(1)2) of the Bar Association Act (BAA) obliges an advocate to notify a client of activities relating to the provision of legal services. This means that law prescribes that the counsel is required to take the initiative in the relationship between an (appointed) counsel and a person being defended.

51. According to law, procedural documents must set out a person's residence or seat and address, and place of work and educational institution, but law does not prescribe that the specified procedural documents set out the telephone number and e-mail address. The latter are usual and fast communication channels the use of which would be comfortable and include no delay for both parties. Although, ordinary mail is normally delivered within a few days, it is not necessarily always like that, and contact in this manner always includes delay. Therefore, finding contact with the person being defended by the counsel is somewhat impracticable due to the lack of contact details which would allow getting in touch immediately.

52. From the viewpoint of the accused, it must be pointed out that, according to law, it is not obligatory to inform the accused of appointment of a counsel thereto, and this remains only the initiative of the counsel. Even if we presume that the counsel's attitude is conscientious, the person should be aware that a counsel has been appointed or is being appointed to him or her, so that he or she could request more detailed information thereon or contact the counsel himself or herself. Therefore, it must be stated that fast contact between the person being defended and the counsel is not ensured by law.

53. In addition to the abovementioned, the limited nature of the role of a counsel in summary proceedings becomes clearly evident as compared to other types of proceedings in § 254(5) and (6) of the CCP – a copy of the court judgment made in summary proceedings is not communicated to the counsel and, after the court judgment is made, he or she has no right to request hearing of the criminal matter pursuant to the general procedure.

54. The ECHR has stressed in its judgment no 36391/02, *Salduz vs. Turkey* of 27 November 2008 the importance of the right of defence in criminal proceedings and has set out that, although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of fair trial. The court pointed out that Article 6(3)c) of the Convention does not specify the manner in which the right must be ensured but it must be borne in mind that the right must be practical and effective, not theoretical or illusory.

55. In the present matter, the court made the judgment on the day after the receipt of the statement of charges. Law does not prescribe time for examination of the statement of charges or time when a court should make a judgment. At the same time, a court has only three possibilities – to agree with the opinion of the Prosecutor's Office, to terminate proceedings or refuse to conduct summary proceedings and to return the file to the Prosecutor's Office (§ 253 of the CCP), other procedural acts will not be performed. The accused or the counsel has no possibility to present opinions or file requests. This means that communication of a statement of charges substantially has the function of provision of preliminary information – a court may make such a judgment. There will be no court hearing or hearing of the statements. Thus, after the receipt of a statement of charges, a counsel can perform no procedural acts.

56. § 45(4) of the CCP provides as a general regulation that the participation of a counsel in a court proceeding is mandatory. Although, it is possible to derogate from the general provisions by a specific regulation - *lex specialis derogat legi generali*, participation of a counsel in court proceedings in the case of summary proceedings is not expressly precluded. On the contrary – the obligation to send a copy of the statement of charges to the counsel arising from § 252(2) of the CCP indicates that participation of the counsel in court proceedings in the case of summary proceedings is considered important. But, as stated

above, actually the counsel has no part in summary proceedings, thus the obligation of the counsel to participate is only illusory.

57. According to § 254(5) of the CCP, a court judgment is delivered to the accused and not to the counsel. The counsel does not know when the court judgment is made. § 254(6) of the CCP precludes the right of the counsel to file requests. Although, the duty of the counsel is to act in proceedings in the interests of the person being defended (§ 47(2) of the CCP), he or she is not the representative of the person being defended, but an independent participant in proceedings. The duty of the counsel is to act in the interests of the person being defended also when the person being defended does not understand the need to act. At the same time, the effectiveness of proceedings which may be achieved by this restriction is limited – provided that the counsel's attitude is conscientious and he or she provides appropriate advice and assistance to the person being defended, a request for hearing of the criminal matter pursuant to the general procedure will be filed most probably anyway.

58. Pursuant to § 254(6) of the CCP, the accused has the right to file a request within ten days as of the receipt of a court judgment. At the same time, the term for the filing of appeals is 15 days. At first glance, a shorter term for the filing of requests seems to be justified as a request for the hearing of the matter pursuant to the general procedure does not have to be reasoned differently from an appeal. At the same time, an appeal can also be filed by a counsel, whereas a request in summary proceedings cannot.

59. Summary proceedings are created so that a person can exercise his or her right of defence in court proceedings when he or she files a request for hearing of the matter pursuant to the general procedure after the receipt of the court judgment. Although, filing of a request for the hearing of a matter pursuant to the general procedure is simple in itself and does not require any special knowledge, it is not easy to assess the need to file a request and the consequences associated with the filing of a request or failure to file a request: e.g. what the judgment made in summary proceedings brings about for the person if he or she does not contest the judgment, or that court expenses increase if a person is also convicted pursuant to the general procedure. It should also be taken into account that if, pursuant to § 333(1) of the CCP, it is possible to waive an appeal until the end of a court dispute, then waiver of the hearing of a matter pursuant to the general procedure has not been regulated in summary proceedings. This means that, in order to form an opinion on the reasonability of filing of a request or exercise the right of defence, the accused has to consult the counsel, which takes time. Before forming an opinion, the counsel has to learn about the judgment from the person being defended and, in addition to forming an opinion by himself or herself, also communicate the opinion to the person being defended. A longer term or the possibility to waive the request later would give the person better possibilities to defend himself or herself, i.e. the right of defence would be ensured better.

60. Arising from the aforementioned, the Chamber finds that different provisions in their conjunction do not ensure effective defence for the accused in summary proceedings. Arising therefrom, the Chamber does not declare any of the provisions unconstitutional individually. The regulation can be amended or revised in many ways in order for the right of defence to be actually ensured. The choice how to do it must remain with the legislator.

61. In paragraph 27 of this judgment, the Chamber found that the regulations regarding summary proceedings are in conflict with the Constitution in the part in which they do not allow the person to request that regulations which are relevant while the person's case is before the court be declared to be unconstitutional. The Chamber holds the opinion that the right of defence of a person cannot be effectively ensured in the situation where it is impossible to request, while the person's case is before the court, the constitutional review of a relevant provision. This means that the ensured right of defence also includes the possibility to file a request for the declaration of a relevant regulation unconstitutional.

62. Arising from the aforementioned, the Chamber declares the regulations regarding summary proceedings to be in conflict with the Constitution in the part in which they fail to ensure the effective right of defence, including failure to allow to request, while a person's case is before the court, that a relevant provision be

declared unconstitutional.

Source URL: <https://www.riigikohus.ee/en/constitutional-judgment-3-4-1-5-10#comment-0>