Constitutional judgment 3-4-1-3-09

JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT

No. of the case	3-4-1-3-09
Date of decision	25 June 2009
Composition of court	Chairman Märt Rask, members Jüri Ilvest, Peeter Jerofejev, Henn Jõks, Priit Pikamäe.
Court Case	Review of constitutionality of § 50(3) and § 46^1 (in the wording in force from 26 September 2008 until 9 January 2009) of the Minister of Justice regulation no. 72 of 30 November 2000 “Internal Rules of Prison“.
Contested judgment	The Tallinn Administrative Court judgment of 25 February 2009 in administrative case no. 3-08-2523.
Hearing	Written proceeding
DECISION	**To declare § 46^1 and the first sentence of § 50(3) of Minister of Justice regulation no. 72 of 30 November 2000 “Internal Rules of Prison“ unconstitutional and invalid.**

FACTS AND COURSE OF PROCEEDING

1. According to the Tallinn Prison search report of 10 October 2008, two A4-format printouts from the Internet were removed from the letter which had arrived on the referred day, addressed to Andero Võikar, and confiscated. By his decision on challenge of 8 January 2009 the Minister of Justice dismissed the challenge filed by A. Võikar requesting that the minister require the Tallinn Prison to return to him the referred sheets.

2. On 12 December 2008 A. Võikar filed an action with the Tallinn Administrative Court, applying that the court require the Tallinn Prison to return to him the two documents that had been confiscated and issue a

precept to the Tallinn Prison prohibiting it, in the future, from confiscating printed materials sent by letter. According to the applicant some song lyrics, printed out from the Internet, had been sent to him on the A4-format sheets and on the basis of § 44 of the Constitution he was entitled to obtain these. The applicant was of the opinion that by confiscating the song lyrics the Tallinn Prison also violated the confidentiality of messages, because it was impossible – without having read the pages – to know whether the materials were type-written on the computer or print-outs from the Internet.

3. By its judgment of 25 February 2009 in administrative case no. 3-08-2523 the Tallinn Administrative Court partly satisfied the action of A. Võikar. The administrative court ordered that the Tallinn Prison return to A. Võikar the items that had been confiscated according to the search report of 10 October 2008. The court also required the Tallinn Prison to refrain from confiscating, on the basis of § 50(3) of the Internal Rules of Prison (hereinafter "the IRP"), items from the letters that are sent to A. Võikar. In the decision part of the judgment the Tallinn Administrative Court declared unconstitutional and did not apply § 50(3) and § 46^1 (in the wording in force from 26 September 2008 until 9 January 2009) of the Minister of Justice regulation no. 72 of 30 November 2000 "Internal Rules of Prison", thus initiating a constitutional review proceeding.

JUSTIFICATIONS OF PARTICIPANTS IN THE PROCEEDING

4. The Tallinn Administrative Court pointed out that pursuant to § 28(1) of the Imprisonment Act (hereinafter "the ImprA") prisoners have the right to correspondence effected pursuant to the procedure provided for in the internal rules of the prison. On the basis of § 28(3) of the ImprA the director of a prison may restrict a prisoner's right of correspondence, but in the present case no such restrictions have been imposed on the applicant. § 29(1) of the ImprA establishes that the letters sent by or to a prisoner shall be opened in the presence of the prisoner, except letters addressed to the persons and agencies provided for in subsections (4)-(5) of this section, and any items the holding of which in a prison is prohibited by the internal rules of the prison shall be confiscated. The list of items and substances prohibited for prisoners is established in § 64^1 of the IRP. The sheets of paper containing song lyrics, which were confiscated from the applicant, do not belong to the prohibited items enumerated in the latter provision. The Imprisonment Act establishes no other legal ground for the confiscation of any other items from the letters sent to prisoners.

At the same time, it proceeds from § 50(3) of the IRP that from a letter sent to a prisoner a prison officer may confiscate such items which are not considered as letter for the purposes of § 46^1 of the IRP. Pursuant to the latter provision (in the wording in force at the time of performance of the contested act) an incoming letter in a prison is a private message meant to the addressee, on paper, postcard or a photo, sent by post; whereas it is allowed to send five stamps and five envelopes with a letter. Consequently, the regulation of the Minister of Justice determined the requirements that a postal consignment must meet in order for a prisoner to be allowed to receive it on the basis of the right established in § 28 of the ImprA; the regulation also establishes that the items sent to a prisoner, which do not meet these requirements, shall be confiscated.

The relevant norms on the basis of which the sheets of paper containing song lyrics were confiscated from the letter sent to the applicant were § 50(3) in conjunction with § 46^1 of the IRP (in the wording in force at the time when the contested act was performed). The court is of the opinion that §§ § 46^1 and § 50(3) of the IRP are of such nature that restricts the prisoners' rights. The right of a person to receive the items sent to him or her is – in the opinion of the court – primarily included in the general right to freedom, established in § 19 of the Constitution. As in the case under discussion the confiscated items were sheets of paper, containing written text, sent to the applicant by post, the infringement of confidentiality of messages, established in § 43 of the Constitution, could be discussed.

Pursuant to the first sentence of § 11 of the Constitution rights and freedoms may be restricted only in accordance with the Constitution. Pursuant to the first sentence of § 3(1) of the Constitution the powers of the state shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith. Pursuant to the second sentence of § 28(1) of the ImprA correspondence shall be effected pursuant to the procedure provided for in the internal rules of the prison. Pursuant to § 105(2) of the ImprA internal rules of

a prison shall be established by a regulation of the Minister of Justice. The court is of the opinion that the provision delegating authority to establish the procedure for correspondence means the authorisation to establish procedural provisions to regulate the organisation of correspondence and the observance of the norms of the Act establishing obligations and prohibitions. The court argues that the referred norm, which delegates authority, does not include authority to impose additional restrictions – as compared to the Act – on the content of correspondence of prisoners. Consequently, the legislator has not authorised the Minister of Justice to regulate which written materials or other items are allowed to be sent to prisoners; neither is the minister authorised to establish new legal grounds for the confiscation of items sent to prisoners by letters. § 29(1) of the ImprA permits to confiscate from letters only such items the holding of which is prohibited in a prison. Nevertheless, by enacting § 46^1 and § 50(3) of the IRP the Minister of Justice has established a norm pursuant to which also such items must be confiscated from the letters sent to prisoners the holding of which is not in itself prohibited for prisoners. That is why the court argues that the Minister of Justice has enacted § 59(3) of the IRP by exceeding the authority delegated by the legislator and therefore the norm is unconstitutional in the formal sense. In conjunction with § 50(3) also § 46^1 of the IRP is established by exceeding the authority delegated by the Act. For the above reasons the court held that §§ 50(3) and 46^1 of the IRP were in conflict with § 3 of the Constitution. Having ascertained the formal conflict of the relevant provisions with the Constitution the court did not consider it necessary to review the substantive constitutionality of the norms. Neither did the court, on the basis of what was said above, consider it necessary to evaluate the arguments of the participants in the proceeding concerning the alleged violation of §§ 43 and 44 of the Constitution.

5. The Tallinn Prison is of the opinion that § 46^1 and § 50(3) of the IRP are constitutional both in the formal and in the substantive sense. § 29(1) of the ImprA must be interpreted together with the second sentence of § 28(1) of the ImprA, and what are to be considered permitted or prohibited items is established by § 46^1 of the IRP. Thus, pursuant to the internal rules, in the prisoners' correspondence all the items that for the purposes of § 46^1 of the IRP do not meet the definition of letter are to be deemed prohibited items. The Minister of Justice was given the authority to establish §§ 46^1 and 50(3) of the IRP by § 28(1) of the ImprA, which is to be interpreted taking into account also §§ 66(1) and 4^1(2) of the ImprA. The Tallinn Prison is of the opinion that the restriction on the items allowed to be sent by letters constitutes a proportional measure for guaranteeing the security of a prison. Reasonable restrictions on the prisoners' correspondence as compared to that of persons at large are inevitable.

In 2008 there were 1113 prisoners in the Tallinn Prison on the average, who receive about 300 private letters a day and about the same number of prisoners' letters are sent out. Pursuant to § 50(1) of the IRP a letter addressed to a prisoner must be given to the prisoner against his or her signature within three working days as of the receipt of the letter by the prison. If the prisoners were allowed to receive different items by letters the prison could not be able to meet this term, because the security check of the letters would be much more labour-intensive. To organise security check of such intensity would constitute unreasonable use of budgetary resources.

6. The Minister of Justice is of the opinion that § 46^1 and § 50(3) of the IRP are in conformity with the Constitution. The authority to establish § 46^1 and § 50(3) of the IRP is delegated by § 28(1) of the ImprA. When interpreting the purpose, content and extent of the authority-delegating provision included in § 28(1) of the ImprA also §§ 66(1) and 4^1(2) of the ImprA must be taken into account. Furthermore, on the basis of § 15(3) of the ImprA the Minister of Justice is entitled to establish by a regulation a list of items which are prohibited for prisoners, the total weight of items held by a prisoner and deposited with the prison, and the procedure for depositing the deposited items. Proceeding from § 50(3) of the IRP a prison has the obligation to confiscate such items from the letters addressed to prisoners that are not letters for the purposes of § 46^1 of the IRP. Such items are prohibited items in prison, because it is not only the nature of an item that has importance in the context of prison, but also the manner in which it was obtained. Consequently, the legislator has established the framework within which the executive has specified the provisions of the Act. It is erroneous to argue that § 29(1) of the ImprA permits to confiscate only such items from letters the holding of which in a prison is prohibited on the basis of § 64^1 of the IRP. The court has erroneously

proceeded from the fact that the permissibility of an item in a prison does not depend only on whether the item is directly in the list of prohibited items; in a prison, which constitutes a closed system, one of the criteria of permissibility of items is also the manner in which the items were obtained. § 15(3) and (4) of the ImprA and § 64^1 of the IRP only determine those items that are prohibited in prison irrespective of the manner in which they were obtained. Pursuant to the internal rules, in correspondence all such items are to be deemed prohibited items that do not conform to the definition of letter established in § 46^1 of the IRP. Although the wording of this provision is not the best one, it has to be interpreted in conjunction with what is provided in § 57 of the IRP. The possibility to send to a prisoner the items which are permissible in the formal sense, which do not fall within § 641 of the IRP, would in essence entitle prisoners to receive packages. The legislator has provided that only persons in custody have the right to receive packages (§ 98(1) of the ImprA). Pursuant to § 23 of the ImprA the prisoners' correspondence in prison is established with the objective of facilitating substantial communication, and not with the objective of allowing to send various items to prison. As the purpose of correspondence is to maintain positive social contacts, it is allowed to send in a letter five stamps and five envelopes.

§ 26 of the Constitution constitutes a fundamental right subject to qualified reservation by law. The aim of imposing restrictions on the prisoners' correspondence is, primarily, the need to protect public order, the protection of the rights and freedoms of others and the prevention of criminal offences. The chosen measure is suitable, necessary and reasonable for the achievement of this aim. There is no other way, except restricting the items to be sent in letters, allowing to actually ensure that various prohibited items do not end up in prison and that contact with outside world is used only for maintaining positive contacts outside prison. The restriction of the definition of "a letter" in the context of imprisonment is not an intensive infringement of fundamental rights, because there is no excess interference with the right to the inviolability of private and family life, established in § 26 of the Constitution. What is at stake on the one hand is the right of a prisoner to receive various items by letters, and on the other hand the obligation of a prison to ensure the achievement of the aims established in §§ 66(1) and 6(1) of the ImprA. A procedure like this guarantees to a prisoner a possibility to communicate with those close to him or her; nevertheless, bearing in mind the aim of protecting general security and legal order the sending of any items to prisoners can not be allowed.

7. The Chancellor of Justice is of the opinion that § 46^1 (in the wording in force from 26 September 2008 until 9 January 2009) was and the first sentence of § 50(3) of the IRP is in conflict with the law and the Constitution. The second sentence of § 50(3) of the IRP is constitutional. The Chancellor of Justice points out also that in the wording presently in force § 46^1 of the IRP is in conflict with the law and the Constitution.

As the outcome of administrative case no. 3-08-2523 depends on the validity of §§ 46^1 and 50(5) of the IRP, the constitutional review in the form of concrete norm control of these provisions, initiated by the Tallinn Administrative Court, is permissible. The first sentence of § 3(1) of the Constitution establishes that the powers of state may be exercised solely pursuant to the Constitution and laws which are in conformity therewith. This is the central provision in the Constitution establishing the requirement that restrictions must be established by law. A norm which delegates authority must set out the content, purpose and extent of the authority it delegates. This requirement arises directly from the principle of importance and is necessary for the identification of a sufficient authority-delegating provision as well as for establishing criteria for the constitutionality of authority-delegating provisions. Consequently, an authority-delegating provision which is not sufficiently regulative, i.e. fails to provide for what is important, is in conflict with the Constitution.

Although two items were confiscated from the appellant, the infringement in the present case does not consist in the restriction of the right of ownership (§ 32 of the Constitution), because it is not the material but the immaterial value of these sheets of paper that is important for the appellant. Although this does not directly proceed from the Tallinn Administrative Court judgment, it can be presumed that in this case § 29(1) of the ImprA was observed and the applicant was present when the letter was opened and therefore the sphere of protection of § 43 of the Constitution is not infringed. What is infringed is the sphere of protection of § 26 of the Constitution, because the contents of an envelope sent to a person by his or her spouse fall within the sphere of protection of private life. The infringement consists in the opening of the letter sent to

the applicant by his spouse and in the confiscation of two pages of song lyrics from the envelope. Consequently, §§ 46^1 and 50(3) of the IRP in their conjunction violate the sphere of protection of inviolability of private life (§ 26 of the Constitution).

When the Minister of Justice is authorised to establish the procedure for correspondence by the internal rules of prisons, this actually means that the Minister of Justice is authorised to establish procedural rules for making the decision concerned – the sequence of procedures the aim of which is to verify the facts necessary for decision and to prepare the decision in other ways. As the Minister of Justice is not authorised to establish the conditions of correspondence, the procedure for correspondence must not contain restrictions on correspondence. § 28 of the ImprA does not stipulate what a letter may and may not contain. As the ImprA does not define "a letter" or the prohibitions on the content thereof, the provisions of the Postal Act must be observed in this regard. The Minister of Justice must not define "a letter" for the purposes of Imprisonment Act differently from the definition thereof in the Postal Act, because this would be in conflict with the principle of importance, arising from the first sentence of § 3(1) of the Constitution, as well as with the priority of higher ranking laws, arising from the same provision. The right to receive messages with any content from anyone does not arise only from the first sentence of § 28(1) of the ImprA, this is also a fundamental right every restriction on which must be in conformity with the Constitution (the first sentence of § 11 of the Constitution). No authority to restrict this right arises from § 28(1) of the ImprA. Neither does § 28(3) of the ImprA constitute a sufficiently defined (content, aim, extent) authorisation to establish, by a regulation, restrictions on what an envelope addressed to a prisoner is allowed to contain, because this is not a restriction on correspondence but a restriction on the receipt of items sent by letter. For the purposes of § 28(3) of the ImprA the restriction on correspondence is to be understood primarily as a prohibition to receive letters from certain persons or to address letters to certain persons. The restriction on the receipt of items sent by letter requires an *expressis verbis* prohibition established by law, i.e. a reference to the criteria or a list of items which may not be sent by letter.

The items prohibited for prisoners are established by § 15 of the ImprA and § 64^1 of the IRP. It can be concluded from § 15 of the ImprA that this norm and the list of prohibited items established on the basis thereof constitute exhaustive grounds for prohibiting prisoners to hold certain items in prison. It can be concluded from § 28(1) of the ImprA in conjunction with § 15 of the ImprA that § 28 of the ImprA does not provide for the possibility to prohibit to send items by letter or receive items sent by letter. The sending or receiving of items by letter can be prohibited only if this meets one of the requirements referred to in § 15(2) of the ImprA. As the definition of "a letter" established in the first sentence of § 46^1 of the IRP (in the wording in force from 1 October 2007 until 9 January 2009) constitutes a restriction on the right of correspondence, this requires the existence of a legal ground; the legislator has not provided such a ground to the Minister of Justice. This norm exceeded the authority and was, therefore, in formal conflict with the law and the Constitution. In the present case § 46^1 of the IRP obtains its meaning in conjunction with the first sentence of § 50(3) of the IRP. On the basis of the first sentence of § 50(3) of the IRP such items shall be confiscated from a letter addressed to a prisoner which can not be deemed as "a letter" for the purposes of § 46^1 of the IRP. This authorisation, included in the regulation of the Minister of Justice, is not based on §§ 15 or 28 of the ImprA or on any other legal ground. This is a norm which exceeds authority and, thus, a norm which is in formal conflict with the Constitution. At the same time it is possible that a prohibited item, sent by a letter, is confiscated from a prisoner on the basis of § 15(2) of the ImprA or § 46^1 of the IRP, which is established on the basis of the former provision. In such a case it is till possible to apply the second sentence of § 50(3) of the IRP. This regulates only the procedure and is not unconstitutional. Due to the fact that even when the first sentence of § 50(3) of the IRP is repealed the referred norm will still retain its separate sphere of application, the second sentence of § 50(3) of the IRP should not be repealed, and the concrete norm control of the provision initiated by the Tallinn Administrative Court should be denied.

As the nature of § 46^1 of the IRP – to restrict the right of correspondence – remains the same even in the wording in force since 9 January 2009, the Chancellor of Justice would have to - if the earlier version of § 46^1 of the IRP is declared unconstitutional - commence an abstract norm control proceeding and make a proposal to the Minister of Justice to bring § 46^1 of the IRP into conformity with the law and the

Constitution. If the Minister of Justice fails to bring the regulation into conformity with the law and the Constitution, the Chancellor of Justice would have to submit a request to the Supreme Court to repeal § 46^1 of the IRP. Such a proceeding is time-consuming and expensive. Although the prohibition of initiative of the court is valid in regard to constitutional review court proceedings, too, in the present case we can speak of the continuing of substantially identical situation and therefore, proceeding from the principle of economy of proceedings, the Chancellor of Justice considers it advisable to extend the court's request of concrete norm control like it was done in the judgment of the Constitutional Review Chamber of the Supreme Court of 12 May 2000 in case no. 3-4-1-5-00, paragraphs 28, 34, 36) – and to declare also the presently valid wording of § 46^1 of the IRP illegal and unconstitutional, and repeal it.

THE PROVISIONS NOT APPLIED BY THE COURT

8. § 46^1 of the Minister of Justice regulation no. 72 of 30 November 2000 "Internal Rules of Prison" (in the wording in force from 26 September 2008 until 9 January 2009) read as follows:

"§ 46^1. A letter

A private message meant to the addressee, on paper, postcard or a photo, sent by post, is deemed a letter in prison. Five stamps and five envelopes may be sent by letter."

9. § 50(3) of the Minister of Justice regulation no. 72 of 30 November 2000 "Internal Rules of Prison" reads as follows:

"§ 50. A letter sent to a prisoner

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(3) A prison officer shall confiscate such items from a letter delivered to the name of a prisoner which can not be deemed as a letter for the purposes of § 46^1 of this regulation. §§ 70, 72 and 73 of this regulation shall be applied to the confiscated items."

OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER

10. Firstly, the Chamber shall assess the relevance of the provisions which the Tallinn Administrative Court did not apply, and shall ascertain the relevant law (I); thereafter the Chamber shall analyse the constitutionality of these provisions (II).

I.

11. Pursuant to § 14(2) of the Constitutional Review Court Procedure Act the provision the constitutionality of which is reviewed by the Supreme Court must be relevant to the adjudication of the matter. According to judicial practice of the Supreme Court a provision which is of decisive importance for the adjudication of a matter is a relevant provision (see e.g. the judgment of the Supreme Court *en banc* of 22 December 2000 in case no. 3-4-1-10-00, paragraph 10). A provision is of decisive importance when in the case of unconstitutionality of the provision the court should render a judgment different from that in the case of constitutionality of the provision (see e.g. the judgment of the Supreme Court *en banc* of 28 October 2002 in case no. 3-4-1-5-02, paragraph 15).

12. The Tallinn Administrative Court points out correctly that the Imprisonment Act provides for two possibilities to restrict the correspondence of prisoners. Firstly, the director of a prison may restrict the right of correspondence of prisoners pursuant to § 28(3) of the ImprA. In the present case no such restrictions had been imposed on the applicant. Secondly, pursuant to § 29(1) of the ImprA any items the holding of which in a prison is prohibited by the internal rules of the prison may be confiscated from letters delivered to prisoners. The list of items and substances prohibited for prisoners is established in § 64^1(1) of the IRP. A sheet of paper containing song lyrics is not a prohibited item enumerated in this provision.

13. In addition to the provisions referred to in the previous paragraph items may be confiscated from a letter delivered to a prisoner on the basis of § 50(3) of the IRP, pursuant to which a prison officer shall confiscate such items from a letter delivered to the name of a prisoner which can not be deemed as a letter fort the purposes of § 46^1 of the IRP. So the Tallinn Administrative Court held that - as the sheets of paper sent to the applicant were confiscated on the basis of § 50(3) of the IRP, and in the case of constitutionality of this norm the action should be dismissed whereas in the case of unconstitutionality of the norm the provision should not be applied and the action should be satisfied - § 50(3) of the IRP was a relevant norm. As § 50(3) of the IRP is inseparably connected to and is applicable only in conjunction with § 46^1 of the IRP, the court also considered the latter provision to be relevant. The Chamber agrees with these conclusions but specifies that the second sentence of § 50(3) of the IRP has its separate sphere of application, because it is possible that it may prove necessary to confiscate from a letter delivered to a prisoner an item which is prohibited for the purposes of § 15(2) of the ImprA or § 641 of the IRP. The second sentence of § 50(3) of the IRP extends the same regulatory framework to the items confiscated from letters that is applied to the items confiscated from packages on the basis of §§ 70, 72 and 73 of the IRP. The Tallinn Administrative Court has not expressed doubts as to the constitutionality of confiscation from letters of items which are prohibited for prisoners under § 15(2) of the ImprA and § 64^1 of the IRP, and consequently, in regard to the procedure subsequent to confiscation of such items, the second sentence of § 50(3) of the IRP was not relevant. That is why only the first sentence of § 50(3) of the IRP in conjunction with § 4^{61} of the IRP is to be deemed relevant.

14. The Chamber does not agree with the opinion of the Tallinn Administrative Court that § 46^1 of the IRP is relevant only in the wording in force from 26 September 2008 until 9 January 2009. The Chancellor of Justice considered it necessary, in this court case, to declare unconstitutional and invalid also the wording of § 46^1 of the IRP which entered into force on 10 January 2009, which differs from the previous wording only as concerns the maximum weight of letters. The Chamber points out that as in the main dispute, which is the basis of this constitutional review matter, the Tallinn Administrative Court adjudicated also an action oriented into the future, the valid wording of § 46^1 of the IRP, too, is relevant to the adjudication of this action, because it regulates the question at issue in the same way. Should the provision not be declared relevant, the third clause of the decision of the Tallinn Administrative Court would obligate the Tallinn Prison to act in conflict with the valid provision addressed to it.

15. As § 46^1 of the IRP defines “a letter”, and pursuant to the first sentence of § 50(3) of the IRP all items shall be confiscated from letters sent to prisoners which are not covered by the definition in § 46^1 of the IRP, §§ 46^1 and 50(3) of the IRP in their conjunction establish the requirements to consignments that prisoners are allowed to received within the right to correspondence established in § 28 of the ImprA. The items that do not meet these requirements are not forwarded to prisoners.

16. The Tallinn Administrative Court argued that the relevant provisions may first and foremost infringe the general right to freedom, established in § 19(1) of the Constitution. The administrative court also considered possible the infringement of the confidentiality of messages, established in § 43 of the Constitution.

§ 19(1) of the Constitution gives rise to the general fundamental right to freedom, the constitutionality of an infringement of which there is no need to review when a contested provision infringes a specific fundamental right. Pursuant to § 43 of the Constitution, everyone has the right to confidentiality of messages sent or received by him or her by post, telegraph, telephone or other commonly used means. Exceptions may be made by court authorisation to prevent a criminal offence, or to ascertain the truth in a criminal proceeding, in the cases and pursuant to procedure provided by law.

The right of § 43 of the Constitution is the right of every person, which also extends to prisoners. As to the objects, § 43 of the Constitution protects all messages sent or forwarded to third persons by any means. The Chamber agrees with the opinion of the Chancellor of Justice that when the addressee of a letter is present when the letter is opened, there is no infringement of the sphere of protection of § 43 of the Constitution. Confiscation of prohibited items in the presence of addressee thereof does not infringe the sphere of

protection of this right. At the same time it is possible to examine the content of a letter in conformity with § 43 of the Constitution even when the addressee is present. As in the present case it has to be presumed that the requirement of § 29(1) of the ImprA – pursuant to which a prison officer shall open letters sent by or to a prisoner in the presence of the prisoner, except letters addressed to the persons and agencies provided for in § 29(4) (5) of the ImprA - was fulfilled, there is no infringement of the sphere of protection of § 43 of the Constitution.

The Chamber is of the opinion that the relevant provisions infringe the right to inviolability of family life, established in § 26 of the Constitution. The first sentence of § 26 of the Constitution establishes that everyone has the right to the inviolability of private and family life. The first sentence of § 26 of the Constitution also extends to prisoners. The objects of protection of § 26 of the Constitution includes all spheres of life that are not protected by special rights (inc. e.g. § 43 of the Constitution). The Chamber agrees with the Chancellor of Justice that the sphere of protection of § 26 of the Constitution also includes the right of a prisoner's spouse to send to prison, by letter, documents and items the holding of which is not prohibited in prison. Consequently, it is to be analysed whether the infringement of private life, which consists in the confiscation – on the basis of § 46^1 and the first sentence of § 50(3) of the IRP - of two sheets of paper containing song lyrics from a letter delivered to applicant, is constitutional.

II.

17. The interference of state authority with the right to the inviolability of private and family life, established in § 26 of the Constitution, does not necessarily amount to a violation of the right. Legislation which infringes a fundamental right does not violate this right when the legislation is constitutional, i.e. in conformity with the Constitution in the formal and in the substantive sense (see the judgment of the Constitutional Review Chamber of the Supreme Court (hereinafter "the CRC") of 13 June 2005 in case no. 3-4-1-5-05, paragraph 7).

18. Formal constitutionality means that legislation of general application, which restricts fundamental rights, must meet the requirements concerning competence, procedure and from, as well as the principles of determinateness and "subject to reservation by law" (see the referred judgment of the CRC in case no. 3-4-1-5-05, paragraph 8).

19. The requirement "subject to reservation by law" is established in the first sentence of § 3(1) and in § 11 of the Constitution, pursuant to which fundamental rights may be restricted only when there is a legal ground in the law providing for the possibility of such restriction (see the judgment of the Supreme Court *en banc* of 2 June 2008 in case no. 3-4-1-19-07, paragraph 25). On the basis of the principle of legality, which specifies the general requirement that reservations can be made only by law, a regulation issued on the basis of authorisation must be in conformity with the Act delegating the authority. Conformity to the Act means also the requirement that the delegated authority must not be exceeded by regulating such issues that are not included in the authorisation (see the referred judgment of the CRC in case no. 3-4-1-5-05, paragraph 9). The requirement that there must be a provision delegating authority also arises from the Code of Administrative Procedure (hereinafter "the CAP"), pursuant to § 90(1) of which a regulation may be issued only upon existence of a provision delegating authority which is set out in an Act, and in accordance with the limits, concept and objective of the provision delegating authority. The necessity of existence of a provision delegating authority when issuing regulations is also referred to in § 89(1) of the CAP.

20. In paragraph 15 above the Chamber pointed out that in their conjunction §§ 46^1 and the first sentence of 50(3) of the IRP restrict the items that prisoners are entitled to receive under the right to correspondence, established in § 28 of the ImprA. The Chamber agrees with the opinions of the Tallinn Administrative Court and of the Chancellor of Justice that the Imprisonment Act does not entitle the Minister of Justice to establish, by internal rules of prison, additional restrictions on the prisoner's right to correspondence. This competence is not given to the minister by § 105(2) of the ImprA, which is only a norm concerning competence and not a norm delegating authority. Neither does the second sentence of § 28(1) of the ImprA entitle the Minister of Justice to establish additional restrictions on the prisoners' right to correspondence.

The administrative court pointed out correctly that the provision delegating the authority to establish the procedure for correspondence only means an authorisation to establish procedural rules to regulate the organisation of correspondence and the observance of the norms of the Act establishing obligations and prohibitions. Procedure means specification to the general procedure established by law (judgment of the CRC of 24 December 2002 in case no. 3-4-1-10-02, paragraph 25), and a provision delegating authority to establish a procedure does not include the authority to establish additional substantial restrictions on the correspondence of prisoners in comparison to the Act.

21. § 4(1)1) of the Postal Act (in the wording in force at the time of the performance of the act contested in the administrative case) refers to a letter consignment as one type of postal items. Pursuant to § 4(2) of the Postal Act a letter consignment is an addressed item or items, packed as required, with the total weight of up to 2 kg (the weight limit of letter consignment was omitted from § 4(2) of the Postal Act by the amendment to the Act which entered into force on 1 January 2009), deposited with a postal service provider for forwarding. Letter consignments include e.g. letters, printed matter and small packages. The Minister of Justice must not, without a provision delegating pertinent authority, define "a letter" differently from the definition thereof in the valid law, irrespective of the fact that the referred definition was only applicable in regard to prisoners. The Chamber points out that by nature correspondence is a from of bilateral communication. Thus, the correspondence with a prisoner does not only concern the prisoner but also the other person who addresses letters to the prisoner. The latter, as a person sending a postal consignment, is entitled to proceed from the Postal Act when using postal services, including in regard to types of postal consignments. On the basis of what has been said the Chamber is of the opinion that the activity of the Minister of Justice upon defining "a letter" differently than the meaning thereof in the valid law is in conflict with the principle of legality, established in the first sentence of § 3(1) of the Constitution.

22. As the Chamber has already expressed the opinion that neither § 28(1) nor § 105(2) of the ImprA or any other legal norms delegate to the Minister of Justice the authority, upon establishing internal rules of prisons by a regulation, to additionally restrict the content of prisoners' correspondence or the list of items allowed in letters, or to establish additional legal grounds for the confiscation of items sent to prisoners by letters, § 461 and the first sentence of § 50(3) of the IRP are in formal conflict with the Constitution. Consequently, it is not necessary in this case to evaluate whether this restriction may be in conflict with the Constitution for substantive reasons, too.

23. For the above reasons the Chamber declares § 46^1 and the first sentence of § 50(3) of the IRP unconstitutional and invalid.
