Constitutional judgment 3-4-1-2-16

S U P R E M E C O U R T

CONSTITUTIONAL REVIEW CHAMBER

JUDGMENT

in the name of the Republic of Estonia

Case number	3-4-1-2-16
Date of judgment	16 November 2016
Composition of court	Chairman: Priit Pikamäe; members: Eerik Kergandberg, Saale Laos, Viive Ligi, Jaak Luik
Basis for proceedings	Tallinn Administrative Court judgment of 19 May 2016 in administrative case No 3-16-78 and Tallinn Court of Appeal judgment of 30 June 2016 in administrative case No 3-15-2393
Hearing	Written procedure

OPERATIVE PART

To dismiss the actions contained in Tallinn Administrative Court judgment of 19 May 2016 in administrative case No 3-16-78 and in Tallinn Court of Appeal judgment of 30 June 2016 in administrative case No 3-15-2393.

FACTS AND COURSE OF PROCEEDINGS

1. Peep Havik was taken into custody on 14 April 2014. On 19 March 2015, P. Havik was prosecuted on charges of having committed criminal offences under § 256(1) (forming a criminal organisation) and § 214(2) cl. 4) (extortion by a group) of the Penal Code. At the preliminary hearing on 19 March 2015, the

court maintained the preventive measure – custody – applied in respect of P. Havik. Since 14 April 2014, P. Havik as a person in custody has been in a custodial institution (at the relevant time in Tallinn Prison).

2. On 15 September 2015, P. Havik filed an application to Tallinn Prison to allow him a long-term visit with his cohabitant. By decision of 8 October 2015, Tallinn Prison returned the application as § 94(5) of the Imprisonment Act (IA) precludes long-term visits for persons remanded in custody. P. Havik filed an objection against the decision, which Tallinn Prison dismissed by a decision on objection on 10 December 2015.

3. On 11 January 2016, P. Havik filed an action with Tallinn Administrative Court, seeking to annul the above decision and the decision on objection by Tallinn Prison and to order Tallinn Prison to grant his application for a long-term visit.

4. By judgment of 19 May 2016 in administrative case No 3-16-78, Tallinn Administrative Court annulled the Tallinn Prison decision of 8 October 2015 and the decision on objection of 10 December 2015 and ordered Tallinn Prison to re-examine the applicant's request. Additionally, the court declared unconstitutional and set aside § 94(5) of the Imprisonment Act which stipulates that long-term visits laid down in § 25 of the IA do not apply to persons in custody.

5. On 19 May 2016, Tallinn Administrative Court referred the judgment to the Supreme Court. This constitutional review case was assigned number 3-4-1-2-16.

6. Taago Vool was taken into custody on 14 April 2014. On 19 March 2015, T. Vool was prosecuted on charges of having committed criminal offences under § 255(1) (membership in a criminal organisation) and § 214(2) cl. 1) (extortion by a person who has previously committed theft, robbery, embezzlement; acquisition, storage or marketing of property received through commission of an offence; intentional damaging or destruction of a thing; fraud or extortion) and cl. 4) (extortion by a group) of the Penal Code. At the preliminary hearing on 19 March 2015, the court maintained the preventive measure – custody – applied in respect of T. Vool. Since 14 April 2014, T. Vool as a person in custody has been in a custodial institution (at the relevant time in Tallinn Prison). On 7 September 2016, by judgment in criminal case No 1-16-6717 Harju County Court convicted T. Vool of criminal offences imputed to him.

7. On 23 February 2015, T. Vool filed an application to Tallinn Prison to allow him a long-term visit with his cohabitant. By decision of 12 March 2015, Tallinn Prison refused to examine the application. On 3 July 2015, T. Vool filed a new application, which the prison by decision of 29 July 2015 refused to examine, as under § 25 and § 94(5) of the IA only convicted prisoners may apply for a long-term visit. T. Vool filed an objection to the decision, which Tallinn Prison dismissed on 31 August 2015 by a decision on the objection. With the same justification, Tallinn Prison also either dismissed or refused to examine all subsequent applications (a total of eight) concerning the same matter. T. Vool did not contest those decisions.

8. On 22 September 2015, T. Vool filed an action with Tallinn Administrative Court, seeking to annul the Tallinn Prison decision of 29 July 2015 and the decision of 31 August 2015 on the objection and to order Tallinn Prison to allow him a long-term visit with his cohabitant. By judgment of 18 March 2016, Tallinn Administrative Court dismissed the action by T. Vool, because under § 25 and § 94(5) of the IA persons in custody were not entitled to long-term visits and no basis existed to declare the restriction unconstitutional.

9. On 28 March 2016, T. Vool filed an appeal with Tallinn Court of Appeal against the Tallinn Administrative Court judgment of 18 March 2016. On 9 and 17 May 2016, T. Vool filed applications with the Court of Appeal to supplement the action with a request also to annul the subsequent decisions by the prison denying the possibility of a long-term visit. The Court of Appeal granted the application to supplement the action by reference to expediency, reaching the opinion that the requirements of the mandatory objection proceedings had been complied with when filing the original action with the Administrative Court.

10. On 8 June 2016, T. Vool filed an application to the Court of Appeal to supplement the action with a request to annul the Tallinn Prison decision of 30 May 2016 by which Tallinn Prison dismissed his application of 26 May 2016 to allow him a long-term visit with his cohabitant. The Court of Appeal also granted this application, finding that the requirements of the mandatory objection proceedings had been complied with when filing the original action with the Administrative Court, and the application to amend the action had also been filed before the expiry of the time limit for amending the action.

11. On 30 June 2016, Tallinn Court of Appeal reversed the Tallinn Administrative Court judgment of 18 March 2016 in administrative case No 3-15-2393 and entered a new judgment by which it granted the action by T. Vool in part and annulled the Tallinn Prison decision of 12 May 2016 and the decision of 30 May 2016.

12. On 5 July 2016, Tallinn Court of Appeal referred the judgment to the Supreme Court. This constitutional review case was assigned number 3-4-1-4-16.

13. By order of 20 September 2016, the Supreme Court Constitutional Review Chamber joined the above cases in unified proceedings and assigned to the case number 3-4-1-2-16.

JUDGMENT OF TALLINN ADMINISTRATIVE COURT

14. A relevant provision must be of decisive importance for adjudicating a case, i.e. in the event of it contravening the Constitution the court should decide differently than if it were constitutional. Since setting aside § 94(5) of the Imprisonment Act would leave no rule that would imperatively prohibit P. Havik from receiving a long-term visit, in resolving the application the respondent should proceed from § 25 of the IA. Section 94(5) of the IA is a relevant provision.

15. Even if the contested provision were to provide for discretion, the prison could not assess the necessity of prohibiting long-term visits for a person in custody from the point of view of securing criminal proceedings as the prison has no competence to decide this.

16. Cohabitation between P. Havik and his cohabitant amounts to family life and P. Havik's cohabitant is his *de facto* spouse who under § 25(1) of the IA would be entitled to a long-term visit if P. Havik were a convicted prisoner. Thus, the imperative prohibition laid down in § 94(5) interferes with the right to inviolability of private and family life enshrined in § 26 of the Estonian Constitution, as well as the right to protection of the family enshrined in § 27 of the Constitution. Article 8 of the European Convention on Human Rights is also relevant.

17. In addition, the fundamental right to equal treatment under § 12(1) of the Constitution is interfered with, as persons in custody are treated unequally in comparison to convicted offenders serving a prison sentence (i.e. convicted prisoners) who are entitled to long-term visits. These are comparable groups.

18. No doubt exists concerning the formal constitutionality of the contested provision.

19. Legitimate aims for interference with § 26 of the Constitution are to prevent absconding from criminal proceedings and continuing to commit criminal offences, including destroying, altering and falsifying evidence, and influencing witnesses. The need to secure the conduct of a preliminary investigation also constitutes a legitimate aim, which is why a different procedure for visits is prescribed for persons in custody than for convicted prisoners.

20. Interfering with the fundamental rights enshrined in § 12, § 26 and § 27(1) of the Constitution is appropriate for attaining the aims. However, at the time of filing the action the prohibition on long-term visits in respect of the applicant was no longer necessary, as the applicant's cohabitant is neither a witness nor a co-defendant in the pending criminal case; it is also impossible to prejudice preliminary proceedings, as the case has already reached the trial stage. The prosecutor's office lifted all the additional restrictions applied in respect of the applicant, so that a long-term visit can also pose no serious risk to the

administration of justice, as it is not practically credible that at the trial stage the applicant could, in the event of being allowed to receive long-term visits, prejudice the administration of justice considerably more than through other means of communication allowed him. The necessity for the restriction from the point of view of criminal proceedings can be assessed by the prosecutor's office or the county court, if a legal basis for this exists, and that assessment would be provided in a court order.

21. Risks to criminal proceedings could be avoided if the body conducting the proceedings could apply § 143 ^{1}(1) cl. 1) of the Code of Criminal Procedure, under which the body conducting the proceedings may, by an order, restrict or completely prohibit the right of a suspect or accused to long-term visits. As this measure is less onerous in respect of a person, while there is no reason to consider it less effective or excessively burdensome from the point of view of the state, restrictions on the fundamental rights of the applicant are not necessary.

22. Even in the event of a conclusion that the necessity for restriction has not completely ceased to exist, the restriction should be considered as manifestly disproportionate due to the length of the period of custody (over two years). Such extensive interference with fundamental rights is also not compensated by other means of communication allowed for the applicant. The right to inviolability of family life also includes the right to have children and be in an intimate relationship, which cannot be compensated through the latter.

23. As noted by the European Court of Human Rights in the case of *Costel Gaciu v. Romania*, prior to conviction a person must be presumed innocent and restrictions applied in respect of them must relate to specific circumstances, and not be universal. Also, in line with the principle of *ultima ratio*, restrictions should be imposed to the minimum extent possible.

24. The court does not agree with the opinion that even though sometimes applying § 94(5) of the IA may lead to disproportionate interference with the fundamental rights of persons in custody, this is not so in the instant case. Without discretion, § 94(5) of the IA leads to unlawful unequal treatment of P. Havik and unjustified interference with his right to family life.

JUDGMENT OF TALLINN COURT OF APPEAL

25. According to § 94(5) of the IA, long-term visits laid down in § 25 of the IA do not apply to persons in custody. There is no dispute that by relying on this fact Tallinn Prison has refused to examine or dismissed all applications for a long-term visit, or that other opportunities for maintaining family relations are guaranteed to T. Vool.

26. The Supreme Court in case No 3-4-1-9-10 reached the opinion that a prohibition on long-term visits for persons in custody is appropriate, necessary, and proportionate in the narrow sense, and the European Court of Human Rights (ECtHR) in its case-law does not require allowing long-term visits for persons in custody either. The Court of Appeal finds that under certain conditions prohibiting long-term visits might be neither necessary nor proportionate in the narrow sense. The instant case also involves such a situation. It also follows from the ECtHR judgments in the cases of *Varnas v. Lithuania* and *Costel Gaciu v. Romania* that in denying long-term visits for persons in custody the state cannot rely merely on a prohibitive legal norm, but must justify why the restriction is necessary and justified by the circumstances of an individual case.

27. The Court of Appeal does not agree with the conclusion of the Administrative Court that a good reason existed for interfering with the right to family life of T. Vool. Tallinn Prison has either refused to examine or dismissed applications for a long-term visit by merely noting that § 94(5) of the IA does not enable any other action, which in itself is contrary to the conditions set in the ECtHR case-law. The fact that holding T. Vool in custody is (still) justified does not lead to the automatic conclusion that the same applies to denying long-term visits.

28. In the instant case, not a single substantive circumstance or justification has been given to demonstrate that allowing T. Vool and his cohabitant a long-term visit could prejudice the pending criminal proceedings

or facilitate distortion of evidence and influencing witnesses. The opinion of the Administrative Court that it is important to prevent too close communication of the accused with his family is merely speculative.

29. Even though the fact that by order of 5 November 2014 the Office of the Prosecutor General lifted all additional restrictions imposed in respect of T. Vool, as there is justified reason to believe that communication with third parties by a person in custody does not prejudice criminal proceedings, cannot necessarily lead to the conclusion that long-term visits cannot prejudice criminal proceedings, yet lifting restrictions on communication imposed under § 143^1 of the Code of Criminal Procedure raises a serious suspicion that prohibiting long-term visits might no longer be proportionate either.

30. Short-term visits, correspondence, and phone calls cannot substitute for long-term visits. Even a short-term visit without a glass partition in a situation where the prison imposes absence of any contact as a precondition for the visit does not compensate for prohibiting long-term visits. Moreover, a restriction imposed on a person in custody simultaneously constitutes interference with a family member's fundamental right ensured under § 26 of the Constitution and this gradually increases over time.

31. Interfering with the inviolability of the family life of T. Vool should be considered disproportionate (unnecessary) as of the refusal of 12 May 2016 by Tallinn Prison; by that time more than two years had passed from his being taken into custody. In view of the stage of criminal proceedings (pending judicial proceedings at the first instance), the criminal offences with which T. Vool is charged (extortion and membership in a criminal organisation), absence of information concerning the need for special protection of family ties, and communication by other means made available to the applicant, it is not possible to assess violation of the applicant's rights at the time of previous refusals by Tallinn Prison.

32. As annulment of the Tallinn Prison decisions of 12 May 2016 and 30 May 2016 resulted in a situation where applications for long-term visits on which those decisions were based are unresolved, Tallinn Prison must examine them anew. The Court of Appeal cannot grant the application requesting the court to order Tallinn Prison to allow the applicant a long-term visit, because the circumstances set out in § 25 of the IA have not yet been established.

OPINIONS OF PARTICIPANTS IN PROCEEDINGS

33. – 77. [Not translated].

PROVISION DECLARED UNCONSTITUTIONAL

78. Imprisonment Act (RT I 2000, 58, 376) § 94 „Visits received by persons in custody", subsection (5):

„(5) The long-term visits provided for in § 25 of this Act shall not be applied to persons in custody.
[RT I, 20 Dec 2012, 3 – entered into force 1 Jan 2013]".

OPINION OF THE CHAMBER

79. The Chamber will first assess the admissibility of the applications (I). Then the Court will identify the fundamental right interfered with and the legitimate aim of interference (II). Finally, the Chamber will assess the proportionality of the interference (III).

80. First, the Chamber notes that in its 2011 judgment it assessed the constitutionality of an earlier provision analogous to the provision which is the object of the present review proceedings (Supreme Court Constitutional Review Chamber judgment of 4 April 2011 in case No 3-4-1-9-10, hereinafter also 'the 2011 judgment'). In that case the Chamber reached the conclusion that § 94(1) in the version in force at the time was constitutional to the extent that it denied long-term visits for persons in custody.

I

81. In accordance with § 15(1) and § 152(2) of the Constitution and § 14(2) (first sentence) of the Constitutional Review Court Procedure Act, the precondition for admissibility of specific constitutional review initiated by the court is the relevance of the provision submitted for review.

82. Several participants in the proceedings have expressed the opinion in their submissions to the court that § 94(5) of the IA is unconstitutional because it lays down an absolute prohibition on long-term visits for all persons in custody, regardless of the reasons for taking them into custody, the circumstances and progress of the criminal case, and the actual need to restrict communication of a person in custody with those outside the prison.

83. For example, the Chancellor of Justice finds that even though in the case of persons in custody whose criminal offence or subsequent circumstances of the proceedings give reason to believe that they would try to unduly influence the criminal proceedings through their family and next of kin, the restriction laid down in § 94(5) of the IA is evidently proportionate, the provision is nevertheless unconstitutional because there also exist persons in custody with regard to whom restricting their communication outside the prison is disproportionate. More specifically, in the opinion of the Chancellor of Justice § 94(5) of the IA seems to be unconstitutional because persons in custody in whose case the restriction is not justified may be caught within its scope of application, so that the provision should be declared unconstitutional regardless of whether the specific applicants constitute such persons in custody.

84. The Chamber does not support that approach in the instant case of specific constitutional review initiated by the courts. In its earlier jurisprudence, the Supreme Court has also expressed the opinion that the aim of specific constitutional review of legislation is primarily to serve the interests of participants in the proceedings (see, e.g., Supreme Court Constitutional Review Chamber order of 28 May 2008 No 3-4-1-4-08, para. 15) and noted that within the frame of specific constitutional review the Chamber assesses the constitutionality of a provision based on the circumstances of a particular case (see, e.g., Constitutional Review Chamber judgment of 15 December 2009 in case No 3-4-1-25-09, para. 26). Additionally, in a later case where the issue of the extent of specific constitutional review arose from this aspect, the Supreme Court unequivocally noted that, in view of the proceedings having been initiated for specific constitutional review, in the course of that review the Court *en banc* can only assess whether in respect of both applicants the legislator had proportionately exercised its right under the Constitution to restrict the fundamental right at issue (see Supreme Court *en banc* judgment of 1 July 2015 in case No 3-4-1-2-15, para. 53).

85. Thus, in the present review case the Chamber also can only check the constitutionality of the restriction applied in respect of the specific applicants.

86. Under § 94(5) of the IA, long-term visits laid down in § 25 of the IA do not apply to persons in custody. The first sentence of § 25(1) of the IA provides that a prisoner is allowed long-term visits from his or her spouse, father, mother, grandfather, grandmother, child, grandchild, adoptive parent, adoptive child, step parent or foster parent, step child or foster child, brother or sister. According to the second sentence of the same subsection, long-term visits from a cohabitant are allowed on condition that they have common children or cohabited for at least two years prior to commencing serving the sentence.

87. In the administrative cases on which the instant case is based, the applicants have contested the prison's refusal to allow them visits with their cohabitant. In the case of neither P. Havik nor T. Vool is it disputed that their cohabitants meet one of the alternative conditions for being a *de facto* spouse set out in § 25(1) (second sentence) of the IA. Thus, a provision excluding long-term visits for a person in custody with their *de facto* spouse applies in respect of the applicants. Next, the Chamber will check the constitutionality of the above provision.

88. Both the Tallinn Administrative Court as well as the Tallinn Court of Appeal have declared

unconstitutional § 94(5) of the IA stipulating that long-term visits laid down in § 25 of the same Act do not apply to persons in custody.

89. In line with the jurisprudence of the Supreme Court, a relevant provision is one which is of decisive importance for adjudicating the case (since the Supreme Court *en banc* judgment of 22 December 2000 in case No 3-4-1-10-00, para. 10). A provision is of decisive importance if in the event of its unconstitutionality the court should decide differently than if it were constitutional (for the first time in the Supreme Court *en banc* judgment of 28 October 2002 in case No 3-4-1-5-02, para. 15).

90. As § 25 of the IA expressly regulates long-term visits for convicted prisoners, this provision does not give rise to the right to long-term visits for persons in custody even in the event of invalidity of § 94(5) of the IA. Nor does such a right derive for the applicants from § 143^1(1) (second sentence) of the Code of Criminal Procedure (CCrP), under which the prosecutor's office or court may, by an order, restrict or prohibit the right of a suspect or accused to long-term visits. The Supreme Court Administrative Law Chamber has previously stated that additional restrictions may only be imposed on those rights that an individual enjoys under the law. Section 143^1 of the CCrP does not expand the rights of groups of individuals but lays down a possibility to impose additional restrictions on existing rights within criminal proceedings – if persons in custody do not have the right to long-term visits, a body conducting the proceedings cannot impose additional restrictions on this right under § 143¹ of the CCrP either (see Supreme Court Administrative Law Chamber judgment of 19 November 2009 in case No 3-3-1-62-09, para. 16). The Chamber agrees with this opinion.

91. The above means that even in the event of the unconstitutionality of § 94(5) of the IA the courts adjudicating the case cannot decide differently than in the event of its constitutionality, because then the actions by the applicants should also be dismissed by reason of the legal order lacking a legal norm laying down the right to long-term visits for persons in custody. Thus, in the opinion of the courts that initiated the present review case, constitutionally-compliant adjudication of the case is additionally prevented by the absence of a legal norm that would grant persons in custody the right to long-term visits.

92. As the above problem can arise only after a legal norm precluding constitutionally-compliant adjudication of the case has been declared unconstitutional, the Chamber will begin its analysis by assessing the constitutionality of that norm. In the instant case, there is no doubt that § 94(5) of the IA precluded allowing the applicants long-term visits. Therefore, the provision is relevant and the applications by Tallinn Administrative Court and Tallinn Court of Appeal are admissible to the extent outlined above.

II

93. The prohibition under § 94(5) of the IA of long-term visits for persons in custody in the instant case unfavourably affects the applicants' right to be with their *de facto* spouse. The Chamber in its 2011 judgment noted that the right to inviolability of family life laid down in § 26 of the Constitution means, inter alia, the right to maintain family ties in their broadest sense (judgment in case No 3-4-1-9-10, para. 43). The Chamber has no reason to withdraw from this position. The prohibition of long-term visits for persons in custody interferes with the right to inviolability of family life laid down in § 26 of the Constitution.

94. Interference by governmental authority with the applicant's right to inviolability of family life enshrined in § 26 of the Constitution does not necessarily mean a violation of the right. A legal act interfering with a fundamental right does not violate the fundamental right if it is constitutional, i.e. formally and substantively conforms to the Constitution (Supreme Court Constitutional Review Chamber judgment of 13 June 2005 in case No 3-4-1-5-05, para. 7).

95. The Chamber has no doubts concerning the formal constitutionality of § 94(5) of the IA.

96. Under § 26 (second sentence) of the Constitution, the state may interfere with individuals' private or family life in the cases and under a procedure provided by law to protect public health, public morality,

public order or the rights and freedoms of others, to prevent a criminal offence, or to apprehend an offender. This means that it is a fundamental right subject to a qualified statutory reservation which may be restricted for the above reasons.

97. In the opinion of the Chamber, prohibiting long-term visits for persons in custody serves first and foremost the aim of preventing exertion of undue influence on criminal proceedings, including destroying, altering and falsifying evidence, and influencing witnesses. This aim falls within the legitimate aims of restricting the fundamental right to family life listed in § 26 (second sentence) of the Constitution, in particular the aim of preventing a criminal offence. In its 2011 judgment, the Chamber also found that prevention of committing offences, including destroying, altering and falsifying evidence, and influencing witnesses features among the interests of the administration of justice and, as such, serves as a legitimate aim for interfering with the fundamental right enshrined in § 26 of the Constitution (judgment in case No 3-4-1-9-10, para. 50).

III

98. The fundamental right to inviolability of family life may be restricted under a statute if imposing the restriction involves, in addition to the legitimacy of the aim, observing the principle of proportionality under § 11 of the Constitution, according to which restrictions must be necessary in a democratic society and may not distort the nature of the rights and freedoms restricted. The court checks conformity with the principle of proportionality in three consecutive stages: first, the appropriateness of a measure, followed by necessity and then, if necessary, also proportionality in the narrow sense.

99. A measure is appropriate if it facilitates attaining the aim of the restriction. In terms of appropriateness, a measure is definitely disproportionate if in no instances does it facilitate attaining the aim of the restriction (Supreme Court Constitutional Review Chamber judgment of 6 March 2002 in case No 3-4-1-1-02, para. 15). In the context of the present review case, this means that prohibiting long-term visits for persons in custody is an appropriate measure for attaining the aim of preventing undue influence on criminal proceedings if the aim is in principle attainable by the contested measure.

100. In its 2011 judgment the Chamber noted that a longer unsupervised stay of a person in custody with their spouse within the meaning of § 25(2) of the IA may facilitate organising commission of offences, including destroying, altering and falsifying evidence, and influencing witnesses (judgment in case No 3-4-1-9-10, para. 59). The Chamber then elaborated that during a long-term visit a suspect or accused could, for example, contact possible witnesses through his or her spouse by influencing the spouse either himself or herself or through other persons to address witnesses – or victims – and to influence them either to give false testimony or to prevent their appearance, i.e. to commit offences in pre-trial and court proceedings against the rights of persons prohibited by §§ 317, 322 and 323 of the Penal Code, as well as to better organise the destruction, alteration and falsification of evidence, i.e. offences prohibited by § 316 of the Penal Code (judgment in case No 3-4-1-9-10, para. 69). These reasons are also relevant now.

101. The Chamber concedes that a person’s opportunity to unduly influence criminal proceedings (including through long-term visits) diminishes over time, depending on the stage of criminal proceedings. However, the Chamber does not agree with the assertion by the Chancellor of Justice that after a person who is potentially subject to influence has provided their evidentiary contribution in criminal proceedings and the judicial proceedings have reached the stage of summations, the possibility of distorting evidence is non-existent. Criminal proceedings do not end with the beginning of summations in the court of first instance. First of all, the county court might decide to resume examination by the court under § 302(1) or § 307(1) of the CCrP. The CCrP also does not prevent submission of new evidence, including hearing a new witness in appeal proceedings (see § 15(2) cl. 1) and § 321 cl. 6) CCrP). It is also conceivable that a witness might be influenced to change testimony given in the county court, also seeking re-examination of that witness in appeal proceedings. Additionally, § 341 of the CCrP enables a criminal case to be remitted to the court of first instance for a new hearing. In the course of a new hearing of a criminal case, as a rule, the right of the parties to submit to the court evidence not submitted during the original hearing is not restricted.

102. Additionally, the Supreme Court Criminal Chamber has noted, although in the context of assessing continued justification for additional restrictions applied under § 143^1 of the CCrP, that even though at the relevant stage of criminal proceedings (i.e. cassation proceedings) the chance that after lifting additional restrictions witnesses could be influenced or the proceedings prejudiced in some other manner was negligible, the Chamber remits the criminal case for a new hearing to the Court of Appeal, and it is not ruled out that new evidence needs to be collected, including re-examination of the accused and witnesses (Supreme Court Criminal Chamber judgment of 30 June 2016 in case No 3-1-1-54-16, para. 31). Thus, prohibiting long-term visits for persons in custody to prevent undue influence in criminal proceedings is in principle appropriate at least until the end of cassation proceedings, undoubtedly also including the instant case.

103. The restriction is necessary if the aim cannot be attained by some other less onerous measure which is at least as effective as the first one. It should also be taken into account how onerous different measures are on third parties, as well as differences with regard to expenses incurred by the state (see, e.g., Supreme Court Constitutional Review Chamber judgment of 6 March 2002 in case No 3-4-1-1-02, para. 15).

104. The Chamber upholds its position expressed in the 2011 judgment that with regard to persons in custody it is not possible to achieve the aims of preventing continued commission of criminal offences, including destruction, alteration and falsification of evidence and influencing of witnesses by means of some other measure which is less onerous on individuals but at least as effective as denying long-term visits (judgment in case No 3-4-1-9-10, para. 60).

105. Thus, for example, measures laid down in the Imprisonment Act, such as surveillance of correspondence and telephone calls of persons in custody, examination of packages, or security measures such as search and surveillance by surveillance agencies, might not be equally effective and less onerous on individuals, and taking account of state expenses, as denying long-term visits (judgment in case No 3-4-1-9-10, para. 61). Therefore, prohibition of long-term visits for persons in custody is a necessary restriction on their fundamental right to family life.

106. To decide on the narrow proportionality of a measure, it is necessary to consider, on the one hand, the extent and intensity of interference with a fundamental right and, on the other hand, the importance of the aim for the restriction. The more intense the interference with a fundamental right, the more solid the reasons justifying it have to be (judgment in case No 3-4-1-1-02, para. 15).

107. The main issue in the instant case is whether the legislator's aim of preventing undue influence on criminal proceedings through a prohibition on long-term visits for persons in custody is sufficiently solid to justify interfering with the inviolability of their family life.

108. Both Tallinn Administrative Court and Tallinn Court of Appeal expressed the opinion in their judgments that § 94(5) of the IA disproportionately interferes with the inviolability of family life of persons in custody due to lack of the right of discretion. The Chamber does not agree with the assertion that the implementer of the Act has no discretion to decide on long-term visits for persons in custody.

109. In its 2011 judgment, the Chamber noted that even at the time when choosing to take a person into preventive custody, the narrow proportionality of interference with the family life of a person in custody as a result of denying long-term visits is weighed from the aspect of preventing continued commission of criminal offences, including destruction, alteration and falsification of evidence and influencing witnesses. Before a (preliminary investigation) judge applies taking a person into custody as a preventive measure at the request of a prosecutor, the choice of a preventive measure must take account of, inter alia, the probability of continued commission of criminal offences, or destruction, alteration and falsification of evidence, the degree of the sentence, the personality of the suspect, accused or convicted offender, their state of health, marital status, and other circumstances relevant to applying the preventive measure (judgment in case No 3-4-1-9-10, para. 65). Thus, the issue of how a preventive measure interferes with a person's family

life is considered first of all when deciding on applying the preventive measure.

110. In addition, § 137(1) of the CCrP in the version in force until 31 August 2016 enabled an application to a preliminary investigation judge or the court to verify the justification for being held in custody after two months from being taken into custody, and § 137(4) of the CCrP provided that if the term for holding a person in custody has been extended for more than six months pursuant to the procedure laid down in § 130(3^1) of the CCrP (extension of the term for holding a person in custody for more than six months in the case of the particular complexity or extent of a criminal matter), a preliminary investigation judge must, on his or her own initiative, verify the reasons for holding the person in custody at least once a month. Under § 275(2) of the CCrP, if the accused is held in custody in county court proceedings, the court must verify the reasons for holding them in custody on its own initiative at least once in six months.

111. If the court is of the opinion that continuing to hold someone in custody has become unjustified, inter alia, for reasons of the resulting interference with their fundamental right to family life becoming too intense, then holding them in custody has to be terminated or, if necessary, replaced by some other more lenient preventive measure (see the judgment in case No 3-4-1-9-10, para. 66). The Chamber sees no reason to change the assessment given to this regulation in the context of long-term visits for persons in custody. The regulatory scheme for taking someone into custody, including verifying the reasons for continuing to hold them in custody, in force both prior to 1 September 2016, as well as the relevant provisions in the CCrP currently in force, enabled and do enable weighing the proportionality of interference with the fundamental right to inviolability of family life of persons in custody in the course of criminal proceedings.

112. According to the information available to the Chamber, verification of reasons for holding the applicants in custody has taken place on the basis of these provisions at least on the following occasions in respect of the applicants. Reasons for holding both P. Havik and T. Vool in custody have been verified under § 130(3^1) and § 137(4) of the CCrP on four occasions. On all these instances, Harju County Court found that continuing to hold them in custody was justified. After prosecuting P. Havik and T. Vool on 19 March 2015, Harju County Court has verified reasons for holding P. Havik in custody on three occasions and reasons for holding T. Vool in custody on two occasions under § 275(2) of the CCrP. P. Havik has contested two County Court orders to this effect in the Court of Appeal, which has also examined the appeals. P. Havik has also used the possibility to file appeals with the Supreme Court against the Court of Appeal orders. The Supreme Court has denied leave to appeal in respect of one of the appeals filed by P. Havik, and preliminary proceedings in respect of the other appeal are pending. T. Vool has contested one of the County Court rulings in respect of him in the Court of Appeal, which has also examined the appeal. T. Vool filed an appeal against the Court of Appeal order with the Supreme Court, which denied him leave to appeal.

113. By no means can the Chamber agree with the assertion that § 94(5) of the IA is unconstitutional because it does not afford discretion to an administrative authority (in this case the prison) in deciding to refuse long-term visits for persons in custody.

114. The legislator has a broad margin of manoeuvre in shaping criminal policy. In the opinion of the Chamber, this also includes a decision on what legal consequences should be linked to taking a person into custody. The legislator's margin of manoeuvre must also include a choice on the issue of which executive branch should be afforded discretion in deciding on the admissibility of long-term visits if it is found necessary to stipulate it (on this, see in more detail paras 118 *et seq.* below), and which branch of the judiciary supervises exercise of that discretion.

115. In line with the regulatory arrangements currently in force, the final assessment of whether a person poses a risk to conduct of criminal proceedings is given in criminal court proceedings. In the opinion of the Chamber, such an arrangement also better corresponds to the principle of internal division of competence between judicial branches.

116. According to § 1 of the Imprisonment Act, the scope of application of the Act includes the procedure for and organisation of execution of imprisonment, detention, and custody pending trial, as well as the prison

service and service as a prison officer. The IA does not regulate the course of criminal proceedings, and the prison service also has no competence to assess whether and to what extent a particular person in custody poses a risk to conduct of criminal proceedings. In the opinion of the Chamber, it is precisely on account of these considerations that the legislator has established regulatory arrangements which link the result of consideration taking place in criminal proceedings – (continued) application of holding someone in preventive custody – to the consequence, i.e. an absolute, non-discretionary prohibition of long-term visits for persons in custody laid down in the Imprisonment Act.

117. In the instant case, several participants in the proceedings, including Tallinn Administrative Court itself, which initiated the review of constitutionality, have pointed out the fact that assessing the risk posed by a person from the aspect of criminal procedural law does not fall within the competence of administrative courts, and especially not within the competence of an administrative authority such as a prison. Tallinn Prison has additionally contended that, if it were afforded the right of discretion, unequal treatment of similar persons in custody would not be ruled out, since the prison, as an administrative authority which does not itself carry out criminal proceedings, has no substantive competence to treat equal groups equally.

118. Moreover, the Chamber would see no reason to doubt the constitutionality of the legislator's decision – to impose a prohibition on long-term visits for some groups of persons in custody – even if interfering with the family life of persons in custody who belong to those groups would not be assessed once again in criminal proceedings. Specifically, it cannot be ruled out that a prohibition on long-term visits for persons in custody laid down in § 94(5) of the IA, if applied in respect of persons in custody in a similar situation to the applicants, would have provided a proportionate result even if interfering with their fundamental right to family life were not assessed in criminal proceedings upon verification of reasons for continuing to hold them in custody.

119. In a country founded on the principle of representative democracy, the legislative power is vested in the Riigikogu. This principle, enshrined in § 59 of the Constitution, is specified by the universal competence of the Riigikogu set out in § 65 cl. 16) of the Constitution. Section 11 of the Constitution, pursuant to which restrictions of fundamental rights must be necessary in a democratic society, does not contain a person's fundamental right to consideration but only requires that consideration in the final instance should provide a proportionate result in terms of restricting a person's fundamental right. In the opinion of the Chamber, no such constitutional right to consideration arises from any other provision of the Constitution either. Interfering with the inviolability of a person's family life may also prove to be proportionate if it was considered by the democratically legitimised legislator when enacting the law.

120. This means that even if the CCrP were not to contain the right of consideration in (continued) application of a preventive measure, the constitutionality of the prohibition laid down in § 94(5) of the IA in the present constitutional review proceedings would depend on whether the Riigikogu, when enacting this provision, correctly, i.e. proportionately with regard to the fundamental right to inviolability of family life, exercised its right of consideration with regard to restricting the family life of persons in custody in a situation similar to that of the applicants.

121. The ECtHR in its judgment in the case of *Varnas v. Lithuania*, cited by both courts that initiated the constitutional review, noted that its conclusion that prohibition of long-term visits for persons in pre-trial detention in the Republic of Lithuania was in violation of Articles 8 and 14 of the ECHR was based first and foremost on the fact that, in justifying the prohibition, the Lithuanian Government, like the Lithuanian administrative courts, in essence relied on legal norms as such, with no reference as to why those prohibitions had been necessary and justified in the applicant's specific situation (ECtHR judgment of 9 July 2013, application No 42615/06, para. 120).

122. In assessing the situation of the applicants, the Chamber will first and foremost take into account the length of the applicants' stay in custody as the main factor affecting the intensity of interference with their fundamental rights, as well as the charges of criminal offences with regard to which criminal proceedings in respect of the applicants were conducted and the contested preventive measure was applied to secure the

proceedings (for more detail, see paras 1 and 6 above).

123. The Chamber has no doubt that the instant case involves intense interference with the applicants' family life, as they have been held in custody for a long time. Both P. Havik and T. Vool had been in custody for more than two years by the time the judgments concerning their long-term visits were issued in administrative court proceedings.

124. However, the applicants' long period of being held in custody is due to the type and severity of the criminal offences with which they are charged. The Supreme Court Criminal Chamber, by reference to ECtHR case-law, noted that a long period of custody may be justified within the meaning of Art 5 para. 3 of the ECHR, if even in the case of best efforts by the state this is due to the particular circumstances of a criminal case, for example the fact that the criminal offence involved several episodes and was committed by a group of persons (see Supreme Court Criminal Chamber order of 22 February 2011 in case No 3-1-1-110-10, para. 16).

125. The fact that a criminal offence involves several episodes, was committed by a group of persons, and is complicated, does not certainly lead to the conclusion that those accused of it pose a risk to the conduct of criminal proceedings by unduly influencing them through long-term visits. However, the ECtHR in the case of *Messina v. Italy No 2* found that security measures preventing close contact during short-term visits by family members were justified taking into account the specific nature of the phenomenon of organised crime, particularly of the Mafia type, in which family relations often play a crucial role (ECtHR judgment of 28 September 2000, application No 25498/94, para. 66).

126. The Chancellor of Justice has also noted in her opinion that in the case of those in custody whose criminal offence provides a reason to believe that they might try to unduly influence criminal proceedings through their family and next of kin, § 94(5) of the IA clearly constitutes a proportionate interference with the fundamental right to family life. In the opinion of the Chamber, the present review case involves precisely this type of criminal offences.

127. According to the judgment in respect of T. Vool in plea bargain proceedings, the criminal organisation, of membership of which P. Havik and T. Vool were accused, was being led by "providing instructions, tasks, guidance and opinions in line with an established chain of command to members of the criminal organisation with regard to organising and committing criminal offences, distributing the proceeds of crime, financing the criminal organisation, recruiting new members to the criminal organisation, and supporting members of the criminal organisation sentenced to imprisonment or being suspects and accused in criminal proceedings, or their next of kin" (see Harju County Court judgment of 7 September 2016 in criminal case No 1-16-6717).

128. The Chamber has misgivings concerning the opinion expressed by the ECtHR in the case of *Varnas v. Lithuania* and also subsequently (see *Costel Gaciu v. Romania* ECtHR judgment of 23 June 2015, application No 39633/10) that in cases concerning prohibition of long-term visits for persons in custody similar to the instant case the risk of undue influence on criminal proceedings, i.e. potential collusion or some other risk of obstructing the process of collecting evidence, is removed by the mere fact that the applicant's wife was neither a witness nor a co-accused in the criminal cases against her husband nor otherwise involved in criminal activities, according to the information available to the Court (*Varnas v. Lithuania*, para. 120). The Chamber considers this assertion particularly questionable in the light of the fact that the relevant criminal organisation had organised support for the next of kin of its members.

129. One should also not overlook the fact that, according to the charges, the activities of the relevant criminal organisation were aimed at committing the criminal offence of extortion, of which the objective criminal characteristics include threats or use of psychological or physical violence. Thus, threats and violence can be considered as characteristic behaviour of members of the relevant criminal organisation, involving the probable risk of using these to unduly influence criminal proceedings, either directly or through an intermediary.

130. In addition, the Chamber notes that in view of the prohibition under § 22(3) of the Constitution to compel anyone to testify against himself or herself or against their next of kin, if a suspect or an accused uses the assistance of their next of kin to obstruct justice in a criminal case, it would not be legally possible to compel that next of kin to confess to a preliminary investigator, prosecutor and the court the obstruction of proceedings and the ascertainment of truth in the administration of justice (judgment in case No 3-4-1-9-10, para. 69).

131. In the light of the foregoing, the Chamber would also have no reason to doubt the choice of the legislator to lay down with regard to persons in custody, such as the applicants in the present specific constitutional review proceedings, an absolute prohibition on long-term visits based on the presumption that the aim of preventing a risk to the conduct of criminal proceedings by exerting undue influence through long-term visits in cases analogous to the present one would outweigh interference with the inviolability of the family life of persons in custody.

132. In this regard, the Chamber would not rule out the constitutionality of such a prohibition, for example, in the case of groups of applicants whose period in custody is longer in comparison to the period in the present review case, but where the acts imputed to them could be more serious by nature (e.g. terrorism). By using its room for manoeuvre, the legislator could also establish, for example, regulation which enables a body conducting the proceedings to consider allowing long-term visits for persons in custody only when the duration of holding them in custody has exceeded a certain threshold specified by the legislator (e.g. one or two years). In the opinion of the Chamber, the legislator here has broad room for manoeuvre in exercising its margin of appreciation.

133. The ECtHR in its case-law has also found that considerations relating to the risk of a suspect's committing further offences or compromising the investigation involve a degree of probabilistic assessment and thus need not be based on firm proof (see, e.g., *Ovsjannikov v. Estonia*, ECtHR judgment of 20 February 2014, application No 1346/12, para. 49). The ECtHR has also acknowledged that the risk of influencing witnesses and obstructing the investigation is particularly high in the case of organised crime (see, e.g., *Rambiert v. Poland*, ECtHR judgment of 10 March 2015, application No 34322/10, para. 34).

134. In view of what was explained in paras 118–133 of this judgment and the fact that interference with the inviolability of the family life of P. Havik and T. Vool has been repeatedly assessed in proceedings to verify continued justification of the preventive measure applied to them, the Chamber has no doubt that § 94(5) of the IA is constitutional in view of the situation of the applicants.

135. This conclusion is also not refuted by the fact that § 25 of the IA allows long-term visits for convicted prisoners on conditions set out in this section. Since, in the case of convicted prisoners, the risk that they could unduly influence criminal proceedings against them which have already ended is excluded, their different treatment from persons in custody in the context of prohibition of long-term visits is justified.

136. The Chamber does not rule out that in different circumstances, including in the case of applicants charged with different criminal offences, or other groups of persons set out in § 25(1) of the IA whose visits with persons in custody are precluded under § 94(5) of the IA, applying § 94(5) of the IA may lead to disproportionate interference with the fundamental right to family life of a person in custody (and their family members). However, the Chamber emphasises that within specific constitutional review proceedings the Supreme Court has no competence to change the established system of preventive custody and related long-term visits for persons in custody on the basis of the circumstances of specific cases which do not confirm the unconstitutionality of the regulatory scheme.

Dissenting opinion of Supreme Court Justices Eerik Kergandberg and Saale Laos to the Constitutional Review Chamber judgment of 16 November 2016 No 3-4-1-2-16

In adjudicating this review case, the Chamber has rightly tried to stay within the limits of specific constitutional review (see paras 84, 85, 87 of the judgment). Thus, justifications focusing on the situation of the specific applicants are perfectly appropriate (see, e.g., paras 123 and 129 of the judgment). However, the Chamber has stopped half-way because the administrative courts that initiated the constitutional review court proceedings have fallen far short of ascertaining all the circumstances – mostly relating to criminal procedure – that may affect the judgment. Of course, it should also be conceded that no easy answer can be found to the question how constitutional review procedure, by relying mostly on criminal procedural arguments, can be used to check the assertion of unconstitutionality raised by the administrative courts.

Readers of the judgment will probably not fail to notice that the opinion of the majority of the Chamber in the instant case is clearly based on the judgment delivered in 2011 in constitutional review case No 3-4-1-9-10. Even if we were to avoid discussion on whether we are dealing with a classic case of specific constitutional review of legislation in this situation, there should be no doubt that prohibition of long-term visits for persons in custody in the Estonian legal order is an issue whose constitutionality would merit more general attention, e.g. in the frame of supervision by the Chancellor of Justice. This is also implied by the last paragraph of the judgment delivered in the present review case.

On the one hand, the Chamber finds that, with regard to suspects and accused in a similar situation to the applicants, the legislator may indeed impose an absolute prohibition on long-term visits with the aim of preventing a risk to the conduct of criminal proceedings by exerting undue influence through long-term visits (para. 131 of the judgment). On the other hand, however, the legitimate aim of taking the specific applicants into custody (i.e. the basis for taking them into custody) was not ascertained. In her opinion submitted as a participant in the proceedings, the Chancellor of Justice rightly noted that in the case of different grounds for taking a person into custody the proportionality of prohibiting long-term visits must also be assessed differently. That is, as a rule, prohibiting long-term visits is neither necessary nor proportionate in the event of a risk of absconding, or in the event of taking a person into custody on the grounds of the risk of their continuing to commit criminal offences not related to influencing the administration of justice.

Relying mostly on the opinion adopted in case No 3-4-1-9-10, the majority of the Chamber also notes in the instant case that narrow proportionality of interference with the family life of a person in custody as a result of denying long-term visits is weighed already when choosing a preventive measure and subsequently when verifying its continued justification. In other words, the majority of the Chamber finds that if, in the case of the continued presence of grounds for preventive custody, the resulting interference with family life (or some other fundamental right) outweighs by its intensity the public interest present in the grounds for taking a person into custody, then the person should be released from custody or the preventive measure should be replaced (bail, electronic supervision). This, in turn, has led the Chamber to the automatic conclusion that in view of the continued justification of preventive custody of the applicants having been verified in the criminal proceedings (para. 112 of the judgment), interference with the inviolability of their family life is proportionate and the prohibition of long-term visits constitutional.

At first sight, deciding the admissibility of interference with the fundamental right to family through considering the admissibility of interfering with the fundamental right to liberty might even seem logical. Indeed, preventive custody as a measure to secure criminal proceedings must in any case be a measure of last resort (the principle of *ultima ratio*), while its duration must also remain within what is minimally necessary. For a person in custody, interference with their fundamental rights is undoubtedly reflected first and foremost in loss of liberty (taking them into custody), rather than in a prohibition on long-term visits, so that for a person in custody it is indisputably more favourable to be released from custody in a situation where it is established that interference with their fundamental right to family due to prohibition of long-term visits is gradually evolving into a violation of the fundamental right to family. However, developing

such a practice of protecting the inviolability of family is difficult if not impossible to expect, because at least in borderline cases not even a violation of the fundamental right to family can outweigh the risks to criminal proceedings and even to the public at large, entailed in the classic grounds for taking a person into custody, i.e. suspicion of the likelihood of absconding and recidivism. There is reason to believe that, in the case of long-term custody, judicial practice would assess the public interest, *a priori*, as stronger and weightier, which, as a rule, always outweighs the intensity of interference with the family life of a person in custody (regardless of whether the latter was specifically mentioned at all among the reasons for release from custody). And when approaching the same question from another angle, termination of different instances of interference with fundamental rights chosen for the purpose of securing the orderly conduct of criminal proceedings must also be purposeful. It is not reasonable to presume and require that terminating interference with the fundamental right to family should in any case and always result in the release of a person from custody. Undoubtedly, opportunities for potentially compromising criminal proceedings are always significantly broader upon release from custody than in the case of allowing long-term visits.

In other words, the "all or nothing" approach described above fails to take into account the possibility that if continued justification exists for applying preventive custody, which outweighs the right to inviolability of family life, then the intensity of interference with the inviolability of family life, which by nature is inherent in the taking of liberty from its very first moment, can be alleviated, for example, by allowing long-term visits in addition to short-term visits, of course on condition that this does not compromise the conduct of criminal proceedings. The ECtHR has also found that long-term custody (two years in the specific case) results in the kind of interference with family life which can no longer be merely justified as being an inevitable consequence of deprivation of liberty (ECtHR judgment of 9 July 2013 *Varnas v. Lithuania*, para. 121: „[…] the particularly long period of the applicant's pre-trial detention (two years at the moment when the applicant had first asked for a conjugal visit) reduced his family life to a degree that could not be justified by the inherent limitations involved in detention. […]". In such a situation, in the case of the continued presence of grounds for preventive custody, specific assessment is required as to whether the need to restrict communication with the next of kin also still exists, i.e. whether the risk of exerting influence on criminal proceedings persists, including in view of the specific stage of criminal proceedings.

The approach adopted in the Chamber judgment overshadows the legitimate aim of interference with the inviolability of family life – to prevent compromising the administration of justice through family members. However, interference with fundamental rights is not constitutional without a legitimate aim. Let us also note in this regard that it is precisely in view of the legitimate aim of the restriction that it is not appropriate to compare persons in custody with convicted prisoners from the aspect of the right to long-term visits. For the above reasons, it is also difficult to agree with the presumption expressed in para. 131 of the judgment (even though by way of *obiter dictum*). This even despite the fact that at the time of having recourse to the administrative court the applicants were accused on charges of belonging to a criminal organisation and extortion.
