Constitutional judgment 5-18-8

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

EN BANC

JUDGMENT

in the name of the Republic of Estonia

Case number	5?18?8
Date of judgment	11 June 2019
Composition of court	Chairman: Villu Kõve; members Velmar Brett, Peeter Jerofejev, Henn Jõks, Eerik Kergandberg, Hannes Kiris, Ants Kull, Saale Laos, Viive Ligi, Heiki Loot, Jaak Luik, Nele Parrest, Ivo Pilving, Jüri Põld, Paavo Randma, Peeter Roosma, Malle Seppik and Tambet Tampuu
Case	Review of constitutionality of § 94(5) of the Imprisonment Act
Basis for proceedings	Tallinn Administrative Court judgment of 2 November 2018 in administrative case No 3?18?1388
Hearing	Written procedure

OPERATIVE PART

To declare unconstitutional and repeal § 94(5) of the Imprisonment Act prospectively, giving the judgment retroactive effect in respect of the applicant in the instant case as well as in respect of persons who, by the time of entry into force of this judgment, have in accordance with the procedure laid down by law contested refusal to enable them to receive a long-term visit or who have, in accordance with the procedure laid down by law, sought compensation for damage caused to them by refusal to enable a long-term visit.

FACTS AND COURSE OF PROCEEDINGS

1. E.G. (the applicant) was apprehended on 3 June 2017 on suspicion of having committed an act of a sexual nature against a child under 14 years old in a cinema hall at Viimsi and, as a person having previously committed an offence against sexual self-determination, on having now committed an act of a sexual nature in respect of a 9-year-old child who is incapable of comprehension. The applicant was taken into custody on 5 June 2017 by Harju County Court order, according to which the ground for taking into custody was the risk of committing further sexual criminal offences. On 7 July 2017, the prosecutor's office brought charges against the applicant under § 145(2) and § 141(2) cls 1) and 6) of the Penal Code. According to the charges, the applicant had, in addition to the above, committed two more acts of a sexual nature in respect of a child under 14 years of age, both of these on a public bus in Tallinn.

2. On 10 July 2017, Harju County Court committed the applicant for trial under abridged procedure on charges under § 141(2) cls 1) and 6) and § 145(2) of the Penal Code and maintained preventive custody. The court decided on the preventive measure without arranging a hearing since no motion had been filed to change or annul it. By judgment of 12 October 2017, Harju County Court convicted the applicant under § 141(2) cls 1) and 6) and § 145(2) of the Penal Code and imposed a sentence of four years' imprisonment to be served without parole. The preventive measure (remand in custody) was not changed. By judgment of 22 March 2018, Tallinn Court of Appeal upheld the Harju County Court judgment.

3. On 18 April 2018, the applicant applied to Tallinn Prison ('the prison') for a long-term visit with their four-year-old son and family. By letter of 17 May 2018, the prison dismissed the applicant's application. The applicant filed a non-judicial administrative challenge against the letter, which the prison dismissed by decision of 22 June 2018 concerning the challenge. The applicant lodged an action with Tallinn Administrative Court, seeking an order to oblige the prison to reexamine their application for a long-term visit, and requesting initiation of constitutional review proceedings.

4. By judgment of 2 November 2018, Tallinn Administrative Court satisfied the action. The Administrative Court annulled the Tallinn Prison letter of 15 May 2018 and the decision of 22 June 2018 concerning the challenge, and obliged the prison to reexamine the applicant's application for a long-term visit. The court also declared § 94(5) of the Imprisonment Act unconstitutional.

5. Tallinn Administrative Court referred its judgment to the Supreme Court with a view to initiating constitutional review court proceedings. The Supreme Court registered the application on 2 November 2018 as case No 5?18?8.

6. On 9 November 2018, the Supreme Court Criminal Chamber issued a judgment in case No 1?17?6580 acquitting the applicant and also annulling the preventive custody applied to them. The applicant had been remanded in custody for a total of 524 days, i.e. approximately one year and five months.

7. By order of 20 February 2019, the Supreme Court Constitutional Review Chamber referred the case for adjudication to the Supreme Court *en banc*.

JUDGMENT OF TALLINN ADMINISTRATIVE COURT

8. Section 94(5) of the Imprisonment Act conflicts with the Constitution since, in the applicant's case, its application without the right of discretion leads to unjustified interference with family life.

9. Section 94(5) of the Imprisonment Act is a relevant rule within the meaning of exercising constitutional review for reasons which the Supreme Court set out in case No 3?4?1?2?16.

10. The absolute prohibition laid down in § 94(5) of the Imprisonment Act interferes with the inviolability of family life established by § 26 of the Constitution. The Supreme Court provided reasoning for this opinion in its judgment in case No 3?4?1?2?16. The applicant's son, mother and sister form a family in the context of the right to short-term and long-term visits. The existence of family relations is also affirmed by short-term visits and telephone calls with the above family members.

11. As the Supreme Court found in the judgment in case No 3?4?1?2?16, the constitutionality of the prohibition laid down in § 94(5) of the Imprisonment Act should be checked in respect of the applicant. First of all, the duration of the applicant's remand in custody should be taken into account as the main factor affecting the intensity of interference with their fundamental rights, and the charges for securing of which proceedings the contested preventive measure was applied.

12. However, the applicant's situation differs from the situation of the applicants in the cases cited above as the latter were accused of criminal offences related to a criminal organisation. The reasoning adopted by the Supreme Court in case No 3?4?1?2?16 to legitimise the absolute prohibition (in sum, risks to administration of justice arising from the functioning of a criminal organisation) are not relevant in the present dispute. The prohibition on long-term visits applies to the applicant only because they are a person in custody. No prohibition on long-term visits or any other restrictions were imposed on the applicant in criminal proceedings – neither in pre-trial nor court proceedings. The instant case also differs from case No 3?4?1?2?16 as the reasons for holding the applicant in custody have not been verified either by way of appeal against an order or when committing the applicant for trial. Although the period of holding the applicant in custody has been shorter than in case No 3?4?1?2?16 or in the European Court of Human Rights (ECtHR) cases *Varnas v. Lithuania* and *Costel Gaciu v. Romania*, it nevertheless amounts to long-term custody. Moreover, the length of holding the applicant in custody does not arise from the nature and severity of the criminal offences committed by the applicant but from court proceedings which have continued because the applicant has been exercising the right of appeal laid down in § 24(5) of the Constitution.

13. Although the applicant was enabled short-term visits with their son, mother and sister during the remand in custody, and they have been entitled to telephone calls, in view of the period of custody of almost one year and five months, this amounts to very limited communication. The purpose of long-term visits is to promote emotional life and to strengthen the emotional connection between family members. The types of communication enabled by the prison cannot replace this.

14. The principle of *ultima ratio* applies in criminal proceedings and restrictions imposed on an individual should be the minimum possible. That is, restrictions imposed on an individual may not be more extensive than necessary in the interests of criminal proceedings. However, in § 94(5) of the Imprisonment Act the legislator has stipulated that remanding a person in custody automatically involves a prohibition on long-term visits, i.e. no consideration needs to be given to it. Although Article 8 of the European Convention on Human Rights (ECHR) does not guarantee the right to long-term visits, a person remanded in custody prior to conviction should be seen as innocent and restrictions imposed on the person may not be universal but should relate to specific circumstances.

15. In the instant case, the court will not decide on whether the applicant can actually meet their son. That issue will arise only when a legal possibility for this arises for the applicant.

OPINIONS OF THE PARTICIPANTS IN THE PROCEEDINGS

16. - 49. [not translated]

CONTESTED PROVISION

50. Section 94(5) of the Imprisonment Act (RT I 2000, 58, 376… RT I, 9 March 2018, 19):

"(5) The long-term visits laid down in § 25 of this Act shall not be applied to persons in custody.

[RT I, 20 December 2012, 3 – entered into force 1 January 2013]".

OPINION OF THE COURT *EN BANC*

51. The Court *en banc* will first assess the admissibility of the application by Tallinn Administrative Court and will delimit the preliminary scope of constitutional review (I). Then the Court *en banc* will identify the fundamental right that is interfered with and will assess the constitutionality of the interference in the light of the circumstances of the present case (II). Subsequently, the Court *en banc* will additionally deal with the issue of the scope of constitutional review and will resolve the application by Tallinn Administrative Court (III).

52. This is the third time when the Supreme Court has been required in constitutional review proceedings, within specific constitutional review, to assess the constitutionality of a prohibition on long-term visits for a person in custody (see Supreme Court Constitutional Review Chamber judgment of 4 April 2011 in case No 3?4?1?9?10, hereinafter also called the 2011 judgment; Supreme Court Constitutional Review Chamber judgment of 16 November 2016 in case No 3?4?1?2?16, hereinafter also called the 2016 judgment). In both of the cases cited above, the majority of the Chamber, in sum, reached the opinion that the provision under review was not unconstitutional. By applying the criteria employed by the Constitutional Review Chamber in the 2016 judgment to check the constitutionality of the contested provision, the Supreme Court Administrative Law Chamber in the judgment of 31 October 2017 in case No 3?14?51567/55 also reached the opinion that in the light of the circumstances of the specific case § 94(5) of the Imprisonment Act was constitutional.

I

53. 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. In line with the long-standing 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).

54. Under § 90(1) of the Imprisonment Act, the provisions of Chapters 1, 2 and 7 of the same Act together with the specifications laid down in the Chapter on execution of custody pending trial apply to being held in custody pending trial. That is, in the event of invalidity of § 94(5) of the Imprisonment Act, § 25 of the Imprisonment Act stipulating long-term visits for prisoners needs to be applied to persons remanded in custody. The Administrative Court, when assessing the refusal by the prison to enable the applicant to receive a long-term visit with family members, should have decided differently in the event of the invalidity of § 94(5) of the Imprisonment Act than in the event of its validity. Therefore, § 94(5) of the Imprisonment Act was of decisive importance in adjudicating the case in Tallinn Administrative Court and is relevant in the instant constitutional review proceedings.

55. In the 2011 case, the Constitutional Review Chamber reached the opinion that in a situation where the Imprisonment Act (IA) failed explicitly to mention long-term visits for persons in custody, the prohibition on long-term visits for persons in custody arose from § 94(1) of the IA under which a person in custody is permitted to receive short-term visits of personal, legal or commercial interest in matters which the person in custody cannot conduct through third persons (see the cited judgment in case No 3?4?1?9?10, para. 35). Considering that with a legislative amendment entering into force on 1 January 2013 the Riigikogu

supplemented § 94 of the IA with subsection (5) under which long-term visits laid down in § 25 of the IA are not to be applied to persons in custody, the Court *en banc* is of the opinion that after repealing § 94(5) of the IA the prohibition on long-term visits for persons in custody can no longer be derived from § 94(1) of the IA. After the Riigikogu's legislative amendment mentioned above, the prohibition on long-term visits for persons in custody derives from § 94(5) of the IA, and if that were to be declared unconstitutional and repealed the legal order would no longer contain a rule to preclude long-term visits for persons in custody.

56. In the opinion of the Court *en banc*, the provision is also not rendered irrelevant by the fact that by the Supreme Court Criminal Chamber judgment in case No 1?17?6580 on 9 November 2018 the applicant was released from custody, so that the Administrative Court would be unable to satisfy the applicant's claim. Amendment of a claim in an action and termination of proceedings in administrative court proceedings is regulated by the Code of Administrative Court Procedure. A provision is relevant in constitutional review proceedings if the court adjudicating the case had to apply it, and in the instant case that condition is fulfilled (see para. 54 of the present judgment).

57. Since the aim of specific constitutional review is above all to serve the interests of participants in the proceedings, in the frame of specific constitutional review the Court *en banc* can check the constitutionality of a relevant provision primarily on the basis of the facts of a particular case, i.e. by assessing whether in the case of a specific applicant the legislator restricted their contested fundamental right proportionally (see, with further references, Constitutional Review Chamber judgment of 16 November 2016 in case No 3?4?1?2?16, paras 84–85). In the case cited, the Constitutional Review Chamber delimited the relevant rule with § 94(5) of the Imprisonment Act insofar as it prohibited a visit with one's *de facto* spouse for persons in custody accused of criminal offences related to a criminal organisation. In the opinion of the Court *en banc*, in the instant case the applicable rule is contained in § 94(5) of the IA which does not allow a person remanded in custody on charges of criminal offences against the sexual self-determination of a minor to receive a long-term visit with their four-and-a-half-year-old child, mother and adult sister. The Court *en banc* will first check the constitutionality of that rule.

II

58. In the previous cases concerning the prohibition on long-term visits for persons in custody, the Constitutional Review Chamber has found that such a prohibition interferes with the right to inviolability of family life laid down in § 26 of the Constitution, i.e. the right to maintain family ties in their broadest sense (cited judgment in case No 3?4?1?9?10, para. 43; cited judgment in case No 3?4?1?2?16, para. 93). The Court *en banc* sees no reason to withdraw from this position. A person in custody may also rely on the constitutional right to maintain family ties in the conditions of a preventive measure imposed on them, and the legislator must justify the restriction of the fundamental right to family of a person in custody. Although the legislator may restrict the right of a person in custody to communicate with their family, inter alia by delimiting the range of family members entitled to a long-term visit, in the opinion of the Court *en banc* the scope of protection of the fundamental right should be defined broadly in order to check that restriction. In the instant case, this means that the family relations of the person in custody with their child, mother and sister fall within the scope of protection of § 26 of the Constitution in the context of long-term visits.

59. There is no doubt that the prohibition on long-term visits negatively affects the right of persons in custody to maintain family ties, i.e. interferes with their right to inviolability of family life under § 26 of the Constitution, which, however, does not necessarily mean violation of that right. A legal act interfering with a fundamental right does not violate the fundamental right if it is constitutional, i.e. compatible with the Constitution both in form and substance. The Court *en banc* has no doubts concerning the formal constitutionality of § 94(5) of the IA.

60. Also when identifying the aim of interference, the position expressed by the Supreme Court in earlier decisions on this issue should be maintained. The provision of § 26 of the Constitution is a fundamental right subject to a qualified statutory reservation, which may be restricted for the aims set out in that provision, i.e. 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. 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. That aim is covered by the legitimate aims of restricting the fundamental right to family set out in the second sentence of § 26 of the Constitution, above all the aim of preventing a criminal offence (correspondingly the cited judgment in case No 3?4?1?9?10, para. 50; cited judgment in case No 3?4?1?2?16, para. 97).

61. 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. In line with long-standing jurisprudence, the court checks conformity of the restriction 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.

62. A measure is appropriate if it facilitates attaining the aim of the restriction. Thus, 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. In the opinion of the Court *en banc*, it cannot be ruled out that a longer unsupervised stay of a person in custody with a family member may facilitate organising commission of criminal offences, including destroying, altering and falsifying evidence, and influencing witnesses. Specifically, in the course of a long-term visit, a suspect or an accused can influence a visitor to contact, either himself or herself or through other persons, witnesses or victims in order to influence the latter either to give false testimony or to prevent their appearance, as well as better organise the destruction, alteration and falsification of evidence (correspondingly also the cited judgment in case No 3?4?1?9?10, para. 69; cited judgment in case No 3?4?1?2?16, para. 100).

63. However, the Court *en banc* has doubts whether the prohibition on long-term visits of a person in custody with their minor child, who is not a victim or a witness in the same criminal case, can in principle facilitate attaining the aim of preventing undue influence on criminal proceedings. The Court *en banc* is unable to come up with a practically credible situation where a person in custody could unduly influence criminal proceedings through their four-and-a-half-year-old son by exploiting the opportunity of a long-term visit. On that basis, the Court *en banc* finds that prohibiting a long-term visit with a four-and-a-half-year-old child is not appropriate for attaining the aim of preventing undue influence on criminal proceedings sought by restricting the fundamental right to family of a person in custody, and is thus unconstitutional.

64. The Court *en banc* concedes that another legitimate aim may exist to restrict the fundamental right to family of a person in custody by prohibiting a long-term unsupervised visit with a minor family member, and the measure may be appropriate for attaining that aim. For example, such a legitimate aim may include protection of the rights and freedoms of the minor. However, the Court *en banc* notes that in the instant case that aim can be attained by other measures. For example, § 25(1^1) cl. 4) of the Imprisonment Act stipulates that authorisation for a long-term visit is refused if the visit may endanger the health and well-being of the visitor or the prisoner. Therefore, the Court *en banc* will next check the necessity, and proportionality in the narrower sense, of a prohibition on long-term visits as a measure restricting the fundamental right to family of a person in custody only with regard to the applicant’s adult sister and mother.

65. The restriction of a fundamental right is necessary if the aim cannot be attained by some other less onerous measure which is at least as effective as the first one. In the opinion of the Court *en banc*, 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 equally effective measure which is simultaneously less onerous on individuals. In the opinion of the Court *en banc*, enabling long-term visits as an instrument of maintaining family ties would not serve its purpose if it were subject to restrictions such as the constant presence of a prison officer or listening in on conversations with a view to preventing exertion of undue influence on criminal proceedings. The sense of long-term visits as a form of exercise of the fundamental right to family lies in affording it

without constant supervision, so that the measure is necessary for attaining its aim.

66. To decide on the narrow proportionality of a measure requires considering, on the one hand, the extent and intensity of interference with a fundamental right and, on the other hand, the importance of the aim of the restriction. The more intense the interference with a fundamental right, the more solid the reasons justifying it have to be. When considering whether the legislator's aim of preventing undue influence on criminal proceedings is sufficiently solid in the instant case to justify interfering with the inviolability of the applicant's family life through a measure such as prohibition on long-term visits with their mother and adult sister, by relying on previous Supreme Court case-law, the Court *en banc* will first of all take into account the severity and nature of the act imputed to the applicant and the length of the period in custody and the factors giving rise to it.

67. The applicant was remanded in custody on charges under § 145(2) and § 141(2) clauses 1) and 6) of the Penal Code, being accused of having committed offences against sexual self-determination in respect of minors on a public bus in Tallinn and in a cinema hall at Viimsi. The applicant's offences consisted mainly of having rubbed their foot against the victims' leg. By judgment of 9 November 2018 in case No 1?17?6580, the Supreme Court Criminal Chamber acquitted the applicant of these acts for the reason that, in terms of severity, they do not reach the scope of protection of §§ 141 and 145 of the Penal Code, instead constituting sexual harassment, i.e. a misdemeanour, under § 153^1(1) of the Penal Code currently in force (see Supreme Court Criminal Chamber judgment of 9 November 2018 in case No 1?17?6580, para. 18). Therefore, the applicant's situation significantly differs from the situation of the applicants in the case which formed the subject-matter of the Supreme Court Constitutional Review Chamber judgment of 2016. Since in that case the applicants were accused of criminal offences related to a criminal organisation, the reasoning that the Chamber provided to justify the restriction (in brief, the risks to administration of justice related to the functioning of a criminal organisation) are not relevant in the instant case.

68. Although in the circumstances of the instant case the risk of influencing criminal proceedings is also not completely non-existent, in the opinion of the Court *en banc* the measure seeking to eliminate that risk is not a proportionate restriction in view of the severity and nature of the acts imputed to the applicant. The ECtHR, whose case-law in applying the ECHR as an international agreement binding on Estonia must be taken into account in interpreting the Constitution, has found that a reasonable suspicion of adversely influencing criminal proceedings must occur in order to prohibit long-term visits. Such a suspicion arises above all when a visitor is somehow connected to the offence, for example, by being an accomplice or a witness to it (see, e.g., ECtHR judgment of 23 June 2015 in case No 39633/10: *Costel Gaciu v. Romania*, para. 60). In the instant case, no such suspicion has arisen.

69. The unconstitutionality of the rule is also supported by the fact that no additional restrictions set out in § 143^1(1) of the Code of Criminal Procedure were imposed on the applicant in criminal proceedings – neither in pre-trial nor court proceedings. Although the Court *en banc* concedes that in view of the fact that under § 25(2) of the IA long-term visits take place without constant supervision, planning or also committing new criminal offences in the frame of those visits is more likely than during short-term visits which, under § 24(1) of the IA, take place under supervision (correspondingly also the Supreme Court Administrative Law Chamber judgment in case No 3?14?51567/55, para. 27), the fact that no additional restrictions were imposed gives reason to believe that in the opinion of the body conducting the proceedings the likelihood that the person in custody could prejudice criminal proceedings was also not particularly high. That conclusion is supported by the fact that according to the arrest warrant the basis for remanding the applicant into custody was the risk of committing further sexual offences, not the risk of offences against the administration of justice. The length of the applicant's stay in custody was also not due to the particular complexity and extent of the criminal case (the applicant was committed for trial already approximately one month after being remanded into custody) but the fact that the applicant contested the judgments in respect of them on appeal and appeal in cassation.

70. Thus, the applicant stayed in custody for approximately a year and five months mostly on account of exercising their constitutional right of appeal, without the grounds for remand into custody having included

any risk of committing criminal offences against the administration of justice or without the presence of circumstances to give reason to consider commission of those offences probable through a long-term visit with family members. It should also be pointed out that under § 22 of the Constitution a person must be deemed innocent until a judgment of conviction in respect of them has entered into force. On that basis, the Court *en banc* finds that the prohibition on long-term visits with the mother and adult sister imposed on the applicant was not a restriction of the fundamental right to family that would have been proportional in the narrow sense.

III

71. In the 2016 judgment, the Constitutional Review Chamber emphasised that although it could not rule out that in different circumstances applying § 94(5) of the IA may lead to disproportionate interference with the fundamental right to family of a person in custody, the Supreme Court has no competence within specific constitutional review proceedings 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 (see the cited judgment in case No 3?4?1?2?16, para. 136). In the instant case, in specific constitutional review proceedings, the Court *en banc* has checked the constitutionality of § 94(5) of the Imprisonment Act on the basis of the circumstances of the specific case, which confirm the partial unconstitutionality of the regulatory scheme. Moreover, the present case is already the fourth of the kind (see, in more detail, para. 52 of the present judgment) in adjudicating which the lower courts have doubted the constitutionality of § 94(5) of the IA.

72. In view of what was noted in the previous paragraph of the judgment and to prevent similar disputes and thereby ensure better protection of the rights of individuals, while also saving the time and expense of the courts and participants in proceedings, the Court *en banc* finds that in the instant case it cannot limit itself to checking the constitutionality of § 94(5) of the IA merely to the extent of the aspects narrowly characterising the situation of the applicant, but the constitutionality of the provision should be weighed as a whole (cf. Supreme Court *en banc* judgment of 25 January 2018 in case No 2?15?17249/49 [1], para. 63). The participants in proceedings in their opinions submitted to the Supreme Court have also assessed the constitutionality of § 94(5) of the IA more broadly than the extent applicable to the specific applicant (see paras 19, 22 and 23–32 of the present judgment).

73. As can be seen from the previous part of the judgment, the scope of application of § 94(5) of the IA also happens to include cases where restriction of the fundamental right to family of a person in custody is unconstitutional. In the opinion of the Court *en banc*, such a situation is caused by the legislator's choice to establish § 94(5) of the IA so that the automatic outcome of remand in custody is an absolute prohibition on long-term visits for the person in custody. In the opinion of the Court *en banc*, such a regulation fails to take into account a situation where remanding a person in custody may be justified while the prohibition on long-term visits inevitably linked to it is unconstitutional.

74. According to earlier relevant case-law of the Constitutional Review Chamber, the constitutionality of interference with the fundamental right to family of a person in custody is ensured by the possibility of the body conducting the proceedings to weigh its proportionality in the frame of verifying the reasons for continuing to hold the person in custody – if holding the person in custody were or would become excessively intense due to resulting interference with the fundamental right to family, holding the person in custody should be stopped or, if necessary, replaced by another more lenient preventive measure (correspondingly, cited Constitutional Review Chamber judgments in case No 3?4?1?9?10 [2], paras 65–66, and case No 3?4?1?2?16 [3], paras 109–111).

75. The Court *en banc* does not agree with this logic. Since the body conducting the proceedings also has the duty to protect the public interest in addition to the duty to protect the fundamental rights of individuals, there is reason to believe that in judicial practice this would always result in assessing the public interest in holding a person in custody in a way that outweighs interference with family life which is automatically linked to preventive custody. In the opinion of the Court *en banc*, the present case may also be an example

of such a situation where the body conducting the proceedings may have weighed interference with the person's fundamental right to family but concluded as a result thereof that the public interest in preventing further sexual criminal offences outweighed the interference. In the opinion of the Court *en banc*, it is not justified to require from a body conducting criminal proceedings that, if holding a person in custody has become disproportionate due to interference with their fundamental right to family having become excessively intense, the person should be released from custody to prevent a violation (correspondingly also the dissenting opinion of Supreme Court justices E. Kergandberg and S. Laos to the cited Constitutional Review Chamber judgment in case No 3?4?1?2?16 [3], paragraph five). In the event of such a step, protection of a person's fundamental right to family may indeed be ensured but the aim of imposing the preventive measure might not be attained.

76. In the opinion of the Court *en banc*, no justification exists to automatically protect some constitutional values at the expense of other constitutional values in a situation where both could be protected. In other words, the Court *en banc* believes that it would be possible to lay down regulatory provisions that would help attain the aim sought by the prohibition on long-term visits – i.e. prevention of undue influence on criminal proceedings – without excessively interfering with the fundamental right to family of a person in custody while also not endangering the aims of preventive custody. For example, risks to criminal proceedings which may be inherent in the right to long-term visits for persons in custody could be avoidable if the body conducting the proceedings could, either already at the time of issuing an order for remand in custody, extending it or verifying the reasons for continuation of holding in custody, decide separately on the right of the person in custody to receive long-term visits (see also the dissenting opinion of Supreme Court justice Jüri Põld to the Constitutional Review Chamber judgment in case No 3?4?1?9?10, para. 1). In that case, verifying the restriction of a person's fundamental right to family would be decoupled from verifying the restriction of a person's fundamental right to liberty.

77. Also in line with established ECtHR case-law, when refusing to enable long-term visits for persons detained on remand the State may not rely merely on a prohibitory legal norm but must justify why that restriction is necessary and justified in the case of a specific detainee on remand (see ECtHR judgment of 13 December 2011 in case No 31827/02: *Laduna v. Slovakia*, paras 62–66; ECtHR judgment of 9 July 2013 in case No 42615/06: *Varnas v. Lithuania*, paras 119–120 and judgment of 23 June 2015 in case No 39633/10: *Costel Gaciu v. Romania*, paras 59–60). In the case of *Laduna v. Slovakia*, the ECtHR found that the aim of effective pre-trial proceedings can also be attained by other measures than a blanket prohibition on long-term visits. Such measures might involve, for example, setting up different categories of detention, or particular restrictions as may be required by the circumstances of an individual case, but which do not affect all detained persons (cited ECtHR judgment in the case of *Laduna v. Slovakia*, para. 66).

78. For the above reasons, the Court *en banc* finds that § 94(5) of the Imprisonment Act which does not enable assessment of the prohibition on long-term visits for a person in custody separately from verification of the preventive measures applied in respect of them, is unconstitutional as it disproportionately restricts the right of some persons in custody to the inviolability of family life deriving from § 26 of the Constitution.

79. The Court *en banc* repeals § 94(5) of the Imprisonment Act prospectively. The Court *en banc* gives the judgment retroactive effect in respect of the applicant in the instant case as well as in respect of persons who, by the time of entry into force of this judgment, have in accordance with the procedure laid down by law contested refusal to enable them to receive a long-term visit or who have, in accordance with the procedure laid down by law, sought compensation of damage caused to them by refusal to enable a long-term visit.

80. The Court *en banc* emphasises that the right to long-term visits arising for persons in custody under § 90(1) of the IA upon repeal of § 94(5) of the IA is not unlimited. Under § 143^1(1) cl. 1) of the Code of Criminal Procedure, the prosecutor's office or court may, by order, restrict or totally prohibit the right of a suspect or accused to short-term and long-term visits if sufficient reason exists to believe that a suspect or accused who is held in custody may adversely affect the conduct of criminal proceedings by their behaviour. Under § 25(1^1) of the Imprisonment Act, a place of detention can still refuse to authorise a long-term visit if the visit may endanger security or order in the prison or the health and well-being of the visitor or the

prisoner, or if reason exists to doubt the reputation of the visitor.

81. The Court *en banc* also emphasises the freedom of the legislator in shaping regulatory provisions compatible with the Constitution. Although, when adjudicating the administrative case, Tallinn Administrative Court declared § 94(5) of the Imprisonment Act unconstitutional due to lack of the right of discretion, the Court *en banc* nevertheless notes, while also agreeing with the conclusion expressed in the Constitutional Review Chamber judgment of 2016, that the prison service might not have sufficient information to assess whether and to what extent a particular person in custody poses a risk to the conduct of criminal proceedings (see the cited judgment in case No 3?4?1?2?16, paras 113–116; the same in cited judgment No 3?14?51567/55, para. 31). Although, in principle, the legislator's broad margin of manoeuvre in shaping criminal policy also includes the possibility to choose which body is the most competent to resolve potential conflicts between a person's fundamental right to family and the interests of criminal proceedings, the argument of equal treatment of persons also speaks in favour of leaving those disputes to be resolved in the frame of criminal proceedings (see the cited judgment in case No 3?4?1?2?16, para. 117).

82. The Court *en banc* also agrees with the Constitutional Review Chamber in that the Constitution does not rule out laying down a statutory prohibition on long-term visits for some groups of persons in custody (see the cited judgment in case No 3?4?1?2?16, paras 118–119). The legislator may also establish regulatory provision entitling a body conducting 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, imposing a prohibition on long-term visits until that time is reached (cited judgment in case No 3?4?1?2?16, para. 132).

Villu Kõve, Velmar Brett, Peeter Jerofejev, Henn Jõks, Eerik Kergandberg, Hannes Kiris, Ants Kull, Saale Laos, Viive Ligi, Heiki Loot, Jaak Luik, Nele Parrest, Ivo Pilving, Jüri Põld, Paavo Randma, Peeter Roosma, Malle Seppik, Tambet Tampuu

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