constitutional-judgment-5-23-16

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	5-23-16
Date of judgment	20 June 2023
Judicial panel	Chair: Villu Kõve; members: Velmar Brett, Hannes Kiris, A Laffranque
Case	Review of the constitutionality of § 23 subsection (5) of the Leave and Prohibition on Entry Act and § 36^3 subsection (2 Granting International Protection to Aliens and § 25 clause of the Interior Regulation No 44 of 16 October 2014 on "Th the detention centre"
Basis for proceedings	Judgment of Tallinn Administrative Court of 20 March 202 case No 3-22-2355

	Riigikogu XX
	Police and Border Guard Board
Participants in the proceedings	Minister of the Interior Minister of Justice Chancellor of Justice
Manner of examination	Written procedure

OPERATIVE PART

1. To declare unconstitutional and invalid the words “mobile phones” in § 25 clause 11 of the Minister of the Interior Regulation No 44 of 16 October 2014 on “The internal rules of the detention centre”.

2. To deny the application by XX for reimbursement of procedural expenses.

3. To replace the applicant’s name in the published judgment with an alphabetical character.

FACTS AND COURSE OF PROCEEDINGS

1. XX (the applicant) is an applicant for international protection who, since 3 August 2002, has been staying in the Police and Border Guard Board (PBGB) detention centre on the basis of authorisations granted in administrative case No 3-22-1647 in accordance with the procedure laid down by the Act on Granting International Protection to Aliens (AGIPA).

2. The applicant applied to the PBGB, requesting to be given access to the web portal YouTube, the e-mail service mail.ru, the social media applications WhatsApp and Telegram and the personal Google storage space while in the detention centre. In a letter of 4 October 2022, the PBGB replied that § 23(5) of the Obligation to Leave and Prohibition on Entry Act and § 36^3(2) of the Act on Granting International Protection to Aliens do not oblige to ensure such access to the internet. According to the letter, the detention centre ensures a foreigner access to databases of official legislation, registers of court decisions and websites of institutions and organisations which publish information intended for general use.

3. The applicant lodged a complaint with Tallinn Administrative Court, seeking an order obliging the PBGB to ensure the applicant full daily access to the internet, or alternatively, to the web portal YouTube, personal Google storage, the e-mail service mail.ru and the WhatsApp and Telegram applications (case No 3-22-2355).

4. The applicant applied to the PBGB requesting the issuance of their personal mobile phone, computer and connecting wire. By a letter of 10 October 2022, the PBGB replied that, in accordance with § 25 clause 11 of the Minister of the Interior Regulation No 44 of 16 October 2014 on "The internal rules of the detention centre" (hereinafter 'the internal rules'), a foreigner in the detention centre may not have mobile phones and other electronic or technical means f communication, including radio transmitters, handheld and personal computers, through which information can be transmitted and received.

5. The applicant lodged a complaint with Tallinn Administrative Court, seeking an order obliging the PBGB to ensure them daily access to the personal mobile phone and the connecting wire (case No 3-22-2356).

6. Tallinn Administrative Court joined the cases No 3-22-2355 and 3-22-2356 in a unified case with No 3-22-2355.

7. By judgment of 20 March 2023, Tallinn Administrative Court granted the complaint, declared the PBGB letters of 4 October 2022 and 10 October 2022 unlawful, ordered the PBGB to redecide on allowing the applicant the use of their personal mobile phone and connecting wire, and redecide on granting daily access to the web portal YouTube, personal Google storage, the e-mail service mail.ru and the WhatsApp and Telegram applications. The Administrative Court also ordered the PBGB to allow the applicant to use the internet on a daily basis in the detention centre to search for information and use the Google Translate service. The Administrative Court declared unconstitutional and set aside § 23(5) of the Obligation to Leave and Prohibition on Entry Act (OLPEA) and § 36^3(2) of the AGIPA insofar as they fail to oblige ensuring access to the internet for persons staying in the detention centre, and § 25 clause 11 of the Minister of the Interior Regulation No 44 of 16 October 2014 on "The internal rules of the detention centre".

REASONING BY TALLINN ADMINISTRATIVE COURT

8. An applicant for international protection may be detained under the AGIPA for up to 18 months. Subsequently, they can be detained under the OLPEA for another 18 months, i.e. for a total of 36 months. By the time of the judgment, the applicant has been detained for 7.5 months. When granting authorisation to detain a person, the court does not assess the need to restrict the person's communication or access to information, as this is not the purpose of detention and is not related to any of the grounds for detention laid down by § 36^1(2) of the OLPEA. The need to restrict communication and access to information of an applicant for international protection may arise as a result of criminal proceedings initiated in respect of them and their remand into custody. Placement in the detention centre does not restrict the right of persons staying there to communicate and receive information. The objective of restricting these rights was also lacking in the application of the PBGB and in the court order authorising detention.

9. Computers are available in the detention centre, but access is ensured only to 14 websites: riigiteataja.ee, eur-lex.euroopa.ee, oiguskantsler.ee, kohus.ee, ohchr.org, coe.int, un.org, unrwa.org, unhcr.org, gov.uk, amnesti.org, curia.europa.eu, hudoc.echr.coe.int and rikos.rik.ee. Most of them can only be used in Estonian or English and cannot be translated by the applicant into a language they understand. The applicant cannot learn Estonian via the internet or participate in other educational programmes. The applicant needs access to websites and online applications in order to communicate with their family and with their representative and proceedings authorities regarding the proceedings for international protection. If the applicant had a personal mobile phone at their disposal, they would not need the detention centre to ensure them access to the internet. Currently, neither has been provided.

10. Persons from third countries are staying in the detention centre. The detention centre enables making telephone calls for 5 euros a month, which in the case of the applicant means 26 minutes when calling abroad. After that it is possible to purchase phone cards for one's own money, but communication with third countries is unreasonably expensive via phone calls. Also, other persons are not able to call the phone of the detention centre. The applicant has not insisted that the use of their mobile phone should be financed by the detention centre, but wishes to use it at their own expense. If a personal mobile phone were used, the applicant would not need to have access to the internet at the expense of the detention centre.

11. Since § 26^{11}(4) of the OLPEA gives the head of the detention centre discretion to restrict the right to use means of communication but § 25 clause 11 of the internal rules of the detention centre prohibits them completely, § 25 clause 11 of the internal rules contravenes § 94(1) of the Constitution and § 50(1) of the Government of the Republic Act under which a minister issues regulations on the basis of and for implementing a law.

12. The applicant's right to equal treatment enshrined in § 12 of the Constitution has been interfered with by their differential treatment compared to persons staying in the accommodation centre for applicants for international protection. Persons staying in the accommodation centre can use their mobile phones and the accommodation centre's internet. Applicants for international protection staying in both the detention centre and the accommodation centre have arrived in Estonia from a third country and are waiting for the final outcome of proceedings for international protection. They have not been convicted of anything and, at least for the time being, there is no basis to consider them a threat to public order and public security.

13. The applicant's right to the inviolability of private and family life laid down by § 26 of the Constitution has been interfered with by the fact that the applicant's communication with their family is very significantly limited, which they could however maintain via a mobile phone. Everyone's right to freely receive information disseminated for general use, laid down by § 44 of the Constitution, has been interfered with by the fact that the applicant cannot search for information on the internet. The right laid down by § 45 of the Constitution to freely disseminate ideas, opinions, beliefs and other information by word, print, image or other means is limited for the applicant due to restriction on their means of communication. The applicant's right to education laid down in the first sentence of § 37 of the Constitution is limited because, according to the applicant, they wish to learn Estonian via the internet.

14. The above restrictions on fundamental rights cannot be regarded as of low intensity and cannot therefore be imposed by a regulation. At the same time, § 25 clause 11 of the internal rules is also unconstitutional in substance, as it does not indicate the legitimate purpose of the restriction. Since the restriction on the use of a personal mobile phone lacks a legitimate purpose, a proportionality test cannot be carried out either. Therefore, this prohibition contravenes § 11 of the Constitution. The interference is particularly intense since, at the same time, it is not possible for the applicant to freely use the internet in the detention centre. In her opinion of 13 July 2022, the Chancellor of Justice pointed out that the CPT has repeatedly recommended that detained foreigners be allowed to use their mobile phones or that they be ensured regular access to their mobile phones. In 2021, the CPT recognised Sweden and Finland for allowing foreigners to make calls with their mobile phones in the detention centre. The Chancellor of Justice found that the Ministry of the Interior should review the ban on the use of mobile phones laid down in the internal rules of the detention centre and bring the relevant provision into line with the recommendations of international organisations.

15. Section 23(5) of the OLPEA lists the benefits which the detention centre must provide to persons staying there. The list does not include access to the internet. The AGIPA also does not contain any special provisions on providing access to the internet. The impossibility of using the internet interferes with the applicant's same fundamental rights as the impossibility of using a personal mobile phone. The applicant does not have the opportunity for personal communication, to educate themselves, and their possibilities to obtain information are extremely limited already due to the lack of a translation program. The internet is the main source of information today. The interference is significantly more intense because, at the same time, the applicant cannot use their personal mobile phone. Similarly to the purpose of the ban on the use of mobile phones, the purpose of the ban on the use of the internet is not clear either. The proportionality of a purposeless interference cannot be checked and such a restriction contravenes § 11 of the Constitution. Restrictions that can be imposed on a person without a compelling need undermine human dignity as a whole.

OPINIONS OF THE PARTICIPANTS IN THE PROCEEDINGS

16. The Constitutional Committee, which has issued an opinion on behalf of the **Riigikogu**, is of the opinion that § 23(5) of the OLPEA is irrelevant, since the list of minimum services set out therein concerns a police jail or other place of detention, and not the detention centre. The services provided in the detention centre are laid down in Chapter 4^1 of the OLPEA. The placement of applicants for international protection in the detention centre is an extreme measure which is used only when absolutely necessary. Thus, applicants for international protection in the accommodation centre and the detention centre are not in a similar situation. The right to education has also not been interfered with, as § 37 of the Constitution covers the levels of education provided by the state and does not include ways of self-education. The internet should be seen as a tool, not as a right. The law lays down the rights of foreigners, the possibility of implementing which must be ensured by the detention centre. In the detention centre, opportunities have been created for the exercise of rights. There are payphones for communicating with family members and other persons. The detention centre also has radios and television sets through which it is possible to keep up to date with information. The provisions are therefore constitutional.

17. The **applicant** submits that § 25 clause 11 of the internal rules of the detention centre is unconstitutional because, as a *contra legem* regulation, it does not stipulate any exceptions to the absolute prohibition.

Section 26^{11}(4) of the OLPEA gives the head of the detention centre discretion to restrict the use of means of communication, but § 25 clause 11 of the internal rules prohibits them completely. The applicant emphasises that, by order of Tartu Administrative Court of 3 August 2022 in administrative case No 3-22-1647, they were not detained on the ground that they posed a threat to national security or public order. Nor can holding them in the detention centre be based on the fact that they might begin to impede collection of evidence in the international protection proceedings, since no such ground for detention is contained in the law.

18. Fundamental rights laid down by §§ 44 and 45 of the Constitution have been interfered with. Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms also provides for everyone's right to freedom of expression. The Administrative Court has rightly indicated that the right to equal treatment contained in § 12 of the Constitution has been interfered with by differential treatment compared to those staying in the accommodation centre. The right to the inviolability of family and private life laid down by § 26 of the Constitution has been interfered with by the fact that the applicant's communication with their family is very significantly limited. Their human dignity has also been interfered with. Being deprived of communication and information (including on current affairs), recreation and family for a long time affects the well-being and mental state. The detention centre has limited opportunities for recreation and exchange of information in a language understood by the applicant.

19. In the opinion of the **PBGB**, there is no conflict with the Constitution. The internal rules of the detention centre have been issued on the basis of § 26^{21}(1) of the OLPEA. Section 26^{21} subsection (2) clause 4 and subsection (3) give rise to an obligation on the Minister of the Interior to establish in the internal rules of the detention centre a list of prohibited substances and items that may endanger the safety of the detention centre, the life or health of the person themselves or others, or disturb them. Thus, the prohibition on the use of mobile phones laid down in § 25 clause 11 of the internal rules of the detention centre is in accordance with the limits of the powers delegated. A foreigner who does not have money is issued two 5-euro prepaid cards a month at the expense of the detention centre. Based on § 26^{11}(6) of the OLPEA, a foreigner who does not have money is allowed to contact family members, state institutions, a counsel, a minister of religion and a consular officer of the country of nationality at the expense of the detention centre. If necessary, personal correspondence is also enabled at the expense of the detention centre. If the phone card limit is exceeded, communicating with the authorities, a counsel or a minister of religion and, in justified cases, with a family member, is enabled from the official phone. Collect calls at the expense of the receiver can also be made.

20. The risks inherent in using the internet or a private mobile phone significantly increase the threat to public order and national security and, at the same time, complicate the effective processing of applications for international protection. Interference with the fundamental rights of a foreigner placed in the detention centre has been considered justified by the court, since a reasonable suspicion exists that the foreigner may abscond, prevent the establishment of important facts in the proceedings or conceal true information concerning themselves, or pose a threat to national security and public order. Access to the internet and the use of a mobile phone would allow a foreigner to manipulate information about themselves through their social media and communication channels, thereby hindering effective and fair proceedings and significantly increasing the threat to public order and national security. It would also create opportunities for planning and successfully implementing escapes. This would allow a foreigner to share information about where it is easier to cross the state border illegally and how to avoid being caught, what questions officials ask foreigners and what procedural steps are taken. Making and sharing recordings with a mobile phone also significantly interferes with the privacy of other people in the detention centre.

21. The **Chancellor of Justice** is of the opinion that neither the OLPEA nor the AGIPA contain a prohibition on the use of the internet, so that there are no grounds for the respondent to prevent access to the websites requested by the applicant. If one were to see as unconstitutional the fact that the minimum requirements laid down by law do not include the obligation to ensure the use of the internet, the rules in Chapter 4^1 of the OLPEA, titled "Detention Centre", would be relevant instead of § 23(5) of the OLEPA. In that case, § 36^3(2) of the AGIPA would also be relevant. Section 23(5) of the OLPEA lays down a list of minimum services to be provided to a foreigner if the PBGB has placed the person to be expelled in a police jail or another place of detention. As regards the prohibition on the use of mobile phones, § 25 clause 11 of the internal rules of the detention centre is also relevant.

22. A complete ban on using the internet would be contrary to the fundamental right to the protection of family life laid down by § 27(1) of the Constitution. It would also contravene everyone's right of to freely receive information disseminated for general use, guaranteed under § 44(1) of the Constitution. The current access regime, which ensures access only to 14 websites on the detention centre's computers, also excessively restricts fundamental rights. Section 25 clause 11 of the internal rules of the detention centre is contrary to the first sentence of § 3(1) and § 94(1) of the Constitution in so far as it prohibits all foreigners in the detention centre from using mobile phones without taking into account the situation of a particular person and the circumstances related to them. It is also unlawful in substance, as it excessively restricts the fundamental right of a foreigner to the protection of family life laid down by § 27(1) of the Constitution and everyone's right to freely receive information disseminated for general use laid down by § 44 (1) of the Constitution.

23. The living conditions of foreigners detained with the authorisation of the administrative court may not be restricted similarly to persons in imprisonment. Modern means of communication and access to the internet are extremely necessary. A foreigner in the detention centre can only communicate meaningfully and with sufficient regularity with their next of kin living far away by video call or e-mail. The possibility of searching for information facilitates both return to the home country as well as finding evidence of persecution. Access to translation applications reduces the possibility of ending up in an information vacuum and also reduces the burden on detention centre staff. Undeniably, ensuring the security of the detention centre is important, but the risks associated with the use of the internet and mobile phones could be mitigated quite effectively. Organisationally, it is possible to stipulate that a mobile phone can be used at a certain time of the day or in specific rooms. There are several closed institutions in Estonia where people referred to them under a court decision can use their mobile phones: e.g. places providing involuntary or coercive treatment or the closed childcare institution service.

24. According to the **Minister of the Interior**, a person in the detention centre does not have a constitutional right to request access to the internet or the use of a personal mobile phone if they are able to exercise their rights through other means of communication at the place of detention. A mobile phone and other devices capable of transmitting and receiving information, as well as technology enabling recording, make it possible to record the residents of the detention centre against their will, to influence the behaviour of others through the recordings and to disseminate without control the information recorded. Unrestricted access to the internet makes it possible to endanger public order and national security, including to organise criminal activities. A mobile phone or a charging cable may pose a risk to the health of other persons in case of non-intended use or breaking. Unrestricted access to the internet or the provision of a mobile phone for private use would not allow the detention centre to organise its work reasonably and ensure the protection of the

rights of others.

25. The detention of an applicant for international protection or a foreigner illegally staying in Estonia is an extreme measure, so that the restrictions do not interfere with the right to equal treatment. Through detention the foreigner has shown that they do not comply with the requirements for entering, staying or living in Estonia. Telephone sets have been installed in the detention centre for communication, Estonian language instruction is provided, and it has been agreed with the local authority that a foreigner subject to the obligation to attend school is sent to a general education school. The detention centre ensures access to 14 websites: riigiteataja.ee, eur-lex.euroopa.ee, oiguskantsler.ee, kohus.ee, ohchr.org, coe.int, un.org, unrwa.org, unhcr.org, gov.uk, amnesti.org, curia.europa.eu, hudoc.echr.coe.int and rikos.rik.ee.

26. The **Minister for Justice** is of the opinion that § 25 clause 11 of the internal rules of of the detention centre is a relevant provision. Section 23(5) of the OLPEA and § 36^3(2) of the AGIPA do not expressly oblige to ensure that a foreigner in the detention centre has access to the internet, but they do not exclude the provision of additional services or deny a person access to the internet. Arising from § 26^{11}(4) of the OLPEA, the use of means of communication in the detention centre is unrestricted unless the head of the detention centre or an official has imposed restrictions as a result of a discretionary decision. Means of communication also include access to the internet. Neither the OLPEA nor the AGIPA contain a rule that would clearly prohibit access to the internet in the detention centre, as prohibited by § 31^1 of the Imprisonment Act. Nor can the restriction on the use of the internet be inferred from the objectives of detention, since the need to restrict access to information is not an independent ground for detention, nor is it related to any of the objectives set out in § 36^1(2) of the AGIPA. Section 23(5) of the OLPEA and § 36^3(2) of the AGIPA can be interpreted in a constitutionally-compliant manner and are therefore not relevant.

27. Section 26^{21}(1) of the OLEPA authorises the minister responsible for the policy area to establish the internal rules of the detention centre and, according to subsection (2) clause 4 of the same section, the internal rules must also contain a list of prohibited items. Since, under § 26^{11}(4) of the OLPEA, the head of the detention centre or an official designated by them may restrict correspondence, telephone calls or the use of other means of communication if this may endanger the internal rules of the detention centre or impede enforcement of expulsion, mobile phones cannot be regarded as items which, by their very nature, are included in the list of items prohibited in the detention centre. Moreover, § 25 clause 11 of the internal rules of the detention centre seriously restricts the fundamental rights of the applicant arising from § 26, 37, 44 and 45 of the Constitution. Such restrictions cannot be imposed by a regulation, but the restriction must arise from a law. Thus, § 25 clause 11 of the internal rules of the detention centre contravenes the principle of legality arising from § 3(1) and § 94(1) of the Constitution, i.e. it is formally unconstitutional. Also, as regards the restriction, its legitimate purpose is not recognisable.

PROVISIONS DECLARED UNCONSTITUTIONAL

28. Section 25 clause 11 of the Minister of the Interior Regulation of 16 October 2014 on “The internal rules of the detention centre”:

"§ 25. Items prohibited in the detention centre

A foreigner may not have the following items in the detention centre:

11) mobile phones and other electronic or technical means of communication, including radio transmitters, handheld and personal computers through which information can be transmitted and received;"

29. Section 23(5) of the Obligation to Leave and Prohibition on Entry Act:

"§ 23. Placement in detention centre

(5) In the case provided in subsection 4 of this section, the provision to a foreigner of at least the following services is ensured:

1) performance of health examinations and availability of necessary healthcare services to the extent provided in § 26^9(7) of this Act;

2) catering;

3) information about their rights and obligations;

4) where necessary, the provision of language assistance in procedural acts performed on the basis of this Act;

5) where necessary, the supply of essential clothing and other consumables and personal hygiene items;

6) at the request of a foreigner, enabling communication and visitation with a person specified in § 26^{10} of this Act, unless there are grounds for prohibiting visitation provided in the specified Act.

[RT I, 08.06.2022, 3 – entered into force 18.06.2022]"

30. Section 36^3(2) of the Act on Granting International Protection to Aliens:

"§ 36^3. Arrangement of detention of applicant for international protection

(2) In addition to the services provided to a person to be expelled at the detention centre, an applicant for international protection shall be ensured the translation and transportation services necessary for the performance of procedural acts provided for in this Act."

OPINION OF THE CHAMBER

31. The dispute in this case is about whether it is constitutional to deny access to the internet for an applicant for international protection staying in the detention centre of the PBGB. Tallinn Administrative Court considered unconstitutional and set aside § 23(5) of the OLPEA and § 36^3(2) of the AGIPA insofar as they fail to oblige ensuring access to the internet for persons staying in the detention centre, and § 25 clause 11 of

the Minister of the Interior Regulation No 44 of 16 October 2014 on “The internal rules of the detention centre”. The latter provision prohibits mobile phones and other devices capable of transmitting and receiving information in the detention centre.

32. First, the Chamber will deal with the admissibility of the application by the Administrative Court (I) and will then assess the constitutionality of the relevant provision (II).

I

33. When resolving a case based on an application by a court of first or second instance, the Supreme Court may invalidate or declare unconstitutional a legislative act or a provision thereof, as well as failure to issue a legislative act which was relevant in adjudicating the case (§ 9(1) and § 14(2) (first sentence) Constitutional Review Court Procedure Act). In line with Supreme Court case-law, in the frame of specific constitutional review a provision is deemed relevant if it is of decisive importance for resolving the case, i.e. if in the event of its unconstitutionality the court should decide differently than if it were constitutional (e.g. Supreme Court *en banc* judgment of 28 October 2002 in case No 3-4-1-5-02, para. 15). The failure to issue a legislative act must also be relevant, and the review of the constitutionality of this, in addition to specific requirements, is subject *mutatis mutandis* to the same principles as in the case of relevance of legal norms (Supreme Court Constitutional Review Chamber order of 30 November 2021 No 5-21-14/15 [1], para. 18).

34. Tallinn Administrative Court, which initiated the constitutional review, was resolving a complaint in which the applicant requested access to the internet and access to their mobile phone in the PBGB detention centre. The objective of the request concerning the mobile phone was also to gain access to the internet in order to use it both for communication and for access to sources of information.

35. The Administrative Court granted both of these requests, obliging the respondent to redecide both on enabling daily access to the websites requested by the applicant as well as on the use of a personal mobile phone. The court declared unconstitutional the provision of the internal rules prohibiting the use of a mobile phone in the detention centre (§ 25 clause 11) and the provisions of the law, which, in the opinion of the court, do not oblige the detention centre to provide access to the internet (§ 23(5) of the OLPEA and § 36^3 (2) of the AGIPA). In the latter case, the Administrative Court thus called into question the constitutionality of the failure to issue a legislative act. Failure to issue a legislative act is contrary to the Constitution only if it violates a positive obligation arising from the Constitution (see Supreme Court Constitutional Review Chamber order of 10 April 2018 No 5-17-42/9 [2], para. 26).

36. With regard to the obligation to ensure internet access in the detention centre, the Chamber notes the following. Section 23(5) of the OLPEA sets out a list of services that must be provided to a foreigner if they are detained in any of the cases laid down by § 23(4) of the OLPEA, i.e. in a police jail or another place of detention other than the detention centre. In the present case, the dispute is precisely about the services provided in the detention centre, so that § 23(5) of the OLPEA could not be applied in the administrative case. The minimum level of services provided in the detention centre is laid down in Chapter 4^1 of the OLPEA. Arising from § 36^3(1) of the AGIPA, the provisions on the detention of a person to be expelled in the detention centre also apply to the detention of an applicant for international protection in the detention

centre.

37. Under § 26^{11}(1) of the OLPEA, persons to be expelled shall be allowed to maintain correspondence and also have the opportunity to use the telephone and other public communication channels for their own money in accordance with the procedure laid down in the internal rules of the detention centre. On the one hand, this provision entitles the person to claim the benefits referred to in this provision and, on the other hand, imposes an obligation on the state to grant these benefits to persons to be expelled (and applicants for international protection). A public communication channel or means of communication within the meaning of § 26^{11}(1) of the OLPEA undoubtedly also include the internet and a device enabling its use, including a mobile phone and a computer.

38. While § 26^{11}(1) of the OLPEA imposes the condition that the person to be expelled themselves must pay for the use of communication channels, it makes no distinction as to whether the person to be expelled has the right to use the channels of communication using their own personal device (the detention centre must not prevent their use) or whether they are entitled to have the necessary equipment in place in the detention centre (a positive obligation on the part of the state to ensure the availability of the necessary equipment). Therefore, it can be concluded that both are covered.

39. Section 26^{11}(1) of the OLPEA, read in conjunction with § 26^{21}(1), imposes an obligation on the minister responsible for the policy area to lay down the procedure for the use of means of communication in the internal rules of the detention centre. However, the procedure for using the internet has not been regulated in the internal rules. According to the explanations by the Minister for the Interior (see para. 25 above), 14 websites can be accessed via the detention centre's computers. They do not include the websites requested by the applicant. Since the law imposes an obligation to allow the use of the internet in the detention centre, there is no loophole in the law which would have prevented resolving the issue of access to the websites requested by the applicant in the administrative case.

40. In accordance with § 25 clause 11 of the internal rules of the detention centre, a foreigner in the detention centre may not have mobile phones and other electronic or technical means of communication, including radio transmitters, handheld and personal computers, through which information can be sent or received. Since internet use always involves sending or receiving information, all personal devices enabling the use of the internet are covered by this provision. Therefore, the provision in question is decisive for adjudicating the case because, in the event of its unconstitutionality and invalidity, the court had to resolve the claim concerning the use of the applicant's personal mobile phone in the detention centre differently than in the event of its constitutionality, and thus the review of its constitutionality is admissible.

II

41. As stated above, under § 25 clause 11 of the internal rules, the Minister of the Interior has prohibited the use of a mobile telephone in the detention centre, without leaving the head of the detention centre or an official designated by them any discretion with regard to this issue. By banning mobile phones, as well as other personal devices enabling the transmission and reception of information, the minister has also banned the use of the internet with a personal device in the detention centre.

42. A complete ban on using the internet freely and with the help of a personal device may interfere with many fundamental rights, since without internet use the exercise of many fundamental rights is complicated nowadays (cf. Supreme Court *en banc* judgment of 15 February 2023 No 3-18-477/73 [3], para. 52). The applicant asserts that the contested prohibition violates the fundamental rights laid down by § 26, § 27, § 44(1) and § 45(1) of the Constitution.

43. The Supreme Court has explained that the restriction on a fundamental right laid down in a regulation must be compatible with the first sentence of § 3 of the Constitution, according to which state power shall be exercised solely on the basis of the Constitution and laws that are in conformity therewith, and with § 94(2) of the Constitution, which lays down, inter alia, that a minister issues regulations on the basis of and for implementing a law. It follows from these rules that, when enacting a regulation (including restricting fundamental rights by means of a regulation), a minister may not contravene the provisions of the laws (see Supreme Court Constitutional Review Chamber judgment of 18 December 2019 No 5-19-41/9 [4], para. 18).

44. The OLPEA contains no rules which expressly regulate the use of the internet in the detention centre, so the law does not impose a general ban on the use of the internet. Since the prohibiting rule resulting from the regulation interferes with fundamental rights, the question is whether the law empowers the minister to prohibit the use of the internet through internal rules. When interpreting the content and limits of the empowerment addressed to the authority issuing the regulation, in addition to the delegating rule, other provisions of the law can also be taken into account. If, in doing so, the rules can be interpreted in several different ways, "the constitutionally-compliant interpretation should be preferred to interpretations which do not comply with the Constitution" (Supreme Court *en banc* judgment of 22 February 2005 in case No 3-2-1-73-04 [5], para. 36).

45. First of all, the Chamber points out that the detention centre is not a place of serving a sentence, but a person is placed there in order to secure specific administrative proceedings – the proceedings for international protection, the proceedings for obliging a person to leave Estonia or for enforcing the obligation to leave Estonia – if other supervisory measures cannot be applied effectively (§ 36^1(1) AGIPA and § 23(1) OLPEA). Thus, restriction of fundamental rights in the detention centre must not proceed from objectives similar to the application of imprisonment, since the purpose of placement in the detention centre is not to direct a person to law-abiding behaviour. Many grounds for detention do not presuppose a suspicion of violation of any legal norm, but merely the risk that in the future the foreigner might not comply with the obligations imposed on them or expected to be imposed on them. For this reason, the nature of the specific prison security environment, which derives from the objectives of imprisonment, cannot be automatically transferred to the detention centre (cf. Supreme Court Constitutional Review Chamber judgment of 17 December 2019 No 5-19-40/36 [6], para. 40).

46. The power to establish the internal rules of the detention centre is conferred on the minister responsible for the policy area by § 26^{21}(1) of the OLPEA. According to subsection (2) clause 4 of the same section, the internal rules must lay down a list of prohibited substances and items. Section 26^{21}(3) of the OLPEA specifies the content of the empowerment, stating that it is prohibited to keep in the detention centre substances and items which: 1) may endanger the life or health of a person themselves or others; 2) may endanger the security of the detention centre; 3) substantially impede the detention centre in complying with hygiene requirements; 4) may disturb other persons. The list contained in § 26^{21}(3) of the OLPEA leaves a

linguistically broad room for interpretation, because, in principle, it is possible to endanger one's own life or health or that of others, or to disturb other persons, with a very large number of ordinary items in everyday use. This interpretation is also represented by the opinion of the Minister of the Interior, stating that the charging cable of a mobile phone can endanger the health of others.

47. As stated above, the OLPEA does not prohibit the use of the internet and § 26^{11}(1) of the OLPEA imposes an obligation on the state to ensure the possibility to use public communication channels in the detention centre, which also include access to the internet. Under § 26^{11}(4) of the OLPEA, the head of the detention centre or an official designated by them may restrict correspondence, telephone calls or the use of other means of communication by a person to be expelled if this may endanger the internal rules of the detention centre or impede enforcement of expulsion. Thus, as a general rule, a foreigner in the detention centre has the right to use also public communication channels or means of communication not specifically mentioned by law, but this right may be restricted by a discretionary decision of the head of the detention centre or an official designated by them.

48. In the opinion of the Chamber, when interpreting § 26^{21}(1)–(3) and § 26^{11}(1) and (4) of the OLPEA in combination, the law does not confer on the authority issuing the regulation an empowerment to impose a general ban on the use of the internet through a list of prohibited items. If a mobile phone could be regarded as an item prohibited in the detention centre, this would render meaningless the empowerment contained in § 26^{11}(4) of the OLPEA to restrict the use of other means of communication by a discretionary decision if this may endanger the internal rules of the detention centre or impede enforcement of expulsion.

49. Thus, § 25 clause 11 of the internal rules of the detention centre contravenes the first sentence of § 3(1) and § 94(2) of the Constitution. By relying on § 15(1) clause 2 of the Constitutional Review Court Procedure Act, the Chamber declares unconstitutional and invalid the words "mobile phones" in § 25 clause 11 of the internal rules of the detention centre.

50. The above does not mean that the security and order at the detention centre and the rights of the persons staying there would remain unprotected if the general ban on mobile telephones were to be lifted. On the contrary, § 26^{11}(4) of the OLPEA makes it possible to consider, on the one hand, the security of the detention centre and the rights of persons staying there and, on the other hand, the fundamental rights of a foreigner staying in the detention centre. Since that provision does not prescribe for the head of the detention centre or an official designated by them the manner in which the use of means of communication is to be restricted, imposing personal, temporal as well as spatial restrictions may be conceivable. Not everyone on the entire territory of the detention centre around the clock needs to be able to use a mobile phone, but personal as well as other circumstances can be taken into account when making the discretionary decision.

51. It should also be noted that § 25 clause 12 of the internal rules of the detention centre cannot, for the reasons set out in the present case, be interpreted in a constitutionally-compliant manner as prohibiting all mobile phones and other devices enabling the use of the internet and capable of making photographic, video or audio recordings. However, such functions of the devices can be taken into account when setting restrictions for the purposes set out in § 26^{11}(4) of the OLPEA.

52. The applicant applied for reimbursement of procedural expenses relating to the examination of the constitutional review case, but failed to submit a list of the procedural expenses or the expense documents even in response to the court's enquiry. Arising from § 63(1) of the Constitutional Review Court Procedure Act, necessary and justified legal costs of a participant in proceedings specified in § 10(1) clause 3 of the Constitutional Review Court Procedure Act are reimbursed within specific constitutional review proceedings (see Supreme Court *en banc* order of 9 April 2020 in case No 5-18-5/33, para. 16). Without a list of procedural expenses or expense documents, the court is not aware of the amount of legal costs, nor is it possible for the court to assess the necessity and justification of the expenses. Consequently, the Chamber denies the applicant's application for reimbursement of procedural expenses.

(signed digitally)

Links
[1] https://rikos.rik.ee/?asjaNr=5-21-14/15
[2] https://rikos.rik.ee/?asjaNr=5-17-42/9
[3] https://www.riigikohus.ee/et/lahendid?asjaNr=3-18-477/73
[4] https://www.riigikohus.ee/lahendid?asjaNr=5-19-41/9
[5] https://www.riigikohus.ee/et/lahendid?asjaNr=3-2-1-73-04
[6] https://www.riigikohus.ee/lahendid?asjaNr=5-19-40/36