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constitutional-judgment-3-18-477

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	3?18?477
Date of judgment	15 February 2023
Judicial panel	Chairman: Villu Kõve; members: Velmar Brett, Peeter Jerofejev, Ha Kull, Kai Kullerkupp, Julia Laffranque, Saale Laos, Viive Ligi, Heik Paal, Nele Parrest, Ivo Pilving, Paavo Randma, Kalev Saare, Juhan S Tambet Tampuu and Urmas Volens
Case	Complaint by Romeo Kalda for access to the website of the Supreme online publication of the Ametlikud Teadaanded [Official Notices]
Contested judicial decision	Judgment of 6 May 2021 of Tartu Circuit Court of Appeal
Basis for proceedings in the Supreme Court	Appeal in cassation by Romeo Kalda

Participants in the proceedings	Riigikogu Romeo Kalda Viru Prison Minister of Justice Chancellor of Justice Minister for Entrepreneurship and Information Technology
Manner of examination	Written procedure

OPERATIVE PART

1.To declare unconstitutional and invalid the first sentence of § 31^1 of the Imprisonment Act (in the version in force since 1 August 2019) insofar as it precludes a prisoner serving a sentence in a closed prison from accessing the part of the Supreme Court website in which no Supreme Court decisions are published, as well as the online publication of the Ametlikud Teadaanded.

2. To declare unconstitutional and invalid § 31^1 of the Imprisonment Act in the version in force from 24 July 2009 to 31 July 2019 insofar as it precluded a prisoner serving a sentence in a closed prison from accessing the part of the Supreme Court website in which no Supreme Court decisions are published, as well as to the online publication of the Ametlikud Teadaanded.

3. To satisfy the appeal in cassation by Romeo Kalda in part.

4. To overturn the judgment of 6 May 2021 of Tartu Circuit Court of Appeal and the judgment of 15 April 2020 of Tartu Administrative Court insofar as they denied the complaint by Romeo Kalda.

5. To enter a new judgment in the case, satisfying the complaint by Romeo Kalda in part.

6. To oblige Viru Prison to enable Romeo Kalda, by 15 March 2023 at the latest, in computers adjusted for this purpose by the prison service, access to the Supreme Court website and the online version of the Ametlikud Teadaanded, subject to the restrictions laid down by the second sentence of § 31^1 of the Imprisonment Act.

7. To order Viru Prison to pay the applicant's procedural expenses in the amount of 60 euros.

8. To refund the procedural deposit.

FACTS AND COURSE OF PROCEEDINGS

1. On 6 September 2013, prisoner Romeo Kalda residing in the closed unit of Viru Prison ('the applicant') applied to the prison for access to the register of court orders on examination of applications for proceedings, decisions of the disciplinary chamber, the internal rules of the Supreme Court, the judges' code of ethics, and European Union (EU) directives, on the Supreme Court website.

1.1. By decision of 16 September 2013, Viru Prison ('the respondent') denied the applicant's application since the version of § 31^1 of the Imprisonment Act in force at the time of resolving the application required prisoner access only to official databases of legislation and the register of court decisions. The respondent denied the challenge filed against the decision.

1.2. The applicant lodged a **complaint** with the administrative court seeking annulment of Viru Prison's decision of 16 September 2013 and an order obliging the respondent to enable access to the subpages of the Supreme Court website (administrative case No 3?13?2425).

1.3. By **judgment** of 6 May 2014, **Tartu Administrative Court** satisfied the complaint, annulled Viru Prison's decision of 16 September 2013 and ordered Viru Prison to enable access to the register of court orders on examination of applications for proceedings, decisions of the disciplinary chamber, the internal rules of the Supreme Court, the judges' code of ethics, and European Union (EU) directives, on the Supreme Court website. By **judgment** of 17 September 2015, **Tartu Circuit Court of Appeal** satisfied the appeal by Viru Prison, overturned the Administrative Court judgment and issued a new judgment denying the complaint.

2. In the application submitted to Viru Prison on 19 January 2015, the applicant sought access to the Ametlikud Teadaanded [official notices] website.

2.1. By decisions of 9 February 2015, the respondent denied the applicant's application and also denied the

challenge against the decision.

2.2. The applicant lodged a **complaint** with the administrative court, seeking annulment of Viru Prison's decision of 9 February 2015, an order obliging the respondent to reconsider the applicant's application and to enable him access to the Ametlikud Teadaanded website (administrative case No 3?15?745).

2.3. By **judgment** of 11 June 2015, **Tartu Administrative** Court denied the complaint. By judgment of 4 October 201, Tartu Circuit Court of Appeal denied the applicant's appeal and upheld the operative part of the Administrative Court judgment, while supplementing the reasoning.

3. The applicant lodged **appeals in cassation** against the Circuit Court of Appeal judgments in administrative cases No 3?13?2425 and No 3?15?745.

3.1. By order of 19 September 2017, the **Supreme Court Administrative Law Chamber** joined administrative cases No 3?13?2425 and No 3?15?745 into unified proceedings (an administrative case under number 3?13?2425). By **judgment** of 15 December 2017, the Chamber overturned the Tartu Circuit Court of Appeal judgment of 4 October 2016 in administrative case No 3?15?745 (access to the Ametlikud Teadaanded website) in its entirety and the Tartu Circuit Court of Appeal judgment of 17 September 2015 in administrative case No 3?13?2425 in part – with regard to access to the internal rules of the Supreme Court, the judges' code of ethics, decisions of the disciplinary chamber and the results of examination of applications for proceedings. With regard to access to EU directives, the Supreme Court denied the appeal in cassation and upheld the judgment of the Circuit Court of Appeal. The Supreme Court remitted the joined administrative case No 3?13?2425 to the administrative court for reconsideration.

3.2. The Administrative Law Chamber found that prohibiting the right of access to websites set out in § 31^1 of the Imprisonment Act interferes with the right to freely receive information disseminated for public use ensured by § 44(1) of the Constitution but found the purpose of interference to be legitimate – to prevent obtaining information from the internet that may endanger prison security and the safety of society outside the prison. The court also considered the measure used in the law to be appropriate for achieving the purpose. However, in the opinion of the Supreme Court, the Circuit Court of Appeal had failed to ascertain the circumstances which would have enabled assessing the necessity for interference. In order to assess the constitutionality of § 31^1 of the Imprisonment Act, the Supreme Court obliged the Administrative Court, when reconsidering the case, to ascertain which specific security and safety risks arise for the state in granting prisoners access to the websites requested by the applicant, what are the prohibited actions that prisoners might carry out on these websites, and what would be the cost of mitigating those risks.

4. On 11 September 2017, the applicant applied anew to Viru Prison to gain access to the Supreme Court website. **By decision of 6 November 2017**, the respondent denied the application. On 6 March 2018, the applicant lodged a complaint with Tartu Administrative Court, seeking annulment of Viru Prison's decision of 6 November 2017 and an order obliging the prison to enable him access to the Supreme Court website.

4.1. By order of 16 March 2018 in administrative case No 3?18?477, Tartu Administrative Court accepted the complaint of 6 March 2018 by R. Kalda for proceedings and joined administrative cases No 3?18?477 and No 3?13?2425 in unified proceedings (an administrative case under number 3?18?477). The Administrative Court involved the Ministry of Justice in proceedings as the administrative body.

4.2. By **judgment** of 15 April 2020, relying on § 152(1) clause 1 of the Code of Administrative Court Procedure (CACP), **Tartu Administrative Court** declined to examine the claims for annulment concerning access to the Supreme Court website, its subpages and the Ametlikud Teadaanded website (para. 3 of the operative part). The court considered the answers of 16 September 2013, 9 February 2015 and 6 November 2017 to be administrative steps in respect of which no claim for annulment can be brought in court.

4.3. Based on § 152(1) clause 2 of the CACP, the court terminated proceedings in respect of the claim to ensure access to EU directives through the Supreme Court website (para. 4 of the operative part). In his complaint, the applicant had sought access to the Supreme Court website in its entirety, including to EU directives. However, on 15 December 2017, the Supreme Court Administrative Law Chamber in case No 3?13?2425 had already issued a final decision concerning access to EU directives, upholding the judgment of the Circuit Court of Appeal denying the applicant's claim.

4.4. The Administrative Court examined the claims for imposing an obligation (mandamus claims) since their satisfaction was not prevented by the force of administrative acts, but denied those claims (para. 5 of the operative part). The court did not consider it necessary to collect additional evidence and to ask the Centre of Registers and Information Systems (RIK) for an opinion on the cost of providing access to the websites.

4.5. The Administrative Court found that the restriction on access to public information laid down by § 31^1 of the Imprisonment Act was not unconstitutional. The purpose of the restriction is to ensure the security of the prison and of society and to prevent electronic communication by prisoners. If a website has functionalities that enable sending messages, or if it is possible to move from the website to another website containing such a functionality, a prisoner may be able to conduct uncontrolled prohibited out-of-prison communications. In addition, a risk exists that outside the prison the subpages would be changed. Links to other websites can be found both on the websites of the Ametlikud Teadaanded and of the Supreme Court (the latter has hyperlinks leading to Facebook and YouTube pages), and a request for information can also be made on the Supreme Court page. Restricting access to the websites at issue is therefore an appropriate means of achieving the objective pursued. Access to the website of the Ametlikud Teadaanded may entail additional security and safety risks, as prisoners may obtain access to information about fellow prisoners or prison officers. This risk is not mitigated by restricting access to parts of the website, which is why access to the website must be excluded.

4.6. In the case of the websites of the Riigikogu and the Chancellor of Justice within the responsibility of the state, which also contain links to other websites or for submitting requests for information, a more lenient measure for mitigating risks is laid down by law: blocking communication opportunities and external links, as well as direct physical supervision. These measures have so far been effective. The content of websites changes over time and new functionalities for sending messages may be added. However, website blocks are not a kind of measure that would be effective enough to completely mitigate security risks. With sufficient

skills, it would be possible to bypass a block on a computer connected to the internet, which physical supervision might not prevent.

4.7. The Administrative Court found that when the legislator amended § 31^1 of the Imprisonment Act so that prisoners could access the websites of the Riigikogu and the Chancellor of Justice, the mitigation of security risks associated with it did not entail large direct costs, at least no such reference was made in the proceedings of the Draft Act amending the Imprisonment Act (680 SE [1], Riigikogu XIII composition). The Ministry of Justice has also not provided evidence that ensuring access to the Supreme Court website and the Ametlikud Teadaanded website would entail significant costs to mitigate risks. However, it is not excluded that, in the future, prisoners will begin to seek access to an even larger number of websites containing legal information, which would increase the need for constant supervision as well as increasing the costs necessary to mitigate risks. The European Court of Human Rights (ECtHR) also found it possible to consider that costs might be incurred in the future. The costs can be high if there are many websites, they are not managed by the state, and access is sought by many prisoners. This would also lead to numerous court disputes over grant of access.

4.8. In the opinion of the Administrative Court, the restriction laid down by § 31^1 of the Imprisonment Act does not seriously interfere with the applicant's rights, so that – when weighed against the purpose of interference – it can be considered proportional in the narrow sense and constitutional. The applicant has not indicated why he needs access to the Supreme Court website or the Ametlikud Teadaanded website. Prisoners can access court decisions on the Supreme Court website, but other information on the page is not strictly necessary for protecting a prisoner's rights. It is implausible that, even if information published in the Ametlikud Teadaanded were accessed, the applicant would be able to start exercising his rights arising from these notices – i.e. to participate in professional and occupational competitions, auctions for the right to cut a growing forest or auctions for bankruptcy estate, and the like. A prisoner can obtain information for public use by submitting a request for information.

5. The applicant lodged an appeal with Tartu Circuit Court of Appeal, seeking to overturn the Administrative Court judgment and to enter a new judgment satisfying his complaint.

5.1. By judgment of 6 May 2021, Tartu Circuit Court of Appeal satisfied the appeal in part and overturned the judgment of Tartu Administrative Court of 15 April 2020 insofar as the Administrative Court had terminated proceedings in respect of the issue of access to EU directives through the Supreme Court website (para. 3 of the operative part). The Circuit Court of Appeal agreed with the applicant that in his complaint of 6 March 2018 he had not claimed access to EU directives through the Supreme Court website. The applicant sought access to the new Supreme Court website because, from 11 August 2017, the search for Supreme Court decisions was enabled only through https://rikos.rik.ee/ [2] but not through the Supreme Court's own website (www.riigikohus,ee [3]). In other respects, the applicant's appeal was denied and the operative part of the Administrative Court judgment was upheld, but the Circuit Court of Appeal amended and supplemented the reasoning of the Administrative Court judgment (para. 4 of the operative part).

5.2. In the opinion of the Circuit Court of Appeal, the applicant failed to justify how the Administrative Court had violated the investigative principle. The applicant referred to failure to collect evidence and failure to involve the RIK, but did not explain what evidence was not collected, what it was supposed to contain and prove, and how this would have contributed to resolving the complaint. The Administrative Court regarded

as evidence the letter of the Ministry of Justice No 13-3/6706-7 of 20 November 2017, in which the Ministry maintained its views set out in letter No 10-4/1972-2 of 31 March 2017. There is no reason to doubt that the letters from the Ministry of Justice also reflect the information available to the RIK which the Ministry administers.

5.3. Although the ECtHR in its judgment of 19 January 2016 in *Kalda v. Estonia* (No 17429/10) found a violation of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the ECtHR did not express the view that § 31^1 of the Imprisonment Act was in conflict with the Convention. The violation was found on account of insufficient reasoning provided in a specific court dispute. Nor did the ECtHR judgment concern the websites currently at issue (it concerned only the websites of the Chancellor of Justice, the Riigikogu, and the Council of Europe Information Office in Tallinn). Incompatibility with the Convention does not yet mean that the provision is unconstitutional. The Supreme Court *en banc*, when granting in part the applicant's motion to reopen the case after the ECtHR judgment, did not declare § 31^1 of the Imprisonment case unconstitutional in case No 3?3?2?1?16. The Estonian government has complied with the ECtHR judgment and, by supplementing § 31^1 of the Imprisonment Act (entered into force on 1 August 2019), ensured access to the websites of the Riigikogu and of the Chancellor of Justice.

5.4. The Circuit Court of Appeal agreed with the position of the Administrative Court that § 31^1 of the Imprisonment Act does not disproportionately interfere with the fundamental right guaranteed by § 44 of the Constitution and is compatible with the Constitution. The restriction of access to the websites of the Supreme Court and the Ametlikud Teadaanded does not seriously interfere with the applicant's rights, so that the purpose – to ensure the safety of society – outweighs the interference. The purpose is related to the constitutional value of securing the internal peace of the country. In *Kalda v. Estonia*, the ECtHR also accepted the aims of protecting the rights of others and preventing disorder and crimes as legitimate aims for interference with Article 10 of the ECHR. There is no measure which would ensure achieving the aim with the same effectiveness as the restriction laid down by § 31^1 of the Imprisonment Act, but in a way that is less intrusive of fundamental rights.

5.5. A prisoner needs information directly related to their own rights and obligations. Access to legislation and court decisions is necessary for the exercise of a prisoner's right of appeal; other legal materials are not strictly necessary for this purpose and can therefore be regarded as general educational material. The prison does not have to offer a prisoner an opportunity to use the internet for learning as a hobby. The internet is not the only way of disseminating information; newspapers, television and radio are available in prison. State agencies are obliged to provide information about their activities upon a request for information and a request for explanation, including the possibility for a prisoner to ask for an explanation about a legal act or its draft. The prison has made legal materials available to prisoners in the form of printed materials in the library. Case-law analyses available on the Supreme Court website have been prepared on the basis of public court decisions. Prisoners have appropriate legal remedies available to protect their rights. The information contained on the websites of state agencies is not intended to replace the legal assistance service.

5.6. The applicant did not justify which of his rights and freedoms were left unprotected due to lack of access to the websites, indicating only the desire to provide legal assistance to other prisoners. On the website of the Ametlikud Teadaanded, court notices are published to persons whose whereabouts are unknown. The whereabouts of prisoners are known to the state. Information from the database of the Ametlikud Teadaanded can be obtained by submitting a request for information. The notices contain

personal data and it is questionable how access to them would contribute to a prisoner's law-abiding behaviour and protection of law and order. Information reflected in the Ametlikud Teadaanded can also be used by a prisoner for other purposes.

5.7. With regard to the security risks and costs involved in providing access to websites, the Circuit Court of Appeal referred to letters from the Ministry of Justice of 31 March and 20 November 2017 and 27 April 2018. Checking that external links and communication options on a website (a forum, comments, a chat environment, an online store, a request for information form) are switched off may not be possible with reasonable effort. From outside the prison, it is possible to change the content of websites so that prisoners obtain access to prohibited content. With the addition of each website, the risk of abuse increases. It is not reasonable to give the prison discretion over resolving requests for access, as this involves procedural costs and disputes. The prison service and the RIK only have control over the content of a website managed by the RIK, but in general each institution has its own website and websites are constantly changed. For example, on the Riigi Teataja website, "My RT" allows a user to register an account and subscribe to acts, court summaries and legal news by e-mail. When registering as a user, a prisoner was able to enter any e-mail address and type a message in the password field, which was sent to the email address entered.

5.8. In his letter of 20 November 2017, the Minister of Justice stated that the amount of expenses depends on the number of websites, their content and mode of access (full or partial access). In order to continuously monitor the content of websites (including when access to the websites of the Supreme Court and the Ametlikud Teadaanded is ensured), one official in the information and investigation department should be hired in each prison (with an annual fixed cost of 86 000 euros). There may also be an increase in the need to purchase additional computers (e.g. 36 computers, fixed cost of 10 800 euros a year) and to develop the prison internet environment (1000 euros). If prisoners wish to make greater use of online access, organisational costs will be added (costs of escorting prisoners, searching, organising distribution of benefits, with an annual fixed cost of 128 000 euros). In order to limit online forms, the RIK needs to create a separate structural unit (6 people) with an annual fixed cost of 210 000 euros.

6. The **applicant** lodged an **appeal in cassation** with the Supreme Court, seeking annulment of the judgment of the Circuit Court of Appeal insofar as it denied the appeal, and the judgment of the Administrative Court to be overturned and his complaint satisfied. The applicant asked that § 31^1 of the Imprisonment Act be set aside on account of its incompatibility with §§ 11 and 44 of the Constitution and Article 10 of the ECHR. The Circuit Court of Appeal incorrectly applied substantive law and violated procedural law by not setting aside an unconstitutional norm and by not following the instructions given in a Supreme Court judgment (judgment No 3?13?2425/53) for assessing the constitutionality of the norm. The Circuit Court of Appeal merely assessed compatibility with the Constitution, although the norm could have been set aside even by relying directly on the Convention.

6.1. Allowing access to the websites of the Supreme Court and the Ametlikud Teadaanded would not entail any additional costs. This was also acknowledged by the Administrative Court. Risks could be avoided in the same way as for websites to which access is ensured. The Ministry of Justice also referred to costs and risks in a dispute concerning access to websites containing EU legislation and case-law of the Court of Justice of the EU. In order to comply with the judgment of the Administrative Court (in case No 3?14?51271), these websites are now accessible.

6.2. The Circuit Court of Appeal disregarded the fact that from 2007 to 2013, as well as for a month in 2017, prisoners had access to the Supreme Court website, but no security or safety risks were revealed. Restricting access to the Supreme Court website was not due to the appearance of security risks or the costs involved. The claim that access was granted erroneously in 2007–2013 is not plausible, since both the prison and the Ministry of Justice were aware of access to the Supreme Court page, as confirmed by the Ministry's 2009 letter to the Supreme Court. In 2012, the websites of the Riigikogu, the Chancellor of Justice, the Ministry of the Interior, the Ministry of Justice, the Prosecutor General's Office, the Chambers of Notaries and Insolvency Practitioners and the Ametlikud Teadaanded were accessible for two months. The submissions of the Ministry of Justice in court proceedings contradict the data submitted to the Riigikogu in proceedings for amending the Imprisonment Act (explanatory memorandum to the Draft Act amending the Imprisonment Act (680 SE [1], Riigikogu XIII composition)), and the amount of expenses is also exaggerated.

6.3. The applicant seeks access to the websites of state agencies where information intended for public use is published but he does not have to justify why he needs that information. While security and safety are important, no justification exists to restrict prisoners' right to information to such an extent in protecting these principles. Technical ways are available to ensure access to websites containing public information without compromising security. Access to information helps a prisoner to protect and exercise their rights, as well as educate themselves and keep abreast of developments in society, thereby facilitating their re-integration and law-abiding behaviour. The applicant has missed notices published in bankruptcy proceedings in due time, and it is not easy for a prisoner to obtain legal assistance. Submitting a request for information is difficult if it is not known what information is available on a website. Moreover, in the case of a request for information, starting from the 21st page of a copy a fee is charged for each page, and a prisoner may not have more than 30 kilograms of things (especially a major problem for life prisoners).

6.4. The applicant contested the judgment of the Administrative Court in its entirety, including refusal by the Administrative Court to examine the annulment complaint. The Circuit Court of Appeal erred in not forming a position as to its correctness.

7. Viru Prison is of the opinion that the judgment of the Tartu Circuit Court of Appeal was justified and that the appeal in cassation should be denied.

8. By **order** of 17 August 2022, the **Supreme Court Administrative Law Chamber** referred the case for adjudication to the Supreme Court *en banc* since resolving the case presumed a decision on the constitutionality of the first sentence of § 31^1 of the Imprisonment Act.

OPINIONS OF THE PARTICIPANTS IN THE PROCEEDINGS

[…]

CONTESTED PROVISIONS

28. Section 31^1 of the Imprisonment Act (in the wording in force from 24 July 2009 to 31 July 2019):

> **§ 31^1. Use of the internet**
>
> Prisoners are not allowed to use the internet, except in computers specially adapted for that purpose by the prison service which enable access under the supervision of the prison service to public legislation databases and the register of judicial decisions.
>
> [RT I 2009, 39, 261 – entered into force 24 July 2009]

29. Section 31^1 of the Imprisonment Act (in the wording in force from 1 August 2019):

> **§ 31^1. Use of the internet**
>
> Prisoners are not allowed to use the internet, except in computers specially adapted for that purpose by the prison service which enable access under the supervision of the prison service to public legislation databases, the register of judicial decisions, the website of the Riigikogu, and the website of the Chancellor of Justice. Prisoners are not allowed access to the part of the website which enables electronic communication.
>
> [RT I, 27.02.2019, 12 [4] – entered into force 1 August 2019]

OPINION OF THE COURT*EN BANC*

30. The Court *en banc* will adjudicate an administrative case referred to it by the Administrative Law Chamber of the Supreme Court. The proceedings are based on an appeal in cassation concerning access by a prisoner serving a sentence in a closed prison to the website of the Supreme Court and the online edition of the Ametlikud Teadaanded. The Administrative Law Chamber developed misgivings as to the constitutionality of the ban on use of the internet in prison under § 31^1 of the Imprisonment Act, which precludes access to these websites.

31. The Court *en banc* will first deal with the relevance of § 31^1 of the Imprisonment Act (I), and then the constitutionality of the provision (II–V). Finally, the Court *en banc* will take a position on the appeal in cassation and will resolve the administrative case (VI).

32. It is not the first time that the issue of the constitutionality of § 31^1 of the Imprisonment Act has been before the Court *en banc*. Section 31^1 of the Imprisonment Act was enacted in 2008 in a wording that allowed prisoners to use the internet only for access to official databases of legislation and registers of judicial decisions. In 2009, the Supreme Court *en banc* took the view that § 31^1 of the Imprisonment Act

was not unconstitutional – to the extent that it excluded prisoners from accessing the Riigikogu website and the website of the Chancellor of Justice (see Supreme Court *en banc* judgment of 7 December in case No 3?3?1?5?09 [5]). The ECtHR, when discussing the same issue in its judgment of 2016 in the case of *Kalda v.* [6] *Estonia* [6] (17429/10), reached the conclusion that the Estonian government had violated Article 10 of the ECHR which guarantees freedom of expression. In 2019, the Riigikogu amended § 31^1 of the Imprisonment Act so that prisoners are also allowed to use the internet to access the Riigikogu website and the website of the Chancellor of Justice.

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33. The provision whose constitutionality the Supreme Court *en banc* is assessing must be relevant to adjudicating the case (second sentence of § 3(3) Constitutional Review Court Procedure Act; see Supreme Court *en banc* judgment of 19 October 2020 in case No 3?18?1672/38 [7], para. 23). In line with Supreme Court case-law, 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 [8], para. 15; judgment of 30 April 2013 in case No 3?1?1?5?13 [9], para. 19; judgment of 15 March 2022 No 5?19?29/38 [10], para. 49).

34. In this administrative case, a complaint is being adjudicated in which the applicant, who is serving a sentence in a closed prison, sought annulment of the respondent's decisions of 2013, 2015 and 2017 refusing him access to the Supreme Court website and the website of the Ametlikud Teadaanded (see paras 1.1, 2.1 and 4 above) (an annulment complaint within the meaning of § 37(2) clause 1 of the Code of Administrative Court Procedure). In addition, the applicant sought an order requiring the respondent to grant him access to these websites (a mandamus complaint within the meaning of § 37(2) clause 2 of the CACP). The Administrative Court declined to examine the applicant's claims for annulment as it considered refusals of access to be administrative steps taken by the respondent, in respect of which no claim for annulment can be brought before the court (see para. 4.2 above). In his appeal in cassation, the applicant also emphasises the desire to have his claims for annulment satisfied, a matter which the Court *en banc* will resolve in part VI.

35. The Supreme Court, like most other state agencies, is obliged to maintain a website for disclosure of information related to its activities (§ 31(1) Public Information Act). The information listed in § 28(1) of the Public Information Act must be disclosed on the website, and the obligation to disclose information may also arise from other legal acts. In addition, a state agency may make available on its website information which it is not obliged to disclose.

36. The Supreme Court website, which until 2017 was at the address www.nc.ee [11], is now located at the address www.riigikohus.ee [12]. In addition to the decisions of the Supreme Court in criminal, civil, administrative and constitutional review cases, other information is published there concerning proceedings in the Supreme Court, disclosure of which is mandatory under the procedural codes (information on accepting appeals in cassation for proceedings, the time of holding court hearings and pronouncing decisions, decisions of the disciplinary chamber), as well as legal information of wider interest (case-law analyses and overviews and other legal materials). The Supreme Court website also contains information about the Supreme Court as an institution (e.g. procurements, contact details, etc.).

37. The Ametlikud Teadaanded is an official online publication of the state of Estonia and its responsible publisher is the Ministry of Justice (§ 13(1) Riigi Teataja Act). The online edition can be used through the website located at www.ametlikudteadaanded.ee/ [13]. It is used to publish notifications (notices, invitations, summons and announcements where an obligation to publish is laid down by legislation, but where publication in another publication has not been prescribed (§ 13(2) Riigi Teataja Act). Since 2003, these have been published exclusively in electronic form; reading them via the public interface is free of charge. A published notification whose purpose of publication is not to serve notice on a natural person can be reused and downloaded.

38. The first part of the sentence in § 31^1 of the Imprisonment Act stating that "prisoners are not allowed to use the internet" establishes a general ban on using the internet in prisons, which completely precludes access to websites. The law allows use of the internet in prisons only for access to websites that fall under the exception set out in the second half of the first sentence of § 31^1 of the Imprisonment Act – these are either websites directly mentioned in that provision (the website of the Riigikogu and the website of the Chancellor of Justice) or websites intended for systematised disclosure of information specified in that provision (databases of legislation and registers of court decisions).

39. The second half of the first sentence of § 31^1 of the Imprisonment Act imposes an obligation on the prison service to enable prisoners access to the exempted websites by adapting computers and ensuring supervision to that end. The prison service must also ensure that prisoners do not have access to parts of the website that allow electronic communication (the second sentence of § 31^1 of the Imprisonment Act). Neither the law regulating implementation of imprisonment nor any subordinate legislation (in particular, the Internal Prison Rules [14] established by regulation No 72 of 30 November 2000 of the Minister of Justice, as well as the prison statutes and house rules for prisons established by the Minister of Justice) lay down any further rules on use of the internet in prisons. Prisoners are not allowed to possess items that can be used to connect to the internet (§ 64^1 clause 10 of the Internal Prison Rules, and house rules of prisons).

40. Currently, the prison service provides access to five websites for prisoners to consult legislation and judicial decisions. Access is ensured to the Riigi Teataja, which is the official online publication of the Estonian state where legislation and other documents are published (§ 1(1) Riigi Teataja Act; address: www.riigiteataja.ee [15]). On the website of the Riigi Teataja it is also possible to search for and access court decisions, including Supreme Court decisions. In addition, prisoners can access Supreme Court decisions on a special page created for their publication (rikos.rik.ee [2]). As prisoners can access Supreme Court decisions both through the Riigi Teataja website and the special page, the applicant did not request access to the part of the Supreme Court website where the court's decisions are published. In addition to the above-mentioned websites of the Estonian state, prisoners have access to the Official Journal of the European Union (the database of European Union legislation, at the address: www.eur-lex.europa.eu [16]), the case-law part of the website of the Court of Justice of the EU (at the address: www.curia.europa.eu [17]) and the database of the case-law of the ECtHR (at the address: www.hudoc.echr.coe.int [18]).

41. The parts of the Supreme Court website that do not disclose decisions of the Supreme Court, as well as the online edition of the Ametlikud Teadaanded, are not covered by the exception set out in the first sentence of § 31^1 of the Imprisonment Act. Thus, the prohibition on use of the internet laid down in the provision precludes prisoners from accessing those pages. Thus, the first sentence of § 31^1 of the Imprisonment Act is

a decisive provision for adjudicating the administrative case. If the first sentence of § 31^1 of the Imprisonment Act did not lay down a general ban on use of the internet (this would be unconstitutional and invalid), the respondent would have no basis for preventing access to the websites in question (see Supreme Court Administrative Law Chamber judgment of 31 May 2007 in case No 3?3?1?20?07 [19], paras 14–15) and the respondent would be obliged to ensure access for the applicant. In the event of constitutionality of the ban laid down by the first sentence of § 31^1 of the Imprisonment Act, the Court *en banc* would be unable to satisfy the applicant's mandamus complaint.

42. Unless the law provides otherwise, the court ascertains any circumstance of the case as it stands at the time of rendering judgment (§ 158(2) Code of Administrative Court Procedure), so that the decisive provision for adjudicating the mandamus complaint is the first sentence of § 31^1 of the Imprisonment Act in the version entering into force on 1 August 2019. However, when adjudicating a mandamus complaint, it must be taken into account that, in order to satisfy it, the prerequisites must generally be fulfilled "both at the time of submission of the complaint and at the time of rendering the judgment – if the respondent was not obliged to perform the requested action at the time of the complaint, he was not unlawfully inactive" (Supreme Court Administrative Law Chamber judgment of 1 March 2017 in case No 3?3?1?79?16 [20], para. 20 with references; Supreme Court *en banc* judgment of 7 December 2009 in case No 3?3?1?5?09 [5], para. 44; Supreme Court Administrative Law Chamber judgment of 14 December 2009 in case No 3?3?1?77?09 [21], para. 11; judgment of 3 June 2013 in case No 3?3?1?13?13 [22], para. 11).

43. At the time when the applicant applied to the respondent for access to the websites at issue, the respondent refused access, and the applicant had recourse to the administrative court, § 31^1 of the Imprisonment Act was in force in a wording different from the current one (in the version in force from 24 July 2009 to 31 July 2019). The section consisted of a single sentence which laid down both prohibition of access to the internet and the exceptions to it (see the wording of the provision in para. 28 above). The Act amending the Imprisonment Act, entering into force on 1 August 2019 (RT I, 27.02.2019, 12 [4]) transformed the earlier text of the provision into the first sentence of the section and added the second sentence. The amendments concerned, in particular, the exception laid down in the first sentence of § 31^1 of the Imprisonment Act: the word "prison" was replaced with the expression "prison service" and the right of access of prisoners to the websites of the Riigikogu and the Chancellor of Justice was added. The exception was also affected by the addition of a second sentence to the provision, which required exclusion of the possibility of electronic communication.

44. Although the general ban on use of the internet laid down by § 31^1 of the Imprisonment Act was not amended in 2019, the provision was in force in a different version from the current one so that, if the provision was constitutional, the Court *en banc* would not be able to satisfy the applicant's mandamus complaint. Therefore, § 31^1 of the Imprisonment Act, in the version in force from 24 July 2009 to 31 July 2019, must also be regarded as a decisive provision relevant to adjudicating the case. For the sake of simplicity, the form "§ 31^1 (first sentence) of the Imprisonment Act" will be used below when speaking about both relevant provisions simultaneously.

45. The Court *en banc* will next check the constitutionality of § 31^1 (first sentence) of the Imprisonment Act to the extent that the relevant provisions are in dispute in the instant case – to the extent that the provision completely precluded or precludes access by a prisoner in a closed prison to the part of the Supreme Court website that does not disclose Supreme Court decisions and to the online edition of the Ametlikud Teadaanded (hereinafter also referred to as the "the websites at issue").

II

46. In the present case, it is necessary to assess whether § 31^1 (first sentence) of the Imprisonment Act violates the fundamental right guaranteed under § 44(1) of the Constitution to freely receive information disseminated for public use. The Court*en banc* will first of all clarify the scope of protection of the relevant fundamental right and the weight of values it protects in a democratic country governed by the rule of law, as well as a similar right in Article 10 of the ECHR and what has been said about its application in the case-law of the ECtHR.

47. Section 44(1) of the Constitution grants everyone the right not to be prevented by the state from accessing information disseminated for public use. The scope of protection of this fundamental right includes all information intended for public use "regardless of its transmitter and carrier, which has been made available to an individually unspecified range of persons" (Supreme Court *en banc* judgment of 7 December 2009 in case No 3?3?1?5?09 [5], para. 21). Inter alia, the scope of protection includes information which "an agency of the state or local authority, or another person performing public functions, has made available on its website (either voluntarily or in compliance with an obligation contained in a law)" (ibid.).

48. The fundamental right guaranteed by § 44(1) of the Constitution is violated if the state prevents the bearer of the fundamental right from freely – i.e. by choosing the time, place and method for doing so – receiving information disseminated for public use, e.g. by restricting access to information published on a website via the internet. Since persons in detention (prisoners, persons serving short-term detention, and persons remanded in custody, see §§ 2–4 of the Imprisonment Act) are also bearers of a fundamental right, the ban on using the internet laid down by § 31^1 (first sentence) of the Imprisonment Act also violates the fundamental right guaranteed by § 44(1) of the Constitution for these persons as well (see Supreme Court *en banc* judgment of 7 December 2009 in case No 3?3?1?5?09 [5], paras 20–22; Supreme Court Constitutional Review Chamber judgment of 18 December 2019 No 5?19?41/9 [23], para. 19).

49. The fundamental right laid down by § 44(1) of the Constitution is important in a democratic society, since access to information is a prerequisite for participation in the life of society. Of particular importance in this regard is free access to information intended for public use which state agencies share about their activities. In the case of prisoners, access to information disseminated for public use may contribute to their reintegration, which is one of the objectives of implementation of imprisonment. The fundamental right guaranteed by § 44(1) of the Constitution is also important because it may be a prerequisite for the exercise of several other fundamental rights and freedoms.

50. Although information mentioned in § 44(2) of the Constitution can also be obtained by everyone, including prisoners, by requesting it from a state agency (e.g. by submitting a request for information), free access to information, including via the internet, plays an important role in modern society. Use of

information and communication technology has become a natural part of Estonian society and affects almost all areas of life. According to the Statistical Office of the European Commission (Eurostat), 92% of Estonian households have internet access (see https://ec.europa.eu/eurostat/databrowser/view/tin00134/default/table?lang=en [24]). According to data from Statistics Estonia, in 2021, more than 90% of the Estonian population use information and communication technology (https://andmed.stat.ee/et/stat/majandus__infotehnoloogia__infotehnoloogia-leibkonnas/IT32 [25]).

51. The right to freely receive information intended for public use without interference by the authorities is also protected by Article 10 of the ECHR (freedom of expression), and this right must also be respected in prison. Although prisoners' right to liberty (Article 5 of the ECHR) is restricted, they generally continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention, subject to the constraints inherent in imprisonment (ECtHR judgment of 6 October 2005 in the case of *Hirst v.* [26] *the United Kingdom* [26] (74025/01), para. 69; judgment of 18 June 2019 *Mehmet Re?it Arslan v. Turkey* [27] (47121/06, 13988/07, 34750/07), para. 55). Being in captivity limits a prisoner's freedom of expression as it implies a number of restrictions on communications with the outside world (see *Kalda v. Estonia*, para. 45). The above is also taken into account by the Estonian Imprisonment Act whose § 4^1 lays down the obligation to observe human dignity and human rights. A person in a place of detention must be treated in a way that respects their human dignity and ensures that serving a sentence or being in custody does not cause them more suffering or inconvenience than that inevitably inherent in detention (see similarly Supreme Court *en banc* judgment of 7 December 2009 in case No 3?3?1?5?09 [5], para. 30).

52. Although the ECtHR has not inferred from Article 10 of the ECHR a general (positive) obligation for states to create access to the internet, the Court has repeatedly emphasised the importance of the internet in today's society, both for the enjoyment of human rights and for the functioning of democracy. The ECtHR has noted that the internet has become the main means by which individuals exercise their right to receive and impart information and ideas, so that the internet plays an important role in public access to information and in the general dissemination of information (*Cengiz v. Turkey* [28] (48226/10, 14027/11), para. 52; *Kalda v. Estonia*, para. 52).

III

53. By precluding a prisoner serving a sentence in a closed prison from access to the part of the Supreme Court website that does not disclose Supreme Court decisions and to the online publication of the Ametlikud Teadaanded, the prohibition on using the internet laid down by § 31^1 (first sentence) of the Imprisonment Act violates the fundamental right guaranteed by §44(1) of the Constitution.

54. As described above, a prisoner may access only the websites covered by the exception referred to in the first sentence of § 31^1 of the Imprisonment Act, while access to other websites is excluded. This means that the websites at issue cannot be accessed even at a prisoner's request and with the permission of the prison service, which would make it possible to assess the weight of the purpose of access to the information and the risks that such access may entail.

55. It must be taken into account that information considered to be information about the activities of a state agency within the meaning of § 44(2) of the Constitution is published on the pages at issue. As noted above, the Supreme Court maintains a website for performing the obligation laid down by § 31(1) of the Public Information Act, and the Ministry of Justice issues the Ametlikud Teadaanded in accordance with the Riigi Teataja Act. Regardless of whether a state agency discloses information on its website in order to comply with an obligation arising from legislation or voluntarily, it is still information about its activities within the meaning of § 44(2) of the Constitution.

56. Leaving aside administrative information about the Supreme Court as a state agency, the information published on the website of the Supreme Court can be briefly defined as legal information. However, the information published in the Ametlikud Teadaanded plays a role in the exercise of various rights of persons. Depending on the purpose of using the information, the restriction on access to information may also lead to violations of prisoners' other fundamental rights that are currently not in dispute, e.g. the fundamental right to education (§ 37 Constitution), the inviolability of private and family life (§ 26 and § 27), the fundamental right to property (§ 32) and other fundamental rights, including the right to free self-realisation guaranteed by § 19(1) of the Constitution (see Supreme Court *en banc* judgment in case No 3?3?1?5?09 [5], para. 30). The ECtHR has found that access to legal information promotes public awareness and respect for human rights (*Kalda v. Estonia*, para. 50).

57. Access to information about the activities of state agencies may contribute to achieving the objectives of execution of imprisonment. The objective of implementation of imprisonment is to direct a prisoner to law-abiding behaviour and to protect law and order (§ 6(1) Imprisonment Act). Directing a prisoner to law-abiding behaviour must enable the prisoner to reintegrate in society, i.e. to be socially responsible in future life without violating law and order. To that end, prison conditions, including the activities available there and prison discipline, must be such as to develop in a prisoner the skills, habits and attitudes necessary for a law-abiding life. Protection of law and order means, above all, ensuring that a convicted person does not commit a new crime. Both of these objectives of implementation of imprisonment increase the safety of society and help to reduce the costs of criminality.

58. Both use of the internet in prison and reading newspapers and magazines (§ 30 Imprisonment Act) as well as following radio and television broadcasts (§ 31 Imprisonment Act) are treated by the Imprisonment Act as a prisoner's contact with the outside world (Subchapter 3 of Chapter 2 of the Imprisonment Act). The purpose of contact with the world outside the prison is to maintain a prisoner's social relationships (§ 23(1) Imprisonment Act), which is a necessary condition for a prisoner's reintegration. Access to information about the activities of state agencies helps prisoners to keep abreast of developments in society, thus having a reintegrating effect and contributing to achieving the objectives of implementation of imprisonment. In this regard, one cannot overlook the fact pointed out by the Chancellor of Justice that, through press and media channels, prisoners primarily receive daily news and entertainment, whereas newspapers often reach prisoners seldom and with great delay (page 4 of the Chancellor of Justice opinion).

59. The websites at issue do not disclose information which could undermine completion of the objectives of imprisonment and endanger the safety of society. Legislation must not oblige disclosure of information which could violate the rights of others. When disclosing information about its activities, a state agency must also take into account the rules for restricting access to information (including protection of personal data; §§ 34 and 35 of the Public Information Act). At the same time, the website of the Supreme Court has

similarities with the websites of the Riigikogu and the Chancellor of Justice, access to which is currently permitted by law. The Riigikogu and the Chancellor of Justice are also constitutional institutions which maintain a website to fulfil the obligation laid down by § 31(1) of the Public Information Act, and the information disclosed on these websites can also be considered (in a broad sense) legal.

60. The intensity of interference with the fundamental right in the present case is somewhat reduced by the fact that the information on the websites at issue can be obtained by a prisoner by means of a request for information (§ 6 Public Information Act). Thus, access to information disclosed on the websites is not completely precluded, although the way in which it can be accessed has been significantly limited. If a request for information has to be submitted in order to obtain information on the website of the Supreme Court or published in the Ametlikud Teadaanded, accessing the information becomes significantly more difficult. This is so firstly because, in that case, the person is not aware what information the information holder (§ 5 Public Information Act; in this case, the Supreme Court and the Ministry of Justice) may have. Websites are nowadays a central tool for sharing information about the activities of a state agency, and through a website it is much easier to get an overview of information and find relevant information than with a request for information. In the case of the Ametlikud Teadaanded, which has been published only electronically since 2003, it is particularly difficult to obtain an overview of information without access to the website. Prisoners are unlikely to obtain the information on the websites at issue from other sources of information available in a closed prison – national newspapers and magazines, radio or television (see § 30(1) and § 31(1) Imprisonment Act).

61. Moreover, it must be taken into account that submitting and fulfilling a request for information entails costs both for the requester and the information holder, as well as for the prison service. A request in prison for information can be submitted by telephone or letter, with both telephone use and correspondence generally taking place at the expense of the prisoner (§ 28(2) Imprisonment Act). Fulfilling a request takes time from the information holder. The costs of fulfilling a request for information in writing (production of paper copies and printouts) are shared between the information holder and the requester, since the requester pays the costs beginning from the 21st page (§ 25(1) and (2) Public Information Act). However, in the case of a prisoner, it must be taken into account that there is a weight limit imposed on a prisoner's belongings in prison (§ 57(3) Internal Prison Rules), which may prevent a prisoner from receiving and storing documents. Although the requester may request oral execution of a request for information, the information holder is not obliged to read out documents when fulfilling a request for information orally (§ 17(6) Public Information Act). The information holder may also refuse to fulfil a request for information if, because of the large amount of information requested, it requires a change in the working arrangements of the information holder, hinders performance of the public duties imposed on it or incurs unreasonably high costs (§ 23(2) clause 3 Public Information Act). The prison service plays the role of an intermediary in submitting and fulfilling a request for information, which, in the case of large-scale exchange of information, is likely to result in a greater time commitment for prison officers.

IV

62. Next, the Court *en banc* will deal with the objectives of the ban on use of the internet arising from § 31^1 (first sentence) of the Imprisonment Act, which restricts access to the websites at issue.

63. The fundamental right to freely receive information intended for public use is guaranteed by § 44 (1) of

the Constitution without a qualifying clause, i.e. without being subject to a statutory reservation. According to the case-law of the Supreme Court, interference with a fundamental right guaranteed in this way may be justified by the fundamental rights of other persons or other constitutional-grade values (see Supreme Court *en banc* judgment of 17 March 2003 in case No 3?1?3?10?02 [29], para. 28; order of 28 April 2004 in case No 3?3?1?69?03 [30], para. 28; judgment of 2 June 2008 in case No 3?4?1?19?07 [31], para. 23).

64. In 2009, when assessing the constitutionality of § 31^1 of the Imprisonment Act, the Supreme Court *en banc* found that the purpose of restricting access to the websites of the Riigikogu and the Chancellor of Justice was the need to achieve the objectives of implementation of imprisonment, in particular to ensure the safety of society (both the security of the prison and the safety of persons outside the prison) and, more broadly, the internal peace of the country (Supreme Court *en banc* judgment in case No 3?3?1?5?09 [5], paras 31 and 35). More specifically, the aim was to prevent misuse of the internet for communication with the world outside the prison, i.e. for purposes prohibited by law and thus not conducive to the objective of execution of the sentence. As an additional risk, the possibility was seen of obtaining information that could endanger the safety of society or be counter-productive to the objective of directing a prisoner to law-abiding behaviour (paras 33–34 of the cited judgment).

65. The Court *en banc* finds that, in the present case, the purpose of interference with the fundamental right guaranteed by § 44(1) of the Constitution must be seen as obstruction of communication outside the prison that is beyond the control of the prison service. This promotes the objectives of implementation of imprisonment, ultimately contributing to the safety of society and internal peace within the country. In addition, the ban on use of the internet laid down by § 31^1 (first sentence) of the Imprisonment Act can be considered to be aimed at reasonable use of public money. Protection of internal peace is an aim expressed in the preamble to the Constitution of the Republic of Estonia and the kind of constitutional-grade value that may justify a violation of the fundamental right guaranteed by § 44(1) of the Constitution without a qualifying clause. Reasonable use of public money has been considered by the Supreme Court primarily to be a permissible objective for interfering with fundamental rights subject to a simple statutory reservation (cf. Supreme Court *en banc* judgment of 26 June 2014 in case No 3?4?1?1?14 [32], para. 114). In the instant case, however, it must be borne in mind that this is not an independent objective, but that reasonable use of public money is ultimately at the service of protecting the internal peace of the country.

66. As stated above, implementation of imprisonment has two interrelated objectives: to direct a prisoner to law-abiding behaviour as the main objective towards reintegration and to protect the legal order by preventing crimes (see para. 57 above). Both of these objectives help to increase the safety of society, thereby protecting the rights and freedoms of others and maintaining the internal peace of the country.

67. The objectives of implementation of imprisonment cannot be undermined by a prisoner's access to the websites at issue and to the information disclosed there (see para. 59 above). However, in terms of implementation of imprisonment it is important that a website may enable a prisoner to communicate via the internet – either with the institution that maintains the website or with other persons outside the prison. Communication-enabling, technical solutions exist both on the websites to which prisoners currently have access as well as on the websites at issue. For example, the pages of the Riigikogu and the Chancellor of Justice, as well as the Supreme Court, have an electronic form for submitting a request for information. It is possible to register as a user on the Riigi Teataja page and on the Ametlikud Teadaanded page ("My RT" and "My AT"). According to explanations by the Minister of Justice, prisoners have used the "My RT" solution to send messages from the prison so that a third-party email address is provided when registering as a user and the message is printed in the password field. Repeated change of the password provided an opportunity to send an unlimited number of short messages from prison. In addition, the Minister referred to

the risk that persons outside the prison may maliciously modify a website so as to allow prisoners to communicate outside the prison without control by the prison service (see para. 15 above).

68. In a closed prison, a prisoner's out-of-prison communication (see Subchapter 3 of Chapter 2 of the Imprisonment Act) is limited and takes place under the extensive control of the prison service. A prisoner can communicate with persons outside the prison either directly (in particular, during short-term or long-term visits; §§ 24–26 Imprisonment Act) or indirectly (correspondence and telephone calls; § 28 Imprisonment Act), communication through a website would be comparable to the latter.

69. The content of communications by letter or telephone generally remains confidential (§ 29(2) Imprisonment Act). However, the prison service has extensive control over the fact of communication having taken place, including being aware of the persons with whom the prisoner has telephone calls or correspondence (see §§ 28–29 Imprisonment Act, Chapter 10 of the Internal Prison Rules). For the objectives of implementation of imprisonment, the prison service can also restrict communication, e.g. not sending a letter addressed to a specific person, but communication with state agencies may not be restricted (§ 28(3), § 29(3) and (5) Imprisonment Act).

70. The rules of the Imprisonment Act and the Internal Prison Rules do not completely prevent opportunities for communication which do not contribute to the objectives of implementation of imprisonment. Outside the prison, the addressee of a letter can also hand the letter over to a person who was not indicated as the addressee, i.e. the actual circle of addressees of the letter remains unknown to the prison service. Also, a letter may be sent to a prisoner by someone who is not listed as the sender and is unknown to the prison service. Nevertheless, the above measures aimed at controlling and limiting communications make it possible to contribute to some extent to achieving the objectives of implementation of imprisonment, as they make inappropriate contact outside prison more difficult. If a prisoner has the opportunity to communicate via a website, the existing control measures would not be employed and the prison service would not be able to restrict communications that undermine the objectives of implementation of imprisonment.

71. The above considerations can also be seen behind the prohibition of electronic communication arising from the second sentence of § 31^1 of the Imprisonment Act. This imposed an obligation on the prison service to ensure that, when access to the websites referred to in the first sentence of the provision is granted, communication opportunities must be excluded. The second sentence was added to § 31^1 of the Imprisonment Act in 2019, when access to the pages of the Riigikogu and the Chancellor of Justice was also allowed. The explanatory memorandum to the Draft Amending Act explained that "prisoners cannot access third websites via the websites of the Riigikogu and the Chancellor of Justice. For example, both websites contain numerous hyperlinks to other websites. Use of such hyperlinks by inmates is excluded, as otherwise the prison service would not have a clear overview of the extent of a prisoner's communication outside the prison (for example, both websites contain a hyperlink to the Facebook website). Access to any part of a website that allows electronic communication is also excluded, including a request for information form, an application and feedback form, a forum, etc." (Draft Act amending the Imprisonment Act (680 SE [1], Riigikogu XIII composition); explanatory memorandum to initiating the draft, page 3).

72. Restricting the possibilities of communication on a website entails costs for the state. In 2019, the legislator opted for a complete ban on communication on websites that prisoners can access (under the exception set out in the first sentence of § 31^1 of the Imprisonment Act). The alternative possibility of the

prison service controlling online communication in a similar way to communication by letter or telephone was rejected because it would have required extensive IT developments and investments (explanatory memorandum to initiating the Draft Act cited in the previous paragraph, page 3).

73. The solution currently chosen also entails costs for the state, since on the permitted websites the parts that allow communication must be identified and prisoner access to them excluded. The amount of time and money required to perform the task set out in the second sentence of § 31^1 of the Imprisonment Act depends, on the one hand, on how many websites are authorised and how extensive they are, and on the other hand, on the technical solutions used to limit communication and how and how often their performance is checked.

74. It appears from the explanations by the Ministry of Justice that, in order to limit the part of the websites that allows electronic communication, a filter (proxy server) was built, which left open only the pages covered by the exception under § 31^1 (first sentence) of the Imprisonment Act. The structure of the filter describes the permitted domains (domain names) and generally only obtaining information from the server (a GET request) is allowed, while sending information to the server (a POST request) is prohibited. Each new website is set up by the RIT for the prison. When the website is changed or updated, the filter might not work properly, but the system will not automatically notify this. Nor are any programs in place to compare whether a part of the page that should not be accessible has become accessible after the website was modified. In order to completely exclude communication opportunities, permitted websites should be checked manually every day (see paras 16–17 above).

75. However, it is not clear from the observations submitted in the proceedings how often it is currently checked whether the filter is working properly or what are the current costs of carrying out that task. The Minister of Justice notes that, due to software updates, checks must be carried out essentially every month. The Minister has also pointed out that since the costs and risk are cumulative with the addition of each website, it is not correct to look at each website separately. The cost of an additional periodic check can be the same as continuous monitoring of a single website and the work related to addition of restrictions (more than 1000 euros, depending on the complexity of the website). Setting up a system for more comprehensive (but not complete) checking of websites would take 300 000 euros, plus labour costs of 204 000 a year for the prison service and the RIK (see para. 19 above).

V

76. Next, the Court *en banc* will assess whether the legitimate objectives described in Part IV justify interference with the fundamental right that the ban on use of the internet laid down by § 31^1 (first sentence) of the Imprisonment Act entails (see Part II).

77. According to the principle of proportionality arising from the second sentence of § 11 of the Constitution, interference with a fundamental right must be appropriate, necessary, and proportional in the narrow sense for achieving the objective. A measure interfering with a fundamental right is appropriate if it helps to attain the objective. However, a measure is necessary only if the objective cannot be attained by using a measure which is less restrictive of fundamental rights. In order 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 the fundamental right and, on the other hand, the importance of the objective (consistent case-law of the Supreme Court since the judgment of the Constitutional Review Chamber of 6 March 2002 in case No 3?4?1?1?02 [33], para. 15).

78. The Court *en banc* has no doubt that the ban on use of the internet laid down by § 31^1 (first sentence) of the Imprisonment Act is appropriate and necessary for attaining its objectives. Section 31^1 (first sentence) of the Imprisonment Act precludes access to the websites at issue, thereby also precluding out-of-prison communications beyond the control of the prison service. The fundamental right guaranteed by § 44(1) of the Constitution would be significantly less interfered with if access were denied only to the communication-enabling part of the websites at issue, as laid down by the second sentence of § 31^1 of the Imprisonment Act in the case of websites to which access is permitted. However, that does not render the contested measure unnecessary. The effectiveness of limiting the possibilities of communication on a website depends on the technical solutions and control chosen for this purpose, which may entail different amounts of costs. Restricting the possibilities of communication on a website is generally more costly than it would be to completely deny access to the website. Costs would also be entailed in a solution where a prisoner has to apply for access to the desired website and the prison service would decide on access on a discretionary basis. It is therefore difficult to see a measure which, with less interference with the fundamental right, would allow both legitimate objectives to be achieved with the same efficiency – to limit out-of-prison communications with third parties on the website just as effectively but without incurring higher costs.

79. In the present case, the question is primarily about the narrow proportionality of the measure, i.e. whether the legitimate objectives are sufficiently compelling to justify interference with the fundamental right guaranteed under § 44(1) of the Constitution as a result of the disputed measure.

80. As noted above, § 44(1) of the Constitution guarantees a fundamental right important for participation in society, a right interfered with by the ban on using the internet laid down by § 31^1 (first sentence) of the Imprisonment Act. This provision precludes prisoner access to the websites at issue, thereby limiting free access to information disseminated for public use about the activities of state agencies. Access to such information about the activities of state agencies is presumed to contribute to the objective of implementation of imprisonment to reintegrate prisoners, without undermining the objective of protecting law and order and preventing crimes. Although prisoners have access to the information published on these websites by submitting a request for information, such access is much more difficult and costly for a prisoner compared to accessing the information via a website. Complying with prisoner requests for information on paper can also be unreasonably costly for the state in a situation where the requested information is disclosed on the website. Complying with requests for information entails a time commitment both on the part of the information holder and the prison service.

81. The objectives of the interference must be regarded as compelling. Control by the prison service over a prisoner’s communication outside the prison is necessary to achieve the objectives of implementation of imprisonment, thereby protecting the rights and freedoms of others and the safety of society.

82. In the light of the explanations provided by the participants in the proceedings, out-of-prison communication via the websites at issue may happen in two ways in particular. First, it is possible that the restrictive filter (proxy server) built for the prison is not functioning properly, so that official communication functionalities existing on the website or added to it during the modification process become available to a

prisoner. This may happen, in particular, as a result of a software update or as a result of changing the website (see paras 67 and 74 above).

83. Currently, the official means of communication on the Supreme Court website is primarily the form for submitting a request for information, although the addition of other technical solutions (including, for example, those enabling direct communication) is not excluded in the future. It is difficult to see how sending a request for information or other submissions through the website to the Supreme Court without the knowledge of the prison service could undermine the objective of implementation of imprisonment. Under the law, the prison service cannot restrict sending submissions to the Supreme Court, among other things it is not possible to open a letter addressed to the Supreme Court or decline to send it out (§ 28(3), § 29(5) the Imprisonment Act). Also a draft law is pending before the parliament, according to which the prison service may (if a secure technical capability exists) allow prisoners to use the internet to transmit submissions to a state agency (Act amending the Imprisonment Act, the Penal Code and the Probation Supervision Act (747 SE [34], Riigikogu XIV composition); the text on initiating the Draft Act, § 1 point 28).

84. On the website of the Ametlikud Teadaanded, the possibility for communication could open, inter alia, through the “My AT” application, similarly to the “My RT” application described above. This type of out-of-prison communication can work against the objectives of implementation of imprisonment, since the prison service is not aware of the fact of communication and cannot restrict it. At the same time, this communication would be limited, as it can only be one-sided (sending messages out of prison) and messages can be very short. However, the possibility of this communication option remaining open for prisoners must be considered unlikely, as it could be ruled out when the Ametlikud Teadaanded website is being set up for the prison. The Minister for Justice has emphasised that controlling changes on a website is difficult in particular if the website is managed by the owner of the website and not by the RIT or the RIK (see paras 17–18 above). As the responsible publisher of the website in question is the Ministry of Justice, it should also not be difficult to ensure that in the event of modification of the website the filter works properly and that communication opportunities are excluded.

85. Secondly, the risk of an unofficial communication functionality for prisoners being added to the website without the knowledge of the owner of the website has been pointed out (see para. 67 above). Since the filter restricting access to websites has been built on a domain-by-domain basis, it allows access to subpages beginning with the name of the respective domain, unless access to the subpage is prohibited by a special exception. Thus, it is possible to maliciously add, for example, a subpage beginning with the name of the permitted domain and enabling communication, which may not be visible on the official website and about which neither the owner of the website nor the prison service is aware.

86. Communication outside the prison, in the manner described in the previous paragraph, may clearly run counter to the objectives of implementation of imprisonment. The prison service would not be aware of the fact that communication took place or of the person with whom the prisoner is communicating, nor could communication be restricted for the purposes of implementation of imprisonment. Depending on the circumstances, such uncontrolled communication can be extensive – e.g. in web-based e-mail exchanges, messages could be both sent and received. Although the risk to implementation of imprisonment arising from such communication could be considerable, its realisation would presume that an official or employee of the owner, developer or administrator of the website are violating their duties (in extreme cases, committing an offence) or the website is under attack from outside. Although it is not unequivocally clear whether, how often and how thoroughly the existence of such maliciously added communication

functionalities is checked on currently authorised websites, the participants in proceedings have not indicated that any such violation has been detected since 2008.

87. Access to the websites at issue does not therefore completely rule out the possibility that prisoners may be able to communicate outside prison. However, the resulting threat to the objectives of implementation of imprisonment cannot, on the one hand, be considered high (sending submissions to the Supreme Court, misuse of the "My AT" application), and on the other hand, the threat is unlikely to materialise. At the same time, the more effective the control over internet use of prisoners the lower the risk to the objectives of implementation of imprisonment. Although any control requires financial expenditure, the more effective the control exercised by the state the higher the costs.

88. In order to grant access to the websites at issue, it would be necessary to adjust them for the prison, i.e. to modify the restrictive filter (proxy server) accordingly. The potential costs involved in this have not been outlined by the Ministry of Justice in the proceedings, probably because these one-off costs would not be excessive. However, higher costs may result from effective periodic checks to assess the appropriateness of the restrictive filter. With each new website allowed, the resources required for periodic checks increase, depending on the amount of work that the additional website brings about for controllers. It can be inferred from the explanations given by the Minister of Justice that the addition of any new website to the existing control system may result in a cost of approximately 1000 euros (presumably a monthly cost was meant). In the opinion of the Court *en banc*, such an additional resource cost would not constitute an unreasonable use of public money if it would enable ensuring the constitutionality of interference with the fundamental right guaranteed by § 44(1) of the Constitution.

89. As the only known case in which a risk materialised and prisoners exploited the possibility of communication beyond the prison's control, the Ministry pointed out the "My RT" case described above (see para. 69). Since the Minister had already described this situation in a letter in 2018, it must have happened before the second sentence of § 31^1 of the Imprisonment Act was enacted.

90. In the light of the facts set out in the proceedings, the Court *en banc* has no reason to consider the existing control system to be insufficient. Inclusion of new websites in the existing system should therefore not require more effective control of websites that are already accessible. Nevertheless, the addition of new websites may lead to a situation where the total costs are so high that a need arises to create a more cost-effective control mechanism, which in turn requires a higher one-off expense. It is not known to the Court *en banc* how many resources overall are currently spent on control of websites, which is why the circumstances related to the total costs cannot be taken into account in the case. However, it can be pointed out that in 2019, when the websites of the Riigikogu and the Chancellor of Justice were added to the list of permitted websites, the explanatory memorandum stated that there would be no costs associated with the Draft Act (see the Act amending the Imprisonment Act (680 SE [1], Riigikogu XIII composition); explanatory memorandum on initiating the Draft Act, page 6).

91. In view of the foregoing, the Court *en banc* is of the opinion that providing access to the websites at issue would not endanger the objectives of implementation of imprisonment and the safety of society or cause unreasonable use of public funds to such an extent as to justify interference with the fundamental right under § 44(1) of the Constitution as a result of exclusion of access. Since the ban on use of the internet arising from § 31^1 (first sentence) of the Imprisonment Act is not narrowly proportional for achieving the

objectives of interference with the fundamental right, § 31[1] of the Imprisonment Act is unconstitutional insofar as it precludes access to the Supreme Court website and the online publication of the Ametlikud Teadaanded.

92. The Court *en banc* declares unconstitutional and invalid the first sentence of § 31[1] of the Imprisonment Act (in the version in force since 1 August 2019) insofar as it precludes a prisoner serving a sentence in a closed prison from accessing the part of the Supreme Court website in which no Supreme Court decisions are published, as well as from accessing the online publication of the Ametlikud Teadaanded. So long as the legislator has not made appropriate amendments to the first sentence of § 31[1] of the Imprisonment Act, the provision gives rise to an obligation for the prison service to ensure prisoners access to the Supreme Court website and the online publication of the Ametlikud Teadaanded on the same basis as access to the websites currently mentioned in the provision. At the same time, the obligation to exclude the possibility of electronic communication, as laid down by the second sentence of § 31[1] of the Imprisonment Act, extends to provision of access to the Supreme Court website and the online publication of the Ametlikud Teadaanded. The Court *en banc* also declares unconstitutional and invalid § 31[1] of the Imprisonment Act in the version in force from 24 July 2009 to 31 July 2019 insofar as it precluded a prisoner serving a sentence in a closed prison from accessing the part of the Supreme Court website in which no Supreme Court decisions are published, as well as from accessing the online publication of the Ametlikud Teadaanded.

93. Additionally, the Court *en banc* notes that the present constitutional review case is already the second to concern prisoners' right of access to the internet. It would be desirable for the legislator to consider a systemic and comprehensive approach to the issue of prisoners' access to the internet, in order to avoid the necessity for the courts to assess the need for access on a website-by-website basis, which would unnecessarily burden the judiciary and the participants in proceedings and would ultimately incur unreasonable costs for the state. The legislator may decide, based on the type of information and its relevance for the fundamental rights of prisoners, the websites of what types of information holders should be made accessible. The position taken in the current judgment that the ban on access to the websites at issue is unconstitutional does not mean that less intensive restrictions on use of the internet which proportionately interfere with fundamental rights might not be imposed, in order to achieve the objectives of implementation of imprisonment. For example, giving the prison discretion to enable access to websites based on the circumstances of each individual case or to use provision of access to some websites as part of the motivational system within the prison is not precluded.

VI

94. Since the Court *en banc* declared § 31[1] (first sentence) of the Imprisonment Act in its relevant part unconstitutional and invalid, the appeal in cassation must be satisfied in part. The Court *en banc* overturns the judgment of Tartu Administrative Court of 15 April 2020 insofar as it denied the applicant's mandamus complaint and the judgment of Tartu Circuit Court of Appeal of 6 May 2021 insofar as it upheld the judgment of the Administrative Court denying the applicant's mandamus complaint. The Court *en banc* enters a new judgment in the case, by which it satisfies the applicant's mandamus complaint and obliges Viru Prison to provide the applicant access to the Supreme Court website and the online publication of the Ametlikud Teadaanded on computers adapted by the prison service for that purpose and under the supervision of the prison service, taking into account the restriction laid down by the second sentence of § 31[1] of the Imprisonment Act. Relying on § 168(1) of the Code of Administrative Court Procedure, the Court *en banc* holds that the judgment must be complied with within a month of pronouncement of the judgment

of the Court *en banc*, i.e. by 15 March 2023 at the latest.

95. In his appeal in cassation, the applicant seeks satisfaction of his initial complaint in its entirety, i.e. including the claims for annulment of the respondent's refusals of 16 September 2013, 9 February 2015 and 6 November 2017 (annulment complaint).

96. The Court *en banc* is of the opinion that the Administrative Court did not violate procedural law by declining to examine the applicant's claims for annulment. In its case-law, the Supreme Court has considered refusal to access websites in a prison to be an administrative measure, even if the prison has formalised it as a decision (see Supreme Court *en banc* judgment of 7 December 2009 in administrative case No 3?3?1?5?09 [5], para. 44; Supreme Court Administrative Law Chamber judgment of 26 March 2012 in case No 3?3?1?77?11 [35], para. 10; judgment of 15 December 2017 No 3?13?2425/53 [36], para. 19.2; judgment of 28 September 2020 No 3?16?1864/65 [37], para. 29).

97. Procedural expenses are to be borne by the party against whom judgment was given, while in the event of partial satisfaction of the complaint procedural expenses are to be divided in proportion to satisfaction of the complaint (§ 108 subs. (1) and (2) Code of Administrative Court Procedure). Although the complaint is satisfied in part, the applicant achieved his objective, so that it is justified to reimburse him for procedural costs in full. The applicant paid a total state fee of 60 euros in the Administrative Court and the Circuit Court of Appeal: the state fee of 30 euros in lodging a complaint in case No 3?15?745 and the state fee of 30 euros in lodging a complaint in case No 3?18?477. Thus, the respondent must be ordered to pay 60 euros in favour of the applicant. The procedural deposit paid when lodging the appeal in cassation must be returned to the appellant (first sentence of § 107(4) of the Code of Administrative Court Procedure, in force at the time of lodging the appeal in cassation).

(signed digitally)

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