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### **Opinion in constitutional review case No 5-23-16**

Dear Chief Justice of the Supreme Court,

You requested the opinion of the Chancellor of Justice in constitutional review case No 5-23-16.

Since neither the [Obligation to Leave and Prohibition on Entry Act](#) (OLPEA) nor the [Act on Granting International Protection to Aliens](#) (AGIPA) lays down a prohibition on the use of the internet, the respondent has no basis to prevent access to the websites requested by the applicant.

Should the Supreme Court nevertheless reach the opinion that the situation in dispute contravenes the [Constitution of the Republic of Estonia](#), because the applicable norms do not impose an obligation on the detention centre to ensure access for detained foreigners to the internet, I find the following.

Foreigners detained under the OLPEA and the AGIPA must be able to use the internet. 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 to only 14 websites on the detention centre's computers, also excessively restricts constitutionally guaranteed rights. Such limited access does not enable a detained person to maintain contact with their next of kin by any of the modern methods of communication. It is also insufficient in terms of a foreigner's possibility to collect information necessary for their asylum or expulsion proceedings or for return to their country of origin.

I also find that [§ 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 internal rules") is contrary to the first sentence of § 3(1) and § 94(2) 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.

The absolute ban on the use of mobile phones 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](#).

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The living conditions (including possibilities for communication and access to information) do not need to – and even may not – be restricted in the same way as the living conditions of people in imprisonment. Modern communication methods (e.g. video calls, correspondence by e-mail) and considerably broader access to the internet as compared to what is provided currently are extremely necessary in view of the situation of a detained foreigner.

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 and/or e-mail. If a foreigner is able to maintain contact with their next of kin and search for necessary information, this significantly simplifies their return to the home country or the country of origin. A more flexible regime for the use of the internet and the mobile phone also enables a foreigner to collect various information about their private life as well as evidence of persecution. This way a foreigner can also discuss directly and more effectively with their representative the circumstances of their asylum or expulsion proceedings and the positions submitted. Access to databases and/or applications enabling text translation would reduce the possibility of detained persons ending up in an information vacuum and at the same time ease the burden on detention centre staff because currently they have to make oral summaries of documents for foreigners. Broadening the opportunities for meaningful contact for detained persons also reduces the burden on the staff of the centre. According to studies and specialist literature, use of information and communication technology improves the internal atmosphere of a detention facility and also has a positive impact on the mental health of detainees.

The experience of other countries and other closed institutions in Estonia affirms that in a detention facility (for foreigners) it is possible to successfully find ways to give people the opportunity to communicate with the outside world in a modern way and to give them access to information so that their fundamental rights are better guaranteed.

It is indisputably important to ensure the safety of the detention centre and the people staying in it. It is also important that the expansion of communication opportunities does not run counter to the objective of placing a foreigner in the detention centre. With the help of modern technology and by regulating the internal working arrangements of the detention centre, the risks associated with the use of the internet and mobile phones could be mitigated quite effectively. Incurring high costs is not absolutely necessary to make supervision more effective. The communication of a detained foreigner can also be restricted in each specific case even on the basis of the law currently in force.

## **1. Access to the internet**

### **1.1. The relevance of the norms in dispute**

The administrative court in its decision of 20 March 2023 No 3-22-2355 declared [§ 23\(5\)](#) of the OLPEA and [§ 36<sup>3</sup>\(2\)](#) of the AGIPA unconstitutional insofar as these provisions fail to oblige ensuring access to the internet for persons staying in the detention centre.

The absence of any norm(s) obliging access to the internet has not caused an unconstitutional situation. The attitude should be the opposite: since neither the [AGIPA](#) nor the [OLPEA](#) lays down any prohibition on the use of the internet, the respondent has no basis to prevent the applicant's access to the requested websites. Namely, in connection with imprisonment, the Supreme Court (Supreme Court *en banc* judgment of 15 February 2023, [3-18-477](#), para. 41) has stated that had

the relevant legislation not laid down a (general) ban on the use of the internet, the detention facility would have no grounds for preventing access to the websites requested by the detained person. Moreover, in the opinion of the Supreme Court, a general ban on using the internet would be unconstitutional and invalid.

Thus, the norms cited by the administrative court are currently irrelevant for the purpose of ensuring access to the internet.

However, 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<sup>1</sup> of the [OLPEA](#), entitled “Detention Centre”, would be relevant instead of [§ 23\(5\)](#) of the OLEPA. It is there that the minimum requirements to be observed when detaining foreigners are mainly laid down. This interpretation is also supported, for example, by the explanations to [Draft Act No 110](#), entitled “Act on Amending the Obligation to Leave and Prohibition on Entry Act and the Act on Granting International Protection to Aliens (prevention of mass immigration)” (§ 1 clause 22, page 11). [Section 23\(5\)](#) of the [OLPEA](#) lays down a list of minimum services to be provided to a foreigner if the Police and Border Guard Board has placed a person to be expelled in a police jail or another place of detention when detaining the foreigner in the detention centre is not possible for some reason.

[Section 36<sup>3</sup>\(2\)](#) of the AGIPA adds translation and transport services to the services provided to an applicant for international protection in the detention centre. Should the Supreme Court interpret as unconstitutional the absence of the obligation to ensure internet access among the minimum requirements laid down by law, this provision is relevant alongside the norms located in Chapter 4<sup>1</sup> (“Detention Centre”) of the [OLPEA](#).

## **1.2. Objectives of the prohibition/restriction on the use of the internet**

Presumably, the purpose of the prohibition/restriction on the use of the internet by a foreigner in a detention centre is to protect the safety of the detention centre and the people in it. It is also important that the opportunities for communication do not run counter to the purpose of placing a foreigner in the detention centre (i.e. to ensure international protection proceedings or expulsion proceedings in a situation where there is a risk that the foreigner may abscond or poses a security risk). Obviously, the purpose of the prohibition/restriction on the use of the internet can also be considered to include the reasonable use of state money, which is ultimately in the service of protecting the internal peace of the country (similarly Supreme Court *en banc* judgment of 15 February 2023 [No 3-18-477](#), para. 65).

The restriction of the fundamental rights guaranteed in § 44(1) and § 27(1) of the [Constitution](#) may be justified by the fundamental rights of other persons or other constitutionally guaranteed values (Supreme Court *en banc* judgment of 15 February 2023, [No 3-18-477](#), para. 63). The above considerations can be regarded as legitimate objectives in restricting those fundamental rights.

## **1.3. The organisation of the use of the internet in the detention centre for foreigners**

The websites that foreigners may visit on the computers of the detention centre for the most part enable access to legal provisions, court decisions and the activities of the Chancellor of Justice and some international organisations (mainly dealing with the right to asylum). No access is provided in the detention centre to modern communication channels (e.g. Skype, WhatsApp, Facebook, e-

mail applications), foreign media or other portals which promptly cover current events (e.g. YouTube) or databases and/or applications that enable translation of text (e.g. Google Translate).

Thus, a similar restriction on the use of the internet is applied to the computers of the detention centre as in Estonian prisons. However, there are no convicted criminals or suspects of an offence in the detention centre. The [legal literature](#) has found that, for this reason, the conditions of detention of persons detained under the [OLPEA](#) or the [AGIPA](#) must be significantly more lenient than, for example, in prison. This also concerns the possibility for detained foreigners to use the internet.

Since the prohibition of mobile phones also essentially prohibits internet connection, the explanations given concerning the restriction on the use of the internet also apply with respect to the substantive constitutionality of [§ 25 clause 11](#) of the internal rules (section 2.4. of the opinion). The possibility of using the internet through a computer is also important even if the use of mobile phones (with internet access) were allowed in the centre, since not all foreigners necessarily have their own mobile phone.

In sections 1.4 to 1.5, I will explain why extremely limited access to the internet in the detention centre is unconstitutional. The same reasoning is also relevant in the case of a total ban on the use of the internet.

#### **1.4. The restriction on the use of the internet and the fundamental right to family (§ 27(1) [Constitution](#))**

The contact of a foreigner in the detention centre with their next of kin and children is inevitably restricted due to detention, but under the Constitution such interference by the state with family life is justified (second sentence of § 26 of the [Constitution](#)). However, under § 27(1) of the [Constitution](#), a foreigner in the detention centre and their next of kin and children are entitled to positive steps by the state that would help them to lead a family life as fully as possible.

The Chancellor has constantly emphasised (in [2016](#), [2019](#), [2022](#) and in the [summary](#) of the latest inspection visit) that foreigners in the detention centre should have more modern ways for communication with their next of kin. Currently, foreigners receive five euros worth of speaking time from the state every month, which must be enough for communication with the next of kin, representatives, the authorities, etc. Communicating by letter with family members living abroad can be cumbersome: in some cases, for example, due to the situation in the country, a loved one may not even have a permanent postal address. It is possible that the next of kin will also not be able to come for a visit to the detention centre. A foreigner using sign language as their mother tongue does not even have any effective and direct way of communicating with people outside the centre.

In ordinary life, the possibilities of making a (video) call via the internet (essentially free of charge) are used every day. In prisons in many European countries, inmates were given such an opportunity even earlier or it was created during the Covid-19 pandemic.<sup>1</sup> The experience of Estonian prisons also shows that information and communication technology can be safely used for video meetings. As far as the Chancellor of Justice is aware, for example, Tartu Prison has organised a video meeting for a prisoner who due to their special need and restrictions imposed on visits had no other option to communicate with their next of kin. The prison affirmed that the video call could be

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<sup>1</sup> See the Chancellor's [opinion of 20 October 2022](#) in constitutional review case No 3-18-477, page 7.

securely arranged via the Skype for Business program used in the prison and that such a meeting did not require particular preparation, expense or upgrading of technical possibilities.<sup>2</sup> The [Draft Act](#) has also considered it possible to create secure online solutions for video meetings in prisons.

Foreigners detained under the [OLPEA](#) or the [AGIPA](#) must be treated more leniently than prison inmates. Therefore, it is particularly incomprehensible why the detention centre has so far failed to find ways to introduce modern means of communication.

Facilitating communication between foreign detainees and their families (e.g. via Skype) has also been consistently recommended by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). In [2021](#) the CPT praised Sweden (para. 22) and in [2020](#) Finland (para. 29) for the possibility for foreigners to use computers with internet connection in the detention centres in these countries. According to information available to the Chancellor, in the Postojna detention centre in Slovenia, for example, foreigners can use their mobile phones and laptops during the day, and the centre provides them with free Wi-Fi. The UN High Commissioner for Refugees in [guidelines](#) (48. vii) on the detention of asylum-seekers, published as early as 2012, also pointed out that it may be important to maintain regular contact via the internet.

The Chancellor has [previously explained](#) that video calls would help to alleviate stress caused by detention and the accompanying lack of communication. Some people in the detention centre are very far from their homeland and loved ones and might not speak any other language besides their mother tongue. If detained people were able to make video calls with their next of kin, this would also reduce the burden on the centre's staff to offer foreigners opportunities for meaningful contact. This is particularly important where such contact with a foreigner is difficult for the centre's staff due to the language barrier or where a foreigner is forced to stay in solitary confinement due to circumstances (e.g. one woman in the female section). Maintaining contact with next of kin is also important for the person to be expelled to smoothly return to their home country or country of origin.<sup>3</sup>

Other ways of communicating via the internet also help to maintain meaningful relationships with next of kin living far away: for example, e-mail or Facebook. E-mail can be used to quickly transmit and also receive messages from next of kin. E-mail can be a good communication option in case a next of kin of the detained foreigner is unable or unwilling to make video calls. A foreigner could also use social networks to keep in touch with next of kin and thus maintain a sense of belonging.

If detained foreigners were allowed to use their mobile phones (with internet access), the state could also save on the costs of acquiring and maintaining computers with internet connection. In any case, this need would be significantly reduced, depending on arrangements for the use of mobile phones.

### **1.5. Restriction on the use of the internet and everyone's right to freely receive information disseminated for general use (§ 44(1) [Constitution](#))**

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<sup>2</sup> See the Chancellor's [opinion of 20 October 2022](#) in constitutional review case No 3-18-477, page 7, and the [summary](#) of the Chancellor's 2020 inspection visit to Tartu Prison cited therein.

<sup>3</sup> See also [Review into the Welfare in Detention of Vulnerable Persons](#), A report to the Home Office by Stephen Shaw, January 2016, p 6.129.

Similarly to Estonian prisons, the detention centre subscribes to newspapers, and television and radio channels can also be followed there. However, through these channels, a foreigner does not receive (or receives in a very limited form) information that could be useful for presenting and supporting their position in international protection or expulsion proceedings. The information they need can often only be found on specific websites or in specific environments.

Of course, a foreigner wants to search for materials necessary for their procedural position. Disputes relating to the status of foreigners inherently concern extremely vital and multifaceted aspects. Databases of court decisions and legislation are certainly important, but a foreigner may need to collect much more detailed and personal information, which is not available on the open pages of the detention centre's computers. A foreigner may also need the internet to promptly discuss the asylum application with their representative or to communicate about the expulsion proceedings. In the [Draft Act](#), it has been considered necessary and feasible to create the possibility of meeting officials (including counsel and representative) via a video link also in prisons.

Information published on social media platforms (e.g. the personal profile history visible only to the user) may be needed by a foreigner to substantiate their position in asylum application proceedings. Such information can be used to prove claims about one's private life (including sexual orientation, family ties) as well as persecution.

According to asylum lawyers, a foreigner may need access to a variety of materials: for example, history of activities on a dating site to substantiate information related to relationships that is important for the proceedings; information from the websites of the foreigner's country of origin related to their political activities; information proving the foreigner's persecution from websites linked to extremist groups; racist/homophobic material demonstrating the risk of persecution in the country of origin.<sup>4</sup>

Other countries have also considered information published on the websites of foreign governments, NGOs and foreign newspapers, as well as pages related to the acquisition of vocational and other education, to be important and relevant to the proceedings of a detained foreigner.<sup>5</sup>

The choice of accessible websites should not be merely a discretionary decision of the detention facility – or of the opposing party to international protection or expulsion proceedings. No suspicion may arise that the Police and Border Guard Board shapes the information available to detained foreigners on computers in order to strengthen their own procedural position. It has been found in the specialist literature that a detention facility cannot decide on behalf of a detained foreigner what information may be relevant and important to the proceedings of their particular case.<sup>6</sup>

People in the detention centre are generally not proficient in the national language, nor can this be assumed. Such people may find themselves in an information blackout and therefore run into difficulty both in matters concerning their asylum proceedings as well as the daily life at the centre. If foreigners could independently use text translation databases and/or applications (e.g. Google

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<sup>4</sup> Immigration Law Practitioners' Association. [ILPA Comments on the Home Office Draft Detention Services Order: Detainee Access to the Internet](#), 26 February 2016, page 3.

<sup>5</sup> UK Home Office, Detention Services Order 04/2016, [Detainee Access to the Internet](#), 2020, p 10.

<sup>6</sup> Immigration Law Practitioners' Association. [ILPA Comments on the Home Office Draft Detention Services Order: Detainee Access to the Internet](#), 26 February 2016, page 2.



Translate), this would also reduce the burden on officials, as they currently have to orally summarise documents for detainees.

A large number of foreigners in the centre speak Russian as a native language or at a good level of proficiency. Although some legal acts (e.g the [AGIPA](#), procedural codes, the [State-funded Legal Aid Act](#)) are also available in Russian online via the website of the *Riigi Teataja* gazette, they are located at an address with a different domain name (juristaitab.ee/ru), which is not included in the list of websites allowed on the detention centre's computers set out in para. 45 of the administrative court decision of 20 March 2023.

Persons subject to expulsion may need to search the internet for information in order to smoothly return to their country of origin. For example, a person may need information on how to find a place to live and look for a job. Information on services (including social services and benefits) and general living arrangements in the country of origin can also be found on the internet.

The experience gained by other countries in mitigating the risks of using the internet may also be useful in the Estonian detention centre. For example, secure computer terminals can be used where a detainee has no possibility to access USB ports. It has also been considered possible to block various functions: for example, downloading, saving and sharing software and files. A search for certain sensitive words or phrases can be excluded on a search engine. It is possible to personalise the use of information and communication technology, to monitor its possible misuse through regularly stored audit trails and to store, by means of alerts, information about attempts to breach the firewall.<sup>7</sup>

International practice demonstrates that even in prisons opportunities have been found to make a significantly larger number of websites available to detained people than is allowed in Estonian detention facilities. For example, as of 2017, inmates in Lithuanian prisons could visit the websites of 110 institutions, and by now the list has been further extended. The relevant list in Finnish prisons also includes several hundred websites.<sup>8</sup>

I have [previously explained](#) that lack of information and communication and scarcity of meaningful activities causes stress in people, which significantly reduces the willingness of detained people to cooperate. This may lead to defiant and aggressive behaviour and endanger the life and health of others in the detention centre. Studies have found that allowing the use of information and communication technology in prison reduces intra-prison violence and improves the internal prison atmosphere.<sup>9</sup> This also applies to detention of foreigners.

For these reasons, the prohibition on internet access, or the number of websites currently accessible in the centre, excessively restricts the fundamental right of a foreigner in the detention centre 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](#).

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<sup>7</sup> Office of Inspector of Custodial Services, *The Digital Divide: Access to digital technology for people in custody*, 2018, pp 2–3; N. Champion, K. Edgar, *Through the Gateway: How computers can transform rehabilitation*, Prison Reform Trust, 2013, p 6. See also the Chancellor's [opinion of 20 October 2022](#) in constitutional review case No 3-18-477.

<sup>8</sup> P. Puolakka, [Towards digitalisation of prisons: Finland's Smart Prison Project](#), Penal Reform International, 2021. See also the Chancellor's [opinion of 20 October 2022](#) in constitutional review case No 3-18-477.

<sup>9</sup> C. McDougall, D. A. S. Pearson, D. J. Torgerson, M. Garcia-Reyes, [The effect of digital technology on prisoner behavior and reoffending: a natural stepped-wedge design](#), *Journal of Experimental Criminology*, Vol 13, 2017, pp 455–482.

## 2. The prohibition on the use of mobile phones

### 2.1. The relevance of the norms in dispute

[Section 25 clause 11](#) of the internal rules is relevant since it prohibits all foreigners in the detention centre from using mobile phones. Without this provision, the Police and Border Guard Board would have no basis to prohibit the use of a mobile phone in the detention centre.

### 2.2. Formal constitutionality of [§ 25 clause 11](#) of the internal rules

[Section 25 clause 11](#) of the internal rules contravenes the first sentence of § 3(1) and § 94(2) of the [Constitution](#) insofar 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 specific circumstances.

In line with the first sentence of § 3 of the [Constitution](#), state power is exercised solely pursuant to the Constitution and laws in conformity therewith. This means that regulations and other norms that are lower than a law in the hierarchy of legislation must comply with the norms of the law. Under § 94(2) of the [Constitution](#) and [§ 50\(1\)](#) of the Government of the Republic Act, a minister issues regulations on the basis of and for implementing a law. Delegating to the executive an issue within the competence of the legislator, and the executive authority's interference with fundamental rights, is only allowed on the basis of a delegating norm laid down by law and compatible with the Constitution (Supreme Court Constitutional Review Chamber judgment of 17 December 2019, [5-19-40](#), para. 36). Under § 90(1) of the Administrative Procedure Act, a regulation may be issued only if a delegating norm for this exists in a law, and in accordance with the limits, spirit and purpose of the delegating norm.

As already noted in section 1.1. of the opinion, the rights guaranteed to a foreigner upon their detention are set out mostly in Chapter 4<sup>1</sup>, entitled “Detention Centre”, of the [OLPEA](#). A foreigner's contact with the outside world through means of communication is regulated in [§ 26<sup>11</sup>](#) of the OLPEA. In line with the first subsection of that provision, a foreigner in the detention centre has 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. Under subsection 4, 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 foreigner if this may endanger the detention centre's internal rules or impede enforcement of expulsion.

[Section 26<sup>11</sup>\(1\)](#) of the OLPEA does not specify what kind of a phone a foreigner may use for their own money. Yet, in the [Imprisonment Act](#), which regulates the conditions of detention, it has been deemed important to exclude the mobile phone from public communication channels: “Prisoners have the right to correspondence and use of the telephone (except mobile phone) [...]” ([§ 28\(1\)](#) Imprisonment Act). This specification entered into force on [1 April 2003](#). Chapter 4<sup>1</sup> of the [OLPEA entered into force on 1 March 2003](#), i.e. one month before.

The history of the two provisions does not reveal why it was decided to formulate the provisions in this way. Since the two legal acts were amended fairly at the same time, it cannot be conceded that at the time of adoption of the relevant amendments to the [OLPEA](#) the use of mobile telephones as public communication channels was considered unthinkable. Consequently, the Riigikogu did not consider it necessary to completely prohibit by law the communication of detained foreigners by a mobile phone. Nor was such a ban imposed by [amendments introduced to the OLPEA in](#)



[2020](#), which, inter alia, removed from [§ 26<sup>11</sup>\(1\)](#) of the OLPEA the part of the sentence which made the use of telephones and other public communication channels dependent on the technical capacity of the detention centre.

The reference in [§ 26<sup>11</sup>\(1\)](#) of the OLPEA to the internal rules of the detention centre, which set out more precise arrangements for communication, cannot be regarded as a delegating norm allowing to completely exclude the mobile phone as a public communication channel. “More precise arrangements” should be understood as meaning the right of the body issuing a regulation to specify, for example, the time of using the telephone, the manner of covering the costs (e.g. with a phone card), and the like.

The wording of [§ 26<sup>11</sup>\(4\)](#) of the OLPEA also suggests that the use of a mobile telephone in the detention centre should not be completely prohibited and that this prohibition may not automatically be applied to all foreigners.

[Section 26<sup>21</sup>](#) of the OLPEA empowers the Minister of the Interior to establish the internal rules of the detention centre. According to [§ 26<sup>21</sup>\(2\) clause 4](#) of the OLPEA, the internal rules must lay down the list of substances and items prohibited for a foreigner. The substance of the delegating norm is further specified by [§ 26<sup>21</sup>\(3\)](#) of the OLPEA, under which it is prohibited to keep in the detention centre substances and items which: (1) may endanger the life and 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 Supreme Court has acknowledged that a detention facility enjoys a significant margin of appreciation in assessing the danger of a substance or item and prohibiting it for a detained person under the internal rules (Supreme Court Constitutional Review Chamber judgment of 17 December 2019, [5-19-40](#), para. 41). It is not excluded that it is, in principle, possible to use a mobile phone (with internet connection) in the detention centre in such a way as to contribute to the emergence of one of the situations laid down by [§ 26<sup>21</sup>\(3\)](#) of the OLPEA.

Nevertheless, it is not permitted to prohibit by a ministerial regulation the use of a specific item and, through this, restrict the communication of a detained person through one particular communication channel not prohibited by a special statutory norm regulating communication. In this way, legislation ranking lower than a law could create situations where the rights laid down by law would not actually be guaranteed.

### **2.3. The objectives of the prohibition on the use of mobile phones**

The following is relevant should the Supreme Court find that [§ 25 clause 11](#) of the internal rules is formally compatible with the Constitution.

The objectives of the ban on the use of mobile phones are the same as those of the prohibition/restriction on the use of the internet discussed in section 1.2.

### **2.4. [Section 25 clause 11](#) of the internal rules and the fundamental right to family ([§ 27\(1\) Constitution](#)) and everyone’s right to freely receive information disseminated for general use ([§ 44\(1\) Constitution](#))**

A total ban on the use of a mobile telephone is neither proportionate nor therefore lawful. The prohibition does not enable taking account of the threat posed by a particular foreigner, nor of their (prior) conduct or the purpose of their placement in the detention centre (to ensure carrying out international protection or expulsion proceedings in a situation where, for example, there is a risk of the foreigner fleeing or a security threat posed by the foreigner themselves). Therefore, the ban excessively restricts the fundamental rights of at least some of the foreigners in the detention centre. One should agree with the assessment of the administrative court (para. 64) that the restriction on the use of mobile phones is particularly intense since access to the internet is rather limited on the centre's fixed computers.

A complete ban on the use of mobile phones in the detention centre can lead to absurd situations. For instance, foreigners who have been [detained at Tallinn Airport](#) due to, for example, an expired visa and who are therefore unable to enter Estonia, will also be taken to the detention centre during a certain period of time. Because of the ban, they cannot use their mobile phone or a personal computer. At the same time, it is assumed that the foreigner organises their own return flight, i.e. finds a suitable airline, obtains a flight ticket, etc. A foreigner may also need to communicate with their next of kin or with people who had to receive them in Estonia, or with an employer. A foreigner in such a situation will also not receive help from computers with internet access located in the accommodation departments of the detention centre, since, according to the centre's internal working arrangements, a foreigner should not come into contact with other foreigners before the initial medical check. Since the computers in the centre's accommodation departments have very limited access to the internet, a detainee is also unable to use it to make the necessary preparations for their departure.

In section 1.4, I explained why foreigners in the centre should have more modern ways to communicate with their next of kin. Using a mobile phone with internet connection enables a person to communicate with their next of kin even more flexibly and privately. The value of photos and videos on a mobile phone for a person who has to stay away from loved ones cannot be underestimated either. Phone calls to many countries are very expensive, and this also imposes a limit on the speaking time, as the state gives a detained foreigner five euros worth of calling time every month. Over the internet (e.g. Skype, WhatsApp, Facebook), a foreigner would have much wider opportunities to keep in touch with next of kin living far away.

A mobile phone could be used to contact a representative in asylum and expulsion proceedings much more effectively and to discuss the circumstances concerning the foreigner's position. It would be much easier to arrange meetings, learn languages and translate the necessary materials. With a mobile phone, a person could promptly communicate with their previous family doctor or another person who is familiar with their health. Experts in the field have stressed that a cell phone can prove to be a personal lifeline when detained, enabling access to confidential psychological support from both the loved ones and mental health professionals.<sup>10</sup> Access to local media and the media in the country of origin is also of no minor importance. Also, a mobile phone can be a valuable tool in recording possible abuses.

Allowing mobile phones (with internet access) is also beneficial for the detention centre: more regular communication with the loved ones and the outside world in general has a positive effect on the mental health of the detained person. This has been acknowledged by both the officials involved in detention and the detained foreigners. It can also alleviate concerns about communication and contact with the outside world in general.<sup>11</sup>

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<sup>10</sup> Australian Lawyers Alliance, [The legacy of the asylum seeker phone ban](#), 19 November 2020.

<sup>11</sup> Australian Human Rights Commission, [Risk management in immigration detention](#), 2019, page 57.

The CPT has repeatedly recommended that detained foreigners should be allowed to use their personal mobile phones or that regular access to mobile phones be ensured for them (see e.g. CPT's recommendations to Kosovo in [2021](#), para. 57; CPT's recommendations to Malta in [2021](#), para. 56). In 2021, the CPT praised [Sweden](#) (para. 25) and [Finland](#) (para. 32) that foreigners in the detention centres there could make calls with their own mobile phones. In other countries, too, in places of detention of foreigners, ways have been found to facilitate people's communication with next of kin in a modern way. For example, in several places of detention for foreigners in Belgium, residents were allowed to use smartphones in their rooms during the Covid-19 crisis.<sup>12</sup> In the recommendations given to Lithuania in [2023](#), the CPT acknowledged (para. 147) that detained foreigners could normally keep abreast of the news, watch programmes and generally interact with the outside world through a mobile phone with internet connection.

No doubt that the safety of the people who are staying and working in a detention facility must be guaranteed. Also, (partial) authorisation of mobile phones requires additional attention from the staff to ensure safety. At the same time, the practice in other countries shows that mobile phone abuses occur very rarely, and severe cases are rather the exception.<sup>13</sup>

The detention centre can mitigate the risks that may arise from using an internet-connected mobile phone with reasonable efforts. The legislation can, if necessary, set restrictions on the use of a mobile phone in case it may endanger the life or health of the person themselves or others in the centre, if it poses a significant threat to the privacy or general security of the people in the centre.

On the organisational side, it is possible, for example, to stipulate that the phone may be used during a certain period of the day and/or in a specific room(s). As far as the Chancellor of Justice is aware, such a solution is used, for example, in Latvia, where foreigners can use their mobile phone for at least two hours a day in a meeting room equipped with free internet access. Also in [recommendations](#) given to Denmark in 2020 (para. 130) the CPT noted that it saw no reason why detained foreigners should not have regular access to their mobile phones, for instance in a specifically dedicated room. After all, it is possible to specify the use of which mobile phone functions is prohibited (e.g. photographing and/or filming other foreigners, staff, the centre's premises) and which ones are allowed. If necessary, an individual risk analysis can be carried out, which will help to assess how likely a particular foreigner is to abuse the device.

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 coercive or involuntary treatment and those providing the closed childcare institution service under the [Social Welfare Act](#). Different solutions have been found to ensure the safety of the institution and the people staying there. In the [Emajõe study centre of Maarjamaa Education College](#) (pp 4-5), the [coercive treatment department of the Psychiatric Clinic of Viljandi Hospital Foundation](#) (pp 6-8) and the [psychiatric clinic of the North Estonia Medical Centre](#) (pp 5-6) the use of the telephone is limited per day. Such a time limit should not be too strict, so that it would prevent a person from having a meaningful conversation. The calling arrangements should be flexible enough to allow a person to make a call, if necessary, also during 'off-hours' (e.g. in an urgent private or procedural matter). In the recommendation to the [Emajõe study centre of Maarjamaa Education College](#), I referred to the possibility of allowing a person to communicate with their next of kin in a room where the call can be visually monitored (e.g. via video surveillance, from a door window) and thus avoid abuses. Of course, it is important that the content of telephone conversations remains private (§ 26

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<sup>12</sup> Asylum Information Database, [Country Report: conditions in detention facilities, Belgium](#).

<sup>13</sup> Australian Human Rights Commission, [Risk management in immigration detention](#), 2019, page 58.

[Constitution](#)), except in a situation laid down by [§ 26<sup>11</sup>\(3\)](#) of the OLPEA. I explained to the [psychiatric clinic of the North Estonia Medical Centre](#) (pp 5-6) that if a person uses a mobile phone camera to film what is happening in the institution, their right of using a mobile phone may be restricted since their activity significantly endangers the privacy of persons under treatment.

Even now, the detention centre may restrict telephone calls and the use of other means of communication by a foreigner under [§ 26<sup>11</sup>\(4\)](#) of the OLPEA if such communication may endanger the internal rules of the detention centre or impede enforcement of expulsion. In more serious cases, it is also allowed to restrict a foreigner's freedom of communication and prohibit the use of personal belongings in the course of applying the security measures laid down by the [OLPEA](#).

In principle, it is also possible to plan an escape and/or endanger the security of the centre by means of fixed telephones already in use in the detention centre. It is also possible to make incoming calls to these phones. As far as the Chancellor of Justice is aware, the centre's officials do not constantly stand next to the telephone sets and do not monitor the content of each conversation. This would also not be allowed.

For the above reasons, I find that the ban on the use of mobile phones excessively restricts the fundamental right of a foreigner in the detention centre to the protection of family life (§ 27(1) [Constitution](#)) and everyone's right to freely receive information disseminated for general use (§ 44(1) [Constitution](#)).

Yours sincerely,

*/ signed digitally/*

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