THE CONSTITUTIONAL COURT
OF THE REPUBLIC OF LATVIA

DECISION
ON TERMINATING LEGAL PROCEEDINGS
IN CASE No. 2013-11-01

Riga *3 April 2014*

The Constitutional Court of the Republic of Latvia comprised of: chairperson of the court hearing Aija Branta, Justices Kaspars Balodis, Kristīne Krūma, Gunārs Kusiņš, Uldis Ķinis and Sanita Osipova,

having regard to the constitutional complaint submitted by Igors Jegorovs,

on the basis of Article 85 of the Satversme of the Republic of Latvia and Para 1 of Section 16 and Para 11 of Section 17(1), as well Section 19^2 and Section 28^1 of the Constitutional Court Law,

at a court hearing of 4 March 2014 examined in written procedure the case "On the Compliance of Section 246(2) of the Criminal Procedure Law with the first sentence of Article 92 of the Satversme of the Republic of Latvia",

established:

1. On 25 April 2005 the Saeima of the Republic of Latvia (hereinafter – the Saeima) adopted the Criminal Procedure Law (hereinafter also – CPL), which

entered into effect on 1 October 2005. Until 1 October 2005 the procedure in criminal cases within the territory of the Republic of Latvia was defined by the Latvian Criminal Procedure Code. By adopting CPL, the legislator significantly amended legal regulation on criminal procedure.

1.1. Initially the second part of CPL Section 246 "Application of a Procedural Coercive Measure" provided: "A person, who exercises the right to defence, has the right to familiarize himself with the procedural documents, the information on facts recorded wherein have been used as the basis for applying procedural coercive measure. If such familiarisation threatens pre-trial investigation or important interests of a third person or society, by the decisions of a person in charge of proceedings this can be postponed until the respective threat is eliminated" (hereinafter – the initial wording of the contested norm). Whereas the first part of CPL Section 396 "Prohibition on the Divulging of Information Acquired during Pre-trial Criminal Proceedings" provided: "Information that a person, who is involved in criminal proceedings, has acquired by exercising his procedural rights or by performing his procedural obligations, may be divulged only with the permission of the person in charge of proceedings and in the amount specified by him."

1.2. On 12 March 2009 the Saeima adopted law "Amendments to the Criminal Procedure Law", which entered into force on 1 July 2009 and by which the second part of CPL Section 246 was expressed in the following wording: "Prior to taking a decision on the application of such security measure, which is related to the deprivation of liberty, the person directing the proceedings shall issue a copy of the proposal, where the selection of a security measure is justified, to the person, who has the right to defence" (hereinafter – the contested norm). Whereas the first part in CPL Section 396 was expressed in the following wording: "Information acquired in the pre-trial criminal proceedings until the completion thereof shall be divulged only with the permission of an investigator or a public prosecutor and in the amount specified by him or her. The investigator or public prosecutor shall

notify in writing a person regarding the criminal liability for divulgement of such information."

1.3. On 23 May 2013 the Saeima adopted the law "Amendments to the Criminal Procedure Law" (hereinafter – Amendments to CPL of 23 May 2013), which entered into force on 27 October 2013.

With the Amendments to CPL of 23 May 2013 the contested norm was expressed in the following wording: "Prior to taking a decision to apply the security measure which is related to deprivation of liberty, the person directing the proceedings shall issue to the person who has the right to defence a copy of the proposal which contains a justification for the selection of the particular security measure with considerations based on the materials of the case" (hereinafter – the new wording of the contested norm). The aforementioned amendments did not provide a new wording of CPL Section 396(1); however, Section 60^2 "Fundamental Rights of a Person who has the Right to Defence in Criminal Proceedings" was added to CPL, Para 1 of the third part of this Section provides that the detained, as well as the suspect or the accused, to whom a security measure related to deprivation of liberty has been applied, has the right "to become familiar with the materials of the case which constitute the basis for the proposal to apply a security measure related to deprivation of liberty insofar as such access does not infringe the fundamental rights of other persons, the interests of the society and does not interfere with reaching of the objective of the criminal proceedings".

2. The applicant – Igors Jegorovs (hereinafter – the Applicant) – holds that the contested norms are incompatible with the first sentence of Article 92 of the Satversme.

2.1. The Applicant notes that the contested norm restricts his right to a fair trial in the pre-trial stage of criminal proceedings, when the decision on applying detention is adopted. I.e., allegedly the contested norm provided that a person, with regard to who the person directing the proceedings proposed application of detention, had the right to familiarize himself with the proposal by the person directing the proceedings addressed to the investigative judge regarding application

of detention. However, neither this, nor any other norms of CPL envisage the possibility for the respective person to familiarise himself with those materials of the criminal proceedings that the person directing the proceedings has used to justify his proposal on applying the detention.

The Applicant holds that the possibility for a person to familiarize himself with the proposal made by the person in charge of the proceedings on applying detention does not ensure that a person's right to defence is exercised in the pre-trial criminal proceedings. It is alleged that a person has been denied the right to express his opinion comprehensively on the validity of the security measure and to contest effectively the substantiation provided by the person in charge of the proceedings. Thus, allegedly, the principle of the equality of parties and the adversarial principle are not complied with and, hence, the right to a fair trial is violated.

It is contended that the regulation included in the contested norm restricts the right to a fair trial of a person with regard to whom the decision on detention is taken. The Applicant assumes that the restriction upon fundamental rights has a legitimate aim – the protection of other persons' rights, since the materials of criminal proceedings could point to specific evidence, among others, witness statements provided by persons, and, thus, a person, with regard to the detention of who a decision is taken, when being at liberty could interfere with the investigation, *inter alia*, by exerting influence upon the aforementioned persons.

The Applicant notes that the restriction that the contested norm comprises is not compensated for by the institution of the investigative judge in criminal proceedings. In practice investigative judge, allegedly, generally refuses to familiarize persons with any materials of criminal proceedings whatsoever. Hence, it is contended that an investigative judge cannot be considered as being "unbiased and independent" court.

The Applicant expresses the opinion that the contested norm permits concealing of information in criminal proceedings. However, a person, with regard to who the decision on detention is taken, should be ensured the possibility to familiarize himself with the evidence, which, in the opinion of the person in charge

of proceedings, justifies application of detention. Allegedly, the case law of the European Court of Human Rights (hereinafter – ECHR) in cases regarding application of detention also points to the aforementioned.

2.2. After having familiarized himself with the materials of the case, the Applicant notes that, essentially, he upholds the interpretation of the criminal procedure norms that the documents submitted by the Saeima comprise. However, the Applicant underscores that in practice the persons directing the criminal proceedings interpret the obligations established in CPL Section 12 as narrowly as possible. Therefore the situation, where CPL does not provide to the person, with regard to who the decision on detention is adopted, the right to familiarize himself with the materials of criminal procedure, which, in the opinion of the person directing the proceedings, justify the need to apply the detention, can be resolved neither by interpreting legal norms, nor by the decision on terminating legal proceedings in the case before the Constitutional Court.

3. The institution, which adopted the contested act, – the Saeima – holds that the contested norm complies with the first sentence in Article 92 of the Satversme.

3.1. The Saeima notes that the State has the obligation to ensure to a person the possibility to familiarize himself with the documents, which serve as the basis for the request by the person directing the proceedings to apply a security measure related to deprivation of liberty to this person. Allegedly, the contested norm does not prohibit the person directing the proceedings to familiarize the person with information that serves as the basis for the request to apply detention to this person. The contested norm is said to establish the obligation of the person in charge of the proceedings to issue to the person a copy of the proposal that justifies the selection of the security measure. Moreover, pursuant to CPL Section 12(1), the person directing the proceedings is obliged, in performing certain procedural activities, to verify, whether in performing these activities persons' fundamental rights would not be infringed upon. Thus, the person directing the proceedings has the

obligation to fill out the proposal referred to above in accordance with the requirements that follow from Article 92 of the Satversme. I.e., this document should make it clear both to the investigative judge and the person and his counsel what facts and considerations have been used as the basis for applying to a person a security measure related to the deprivation of liberty.

The Saeima underscores that pursuant to CPL Section 271 the decision on applying detention is adopted by the investigative judge and that pursuant to CPL Section 40 the investigative judge has the obligation to control, whether human rights are respected in criminal proceedings. In those cases, where the person directing the proceedings has not filled out the respective proposal in an appropriate way, the investigative judge may ensure that a person's fundamental rights are respected by informing the person about those facts and considerations, which justify the need of applying a security measure related to the deprivation of liberty to the person.

It is alleged that the contested norm *per se* does not prohibit persons from familiarising themselves with the materials of the case. However, a restriction is said to follow from CPL Section 375(1), which provides: "During criminal proceedings, the materials located in the criminal case shall be a secret of the investigation, and the officials who perform the criminal proceedings, as well as the persons to whom the referred to officials present the relevant materials in accordance with the procedure provided for in this Law, shall be permitted to familiarize themselves with such materials." This restriction is said to have a legitimate aim – public safety and the protection of other persons' rights. CPL, allegedly, provides for sufficient procedural tools that both the person directing the proceedings and the investigative judge can ensure to a person, who has the right to defence, also the right to familiarize himself with the considerations regarding the need to apply the particular security measure.

3.2. At the same time the Saeima notes that in the case under examination there are grounds for terminating legal proceedings.

The Saeima recognizes that there had been deficiencies in the application of the contested norm. The Minister for Justice had also pointed to them, proposing

establishing stricter requirements with regard to the proposal referred to in the contested norm to improve the quality of this document and ensure that the rights of a person, with regard to whom application of a security measure related to the deprivation of liberty is requested, are effectively exercised. The Saeima responded to the deficiencies in the application of the contested norm, and therefore with the Amendments to CPL of 23 May 2013 expressed it in new wording, specifying the content of the proposal on applying detention. In addition to this, Section 60^2 had been added to CPL, providing *expressis verbis* that a person has the right "to become familiar with the materials of the case which constitute the basis for the proposal to apply a security measure related to deprivation of liberty". The amendments referred to above had been introduced, *inter alia*, also to meet the requirements set by the Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (hereinafter – Directive 2012/13/EU.

The Saeima, referring to Para 2 and Para 6 of Section 29(1) of the Constitutional Court Law, requests termination of legal proceedings in the case, since the contested norm has become invalid; moreover, the possible violations of a person's fundamental rights had not been caused by the contested norm, but by its application in practice.

4. The summoned person – the Ministry of Justice of the Republic of Latvia (hereinafter – the Ministry of Justice) – holds that the contested norm, if it is examined in interconnection with other norms of CPL, complies with the first sentence of Article 92 of the Satversme.

The Ministry of Justice notes that the rights established in Article 92 of the Satversme may be restricted. The Ministry of Justice informs that the contested norms have been drafted to deal with problems that are linked to divulging a secret of the investigation. The divulging of the secret of investigation may violate the fundamental right of other persons, in particular – those of victims, to fair regulation of criminal law relationships. Pursuant to CPL Section 375(1) the materials located in a criminal case during criminal proceedings are a secret of the

investigation and the person directing the proceedings may decide the persons to whom and the amount in which these materials should be presented. The purpose of this restriction is to protect a secret of the investigation. The restriction was established by law and it has a legitimate aim – the protection of public interests. This restriction should be applied in compliance with the principle of proportionality. Moreover, it is alleged that it is the contested norm, which ensures the right of the suspect and the accused to familiarize themselves with the copy of the proposal drafted by the person directing the proceedings and refers to justification for selecting the particular security measure by specific considerations, based upon the materials in the case, before the decision on applying the security measure – detention – is adopted.

The Ministry of Justice underscored that the contested norm did not prohibit from familiarizing a person with the materials of the criminal proceedings and, thus, it did not comprise any restriction upon a person's fundamental rights.

With regard to the Amendments to CPL of 23 May 2013, the Ministry of Justice informs that these had been elaborated by a working group, established by the Minister for Justice, with the aim of examining the compliance of CPL with the requirements of the Directive 2012/13/EU. The working group had arrived at the conclusion that stricter requirements with regard to the proposal that the contested norm envisaged should be set. The aim of the Amendments to CPL of 23 May 201 is to ensure compliance with the Directive 2012/13/EU, as well as to improve the application of the contested norm.

5. The summoned person – the Ombudsman of the Republic of Latvia (hereinafter – the Ombudsman) – holds that the contested norm is incompatible with the first sentence of Article 92 of the Satversme.

The Ombudsman notes: in order for a person to exercise the rights that are envisaged in the second part of Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention), it is important to ensure to a person the right to familiarize himself

with the facts and circumstances that serve as the basis for restricting his rights and freedoms.

The principle of procedural equality is said to be an important component in the right to a fair trial. In accordance with this principle, a fair balance should be established in the rights of the parties to the proceedings, i.e., everyone should be ensured the possibility to use procedural measures and no party to the proceedings may be placed in a more adverse situation compared to others. It is said that obligation of the State to ensure such procedural regulation on hearing cases that would effectively ensure abiding by it follows from the principle referred to above.

Allegedly, the contested norm restricts the right of a person who has right to defence and his counsel to familiarize themselves with the materials of the criminal proceedings, which is the basis for applying detention.

The restriction has been established by law and it has a legitimate aim – protecting the rights of other persons, who are involved in the criminal proceedings (for example, victims or witnesses) and ensuring unhindered course of the criminal proceedings. The contested norm is said to ensure that the information included in the materials of the criminal proceedings is not divulged to a person, who might influence victims or witnesses. Therefore only that information, which the person directing the proceedings has considered necessary to include into the proposal that the contested norm refers to, is available to the person and his counsel. This could cause a situation, where the person and his counsel are being misled regarding the true amount of information. Likewise, the contested norm could become the cause of biased interpretation of the materials in criminal proceedings. The contested norm does not envisage case-by-case assessment, which should be recognised as being a more lenient measure for reaching the legitimate aim.

In addition, the Ombudsman notes that the Amendments to CPL of 23 May 2013 could eliminate the deficiencies of the contested norm, if applied in accordance with their aim and meaning, by conducting an individual assessment on case-by-case basis.

6. The summoned person – the Prosecutor's General Office of the Republic of Latvia (hereinafter – the Prosecutor's General Office) – holds that the contested norm complies with the first sentence of Article 92 of the Satversme.

The Prosecutor's General Office holds that the need for effective investigation and the protection of public interests justify the fact that a large part of information obtained during investigation is a secret of the investigation and is not divulged, so that the suspects and the accused could not change the meaning and the content of evidence maliciously, as well as unlawfully influence the persons who testify. The contested norm is said to allow reaching this legitimate aim at the same time respecting the right to defence, since it envisages the right of the person to receive a copy of the proposal made by the person directing the proceedings. Before the contested norm was adopted the person had no right to receive a copy of such document.

Allegedly, the contested norm establishes neither a prohibition, nor an obligation for the person directing the proceedings to familiarize the person, to whom detention is applied, with materials in the case. Neither do other CPL norms establish such an obligation. Whereas CPL Section 375(1) establishes the status of a secret of the investigation for the materials of criminal proceedings. The person directing the proceedings must apply CPL norms in compliance with human rights requirements, and the contested norm could have been interpreted and applied in compliance with Article 92 of the Satversme.

The Prosecutor's General Office upholds the request of the Saeima regarding termination of legal proceedings in the case, since the infringement upon a person's fundamental rights is not caused by the contested norm itself, but by the application of this norm in practice. Moreover, it should be taken into consideration that the legislator, in response to the deficiencies in the practical application of the contested norm, has amended CPL and the contested norm has already become invalid.

7. The summoned person – professor of the University of Latvia, Faculty of Law, Dr. iur. Kristīne Strada-Rozenberga – holds that the contested norm is incompatible with the first sentence of Article 92 of the Satversme.

K. Strada-Rozenberga notes that the contested norm has substituted the rights of a suspect or an accused to familiarise himself with concrete procedural documents that are used to justify the selection of a security measure with the obligation of the person directing the proceedings to issue a copy of the proposal to apply detention. Therefore, in order to ensure the right to defence to a person to whom detention is applied, he should be issued such proposal regarding application of a security measure that would indicate in as detailed manner as possible the procedural documents and the information they contain that is used to substantiate this proposal. However, in the practice of applying the contested norm there had been significant deficiencies exactly as regards the substantiation included in the proposal. Moreover, in such cases persons had not been ensured access to those materials of the case that had been used to justify application of detention. Such approach is said to be incompatible with the ECHR practice. The process of applying detention should ensure the adversarial principle [the principle of equal opportunities to parties] between the person directing the proceedings and the defence. This principle is said to be violated if the defence is denied access to those documents of investigation that contain information, on the basis of which a decision on applying or prolonging detention is taken. The lack of sufficiently precise and complete information on the substantiation for applying a coercive measure should be recognised as being an effective obstacle to defence. Therefore to ensure to a person a real possibility to provide counter-arguments with regard to the necessity of detention, he should be informed about the facts, on the basis of which a conclusion is made regarding the presence of grounds for applying a coercive measure.

Amendments to CPL of 23 May 2013 could promote the safeguarding of right of those persons who have the right to defence in the pre-trial criminal proceedings and improve the situation regarding the compatibility of the new wording of the contested norm with the first sentence in Article 92 of the

Satversme. However, the words "a copy of the proposal which contains a justification for the selection of the particular security measure with considerations based on the materials of the case" that the contested norm in its new wording comprises, as well as the reservation included in Para 1 of CPL Section 60^2 (3) "insofar as such access does not infringe the fundamental rights of other persons, the interests of the society and does not interfere with reaching of the objective of the criminal proceedings" in the practice of applying law, allegedly, does not ensure compatibility with the requirements of the Convention and the Satversme. Moreover, it is contended that the CPL regulation does not comprise any requirements as regards the need of control by court in those cases, where a person's rights to familiarize himself with the materials of the case are restricted in pre-trial criminal proceedings. I.e., a person has no right to contest or appeal against such a decision.

In assessing the new wording of the contested norm, K. Strada-Rozenberga expressed the opinion that Directive 2012/13/EU had been transposed into Latvian legal acts incompletely and not in compliance with its requirements.

8. The Regional Courts of Kurzeme, Latgale, Rīga, Vidzeme and Zemgale (hereinafter jointly – regional courts) that implement control over the decisions taken by investigative judges on applying detention have provided information on the practice of applying the contested norm.

The regional courts note that the contested norm does not deny a person or his counsel the possibility to familiarize himself, pursuant to CPL Section 375(1), with the information on the basis of which the person directing the proceedings has proposed applying detention to the person.

In general, significant deficiencies in the application of the contested norm in practice are not observed. However, in some cases the proposals made by a person directing the proceedings to apply detention are formal and do not refer to particular facts that would justify the need to apply detention. The regional courts have already received complaints because persons have been denied the right to exercise their defence in full, since the information and evidence, which the person

directing the proceedings has used to justify the proposal on applying detention were not available. Such complaints are examined by regional courts, and in some cases the respective decisions are revoked, *inter alia*, also in those case, where it is established that the case materials of criminal proceedings cannot be regarded as sufficient grounds for applying detention.

The regional courts draw attention to the fact that the new wording of the contested norm in interconnection with the new CPL Section 60^2 will eliminate the deficiencies that could be identified in the practice of applying the contested norm and will promote respecting the human rights of a person, who has the right to defence, in pre-trial criminal proceedings.

The Constitutional Court found:

9. On 27 October 2013 the contested norm became invalid. Therefore the Saeima requests terminating legal proceedings in the case under review on the basis of Para 2 of Section 29(1) of the Constitutional Court Law.

The Saeima also points to the fact that in the case under review legal proceedings cannot be continued, since the infringement upon a person's fundamental rights is not caused by the contested norm, but by its application in practice. This, in turn, is said to be the grounds for terminating legal proceedings in accordance with Para 6 of Section 29(1) of the Constitutional Court Law.

If a request to terminate legal proceedings has been expressed in a case, then the Constitutional Court usually decides on this issue first of all, unless in order to adopt this decision some aspects of the case should be examined on their merits (*see, for example, Judgement of 19 October 2011 by the Constitutional Court in Case No. 2010-71-01, Para 11 –14).*

Thus, the Constitutional Court will first of all examine, where such circumstances exist due to which legal proceedings in the case under review should be terminated.

10. Para 2 of Section 29(1) of the Constitutional Court Law provides that legal proceedings in a case may be terminated before announcing the judgement by a decision of the Constitutional Court, if the contested legal norm has become invalid.

The provisions established in Section 29(1) of the Constitutional Court Law grant the right to the Constitutional Court; however, they do not envisage an obligation to do so. I.e., if the circumstances referred to in this legal norm are present, then in some cases the continuation of legal proceedings in the case may be necessary to prevent a violation of the applicant's fundamental rights or a serious infringement upon the interests of the State or society (*compare with Judgement of 2 June 2008 by the Constitutional Court in Case No. 2007-22-01, Para 9.1).* Thus, in the case under review the Constitutional Court must examine, whether such considerations do not exist due to which legal proceedings in the case should be continued (*see, for example, Judgement of 11 January 2011 by the Constitutional Court in Case No. 2010-40-03, Para 6, and Judgement of 27 January 2011 in Case No. 2010-22-01, Para 8).*

In interpreting Para 2 of Section 29(1) of the Constitutional Court Law, it must be taken into consideration that this norm is aimed at ensuring economy of the Constitutional Court procedure and that the Constitutional Court should not adopt a judgement in cases, where the dispute no longer exists (*see, for example, Judgment of 12 February 2008 by the Constitutional Court in Case No. 2007-15-01, Para 4).* Therefore, to decide on the issue of terminating legal proceedings on the basis of the aforementioned norm, in the case under review the Constitutional Court must establish:

1) whether the contested norm has become invalid;
2) whether no circumstances exist that would require continuation of legal proceedings.

10.1. The case has been initiated with regard to the compliance of the contested norm with the first sentence of Article 92 of the Satversme, i.e., the wording of CPL Section 246(2) that was in force from 2009 to 2013. The contested

norm became invalid on 27 October 2013 with the coming into force of the Amendments to CPL of 23 May 2103 adopted by the Saeima.

Thus, the contested norm is no longer in force, and this could be the grounds envisaged in Para 2 of Section 29(1) of the Constitutional Court Law for terminating legal proceedings in the case.

However, the amendments to the contested norm and even recognising a legal act as being invalid and inclusion of a contested norm in another legal act, which does not solve the dispute substantially, cannot be recognised as sufficient grounds for terminating legal proceedings in those cases, where continuation of legal proceedings is required to protect the fundamental rights of the submitter of the constitutional complaint (*compare, see Judgement of 12 June 2002 by the Constitutional Court in Case No. 2001-15-03).* Thus, the Constitutional Court must verify, whether the regulation that the legislator has established on the particular issue as to its content differs, or whether the legislator has decided to regulate this issue no longer.

In those cases, when the content of legal regulation has been amended, but the text of the contested norm has not been excluded from the regulation, the Constitutional Court must establish the scope of amendments that have been introduced to conclude that the content of the legal norm has substantially changed. Otherwise, the party adopting legal norms would introduce only editorial changes to their text, which should always be considered as formal grounds for requesting termination of legal proceedings in the case. A situation like this would collide with the principle of a judicial state, would not promote safeguarding a person's fundamental rights, or implementing the interests of the State or society.

With the Amendments to CPLS of 23 May 2013 the contested norm has been expressed in a new wording; thus, formally, it should be recognised as being invalid. The contested norm provided that prior to adopting a decision on applying such coercive measure that is related to deprivation of liberty, a person directing the proceedings must issue to the person, who has the right to defence, a copy of the proposal, which justifies the selection of the security measure. Whereas the new wording of the contested norm provides: prior to adopting a decision on applying such coercive measure that is related to deprivation of liberty, a person directing the proceedings must issue to the person, who has the right to defence, a copy of the proposal with justification of the selected security measure on the basis of concrete considerations, based upon materials in the case. The comparison of the content of the two norms allows concluding that the word "justifies" of the

contested norm was explained by the words of the new wording of the contested norm "justification on the basis of concrete considerations, based upon materials in the case."

Thus, as to the content, the contested norm and its new wording do not differ substantially.

10.2. In the case under review it is important to take into consideration also the fact that the contested norm was applied to the Applicant in proceedings, where the issue of placing him in pre-trial detention was decided. The criminal proceedings initiated against the Applicant in that part, in the framework of which the detention referred to above was applied to him, was terminated on 22 March 2013 by the decision of the person directing the proceedings (*see Case Materials pp. 198-200).*

Even though the direct negative consequences – being in detention – caused to the Applicant by applying the contested norm no loner exist, nevertheless the review of the constitutionality of the contested norm could be of importance in case, if the contested norm were recognised as being incompatible with the Satversme. In such a case there would be grounds to recognise that during the period when the contested norm was effective a procedure that violated the Applicant's fundamental rights had been applied to him. The Constitutional Court may not refuse to provide its assessment, if the dispute has not been resolved with the contested norm becoming invalid and if the constitutional law issue that the case pertains to has not been examined.

The Constitutional Court has already noted that its adjudications play an important role in ensuring the principle of justice. Therefore it is the obligation of the Constitutional Court to provide its assessment of a constitutionally important issue also in the case where the contested norm has become invalid (*see Judgement of 3 February 2012 by the Constitutional Court in Case No. 2011-11-01, Para 9).*

The case under review pertains to an important issue of constitutional law, i.e., a person's right to receive information and to exercise one's right to defence in pre-trial criminal proceedings in which security measure related to deprivation of liberty is applied. It is necessary to continue legal proceedings in the case to verify, whether the protection of the Applicant's and other persons' fundamental rights is ensured.

Thus, the Saeima's request to terminate legal proceedings in the case in accordance with Para 2 of Section 29 of the Constitutional Court Law must be rejected and the legal proceedings in the case under review must be continued.

11. The Applicant holds that the contested norm violates the principle of equal opportunities of parties and is incompatible with the first sentence of Article 92 of the Satversme.

The first sentence of Article 92 of the Satversme provides: "Everyone has the right to defend his or her rights and lawful interests in a fair court." The Constitutional Court, in interpreting the first sentence of Article 92 of the Satversme , has recognised that the concept "fair court" referred to above comprises two aspects, i.e., "a fair court" as an independent institution of judicial power which hears the case and "a fair court" as a due procedure, appropriate for a judicial state, in which the case is heard.

This concept in the former aspect should be interpreted in interconnection with Chapter 6 of the Satversme, in the latter one – in connection with the principle of a judicial state that follows from Article 1 of the Satversme (*see Judgement of 5 March 2002 by the Constitutional Court in Case No. 2001-10-01, Para 2 of the Findings).* A fair court as due procedure, appropriate for a judicial state, means the obligation of the State to envisage legal safeguards for abiding by the principle of legality and justice in adjudicating cases and comprises a number of elements – interconnected rights. It comprises, for example, the right to access to court, the principle of equal opportunities to parties (principle of equality and adversarial principle), as well as the right to be heard (*see Judgement of 5 November 2008 by the Constitutional Court in Case No. 2008-04-01, Para 8.2, Judgement of 17 May 2010 in Case No. 2009-93-01, Para 8.3, and Judgement of 30 March 2011 in Case No. 2010-60-01, Para 19).*

Article 92 of the Satversme imposes an obligation upon the State to establish a system, pursuant to which a court would hear a criminal case in a procedure that would ensure fair and unbiased adjudication of this case. The Constitutional Court has already recognised that the concept "a fair court"

comprises also the principle of equal opportunities to parties (*see Judgement of 27 June 2003 by the Constitutional Court in Case No. 2003-03-01, Para 6 of the Findings).*

The principle of equal opportunities is one of the elements in a fair trial, which comprises also the fundamental right to having the case heard in adversarial procedure. The principle of equality of parties requires that each party were granted a reasonable opportunity to provide its arguments in the case in circumstances that do not place it in a notably more adverse situation compared to the other party. Thus, both parties – both the prosecution and the defence – should have the possibility to familiarize themselves with the arguments of the other party and the evidence that has been collected, as well as to comment on them *[see Gless S. Transnational Cooperation in Criminal Matters and the Guarantee of a Fair Trial: Approaches to a General Principle. No: Utrecht Law Review. Vol. 9. No. 4(September 2013) pp. 90 and 91]*.

Detention is a security measure that is related to deprivation of liberty, which pursuant to CPL norms can be applied both in pre-trial criminal proceedings and in the process of adjudicating the case. The decision on applying detention in pre-trial criminal proceedings is adopted by an investigative judge at a closed court hearing, in which the person directing the proceedings, as well as the person, whose detention is decided upon, and his counsel participate.

The Constitutional Court, in interpreting Article 92 of the Satversme, has noted that principle of equal opportunities for the parties in criminal proceedings envisages, on the one hand, to all parties involved in the proceedings the possibility to present the facts of the case and, on the other hand, prohibits granting to any of the parties substantial advantages compared to the opponent. Criminal proceedings consist of a number of procedural stages, but these must regarded as a unified whole, therefore the principle of equal opportunities to the parties must be respected in court both during the pre-trial proceedings and in adjudicating the case (*compare see Judgement of 27 June 2003 by the Constitutional Court in Case No. 2003-03-01, Para 6 of the Findings).*

Thus, the principle of equality of parties falls within the scope of Article 92 of the Satversme and must be respected in deciding on the issue of applying the security measure – detention.

12. Pursuant to Article 89 of the Satversme, which provides that the State recognises and protects fundamental human rights in accordance with the Satversme, laws and international agreements binding upon Latvia, the State has an obligation to take into account the international commitments in the field of human rights (*see, for example, Judgement of 30 August 2000 by the Constitutional Court in Case No. 2000-03-01, Para 5 of the Findings).* International norms of human rights and the practice of their application on the level of constitutional law serves as a means of interpretation to establish the content and scope of fundamental rights and of the principle of a judicial state, insofar this does not lead to decreasing or restricting the fundamental rights included in the Satversme (*see, for example, Judgement of 13 May 2005 by the Constitutional Court in Case No. 2004-18-0106, Para 5 of the Findings).*

The Constitutional Court has already noted that "Article 92 of the Satversme guarantees the minimum of rights envisaged in the fourth part of Article 5, as well as in the first and the second part of Article 6 of the Convention" (*Judgement of 27 June 2003 by the Constitutional Court in Case No. 2003-03-01, Para 2 of the Findings).*

The fourth part of Article 5 of the Convention provides that everyone who is deprived of liberty by arrest or detention is entitled to take proceedings by which the lawfulness of his detention must be decided speedily by a court and his release ordered if the detention is not lawful. Whereas Article 6 provides: "In the determination of his civil rights and obligations [..] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

To conclude, what is the scope of protection for fundamental rights that in this case is envisaged by Article 92 of the Satversme, the content of the Convention norms *vis-à-vis* a person's right to familiarize himself with the

materials of criminal case that justify the necessity to apply detention to this person must be established.

13. If it follows from the norms of the Convention and their interpretation in the ECHR case law that the respective human rights that are enshrined in the Convention cover also the particular situation, then this situation usually falls also with the scope of respective fundamental rights enshrined in the Satversme (*see Judgement of 19 October 2011 by the Constitutional Court in Case No. 2010-71-01, Para 12.1).*

ECHR has noted that Article 6 of the Convention and, in particular, the requirements set in the third part thereof can be important also before the case is transferred for adjudication (*see ECHR Judgement of 24 November 1993 in case "Imbrioscia v. Switzerland", Application No. 13972/88, Para 36).* The procedure envisaged by the fourth part of Article 5 of the Convention should not comply as to all its features to the guarantees that follow from the first part of Article 6 of the Convention (*see, for example, ECHR Judgement of 15 November 2005 in case "Reinprecht v. Austria", Application No. 67175/01, Para 39).* Nevertheless, this procedure should have judicial character and must give to the respective persons legal guarantees that are appropriate for the particular type of deprivation of liberty (*see, for example, ECHR Judgement of 29 March 2001 in case "D.N. v. Switzerland", Application No. 27154/95, Para 41).*

It has been recognised in the case law of ECHR that the procedure of applying detention must always ensure compliance with the principle of equality of parties between the person directing the proceedings and the defence. This principle is not complied with if the defence is denied access to those materials in the criminal case that comprise information about the facts that serve as the basis for deciding on applying detention for the first time or extending the detention (*see, for example, ECHR Judgement of 30 March 1989 in case "Lamy v. Belgium", Application No. 10444/83, Para 29, Judgement of 12 December 1991 in case "Toth v. Austria", Application No. 11894/85, Para 83 –84, and Judgement of 25 March 1999 in Case "Nikolova v. Bulgaria", Application No. 31195/96, Para 58).*

Concurrently, ECHR has recognised that the need to ensure effective course of criminal proceedings may be the basis for keeping a part of information collected in criminal proceedings secret. It would prevent the possibility that the person against who the criminal proceedings have been initiated could hide other evidence or obstruct investigation. However, the reaching of this legitimate aim should not involve imposing substantial restrictions upon the right to defence. Information, which is important for assessing the legality of detaining a person, must always be made known in an appropriate way to the counsel of the person (*see ECHR Judgement of 9 March 2006 in case "Svipsta v. Latvia", Application No. 66820/01, Para 137, Judgement of 13 February 2001 in case "Lietzow v. Germany", Application No. 24479/94, Para 47, and Judgement of 13 February 2001 in case "Garcia Alva v. Germany", Application No. 23541/94, Para 42).*

Thus, the principle of equal opportunities to the parties, enshrined in the first sentence of Article 92 of the Satversme, envisages the right to familiarize oneself with those materials that are used to justify application of detention in the scope that allows exercising a person's right to defence.

14. The Applicant expresses the opinion that the contested norm restricts his right to a fair trial in the pre-trial criminal proceedings, since it denies a person the right to familiarize himself with those materials of criminal proceedings that are used to justify the proposal made by the person directing the proceedings to apply detention. The Saeima, in turn, notes that the restriction upon fundamental rights is caused by the application of the contested norm in practice and not by the norm itself, and request termination of legal proceedings on the basis of Para 6 of Section 29(1) of the Constitutional Court Law.

The assertion that the possible violation of a person's fundamental rights is not causes by the contested norm, but by its application in practice *per se* are not the grounds for terminating legal proceedings in the case. In this case, to have the grounds for terminating legal proceedings, first of all it should be established that it is impossible to continue legal proceedings in the case.

To decide, whether legal proceedings should be terminated on the basis of Para 6 of Section 29(1) of the Constitutional Court Law, the Constitutional Court must examine, whether the contested norm restricts the Applicant's rights that have been established in the first sentence of Article 92 of the Satversme.

14.1. The contested norm defines *expressis verbis* the obligation of the person directing the proceedings to issue to the particular person a copy of the proposal, where the selection of the security measure is justified. Thus, the contested norm defines the rights of this person to receive information on the justification for applying detention in a particular form, i.e., to receive the copy of the respective document without specially requesting it, moreover, before the decision on applying detention is adopted.

This regulation was adopted with the aim to ensure to a person the right to receive appropriate information on the materials in the criminal case that serve as the basis for selecting the security measure in all cases, where a security measure related to deprivation of liberty is selected (*see Case Materials, p. 88*).

The initial wording of the contested norm provided that in some cases, when presenting the materials of the case threatened pre-trial investigation or important interests of third parties or society, the presenting of the respective materials of the case could be postponed, with the decision by the person directing the proceedings, until the particular threat has been eliminated. However, it did not define the obligation of the person directing the proceedings to issue a copy of the proposal referred to in the contested norm. Therefore in some cases persons had no possibilities whatsoever to familiarize themselves with the procedural documents, which contained information on facts that were used to justify application of detention.

Compared to its initial wording, the contested norm defined the obligation of the person directing the proceedings in all cases before applying detention inform the person about the justification for the selected security measure – detention. Hence, the contested norm envisaged a person's right to receive information on the grounds for applying detention.

14.2. The contested norm did not stipulate *expressis verbis* what exactly should be considered as justification for applying detention. This fact has caused deficiencies in applying the contested norm in practice.

The summoned person K. Strada-Rozenberga notes that significant deficiencies in the practical application of the contested norm could be observed. Pursuant to the contested norm, the proposal on applying detention should indicate all procedural documents and the facts included therein that are used to justify the need to apply a security measure. However, allegedly this was not happening in practice (*see Case Materials, pp. 117 – 118).* The Prosecutor's General Office also notes that there had been cases, where the content of the proposal made by the person directing the proceedings did not provide complete clarity as to the particular facts justifying the need to apply detention. Thus, in practice, persons had had a restricted possibility to provide counter-arguments and to exercise defence in full (*see Case Materials, p. 84*). This was confirmed also by investigative judges, who underscored that in some cases "the proposals or statements made by persons directing the proceedings are not substantiated by evidence acquired in the proceedings" (*see Case Materials, p. 110*).

The study conducted by Public Policy Centre PROVIDUS in 2011 "Detention in Latvian Criminal Proceedings" also points to deficiencies in applying detention. The authors of the study – Dr. iur. Andrejs Judins and M.iur. Ilona Kronberga – have arrived at the conclusion that low quality proposals on applying detention are not a rarity. The approach taken my some persons directing the proceedings in drafting these proposals should be critically examined, i.e., the proposal do not present an analysis of the information characterising the particular case and the person, which should be used to justify application of detention, but only quote sections of the Criminal Law (*see: Apcietinājums Latvijas krimināl procesā. „Sabiedriskās politikas centrs PROVIDUS", 2011, p. 53. Available: http://www.sfl.lv/upload_file/2011%20gads/Apcietinajums%20Latvijas%20kriminalprocesa.pdf , accessed on 4 March 2014).*

Even though the contested norm did not directly define the content of the proposal regarding application of detention, nevertheless, this document had to comprise justification, so that the investigative judge, the respective person and his counsel should understand, which facts and considerations had served as the basis for applying security measure – detention. The need for such justification follows from the very purpose of the proposal as a procedural document and the CPL provisions on the basis of detention and its application, from the basic principles enshrined in the Criminal Procedure Law, as well as the content of Article 92 of the Satversme. Since persons did not receive sufficient information on the justification of detention, in some cases persons' rights to defence could have been restricted, and inappropriate application of the contested norm caused such restriction of fundamental rights.

Hence, also before the amendments of CPL of 23 May 2013 entered into force, the contested norm had to be interpreted so as to mean that the proposal on applying detention had to comprise justification for the selection of the security measure by concrete considerations based in the case materials.

15. The Applicant holds that it follows from the contested norm in interconnection with CPL Section 375 and Section 396 that neither the person, to whom the security measure has been applied, nor his counsel has clearly defined procedural rights to familiarize themselves with the materials in the criminal case (the original materials, not information about them or recounting of them) that justify the application of such security measure. The Applicant notes that any justification provided by the person directing the proceedings, also justification of the selection of security measure by concrete considerations based on the materials of the case, is solely an interpretation of the case materials provided by the person directing the proceedings and may be presented a biased way and selectively. Whereas the Saeima and other persons involved in the case under review, *inter alia*, the Prosecutor's General Office and investigative judges note that the contested norm does not deny to the person or his counsel the possibility, pursuant

to CPL Section 375(1), to familiarize themselves with the information, on the basis of which the person directing the proceedings has proposed applying detention to the person.

Both in the Applicant's case, as well as in other cases that the Applicant's counsel has provided information on, the person or his counsel had been denied the possibility to familiarize themselves with the case materials upon their request (*see Case Materials, p. 128*).

The Applicant's counsel had submitted the request for the permission to familiarize himself with the case materials both to the person directing the proceedings and the investigative judge. The respective documents, *inter alia*, contained references to the Convention and the ECHR practice.

It is noted in the minutes of the Riga City Zemgale Suburb Court that "the court decides to reject the attorney's request regarding familiarizing himself with the case materials, since the issue on familiarizing with the materials in the criminal case is decided by the person directing the proceedings" (*see Case Materials, p. 168*). The court has indicated in the decision on applying the security measure – detention – that "… the materials in the criminal case reveal that Igors Jegorovs has been familiarized with the minutes on detention, decision on being recognised as the suspect, and the proposal on applying detention, in which the person directing the proceedings has presented his considerations, has been issued to him. Whereas in view of the need to ensure effective investigation of criminal proceedings, part of the information collected in the course of investigation is confidential and is not being disclosed, so as to prevent obstructing investigation and the procedure of obtaining evidence" (*see Case Materials, p. 165*). Likewise, the person directing the proceedings, having examined the request and "materials in the criminal proceedings, which cannot be listed in detail", on the basis of CPL Section 375 and Section 396, has noted that "at this moment the application cannot be satisfied" and has rejected it. The Prosecutor's Office of Investigation of Financial and Economic Crimes have rejected the Applicant's complaint regarding the said decision, noting that the person directing the proceedings had made valid references to CPL Section 375 and Section 396. The prosecutor is of the opinion

that the Applicant "has no need to familiarize himself additionally with the materials of the criminal case in order to understand the grounds for adopting the decision on applying the security measure – detention" (*see Case Materials p. 189*).

Hence, the restriction upon the Applicant's fundamental rights occurred not because of the contested norm, but as the result of actions taken by the person directing the proceedings. Whereas the court did not verify the proportionality (legality) of this restriction. Moreover, the restriction to familiarize oneself with the materials of the case was justified by CPL Section 375 and Section 396, and not by the contested norm.

Thus, the contested norm does not restrict the Applicant's fundamental rights established by the first sentence of Article 92 of the Satversme.

16. The content of the contested norm and its new wording, substantially, does not differ. With the adoption of the Amendments to CPL of 23 May 2013, direct reference to a person's right to familiarize himself with the case materials was added to CPL. I.e., Para 1 of CPL Section 60^2 (3) provides that in addition to the rights established in the first part of this Section, the detained person, as well as the suspect or the accused, to who a security measure related to deprivation of liberty is applied, has the right to familiarize himself with the materials of the case that are used to justify the proposal on applying a security measure related to deprivation of liberty, insofar such access does not pose a threat to other persons' fundamental rights, public interests and does not interfere with reaching the aim of criminal proceedings.

16.1. The proposal by the person directing the proceedings that is addressed to investigative judge is only one among several elements that ensure to the person, who has the right to defence, also the right to information in pre-trial criminal proceedings. The content of this proposal allows the respective person to identify clearly the substantiated considerations of the person directing the proceedings that are the basis for applying detention. I.e., as it is *expressis verbis* established by the

new wording of the contested norm, the proposal by the person directing the proceedings must comprise "justification of the selection of security measure on the basis of concrete considerations, based upon materials in the case". References to concrete considerations, based upon materials in the case that the person directing the proceedings includes in the proposal are meaningless if the person, who has the right to defence, has been denied access to such materials. Thus neither the person himself nor with the mediation of a counsel has the possibility to verify, whether the interpretation of case materials, which is provided by the person directing the proceedings in the proposal on applying detention, is correct.

Thus, the meaning of the proposal defined in the contested norm is to ensure that the person would know, which materials he has the right to request.

16.2. In ensuring to a person the right to familiarize himself with the materials in a criminal case, the public interest in effective course of criminal proceedings and the need to protect the right of other persons must also be taken into consideration. Para 1 of CPL Section 60^2 (3) provides that access to case materials must be ensured insofar "such access does not infringe the fundamental rights of other persons, the interests of society and noes not interfere with reaching of the objective of the criminal proceedings." However, even though the interests referred to above must be considered as being important, the secret of investigation referred to in CPL Section 375 or the protection of other persons' rights may not serve as universal grounds for refusing to a person access to all materials of the case in pre-trial criminal proceedings, when the decision on detaining a person is taken, by referring to the existence of these interests. Therefore a reasonable balance must be found between keeping the secret of investigation and respecting the rights of other persons, on the one hand, and, on the other hand, abiding by the principle of equal opportunities to parties. Such balance may be achieved if in the framework of pre-trial criminal proceedings a person is given access not to all materials of the case, but only to those that justify the need to apply detention and my not cause serious harm to other persons' rights (as, for example, sensitive personal data, commercial secret) or to the interests of investigation. Whereas the person directing the proceedings has the duty to organise criminal proceedings and

arrange the materials in the case in such a way as to, in case of necessity, those materials that justify application of detention could be separated from other materials, to which access cannot be allowed.

16.3. Investigative judge has an important function in the process of applying pre-trial detention. Investigative judge is a judge, who, in cases and in procedure provided for by law, controls whether human rights are respected in criminal proceedings. Thus, it is the investigative judge, who must find a reasonable balance between the protection of human rights and the need to restrict a person's rights in the interests of public safety. A situation, where a person's fundamental right to familiarize himself with the case materials that justify application of detention is restricted and this restriction is not transferred under judicial control, is inadmissible.

Pursuant to the provisions of CPL Section 40, the investigative judge has the obligation to ensure compliance of the procedure of applying detention with human rights, *inter alia*, human rights established in the Convention and the Satversme. A judge can adopt a reasoned and well-considered decision only if both parties have been guaranteed equal opportunities, i.e., if both parties have equal knowledge of the subject of dispute – the case materials that justify application of detention. An investigative judge should not ignore a situation, where a person, on whose detention decision is being taken, has not been ensured access to materials in criminal case in compliance with the principle of equal opportunities to parties.

17. The Constitutional Court already found in Para 15 of this Decision that the contested norm does not restrict the Applicant's fundamental rights and that the restriction upon his fundamental rights has been occurred as the result of applying CPL Section 375 and 396. Reviewing the legality of such restriction does not fall within the jurisdiction of the Constitutional Court. Thus, there are no grounds to continue hearing the case and assessing compatibility of the contested norm with the first sentence of Article 92 of the Satversme.

Hence, continuing legal proceedings in this case is impossible.

In view of the above and on the basis of Para 6 of Section 29 of the Constitutional Court Law the Constitutional Court

decided:

to terminate legal proceedings in Case No. 2013-11-01 "On the Compliance of Section 246(2) of the Criminal Procedure Law with the first sentence of Article 92 of the Satversme of the Republic of Latvia."

The decision is not subject to appeal.

Chairperson of the court hearing A. Branta