THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

J U D G E M E N T

on Behalf of the Republic of Latvia

in Case No. 2015-14-0103

12 May 2016, Riga

The Constitutional Court of the Republic of Latvia comprised of: chairman of the court sitting Aldis Laviņš, Justices Kaspars Balodis, Gunārs Kusiņš, Uldis Ķinis, Sanita Osipova and Ineta Ziemele,

having regard to a constitutional complaint submitted by Lato Lapsa,

on the basis of Article 85 of the Satversme [Constitution] of the Republic of Latvia and Para 1 and 3 of Section 16, Para 11 of Section 17 (1), as well as Section 19^2 and Section 28^1 of the Constitutional Court Law,

on 6 and 13 April 2016, participants of the case being present at the hearing, examined the case

"On Compliance of Para 2 and Para 6 of Section 1, Section 4, Section 10, Section 18(1) of Law on Development and Use of the National DNA Database, as well as Para 2 and Para 13 of the Cabinet of Ministers Regulation of 23 August 2005 No. 620 "The Procedure of Providing Information to be Included in the National DNA Database, as well as the Procedure for Collecting Biological Material and Biological Trace", insofar as these apply to persons suspected, with Article 96 of the Satversme of the Republic of Latvia."

The Facts

1. On 17 June 2004 the Saeima [the Parliament] adopted Law on Development and Use of the National DNA Database (hereinafter – DNA Law), which entered into force on 1 January 2005. It has been amended twice – on 9 March 2006 and on 16 June 2010.

Para 2 of DNA Law Section 1 provides that biological traces are biological material collected at the crime scene, at the place of residence of a missing person, from the victim, person arrested, suspected or accused or clothes thereof, from a corpse, as well as from other types of material evidence;

Para 6 of DNA Law Section 1 provides that comparative samples are the biological material taken from victims, persons arrested, suspected, accused or convicted, from unidentified bodies, biologically close relatives of missing persons (children, parents) to ascertain the source of the biological traces, identify a missing person or an unidentified body.

DNA Law Section 4 provides that information regarding DNA profiles and that concerning persons, who are suspected, have been accused or have been convicted, regarding unidentified bodies, persons missing in the Republic of Latvia and biological traces are compiled and kept within the National DNA Database.

DNA Law Section 10 defines what kind of information must be included within the National DNA Database regarding a suspect, person convicted or accused of committing a criminal offence.

Section 18 (1) of DNA Law provides that DNA profiles and information about suspected or accused persons, if the criminal proceedings are terminated as a whole or against the particular person on the basis of exonerating circumstances or the decision by which the respective person has been recognised as being a suspect is revoked on the same grounds, as well as in the case, where an exonerating judgement has entered into force, DNA must be stored in the National Database for 10 years as of the day when the Forensic Service Department has received the decision or the judgement, or the aforementioned information is deleted from the National DNA Database after the Forensic

Service Department has received a written application from the person concerned (hereinafter – the contested norms of DNA Law).

Para 2 and 6 of DNA Law Section 1, Section 4 and Section 10 of this Law have been in force in this wording since 6 April 2006, when amendments of 9 March 2006 to DNA Law entered into force. All the sections referred to above have included reference to the suspect since DNA Law entered into force in its initial wording.

Section 18(1) of DNA Law has been in force in this wording since 20 July 2010, when the amendments of 16 June 2010 to DNA Law entered into force, decreasing the term for storing DNA profiles and information about suspects and accused persons from seventy-five years to ten years.

Cabinet Regulation of 23 August 2005 No. 620 "The Procedure of Providing Information to be Included in the National DNA Database, as well as the Procedure for Collecting Biological Material and Biological Trace" (hereinafter – Regulation No. 620) has been issued in compliance with DNA Law.

Para 2 of Regulation 620 provides: "Biological material shall be collected from close relatives of missing persons, suspects, accused persons, persons on trial or persons convicted for committing a criminal offence and from victims, as well as from unidentified dead bodies and from dead bodies of persons who have died a violent death." Whereas Para 13 of Regulation No. 620 provides: "Biological traces shall be collected at the crime scene, from the victim or the suspect or clothes thereof, from a corpse, as well as from other material evidence in the procedure established by the Criminal Procedure Law (hereinafter – contested norms of Regulation No. 620)." The contested norms of Regulation No. 620 have been in force in this wording from the moment they were adopted.

2. The applicant – **Lato Lapsa** (hereinafter – the Applicant) – is a natural person, why by the decision of an official in charge of criminal proceedings of 17 April 2014 was recognised as being a suspect in criminal proceedings.

The official in charge of criminal proceedings had prepared a deed on taking biological material from the Applicant to determine his DNA profile and store it in the National DNA Database.

The Applicant refused to give biological material, since the decision including substantiation for taking biological material had not been presented to him. His refusal was recorded in the aforementioned deed.

Record keeping for administrative violation for refusal to give biological material pursuant to Section 175^2 of the Latvian Administrative Violations Code (hereinafter – LAVC) was initiated.

On 24 September 2014 the City of Riga Central District Court passed a Judgement, terminating the record keeping for administrative violation and issuing an oral reprimand to the Applicant. The Applicant appealed against this judgement by submitting a complaint, holding that the contested norms did not establish an obligation to a person to give biological material. The Panel of Criminal Cases of Riga Regional Court rejected the Applicant's appeals complaint and upheld the judgement by the City of Riga Central District Court. The judgement entered into force on 9 January 2015.

On 24 April 2015 a prosecutor of the Department of Criminal Law of the Prosecutor's General Office, Unit for Investigating Particularly Important Cases, adopted a decision on terminating criminal proceedings, on the grounds that the offence committed by the Applicant did not comprise elements of crime (*see Case Materials, Vol. 1, p. 30*).

The Applicant has turned to the Constitutional Court. He holds that the contested norms of DNA Law and the contested norms of Regulation No. 620 (hereinafter jointly also – contested norms) have violated his right to privacy, enshrined in Article 96 of the Satversme of the Republic of Latvia (hereinafter – Satversme).

The Applicant, referring to findings expressed by the Constitutional Court, notes that this right protects the physical and mental integrity of a person, dignity and respect, name and identity, as well as personal data and prohibits ungrounded interference by the State in a person's private life.

The Applicant holds that in preparing draft DNA Law neither its compliance with international norms of human rights, nor possible infringements upon persons' fundamental rights, which might arise after adoption of this legal act, had been analysed. Likewise, it had not been examined, whether the rights of any group of persons included in the draft law were not violated without grounds or disproportionally restricted compared to society's common interests.

Legal acts should be sufficiently clear, so that application thereof "would not create adverse consequences to persons, and so that the persons applying legal acts would understand their own actions clearly". Allegedly, neither the contested norms, nor their interpretation in interconnection with the Criminal Procedure Law clearly state what happens in those cases, where a person refuses to give biological material. Thus, "consequences may be unpredictable – depending upon interpretation by a particular person applying the law".

Allegedly, the fact that a decision could be adopted with respect to the suspect that no elements of crime were found in his actions has not been taken into consideration either. It is not clear to the Applicant "in what way storing and comparing of an innocent person's data could facilitate faster resolving of criminal offences".

The Applicant holds that in the stage of preparing draft DNA Law the particular regulation had been discussed neither with experts and non-governmental organisations, nor international advisors, no public awareness raising measures had been implemented either. Thus, the quality of the law and the legality of restriction upon fundamental right are questioned. The Applicant questions the appropriateness of measures chosen by the legislator for reaching the legitimate aim, as well as the proportionality of the restriction upon the fundamental right.

The Applicant admits that the legitimate aim of contested norms is public safety and protection of other persons' rights, by increasing the number of resolved crimes; however, he doubts, whether taking of biological material from suspects had to be envisaged for reaching this aim. Allegedly, taking biological material from convicted persons is well-founded. Society is interested in efficient resolving of criminal offences, and in those instances, where a person has been

recognised as being guilty by a legal court judgement that has entered into force, DNA profile could help to resolve a previous criminal offence or criminal offences that might be committed in the future. However, the contested norms are said to envisage taking of biological material from all suspects "without any more profound substantiation or criteria".

Allegedly, the contested norms place the Applicant in an equal situation with a person, "who is caught at the crime scene". In the Applicant's situation a decision had been adopted that his actions did not comprise characteristics of a criminal offence, and the criminal proceedings had been terminated. If the Applicant had allowed taking of biological material, then, to his mind, a situation would occur that data of an innocent person were used in comparison necessary for resolving criminal offences. Refusal to give biological material, in its turn, had lead to adverse consequences – record keeping with regard to an administrative violation had been initiated, as the result of which the court had issued oral reprimand to him. If the contested norms did not provide for taking of biological material from all suspects and storing personal data thereof within the National DNA Database, the Applicant would not have incurred these adverse consequences. In situation like this, applying any kind of sanctions to a person, who has not been recognised by a court's judgement as being guilty, is said be a disproportional restriction upon fundamental rights of this person.

The Applicant holds that the legitimate aim could be reached by measures less restrictive upon a person's rights. Taking of biological material from suspects should at least be restricted by certain conditions that should be met or the existence of which should be verified before biological material is taken. Such conditions could be an order by the head of the investigative institution, reasoned decision by the official in charge of criminal proceedings, decision by a supervisory institution or a decision by the investigative judge. Likewise, a pre-requisite for taking biological material could be suspicion regarding committing of a particular type of criminal offence or the severity of potential sanctions.

The contested norms are said to be incompatible with the principle of proportionality, since they, allegedly, do not ensure a reasonable balance between the interests of a person and those of society. Violation of private life, caused by

taking of biological material from all suspects for determining DNA profile and storing in the National DNA Database, is said to be disproportional.

At the court hearing Valērijs Ickevičs, the Applicant's representative, did not uphold the view of the Saeima and the Cabinet that the contested norms had not been applied to the Applicant. He underscored that they had caused an infringement upon the Applicant's fundamental rights, since it had been recognised that his actions comprised elements of an administrative violation. Record keeping with regard to an administrative violation is to be equalled to criminal proceedings, with respect to consequences caused to a person. V. Ickevičs referred to the case law of the European Court of Human Rights (hereinafter – ECHR), emphasizing that only the suspect himself could assess in full how severe the influence of such record keeping had been upon his psychological and emotional state.

The Applicant requested the Constitutional Court to recognise the contested norms as being invalid as of the date they entered into force.

3. The institution, which issued the contested act, – the **Saeima** – holds that the contested norms comply with Article 96 of the Satversme and that legal proceedings in the case should be terminated.

The Saeima points out that the contested norms do not apply to the Applicant. Allegedly, none of the contested norms defines the grounds for taking biological material. Requiring of expert examination and performance of other investigative activities within criminal proceedings, as well as taking the biological material required for performing such actions is said to be defined by the Criminal Procedure Law, not by the contested norms,

The Applicant had not contested the norms of the Criminal Procedure Law that define the grounds for taking comparable samples from suspects.

The Applicant is said to contest, in fact, the grounds for taking biological material, i.e., legal regulation that allows determining DNA profiles of suspects and storing thereof in the National DNA Database. The Saeima recognises that the contested norms infringe upon the rights to private life of these persons,

guaranteed in Article 96 of the Satversme; however, it holds that the infringement is proportional.

Ilze Tralmaka, the representative of the Saeima, stated at the court hearing that biological material from suspects in criminal proceedings is not taken "automatically", solely on the basis of these persons' status in criminal proceedings. The official in charge of criminal proceedings is obliged to make a case-by-case assessment and require DAN expert examination only if it is necessary. Thus, DNA profiles that have been obtained on the basis of decisions by officials in charge of criminal proceedings are compiled and stored in the National DNA Database.

Allegedly, the Applicant has not used all general legal remedies that would allow resolving the infringement upon his fundamental rights upon its merits. I.e., he had not exercised the right envisaged in the Criminal Procedure Law to contest the validity of investigator's decision to take biological material for performing DNA expert examination by submitting a complaint to the supervising prosecutor. Three stages are to be distinguished in the procedure for determining DNA – taking of the biological material, genetic analysis thereof and storing of DNA profile in the National DNA Database. A person, who considers that his rights have been infringed upon within the particular stage, may submit a complaint for each of these stages to the supervisory prosecutor or a higher standing prosecutor. The Applicant had not complained about infringement upon his rights in any of the stages in this procedure.

Likewise, it cannot be established that the contested norms would cause a legal situation that could be recognised as being "of particular importance and requiring an urgent solution". Record keeping regarding an administrative violation with respect to the Applicant has been terminated and, thus, it had not caused adverse consequences to him. A reprimand by the court cannot be recognised as an administrative sanction and does not cause to the Applicant as severe adverse consequences that could be the grounds for initiating legal proceedings at the Constitutional Court.

The Saeima holds that the contested norms had been worded clearly enough, allowing a person, in case of necessity seeking appropriate advice, to

understand the content of rights and obligations following therefrom and predict the consequences of applying the norms. The addressees of DNA Law are said to be, basically, persons who "ensure criminal proceedings and are linked to maintenance of the DNA National Database". The official in charge of criminal proceedings or members of investigative team in criminal proceedings, who have acquired appropriate education and apply legal norms in their everyday work, should not construe the contested norms in a way that would allow "automatic collection of biological material from all suspects". The Saeima holds that "problem of interpretation" of the contested norms has occurred in the case under review, that it is not systemic, and should be resolved by "explaining interpretation of the norm to persons applying the norm".

The legitimate aim of the restriction is said to comply with provisions of Article 116 of the Satversme – public security and protection of other persons' rights. DNA profiles that are included in the National DNA Database are used to resolve and prevent criminal offences.

The established restriction is said to be appropriate for reaching the legitimate aim. The usefulness of data stored in the National DNA Database in resolving criminal offences is said to be significant.

Allegedly, there are no alternative and more lenient measures to storing DNA profiles of suspects. The only issue that could be considered would be the term for storing the DNA profiles of such persons; however, setting the term falls within the legislator's jurisdiction. The current term for storing DAN profiles – 10 years – has been established by taking into consideration limitation periods for criminal liability, possibilities to prove in the future faster and in a more effective way the guilt or innocence of a person and the need to make the work of law enforcement institutions in resolving criminal offences easier. The Saeima holds that the established term is valid.

DNA Law sets out the obligation of the State to delete the data stored in the National DNA Database, upon receiving a person's application in writing. Thus, it could be considered that those persons, who after criminal proceedings have been terminated, who have been exonerated, or whose status of a suspect

has been revoked, do not use this opportunity, are storing their data in the National DNA Database voluntarily.

The Saeima underscores that combatting crime in public interests is not only the right of the State, but also its positive obligation. Hence, the benefit gained by society exceeds the damage inflicted upon an individual. The restriction upon an individual's rights is said to be relatively minor. The State has envisaged safeguards against abuse of data, and a person has been granted the possibility to achieve that his data are deleted from the National DNA Database in a fast and simple way. Thus, the legislator has ensured a reasonable balance between public interests and a person's right to private life, hence, the contested norms are said to be proportional.

The DNA profile, which is obtained from suspect's biological material and included in the National DNA database, is to be linked with a particular, identified natural person and therefore recognised as personal data in the meaning of Personal Data Protection Law (hereinafter – Data Protection Law). The Saeima holds that sensitive personal data, i.e., information about a person's race or state of health, including information about hereditary diseases or genetic particularities, are not stored in the National DNA Database. Therefore, allegedly, the restriction established by the contested norms does not affect a person's right to enjoy his fundamental rights effectively, nor any other aspects that are important for a person's existence or identity.

4. The institution, which issued the contested act, – **the Cabinet of Ministers** – holds that the contested norms comply with Article 96 of the Satversme.

The Cabinet holds that the application does not substantiate the existence of an infringement. The contested norms do not define an obligation "to take and to give a sample of biological material" and therefore, allegedly, do not cause a direct infringement to the Applicant.

The ruling on not applying an administrative sanction to the Applicant is said not to be linked to DNA Law or Regulation No. 620, but to the failure to perform an obligation defined in the Criminal Procedure Law. Moreover, the

Applicant's biological material was not taken, and, thus, his fundamental rights have not been infringed upon.

The Applicant, allegedly, has not exhausted general legal remedies. Appealing against a court's ruling is not to be recognised as exhausting those general legal remedies, which in the circumstances of the particular case should be considered as being effective. The Applicant has not used legal remedies envisaged in the Criminal Procedure Law. I.e., he did not turn to the supervising prosecutor or a higher-standing prosecutor with a complaint about the official's in charge of criminal proceedings "decision to take a sample of biological material for comparative examination". The Cabinet holds that these legal remedies were available to the Applicant and would have been able to ensure effective protection of his rights.

The legitimate aim of storing information about suspects' DNA and other information is resolving criminal offences and providing proof thereof, or public security, as well as protection of national security.

The Applicant's statements regarding the lack of clarity of the norms of DNA Law and of Regulation No. 620 is said to be unsubstantiated. The contested norms are said to comprise a clear, understandable, and predictable regulation on taking biological material of suspects in criminal proceedings, determining DNA profiles, as well as on rules of storage. At the court hearing Vilnis Vītoliņš, the Cabinet's representative, upheld the opinion expressed by the Saeima's representative that the DNA Law should be interpreted in a way that only those DNA profiles that have been determined as the result of investigative activities within criminal procedure should be collected in the National DNA Database.

The right to take biological material and the obligation to give it is regulated by the Criminal Procedure Law. The decision on taking biological material is adopted on the basis of information about the facts that testify of the person's connection with the particular criminal offence. Information about a person's DNA profile may be included in the National DNA Database only in those cases, where the official in charge of criminal proceedings has adopted a decision on taking biological material. The official in charge of criminal proceedings also has the possibility to abstain from taking biological material.

Thus, individualised assessment of the necessity to take a sample of biological material is ensured within the framework of each criminal case.

The validity of actions taken by the official in charge of proceedings is supervised by an unbiased and independent official – a prosecutor, who has the right to respond to breaches by institutions of pre-trial investigation and to adopt binding decisions. Moreover, a person, whose rights or lawful interests have been violated, has the right to submit a complaint about actions taken by the official in charge of proceedings.

Storing of information about suspects' DNA profiles helps to reach the legitimate aim and therefore is appropriate for reaching it. Resolving of criminal offences is said to depended upon the volume of information that investigative institutions have at their disposal. Excluding suspects from the group of those persons, whose DNA profiles can be determined and stored in the National DNA Database would decrease the effectiveness of preventing, resolving and proving criminal offences.

Allegedly, it is impossible to reach the legitimate aim as effectively by measures that are less restrictive upon a person's rights. Each measure aimed at resolving and proving criminal offences is said to be unique, and these measures cannot be compared and "assessed as being less restrictive". The range of respective measures for combatting crime should ensure as effective prevention, resolving and proving of committed and possible future criminal offences as possible.

DNA profile and other information referred to in Section 10 of DNA Law in general are to be recognised as the personal data of a natural person, insofar this information allows identifying a particular natural person. The storage of data included in the National DNA Database complies with the provisions of the law On State Information Systems and the Personal Data Protection Law (hereinafter – Data Protection Law). Arbitrary or automated receipt of information from the National DNA Database is said to be impossible. Moreover, the subject of a DNA profile is made anonymous by a system-produced encoding, therefore the possibility to identify the respective person by the DNA profile is excluded.

The data subject has been ensured the possibility to choose – to allow storing information about his DNA profile in the National DNA Database for 10 years or to request immediate deletion of the DNA profile. Thus, the data subject is not placed in a situation that is more unfavourable compared to persons who have not been recognised as being suspects. A similar regulation on collecting biological material from suspects and storing DNA data is said to be in force also in Belgium, France, Lithuania, Norway, and Spain.

The damage inflicted upon an individual's rights is said to be smaller that the public benefit, and, thus, the contested norms are said to be proportional.

The representative of the Cabinet at the court hearing upheld the opinion that the case should be terminated, since no violation of fundamental rights could be established and the Applicant in the particular situation had failed to use all effective and real legal remedies.

5. The summoned person – **the Data State Inspectorate** – notes that information about a person's DNA profile is to be considered as personal data in the meaning of Data Protection Law. DNA profile is to be considered as the data of a natural person even in the case, where at the moment of establishing the profile it has not yet been attributed to an identified person, but has been established with the aim of identifying a natural person. Pursuant to Data Protection Law, any information that pertains to an identified or an identifiable natural person are personal data.

Usually identification of a person is ensured by some data, which are called "identifiers" and are closely linked to the particular person. Such data are, for example, features of a person's appearance or other characteristics of a person – vocation, position, personal identification number, as well information about the physical status of the particular person, for example, DNA profile, outcomes of blood tests, x-rays.

To recognise data as being such that are attributed to a person, the presence of criteria regarding the content, purpose and outcome of information must be established. The criterion of content is met if information applies to this person (is about this person). The purpose is said to be present, if, in view of all

circumstances of the particular case, data can be used with the aim of assessing a person, treating this person in a special way or influencing the person. Outcomes can be identified if by using the respective information a person's rights and interests can be influence, i.e., as the result of processing this information other persons start treating this particular person differently.

6. The summoned person – **the Prosecutor's General Office** – holds that the contested norms comply with Article 96 of the Satversme.

The Prosecutor's General Office recognises that by "subjecting persons to DNA tests" and storing DNA profiles in the National DNA Database a person's right to private life is restricted; however, it holds that public benefit granted by the contested norms is much more significant than restrictions upon a suspect's right to private life. In practice, taking of biological materials from suspects has repeatedly helped to resolve particular kinds of crimes, for example, sex crimes and paedophilia, which could not have been resolved by other methods.

In criminal proceedings the person, who is recognised as being suspect, is not anonymous. The official in charge of the proceedings has the duty to identify the person, who, possibly, has committed a criminal offence, by using the personal data already at the disposal of the State, such as the name, surname and personal identity code. Moreover, a person has to be identified also in such cases, where criminal proceedings against him are terminated due to exonerating causes. Pursuant to law, at this moment the State's obligation to compensate to this person for damages caused arises. Therefore, by creating a suspect's DNA profile, his rights, essentially, are not violated more than they are violated by processing the data of the respective person that are already at the State's disposal. The Prosecutor's General Office recognises that a person's DNA profile is personal data in the meaning of Data Protection Law. Although, as the Prosecutor's General Office holds, the DNA profile stored in the National DNA Database does not contain sensitive personal data, it is securely protected, and third persons have no possibility to access it unlawfully.

At the court hearing Agnis Pormalis, representative of the Prosecutor's General Office, noted that Para 14 of Section 12 of the law "On Police" granted

to police officers the right to obtain data necessary for identifying a person. Whereas Para 14^2 of the same Section grants the right to take biological material in the procedure established by the legal acts regulating establishment and use of the National DNA Database. The contested norms in the context of other provisions of DNA Law and Regulation No. 620 envisage taking of biological material from all suspects, solely on the basis of their status in criminal proceedings. Pursuant to Section 2 of DNA Law, the purpose of this law is to establish the National DNA Database to be used for resolving criminal offences. The second part of Section 13 of DNA Law, essentially, envisages an obligation of the authorities referred to in the first part of the same Section, to ensure enforcement of the law in the procedure established by the Cabinet.

7. The summoned person – **the Ministry of Justice** – supports the opinion expressed in the written reply by the Cabinet to the Constitutional Court.

The Ministry of Justice recognises that, essentially, DNA is linked to the need to identify a particular natural person. DNA profile, insofar it applies to living persons, is to be considered as being personal data.

DNA profile is to be considered as personal data requiring special protection. In view of the complex nature of genetic information and particular sensitivity thereof, a major risks exists that this information could be used for aims that were not initially envisaged. The Ministry of Justice underscores that processing of genetic data is permitted only when it is absolutely necessary and when appropriate safeguards with respect to the rights and freedoms of data subjects are in place, as well as only when it is permitted by legal acts of the European Union or a member state, or when vital interests of the data subject or other person must be protected, or when data, which obviously have already been disclosed by the data subject, are processed.

Elīna Feldmane, the representative of the Ministry of Justice, at the court hearing underscored that the Ministry's opinion is similar to the one expressed by the Cabinet's representative. The basis for taking a suspect's biological material and the officer's in charge of proceedings right to decide on taking thereof is the Criminal Procedure Law. Persons, who have been granted a criminal procedural

status, have criminal procedural obligation to obey legal orders of officials. Likewise, a person should resolve the issue of effective protection of his rights and interests within the framework of the Criminal Procedure Law and not that of record keeping with respect to an administrative violation.

8. The summoned person – **the State Police** – holds that the restriction upon a person's right to inviolability of his private life included in Article 96 of the Satversme caused by the contested norms is proportional and complies with Article 116 of the Satversme.

The restriction upon fundamental right has been established by a law adopted in due procedure and ensures clear, understandable and predictable abiding by requirements of the law, as well as appropriate means for protecting data against arbitrary and malevolent use.

Information about DNA profiles and persons, who have been granted the status of a suspect, are collected and stored in the National DNA Database in accordance with the procedure, in the volume and within terms defined in DNA Law and Regulation No. 620, issued on the basis thereof.

The National DNA Database is to be used to resolve criminal offences, searching for missing persons and identification of unrecognised bodies (human remains), as well as for exchanging the outcomes of DNA genetic examination with foreign countries and international organisations.

The Forensic Services Department of the State Police is the supervisor of the National DNA Database and the holder of information resources. The procedure, in which biological material is taken and information is submitted to the Forensic Services Department of the State Police for inclusion in the National DNA Database, is defined by Para 2 of Regulation No. 620, and it provides that biological material is taken also from suspects. Para 13 of Regulation No. 620, in turn, defines the cases, where traces of biological origin are collected at the crime scene in the procedure established by the Criminal Procedure Law.

Dainis Vēbers, the Representative of the State Police, at the court hearing underscored that not always, when a person is recognised as a suspect in criminal proceedings, biological material is taken from him for comparative examination

to identify the source of traces of biological origin. The necessity for this in criminal proceedings is assessed by the official in charge of criminal proceedings on case-by-case basis. If the official in charge of criminal proceedings has decided to take a sample of the suspect's biological material for establishing circumstances of the case under investigation, then the person has an obligation, enshrined in the Criminal Procedure Law, to give or to allow taking of the required sample.

At the court hearing D. Vēbers underscored that, on the basis of DNA Law and Regulation No. 62, biological material is collected also outside regulation of the Criminal Procedure Law, the sole basis being the status of a suspect. In 2015 more than six thousand samples had been collected, whereas the number of conducted expert examinations is approximately three thousand, including expert examinations aimed at identifying traces of biological origin. To save resources, in those cases, where a person's DNA profile has already been included in the National DNA Database (for example, a person has been recognised as being a suspect repeatedly), due to consideration of expedience, the sample is not taken repeatedly.

The National DNA Database is said to contribute significantly to resolving criminal offences. Since 2006 more than 68 thousand "DNA samples" have been submitted to the National DNA Database, of which 80% have been collected from suspects, 10% – from convicted persons, and 10% are samples belonging to other categories. In 2014 the Forensic Services Department conducted 3952 DNA expert examinations, examining approximately 10 thousand items of material evidence from crime scenes. In 2014 in 434 instances matching DNA were identified in the National DNA Database, and officials in charge of criminal proceedings had been informed about them. Since the National DNA Database began its operations, 2462 matching DNA had been identified and references to concrete persons had been provided. Approximately 70% of all matching DNA are linked to persons, who have been registered in the National DNA Database as suspects.

The existing mechanism for rights protection is said to be sufficient. A person, whose rights or lawful interests had been infringed upon, has the right to

submit a complaint about actions or rulings by an official in charge of criminal proceedings, *inter alia*, also for taking biological material for comparative examination. Whereas a person, whose data have been included in the National DNA Database, has the right to demand immediate deletion of the data, if the person has not been recognised as being guilty for committing a criminal offence or if criminal proceedings against the particular person have been terminated due to absence of elements of criminal offence.

The DNA profile, which is determined and stored in the National DNA Database, is to be recognised as being personal data in the meaning of Data Protection Law. The DNA profiles stored in the National DNA Database are restricted access information.

The State Police holds that the current procedure and legal regulation is appropriate for protecting other persons' rights, democratic state order, public security, welfare, and morals. Preventing, resolving and proving criminal offences is said to be the fundamental task of all democratic states. The benefit gained by society due to restricting some persons' rights to inviolability of private life by taking biological material and storing information about suspects' DNA profiles in the National DNA Database exceeds the restrictions upon a person's rights.

9. The summoned person – **Olga Bergere**, Head of the Unit for DNA Expert Examination at the Forensic Services Department of the State Police, – during the court hearing explained the practical aspects of determining DNA profile.

Information both about a person's health and his genetic characteristics is encoded into DNA molecule. The aim of the National DNA Database is very concrete, and the police experts have at their disposal equipment and reagents, which are used to reach this aim. The necessity of expert examination is assessed by the official in charge of proceedings. In the course of expert examination, the official in charge of the proceedings submits objects of examination and material evidence, as well as deeds and samples for comparative examination. These samples are examined in the framework of expert examination and afterwards are

also included in the National DNA Database. Whereas in those cases, when in the framework of case under investigation, no expert examination is required, the official in charge of criminal proceedings may submit samples for including DNA profile in the National DAN Database, without commissioning expert examination.

Special kits for taking DNA are used to take biological material. The official in charge of proceedings, by using this kit, can take a person's biological material, fill in a deed on collecting thereof and send the sample to the Forensic Services Department. The DNA profile is then entered into the database, whereas the swab with biological material remains at the disposal of experts and is stored for 10 to 75 years, so that in case of necessity it could be repeatedly examined (*see transcript of the Constitutional Court's sitting of 6 and 13 April 2016, Case Materials, Vol. 3, pp. 3 and 4).*

DNA characteristics that are studied may differ in various countries; therefore initially DNA samples are examined according to universal characteristics that can be compared to other countries. In Latvia samples initially are examined according to nine characteristics. If a match is established, then the respective sample can be examined repeatedly, increasing the number of characteristics to be examined by special reagents and, thus, increasing the degree of credibility of the outcome. Thus, to verify matching DNA, DNA profile may be established repeatedly, using the stored biological material.

10. The summoned person – **the Ombudsman of the Republic of Latvia** (hereinafter – the Ombudsman) – recognises that storing of DNA places disproportional restrictions upon a person's right to inviolability of private life; however, he underscores that in the particular circumstances of the case biological material for determining DNA had not been taken from the Applicant and had not been stored.

The Ombudsman holds that no "obvious shortcomings" can be identified in the regulation. The fact that during the drafting of regulatory enactments the legislator did not hold extensive consultations about the legal regulations *per se* is to be assessed only as a deficiency in the legislator's activities.

DNA data are to be recognised as being personal data in the meaning of Data Protection Law. The contested norms have the aim to establish the National DNA Database to be used for resolving criminal offences, searching for missing persons and identifying unidentified bodies, as well as to regulate exchange of outcomes of genetic examinations with foreign countries and international organisations. Since the biological material required for examination is not collected voluntarily, the exchange of research results should not be considered as an admissible cause for restricting a person's fundamental rights. Thus, only resolving of criminal offences should be recognised as being a legitimate aim for restricting a person's fundamental rights, whereas exchange of research results should be considered as a subordinate activity aimed at reaching the legitimate aim.

Information about persons, who have come in the range of attention to the attention of law enforcement institutions, is stored also in other state registers. The Information Centre of the Ministry of the Interior maintains information system on criminal procedure, a register of terminated criminal cases and of persons who have committed administrative violations, as well as other databases. Hence, law enforcement institutions have also other possibilities to obtain information about persons, who are suspected of having committed activities that are similar to the particular criminal offence under examination, but have not been recognised as being guilty.

Taking of biological material should be assessed in the context of substantiation for the particular criminal procedural decision. The Ombudsman holds that the Criminal Procedure Law imposes upon the official in charge of proceedings the obligation to assess the necessity of taking biological material on case-by-case basis, whereas a person has the possibility to appeal against the decision by the official in charge of proceedings.

The Ombudsman refers to the case law of ECHR and underscores that state institutions have not only the negative obligation to abstain from any ungrounded interference into the inviolability of private life, but also a positive obligation to perform activities necessary for the protection of this right. Allegedly, it is not understandable in what way the fact that information about a

person, in whose activities no elements of a criminal offence have been identified, is stored in the National DNA Database for 10 years, facilitates resolving of criminal offences. Upon adopting the final decision in criminal proceedings, where a person's guilt has not been proven or no elements of criminal offence have been identified in his activities, the DNA data taken from these persons should be destroyed without waiting for the person to submit an application. Moreover, the first part of Section 18 of DNA Law envisages only a person's right to demand deleting information from the DNA National Database. Thus, a situation may occur, where information on a particular person provided to foreign institutions is stored there and a person's right to inviolability of private life is restricted for a long period of time irrespectively of this person's request to delete this information. DNA Law does not envisage that a person's death might be a reason for deleting the respective data from the National DNA Database.

The Ombudsman holds that with respect to the term of storing DNA data the State fails to perform its positive duty to protect a person's right to inviolability of private life. Storing DNA profiles of such persons, who have not been recognised as being guilty for committing criminal offences, requires particularly significant reasons. The condition that information included in the National DNA Database is to be deleted only upon the receipt of a written application from the respective person is said to be incompatible with the principle of good governance. A person, whose guilt has not been proven or who has been exonerated, in a situation, where his DNA profile is stored together with DNA profiles of convicted persons, may develop "a feeling that the treatment is not the same as towards an individual, the legality of whose actions has not been doubted".

11. The summoned person –*Dr. iur.* **Aldis Lieljuksis**, associate professor at Riga Stradins University Faculty of Law, – holds that the restriction established by the contested norms is substantiated and proportional.

For various services of the State establishing and verifying a person's identity is an important issue, to the utmost extent linked to public security.

Biometrical data are obtained not solely in connection with legal violations of criminal nature, i.e., from detained, suspected, accused or convicted persons, but in general from any person with the purpose of identifying the person, for example, in preparing personal identity documents. Thus, one can conclude that it is allowed to obtain and store biometrical data for the purpose of identification of also such persons, who have not committed a criminal offence.

DNA profile allows establishing a person's state of health, and, thus, DNA profile is to be placed within the category of the most sensitive data. Use of DNA profiles for identifying persons in criminal proceedings is said to be a relatively recent, but very significant method. In some cases determining of DNA profile in criminal proceedings can be the only possibility to find out a person's identity. Determining of DAN profile allows reaching a very high degree of credibility in identification of a person and avoiding ungrounded charges of crimes that persons have not committed, as well as helps resolving previously unresolved crimes. Fingerprints allow identifying only one particular person, whereas the outcomes of DNA analysis allow establishing also a DNA match between persons. Establishing of DNA profile, undeniable, has also a preventive effect, as a person, whose DNA profile has been determined, must take into account a greater probability of being detected.

Although taking of DNA material is interfering into a person's private life, it should be considered as being proportional. The data obtained for performance of police functions can be used only for the purpose of investigating and resolving crimes, i.e., they serve as a measure for protecting public security.

In assessing the possibility of not taking biological material from every suspect, the fact that Latvia's criminal penal policy for a long time has been unstable, should be taken into consideration. In a situation, where the criminal penal policy is changing rapidly, it is not advisable to specify the circle of suspects, linking determining DNA profile with the severity of offence or applying it only, for example, to persons suspected of having committed a crime.

At the court hearing A.Lieljuksis in addition expressed an opinion that preventing, resolving and investigation of criminal offences was the function of the State, which could be called "crime combating function". State registers have

an important role in combatting crime, since they provide the possibility to effectively use the collected data for prevention, resolution and correct qualification of criminal offences, moreover, to effectively share the data on international level. The function of collecting, processing, storing and sharing various data is performed by institutions of public administration, by conducting investigatory operations, pre-trial investigation, prosecution and adjudication. DNA Law is said to be one of those laws, from which the obligation to obtain and collect data about detained, suspected, accused and convicted persons, in performing this state function, follows. In view of the purpose of DNA Law and the systemic method of interpreting it, it is evident that the biological material has to be taken from all suspects and that is a mandatory legal requirement. This general function performed by the state should be differentiated from investigation in each particular criminal proceedings, conducted in the procedure defined by the Criminal Procedure Law and applicable only to the particular criminal offence.

12. The summoned person – *Mg. iur.* **Agris Bitāns**, lecturer at the University of Latvia, – holds that disproportional restriction upon a person's fundamental rights can be discerned in this case.

Since DNA profile provides information about a person's health, there are grounds to recognise it as being sensitive personal data in the meaning of Data Protection Law and to apply special data protection requirements to it.

The aim of taking biological material and determining DNA profiles is resolving criminal offences. Therefore analysis of suspects' DNA data *per se* is not incompatible with the purpose of using personal data in criminal proceedings. However, there are grounds to question, whether Para 2 of DNA Law Section 1 has not been worded to broadly, since the grounds for taking biological material needed for establishing DNA profile is not the objective necessity to resolve the particular crime, but a person's procedural status. Taking of biological material of a person with the status of a suspect is not objectively necessary in all cases. Therefore taking biological material only because the status of a suspect has been applied to a person, would not be proportional to the purpose of processing

personal data. In the context of Data Protection Law, clear legal grounds for taking and processing of such data cannot be discerned.

Likewise, it is not clear, why exactly the term of 10 years has been set for storing DNA profiles. Pursuant to the principles of processing personal data, the term of their storage should comply with the purpose of storing the data, which in the particular case is resolving and preventing criminal offences. The currently established term for storing DNA data cannot be directly linked to criminal procedural activities envisaged in legal provisions. Such term for storing DNA data without appropriate substantiation is to be considered as being excessive.

Allegedly, disproportional restriction upon fundamental rights can be discerned also in the situation, where a decision has been adopted on revoking the status of a suspect or on terminating criminal proceedings (in particular, on exonerating grounds), but biological material has been already taken from the respective person and DNA profile has been determined. From the perspective of fundamental rights, the situation, where a person has to turn to the state institution, requesting in writing that the information on him would be deleted, since Regulation No. 620 does not envisage "automatic" deletion of data, should be recognised as legally unfounded.

The Findings

13. The Saeima, the Cabinet and the Ministry of Justice have referred to findings by the Constitutional Court and express the opinion that the contested norms do not cause a direct and concrete violation of Applicant's fundamental rights defined in Article 96 of the Satversme and, thus, legal proceedings in the case should be terminated.

Legal proceedings in the case should be terminated also because the Applicant, allegedly, has not used all effective general legal remedies.

If arguments have been provided that could serve as the grounds for terminating legal proceedings in a case, the Constitutional Court must examine

these (*see, for example, Judgement of 19 October 2011 by the Constitutional Court in Case No. 2010-71-01, Para 11*).

14. To establish, whether legal proceedings in the case under review should be continued, the Constitutional Court will verify:

1) whether the contested norms pertain to such fundamental rights of the Applicant that have been defined in Article 96 of the Satversme;

2) whether direct and concrete violation of the Applicant's fundamental rights exists;

3) whether the pre-requisites defined in law regarding use of general legal remedies and terms for submitting the constitutional complaint have been met (*see, for example, Judgement of 10 May 2013 by the Constitutional Court in Case No. 2012-16-01, Para 16.4*).

15. To examine, whether the contested norms pertains to the Applicant's fundamental rights defined in Article 96 of the Satversme, the Constitutional Court must, first, establish the scope of this Article.

15.1. Article 96 of the Satversme provides that everyone has the right to inviolability of his or her private life, home, and correspondence.

The right to private life means that an individual has the right to his own private space, suffering minimum interference by the State or other persons. A finding has been enshrined in the case law of the Constitutional Court that the right to inviolability of private life protects a person's physical and mental integrity, honour, and dignity, name and identity, personal data (*see Judgement of 26 January 2005 by the Constitutional Court in Case No. 2004-17-01, Para 10, Judgement of 11 May 2011 in Case No. 2010-55-0106, Para 10.2, and Judgement of 14 March 2011 in Case No. 2010-51-01, Para 13*).

Article 89 of the Satversme provides that the State recognises and protects fundamental human rights in accordance with the Satversme, laws and international agreements binding upon Latvia. It follows from this Article that the legislator's aim is to harmonise the human rights provisions included in the Satversme with international legal provisions. International human rights provisions that are binding upon Latvia and the practice of application thereof on

the level of constitutional law serve as a means of interpretation to define the content and scope of fundamental rights and principles of a state governed by the rule of law, insofar they do not cause decrease or restriction of fundamental rights included in the Satversme (*see Judgement of 13 May 2005 by the Constitutional Court in Case No. 2004-18-0106, Para 5 of the Findings.)*

In interpreting Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention), the ECHR has recognised that the concept of "private life" has broad scope. Collection and storing of personal data fall within the scope of the right to inviolability of private life (*see Judgement of 16 February 2000 by the Grand Chamber of ECHR in Case "Amann v. Switzerland", application No. 27798/95, Para 65, and Judgement of 4 December 2008 in case "S. and Marper v. the United Kingdom", applications No. 30562/04 and No. 30566/04, Para 68 and 69*). Inviolability of private life and protection of personal data have been enshrined also in Article 7 and Article 8 of the European Union Charter of Fundamental Rights.

The Constitutional Court finds that collection, processing and storing of data that characterise a person's physical and social identity fall with the scope of a person's right to inviolability of personal life.

Thus, the right to inviolability of personal life enshrined in Article 96 of the Satversme comprises protection of the personal data of a natural person.

15.2. In the case under examination, when the Applicant was recognised as being a suspect in criminal proceedings, a deed was drawn up on taking biological material for inclusion into the National DNA Database.

The Constitutional Court must establish, whether the suspect's biological material, which is taken for genetic analysis of DNA and the DNA profile stored in the National DNA Database are data of a natural person and, thus, fall within the scope of Article 96 of the Satversme.

Pursuant to Para 1 of Section 1 of DAN Law, biological material is parts of human tissue or organs or body fluids, which contain cells with deoxyribonucleic acid un the nuclei thereof (for example, blood, saliva, bones).

Para 3 of Section 1 of DNA Law provides that DNA is the part of the deoxyribonucleic acid molecule, which indicates the genetic information of identifying features of a human. Genetic analysis of DNA is analysis of biological material to determine DAN profile. Whereas Para 4 of Section 1 of DNA Law provides that DNA profile is a computer-readable result of the genetic analysis of DNA.

Definition of a natural person's data is included in Data Protection Law. Pursant to Para 3 of Section 2 of this Law, personal data is any information related to an identified or identifiable natural person.

Biological material, which is taken from a person, drawing up a deed thereon, the sample form of which is included in Annex 1 to Regulation No. 620, comprises DNA data of a concrete (already identified) person. Upon analysis of the collected biological material, a person's DNA profile is determined and included for storage into the National DNA Database. Thus, throughout the process of determining DNA profile, data of an identified person are handled.

Therefore, both the biological material of an identified person, as well as the new units of information created in the process of analysis, *inter alia*, also the outcome of genetic analysis of DNA (DNA profile) stored in a particular format (computer readable) are to be recognised as the personal data of a natural person in the meaning of Data Protection Law and Article 96 of the Satversme.

15.3. Pursuant to Para 8 of Section 2 of Data Protection Law, sensitive personal data are personal data, which indicate the race, ethnic origin, religious, philosophical or political convictions, or trade union membership of a person, or provide information as to the health or sexual life of a person.

The Constitutional Court has recognised that these data indicated in Data Protection Law, essentially, comply with the data of special categories regulated by Article 8 of Directive of the European Parliament and of the Council of 24 October 1995 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (*see Judgement of 14 March 2011 by the Constitutional Court in Case No. 2010-51-01, Para 13*). The finding that an individual's DNA profile are sensitive personal data has been consolidated also in the case law of ECHR (*see Judgement of*

4 December 2008 by the Grand Chamber of ECHR in Case |S. and Marper v. the United Kingdom", applications No. 30562/04 and No. 30566/04, Para 75 and 76). In all cases DNA profile is determined with the aim of identifying a concrete person or a link between several persons. The fact that only part of information that biological material comprises is used in the process of determining DNA profile does not substantially influence recognition of DNA profile as being sensitive personal data (*see, ibid., Para 73*). Neither the fact that DNA profile is a computer readable outcome of genetic analysis of DNA that cannot be used without applying appropriate information technology influences recognition of DNA profile as being sensitive personal data (*see, ibid., Para 75*).

Thus, biological material of an identified person, which is collected and analysed in the process of determining DNA profile, as well as DNA profile are a natural person's personal data requiring special protection.

15.4. Section 10 (4) and Section 12 of Data Protection Law define the general principles according to which personal data of a natural person are processed for the needs of criminal proceedings. These norms provide that personal data, which relate to criminal offences, conviction in criminal cases and in cases of administrative violations, or to court rulings or court file materials, may be processed for the needs of criminal proceedings. Data Protection Law is applicable also to processing of a natural person's personal data for purposes that have not been initially envisaged in the field of criminal law, *inter alia*, for the following purposes: to prevent immediate significant threat to public safety; to detect criminal offences and to carry out criminal prosecution.

Legal grounds for processing sensitive personal data of a natural person have been defined in Section 11 of Data Protection Law, providing that processing of sensitive personal data is prohibited, except cases referred to in this Section. Para 11 of this Section permits processing of sensitive personal data, when performing functions of public administration or establishing State information systems laid down in the law. The National DNA Database has the status of a State information system.

Thus, in the framework of criminal proceedings processing of both non-sensitive personal data of a natural person and of sensitive data is permitted.

Thus, both the biological material of a suspect and his DNA profile are personal data of a natural person that fall within the scope of Article 96 of the Satversme and, in view of their sensitive nature, require special protection.

16. To assess, whether a direct and concrete violation of the Applicant's fundamental rights exists, the scope of the contested norms should be defined and it must be established, whether the contested norms pertain to the Applicant's situation, and verified, whether the contested norms have caused an infringement upon fundamental rights.

16.1. The Applicant contests compliance of Para 2 and 6 of Section 1, Section 4, Section 10, Section 18(1), as well as of Para 2 and Para 13 of Regulation No. 620 with Article 96 of the Satversme, insofar these norms provide that biological material for determining DNA profile and for storing in the National DNA Database should be taken from all suspects.

The Constitutional Court has recognised that it must, within the limits of its jurisdiction, establish the purpose and the true meaning of the contested norm and of other legal norms closely linked thereto (*see Judgement of 20 October 2011 by the Constitutional Court in Case No. 2010-72-01, Para 12*).

Hence, the Constitutional Court must establish the scope of the contested norms.

16.1.1. At the court hearing different opinions were expressed as to whether the contested norms envisaged taking the suspect's biological material for determining DNA profile only, if the official in charge of the proceedings had adopted a decision on the necessity to determine it for clarification of some circumstances of the case, or whether biological material is taken from all persons, who have been granted the status of a suspect.

The Saeima and the Cabinet at the court hearing upheld the opinion that in each particular case the official in charge of criminal proceedings adopted a decision on taking a suspect's biological material for determining DNA profile and storing in the National DNA Database (*see transcript of the Constitutional Court sitting of 6 and 13 April 2016, Case Materials, Vol. 2, p. 87*). The Ministry

of Justice also expressed the opinion that the official in charge of criminal proceedings had to assess in all cases, whether determining of DNA profile was necessary in the particular case (*see transcript of the Constitutional Court sitting of 6 and 13 April 2016, Case Materials, Vol. 3, p. 12*).

Written replies by the Prosecutor's General Office and the State Police included arguments related to pre-requisites for taking a suspect's biological material for the purpose of comparative analysis (*see Case Materials, Vol. 1, pp. 106 and 126*), but did not analyse the facts of the case under examination. At the court hearing representatives of the State Police and the Prosecutor's General Office added to the opinions expressed in writing by noting that in those cases, where a suspect's biological material is taken for the purpose of including his DNA profile in the National DNA Database, without requiring expert examination un the particular case, the pre-requisite for applying the contested norms is the status of the respective person in criminal proceedings and the provisions of DNA Law ((*see transcript of the Constitutional Court sitting of 6 and 13 April 2016, Case Materials, Vol. 2, p. 130, and Vol. 3, p. 27*). The summoned person A. Lieljuksis upheld this interpretation of the contested norms (*see Case Materials, Vol. 1, p. 117*). This interpretation was approved also by the summoned person A. Bitāns (*see Case Materials, Vol. 1, p. 136*).

Pursuant to Section 13 of DNA Law, taking of biological material, as well as timely provision of the Forensic Services Department with information for inclusion within the National DNA Database in accordance with the procedures specified by the Cabinet is ensured by investigative institutions, the Prison Administration, prosecutor's offices, courts, and institutions or medical treatment or medical practitioners. These institutions and persons are responsible for taking biological material, as well as for timely provision of information and conformity of such information with certifying documents thereof.

Para 14^2 of Section 12 of the law "On Police", in turn, provides that a police officer, in performing the duties assigned to him, in conformity with the competence of the service, has the right to collect biological material in the procedure defined by regulatory legal acts on establishment and use of the National DNA Database. The fact that DNA Law defines the obligation of

investigative institutions, but the law "On Police" – the rights of investigative institutions to perform activities for identifying persons, *inter alia*, to take biological material of suspects, was confirmed at the court hearing by the representatives of the State Police and the Prosecutor's General Office, as well as by the Ministry of Justice and by A. Lieljuksis (*see transcript of the Constitutional Court sitting of 6 and 13 April 2016, Case Materials, Vol. 2, p. 138, and Vol. 3, pp. 16, 27 and 63*).

The case under examination contains materials revealing that the senior inspector of the Security Police had testified in the sitting of the first instance court that all police institutions have the obligation to take "a DNA sample" of a suspect. Allegedly this is done on the basis of Regulation No. 620, which has been issued in compliance with DNA Law. The witness had noted that "collection of DNA samples is not linked to the particular criminal proceedings, in which Lato Lapsa has been recognised as being a suspect" (*see Case Materials, Vol. 1, p. 24*).

The contested Para 6 of DNA Law Section 1 provides that comparative samples are the biological material taken from, *inter alia*, persons suspected to ascertain the source of the biological traces, identify a missing person or an unidentified body (*see transcript of the Constitutional Court sitting of 6 and 13 April 2016, Case Materials, Vol. 2, p. 147, and Vol. 3, pp. 1 and 3*).

Thus, in the Applicant's situation, the official in charge of criminal proceedings performed the obligation defined in DNA Law to collect biological material from the suspect for determining is DNA profile and it was necessary for creating the National DNA Database.

16.1.2. Pursuant to provisions of DNA Law Section 2, the purpose of this Law is to establish the National DNA Database to be used to disclose criminal offences, to search for missing persons and to identify unidentified bodies (human remains), as well to determine and regulate the exchange of the results of DNA genetic analysis with foreign states and international organisations. Section 4 of DNA Law, in turn, provides, that information regarding DNA profiles and that concerning persons, who are suspected, have been accused or have been convicted, regarding unidentified bodies, persons missing in the

Republic of Latvia and biological traces is compiled and stored within the National DNA Database.

I. Tralmaka, representative of the Saeima, at the court hearing expressed the opinion that the purpose of DNA Law should be understood as compiling in a united database those DNA profiles that have been determined in performing investigative activities of criminal procedural nature (*see transcript of the Constitutional Court sitting of 6 and 13 April 2016, Case Materials, Vol. 2, pp. 94 and 102*). This opinion was substantiated by the points made in annotation to the draft DNA Law. This was upheld by representatives of the Cabinet and the Ministry of Justice.

Whereas A.Lieljuksis underscored at the court hearing that the purpose of DNA Law should interpreted as being broader than just compiling the data obtained in the framework of investigative activities of criminal procedural nature. Information included in the National DNA Database was said to facilitate detection of as many criminal offences as possible, without limiting itself to just one criminal proceedings. Essentially, this opinion was upheld also by the representative of the State Police, O. Bergere, Head of the Unit for DNA Expert Examination at the Forensic Services Department of the State Police, and the representative of the Prosecutor' General Office. O. Bergere explained that information stored in the National DNA Database was regularly shared with foreign countries in the framework of Prüm system (*see transcript of the Constitutional Court sitting of 6 and 13 April 2016, Case Materials, Vol. 2, p.2*).

Section 4 of DNA Law clearly defines stages in determining DNA profile, i.e., collecting and storing of information. In interpreting this norm, it should be taken into consideration that Regulation No. 620, issued on the basis of DNA Law, regulates taking of biological material, because without it DNA genetic analysis objectively would be impossible.

Regulation No. 620 regulates actions by officials in all cases, when a person's biological material has to be taken, *inter alia*, defines the procedure for taking it, for drawing up a deed, the sample form of which has been included in Annex 1 to Regulation No. 620, as well as for providing information to the Forensic Services Department of the State Police. The contested Para 2 of

Regulation No. 620 defines categories of those persons, from whom biological material must be taken (providers of the sample), defining, *inter alia*, suspects as one of these categories. Thus, taking of biological material, although is not directly indicated in DNA Law Section 4 as a separate activity, is one of the stages in determining DNA profile.

DNA Law Section 10 sets out what kind of information about a person suspected of committing a criminal offense should be included in the National DNA Database. Thus, this norm defines elements in the data unit of a natural person to be included and stored in the National DNA Database.

DNA Law Section 18(1), in turn, defines the period of storing DNA profiles and information about suspects in the National DNA Database in case, if criminal proceedings are terminated as a whole or against the particular person on exonerating grounds, or the decision by which the respective person has been recognised as a suspect is revoked on the same grounds, or if an exonerating judgement has entered into force. This norm also provides in which case information from the National DNA Database is to be deleted, if an application regarding deleting the information in writing has been received from the respective person; however, if such application has not been received, the DNA profile and information are stored in the National DNA Database for 10 years from the day the Forensic Services Department has received the particular decision or judgement.

At the court hearing, contrary to the opinion expressed by the Saeima and the Cabinet, representatives of the State Police and the Prosecutor's General Office, as well as A. Lieljuksis stated that Para 6 of Section 1, Section 4, Section 10, the first part of Section 18 of DNA Law, as well as Para 2 of Regulation No. 620 created a uniform regulation on collecting and storing DNA profiles of suspects in the National DNA Database (*see transcript of the Constitutional Court sitting of 6 and 13 April 2016, Case Materials, Vol. 2, p. 133, and Vol. 3, pp. 35 and 70*).

The purpose of DNA Law is to establish the National DNA Database, which is to be used for resolving any criminal offence. The Constitutional Court recognises that in a case, where DNA profiles of suspects are determined with the

aim of investigating a particular criminal offence, on the basis of a decision adopted by an official in charge of criminal proceedings, the aim of DNA Law would be reached only partially; i.e., possibly a larger part of DNA profiles would not be used for resolving other criminal offences.

Thus, considering the purpose of DNA Law and opinions expressed at the court hearing concerning application of contested norms, in particular, concerning data exchange and cooperation with foreign countries, such interpretation of the contested norms that allows taking biological material necessary for determining DNA profile from all subjects defined in Section 13 of DNA Law - the persons who have been granted the status of a suspect in criminal proceedings, should be recognised as being compatible with reaching the purpose of DNA Law.

Thus, Para 6 of Section 1, Section 4, Section 10 and the first part of Section 18 of DNA Law, as well as Para 2 of Regulation No. 620 form a united legal regulation, which is the basis for taking biological material from a suspect for determining his DNA profile an storing it in the National DNA Database.

16.2. The contested Para 2 of Section 1 of DNA Law provides that biological traces are biological material collected at the crime scene, *inter alia*, suspected or accused or clothes thereof, as well as from other types of material evidence.

The Contested Para 13 of Regulation No. 620, in turn, provides that biological traces are to be collected at the crime scene, from the victim or the suspect or clothes thereof, as well as from other material evidence in the procedure established by the Criminal Procedure Law.

It was established at the court hearing that the provisions of Para 2 of DNA Law Section 1 and Para 13 of Regulation No. 620 had not been applied in the Applicant's case. I.e., in the particular criminal proceedings, where the Applicant was recognised as being the suspect, traces of biological material were not taken and the decision on determining the source of biological traces for investigative purposes was not adopted.

Thus, Para 2 of DNA Law Section 1 and Para 13 of Regulation No. 620 are not applicable to the Applicant's situation.

Therefore, legal proceedings in the part of the claim regarding compliance of Para 2 of DNA Law Section 1 and Para 13 of Regulation 620 with Article 96 of the Satversme are to be terminated pursuant to Para 3 of Section 29(1) of the Constitutional Court Law.

16.3. In verifying, whether such circumstances exist due to which examination of the case should be continued regarding compliance of Para 6 of Section 1, Section 4, Section 10 and the first part of Section 18 of DNA Law, as well Para 2 of Regulation No. 6290 (hereinafter in the text of the Judgement the term "contested norms" are used to denote only these norms) with Article 96 of the Satversme, the Constitutional Court must verify, whether the contested norms have caused an infringement in the Applicant's situation.

To differentiate between cases, when a person submits a constitutional complaint with the purpose of defending his rights, and cases, where a person does it for the interests of the public, for example, to protect other persons' rights or for reaching political, scientific or other aims, it is not enough to establish that a person belongs to a group, to which the legal norm applies. A person must credibly demonstrate that the adverse consequences caused by the legal norm infringes upon his fundamental rights (*see Judgement of 10 May 2013 by the Constitutional Court in Case No. 2012-16-01 22, Para 22.1*).

The Saeima, the Cabinet and the Ministry of Justice are of the opinion that the Applicant's fundamental rights have not been infringed upon, because he refused to give his biological material for determination of DNA profile. At the court hearing the Saeima maintained the opinion that the Applicant had not provided arguments showing that each of the contested norms had been applied to him, causing an infringement upon rights (*see transcript of the Constitutional Court sitting of 6 and 13 April 2016, Case Materials, Vol. 2, p. 88*). The Cabinet and the Ministry of Justice upheld the Saeima's opinion.

The Constitutional Court has already established that the case materials contain a deed that proves that the Applicant had had to give biological material for its genetic analysis, for determining the DNA profile and for storing in the

National DNA Database (hereinafter – procedure for determining DNA profile). The Applicant delayed the initiated procedure for determining DNA profile, being of the opinion that it infringed upon his fundamental rights.

Record keeping for an administrative violation for refusal to give biological material was initiated against the Applicant in accordance with LAVC Section 175^2. The court, in assessing the Applicant's behaviour, has recognised that he had the obligation "to participate in establishing the National DNA Database" (*see Case Materials, Vol. 1, p. 24*). The record keeping in the case of administrative violation has not been terminated on exonerating grounds. It has been recognised that the Applicant's behaviour contains elements of violation and he has been orally reprimanded.

It has been recognised in the case law of the Constitutional Court: to ensure that the rights guaranteed to an individual in the Satversme are effectively protected, the Constitutional Court must examine their actual application (*see Judgement of 21 October 2009 by the Constitutional Court in Case No. 2009-01-01, Para 11.3*). Moreover, the Constitutional Court has recognised that in the presence of any doubt concerning possibilities to terminate legal proceedings, the Court has *ex officio* obligation to examine the case on its merits and to provide an assessment as extensive as possible on whether the Applicant's fundamental rights have not been violated (*see Judgement of 19 November 2009 by the Constitutional Court in Case No. 2009-09-03, Para 10*).

There is no dispute in the case, whether Para 2 of Regulation No. 620 was applied to the Applicant, since he had the status of a suspect. Thus, the Applicant belonged to the identified group of subjects, to which the contested norms were applied as a united regulation.

The Constitutional Court noted that ECHR has emphasized the special risks and far-reaching consequences of storing biological material and DNA profile, in view of the fact that the respective sensitive information can actually be used at any time in the future (*see Judgement of 4 December 2008 by the Grand Chamber of ECHR in case "S. and Marper v. the United Kingdom", applications No. 30562/04 and No. 30566/04, Para 69*). Considering the nature of these data, requiring special protection, the fact that the Applicant succeeded

in unlawfully avoiding application of the contested norms as united legal regulation dos not mean that he has not entered the scope of these norms. Moreover, the Applicant had been in a legal situation that had caused adverse consequences to him; i.e., it was recognised that he had committed an administrative violation.

Thus, the contested norms have caused an infringement upon the Applicant's fundamental rights.

17. To verify, whether the Applicant has used all possibilities to defend his rights by general legal remedies, the Constitutional Court shall determine whether all effective and real legal remedies have been used.

The Saeima, the Cabinet and the Ministry of Justice underscored that the first part of Section 336 of the Criminal Procedure Law granted to the person, whose rights or lawful interests had been infringed upon in criminal proceedings, the right to submit a complaint regarding the action or decision by the official in charge of criminal proceedings. Allegedly, the Applicant did not use this possibility. At the court hearing the representative of the State Police upheld the opinion that a person had the right to complain about the action or decision by the official in charge of criminal proceedings; however, he noted that in the particular situation a complaint like this would not be effective. Since administrative record keeping was initiated for refusal to give biological material, within the framework of it the Applicant had had the possibilities to defend his rights (*see transcript of the Constitutional Court sitting of 6 and 13 April 2016, Case Materials, Vol. 2, p. 137*). The representative of the Prosecutor's General Office upheld this opinion (*see transcript of the Constitutional Court sitting of 6 and 13 April 2016, Case Materials, Vol. 3, p. 43*).

The Applicant has defended his rights within the framework of record keeping regarding an administrative violation. Although the court has recognised the Applicant's violation as being insignificant and has not applied sanctions, the Applicant has appealed by submitting a complaint. He has expressed the opinion in it that "no regulatory enactment defines the obligation to give biological material to any institution [..], neither to provide assistance in establishing the

National DNA Database" (*see Case Materials, Vol. 1, p. 26*). The court has not recognised this opinion as being substantiated. Both court instances have recognised that the demand by a police official to give biological material for determining the DNA profile and storing it in the National DNA Database had been lawful. The court held that examination of DNA Law and Regulation No. 620, issued on the basis thereof, did not fall within its jurisdiction. None of the court instances had found grounds for turning to the Constitutional Court to verify, whether the restriction upon fundamental rights that followed from the contested norms complied with the Satversme.

The Constitutional Court has recognised that constitutional complaint has been created as a subsidiary legal remedy. Abiding by the principle of subsidiarity, only real and effective possibilities to protect fundamental rights that have been infringed upon must be exhausted, and not just any possible legal remedies that in any way could pertain to the applicant's situation (*see Judgement of 19 October 2011 by the Constitutional Court in Case No. 2010-71-01, Para 14*). ECHR has also underscored that requirements of the subsidiarity principle must be applied in a flexible way, avoiding excessive formalism (*see, for example, Judgement of 18 January 2007 by ECHR in case "Estrikh v. Latvia", application No. 73819/01,Para 93 and 94*).

Since the contested norms form a united regulation, pursuant to this regulation the procedure of determining DNA profile consists of a number of subsequent stages – taking the suspect's biological material, analysis of DNA to determine DNA profile and storing the DNA profile in the National DNA Database. The Constitutional Court holds that in the case under review the fact that the contested norms do not envisage the possibility for interrupting the procedure of determining DNA profile in any of its stages as being significant. Therefore it cannot be recognised that effective legal remedies would be accessible to a person in all stage of determining DNA profile.

In the Applicant's situation the dispute occurred at the moment when taking of biological material was initiated, and this dispute was examined in the framework of record keeping regarding an administrative violation. The Constitutional Court notes that the opinion held by the Saeima and the Cabinet

that the Applicant in the particular circumstances, in addition to the record keeping that had been initiated, had to contest the action or decision by the official in charge of criminal proceedings, in order to recognise formally that he had used all possible legal remedies to protect his rights, is unfounded. The case contains materials that prove that two purposes of determining a person's DNA profile can be differentiated between. In the case, where the suspect's DNA profile is determined only to be stored in the National DNA Database, but is not necessary for conducting investigatory activities, no criminal procedural regulation on the suspect's obligations and rights in connection thereto has been established.

In the Applicant's Case, within the framework of record keeping regarding administrative violation, it was possible to examine on its merits both the legality of an official's demand and to examine compliance of the contested norms with the Satversme.

Thus, in the circumstances of the particular case the Applicant has used all effective and real general legal remedies.

Therefore, legal proceedings in the part regarding compliance of Para 6 of Section 1, Section4 and Section 10, as well as the first part of Section 18 of DNA Law, as well as Para 2 of Regulation 620 with Article 96 of the Satversme must be continued.

18. The contested norms envisage collecting and storing sensitive personal data in the National DNA Database.

Thus, the contested norms comprise restrictions upon rights established in Article 96 of the Satversme.

To establish, whether the restriction upon inviolability of private life, established by the contested norm, is admissible, the Constitutional Court must examine, whether this restriction upon fundamental rights has been established by law adopted in due procedure, whether it has a legitimate aim and whether the restriction is proportional (*see, for example, Judgement of 29 October 2003 by the Constitutional Court in Case No. 2003-05-01, Para 22*).

19. To examine, whether the restriction upon fundamental rights has been established by law, it must be verified:

1) whether the law has been adopted in accordance with the procedure established in legal acts;

2) whether the law has been promulgated and is publicly accessible in accordance with legal requirements;

3) whether the law has been worded with sufficient clarity so that a person would be able to understand the content of rights and obligations following from it and predict the consequences of application thereof (*see Judgement of 2 July 2015 by the Constitutional Court in Case No. 2015-01-01, Para 14*).

20. It is not disputed in the case that the norms of DNA Law had been adopted and promulgated in the procedure defined in the Satversme and the Saeima Rules of Procedure. Neither is the public accessibility of DNA Law disputed.

There are no materials in the case that would create doubt as to whether the norm of Regulation No. 620 had been adopted and promulgated in due procedure and were publicly accessible.

21. The Applicant doubts the quality of the contested norms, noting that legal regulation on determining DNA profile for including and storing it in the National DNA Database is unclear. The Ombudsman and A. Bitāns have also noted the lack of clarity of the contested norms.

The Saeima and the Cabinet, as well as the Ministry of Justice hold that the contested norms had been defined with sufficient clarity, so that a person, in case of necessity seeking appropriate advice, would be able to understand the content of rights and obligations following therefrom and would be able to predict the consequences of applying thereof.

The Saeima and the Cabinet have underscored the legislator's discretion to seek advice of experts and social partners, as well as the fact that the scope of

such consultations does not directly influence the quality of legal norms that are adopted.

The Constitutional Court is of the opinion that extensive feasibility study during the period of drafting and adopting a legal norm, *inter alia*, analysis of other countries' experience and consultations with scholars and experts of the field, could have a favourable impact upon the quality of a legal norm. However, the level of detail or the scope of the feasibility study *per se* cannot be the grounds for establishing sufficient quality of a legal norm.

At the court hearing the representative of the Saeima upheld the opinion that legal norms had been clearly defined. However, in the Applicant's situation the norms had been, allegedly, applied erroneously. The Cabinet and the Ministry of Justice supported the Saeima's opinion.

The representative of the State Police did not find an error in the official's actions. At the court hearing he expressed the opinion that upon initiating the procedure for determining the Applicant's DNA profile the contested norms had been applied in accordance with the established practice (*see transcript of the Constitutional Court sitting of 6 and 13 April 2016, Case Materials, Vol. 2, pp. 131 and 132*). This opinion was upheld by the representative of the Prosecutor's General Office and A. Lieljuksis.

It has been recognised in the case law of the Constitutional Court that the opinion of participants of the case and of the summoned persons with regard the content of legal norms *per se* is not decisive in establishing the legal consequences of the respective legal norms, since a legal norm cannot be understood outside the practice of applying thereof and the legal system, within which it functions (*see Judgement of 28 November 2014 by the Constitutional Court in Case No. 2014-09-01, Para 20.2.2*). The Constitutional Court has established the scope of the contested norm and concludes that the contested norms, in the interpretation enshrined in Para 16 of this Judgement, are clear and predictable.

Thus, the restriction upon fundamental rights has been established by law.

22. All restrictions upon rights should be based upon circumstances and substantiation of its necessity; i.e., the restriction should be established due to important interests – for a legitimate aim (*see, for example, Judgement of 22 December 2005 by the Constitutional Court in Case No. 2005-19-01, Para 9*).

It follows from Article 116 of the Satversme that a person's right to inviolability of private life may be restricted in cases envisaged by law to protect other persons' rights, democratic state order, public security, welfare, and morals.

In legal proceedings before the Constitutional Court the obligation to indicate the legitimate aim first of all rests with the institution that issued the contested act (*see, for example, Judgment of 25 October 2011 by the Constitutional Court in Case No. 2011-01-01, Para 13.2*).

The Saeima has indicated that the legitimate aim of the restriction is establishing of the National DNA Database and using it to resolve criminal offences, search for missing persons and identify unidentified bodies, as well as sharing the results of DNA genetic analysis with foreign countries and international organisations. This complies with the legitimate aim defined in Article 116 of the Satversme – for public security and protection of other persons' rights. Essentially, all other participants of the case uphold the Saeima's opinion.

ECHR has recognised that crime prevention and resolving of criminal offences are legitimate aims that justify storing of sensitive personal data (*see Judgement of 4 December 2008 by ECHR in case "S. and Marper v. the United Kingdom", applications No. 30562/04 and No. 30566/04, Para 100, and Judgement of 4 June 2013 in cases "Peruzzo v. Germany" and "Martens v. Germany", applications No. 7841/08 and No. 57900/12, Para 40*).

The Constitutional Court upholds the opinion expressed by the Saeima regarding importance of sharing the results of genetic analysis, in particular, among the EU member states. Resolving of criminal offences by verifying a person's possible connection to other criminal offences is in the interests of society as a whole and each member of it.

Thus, the legitimate aim of the restriction is public security and protection of other persons' rights.

23. In determining, whether the restriction established by the contested norms is proportional, the Constitutional Court examines, whether the restrictive measures that are used are appropriate for reaching the legitimate aim, whether the aim cannot be reached by other means, less restrictive upon an individual's rights, and whether the benefit gained by society from the established restriction exceeds the harm inflicted upon the individual (*see, for example, Judgement of 22 December 2008 by the Constitutional Court in Case No. 2008-11-01, Para 13*).

23.1. The Applicant has recognised that taking biological material from convicted persons is appropriate for reaching the legitimate aim of the restriction. Effective resolving of criminal offences is said to be in public interests. If a person has been recognised as being guilty by a court's judgement that has entered into legal force, then comparison of this person's DNA profile could help to discover previously committed criminal offences or prevent criminal offences planned in the future. This is said to be compatible with the aim of the restriction.

However, the Applicant holds that determining DNA profiles of suspects is incompatible with the principle of presumption of innocence in criminal procedure and therefore is not an appropriate measure with respect to these persons.

The Saeima does not uphold this opinion expressed by the Applicant and notes that the principle of presumption of innocence is not violated, because determining of DNA profile does not mean that a person has been recognised as being guilty of committing a criminal offence.

The Cabinet, in turn, has noted that fast technological development, as well as unpredictability of inhabitants' actions has brought changes also in the way criminal offences are committed and resolved. The constantly increasing number of cross-border criminal offences is making employees of investigative institutions adapt investigative activities to the new situation. Resolving of criminal offences is said to be directly dependent upon information that is at the

disposal of police. The chosen measure is said to be appropriate for promoting effective resolving of criminal offences, achieving fair regulation of criminal law relationships without excessive interference into a person's life, as well as for ensuring the preventive function.

The Cabinet has also underscored that in the absence of the National DNA Database, such criminal offences as, for example, crimes against morals and sexual inviolability, would not be resolved, because in such cases DNA is one of the most important pieces of evidence. The State Police, the Prosecutor's General Office, and A. Lieljuksis also upheld this opinion.

ECHR has recognised that combatting crime, in particular, terrorism and organised crime, to a large extent depends upon contemporary scientific methods of investigation and identification (*see Judgement of 4 December 2008 by ECHR in case "S. and Marper v. the United Kingdom", applications No. 30562/04 and No. 30566/04, Para 105*). The importance of these methods has been highlighted also in the sixth paragraph of Recommendation of 10 February 1992 by the Committee of Ministers of the Council of Europe *On the Use of Analysis of Deoxyribonucleic Acid (DNA) within the Framework of Criminal Justice System*, as well as in the first and the second paragraph in the Preamble of the Resolution by the Council of the European Union of 9 June 1997 No. 97/C193/02 *On the Exchange of DNA Analysis Results*.

The Constitutional Court recognises that determining DNA profiles of suspects in the stage of investigating possible criminal offences is an appropriate measure for reaching the legitimate aim of the restriction. Determination of DNA profile allows identifying, with high level of accuracy, the presence of a particular person at the crime scene or connection with previously committed criminal offences, during the investigation of which DNA profiles had been determined, as well as connections with other persons.

Thus, the restriction is appropriate for reaching the legitimate aim of the restriction.

23.2. In assessing, whether the legitimate aim could not be reached in a more lenient way, it should be taken into consideration that a more lenient measure is not just any other measure, but only a measure by which the

legitimate aim can be reached in the same quality. Moreover, the Constitutional Court does not have the right to determine, which measure is the best, but has the right to determine, whether the measure chosen by the State is effective (*see Judgement of 8 April 2015 by the Constitutional Court in Case No. 2014-34-01, Para 18*).

In assessing, whether the legitimate aim could be reached by measures that are less restrictive upon an individual's rights, the Applicant has pointed to two alternatives. He has expressed the opinion that biological material should not be taken from suspects, but has not provided concrete arguments supporting this alternative.

The Applicant holds that a more lenient restriction upon suspects' rights could be also setting additional requirements for determining DAN profile, for example, an order by the head of the investigative institution, reasoned decision by the official in charge of criminal proceedings or the severity of possible sanction to be applied for the respective criminal offence.

The Saeima and the Cabinet have expressed the opinion that the legitimate aim cannot be reached by more lenient alternative measures (*see Case Materials, Vol. 1, pp. 54 and 72*). Allegedly, in some cases DNA is the only means for identifying a person, who is searched for in connection with possible involvement in committing a criminal offence. Each measure aimed at preventing, detecting and proving a criminal offence is said to be unique and different from others. These measures are said to supplement each other, and only the use thereof in their totality can ensure the most effective resolving of all criminal offences committed in the past and of the possible future criminal offences (*see ibid.*). The Prosecutor's General Office and the State Police also hold that the data stored in the National DNA Database are of special significance in investigating and resolving criminal offences (*see Case Materials, Vol. 1, pp. 107 and 128*).

At the court hearing the summoned person O. Bergere explained that the Unit for DNA Expert Examination at the Forensic Services Department of the State Police had two main lines of activity. If a decision by the official in charge of criminal proceedings on requesting DNA expert examination is adopted,

experts perform expert examination, which includes also examination of material evidence, looking for traces and analysis. Alongside this, other experts perform analysis of DNA samples and enter the respective information in the National DNA Database. In fact, DNA samples of persons are being constantly compared. This may allow detecting matches with a particular person or identifying material evidence, which might link a number of cases and establish a series of criminal offences (*see transcript of the Constitutional Court sitting of 6 and 13 April 2016, Case Materials, Vol. 2, p. 149*).

A. Bitāns holds that taking of biological material from all suspects for determining their DNA profile should be recognised as being unlawful (*see Case Materials, Vol. 1, p. 139*). A. Lieljuksis, in turn, states that taking of biological material from suspects could be restricted by additional requirements, for example, the nature of the offence and degree of dangerousness. In current investigations DNA is the most accurate method for identifying persons that is used in practice, it also is said to ensure a very high degree of credibility of identification. It allows avoiding ungrounded charges of criminal offences that a person did not commit, and also helps to resolve crimes that cannot be resolved by other methods. However, A. Lieljuksis underscored that in circumstances of unstable penal policy linking determination of DNA profiles with the penal sanction envisaged for a particular criminal offence would not be advisable (*see Case Materials, Vol. 1, p. 123*).

The Constitutional Court recognises that determining of DNA profile is a unique method for identifying persons. In those cases, where a person cannot be identified by other methods, determining of DNA profile may be the sole effective measure of identification.

The Constitutional Court finds that for a certain period of time, in procedure established by law, law enforcement institutions have access to DNA profiles of all suspects that can be accordingly used for investigation not only within the framework of the particular criminal procedure, where the persons has been granted the status of a suspect. In view of the fact that criminal offences may be linked in various ways, it has to be recognised that the National DNA Database that contains as many DNA profiles as possible not only allows

investigating particular criminal offences in a more effective way, but also curbs criminality, resolving other criminal offences, which previously were unresolved, and promotes preventing and resolving criminal offences in the future. This would not be ensured if DNA profiles were determined only in those cases, where the official in charge of criminal proceedings had adopted a respective decision, in view of the need to verify the circumstances of the case. Establishment of the National DNA Database with respect to categories of identified subjects as a measure for reaching the legitimate aim should be separated from those cases, where individual decisions by the official in charge of criminal proceedings are adopted in criminal proceedings. As effective prevention of crime and resolution of criminally punishable offences as possible, which is to be ensured by storing in the National DNA Database the DNA profiles of subjects defined in law, complies with the legitimate aim.

Thus, there are no more lenient measures that would allow reaching the legitimate aim in the same quality.

23.3. In examining the proportionality of a restriction, it must be verified, whether the adverse consequences that the individual incurs as the result of restriction upon his fundamental rights do no exceed the benefit that society in general gains. I.e., the interests that must be balanced in the case, as well as the interests that should be given priority must be identified (*see, for example, Judgement of 7 October 2010 by the Constitutional Court in Case No. 2010-01-01, Para 15).*

The Applicant notes that with respect to suspects the contested norms are of "disproportionally restrictive nature".

The Saeima and the Cabinet hold that the negative consequences caused for the individual are minor compared to the public benefit gained by application of the contested norms. To substantiate public benefit, the Saeima underscores that combating crime in public interests is not only the right, but also a positive obligation of the State, which follows, *inter alia*, from fundamental human rights and freedoms included in the Satversme and the Convention. Moreover, this obligation of the State pertains not only to crimes that could have been committed on its territory, but, in certain instances, also to such crimes that have

been committed outside its territory and the resolving of which requires effective interstate cooperation (*see Judgement of 7 January 2010 by ECHR in case "Rantsev v. Cyprus and Russia", application No. 25965/04, Para 289 and 307*). DNA Law, allegedly, provides to a person sufficient legal remedies regarding acquiring and storing of his personal data. Moreover, determining and storing of DNA profile in the National DNA Database is said to be compatible not only with public interests, but also those of the data subject. Thanks to the determined DNA profile, a person can be effectively excluded from the circle of suspects with respect not only to one, but, possible, even several criminal offences; moreover, the determined DNA profile can be effectively used, for example, in searching for a missing person.

This opinion was expressed also by the Cabinet of Ministers, the Ministry of Justice, the Prosecutor's General Office, and the State Police. The Constitutional Court also supports this opinion.

23.3.1. The Constitutional Court has recognised that the following principles of personal data protection are in force: rule of law, fairness, minimality, and anonymity. Rule of law comprises also the requirement that the use and transmitting of personal data for other purposes than the ones they were initially obtained may occur only with the consent of the respective person or on legal basis. The principle of fairness requires that obtaining and processing of information occurs in a way that excludes excessive interference to the privacy, autonomy and integrity of data subjects. The principle of minimality provides that processing of personal data is prohibited, unless significant and previously clearly defined objectives of data processing must be reached. Anonymity means that linking information with the particular data subject has become impossible (*see Judgement of 14 March 2011 by the Constitutional Court in Case No. 2010-51-01, Para 14*).

ECHR has recognised that a state has the right to store only such volume of data that complies with the legitimate aim of data processing, and demands existence of sufficient legal remedies, noting that the sufficiency thereof depends upon the volume of stored personal data, duration of storing, rules on destroying and using data (*see Judgement of 25 September 2001 by ECHR in case "P.G.*

and J.H. v. the United Kingdom", application No. 4478798, Para 44-47, and Judgement of 4 December 2008 in case "S. and Marper v. the United Kingdom", applications No. 30562/04 and No. 30566/04, Para 103 and 107).

The Council of the European Union has pointed out to the member states the need to abide by appropriate rules of personal data protection, when engaging in mutual personal data exchange.

It is recognised in the Framework Decision that competent authorities may collect personal data only for specified, explicit and legitimate purposes in the framework of their tasks and personal data may be processed only for the same purpose for which data were collected. It also underscores that member states should ensure that subjects are informed that personal data could be or are being collected, processed or transmitted to another member state [*see Council Framework Decision 2008/977/JOHAN of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, Para 27 of Preamble and Para 1 of Article 3*]. As regards processing of data, Framework Decision does not prohibit member states to establish even stricter measures for personal data protection than defined therein; however, it underscores the necessity to ensure that any personal data that member states exchange among themselves are processed legally and in compliance with fundamental principles.

Consequently, in assessing the adverse consequences caused to a person, the Constitutional Court must verify, whether the contested norms comply with these principles of data protection.

The contested norms envisage using DNA profile only in accordance with the purpose of DNA Law; i.e., establishing the National DNA Database. DNA Law provides that data to be included in the National DNA Database are to be used for resolving criminal offences, searching for missing persons, and identifying unidentified bodies (human remains).

The Constitutional Court has recognised that the legitimate aim of the restriction upon fundamental rights established by the contested norms is protection of public security and other persons' rights.

Pursuant to DNA Law Section 10, the following information is included in the National DNA Database: the suspect's given name and surname, his personal identity number, nationality and DNA profile, the criminal case number, the name of the of institution, where the comparative sample has been taken, and the name and surname of the person, who has taken this sample. Thus, the amount of information that is objectively needed for identifying DNA profile is stored.

Pursuant to DNA Law Section 15, the suspects' DNA profiles and other information included in the National DNA Database is restricted access information. DNA Law Section 16 provides that the right to receive information from the National DNA Database is given only to investigatory institutions, with the consent of a prosecutor, institutions of prosecutor's office and courts for conducting pre-trial criminal proceedings, examination and adjudication of cases. Likewise, information to foreign law enforcement institutions may be issued only for these purposes (*see, also, Resolution by the Council of the European Union of 9 June 1997 No. 97/C193/02 On the Exchange of DNA Analysis Results, the ninth paragraph of the Preamble*).

The subject of determined and stored DNA profile is made anonymous by a system-produced encoding, thus ensuring his protection. Moreover, the DNA profile in a coded (computer-readable) form is stored separately from the information, by which it could be identified and that is set out in DNA Law Section 10. Thus, anonymity of data is ensured (*see Case Materials, Vol. 1, p. 56*).

The National DNA Database stores accurate data. To exclude possible errors or inaccuracies, information into the National DNA Database is entered twice. To record in detail any handling of the data, the entering, reviewing of and accessing data is registered, indicating the time and date of each manipulation (*see ibid.*).

While a person has the status of a suspect in criminal proceedings, determining of DNA profile pursuant to Para 6 of Section 1, Section 4, Section 10 of DNA Law and Para 2 of Regulation 620 complies with the principles of personal data protection; i.e., the rule of law, fairness, minimality, and

anonymity. Thus, the public benefit from these contested norms exceeds the restrictions established upon a person's rights.

Thus, the restriction upon fundamental rights established by the contested norms is proportional and complies with Article 96 of the Satversme.

23.3.2. DNA Law Section 18 (1) defines the term for storing DNA profiles and information, *inter alia*, with respect to suspects in cases, where criminal proceedings have been terminated as a whole or against the particular person on exonerating grounds, or the decision by which a person has been recognised as being a suspect or an accused person, on the same grounds, has been revoked, as well as if a judgement exonerating the person has entered into force. The data subject has the right, upon onset of circumstances specified in this norm, to request that his data are immediately deleted from the National DNA Database.

It was already established in the case that a person's criminal procedural status is the sole criterion for storing his DNA profile on the basis of the contested norms. The Constitutional Court establishes that, pursuant to DNA Law Section 18(1), in those cases, where there no longer is legal basis for storing a person's DNA profile in the National DNA Database, but an application requesting deletion of these data has not been received from the person, these sensitive personal data are still stored, although he is no longer a suspect.

Following the change of a person's criminal procedural status, i.e., in the case, where the criminal proceedings are terminated as a whole or against the particular person on the grounds of exonerating circumstances, or the decision by which a person has been recognised as being a suspect on the same grounds is revoked, as well as if a judgement exonerating the person has entered into force, then the grounds, established in law, upon which a person's fundamental rights are restricted for reaching the legitimate aim, disappear. Therefore with respect to such cases the State has the obligation to establish such legal regulation that would define criteria for restitution of a person's rights in their initial scope.

It was stated at the court hearing that there was no particular procedure for storing and destroying biological material taken from a person after it had been genetically analysed. Likewise, there is no control mechanism that would allow

the person himself or with the mediation of an independent institution to verify that his sensitive data, including biological material that had been taken, have been destroyed or deleted and are not used for purposes that cannot be recognised as being legitimate. The Constitutional Court also notes that neither does DNA Law Section 18 (1) define the term, within which, from the receipt of a person's request, the person's data are deleted from the National DNA Database. Likewise, the State has not been established an obligation to stop the procedure of determining DNA profile, when during it the particular criminal procedural status of a person has been revoked and the legal grounds for determining his profile for storing in the National DNA Database no longer exist. The term for storing the collected biological material and procedure for destroying thereof has not been defined either.

The Constitutional Court cannot uphold the opinion expressed by the Saeima that the fact that a person has not submitted an application requesting deletion of his data from the National DNA Database is to be regarded as agreeing to storage of the data. The Constitutional Court notes that one of the priorities in the reform of data protection of the European Union member states is to ensure persons fundamental rights better, in particular, in the field of data protection. Considering the sensitive nature of a person's biological material and DNA profile, the subjects of law should be imposed such obligations that would ensure that personal sensitive data are not stored without grounds established in law. DNA Law does not define such obligation.

It has been underscored in the case law of ECHR that Article 8 of the Convention imposes upon state institutions not only a negative obligation to refrain from any unfounded interference into inviolability of private life, but also a positive obligation to take measures necessary to protect this right (*see Judgement of 26 March 1985 by ECHR in case "X and Y v. the Netherlands", application No. 8978/80, Para 23*). Thus, the legislator must establish such mechanism for personal data protection that would ensure that the rules of storing thereof would fully comply with the envisaged purpose of data processing. The Constitutional Court holds that with respect to rules on storing

and deleting suspects' biological material and DNA profile the legislator has failed to perform its duty.

Thus, a person, who has been a suspect in criminal proceedings, after this status has been revoked, has not been ensured all necessary guarantees with respect to deletion of his sensitive data, although grounds for storing these data established in law no longer exist.

Therefore, the restriction imposed a person's rights exceeds the public benefit and the restriction upon fundamental rights included in the DNA Law Section 18 (1) is not proportional.

Thus, the first part of DNA Law Section 18, insofar it applies to suspects, is incompatible with Article 96 of the Satversme.

24. Pursuant to Section 32(3) of the Constitutional Court Law, the legal norm that has been recognised by the Constitutional Court as being incompatible with a norm of higher legal force, is to be recognised as being invalid as of the day when the judgement by the Constitutional Court is published, unless the Constitutional Court has provided otherwise. This norm grants to the Constitutional Court broad discretion to decide upon the date, as of which the norm, which has been recognised as being incompatible with a norm of higher legal force, becomes invalid. I deciding upon the date as of which the contested norms becomes invalid, the rights and interests of not only the applicants, but also those of other persons must be taken into consideration (*see, for example, Judgement of 16 December 2005 by the Constitutional Court in Case No. 2005-12-0103, Para 25, and Judgement of 19 October 2011 in Case No. 2010-71-01, Para 26*).

In the case under review the Constitutional Court must take into consideration that immediate revoking of the contested norms, before a new legal regulation has entered into force, is impossible, because in such a case suspects' biological material stored after determination of DNA profile would have to be destroyed immediately, but collection of new biological material would be impossible prior to adoption of new legal regulation. This would place public security under threat.

In a situation like this it is necessary and admissible that the norms that are incompatible with the Satversme remain in force for a certain period to give the legislator the possibility to adopt a new legal regulation that would ensure protection of suspects' sensitive data (*see, for example, Judgement of 22 October 2002 by the Constitutional Court in Case No. 2002-04-03, Para 3 of the Findings, and Judgement of 9 March 2010 in Case No. 2009-69-03, Para 16)*. In view of the fact that legislator needs a reasonable period of time for drafting and adopting a new legal regulation, the contested norms in this case cannot be recognised as being invalid as of the date when the judgement by the Constitutional Court is published.

The Substantive Part

On the basis of Section 30-32 of the Constitutional Court Law, the Constitutional Court

held:

1) **to terminate legal proceedings in the case in the part regarding compliance of Para 2 of Section 1 of Law on Development and Use of the National DNA Database and Para 13 of the Cabinet of Ministers Regulation of 23 August 2005 No. 620 "The Procedure of Providing Information to be Included in the National DNA Database, as well as the Procedure for Collecting Biological Material and Biological Trace", insofar as these apply to persons suspected, with Article 96 of the Satversme of the Republic of Latvia;**
2) **to recognise Para 6 of Section 1, Section 4, Section 10 of Law on Development and Use of the National DNA Database, as well as Para 2 of the Cabinet of Ministers Regulation of 23 August 2005 No. 620 "The Procedure of Providing Information to be Included in the National DNA Database, as well as the Procedure for Collecting Biological Material and Biological Trace", insofar as these apply to**

persons suspected, as being compatible with Article 96 of the Satversme of the Republic of Latvia;

3) **to recognise Section 18(1) of Law on Development and Use of the National DNA Database, , insofar as it applies to persons suspected, as being incompatible with Article 96 of the Satversme of the Republic of Latvia and invalid as of 1 January 2017.**

The Judgement is final and not subject to appeal.

The Judgement enters into force on the day it is promulgated.

Chairman of the court sitting A. Laviņš