REPUBLIC OF ESTONIA
MINISTRY OF JUSTICE
AND DIGITAL AFFAIRS

Our Ref 21.05.2026 No 11-3/4054-1

Dear colleagues in the prison service,

I am writing to kindly seek your support for the Estonian prison service in the proceedings currently pending before the Grand Chamber of the European Court of Human Rights concerning the smoking ban for detainees.

Since 2017, Estonian prisons have been entirely tobacco-free, with a comprehensive ban on smoking in place. Smoking-related tobacco products and designated smoking areas have been absent from prisons for nearly a decade, ensuring that both staff and detainees are in a fully tobacco-free environment. In its initial judgment of 4 November, the European Court of Human Rights expressed concerns that, in introducing the ban, insufficient consideration had been given to the private autonomy of prisoners who wish to smoke. Estonia has since referred the case to the Grand Chamber.

The Grand Chamber has decided to take up the case. As ECHR proceedings allow states to submit observations and express support for the positions of other states, I would respectfully encourage you to consider participating in the proceedings and sharing your views. Such contributions could play an important role in helping Estonia (and other countries) secure broader support for its position and arguments in this case.

A smoking ban in prisons is not merely a restriction but a forward-looking solution that protects the health of both detainees and staff, fulfills the employer's duty to ensure a safe environment, reduces debt relationships, and frees up staff resources for more meaningful security and rehabilitation efforts.

Accordingly, I invite you—if you find these arguments persuasive and support the view that states should have the right to impose such restrictions—to express your support to the ECHR by 15 June 2026 at the latest. This can be done by submitting a request through your country's representative before the ECHR.

With appreciation for your consideration of this matter.

If you have any questions or would like to discuss this further, please feel free to reach out to me.

Yours sincerely,

Rait Kuuse
Deputy Secretary General on Prisons
Ministry of Justice and Digital Affairs

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Reg no 70000898

Encl.: 1. Referral request (ECHR);
2. Prison smoking ban in Estonia.

REPUBLIC OF ESTONIA
MINISTRY OF FOREIGN AFFAIRS

Request

by the Government of Estonia

that the case of

Vainik and Others v. Estonia, no. 17982/21 and 3 others

be referred to the Grand Chamber

4 February 2026

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Introduction to the case and the reasoning in the Chamber judgment

1. This case concerns the prohibition of smoking in Estonian prisons. It is the first time that the European Court of Human Rights (the Court) has been called upon to assess the impact on prisoners of a complete prohibition to smoke. In their judgment of 4 November 2025, the Chamber of the third section of the Court found a violation of Article 8 of the Convention on account of that prohibition.

2. A lengthy and gradual tightening of restrictions on smoking in prisons preceded the introduction of the prohibition, culminating in a complete ban that has been in force since 1 October 2017. The prohibition was introduced with an executive regulation. Its compatibility with the fundamental rights was analysed in the process of drafting and subsequently in constitutional review proceedings before the Supreme Court.

3. The Chamber's majority held that the choice to smoke, and the provision of treatment to counter the withdrawal effects of quitting smoking due to the prohibition, fell within the material scope of the right to respect for private life, and that Article 8 was therefore applicable. In particular, they relied on the notion of personal autonomy, including the opportunity to pursue activities perceived to be harmful to oneself, and noted that smoking was not generally prohibited in the respondent State (§§ 129-132).

4. In examining whether the interference was "necessary in a democratic society", the majority attached particular weight to the applicants' personal autonomy (§§ 163-164), absence of parliamentary scrutiny prior to the introduction of the smoking ban (§§ 166-168), and inadequacy of the domestic authorities' proportionality assessment, in that "the understanding of personal autonomy, together with the importance of prisoners' freedom of choice to decide on matters concerning their own body and health" seems to have been "completely absent from the domestic discussion" (see § 169), as well as lack of consensus among member States on the need to prohibit in prisons smoking which is a legal activity at liberty (§ 170).

5. The Government respectfully submit that the present exceptional case raises serious questions affecting the interpretation and application of Article 8 of the Convention which warrant consideration by the Grand Chamber.

Exceptional nature of the case

6. The case is exceptional because it raises, for the first time, the question whether the possibility to smoke in a closed environment such as a prison may form part of the protected sphere of private life and constitute a position protected under Article 8 of the Convention. The Court's

previous case-law on smoking in detention settings has concerned positive obligations to protect non-smokers from exposure to second-hand smoke (see § 148 of the judgment). Any case in which the Court is asked to extend the scope of Article 8 to a new sphere of conduct is, by its nature, exceptional.

7. The case raises important questions for tobacco control and public health measures. Recognition of smoking as a position protected under Article 8 of the Convention may generate challenges to restrictions which, in contemporary European societies, are thus far widely regarded as legitimate and non-controversial.

8. The question about smoking in prisons under the Convention is not confined to the situation of the respondent State. It concerns the proper limits and methodology of Article 8 reasoning in relation to harmful and addictive practices. The judgment in the instant case is likely to be invoked and has repercussions in prison systems across various jurisdictions. It may influence the development of smoke-free prison policies in multiple member States. Smoking (and exposure to second-hand smoke) is widely recognised as a serious public health problem, particularly in prisons where smoking prevalence is high and where both prisoners and staff are exposed to it. There is a broad understanding in public health policy that partial restrictions are insufficient to secure a genuinely smoke-free environment for non-smokers, and that effective protection generally requires comprehensive smoke-free rules, since ventilation and segregation measures do not eliminate exposure to second-hand smoke.[1]

9. If the Chamber judgment becomes final, it is liable to have serious operational and financial repercussions for Estonia. Estonia has now for eight years since 2017 maintained the prison environment fully smoke-free, thereby protecting both non-smoking prisoners and staff. Estonia is one of the few States to have succeeded in doing so. Any reversal of that policy would require substantial changes to infrastructure and daily prison management. It would also place prison officers in circumstances where they are exposed to tobacco smoke on a routine basis, even in outdoor exercise yards as enclosed spaces.

10. As an ancillary aspect, the closeness of the vote and the strong judicial disagreement indicate that the case raises difficult and unsettled questions that call for clarification by the Grand Chamber. The Chamber found a violation of Article 8 of the Convention by 4 votes to 3 and the

[1] See Guidelines for implementation of Article 8 [of the World Health Organisation Framework Convention on Tobacco Control] (Protection from exposure to tobacco smoke), FCTC/COP2(7), p 25: "No safe levels of exposure to second-hand smoke exist, and, as previously acknowledged by the Conference of the Parties in decision FCTC/COP1(15), engineering approaches, such as ventilation, air exchange and the use of designated smoking areas, do not protect against exposure to tobacco smoke."

admissibility of the complaint under that article was also contentious. The judgment is accompanied by separate opinions of six of the seven judges on the bench, including a partly dissenting opinion explicitly characterising the ruling as establishing "a new fundamental right … the right to smoke in prison".

Serious questions affecting the interpretation and application of the Convention

11. The Government sets out below the serious issues arising in the case. Each point is capable of recurring beyond the confines of the respondent State and the present case, thus warranting clarification or guidance from the Court at Grand Chamber level.

i) Extension of the scope of Article 8

12. The first issue concerns the scope of Article 8 and, in particular, whether the "choice to smoke", including in a closed environment such as a prison, is capable of falling within the notion of "private life" protected by Article 8 § 1, and, if so, on what basis and within what limits.

13. In the present case, the Chamber held that "whether to smoke" is an aspect of personal autonomy and therefore falls within the scope of private life under Article 8 (§§ 129-132, 163–164). In the separate opinions that approach was disputed. In particular, the partly dissenting opinion of Judge Pavli characterised the judgment as effectively establishing "a new fundamental right … the right to smoke in prison", and questioned whether such a right exists under Article 8 under any of the theories or grounds relied upon by the majority (separate opinion of Judge Pavli, §§ 1–3). Recognising a right to smoke in prison implies that there is a general right to smoke. However, it is absolutely implausible to speak of a *general* right to smoke if we look at current practices in contemporary European societies.

14. The seriousness of the issue lies in the implications for the methodology by which certain specific interests are identified and delimited as meriting the protection of Article 8. If personal autonomy, as a general concept, is sufficient to bring within Article 8 any lifestyle choice perceived to be harmful, this may materially affect the reach of Article 8 in areas of public health regulation and in closed settings where accommodation of the choice may entail harm to others and operational constraints.

15. The Government accordingly submit that Grand Chamber guidance is required on the doctrinal filter to be applied when an interest regarding which Article 8 protection is sought concerns a harmful or addictive practice, and on whether additional limiting criteria are required, such as the closeness of the activity to identity, physical integrity, or personal development, and

the compatibility of the claimed interest with the rights of others and the underlying values of the Convention.

ii) Application of the "threshold of severity" under Article 8

16. Even if smoking (in prison) may in principle fall within the ambit of Article 8, the case raises a further serious question whether the measure complained of in a particular case must also attain a minimum level of seriousness (exceed a threshold of severity) in its effects on the applicant's private life in order to constitute an interference with the scope of Article 8 (making it applicable in a specific situation and triggering the obligation to justify that interference under Article 8 § 2; see *Denisov v. Ukraine* [GC], no. 76639/11, §§ 111-113, 25 September 2018, *Vučina v. Croatia* (dec.), no. 58955/13, §§ 32-34, 24 September 2019).

17. That important methodological question has remained unanswered in the present case. The Chamber accepted Article 8 applicability on the basis of the broad notion of "private life" and the manner in which it has been applied in the Court's case-law (§§ 129-132). The methodology in the present case is contested in the separate opinions, which emphasise doubts as to whether the impact on the applicants' Article 8 interests was severe enough. The Government would argue that a minimum level of severity threshold would need to be applied and that under the circumstances, even if the applicants can be said to have discharged their burden of proof, the effect of the prohibition of smoking was not serious enough to bring their specific situations within the scope of Article 8 of the Convention.

18. The Government submit that the Grand Chamber could clarify in the context of the possible right to smoke (i) how the threshold-of-severity analysis applies under Article 8, (ii) what factors determine whether it is met, and (iii) the burden on applicants to identify and substantiate concrete repercussions.

19. The point is of general importance because it concerns how the threshold of severity is to be applied under Article 8 consistently to a novel aspect, that furthermore does not appear to be concerning the core of that Convention right.

iii) Relevance of parliamentary scrutiny in applying subsidiarity and the margin of appreciation

20. Another serious question is how, and to what extent, the Court may treat the form of domestic decision-making (for example parliamentary legislation versus executive regulation) as a decisive factor in the application of the principles of subsidiarity and margin of appreciation in the context of proportionality assessment under Article 8 of the Convention, where the domestic

processes, considered as a whole, included detailed analysis of the impact of the impugned measure and constitutional review.

21. The majority of the Chamber treated as decisive that the ban "was not adopted by Parliament", and stated that it did not benefit from "direct parliamentary review and debate", notwithstanding its acceptance that the measure was "in accordance with the law" and that its constitutionality and impacts were examined in the drafting process and subsequently by the Supreme Court (§§ 154, 167-168).

22. That approach departs significantly from the Court's previous case-law and could seriously affect fundamental aspects of the shared responsibility between the Court and the domestic authorities in the application of the Convention. In *Animal Defenders International v. the United Kingdom* [GC] (no. 48876/08, § 108) the Court referred to the importance of the quality of the parliamentary *and* judicial review of the necessity of a general measure. In *Humpert and Others* ([GC], nos. 59433/18 and 3 others, § 146), the Court, in its application of *Animal Defenders International,* referred to the "convincing ... justifications of a general measure" and proceeded to find those justifications in the extensive assessment of the domestic courts and not in the parliamentary debate. In the case of *Mikyas and Others v. Belgium* ((dec.), no. 50681/20, § 55, 9 April 2024) a restriction of Article 9 rights was imposed with a decision of educational establishments (§§ 8 and 55). In that case the Court does not appear to have been taken any issue with that in the context of applying the subsidiarity and margin of appreciation doctrines in favour of the respondent State (§§ 70 and 76).

23. The Grand Chamber's clarification is necessary to avoid uncertainty as to when the Court will treat non-parliamentary adoption as a major deficiency, even where a measure is lawful and subject to thorough scrutiny of different authorities at domestic level.

iv) Issues related to the methodology of applying the freshly-recognised "right to smoke"

24. If smoking in prison is to be regarded as falling within the scope of Article 8 of the Convention both in principle and in the particular situation of the applicants, the case raises serious methodological questions about how the justification analysis, and in particular the balancing exercise, is to be conducted under Article 8 § 2.

25. The Government submit that the issues below have a cumulative impact on the "necessity in a democratic society" assessment of any possible restriction of the right to smoke and thus require clarifications by the Grand Chamber.

- **Personal autonomy in prison where the conduct endangers others and raises concerns over security and order**

26. What elements must domestic authorities address, and what level of detail is required, when balancing prisoners' personal autonomy against (i) protection of the health of others and (ii) prison security and operational constraints?

27. The Chamber criticised the domestic analysis for not addressing the ban's importance and impact from the perspective of prisoners' personal autonomy and freedom of choice over their own body and health (§ 169).

28. The problem is acute in view of the Court's established case-law on States' obligations to protect non-smoking prisoners from second-hand smoke under Article 3 (§ 148), and the fact that Article 3 is an absolute right (it cannot be interfered with) whereas Article 8 is qualified (it may be interfered with under the circumstances of § 2, but those interferences must be justified).

29. The Government submits that the Grand Chamber could provide guidance on how to take account of (i) risks to the health of others in a closed environment, (ii) the particular vulnerability of non-smoking prisoners, and (iii) the security and resource implications of partial accommodation of the smokers' interests.

- **Margin of appreciation issues**

30. The case also raises serious questions regarding the practical operation of subsidiarity and the margin of appreciation in review of general measures (in addition to the issue related to the relevance of parliamentary scrutiny above).

31. The first serious issue under this heading is how the Court should calibrate the margin of appreciation in social and public health policy – policy areas which are in principle within the margin of appreciation of the domestic authorities, who are best placed to assess priorities, use of resources and social needs (see *Hristozov and Others v. Bulgaria*, nos. 47039/11 and 358/12, § 119; *Vavřička and Others*, no. 47621/13, §§ 274 and 280; and *Communauté genevoise d'action syndicale (CGAS) v. Switzerland* [GC], no. 21881/20, § 160, 27 November 2023) – where there is a discernible regulatory trend in the member States of the Council of Europe towards smoke-free environments, but no uniform practice yet amounting to "consensus".

32. A further issue concerns the consequences, for the proportionality assessment, of the Court's finding that a State enjoys a considerable margin in regulating a particular sphere of life (as for example in §§ 161, 170). The Government would argue that if a State enjoys a **"**considerable

margin" in regulating smoking in prisons, that conclusion should have concrete methodological consequences for the intensity of review of the contentious measure.

33. The case presents an opportunity for the Grand Chamber to clarify the appropriate width and breadth of the margin of appreciation in matters of public health and prison administration when there is a trend, but no uniform practice regarding a specific activity, as well as the appropriate consequences of a wide or considerable margin for the assessment of "necessity in a democratic society" of an interference with that activity.

- **Giving appropriate weight to the legitimate aims**

34. The legitimate aims justifying the prohibition of smoking in the present case were protecting the health of others (non-smoking prisoners and prison staff from the harmful effects of second-hand smoke) and preventing disorder or crime (prison security and more efficient use of prison resources).

35. The majority of the Chamber have stated that they welcome the efforts to protect health and security in prisons (§ 171, but see also §§ 157-159 which deals with health protection in the section of the judgment "Margin of appreciation in the present case").

36. The serious issue that presents itself in this context is how explicitly could the Court be expected to state what weight it gives or how important it considers that the legitimate aims are in a given situation. The Government submit that it is especially important for understanding the reasoning of the Court when the review of necessity in a democratic society takes a more intensive form. Again, the Grand Chamber can refine the methodology as regards that aspect.

- **Assessment of the nature and intensity of the interference**

37. The majority of the Chamber attached considerable weight in the assessment of necessity (the balancing exercise) to the personal autonomy of the applicants and the choice to smoke in the context of already limited personal autonomy (§ 163-164, 169).

38. The Government submit that the Grand Chamber could clarify how the nature of the interest invoked and the intensity of the interference affect the balancing exercise, particularly where (i) the prohibition under scrutiny is introduced gradually over years by reducing possibilities of smoking (§§ 52, 69), (ii) it is not unexpected (§§ 5–7, 68–71), (iii) supportive measures (treatment and counselling) are provided (§§ 48, 55–56, 169), and the interest in question that the measure interferes with cannot be considered falling within the core of the scope of protection of Article 8, but can at best be seen as falling on the periphery of the interests protected by Article

8 (see also § 160 “the activity itself cannot be considered an indispensable or inextricable facet of an individual’s identity or existence”).

39. The Grand Chamber could explain further how the Court could review and explicitly reflect in writing the entirety of different factors determining the nature and intensity of an interference for the purposes of the balancing exercise. That is especially important to ensure transparency and intelligibility of the Court’s reasoning and thereby to safeguard the authority of the Court’s judgments.

Conclusion

40. For the reasons set out above, the Government are of the opinion that the case is exceptional and raises serious questions affecting the interpretation and application of Article 8, and serious issues of general importance, concerning: (i) extension of the scope of Article 8 of the Convention; (ii) the role of any threshold of severity in engaging Article 8; (iii) the proper weight to be given to parliamentary scrutiny in the application of the principles of subsidiarity and margin of appreciation of the Preamble to the Convention; and (iv) the methodology for applying the newly-recognised “right to smoke”.

41. Should the Chamber judgment become final, it is liable to create considerable operational and financial repercussions for Estonia. Any reversal of the eight-year smoking ban would require substantial changes to prison infrastructure and daily management. It would expose prison staff to tobacco smoke on a routine basis, it would reintroduce related security risks (tobacco products as a means of payment and creation of obligations among prisoners, fire hazards etc.) and increase staff workload through the need for additional supervision.

42. The Government therefore respectfully request, pursuant to Article 43 of the Convention and Rule 73 of the Rules of Court, that the case be referred to the Grand Chamber.

43. If the panel decides to refer the case to the Grand Chamber, then the Government would like to have an opportunity to submit further observations on the admissibility and merits of the complaint under Article 8 of the Convention (Rule 71 § 1 and 59 § 1 of the Rules of Court).

Tim Kolk
Agent of the Government of Estonia
before the European Court of Human Rights

Smoking Ban in Estonian Prisons – ECHR Grand Chamber

Estonia emphasizes the importance of public health, prison security, and the margin of appreciation of states in the Grand Chamber proceedings of the European Court of Human Rights (ECHR). Smoke-free prisons are a measure to protect the health of detainees and staff, not a punitive restriction. We kindly ask you to highlight the fundamental significance of this case and encourage you to support Estonia in the Grand Chamber proceedings before the ECHR. It is important to clarify that the ECHR has not recognized a right of detainees to smoke—the dispute primarily concerns the adequacy of reasoning and the states' margin of appreciation.

Background: In 2017, Estonia introduced a complete smoking ban in prisons. Four detainees challenged the ban in court, claiming a disproportionate restriction of their private life. In 2019, the Estonian Supreme Court found that the ban was constitutional, serving the aims of health protection and order, and providing support for those wishing to quit smoking. On 4 November 2025, the ECHR (by 4 votes to 3) found a violation of Article 8 of the Convention, holding that insufficient consideration had been given to detainees' private autonomy in introducing the ban. The ECHR acknowledged the legitimate aims of the ban (protection of health, order, and security) and found no degrading treatment (no violation of Article 3 of the Convention). According to the Court, the violation stemmed primarily from shortcomings in the reasoning of the decision, rather than from the nature of the smoking ban itself. Estonia requested a referral of the case, emphasizing its fundamental importance for prison policy across European states. On 23 March 2026, the Grand Chamber of ECHR accepted the case for examination, confirming that the issue is of significant legal and societal importance. A final judgment is expected in 2027.

Key developments:

- The ECHR Chamber's 4–3 judgment and the three separate opinions demonstrate that the issue is contentious and requires clarification by the Grand Chamber.
- **Broader context:** Prison practices across Europe vary—most states allow detainees to smoke to some extent (e.g. in outdoor areas or designated cells); a total ban is rare. Estonia is essentially the only European country with fully smoke-free prisons. At the same time, the WHO has recommended smoke-free prisons to achieve public health objectives.
- The Grand Chamber will set a precedent: whether restrictions on smoking in prison fall within the state's margin of appreciation, or whether limits will be imposed that could affect the policies of many countries in the future.
- Estonia emphasizes that Article 8 of the Convention protects private life, but restricting smoking habits falls within the state's margin of appreciation when justified by public health and safety considerations.
- **Public reactions:** Some members of the public misinterpreted the ECHR judgment as establishing a "right of prisoners to smoke." Estonia has corrected this

misunderstanding, stressing that the judgment does not require lifting the ban, but only providing more thorough reasoning.

Assessment:
The Grand Chamber proceedings have fundamental importance for European human rights practice, as the outcome will determine whether states retain their margin of appreciation in prison policy. It is questionable whether smoking, as a knowingly harmful habit, should fall within the scope of protection under the Convention at all, given that the ECHR does not explicitly provide for such a "right to smoke." The issue lies not in the smoking ban itself, but in the adequacy of its justification.

Estonia's main arguments:

- **Public health and safety:**

A smoke-free prison protects the health of both detainees and staff and reduces security risks (tobacco cannot be used as illicit currency, and fire hazards and conflicts are reduced). A prison is both a workplace and a living environment where passive (second-hand) smoking poses a serious health risk. According to the World Health Organization (WHO), there is no safe level of exposure to tobacco smoke, and effective protection can only be achieved through a completely smoke-free environment. Under European Union law, employers must ensure a safe working environment. Directive 89/391/EEC requires employers to protect workers' health and prevent risks at their source, including exposure to tobacco smoke.

The regulation of tobacco use is also governed by the WHO Framework Convention on Tobacco Control (FCTC), which links protection from tobacco smoke to human rights, including the rights to life and health (e.g. the WHO Constitution, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, and the International Covenant on Economic, Social and Cultural Rights). Under Article 8 of the FCTC, effective protection requires a 100% smoke-free environment, and alternative measures such as ventilation or designated smoking areas are not effective. Therefore, a total smoking ban is a justified measure to protect the health of employees and others.

A smoking ban in prisons significantly reduces the resources needed to prevent indoor smoking, conduct searches, ensure supervision, respond to fires, and combat the illegal handling of cigarettes. Detecting cigarettes is often difficult and may require extensive and burdensome searches. The ban reduces the illegal entry of cigarettes and the associated security and fire risks arising from improvised ignition devices and modified equipment. It also limits the use of cigarettes as a means of exchange or payment in prison, preventing illicit debt relationships and the formation of subcultural hierarchies. For these reasons, a total smoking ban within prison premises is an appropriate measure to protect health, strengthen security, and ensure more effective supervision.

- **Impact and effectiveness:** Limited smoking areas only mitigated the problem; a total ban resolved smoking-related disturbances. The ban reduced confrontations and administrative burden and improved the working environment.

- **Proportionality and human dignity:** The ban was implemented gradually and with accompanying measures (counselling, nicotine replacement therapy), and therefore did not cause excessive suffering (no violation of Article 3 of the Convention was found). The smoking ban is not punitive, but a measure to ensure health and safety.
- **Limits of autonomy:** In prison, detainees' autonomy is inevitably restricted—the state is obliged to protect the health and safety of others. The ECHR does not require states to allow detainees to smoke.
- **Margin of appreciation:** A smoke-free prison is a matter of prison policy, in which the state enjoys a wide margin of appreciation. Member States must be able to decide how to ensure public health and prison security—interference by the ECHR is justified only in exceptional cases.