



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF CHOCHOLÁČ v. SLOVAKIA

(Application no. 81292/17)

JUDGMENT

Art 8 • Private life applicable • General and indiscriminate ban on prisoner possession of pornographic material not permitting proportionality assessment in an individual case

STRASBOURG

7 July 2022

FINAL

14/11/2022

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Chocholáč v. Slovakia,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Marko Bošnjak, *President*,

Péter Paczolay,

Krzysztof Wojtyczek,

Alena Poláčková,

Erik Wennerström,

Raffaele Sabato,

Davor Derenčinović, *judges*,

and Renata Degener, *Section Registrar*,

Having regard to:

the application (no. 81292/17) against the Slovak Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Slovak national, Mr Roman Chocholáč (“the applicant”), on 21 November 2017;

the decision to give notice to the Government of the Slovak Republic (“the Government”) of the complaints under Articles 8 and 10 of the Convention and to declare the remainder of the application inadmissible;

the observations submitted by the Government and the observations in reply submitted by the applicant;

third-party comments received from the European Centre for Law and Justice (“the ECLJ”), which had been granted leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3);

Having deliberated in private on 31 May 2022,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The case concerns a rule pursuant to which inmates serving prison sentences are banned from possessing adult material because it is considered to be a threat to morality. It mainly raises issues under Article 8 of the Convention.

THE FACTS

2. The applicant was born in 1989 and is serving a life sentence in Leopoldov prison for murder.

3. Having been granted legal aid, the applicant was represented before the Court by Mr T. Bicko, a lawyer practising in Považská Bystrica.

4. The Government were represented by their Agent, Ms M. Bálintová.

5. The facts of the case may be summarised as follows.

I. INCIDENT

6. At the relevant time, the applicant was serving a sentence in Ilava Prison. He was placed under the maximum security regime in a single-occupancy cell within a separate prison section reserved exclusively for life prisoners.

7. On 26 April 2013 he was subjected to a routine search in connection with a visit that he was going to pay to another life prisoner. A popular weekly magazine was found in his possession, on the inside of which pictures showing explicit content had been pasted.

8. It was later submitted by the applicant and not disputed by the authorities that the pictures had been cut out from adult magazines which were freely available in the press distribution network in Slovakia and in the Czech Republic and that they depicted “classic” adult heterosexual sex (*klasický sex medzi dospelými ženami a mužmi*).

9. With reference to the definition of pornography and the offence of threatening morality (*ohrozenie mravnosti*) provided in Article 132 § 2 and Article 371 § 1 of the Criminal Code (Law no. 300/2005 Coll., as applicable at that time), the material was found to be pornographic in nature and, as such, a threat to morality within the meaning of section 40(i) of the Execution of Prison Sentences Act (Law no. 475/2005 Z. z. Coll., as amended – hereinafter “the EPSA”).

10. The material was taken away from the applicant and disciplinary proceedings were opened against him.

II. DISCIPLINARY PROCEEDINGS

11. In his defence, the applicant emphasised that the pictures depicted heterosexual adult intercourse, that this was in accordance with nature, and that he had freely opted for that orientation. The pictures were intended for his own use, had been pasted in a magazine that belonged to him and were a part of his private life. They had a soothing and positive impact on him, especially as he was excluded from social life. The fact that somebody found the pictures offensive did not mean that their possession should be punishable. A threat to morality had to be seen in the light of the prevailing environment – in his case, the life prisoners’ section of the prison, where homosexuality was prevalent but was not countered, and – as the applicant argued – it was even supported by the prison authorities. Being of heterosexual orientation, the applicant considered that he had been discriminated against, and contended that he had not breached any law.

12. On 10 May 2013 the applicant was found guilty of a disciplinary offence. He appealed against that decision, but his appeal was dismissed on 17 May 2013. His arguments were noted but given no response, as the material in question was proscribed, and its possession was illegal. In view

of the circumstances, it was decided that the appropriate sanction was that of a reprimand under section 52(3)(a) of the EPSA.

13. Following repeated requests by the applicant in which he essentially reiterated the above arguments, the decision was reviewed and upheld by two levels of the Public Prosecution Service, the final decision being delivered by means of a communication of 27 May 2015. The decision found that the pictures were pornographic and as such threatened morality, and that they were accordingly proscribed. The applicant must have known this, as he had attempted to conceal them.

III. CONSTITUTIONAL REVIEW

14. The applicant subsequently asserted his rights before the Constitutional Court, relying on, *inter alia*, Articles 8 and 10 of the Convention. He continued to advance the same arguments as before and added that, in applying section 40(i) of the EPSA, the prison administration and the Public Prosecution Service had wrongfully relied on the criminal-law provisions concerning the offence of threatening morality through pornography. Those provisions only made it an offence to produce or procure and then put into circulation pornography that involved disrespect towards human beings, violence, zoophilia or – as the law terms it – other pathological sexual practices. Aside from that offence and certain others, such as those involving children, pornography was not a matter of criminal law. His case involved the possession of material depicting “ordinary” adult heterosexual sex (*bežný heterosexuálny sex dospelých ľudí*). This was no threat to morality among the general population, and there were *a fortiori* no grounds to presume that it could jeopardise the morality of mentally stable adults in the prison population.

15. The applicant also noted that for a heterosexual man in prison, complete isolation from the opposite sex led to loneliness, stress, anxiety and aggression. Self-stimulation served as a tool to reduce those negative effects, particularly when inspired by explicit material. There was no indication of any instance within the prison environment when such material had triggered aggressive or otherwise negative behaviour, but a situation marked by a ban on access to it might well do so.

16. Furthermore, the applicant pointed out that the practice in various prisons was inconsistent and that the relative leniency of his sanction was only due to the fact that he had had no previous disciplinary convictions.

17. In a judgment of 15 March 2017, the Constitutional Court found that Article 8 of the Convention was inapplicable to the facts of the applicant’s case and that there had been no violation of his freedom to receive information under Article 10 of the Convention.

18. It recognised that prisoners continued to enjoy all the Convention rights and freedoms, the exercise of which was not by definition incompatible

with the execution of a prison sentence. An interference with such rights and freedoms was to be examined in the light of the Convention requirements. The questions to be answered were whether the provisions in question guaranteed the right to be allowed to possess pornographic material and, if so, whether the interference with that right was justified.

19. Within the given context, pornography was to be understood as defined in the Criminal Code (see paragraph 30 below).

20. No pornography involving children, disrespect towards human beings, violence, zoophilia or other pathological sexual practices within the meaning of the applicable legal definition (see also paragraph 31 below) was protected as a matter of principle. Any other type of pornography had to be considered with regard to its specific audience and context and the aims sought by its dissemination. Three “other” types of pornography could thus be distinguished: (i) that which was intended to be displayed on a limited basis or excluded within a given context; (ii) that which could be displayed without limits; and (iii) that in respect of which the position depended on the concrete circumstances.

21. Such “other” pornography could fall within the remit of private life under Article 8 of the Convention only if it depicted the person concerned or a scene from his or her intimate sphere, which was not the situation in the applicant’s case.

22. The matter was accordingly to be viewed with regard to the freedom to receive information under Article 10 of the Convention. The withdrawal of the material in question from the applicant’s possession and the disciplinary sanction imposed on him had amounted to an interference with that freedom. Its legal basis was section 40(i) of the EPSA and it pursued the aims of the protection of morals, the prevention of disorder and the protection of the rights and freedoms of others.

23. As to the necessity of the interference, the legal provision in question was cast in absolute terms and allowed for no balancing of individual interests. It was true that the prison context was specific in that it involved complete isolation from, and thereby a total exclusion of intimate contact with, the opposite sex. Pornography could thus serve as a stimulus for auto-erotic satisfaction. It could, however, also prompt sexual and violent offences.

24. The actual impact of pornography within the prison context in general terms was a question to be answered by experts and the Constitutional Court had no power to deal with it in response to an individual complaint. Accordingly, it could not but trust in the rationality of the lawmakers in having passed the legislation in question on the basis of sufficient expert evaluation. These matters had to be examined and assessed at a central level and the administration of a given prison was not equipped to assess the likely impact of pornography on inmates in individual cases. The lawmakers’ absolute preference for the above legitimate aims therefore had to be accepted

without any balancing against the individual's freedom to receive information.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. EXECUTION OF PRISON SENTENCES ACT

25. In accordance with section 35(1) of the EPSA, convicted prisoners have the right to subscribe to newspapers and magazines and to order books at their own expense other than those that, *inter alia*, threaten morality.

26. Pursuant to section 40(i), convicted prisoners are forbidden to keep, *inter alia*, printed material or objects that threaten morality and objects by which they might frustrate the purpose of the execution of the sentence, the fundamental principles of the execution of the sentence being defined in section 3 as including, *inter alia*, the support for attitudes that foster the prisoner's reintegration in the society (sub-section 3).

27. Disciplinary sanctions under section 52(3) comprise: (a) a reprimand, (b) a ban on telephone communications, (c) a ban on making purchases in the prison shop, (d) a ban on the use of a private television or radio receiver, (e) placement in a closed section outside working hours, (f) whole-day placement in a closed section, (g) solitary confinement, and (h) confiscation of an item.

28. If another disciplinary offence is committed within six months from the time when a decision imposing the disciplinary sanction of a reprimand for an earlier offence becomes final, the newly committed offence is to be punished by a more severe sanction than a reprimand (section 53(1)).

29. Upon the inmate's request, a disciplinary sanction is normally expunged (*zahľadnie disciplinárneho trestu*) if the inmate has fully complied with the applicable rules for a period of one year after the implementation of the sanction, and the sanction is thereby treated as never having been imposed (section 61(1) and (6)).

II. CRIMINAL CODE

30. At the relevant time, the notion of pornography was defined in Article 132 § 2 of the Code as comprising the portrayal of coitus, other forms of sexual intercourse or similar sexual contact or the depiction of exposed genitals aimed at provoking the sexual satisfaction of another person.

31. The basic form of the offence of threatening morality is defined in Article 371 § 1 as comprising, *inter alia*, the production, purchase, import or other means of procurement, and the subsequent sale, renting out or otherwise putting into circulation, of pornography involving disrespect towards human beings, violence, sexual intercourse with an animal or other pathological sexual practices (*iné sexuálne patologické praktiky*).

32. A specific form of the offence under Article 372 deals with making pornography accessible to children.

33. As to pathological sexual practices, their promotion or public support, approval or substantial downplaying constitutes an offence under Article 373.

III. OPINION OF THE DIRECTOR GENERAL OF THE PRISON AND COURT GUARD SERVICE

34. In 2014 the Director General of the Prison and Court Guard Service conducted an information campaign, distributing among all prison facilities in Slovakia an opinion on, *inter alia*, the interpretation of the term “printed material which threatens morality”. It distinguished between pornography and mere erotica. The former was to encompass magazines or books portraying figures whose principal aim was to activate the strong instinctual behaviour of the reader; the latter was to include daily press, magazines and books depicting the naked body for artistic, commercial or educational purposes. The assessment was *in concreto* to be made by each prison’s educational officer (*pedagóg*).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

35. Relying on Articles 8 and 10 of the Convention, the applicant complained about the sanction he had received for the possession of the material in question. The Court considers that the complaint falls to be examined under Article 8 of the Convention, the relevant part of which reads as follows:

“1. Everyone has the right to respect for his private ... life ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. Admissibility

36. The Court notes that the complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

37. The applicant emphasised that he was serving a life sentence in a maximum-security prison and that he lived alone in his cell. It accordingly constituted his home, the place where he led his intimate life.

38. In such a situation, he was excluded from any possibility of intimate contact with the opposite sex. As he was heterosexual, his only alternative was auto-erotic stimulation, for which he used inspiration from otherwise commonly available pornographic material. He was aware that the possession of such material in prisons in Slovakia attracted disciplinary sanctions and this was what had happened to him in the present case.

39. The removal of the contested material from him and the imposition of a disciplinary sanction had amounted to an interference with his privacy, and in particular, his sexual life. The interference had been unjustified as, in the applicant's view, the possession of such material in his specific circumstances could not have endangered morals, order within the prison or the rights of anyone else.

40. He further challenged the prison staff's unlimited discretion in determining whether certain material interfered with those values and argued that the Government had failed to show any concrete example of when the presence of pornography in prison had caused disturbances or violence.

41. Lastly, the applicant emphasised that the leniency of the sanction was only due to the fact that this had been his first disciplinary offence.

(b) The Government

42. The Government relied on the Constitutional Court's finding to the effect that, since the material in question had not depicted the applicant or any scene from his own intimate life, it had fallen outside the purview of his right to respect for private life. Serving a prison sentence entailed limitations on how a person could lead his or her private, including sexual, life. The applicant had not demonstrated that he had been unable to practise auto-eroticism without violating the relevant rules. The blanket ban on access to pornography had not had, in their view, any concrete consequences for the applicant's sexual life, mental health or well-being such as to qualify as an interference with his right to privacy.

43. Should the Court nevertheless find that the removal of the contested material from the applicant and the disciplinary sanction imposed on him had constituted an interference with the applicant's Article 8 rights, the Government contended that it had been based on section 40(i) of the EPSA, as interpreted in line with the 2014 Opinion of the Director General of the Prison and Court Guard Service. Any pornographic material was considered

a threat to morality within the meaning of that provision, of which the applicant had undoubtedly been aware. In sum, the interference had been in accordance with the law.

44. As established by the Constitutional Court, the interference had served the aim of protecting morals, order and the rights and freedoms of others.

45. As for its necessity, the Government contended that limiting certain rights and freedoms to protect morals was justified, despite the absence of a concrete definition of that concept in the domestic law, and that the level of protection afforded to morals corresponded to the historical, social and religious perception of the concept. As there was no uniform European understanding of it, the Contracting Parties' margin of appreciation was wide.

46. Within the prison context, the domestic legislation was aimed at preparing convicted persons for life after prison, including fostering respect for laws and social norms. As to the rights of others, in view of the inherent variety of their needs, values and beliefs, exposing prisoners to pornography could lead to offence and interpersonal conflict, and thereby eventually to endangering safety and order in prisons.

47. Given the state of the Slovakian prison system, it was impossible to allow access to pornography on an individual basis without a risk that it might be disseminated to others. However, a certain discretion was always left to the prison's educational officer for a case-by-case assessment.

48. The Constitutional Court's conclusion that the lawmakers' absolute preference for the stated legitimate aims had to be accepted without any balancing against the individual's freedom to receive information (see paragraph 24 above) had in itself involved a proportionality test.

49. The Government also argued that the ban on pornography in prisons did not extend to material of a purely erotic nature and that, accordingly, it had not constituted any far-reaching restriction of the applicant's rights. The sanction imposed had been the mildest possible one, without any additional consequences, and it had been possible to have it expunged after one year.

50. In sum, the Government maintained that the interference had been compatible with the requirements of the Convention.

(c) The third-party intervener's submissions

51. The ECLJ submitted that the Convention did not guarantee a right of access to pornography. In its view, pornography was, in essence, contrary to morals and its dissemination should not be protected by the Convention. It contended that a prohibition on the possession of pornographic material was necessary, proportionate and in conformity with international standards.

2. *The Court's assessment*

(a) *Applicability and interference*

52. Prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention. Any restrictions on these other rights must be justified, although such justification may well be found in the considerations of security, in particular the prevention of crime and disorder, which inevitably flow from the circumstances of imprisonment. It is inconceivable, therefore, that a prisoner should forfeit his Convention rights merely because of his status as a person detained following conviction. Nor is there any place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic disenfranchisement based purely on what might offend public opinion (see, *mutatis mutandis*, *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, §§ 69 and 70, ECHR 2005-IX, with further references).

53. The concept of “private life” within the meaning of Article 8 of the Convention is a broad term not susceptible to exhaustive definition, which covers the physical and psychological integrity of a person. Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8 (see, among other authorities, *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 66, ECHR 2008, with further references).

54. The facts of the applicant’s case before the Court are linked to his serving a life term in Slovakia. It is a specific feature of the prison system concerned that it allows for no conjugal visits. It is true that this as such is not the subject matter of the present case and that, although reform movements to facilitate such visits have been noted with approval, the Convention does not require the Contracting Parties to make provisions for them (*Lesław Wójcik v. Poland*, no. 66424/09, § 114, 1 July 2021). Nevertheless, it forms a part of the context in which the impugned restriction on the applicant’s ability to lead sexual life should be viewed.

55. It is uncontested in the present case that the applicant held printed material capable of being used as a stimulant for auto-eroticism in his private sphere for that purpose. The case accordingly involves no issue of any positive obligations in relation to it in general or *in concreto*. Although the status of such a material is likewise not an object of the present application, the Court notes that its possession is normally not against the law in the respondent Contracting Party. However, in the applicant’s specific situation, it was forbidden by a rule that has been enforced through the confiscation of the material and the imposition of a disciplinary sanction.

56. In these circumstances, the Court finds that the facts of the present case fall within the material scope of the right to respect for private life under

Article 8 of the Convention. The seizure of the contested material from the applicant and the reprimand he received for its possession accordingly constituted an interference with that right.

(b) Justification for the interference

57. To determine whether this interference entailed a violation of Article 8 of the Convention, the Court must examine whether it was justified under the second paragraph of that Article, that is, whether the interference was “in accordance with the law”, pursued one or more of the legitimate aims specified therein, and to that end was “necessary in a democratic society”.

(i) In accordance with the law

58. The legal basis for the interference in the present case was section 40(i) of the EPSA, and no reproach can be made in respect of it under the criteria established by the Court’s case-law (see, among many other authorities, *Khoroshenko v. Russia* [GC], no. 41418/04, § 110, ECHR 2015, and the cases cited therein). It was therefore in accordance with the law for the purposes of the Convention.

(ii) Legitimate aim

59. The enumeration of the exceptions to the right to respect for private life, as listed in Article 8 § 2, is exhaustive and their definition is restrictive. For it to be compatible with the Convention, a limitation of that right must pursue an aim that can be linked to one of those listed in that provision (see *S.A.S. v. France* [GC], no. 43835/11, § 113, ECHR 2014 (extracts)).

60. In the present case, concordantly with the Constitutional Court, the Government relied on the aims of the protection of morals, the prevention of disorder and the protection of the rights and freedoms of others.

61. In that connection, the Court notes first of all that the legal provision on the basis of which the interference was carried out only seeks to protect morality, but not order or the rights or freedoms of others, and that the reliance by the Constitutional Court and the Government (see paragraphs 22 and 31 above) on the notions of order and the rights or freedoms of others has been purely abstract and without any link to the facts of this case at all. As to the law that has been applied in this case, the use of the general term of morality as well as the aid to its interpretation by reference to criminal-law provisions which all presuppose the transmission of inappropriate material to others may be seen as indicative of the interest in protecting morality in the general sense.

62. On the facts, the applicant was given a disciplinary sanction for possession of the material at issue, which he kept purely for his private ends, and at no stage has there been any suggestion that it was intended or likely to be transmitted to any other person. Therefore, to the extent that the notions of

morality, order and the rights and freedoms of others presuppose the involvement of a third party, they do not appear to be relevant to the facts of the present case.

63. However, the Court does not find it necessary to take a definitive stance as to whether the disputed measure in fact pursued any of the indicated legitimate aims because it considers that, in any event, it was not necessary in a democratic society, for the reasons set out below (see *Biržietis v. Lithuania*, no. 49304/09, § 54, 14 June 2016).

(iii) Necessity in a democratic society

64. The notion of “necessity” implies that the interference with an individual’s right to respect for his or her private life corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aims pursued. In determining whether an interference was “necessary in a democratic society”, the Court will take account of the fact that the Contracting States have a margin of appreciation, the breadth of which depends on a number of factors, including the nature of the activities restricted and the aims pursued by the restrictions. In any event, it remains incumbent on the respondent State to demonstrate the existence of the pressing social need behind the interference (see *Khoroshenko*, cited above, § 118, with further references).

65. In the present case the Constitutional Court acknowledged that the legal provision in issue was cast in absolute terms (see paragraph 23 above). To the extent that the Government referred to any discretion on the part of the prison’s educational officer in assessing individual circumstances, this played no role in the circumstances of the case and such discretion has not been substantiated in any concrete terms.

66. As likewise acknowledged by the Constitutional Court, possession of explicit material in the prison context puts the private interest of the person concerned in opposition to the public interest.

67. As to the former, being aware that imprisonment entailed a total exclusion of intimate contact with the opposite sex, the Constitutional Court recognised that pornography could serve as a stimulus for auto-erotic satisfaction.

68. In addition, for its part, the Court notes that the applicant’s individual situation is marked by the following relevant features. In view of his sentence and the organisation of the Slovakian prison system, the applicant’s state of deprivation of any direct intimate contact is long-term, if not permanent. There is no indication that the applicant has ever been convicted of a sexual offence or has suffered from any condition in which the material in question could trigger violent or otherwise inappropriate behaviour. Furthermore, there has been no suggestion that the material in question involved any elements proscribed by law as such. On the contrary, material of that kind is commonly available through the general distribution of the press to the adult

population in the respondent State and beyond. The information available indicates that the material was kept in the applicant's private sphere and was destined exclusively for his individual and private use within that sphere, in particular in his cell of which he was the sole occupant.

69. In this context, the Court considers that the relatively negligible level of penalty imposed on the applicant is not decisive. This is mainly because the core of the problem is the underlying ban and not the sanction and also because, had the ban been breached repeatedly, the sanction was bound to increase in severity (see paragraph 28 above).

70. Concerning the public interests at play, and in particular that of the protection of morals, the Court notes that it is not possible to find in the legal and social orders of the Contracting Parties a uniform European conception of morals. The view taken of the requirements of morals varies from time to time and from place to place, especially in the present era, characterised as it is by the far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements, as well as on the "necessity" of a "restriction" or "penalty" intended to meet those requirements (see *Müller and Others v. Switzerland*, 24 May 1988, § 35, Series A no. 133, and, more recently, *Pryanishnikov v. Russia*, no. 25047/05, § 53, 10 September 2019).

71. The respondent Contracting Party's margin of appreciation in relation to the means for the protection of morals would accordingly be a wide one (see, for example, *Dickson v. the United Kingdom* [GC], no. 44362/04, § 78, ECHR 2007-V). However, at the same time, the Court reiterates that a justification for any restriction on Convention rights of prisoners cannot be based solely on what would offend public opinion (*ibid.*, § 68).

72. Furthermore, as to the prevention of disorder in prison and the protection of the rights and freedoms of others, the Court notes that no concrete evidence or examples have been furnished supporting the allegation that possession of adult content as in the applicant's case entailed genuine risks in relation to these values. As to the rehabilitation and reintegration aspect of the purpose of a prison sentence (see *Khoroshenko*, cited above, § 121), the Court observes that it is in general recognised at the national level and that prisoners are forbidden to keep objects incompatible with that purpose (see paragraph 26 above). However, this particular ground for sanctioning the applicant for the possession of the impugned material was not relied on in the assessment of his case at the national level.

73. As to any balancing of the competing interests, the Constitutional Court distinguished those at the applicant's individual level and those at a general level. Concerning the former, it confirmed the lack of legislative scope for taking into account any individual interests, and the prison

administration's practical inability to deal with individual cases in a differentiated manner (see paragraph 24 above).

74. Furthermore, in general terms, the Constitutional Court held that it had no power to deal with the problem in response to an individual complaint. Rather, it referred to the notion of rational lawmakers, presuming that the latter would have based the legislation they passed on the requisite expert assessment. However, neither the Constitutional Court in its judgment nor the Government in the proceedings before the Court have supported this presumption by reference to any actual expert evaluation (see *Dickson*, cited above, § 83).

75. In these circumstances, not even the Constitutional Court's assessment can be accepted as involving any real weighing of the competing individual and public interests (*ibid.*, § 82).

76. The contested ban thus amounted to a general and indiscriminate restriction not permitting the required proportionality assessment in an individual case (*ibid.*, § 84; see also, *mutatis mutandis*, *Hirst*, cited above, § 82).

77. The Court finds that the absence of such an assessment both at the legislative level and on the facts of the applicant's individual case as regards a matter of importance for him must be seen as falling outside any acceptable margin of appreciation, such that a fair balance was not struck between the competing public and private interests involved.

(c) Conclusion

78. There has accordingly been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

79. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

80. The applicant claimed 75,000 euros (EUR) in respect of non-pecuniary damage.

81. The Government contended that the amount of the claim was overstated.

82. The Court awards the applicant EUR 2,600 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

83. The applicant also claimed EUR 850 for the costs and expenses incurred before the Court.

84. The Government argued that that claim was unsupported by any evidence.

85. The Court notes that the amount of the claim has been paid to the applicant by way of legal aid (see paragraph 3 above). There is accordingly no call for the Court to make any additional award in that regard.

FOR THESE REASONS, THE COURT

1. *Declares*, by a majority, the application admissible;
2. *Holds*, by five votes to two, that there has been a violation of Article 8 of the Convention;
3. *Holds*, by five votes to two,
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,600 (two thousand six hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 7 July 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener
Registrar

Marko Bošnjak
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) Dissenting opinion of Judge Wojtyczek;

CHOCHOLÁČ v. SLOVAKIA JUDGMENT

(b) Dissenting opinion of Judge Derenčinovič.

M.B.
R.D.

DISSENTING OPINION OF JUDGE WOJTYCZEK

1. I respectfully disagree with the majority's view that Article 8 is applicable in the instant case and that it has been violated.

2. In my view, an interference with private life has to reach a minimum threshold of severity in order to trigger the applicability of Article 8 (see on this issue the remarks of Judge Derenčinović in his dissenting opinion appended to the instant judgment). Access to pornographic material is not considered – objectively – a matter of importance for an individual. The threshold of applicability of Article 8 has therefore not been met in the instant case.

I note in this context that under the approach proposed by the majority, any restriction on a particular behaviour in a domain an individual considers important for him constitutes an interference with Article 8 which has to be justified and to meet all the criteria set forth in paragraph 2 of that Article.

3. The issue of circulation of pornographic material has been addressed in international hard and soft-law instruments. I regret that the majority decided to omit any references to such instruments. Without pretending to provide an exhaustive list, I would like to point in particular to the following instruments.

Slovakia is a party to the International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications. While this treaty does not require States to criminalise possession of pornographic material, it requires States to take measures aimed at suppressing the circulation of such material.

The Council of Europe bodies have addressed this issue in several soft-law documents. The Committee of Ministers has adopted, in particular, Recommendation No. R (89) 7 to member States concerning principles on the distribution of videograms having a violent, brutal or pornographic content. The Parliamentary Assembly of the Council of Europe has adopted, *inter alia*, Resolution 1835 (2011) on violent and extreme pornography. The Standing Committee, acting on behalf of the Parliamentary Assembly, on 26 November 2021 adopted Resolution 2412 (2021) on gender aspects and human rights implications of pornography, which contains, *inter alia*, the following assessments and recommendations:

“2. Research shows that pornography contributes to shaping people's mindsets on sexuality and on their perceptions of gender roles, often engendering and perpetuating stereotypes and thereby undermining gender equality and women's self-determination by conveying an image of women as subordinate to men and as objects, and trivialising violence against women.

....

the Assembly calls on member and observer States, as well as partners for democracy:

....

10.5.3 promote and provide counselling and support services for compulsive users of pornography.”

Within the framework of the Convention on the Elimination of All Forms of Discrimination against Women, the Committee on the Elimination of Discrimination against Women has linked pornography with gender-based violence:

“These attitudes also contribute to the propagation of pornography and the depiction and other commercial exploitation of women as sexual objects, rather than as individuals. This in turn contributes to gender-based violence.” (General Recommendation No. 19: Violence against Women, 1992, § 12)

The Human Rights Committee has expressed the following view, in the context of the International Covenant on Civil and Political Rights:

“22. In relation to article 19, States parties should inform the Committee of any laws or other factors which may impede women from exercising the rights protected under this provision on an equal basis. As the publication and dissemination of obscene and pornographic material which portrays women and girls as objects of violence or degrading or inhuman treatment is likely to promote these kinds of treatment of women and girls, States parties should provide information about legal measures to restrict the publication or dissemination of such material.” (CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), 29 March 2000, CCPR/C/21/Rev.1/Add.10)

The European Parliament has adopted the Resolution of 12 March 2013 on eliminating gender stereotypes in the EU (2012/2116(INI)), which contains, *inter alia*, the following assessments and recommendations:

“The European Parliament ...

M. whereas in television programmes, computer games and musical video clips there is an increasingly noticeable tendency, partly for commercial purposes, to show provocatively dressed women, in sexual poses, thereby further contributing to gender stereotyping; whereas the lyrics of songs for young people contain sexually suggestive content, which often promotes violence against women and girls;

N. whereas young women and men are most affected by pornography’s new cultural status; whereas the ‘mainstreaming of pornography’, i.e. the current cultural process whereby pornography is slipping into our everyday lives as an evermore universally accepted, often idealised, cultural element, manifests itself particularly clearly within youth culture: from teenage television and lifestyle magazines to music videos and commercials targeted at the young;

...

12. Calls on the EU to develop awareness campaigns on zero-tolerance across the EU for sexist insults or degrading images of women and girls in the media; ...”

The adoption of these instruments entails the conclusion that, after a period marked by a tendency to decriminalise pornography, there is now a growing international tendency to broaden the scope of criminalisation of pornography.

4. The Court refrained from relying on any comparative-law research in the present case. It appears, however, that there is no European consensus on the question of access to pornography in prisons and restrictions in this domain seem rather to constitute the rule. It is worth noting here that the German Federal Constitutional Court rejected a constitutional complaint lodged by a prisoner serving a life sentence who was denied access to obscene publications (BVerfGE 40, 276, decision of 29 October 1975, 2 BvR 812/73). It justified the restriction by invoking the necessity to ensure the proper execution of sentences and the reintegration of the prisoner into society.

5. The above-mentioned international legal materials show that pornography is widely considered to be a significant cause of violence against women. This assessment is shared, in particular, by several streams within the feminist movement.

6. Scientific studies demonstrate, moreover, the addictive impact of pornography. The competent national authorities should therefore devise efficient programmes enabling prisoners who so wish to overcome this addiction.

7. Under the circumstances set out above, a general ban on pornographic material in prisons pursues several legitimate purposes. It serves the objective of rehabilitation and reintegration of prisoners. It facilitates the preservation of order in prisons. It also promotes the more general aim of eliminating negative gender stereotyping and violence against women.

8. The majority blame the Slovak authorities for having adopted general measures not permitting an individual proportionality analysis in each and every individual case (see paragraphs 73-77 of the judgment). In other words, limitations on prisoners' access to pornography can only be imposed by way of individual measures, taken after a case-by-case proportionality assessment, which means that a special justification for the restriction has to be provided in the specific individual circumstances.

I do not share this approach. Firstly, the preservation of order in prisons requires the enactment of general rules regulating the possession of objects by prisoners in their cells. Enacting "indiscriminate" bans is unavoidable in this context. Such restrictions are a rule in prison regulations. Secondly, any system based on a case-by-case proportionality assessment by prison authorities entails economic costs and the use of resources which could have been allocated to improving prison conditions and developing rehabilitation programmes. Thirdly, I note the following general view expressed by the Court (see *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 108, ECHR 2013 (extracts)):

"A general measure has been found to be a more feasible means of achieving the legitimate aim than a provision allowing a case-by-case examination, when the latter would give rise to a risk of significant uncertainty (see *Evans*, § 89 ...), of litigation, expense and delay (see *James and Others*, § 68, and *Runkee*, § 39 ...) as well as of discrimination and arbitrariness (see *Murphy*, §§ 76-77, and *Evans*, § 89 ...)."

9. The majority note that in Slovakia possession of the impugned materials, which were confiscated by the prison authorities, is legal outside the prison context (see paragraph 68 of the judgment). It is clear that prison rules cannot allow the introduction into cells of any object which a prisoner wishes, even if the possession of the object would otherwise be legal outside the prison context.

10. In conclusion, I have to note that the judgment is based upon the implicit assumption that any restriction on prisoners' freedom constitutes an interference with Article 8 which has to be justified and to meet all the criteria set forth in paragraph 2 of that Article. Access to pornography in prisons becomes at least a *prima facie* right, as any limitation thereof requires the fulfilment of the criteria set forth in Article 8 and, furthermore, an individual justification based upon a case-by-case proportionality assessment.

DISSENTING OPINION OF JUDGE DERENČINOVIĆ

I. INTRODUCTION

1. In the present judgment, the majority ruled that the application was admissible and found a violation of Article 8 of the Convention based on an unjustified interference of the State with the applicant's privacy rights. I respectfully disagree with that conclusion because, in my opinion, Article 8 is not applicable in this case. In this connection, I note that the Slovak Constitutional Court also found Article 8 inapplicable to the present case and examined the applicant's constitutional complaint under Article 10 (see paragraph 17 of the judgment). Furthermore, in this separate opinion I elaborate on the grounds for finding the application incompatible *ratione materiae* with Article 8 of the Convention.

II. INCOMPATIBILITY *RATIONE MATERIAE*

2. The Court has held in many contexts that, for an issue to arise under Article 8 of the Convention, the impugned situation affecting an applicant's private life must reach a certain threshold of severity or seriousness (see *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no. 17224/11, § 76, 27 June 2017; *Denisov v. Ukraine* [GC], no. 76639/11, §§ 112-14, 25 September 2018; *Hudorovič and Others v. Slovenia*, nos. 24816/14 and 25140/14, § 115, 10 March 2020; and *Behar and Gutman v. Bulgaria*, no. 29335/13, § 67, 16 February 2021). Whether or not that level of seriousness was attained will depend on the circumstances of the particular case (see *Vučina v. Croatia*, no. 58955/13, § 31, 24 September 2019). Once a measure is found to have seriously affected the applicant's private life, that conclusion means that the complaint is compatible *ratione materiae* with the Convention and that an issue of the "right to respect for private life" arises. Indeed, the question of applicability and the existence of an interference with the right to respect for private life are often inextricably linked (see, *mutatis mutandis*, *Denisov*, cited above, § 92). On the other hand, if the requisite level of seriousness is not attained, the complaint is inadmissible as incompatible *ratione materiae* with the Convention (see *Vučina*, cited above, § 32).

3. Since this is the first time that the issue of possession of pornographic material by a prisoner has been addressed from the perspective of Article 8 of the Convention, the criteria determining whether the threshold of that provision in the given context was reached have not been yet established. That being so, it is regrettable that the judgment does not contain any analysis whatsoever in this respect. Relying only on a very general statement that sexual life falls within the scope of Article 8 of the Convention, the majority rashly conclude that that provision applies to the facts of the present case

without explaining the exact link between the possession of pornographic material, prohibited by internal prison rules, and the applicant's sexual life.

I would therefore suggest that the following elements should have been considered, by analogy with the criteria developed in some other Article 8 cases (see, for instance, *Vučina*, cited above, § 34), in the context of the present case:

- (a) the purpose for which the seized material was used; and
- (b) the consequences of the seizure for the applicant.

A. Purpose for which the seized material was used

4. According to the applicant, the material was used by him as a stimulant for auto-eroticism because of the specific feature of the prison system in Slovakia that allows no conjugal visits. He argued that his ability to lead any sexual life in prison had been severely and lastingly restricted (see paragraphs 38 and 39 of the judgment). This could be understood as meaning that possessing pornographic content was a form of compensation he used for self-stimulation purposes. The majority took the position that the lack of conjugal visits formed part of the context in which the impugned restriction on the applicant's ability to lead sexual life should be viewed (see paragraph 54 of the judgment).

5. This approach, in my opinion, seems to be wrong. First and foremost, there is nothing in the case-law of the Court to suggest that conjugal visits constitute a right that falls within the ambit of Article 8 of the Convention. The Convention does not require the Contracting States to provide prisoners with the possibility of intimate visits. The majority have not contested this (see paragraph 54 of the judgment). In the case-law of the Court, the refusal by the prison authorities to allow an applicant to have the possibility of private physical contact with his wife has been found to be compatible with the Convention, being a justified measure for the preservation of order and the prevention of crime (see *Aliev v. Ukraine*, no. 41220/98, §§ 185-90, 29 April 2003, and *Lesław Wójcik v. Poland*, no. 66424/09, § 114, 1 July 2021). In other words, conjugal visits are not a right but a mere privilege that, depending on the circumstances, the authorities may or may not provide to prisoners. Having this in mind, it remains unclear how the possession of pornographic material in prison that is of a "compensatory nature" falls under Article 8. Claiming that a derivative (secondary) privilege to something that *per se* is not a right under Article 8 (but rather a primary privilege) enjoys the protection of that provision seems to contradict the rules of normative interpretation. This also considerably and additionally broadens the scope of Article 8 in a manner that, in my opinion, goes against the letter and the spirit of the Convention. Therefore, the first element/criterion in assessing the (in)admissibility of the present case under Article 8 has not been met.

B. Consequences of the seizure for the applicant

6. There is no doubt that self-stimulation may be one possible way to practise sexual life in prison. However, nothing in the case file suggests that the applicant was in any way prevented from performing self-eroticism. As the Government correctly pointed out in their observations, “the applicant had not demonstrated that he had been unable to practice auto-eroticism without violating the relevant rules”. Therefore, the blanket ban on access to pornography had not had, in their view, “any concrete consequences for the applicant’s sexual life, mental health or well-being such as to qualify as an interference with his right to privacy” (see paragraph 42 of the judgment).

7. Furthermore, the sanction was very lenient compared with all the other measures that could have been applied. There were also no additional negative consequences for the applicant in terms of revoking privileges or prohibiting their acquisition under the relevant regulations. Nothing in the application or further observations from either side in this case suggests that there were any adverse health-related or psychological side-effects for the applicant because of the seizure of his pornographic material. Although the confiscation of the pornographic material might have caused him some distress, the level of seriousness associated with it and the inconvenience that he suffered did not give rise to an issue of a violation of his privacy rights under Article 8 of the Convention (see, *mutatis mutandis*, *Vučina*, cited above, § 50). Since the consequences for the applicant do not indicate particularly substantial interference with the right to respect for private life (see, *mutatis mutandis*, *Vučina*, cited above, § 46), the second element/criterion in the assessment of the (in)admissibility of the present application under Article 8 has not been met.

III. CONCLUSION

8. Given that neither of the criteria for admissibility has been met in this case, the application should have been considered incompatible *ratione materiae* in the context of Article 8.