

ECtHR: CHOCHOLÁČ v. SLOVAKIA (Application No. 81292/17, 7 July 2022) / Andrej Beleš

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Abstract: *The purpose of this commentary is primarily to analyse the judgment of the ECtHR in case of Chocholáč v. Slovakia on 7 July 2022 and the related ruling of the Constitutional Court of the Slovak Republic of 2017. In these decisions, the courts dealt with the general prohibition on the possession of pornographic materials in the serving of a prison sentence. What is interesting about these decisions are the fundamental substantive differences in terms of the assessment of the legitimacy and proportionality of that prohibition in relation to the right to privacy and the right to information of persons in the serving of a prison sentence. The practical implementation of the ECtHR decision must be seen in the context of the problems of the Slovak prison system.*

Key words: *Serving of a Prison Sentence; Pornography; Right to Privacy; Right to Information; ECtHR; Constitutional Court*

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1. INTRODUCTION AND CONTEXT OF THE SLOVAK PRISON SYSTEM

Some decisions of the *European Court of Human Rights* (ECtHR) from 2022 point out fully the inconsistency of the Slovak legislation in the field of prisons with the standards emphasised by the *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (CPT) and the ECtHR.

The problems with the Slovak prison system stem primarily from the high number of prisoners – convicted persons serving prison sentences and accused persons in custody. Within the countries of the European Union, the Slovak Republic is one of the countries with the highest number of imprisoned persons per capita.¹ In 2021, the ratio was 183 prisoners per 100 000 inhabitants. The reason for this situation is mainly due to the pro-punitive setting of penal policy, which is characterised by generally high incarceration rates (see Turay, 2020, p. 42; Beleš, 2018, pp. 1029-1042), insufficient use of alternative punishments, including house arrest with an electronic monitoring system (Beleš, 2019).

¹ The average number of accused and convicted persons in custodial and penal institutions in 2021 was 10 388, see Generálne riaditeľstvo Zboru väzenskej a justičnej stráže (2022).

Consequently, the high number of imprisoned persons causes problems with prisoners' accommodation capacities, and limited possibilities for pedagogical and psychological work with convicts. Prison overcrowding also increases the demands on maintaining the prison order, protection of life, health and other rights and interests, which leads to the application of intense restrictive and safety measures. Therefore, the current situation of prison system in the Slovak Republic is not satisfactory, neither in the sphere of the application when deciding on convicted persons, namely in the area of imposing non-conditional prison sentences, nor in the legislative sphere, which regulates the conditions of imprisoned persons, decisions on them in the context of the duration and course of their sentences, which are often not in line with the case law of the ECtHR, the recommendations of the CPT and the subsequent decision-making of the constitutional judiciary.

A critical assessment of the Slovak prison system in the context of violations of fundamental rights and freedoms has been made by the ECtHR, in particular in the decisions *Maslák v. Slovakia* (no. 2) of 31 March 2022, complaint no. 38321/17, and *Chocholáč v. Slovakia* of 7 July 2022, complaint no. 81292/17, respectively. The first case (*Maslák*) concerned the subjecting a detainee to a special high-security regime in the light of inadequate legal protection against abuse, whereby the Court found a violation of the right to respect for private and family life according to Art. 8 of the Convention.

The second case (*Chocholáč*) is specific in that it concerns the experience of sexuality as a part of the limited private life of convicted persons in prison and their possible right to possess pornographic materials depicting so-called *classical heterosexual intercourse between a man and a woman*. In this context, two fundamental questions arose, namely:

- whether the possession of pornographic material can fall within the material scope of the fundamental right to private and family life under Article 8 of the Convention,
- whether the prohibition on the possession of pornographic material in the interests of maintaining order and morality in the custodial setting is a proportionate restriction on the right to private and family life.

2. CIRCUMSTANCES OF THE CHOCHOLÁČ CASE AND THE ASSESSMENT OF THE CASE BY THE SLOVAK CONSTITUTIONAL COURT

In 2013, the applicant was serving a life prison sentence in Ilava Prison in a single-occupancy cell within a separate prison section reserved exclusively for life prisoners. Contact visits (conjugal visits) are not allowed in this regime of imprisonment.

The applicant visited a fellow prisoner in his cell, taking with him his personal belongings, including a *Plus 7 dní* magazine in which he had cut-out erotic/pornographic pictures from commonly sold erotic/pornographic magazines, such as *Fontána*, *Inspirace*, *OKM*, *Tabu*, *České péčko*, and others, pasted. According to the applicant, these pictures depicted adult men and women engaged in heterosexual intercourse. During an inspection of the *Plus 7 dní* magazine in front of the applicants' cell, members of the Prison and Judicial Guard Corps ("the Corps") confiscated the magazine from the applicant, which, according to the Corps, constituted a seizure of evidence.

Subsequently, the applicant was notified of the initiation of disciplinary proceedings for violation of the prohibition on the possession of printed matter and objects that endanger morality under Section 40(i) of Act No. 475/2005 Coll. on the Execution of Prison Sentences (hereinafter referred to as the "Act on the Execution of Prison Sentences"). For the above-mentioned unlawful conduct, the applicant was given

a **disciplinary penalty – a reprimand**. The applicant then lodged a complaint with the Regional Public Prosecutor's Office and subsequently with the Prosecutor General's Office seeking annulment of that decision, but both complaints were dismissed as unfounded. In the decision, the Prosecutor General's Office stated, inter alia, that pornography was one of the attributes endangering morality and the possession of such printed matter was prohibited for the convict, referring to section 40(i) of the Act on the Execution of Prison Sentences.

The applicant then lodged a complaint to the Constitutional Court of the Slovak Republic for violation of his fundamental rights as a last national remedy. This complaint was eventually rejected by the **ruling of the Constitutional Court of the Slovak Republic in case II. ÚS 819/16**.² In his complaint, he stated that the pasted images were of an erotic nature and the depiction of sexual intercourse was, in his opinion, wrongly called pornography. He also pointed out in his constitutional complaint that he considered that *"being heterosexually oriented is a right guaranteed by Article 9 of the Convention and, in his opinion, Article 10 of the Convention also guarantees him the right to express it in words, writing or images, for example in the form of a photograph. He also referred to his right to privacy, whether by means of photographs in any medium, the Internet, television, or a magazine"*, or referred to his right to privacy, since it was an expression of *"beliefs and sexual orientation in the form of pictures, and thus photographs pasted in a magazine, which also constituted his privacy protected by Article 8 of the Convention"*.³

In the context of the interference with fundamental rights and freedoms, the applicant also **questioned the legality and proportionality of such a measure, in particular its reasonability and necessity**: *"In his view, the same materials that can endanger morality in an environment where children are, such as a nursery, cannot be considered to endanger morality in a penal institution, where, according to the applicant, there is the highest concentration of evil per square meter in the whole republic."*⁴ According to the applicant, the threat to morality must be interpreted in accordance with the Slovak Criminal Code (offence under Article 371 of the Criminal Code – the threat to morality), i.e. only products which are pornographic and which show disrespect for human beings, violence, intercourse with an animal can threaten morality. On the contrary, erotic depictions of heterosexual intercourse cannot threaten the morality of a mentally healthy person.

The applicant considered that the prohibition of erotic material was related to the fact that such material would cause the convicted person to desire a woman that he could not satisfy in the standard way, which might lead to aggression and an attempt to escape. According to the applicant, however, the opposite is true: *"isolation in prison causes loneliness, stress and, for some, aggression: 'the only neutral or even positive compensatory means of relieving the pressure described above is 'masturbation', which has beneficial effects - the release of endorphins [...] It is clear, according to the applicant, that the best means of stimulating oneself are just qualified materials with pornographic content of a heterosexual nature and classical sexual themes of 'man and woman'."*⁵ The applicant added that if the possession of ordinary pornography did not constitute a danger to morals for persons at liberty, there was no reason, according to the applicant, to suppose that there could be a danger to morals for mentally competent adults in the serving of a prison sentence.

² Slovakia, Constitutional Court of the Slovak Republic, II. ÚS 819/16 (15 March 2017).

³ *Ibid.*, par. 3.

⁴ *Ibid.*, par. 3.2.

⁵ *Ibid.*, par. 3.5.

The applicant's objections were addressed by the Ilava Prison. In the opinion of that establishment, the possession of printed matter with pornographic content by convicted persons while serving a prison sentence is restricted in accordance with the provisions of section 4 of the Act on the Execution of Prison Sentences, according to which a convicted person is obliged during the serving of a sentence to submit to restrictions on those fundamental rights and freedoms the exercise of which would be contrary to the purpose of the serving of the sentence or which cannot be applied with regard to the serving of the sentence. The Institute added: "*In the conditions of a prison establishment, which is [...] a multicultural environment and in which privacy cannot be guaranteed, allowing the possession of printed matter with pornographic content, in view of [...] the heterogeneous composition of the convicted persons, would not only lead to a threat to morality but also to a disturbance of interpersonal relations and of the order in the institution.*"⁶ Moreover, if the possession of pornography were generally allowed in serving of prison sentences, it would not be possible to exclude its transmission also among juvenile convicts.

According to the applicant, the Constitutional Court of the Slovak Republic should have assessed the constitutional complaint from the point of view of the prohibition of torture and inhuman treatment under Article 3, the right to respect for private and family life under Article 8, the right to freedom of thought under Article 9 and the right to freedom of expression under Article 10 of the Convention. The Court began its observations by essentially praising the applicant for his constitutional complaint, which "*contributes to the constitutionally relevant debate concerning the extent of restrictions on the human rights and freedoms of persons in serving of prison sentence, all the more so when it comes to the unusual, taboo, even slightly controversial subject of pornography and its availability to persons in serving of prison sentence.*"⁷

The court made a material assessment of the case from the point of view of the right to privacy (Article 16(1) of the Constitution of the Slovak Republic, Article 8(1) of the Convention) and the right to information (Article 26(1) of the Constitution of the Slovak Republic, Article 10(1) of the Convention). **Pornography** [an aesthetically mastered and culturally valuable literary, artistic or scientific audio-visual work (e.g. a film work), photographic work, verbal work (...) or architectural work which depicts human beings having natural intercourse with adults, or other sexual intercourse or other similar sexual intercourse between adults, or depicts the naked body of an adult, including the sexual organs] **and its production, distribution, making available or possession are subsumed within the right to information under Article 10 of the Convention in terms of its material scope.** The material scope of the right to privacy under **Article 8** of the Convention arises, according to the Constitutional Court, where these works are **primarily connected to the intimacy of these particular subjects** (owner, exhibitor, addressee). A pornographic work is connected with the intimacy of those persons if it depicts them or depicts the intimate situation of a person close to them.⁸ Thus, the Constitutional Court defined the relationship between pornography and private life on the basis of what the pornography depicts and not on the basis of the pornography's meaning to the possessor. The Constitutional Court thereby **interpreted the concept of private life⁹ in a relatively restrictive manner.** Child pornography, pornography depicting disrespect or violence, pornography depicting sexual intercourse with an animal, or pornography depicting

⁶ *Ibid.*, par. 5.1.

⁷ *Ibid.*, par. 10.

⁸ *Ibid.*, par. 12.3; see as well par. 12.11 of this ruling.

⁹ Art. 16 of the Constitution of the Slovak Republic is a general provision on the "inviolability of privacy" and Article 19 specifically protects "private life" (Svák, 2021a, pp. 235-244).

sexually pathological practices (which did not relate to the case under examination) are completely outside the protection of the right to privacy or right to information.

The Constitutional Court drew attention to the constitutional as well as the Convention's licence to restrict the right to information and the right to privacy. According to the Court, the legality of the restriction of rights is fulfilled. The legitimacy of the restriction of rights is fulfilled by the legitimate aim of preventing a threat to morality in the area of serving of the prison sentence and at the same time preventing a threat to security and fulfilling the aim of the serving of the sentence.

A pornographic literary, art, or scientific work (to which the protection of Articles 10 and 8 of the Convention applies) is capable of endangering morality with respect to particular addressees. The Court found that the prohibition of the possession of printed matter and items endangering morals and the subsequent imposition of a disciplinary penalty interfered with the convicted person's right to information under Article 10 of the Convention (but not with his right to privacy, as the printed matter did not directly concern him). However, that **interference is justified on the ground that pornography is in all circumstances capable of undermining the morale and security of a penal institution:** *"Pornography, in general, may serve, on the one hand, as a stimulant for the convicted person in custody to engage in autoeroticism, but, in combination with the specific features of the penal institution environment and the natural instincts of human beings described above, it may incite sexual or violent offences committed, for example, against fellow prisoners."*¹⁰

The Constitutional Court added that it was not called upon to resolve the question of whether access to pornography in prison serves as a stimulant to autoeroticism or, on the contrary, is the cause of the commission of offences and the overall decline in morality. Therefore, the court chose to give credence to the **"rational lawmakers"** that relied on expert knowledge in determining the prohibition on the possession of pornography while serving prison sentence. Moreover, the court did not presume to instruct the institutions supervising the serving of prison sentence to interpret the blanket ban on pornography in custody in terms of balancing the interests in a particular case.

Critically, the Constitutional Court thus **avoided the standard test of proportionality** of the interference with fundamental rights, in which it would have examined the appropriateness, necessity, and proportionality of the measure in question. The Court **preferred to "trust" that the legislator had "good reasons" for enacting the legislation**, and also found that differentiated access to pornography by prisoners was practically impossible.

3. THE ECTHR'S ASSESSMENT OF THE CASE

First of all, the ECTHR recalled that even a convicted person serving a prison sentence does not lose his or her rights. Tolerance and generosity are the hallmarks of a democratic society, and a prisoner must not be automatically deprived of his rights simply because public opinion demands it (or because public opinion considers pornography immoral). The Court considered the present case from the perspective of the **right to privacy, since sexual life falls within the personal sphere of the individual and thus within the material scope of Article 8** of the Convention. The seizure of pornographic material from the applicant and the disciplinary sanction he received for its possession accordingly constituted an interference with that right.¹¹

¹⁰ Slovakia, Constitutional Court of the Slovak Republic, II. ÚS 819/16 (15 March 2017), par. 12.14.

¹¹ ECTHR, Chocholáč v. Slovakia, app. no. 81292/17, 7 July 2022, par. 56.

I am of the view that the material scope of Article 8 of the Convention in relation to the possession of pornographic material **should have been examined in more detail** and the court should have given further reasons as to why the principle of the right to privacy came into play and **specifically in what way the sex life was restricted** (the convicted person was not prohibited from masturbating, only the possession of pornography was prohibited). This is because the right to privacy cannot be seen as a "residual right"¹² which applies when other provisions of the Convention are not applicable in terms of substantive scope. Indeed, in terms of the inclusion of the protection of gender identity and sexual life, the Court has so far ruled mainly on the status and rights of transsexual and homosexual (or non-binary) persons or on the sanctioning of certain sexual practices (Kratochvíl, 2012). On the other hand, it should be added that the content of the right to privacy is subject to evolution, the individual concepts corresponding to the sub-rights to privacy are interpreted extensively and new rights are created (Svák, 2021b, p. 163). Nor did the Court in the *Chocholáč* case examine, in addition to Article 8 of the Convention, the possible alternative or cumulative application of Article 10 of the Convention.

In examining the legitimacy of the interference with the right to privacy, the court noted that the purpose of section 40(i) of the Act on the Execution of Prison Sentences is to protect public morals. At the same time, the Court noted that the Slovak Constitutional Court had been wrong to conclude that the aim was also to protect order and security as well as the rights and freedoms of others: such conclusions of the Constitutional Court were "purely abstract and without any link to the facts of this case at all". There was nothing in the facts to suggest the involvement of third parties and the applicant was disciplined only for possessing pornographic material for his own purposes. Therefore, it is also questionable whether the protection of public morals as a general public interest objective to restrict the right to privacy has been met at all.¹³ Nevertheless, the Court went on to examine proportionality, i.e. whether the measure in question was necessary in a democratic society.

At the beginning of its consideration of the measure at issue, the Court noted that the prohibition against the possession of pornography was absolute and that the prison educator (contrary to the government's contention) did not have discretion to decide that a disciplinary offence had not been committed when considering the disciplinary offence. The court also reiterated that the deprivation from direct intimate contact was longstanding in the applicant and the pornographic material found on his person was not generally prohibited but was freely available for sale to adults.

With regard to proportionality in relation to public morality, the Court recalled that there was no uniform view in the Contracting Parties to the Convention on the content of this concept, or on what values should be protected under the concept of morality. Therefore, States have a wide margin of appreciation in this area. The margin of appreciation means self-limitation of the court, which leads to respect for the State's appreciation within the granted range of discretion, especially in matters of application of the Convention to the particular facts of the case (Kopa, 2014, pp. 29-32).

However, the limitation of a fundamental right within the State's discretion **must not be based solely on the assessment that a certain conduct *per se* (possession of pornography) offends public opinion.**¹⁴ In the light of the purposes of punishment (re-education and ensuring that the convicted person will lead a proper life in the future), the

¹² "Article 8 may not be understood as 'catch-all provision' [...]" (Grabenwarter, 2014, p. 184).

¹³ ECtHR, *Chocholáč v. Slovakia*, app. no. 81292/17, 7 July 2022, par. 62.

¹⁴ *Ibid.*, par. 70 and 71.

Court recognises that national law may prohibit the possession of certain material. However, sanctioning the applicant for possession of pornography was not based on an assessment of his particular case in terms of whether the fulfilment of the purposes of the sentence was being undermined. Finally, the Constitutional Court also confirmed that the prison administration is not practically able to deal with individual cases in a differentiated manner. The Constitutional Court **referred to the notion of rational lawmakers, but it has not been shown that the legislation in question is based on expert knowledge**, which would demonstrate that the legislation in question is appropriate and necessary to fulfil the stated objective.

On the basis of the foregoing, the Court concludes that **the absence of an assessment of the proportionality** of the restriction of the fundamental right **at both the legislative and the individual level** establishes that the margin of appreciation has been exceeded.¹⁵ Therefore, there has been a violation of the right to privacy under Article 8 of the Convention.

In his dissenting opinion, Judge Wojtyczek stated that the case did not fall within the material scope of the right to privacy under Article 8 of the Convention because the interference with that right must reach a certain level of seriousness, and access to pornography was not sufficiently relevant to an individual's private life. He also stated that a growing tendency to increase the scope of the criminalisation of pornography could be identified in a number of acts of international law and European Union law (soft law). According to the judge, the prohibition of pornography pursues several objectives, in particular the fulfilment of the purpose of punishment, the preservation of order as well as the prevention of gender stereotyping and violence against women. According to the judge, an individualised and non-discriminatory assessment of which convicts can and cannot possess pornography is unenforceable.

Furthermore, judge Derenčinović stated (as dissenting opinion) that access to pornography does not fall within the material scope of Article 8 of the Convention because it does not reach a sufficient level of seriousness. In assessing that degree, the court should have taken into account two criteria: the purpose of the use of the confiscated pornographic material, and the consequences of the confiscation for the applicant.

4. CONCLUSION

The Constitutional Court of the Slovak Republic primarily assessed the prohibition of access to pornography by convicted persons from the point of view of interference with the right to information under Article 10 of the Convention, stating that interference with the right to privacy under Article 8 of the Convention could only occur if the pornographic materials directly concerned the person whose privacy was at stake. The Constitutional Court thus proceeded to an **overly restrictive interpretation of the protection of privacy** under Article 8. The Constitutional Court's conclusions regarding the absence of interference with the right to information can be regarded as alibi-like, since the Constitutional Court relied only on the fact that "rational lawmakers" must have had good reasons for a general prohibition of convicts' access to pornography, without examining those reasons in detail.

This approach was critically assessed by the ECtHR when it pointed out that the proportionality of the general prohibition of convicts' access to pornography had not been assessed at the general legislative level, and the legislation did not allow for an

¹⁵ *Ibid.*, par. 77.

assessment of proportionality even at the individual level. However, the ECtHR examined the measures in question solely from the perspective of the right to privacy, **giving a very brief justification of the substantive scope of Article 8** of the Convention, and **did not address the possible interference with the right to information under Article 10** of the Convention. I also preferred to assess it in the light of Article 10 of the Convention in my earlier paper (Beleš, 2017).

Beyond that, it should be noted that, just as a general domestic legislative prohibition in relation to prisoners requires more detailed justification, an assessment by the ECtHR would also require a **more detailed examination of the necessity of the measure in question** (in terms of whether there are indeed less restrictive measures that are reasonable and appropriate), or a broader assessment also in terms of the protection not only of the right to privacy, the right to information, but also the **protection of human dignity**. The possibilities of application of the above-mentioned ECtHR decision in the conditions of the Slovak prison system will require a separate penological research.

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