PRISONERS' RIGHTS

Prisoners, free speech, privacy and access to pornography

Chocholac v Slovakia (App. No. 81292/17), decision of the European Court of Human Rights 7 July 2022

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Introduction

In *Golder v United Kingdom*,[1] the European Court of Human Rights rejected the claim that a prisoner's right of access to the courts and legal advice was impliedly restricted under the Convention, insisting instead that any restriction had to meet the requirements of legality and necessity in the qualifying provisions of the relevant article. Equally, in *Raymond v Honey*,[2] the UK House of Lords stressed that prisoners retain all civil rights that are not taken away either expressly or by necessary implication. The phrase 'necessary implication' of course opens up the possibility of imposing restrictions on prisoners' rights because they are prisoners. There is a strong public perception that prisoners forego their rights on incarceration and that the taking away of such rights is a necessary and justified punishment for their crimes. In *Boyle and Rice v United Kingdom*,[3] the Court stated that:

> When assessing the obligations imposed on the Contracting States by Art 8 in relation to prison visits, regard must be had to the ordinary and reasonable requirements of imprisonment and to the resultant degree of discretion which the national authorities must be allowed in regulating a prisoners' contact with his family. (At para 74).

Further, in *Dickson v United Kingdom,*[4] the European Court accepted that it was permissible for the prison authorities to take notice of public confidence in the penal system and to interfere with the prisoner's rights as part of the sentence:

> …whilst reiterating that there is no place under the Convention system… for automatic forfeiture of prisoners' rights based purely on what might offend public opinion, the Court nevertheless accepts that the maintaining of public confidence in the penal system has a legitimate role to play in the development of penal policy within prisons (at para 33).

A recent decision of the European Court of Human Rights explores these conflicting and complex theories in the context of the prisoner's right to private life and freedom of expression. In particular, it concerned the question whether prison authorities can restrict a prisoner's access to pornographic materials, and if so to what extent and for what purpose. Although the Court found that the prisoner's rights had been interfered with disproportionately on the facts, strong dissenting judgments evidence a difference of judicial opinion in this area.

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[1] (1975) 1 EHRR 524.
[2] [1980] AC 1.
[3] (1988) 10 EHRR 425.
[4] (2007) 44 EHRR 21.

Facts and decision in *Chocholac*

The applicant is serving a life sentence for murder. During a routine search of his maximum security cell, a magazine was found which had explicit pictures pasted on to its pages. The material was found to be pornographic in nature and a threat to morality within the meaning of s.40 (i) of the Execution of Prison Sentences Act (EPSA). The material was confiscated, and disciplinary proceedings were opened against him; a reprimand was then issued under s.52 (3) (a) of the Act. A case was subsequently brought before the Slovakian Constitutional Court by the applicant based on Articles 8 and 10 of the Convention: that the images formed part of his private life, and that they had a "soothing and positive impact on him, especially as he was excluded from social life". It was also argued that s.40(i) of the Act was wrongly applied in that it was only an offence to "produce or procure and then put into circulation pornography that involved disrespect towards human beings, violence, zoophilia or … other pathological sexual practices". The Constitutional Court dismissed the applicant's claim, finding that pornography only fell within the remit of private life if it depicted the person concerned or a scene from their intimate sphere. The applicant then brought an application under the Convention, complaining that the sanction he received for the possession of explicit photographs violated his Convention rights; the Court deciding to deal with the case under Article 8 only.

After finding the case admissible, the Court held (by a majority of 5 to 2) there had been a violation of Article 8. The Court reiterated that prisoners continue to enjoy all the fundamental rights and freedoms save for the right to liberty and that possession of pornographic material is not normally against the law in the respondent State.[5] Nevertheless, in this case possession was forbidden by a rule that had been enforced through confiscation and the imposition of a disciplinary sanction. Accordingly, the seizure constituted an interference with the right to respect for private life under Article 8 and it was thus necessary to examine whether the interference was in accordance with the law, pursued a legitimate aim, and was necessary in a democratic society.[6]

The Court noted that legal basis for interference was Section 40(i) of the Act and, thus, in accordance with the law.[7] It then noted that the legal provision in question only sought to protect morality, and not order or the rights or freedoms of others. Accordingly, the Constitutional Court's reliance on notions of order and the rights or freedoms of others had been purely abstract, and without any link to the facts of this case.[8] In any case, the Court held that it was not necessary to take a definitive stance as to whether the disputed measure pursued a legitimate aim because it considered that, in any event, it was not necessary in a democratic society. [9]

Examining that question, the Court observed that necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued, but that the facts of the case did not correspond to such a need.[10] This was because the relevant material was "kept in the applicant's private sphere and destined exclusively for his individual and private use".[11] Thus, the core of the problem

[5] *Chocholac v Slovakia,* at 52.
[6] *Chocholac v Slovakia,* at 55.
[7] *Chocholac v Slovakia,* at 58.
[8] *Chocholac v Slovakia,* at 60-61.
[9] *Chocholac v Slovakia,* at 63.
[10] *Chocholac v Slovakia,* at 64.
[11] *Chocholac v Slovakia,* at 68.

was the underlying ban and not the sanction. While there is a wide margin of appreciation afforded to states in determining social needs, a restriction on Convention rights of prisoners cannot be justified solely on what would offend public opinion.[12] The contested ban therefore amounted to a general and indiscriminate restriction and, as a result, a fair balance had not been struck between the competing public and private interests involved, which led to a violation of Article 8.[13]

Dissenting, judges Wojtyczek and Derencinovic opined that the claimed interference with the prisoner's Article 8 rights failed to meet a sufficient threshold of severity or seriousness to constitute a violation.[14] On the question of whether there was a legitimate aim for the restriction, Judge Wojtyczek felt that a general ban on pornographic materials in prisons pursued several legitimate interests. First, Slovakia is a State Party to the International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, which requires contracting parties to take measures aimed at suppressing the circulation of such material.[15] The judge also cited several materials that argue that pornography is widely considered a significant cause of violence against women.[16] He also disagreed with the majority's decision that each ban should be reviewed on a case-by-case basis to ensure the balancing of competing interests. In his view, a case-by-case review would go against the preservation of order in prisons, which requires the enactment of general rules regulating the possession of objects by prisoners in their cells.[17] Disagreeing with the majority, in his view general measure may be a more feasible means of achieving the legitimate aim than a provision that allows a case-by-case examination.[18]

In finding that the inconvenience suffered by the applicant did not give rise to an issue of a violation of his privacy rights under Article 8, Judge Derenčinović stressed that the majority failed to consider two elements: the purpose for which the seized material was used, and the consequence of the seizure for the applicant.[19] Thus, he felt that the use of materials should not be seen as "compensation" for a ban on intimate visits.[20]

The decision in *Chocholac* and prisoners' democratic rights

This decision raises a number of fundamental issues regarding the protection and limitation of prisoners' democratic rights. As we have seen above, in *Dickson* and in *Boyle and Rice*, the European Court has accepted that restrictions can be permissible even if they might not be regarded as valid outside the prison environment. This does not necessarily accept the principle of automatic forfeiture, but does allow the state a broader discretion in restricting such rights, and of putting forward legitimate reasons for such restriction. This is evident throughout most of the case law under Article 8, both from the European Court and the domestic courts in the United Kingdom.

[12] *Chocholac v Slovakia,* at 69.
[13] The Court awarded the applicant €2,600 in respect of non-pecuniary damage, plus any tax that may be chargeable (five votes to two). The Court (unanimously dismissed the remainder of the applicant's claim for just satisfaction.
[14] *Chocholac v Slovakia,* dissenting opinion, at 2.
[15] *Chocholac v Slovakia,* Ibid, at 3.
[16] *Chocholac v Slovakia,* Ibid, at 3
[17] *Chocholac v Slovakia,* Ibid, at 7.
[18] *Chocholac v Slovakia,* Ibid, at 8.
[19] *Chocholac v Slovakia,* dissenting opinion, at 4-5.
[20] *Chocholac v Slovakia,* Ibid, at 5

Prisoners and the right to private life

As noted in the introduction, the European Court has indicated that it will give member states a wide margin of appreciation in regulating the private and family life of prisoners, for example, in matters such as family visits. Thus, in *Boyle and Rice* v *United Kingdom*,[21] in rejecting claims made by prisoners against restrictions placed on their visiting rights, it stated that regard must be had to the ordinary and reasonable requirements of imprisonment and to the resultant degree of discretion that the national authorities must be allowed in regulating a prisoner's contact with his family.[22] In general, therefore, the Strasbourg Court and the domestic courts have taken a 'hands-off' approach with regard to prison regulations that interfere with the prisoner's private and family life, stating that the prison authorities are better placed to determine the type and level of restrictions in this area.[23]

Thus, notwithstanding restrictions on private and family life need to be justified as being for a legitimate purpose and be proportionate, the courts continued to provide the authorities with a relatively wide margin of appreciation in this area, upholding restrictions that are reasonably related to factors such as good order and discipline.[24]

Prisoners and the right to private sexual life

Although the European Court has confirmed that the right to private life includes the right to a private sexual life, there is little authority for the prisoner's general claim to a private sexual life. Thus, in *X* v *United Kingdom*[25] the European Commission held that there was no violation of the prisoner's convention rights when prisoners were not allowed conjugal visits and this stance has been maintained in subsequent cases.[26] Despite the above approach, in domestic law prisoners enjoy a limited right to sexual life. In *R* v *Secretary of State for the Home Department, ex parte Fielding*,[27] a policy whereby male prisoners were only provided with condoms if they could prove that they were at specific risk of contracting AIDS or HIV was declared unlawful.[28] The case was not decided on Convention principles, although it was held that Article 8 could inform the court on the question of the rationality of the policy; and the court held that prisoners did not have a general right to be supplied with condoms on demand.[29]

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[21] (1988) 10 EHRR 425.

[22] Thus, in that case the prisoners could not complain when their visiting and contact rights had been reduced because of their transfer to another prison with a less generous regime.

[23] This is particularly so where the prisoner poses a risk because of the nature of their offence or subsequent behaviour: see *R. (on the application of Syed) v Secretary of State for Justice* [2017] EWHC 727 (Admin); [2017] 4 W.L.R. 101 (QBD (Admin)); although a breach of common law procedure was found. See also *R (AB) v Secretary of State for Justice* [2017] EWHC 1694 (Admin), with respect to controls in youth offender institutions.

[24] In *R* v *Ashworth Hospital Authority, ex parte E*, *The Times*, 17 January 2002, it was held that the decision of a special hospital to refuse a male patient's request to dress as a woman was justified under the terms of Article 8(2) of the Convention on security and therapeutic grounds.

[25] (1979) 2 DR 105.

[26] See also *ELH and PBH* v *United Kingdom* [1998] EHRLR 231.

[27] Unreported, decision of the High Court, 5 July 1999.

[28] See Delphine Valette, 'AIDS Behind Bars: Prisoners' Rights Guaranteed' (2002) Howard Journal of Criminal Justice, 107.

[29] See also *R* v *A Hospital, ex parte RH*, decision of the Administrative Court, 30 November 2001, where the applicant, who was detained under the Mental Health Act 1983, unsuccessfully challenged the hospital's policy of not providing condoms to patients, claiming that it was irrational and contrary to his Convention right to private life.

However, in *R. (Hopkins) v Soxedo/HMP Brozenfield*,[30] the domestic courts displayed a great deal of deference with respect to allowing prisoners to have intimate relationships in prison. Indeed the decision appears to accept the automatic forfeiture of prisoners' Article 8 rights. In this case, a prisoner applied for judicial review of the decision to cease to allow her to share a cell with her civil partner. The prison had decided to remove her partner from the claimant's cell pursuant to the "intimate relationship restriction" in its Decency/Managing Relationships Policy, which provides that it not accepted that women in an intimate relationship are to share a cell. On the question of whether the prisoner's Article 8 rights had been violated, it was held that the prisoner's article 8 rights had not been engaged or infringed as any such claim by a prisoner had to include consideration of the necessary restrictions of prison life.[31] In the court's view, a serving prisoner's article 8 rights were different and much more limited than those of free persons: being a prisoner inevitably curtailed the claimant's right to choose when and how she could associate with others. Consequently, the decision did not of itself constitute an infringement of the claimant's article 8 rights, as it was inherent in the prison sentence and was not of such a degree that her art.8 rights had not been respected. She and the interested party could mix for as long as they liked during the periods when they, like all other prisoners, were not locked in their cells. The fact that they could not share a cell and that the claimant could not receive care and support from her partner when they were locked in their cells did not mean that her article 8 rights were engaged and infringed.[32]

The court then decided that even if article was engaged, the prison's decision had been justified under article 8(2), which allows for lawful and necessary restrictions. The decision had been taken in accordance with law because of the terms of the policy, in particular the intimate relationship restriction, and it had pursued the legitimate aim of promoting good order and discipline in the prison, which was necessary for the prevention of disorder that could arise if same-sex partners were allowed to share cells. Further, in the court's view, the policy was proportionate to its aim.

The right to marry and found a family

Article 12 of the Convention guarantees the right to marry in accordance with the law, and in *Hamer* v *United Kingdom*,[33] the European Commission of Human Rights held that the prohibition on prisoners marrying while in prison struck at the very essence of the right guaranteed by Article 12 of the Convention.[34] However, the right to found a family whilst in prison has been restricted not only by the absence of a universal right to conjugal visits, but by cases where the prisoner has been denied a request to begin a family via artificial insemination. In *R* v *Secretary of State for the Home Department, ex parte Mellor*,[35] a prisoner serving a life sentence for murder claimed that he had the right to artificially inseminate his wife. The Secretary of State had a policy allowing artificial insemination in exceptional cases, but refused the applicant permission because he and his wife could start a family on his release. The Secretary of State also took into account the fact that as the relationship had not been tested outside prison it would not be in the best interests of any

[30] [2016] EWHC 606 (Admin).
[31] Applying the decision of the European Court in *Nowicka v Poland* (30218/96) [2003] 1 F.L.R. 417.
[32] *Applying R (Bright) v Secretary of State for Justice* [2014] EWCA Civ 1628.
[33] (1982) 4 EHRR 139.
[34] In *R (Crown Prosecution Service)* v *Registrar-General of Births, Deaths and Marriages* [2003] 2 WLR 504, it was held that it was not lawful to prevent a prisoner from marrying even where the marriage would make the wife a non-compellable witness for the prosecution in his forthcoming trial.
[35] [2001] 1 WLR 533.

child for permission to be granted. The High Court held that those articles did not guarantee to a prisoner the right to found a family while in prison. The decision was upheld by the Court of Appeal, which found that the restriction was for a legitimate aim and was proportionate in the circumstances. Although the Court of Appeal held that the prisoner might, in exceptional circumstances, be able to claim the right to artificially inseminate his wife; it was satisfied that no such circumstances existed in the present case. This approach was also adopted by the Scottish courts in *Dickson* v *Premier Prison Service*,[36] where it was held that it was not irrational or unlawful to refuse a prisoner's request to allow him to artificially inseminate his wife, even though on his release his wife would be 51 years of age and unlikely to be able to conceive. The court held that the likelihood of procreation on his release was only the starting point for the Secretary of State to consider. He was entitled to take into account the fact that his wife was claiming benefits, the welfare of the child, the implications of creating single-parent families and public concern about deterrence and punishment.

An appeal under the European Convention was initially unsuccessful and in *Dickson* v *United Kingdom*,[37] the European Court held that the policy rightly took into account matters which reflected public concern and the Secretary's application of those factors to the particular case was both legitimate and proportionate.[38] However, on reference to the Grand Chamber it was held that there had been a violation of Article 8 on the facts.[39] The Grand Chamber accepted that the Secretary of State could legitimately take into account the welfare of the child in making his decision. However, it held that the policy, and its review by the courts, did not strike a proper balance between the competing interests on the one hand of the applicants and on the other of the public interest in regulating and refusing such facilities.

A more robust approach has been taken with respect to challenges to prison mother and baby policies. The right of mothers to keep their babies with them during their sentence was raised in *R* v *Secretary of State for the Home Department, ex parte P and Q*.[40] where the Court of Appeal held that a blanket policy subjecting every mother to its provisions irrespective of individual family circumstances was unlawful. The Prison Service was required to consider whether a proposed interference with the child's family life was justified by the legitimate aims recognised by Article 8(2) of the Convention and to strike a fair balance between those aims. Although the Prison Service was entitled to adopt a policy that attempted to balance the rights of family life with the best interests of the child, in the case of one prisoner the policy would have a disproportionately detrimental effect on the child and the mother. The case is important in recognising the principle that a prisoner does not forego their fundamental rights on incarceration, and is a good example of the courts insisting that fundamental rights should not be compromised by inflexible policies that bind the administration and which fail to take account of the particular circumstances of any particular case.[41]

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[36] [2004] EWCA Civ 1477. See Helen Codd, 'Regulating Reproduction: Prisoners' Families, Artificial Insemination and Human Rights' [2006] EHRLR 39. See also Jackson, Prisoners, Their Partners and the Right to Family Life [2007] 19 (2) CFLQ 239.
[37] (2007) 44 EHRR 21.
[38] See Helen Codd, 'The Slippery Slope to Sperm Smuggling: Prisoners, Artificial Insemination and Human Rights' (2007) 15 Med Law Rev 220.
[39] *The Times*, 21 December 2007.
[40] [2001] 3 WLR 2002.
[41] Contrast *B v S* [2009] EWCA Civ 548, where it was held that there was no violation of Article 8 when a woman had been committed to prison without being allowed initially to have her baby with her (because a

Prisoners and free speech

With respect to free speech, the majority of cases concerning prisoners' expression have been dealt with under Article 8 of the Convention,[42] and the Court dealt with the present case under this Article. The Court had previously accepted that Article 8 also protects the right to freedom of expression. Thus in *Silver v United Kingdom,*[43] both the European Commission and the European Court considered that in the context of correspondence, the right to freedom of expression was guaranteed by Article 8 of the Convention.[44]

That prisoners enjoy a general right to free speech was also endorsed in *Bamber v United Kingdom*,[45] where a prisoner had been disciplined for breaking prison rules on contacting the media. Although the application was declared inadmissible because the interference was seen as a reasonable and necessary method of exercising effective control over communications with the media by the telephone,[46] the Commission accepted that the applicant had the right of freedom of expression under Article 10 and that such a right had been interfered with. Accordingly, although the applicant had other methods of communication with the media open to him, the restriction on his right to communicate with the media by telephone amounted to an interference with his right of freedom of expression. The case thus appears to confirm that any restriction on a prisoner's freedom of expression must relate to real issues of good order and discipline in prisons, and not to mere concerns of public confidence and objection raised by the fact that the speaker is a prisoner.

Turning to the present case, it would appear to be valid to restrict C's access to pornography if the state could point to a specific harm caused to good order and discipline in the prison, or the prisoner's health and rehabilitation. Thus, the majority insist that each case is dealt with on its merits rather than by a general, blanket rule. The majority also question whether there was any legitimate aim in this case, as the legal provision was concerned with morality, and the state's arguments based on order and discipline. In that sense, it is interesting that the Court moved to the question of proportionality without laying down further guidance on the legitimate aims for restricting prisoners' speech and private life.

With respect to UK law, the domestic courts have not provided clear guidance in this area. In *R v Secretary of State for the Home Department, ex parte O'Brien and Simms*[47] the House of Lords declared the Home Secretary's policy restricting journalists' reporting when visiting prisoners as unlawful.[48] However, the case did not establish that a prisoner had a general right of free speech in domestic law, and left open the question whether prisoners lose their right of free speech as a necessary incident of imprisonment. Thus, Lord Steyn stressed that the prisoners' claims were not based on the right to free speech in general, but

written application had to be made). Although the Article 8 rights of the baby had been engaged, and the judge had not given sufficient weight to this when sentencing, this did not demand that her sentence be postponed for 6 months.

[42] Guaranteeing, *inter alia*, the right to correspondence. For example in *Golder v United Kingdom*, note 1, the Court was dealing with alleged violations of arts 6 and 8 only, and in *Boyle and Rice v United Kingdom*, note 3, the Court was dealing with alleged violations of arts 8 and 13.

[43] (1983) 4 EHRR 537.

[44] Ibid, at para 107. See also *McCallum v United Kingdom* (1991) 13 EHRR 597.

[45] Application No. 33742/96, admissibility decision of the European Commission 11 September 1997.

[46] The Commission found that the new rule was for the legitimate aims of preventing disorder and for the protection of morals and/or the rights of others.

[47] [1999] 3 All ER 400. See also Foster, 'Do Prisoners enjoy the right to free speech?' [2000] EHRLR 393.

[48] In *R (A) v Secretary of State for the Home Department* [2003] EWHC 2846 (Admin), it was held that article 10 of the European Convention was not broken by requirements for the monitoring of journalists' interviews with asylum seekers detained under s.21 of the Anti-Terrorism, Crime and Security Act 2001.

were limited to a very specific context: the right of the prisoners to seek justice via the oral interviews with the journalists. His Lordship then considered the value of free speech in particular contexts:

> Not all types of speech have an equal value. For example, no prisoner could ever be permitted to have interviews with a journalist to publish pornographic material or to give vent to so-called hate speech. Given the purpose of a sentence of imprisonment, a prisoner can also not claim to join in a debate on the economy or on political issues by way of interviews with journalists. In this respect the prisoner's right to free speech is outweighed by deprivation of liberty by the sentence of a court, and the need for discipline and control in prisons.''[49]

In addition, their Lordships stressed that any right to freedom of expression was subject to rigid control by the prison authorities. For example, Lord Hobhouse accepted that the right to communicate with professional journalists needed to be controlled and regulated as a necessary part of running a penal institution.[50] His Lordship then accepted that some measure of control was permissible, provided it did not go beyond what was reasonably necessary,[51] and that the need to control such visits ought to be vested in and exercised by the prison governor.[52]

The passing of the Human Rights Act 1998 allowed the domestic courts to apply principles of necessity and proportionality when questioning legislative and administrative acts that impinge on the human rights of prisoners.[53] However, the case law is inconsistent, particularly where the prisoner is not using their democratic rights to augment broader principles of justice and the public interest, as in *O'Brien and Simms.*

A more positive approach was taken in *R (Hirst) v Secretary of State for the Home Department*,[54] a case where a prisoner had conducted a number of interviews with radio stations over the telephone on matters concerning prison life, but contrary to Prison Service Order 4400.[55] He had applied for permission to contact the media by telephone on matters of legitimate public interest relating to prisons and prisoners, but the request was refused because the claimant could exercise his right of free speech by writing to the media, rather than speaking to them on the telephone. The judge stressed that any interference with the right to freedom of expression had to comply the doctrine of proportionality,[56] and that the

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[49] [1999] 3 All ER 400 at 408, g-h. In this respect, his Lordship's general views reflect those of Kennedy and Judge LJJ in the Court of Appeal.

[50] Ibid. at 418, f-g. In the High Court Latham J had concluded that Rule 33 of the Prison Rules 1964 was lawful in covering the effect of inmate's activities on the interests of other persons. Latham J relied on the decision in *R. v. Secretary of State for the Home Department, ex p Bamber* [1996] 2 WLUK 252, which upheld the legality of restrictions imposed on prisoners contacting the media by telephone.

[51] [1999] 3 All ER 400, at 420, c-e, referring in particular to *Campbell v United Kingdom* (1992) 15 EHRR 137. His Lordship also relied on *R. v. Secretary of State for the Home* Depar*tment, ex p Leech* [1993] 4 All ER 539, and the Canadian case of *Solosky v R* (1979) 105 DLR (3rd) 745, which advocated basically the same test.

[52] *Ibid* 423, g-j, citing Judge LJ in *R v Secretary of State for the Home Department, ex p O'Brien and Simms* [1998] 2 All E.R. 491, at 510.

[53] *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532.

[54] [2002] 1 WLR 2929.

[55] This provides that prisoners must not make calls to the media if it is intended, or likely, that the call will be used for publication or broadcast. The paragraph declares that a prisoner may make a written application to do so, but that permission will only be granted in exceptional circumstances and that prisoners should normally communicate with the media by written correspondence.

[56] *Ibid*, at 2939, F (para. 29), citing the House of Lords' decision in *R v Secretary of State for the Home Department, ex parte Daly*, n 53.

question of whether the restrictions were unjustified had to be established by applying the principle of proportionality, albeit against the backcloth of the prison environment.[57] The onus was on the party seeking to interfere with Article 10 to show that the interference is designed to meet a legitimate objective, that the means adopted are rationally connected to that objective, and that the Convention right is not impaired more than is necessary to achieve that objective.[58] The judge accepted that some restrictions had to be placed on the prisoner, for example, a prisoner could not attend any public meetings or debates outside prison. This was a necessary consequence of the prisoner being locked up and his or her loss of liberty would thus impact on the enjoyment of his Convention rights.[59] On the other hand, he referred to a number of cases where the courts had upheld the freedom of speech of prisoners where it was directed at securing another important right of the citizen, such as access to the courts.[60]

The decision in *Hirst* recognizes the increased importance of freedom of expression and freedom of the press, stressing the need to show an overriding justification for any interference with such a right. Most significantly the decision modifies the view that prisoners lose their general right of freedom of expression on incarceration, Elias J rejecting the notion that the restrictions placed on a prisoner's right to contact the media on matters relating to prisons and prisoners were part and parcel of the sentence itself. Instead, the prisoner, in this case at least, retains the fundamental right to freedom of expression, placing the onus on the Home Secretary and the prison authorities to justify any restrictions by reference to proportionate measures that pursue the legitimate aim of maintaining security and order in prisons.

However, the decision in *Hirst* does not question the validity of Lord Steyn's statement that in some respects a prisoner's right to free speech is affected by and outweighed by deprivation of liberty by the sentence of the court. Thus, the subsequent decision of the Court of Appeal in *R (Nilsen) v Secretary of State for the Home Department and another* [61] accepted that the prison governor and the Home Secretary can take into account the views and sensibilities of the public and the prisoner's victims in placing restrictions on freedom of expression. It also held that restrictions on prisoners' speech do not have to be related to matters of good order and discipline within the prison gates.

The case was brought by Nilsen, a whole life sentence prisoner, who argued that prison rules that prohibited publication by the prisoner of his criminal activities was *ultra vires* the Prison Act 1952 and contrary to Article 10. The High Court rejected the argument that the Home Secretary's powers did not extend beyond the prison walls and were confined to good order and discipline within the prison.[62] The Home Secretary could concern himself with consequential effects outside prison and it followed that he could restrict a prisoner's freedom of speech in pursuance of the legitimate aims of, *inter alia*, the prevention of disorder or crime, the protection of morals and the protection of the rights of others. On appeal, Lord Phillips MR opined that one legitimate aspect of a sentence of imprisonment was to subject the prisoner's freedom to express himself outside the prison to appropriate control. Thus, criminals who were deprived of their liberty by imprisonment were deprived

[57] Ibid, at 2940, B-E (para. 31).
[58] Ibid, at 2941, C (para. 33), citing d*e Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Land and Housing* [1999] 1 AC 69.
[59] Ibid, at 2943, H-2944A (para 42).
[60] Ibid, at 2944, B-F (paras 43 to 45), citing *Raymond v Honey*, note 1.
[61] [2004] EWCA Civ 1540; [2005] 1 WLR 1028.
[62] *The Times*, 2 January 2004.

of enjoyment of their communication with the outside world, save in so far as the prison authorities permitted such.[63] The wording of the regulation drew the line appropriately between what was and what was not acceptable conduct on behalf of a prisoner and fell within the Home Secretary's powers conferred by the Act.[64]

With respect to the prisoner's right to access pornography, in the UK the matter seems to be one for the discretion of the prison governor, each governor allowing access to soft porn pornography in certain prisons. However, with respect to legal challenge, the limited case law in this area suggests that the authorities are free to regulate the access of such materials to prisoners.

In *Morton v HMP Long Lartin,*[65] a prisoner applied for judicial review of a decision of the governor to refuse him permission to receive specific pornographic magazines, arguing that the decision breached his rights under Article 10 of the Convention, as given effect to by the Human Rights Act 1998. Specifically, it was argued that the refusal was disproportionate given that what the prisoner sought to do did not present any threat to morality or order within the prison. Refusing the application, the judge held that a prisoner was not in the best position to determine how his interests were to be balanced with the interests and safety of the rest of the prison population. Thus, the determination by the governor to withhold the magazines amounted to an exercise of his discretion based on circumstances peculiar to that establishment at that time, made within the remit of an adequately disclosed and obvious policy and was therefore not in breach of Article. The judge ruled as follows (at para 9):

> In my judgment, there could be no prospect of the court in this case, on the range of issues which Mr Morton has raised, concluding that the Governor's decision was not permissible having regard to the rights to which prisoners are guaranteed by the Convention. The Governor must be accorded a wide margin of judgment in this matter. The court would be bound to pay deference to his position as the Governor of a particular prison, where he has responsibility for all. In my judgment, the pointers are all one way, not because there is absolutely no argument for the point of view Mr Morton puts forward, but because, in my judgment, the court would see no basis for setting aside the exercise of judgment which has been made by others.

The majority decision in *Chocolate* presents a very different view on this matter, suggesting that the prisoner enjoys the prima facie right to such access and that any restriction has to be justified on a case-by-case basis, with the state required to offer sound evidence on legitimate grounds.

Conclusions

It is difficult gauge the importance of the majority decision in *Chocholac* on the enjoyment of prisoners' Article 8 (and 10) rights. Although the Strasbourg Court has insisted that restrictions on prisoners' democratic rights have to be justified under the established principles of legitimacy and proportionality, it has offered a great area of discretion to prison authorities in restricting both private and family life and prisoners' free speech. In doing so,

[63] His Lordship also distinguished the present case with the decision of the House of Lords in *O'Brien and Simms*. There court was concerned with a blanket ban, whereas the present case was concerned with a tightly drawn restriction on a prisoner writing about his crimes, which was subject to an exception covering serious representations about conviction or sentence or part of serious comment about crime or the criminal and penal system.
[64] Ibid, at 1038, F (para 29).
[65] [2002] EWHC 3082 (Admin).

it has also accepted that such restrictions can be greater than those tolerated outside the prison environment. Thus, although it has eschewed the principle of automatic forfeiture, it has accepted that good order and discipline in prison, together with the nebulous concept of public confidence in the state's criminal justice system, are capable of justifying most restrictions on the prisoners Article 8 and 10 rights.

It is suggested that the majority's decision on both legitimacy and proportionality is correct and in line with previous jurisprudence in this area. As the basis of the legal restriction was public morals, rather than good order and discipline or the rights of others, then a blanket ban on prisoners accessing such information should be considered disproportionate, particularly as the prisoner was to use the material for his own private purpose. If on the other hand the aim of the law, and its application in this case, was to uphold prison discipline, to prevent crime, or to affect the rehabilitation of the prisoner, then previous case law would suggest that such a restriction would be lawful under the Convention. The minority's view reflected those aims, but if the law was not passed, or applied, for those purposes, the restriction must be regarded as both illegitimate and disproportionate.

Despite the majority's decision in this case, it is still likely that most restrictions on the prisoner's right to enjoy their private sexual life, and freedom of expression, are capable of being justified under the qualifying provisions of Articles 8 and 10. What the case has illustrated is that some judges embrace the principle of automatic forfeiture more than others, and are thus prepared to validate restrictions without robust application of the principles of legitimacy and necessity. The majority decision is welcome for that reason, but the decision should not be seen as introducing a new era in the enjoyment of prisoners' democratic rights, or the reduction of the authorities' wide discretion in restricting those rights.