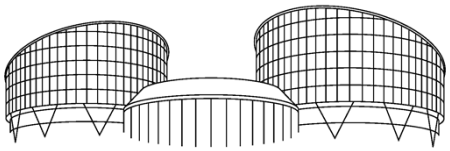

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF LESŁAW WÓJCIK v. POLAND

(Application no. 66424/09)

JUDGMENT

Art 8 • Family life • Prison governor's refusal of convicted prisoner's requests for unsupervised conjugal visits adequately reasoned, and not arbitrary or manifestly unreasonable in the circumstances • Impugned measure part of system of privileges for prisoners linked to their conduct and with inherent element of discretion

Art 35 § 1 • Interlocutory appeal lodged with a regional court effective domestic remedy against the prison governor's refusal

STRASBOURG

1 July 2021

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Lesław Wójcik v. Poland,

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

Tim Eicke, *President,*
Krzysztof Wojtyczek,
Armen Harutyunyan,
Pauliine Koskelo,
Jovan Ilievski,
Gilberto Felici,
Linos-Alexandre Sicilianos, *judges,*

and Liv Tigerstedt, *Deputy Section Registrar,*

Having deliberated in private on 8 June 2021, delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 66424/09) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Mr Lesław Wójcik ("the applicant"), on 25 November 2009.

2. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz, followed by Ms J. Chrzanowska and, subsequently, by Mr J. Sobczak of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that unjustified and disproportionate restrictions on his right to receive private conjugal visits in prison had been in breach of Article 8 of the Convention.

4. On 13 December 2011 the application was communicated to the Government.

5. On 17 April 2012 the Court granted a request for third-party intervention lodged by the Helsinki Foundation for Human Rights based in Poland (Article 36 § 2 of the Convention and Rule 44 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The facts of the case, as submitted by the parties, may be summarised as follows.

A. Chronology of the applicant's detention

7. The applicant was deprived of his liberty in connection with two sets of criminal proceedings against him. On 19 January 2007 the Tarnobrzeg

Regional Court convicted the applicant of a number of offences, including robbery, currency counterfeiting and destruction of property and sentenced him to five years' imprisonment (case no. IIAKa 35/07). On 6 March 2009 the Tarnobrzeg District Court convicted him of robbery and battery and sentenced him to three years and six months' imprisonment (case no. IIK 84/08).

8. From 11 September 2009 until 22 November 2010 and from 24 January until 14 June 2011, the applicant served his prison sentence, alternating between Rzeszów Prison and Cracow Remand Centre's hospital. Between those two periods and on the latter date, the applicant was granted a licence for temporary leave in view of cardiological ailments from which he was suffering.

9. From 15 July until 21 December 2011 the applicant resumed his prison sentence; he was subsequently moved to Wrocław and Rzeszów Prisons and Katowice Remand Centre. On the latter date he was again granted a licence for temporary leave on health grounds.

10. On 13 June 2012 the applicant was moved to an open-type prison in Chmielów.

B. The applicant's conduct in prison and regular visits from his wife and relatives

11. In 2008 the applicant got married. He had a child with his wife. From the beginning of his post-conviction detention he lodged regular requests for visits from his wife, his child, his parents, his two brothers and his sister. In addition, the applicant lodged requests for private conjugal visits (*widzenie małżeńskie*), otherwise known as "intimate visits", which take place in a private room without a guard being present.

12. During the first term of his detention after conviction (between September 2009 and November 2010) the applicant received on average three supervised visits per month, which added up to thirty-seven visits (thirty in Rzeszów Prison and seven in Cracow Remand Centre). That number included seven unaccompanied visits from the applicant's wife.

13. It appears that in October 2009, the prison administration lodged five requests for the applicant to be punished for various disciplinary infractions. On 14 October 2009 the applicant was punished by being placed for fourteen days in a solitary-confinement cell.

14. On 9 November 2009 the applicant's supervisor (*wychowawca*) granted a request lodged by the applicant for a conjugal visit, in view of the latter's improving behaviour. On 23 November 2009 the prison governor decided not to allow the visit and instead to issue an official commendation (*pochwała*), pending a consolidation of the applicant's good conduct.

15. On 19 January 2010 – after asking the guards escorting him to the hospital on 12 January 2010 to set him free in exchange for future payment

– the applicant was given a disciplinary punishment: for fourteen days he was not allowed to receive any visitors or to make phone calls. On 26 February 2010, when taken to the dentist, the applicant made unauthorised contact with his family. These incidents were reported to the prosecution service.

16. As can been seen from the documents submitted to the Court, throughout the applicant's first term of detention he was at times insolent and uncooperative (thirteen requests for disciplinary punishment were issued in the first ten months of his detention in Rzeszów Prison); however, at times the standard of his behaviour was adequate. He lodged frequent requests to be rewarded by a conjugal visit for his voluntary involvement in prison work and activities.

17. During the second term of his imprisonment, from January until June 2011, the applicant was granted thirteen supervised family visits, including three unaccompanied visits from his wife. According to the applicant's submission to the Court, four requests for a conjugal visit and two requests for an additional family visit were refused.

18. During the third term of his imprisonment, from July until December 2011, thirteen requests for family visits lodged by the applicant were granted, including three unaccompanied visits from his wife. Two requests for a conjugal visit were refused and, according to the Government's submission to the Court, two were granted (requests lodged on 12 and 21 November 2011). According to the applicant's submission to the Court, only one unsupervised conjugal visit to him in Wrocław Prison was granted during his third period of imprisonment.

19. The supervised visits described below, which are otherwise known as "visits at the table" (*widzenie przy stoliku*), took place in a common room where the applicant was allowed to see his visitors in person and in the presence of a prison officer. The applicant was not allowed to kiss or hug his wife during those visits.

C. Refusals to grant unsupervised conjugal visits and the applicant's interlocutory appeal

1. Refusals to grant the requests filed by the applicant

20. During the first term of his detention after conviction (between September 2009 and November 2010), requests lodged by the applicant or his wife for a conjugal visit were refused fourteen times.

21. It appears that the applicant lodged his first request for a conjugal visit on 25 September 2009. It was refused four days later (see paragraph 25 below). Requests for additional family visits were refused nine times during his first period of detention.

22. In his numerous requests for a conjugal visit, including requests lodged on 17 March 2010 and 19 September 2011, the applicant stated that

intimate contact was necessary for him and his wife to maintain their marriage bonds. They also wanted to conceive another child. Contact during supervised family visits was too limited and his relationship with his wife had suffered. In a number of his subsequent requests, the applicant also mentioned the advanced state of his rehabilitation and his good conduct, his work on a prison Internet site, his preparation of information posters, his helping to clean his prison wing and his organising religious meetings. This, in the applicant's opinion, constituted outstanding conduct and justified granting him a reward.

23. The applicant submitted to the Court that the refusal to grant his requests for a conjugal visit had not been properly reasoned and had been communicated to him only orally by his prison supervisors.

24. The Government submitted to the Court that each of the applicant's requests for conjugal visits had been refused by means of a handwritten note added (by the governor or deputy governor of the prison in question) to the applicant's written request.

The grounds for each such refusal had been the applicant's reprehensible attitude and behaviour (*naganna postawa i zachowanie*). That assessment, in turn, had been made on the basis of written reports concerning the applicant's conduct prepared by prison staff.

25. The Government further submitted to the Court copies of the applicant's fourteen requests for a conjugal visit. They were lodged on the following dates: 25 September and 2 and 18 November 2009, 4 January and 8 and 17 March, 1, 21 and 28 June and 6 July 2010, and 26 and 31 January, 19 September and 7 November 2011 (see paragraph 20 above).

All of those requests were refused.

26. The handwritten note added to the request of 17 March 2010 reads as follows: "Refused (convicted person to be informed) 18.03.2010". The note contains an illegible signature and bears the stamp of the Rzeszów Prison Deputy Governor.

A one-page copy of this document was submitted to the Court, the original of which appears to have been two pages long.

27. The handwritten note on the top of the first page of the request of 19 September 2011 reads as follows: "Refused 20.09.2011". The note contains an illegible signature and bears the stamp of the Rzeszów Prison Deputy Governor.

The second page of this document bears an additional handwritten note that was signed and stamped by the applicant's prison supervisor on 19 September 2011. This note is four-lines long and reads as follows: "The request is not approved; educational reasons (*względy wychowawcze*); I informed the applicant of the possibility of applying for the above-mentioned visit under the rewards procedure; exceptional grounds lacking (*brak szczególnych przesłanek*)."

28. The remaining requests for conjugal visits bear similar handwritten notes: the word "refused" (*odmownie*), a date, a stamp and the illegible signature of the Rzeszów Prison Deputy Governor (the first thirteen requests) or of the Wrocław Prison Deputy Governor (the request of 7 November 2011).

These requests bear additional handwritten notes, which contain the illegible signatures of (and are stamped by) the applicant's prison supervisors. These notes read as follows: "I do not support" *Nie popieram*); "This is a form of a reward that the convicted person does not deserve at the moment" and "I informed [the applicant] of the possibility to apply for such a visit under the rewards procedure (*w trybie nagrodowym*)".

A number of the notes that were made by the applicant's supervisors also contain short handwritten information to the effect that either "the conduct of the convicted person had been unacceptable"; that requests for disciplinary punishment had been lodged; that the applicant had already received an additional supervised visit from his relatives; or that there was a hierarchy of rewards and he could not choose his rewards as he pleased.

29. The Government stated that other than for the reason of the applicant's reprehensible behaviour, one request for a conjugal visit (lodged by the applicant on 7 November 2011) had been orally rejected by the Wroclaw Prison Governor because the applicant's wife had not sent a letter of consent in respect of the proposed conjugal visit. The Government submitted to the Court a copy of the applicant's handwritten request. The document bears an illegible signature and handwritten notes to the effect that the applicant had just been transferred from another prison without his prisoner's records and that his temporary records did not contain his wife's written consent.

30. Two forms were also submitted to the Court, dated 21 November and 12 December 2011, by which the applicant's supervisor at Wrocław Prison recommended the granting of the applicant's requests for a conjugal visit in view of the latter's good behaviour and his work on an information poster.

2. Refusal to grant the requests lodged by the applicant's wife

31. Irrespective of the applicant's own requests, his wife lodged a number of requests for a conjugal visit, stating that the couple had only recently been married and that they were trying for another baby. These requests were each refused by means of a written letter of reply signed by the prison governor or his deputy and sent to the applicant's wife, with a copy being sent to the applicant in prison.

32. Submitted to the Court were letters dated 17 and 28 December 2009 and 12 February, 17 and 23 March 2010 and 28 May 2010 by which the Deputy Governor of Rzeszów Prison refused six requests lodged by the applicant's wife for a conjugal visit. Five of the six letters stated, without

giving any details, that the applicant did not deserve to be so rewarded. In addition, on 25 March 2010 the Governor of Rzeszów Prison informed the applicant's wife in more elaborate terms that a conjugal visit could only be granted as a reward – for a prisoner's good conduct or by way of motivation – if it was justified by a prisoner's exceptional family or personal circumstances. The applicant did not qualify for either measure. His prison supervisors unanimously considered that his behaviour had been highly reprehensible. Many requests that the applicant be subjected to disciplinary punishment had been lodged. His conduct had not improved. Attempts to encourage good behaviour, such as the granting of an additional supervised visit from the applicant's siblings, had been unsuccessful.

D. The applicant's interlocutory appeals and complaints about the refusals to grant conjugal visits

1. Appeals under Article 7 of the Code on the Execution of Criminal Sentences

33. On 18 March 2010 the Governor of Rzeszów Prison refused to grant the applicant a conjugal visit with his wife. That decision was issued in the form of a note handwritten on the applicant's request of 17 March 2010 (see paragraph 22 above). On an unspecified date the applicant lodged with a penitentiary judge (*sędzia penitencjarny*) of the Rzeszów Regional Court (*Sąd Okręgowy*) an interlocutory appeal against that decision. The applicant specifically invoked Article 8 of the European Convention of Human Rights and Article 141 of the Code on the Execution of Criminal Sentences (*Kodeks Karny Wykonawczy*) ("the Code"), arguing essentially that he deserved to be granted the visit requested.

34. In connection with the above-mentioned appeal, the penitentiary judge obtained an explanatory note on the applicant's conduct (*sprawozdanie z czynności wyjaśniających*) dated 16 April 2010 and signed by the Rzeszów Prison Deputy Governor and lower-ranking staff. The document noted that on 18 March 2010 the deputy governor had refused the applicant's request for a conjugal visit in the light of the latter's reprehensible behaviour. The applicant had been dismissive and manipulative. He had received multiple disciplinary punishments. Therefore, granting him a reward would not have served any educational purpose.

35. On 30 April 2010 the penitentiary judge dismissed the applicant's interlocutory appeal. It was observed that the system of rewards was a measure aimed at helping prisoners' resocialisation. In principle, rewards should be granted to prisoners willing to actively participate in their rehabilitation programme and not to those who only occasionally showed good conduct. A motivational measure within the meaning of Article 141 of the Code was still a type of a reward and was to be granted only in

particularly justified circumstances. In view of his insolence and numerous disciplinary punishments, the applicant had not qualified for any reward. Lastly, it was considered that the refusal to grant the request in question had not hindered family bonding, which had been maintained through supervised visits, correspondence and telephone calls.

36. It appears that on 23 or 28 September 2011 the applicant lodged a similar interlocutory appeal against the refusal of 20 September 2011, which was issued in the form of a handwritten note added to the applicant's request of 19 September 2011 for a conjugal visit (see paragraphs 25 and 27 above). The case was registered under case no. III. Kow 1417/11.

37. On 10 October 2011 the Rzeszów Regional Court obtained an explanatory note on the applicant's conduct from his senior supervisor (*starszy wychowawca*) at Rzeszów Prison. The note stated that the Deputy Governor of Rzeszów Prison had refused the applicant's request of 19 September 2011 for a conjugal visit. The applicant complained that he had not received any reasoning in respect of this refusal. The applicant's supervisor had not approved this request because of the lack of any consolidation of the applicant's good behaviour. The applicant had been told of the refusal of the request by his supervisor. Having examined the applicant's file, the senior supervisor had considered that the applicant's behaviour had not been good enough to warrant the reward sought. The applicant had admittedly been rewarded on two occasions, but two requests for his disciplinary punishment had also been lodged.

38. A copy of the subsequent decision of the penitentiary judge has not been submitted by the parties.

2. Complaints to the prison authorities

39. The applicant and his wife lodged various applications with the prison authorities, complaining that the law did not require the prison authorities to reply in writing to requests for visits lodged by prisoners but only to those lodged by potential visitors. They also stated that the repeated refusals to grant unsupervised conjugal visits had hindered family bonding and had been in breach of Article 141 of the Code.

The applicant furthermore alleged that an additional visit and, in particular, a conjugal visit could be granted by a prison governor once a month as a reward for a prisoner's good behaviour. According to the practice followed at Rzeszów Prison, such visits were granted only to inmates employed by the prison. The applicant alleged that his application for such employment (he had even offered to work for free) had been rejected owing to the limited employment opportunities in the prison and to his poor health. Consequently, additional family visits and conjugal visits were beyond his reach.

40. The applicant submitted to the Court copies of twelve letters of reply sent to the applicant by the Rzeszów Regional Inspectorate of the Prison

Service, the Governor of Rzeszów Prison and his deputy, and the Governor of Cracow Remand Centre (dated 6 February, 7 and 21 April, 19 and 25 May, 27 July, 9 August, and 2, 6, 13 and 27 September 2010 and 9 June 2011).

All of these letters reiterated the rules on the granting of rewards and noted that the applicant did not qualify for any reward or of motivational measure in view either of his reprehensible conduct or the lack on his part of any special and consolidated resocialisation-related achievements. The authorities also stressed that the applicant enjoyed sufficient contact with his family because visits from them in a common room or visits *via* an interphone had been regularly authorised.

41. In addition to those arguments, the Governor of Rzeszów Prison observed, in his letters to the applicant of 9 August and 2 September 2010, that the applicant had expressed a very hostile attitude towards his wife (in a letter to his wife dated 20 July 2010 – the letter had been opened and read by the prison authorities). It had therefore been concluded that the unsupervised visit sought could have put the applicant's wife in danger.

42. Moreover, on 9 June 2011 the Governor of Cracow Remand Centre denied that the applicant had been promised a conjugal visit as a reward for his participation in the cleaning of the remand centre. Work performed by the applicant on 28 May 2011 had been rewarded by means of the authorisation of an additional supervised visit.

3. Complaints lodged with the Minister of Justice and the Ombudsman

43. On 17 February 2010 the applicant wrote to the Minister of Justice, asking that the legal provisions on the granting of conjugal visits to convicted prisoners be amended. In reply (of 8 March 2010), the applicant was informed that conjugal visits could be granted as a reward or as a motivational measure, which was in line with European standards. Refusal to grant such visits could be challenged by lodging a complaint with a penitentiary judge or with the head of the relevant regional Prison Service.

44. On 14 July 2010 the applicant lodged a complaint with the Ombudsman (*Rzecznik Praw Obywatelskich*). On 29 October 2010 the Ombudsman obtained a report from the Rzeszów Regional Inspectorate of the Prison Service. The report concluded that a series of actions ("five positive actions") undertaken by the applicant had undoubtedly constituted outstanding behaviour. The authorities could nevertheless use their discretion not to reward the applicant. The law did not require that each positive action shown by a prisoner be rewarded.

45. By a letter of 26 May 2011 the Ombudsman informed the applicant that the basic forms of family contact in prison were: visits that took place in a common room, where a prisoner was allowed to see his visitors in person and in the presence of a prison guard; telephone calls; and letters. Conjugal visits could be exceptionally granted by a remand centre or a

prison governor as a reward for a prisoner's good behaviour. Conjugal visits, therefore, constituted not a prisoner's right but a privilege.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Judicial review and complaints to administrative authorities

46. Detention and prison establishments in Poland are supervised by penitentiary judges, who act under the authority of the Minister of Justice.

Under Article 6 of the Code on the Execution of Criminal Sentences (*Kodeks Karny Wykonawczy*) ("the Code"), a convicted person is entitled to lodge applications, complaints and requests with the authorities enforcing that person's sentence.

Article 7 §§ 1 and 2 of the Code provides that a convicted person can challenge before a court any decision issued by a judge, a penitentiary judge, the governor of a prison or of a remand centre, a regional director or the Director General of the Prison Service, or a court probation officer. Article 7 § 1 of the Code states that such a decision can be challenged on the grounds of its "non-compliance with the law" unless otherwise provided by the law.

The remainder of Article 7 of the Code reads as follows:

> "3. Appeals against decisions [mentioned in paragraph 1] shall be lodged within seven days of the date of the pronouncement or the serving of the decision; the decision [in question] shall be pronounced or served with a reasoned opinion and an instruction regarding the right [to lodge an appeal and] the deadline and procedure for lodging an appeal. An appeal shall be lodged with the authority that issued the contested decision. If [that] authority does not consider the appeal favourably, it shall refer it, together with the case file and without undue delay, to the relevant court.
>
> 4. The court that has jurisdiction to examine the appeal may suspend the enforcement of the contested decision ...
>
> 5. Having examined the appeal, the court shall decide either to uphold the contested decision or to quash or amend it; the court's decision may not be subject to an interlocutory appeal."

47. Article 102 § 10 of the Code guarantees a convicted person the right to lodge applications, complaints and requests with other relevant authorities, such as the management of a prison or remand centre, heads of units of the Prison Service, penitentiary judges, prosecutors and the Ombudsman.

B. Constitutional complaint and proceedings for compensation

1. Relevant provisions

48. Article 79 § 1 of the Constitution provides as follows:

"In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed has the right to appeal to the Constitutional Court for a judgment on the conformity with the Constitution of a statute or another normative act on the basis of which a court or an administrative authority has issued a final decision on his freedoms or rights or on his obligations, as specified in the Constitution."

Article 190 of the Constitution, in so far as relevant, provides as follows:

"1. Judgments of the Constitutional Court shall be universally binding and final.

2. Judgments of the Constitutional Court ... shall be published without delay.

3. A judgment of the Constitutional Court shall take effect from the day of its publication; however, the Constitutional Court may specify another date in respect of the end of the [period during which a normative act will have] binding force. Such a time-limit may not exceed eighteen months in respect of a statute or twelve months in respect of any other normative act ...

4. A judgment of the Constitutional Court on the non-conformity with the Constitution, an international agreement or statute, of a normative act on the basis of which a final and enforceable judicial decision or a final administrative decision ... was given, shall be a basis for reopening the proceedings [in question], or for quashing the decision ... in a manner and in accordance with principles specified in provisions applicable to the proceedings in question."

49. Article 417^1 of the Civil Code, which entered into force on 1 September 2004 and which was amended as of 25 September 2010, regulates the State liability in tort. It reads, in its relevant parts, as follows:

"1. If damage has been caused by the enactment of a law, reparation for [that damage] may be sought after it has been established in the relevant proceedings that that statute was incompatible with the Constitution, a ratified international agreement or another statute.

2. If damage has been caused by a binding ruling or a final decision, reparation for [that damage] may be sought after it has been established in the relevant proceedings that [the binding ruling or the final decision] were contrary to law ... This also concerns a situation in which a binding ruling or a final decision was based on a statute incompatible with the Constitution, a ratified international agreement or another statute ..."

2. Constitutional Court's judgments in cases SK 58/03 and SK 17/07

50. The rulings which were relied on by the Government in their observations on the admissibility of the present case (see paragraph 71 below) may be summarised as follows.

51. Both constitutional complaints in question were lodged by former detainees who challenged the constitutionality of Article 263 §§ 3 and 4 of the Code of Criminal Procedure regulating the statutory maximum cumulative length of detention on remand (for details, see *Porowski v. Poland*, no. 34458/03, § 73, 21 March 2017).

52. On 24 July 2006 the Constitutional Court declared Article 263 § 4 of the Code unconstitutional, holding that its imprecise and broad wording

could lead to arbitrary court decisions on detention on remand (no. SK 58/03). The Constitutional Court ruled that the provision in the part which had been declared unconstitutional was to be repealed within six months from the date of the publication of the judgment in the Journal of Laws (*Dziennik Ustaw*). On 16 February 2007 the controversial clause was reformulated in a new paragraph 4 (a) of Article 263 of the Code.

53. On 10 June 2008 the Constitutional Court declared Article 263 § 3 of the Code, *inter alia*, in breach of the principle that any deprivation or restriction of liberty could only be provided by an act of law and had to be in accordance with clearly formulated and coherent legal provisions (SK 17/07). The Constitutional Court observed that a direct consequence of its ruling was the repeal of the unconstitutional law principle by virtue of the judgment itself, as from the date of its publication. It furthermore stated that the judgment in question allowed the domestic courts to start interpreting and implementing the impugned provision of the Code of Criminal Procedure in compliance with the Constitution, as indicated by the Constitutional Court. The last paragraph of the judgment contained a general clause reiterating that under Article 190 of the Constitution and other provisions, a judgment of the Constitutional Court declaring the unconstitutionality of a particular principle of law, served as a basis for the reopening of proceedings in cases in which a final and enforceable judicial or administrative decision, had been issued on the basis of the normative act declared unconstitutional. As a result of the judgment, on 12 February 2009 the impugned Article 263 of the Code was amended.

C. Prisoner's contact with his family

54. Pursuant to Article 105 of the Code, prison authorities should enable a person who is serving a prison sentence to maintain his or her family ties through visits, correspondence, telephone calls, parcels and money transfers. The organisation of prisoners' contacts with family members, including the monitoring of visits and correspondence, depends on the type of prison and the prisoner's individual circumstances.

55. A person who is serving a sentence in a closed-type prison is entitled to two visits per month. With the permission of the prison governor both visits may take place on the same day. Such visits, including conversations, are monitored by the prison's administration (Article 90 §§ 6 and 7 of the Code).

56. A person who is serving a sentence in a semi-open prison is entitled to three visits per month. With the permission of the prison governor all three visits may take place on the same day. These visits, including conversations, are monitored by the prison's administration (Article 91 §§ 8 and 9 of the Code).

57. A person who is serving a sentence in an open prison is entitled to an unlimited number of visits. These visits, excluding conversations, may be monitored by the prison's administration (Article 92 §§ 10 and 11 of the same Code).

58. Article 105 (a) of the Code provides further details on the organisation of visits, irrespective of the prison type.

Visits of persons who are not members of a prisoner's family may take place only with the permission of the prison governor. Visits from family members do not require such procedure.

59. As a general rule, a prisoner is entitled to one sixty-minute-visit per day. A maximum of two adults are allowed to visit a prisoner at any one time. The number of minors is unlimited. However, children younger than the age of fifteen must be accompanied by an adult. Prisoners with full custody rights are also entitled to an additional visit from their children (see also Article 87 (a) of the Code).

60. Typically, visits must take place in a common room at an individual table and under the supervision of a prison guard. They are organised in such a way as to enable a prisoner to have direct contact with a visitor.

In practice, there are four types of visits:

(i) An "open visit" (*widzenie bezdozorowe*), commonly referred to as a "visit at the table" ("*widzenie przy stoliku*"). This takes place in a common room designated for visits. Each detainee and his visitors have at their disposal a table at which they may sit together and can have an unrestricted conversation and direct physical contact. Several detainees receive visits at the same time and in the same room.

(ii) A "supervised visit" (*widzenie dozorowane* or *widzenie przy stoliku w obecności funkcjonariusza Służby Więziennej*). This takes place in the same common room, but a prison guard is present at the table, controls the course of the visit, listens to the conversation and may restrict physical contact. His principal role usually is to ensure that the visit is not used for the purposes of achieving any unlawful aims and to prevent the transfer of any forbidden objects.

(iii) A "closed visit" (commonly referred to in Polish as *widzenie przy okienku*). This takes place in a special room. A detainee is separated from his visitor by a Perspex partition and they communicate through an internal phone.

(iv) A "conjugal visit" (*widzenie małżeńskie*), also known as an "intimate visit". This takes place without the presence of a prison guard in a private room, which may be equipped with a bed.

61. Under Article 138 of the Code, "conjugal visits", "open visits", any type of additional or longer visits, as well as a short unsupervised leave from prison constitute rewards ("*nagrody*"). They are granted by a prison governor to "a prisoner who stands out because of his good behaviour" (*wyróżniającemu się dobrym zachowaniem*) or as a form of motivation

aimed at improving a prisoner's behaviour (Article 137 of the Code). Article 141 of the Code furthermore provides that rewards are also granted to prisoners as a form of "motivation" (*ulga*) if it is "particularly justified by a prisoner's family or personal circumstances (*w wypadkach szczególnie uzasadnionych warunkami rodzinnymi lub osobistymi skazanego*). The same chapter of the Code, entitled "Rewards and Motivation" also lists, in its Article 141 (a), a short compassionate leave from prison.

62. Articles 142 and 143 § 6 of the Code stipulate that a prisoner who is responsible for breaching the law or a prison's internal order is liable to incur a disciplinary punishment, which may take the form of restrictions on visits. For example, a visit will be organised only in a manner which does not allow a prisoner to have direct contact with a visitor. Such restrictions are ordered by a prison governor for a maximum period of three months.

63. On 2 July 2009 the Polish Constitutional Court ruled (no. K. 1/07) that Article 217 § 1 of the Code, in so far as it did not specify the reasons for refusing family visits to those in pre-trial detention, was incompatible with a number of constitutional provisions, including the principle of protection of private and family life (Article 47 of the Constitution), the principle of proportionality (Article 31 § 3 of the Constitution), Article 8 of the Convention, and Article 37 of the United Nations Convention on the Rights of the Child. It was held that the impugned provision did not indicate with sufficient clarity the limitations on a detainee's constitutional right to protection of private and family life and did not stipulate the possibility to appeal against a prosecutor's decision to refuse a family visit to a person in pre-trial detention. The Constitutional Court's judgment became effective on 8 July 2009, the date of its publication in the Journal of Laws (*Dziennik Ustaw*).

64. On 5 November 2009 Parliament adopted amendments to Article 217 of the Code. In particular, subparagraphs 1a-1f were added. Those provisions stipulate that a detainee is entitled to at least one family visit per month. In addition, they indicate specific conditions for refusing a family visit to a detainee and set out an appeal procedure against such a refusal. The amendments entered into force on 8 June 2010.

III. RELEVANT INTERNATIONAL AND COMPARATIVE LAW MATERIALS

65. As applicable at the relevant time, Recommendation Rec(2006)2 of the Committee of Ministers to member States on the European Prison Rules (adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies), in so far as relevant, reads as follows:

> "Contact with the outside world
>
> ...

24.4 The arrangements for visits shall be such as to allow prisoners to maintain and develop family relationships in as normal a manner as possible ..."

66. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), CPT Standards, CPT/Inf/E (2002) 1 - Rev. 2010, in so far as relevant, read as follows:

"...32. The regimes of a number of the juvenile detention centres visited by the Committee have included generalised incentive schemes, which allow juveniles to attain additional privileges in exchange for displaying approved behaviour.

It is not for the CPT to express a view on the socio-educative value of such schemes. However, it pays particularly close attention to the content of the base-level regime being offered to juveniles subject to such schemes, and to whether the manner in which they may progress (and regress) within a given scheme includes adequate safeguards against arbitrary decision-making by staff. ..."

67. On 20 December 1996 the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) presented its Report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 30 June to 12 July 1996 (CPT/Inf (98) 13 | Section: 41/67). This report contains the following relevant observations in respect of the contact with the outside world in prison establishments:

"... 150. It is very important for prisoners to be able to maintain reasonably good contact with the outside world. Above all, prisoners must be given the means of safeguarding their relationships with their family and close friends. The continuation of such relationships is of critical importance for all the interested parties, and especially for the social rehabilitation of a prisoner. The guiding principle should be the promotion of contact with the outside world; any limitations upon such contact should be based exclusively on security concerns of an appreciable nature or resource considerations.

151. Prisoners were allowed two visits of one hour each per month; further, additional or extended visits could be authorised as a reward for good Behaviour. ..."

On 12 July 2011 the CPT presented a similar report on the visit to Poland carried out from 26 November to 8 December 2009 (CPT/Inf (2011) 20). The CPT concluded in paragraph 136 of this report that the rules and practice applicable to family visits, correspondence and access to telephone for sentenced prisoners were on the whole adequate. The CPT also found it desirable for sentenced prisoners to be entitled to at least one visit per week.

68. The Standard Minimum Rules For The Treatment of Prisoners Adopted by the First United Nations Congress On The Prevention of Crime And The Treatment of Offenders, held at Geneva in 1955, and approved by the Economic And Social Council By its Resolutions 663 C (Xxiv) Of 31 July 1957 And 2076 (Lxii) of 13 May 1977, read as follows, in so far as relevant:

"... Privileges

70. Systems of privileges appropriate for the different classes of prisoners and the different methods of treatment shall be established at every institution, in order to encourage good conduct, develop a sense of responsibility and secure the interest and co-operation of the prisoners in their treatment....”

69. The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) General Assembly resolution 70/175, annex, adopted on 17 December 2015, read as follows, in so far as relevant:

“... Rule 58 (Contact with the outside world)

1. Prisoners shall be allowed, under necessary supervision, to communicate with their family and friends at regular intervals:

(a) By corresponding in writing and using, where available, telecommunication, electronic, digital and other means; and

(b) By receiving visits.

2. Where conjugal visits are allowed, this right shall be applied without discrimination, and women prisoners shall be able to exercise this right on an equal basis with men. Procedures shall be in place and premises shall be made available to ensure fair and equal access with due regard to safety and dignity.

...

Rule 95 (Privileges)

Systems of privileges appropriate for the different classes of prisoners and the different methods of treatment shall be established at every prison, in order to encourage good conduct, develop a sense of responsibility and secure the interest and cooperation of prisoners in their treatment. ...”

70. In the United Kingdom’s the Ministry of Justice and Her Majesty’s Prison and Probation Service issued Incentives Policy Framework of 8 July 2020. This document, in so far as relevant, read as follows:

“ ... 1. Purpose

1.1 The system of privileges is a key tool for incentivising prisoners to abide by the rules and engage in the prison regime and rehabilitation, including education, work and substance misuse interventions – whilst allowing privileges to be taken away from those who behave poorly or refuse to engage. This policy sets a common framework with which local incentives policies must comply.

2. Context

2.1 The Incentives Policy Framework... allows Governors to incentivise good behaviour and tackle poor behaviour and breaches of the Prison Rules and YOI Rules, helping prisoners to make the right choices to prepare them to lead crime-free lives when they leave prison.

...

Extra and Improved Visits

5.51 Prisoners on Standard, Enhanced or levels above Enhanced may receive improved visits, which could include additional visits over their statutory entitlement, visits in better surroundings, or longer visits. This would be in addition to a prisoner’s statutory entitlement...”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

71. The applicant complained that unjustified and disproportionate refusals to grant him unsupervised conjugal visits in prison had been in breach of his right to respect for his private and family life, within the meaning of Article 8 of the Convention. He also submitted that the fact that under the law conjugal visits constituted a reward or a form of motivation the granting of which lay at the discretion of a prison governor meant that they were in fact "optional" and practically impossible to obtain.

Article 8 of the Convention reads as follows:

> "1. Everyone has the right to respect for his private and family 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

1. The parties' submissions

72. The Government submitted that the applicant had failed to pursue all effective remedies available to him under domestic law with respect to the alleged violation of his right to respect for his private and family life on account of the refusals to grant requests for conjugal visits.

73. Whereas the Governor of Rzeszów Prison had refused nineteen times to grant an additional family or a conjugal visit sought by the applicant and the governors of Cracow Remand Centre and Wrocław Prison had issued five such decisions, the applicant had appealed only once or twice, and for the first time, only after four months had elapsed following the lodging of his application with the Court against the decision issued on 18 March 2010.

74. Moreover, the Government argued that the above-mentioned interlocutory appeals could not satisfy the requirement that domestic remedies be exhausted, within the meaning of Article 35 § 1 of the Convention. Each of the applicant's requests for a conjugal visit had been examined in the light of changing circumstances – namely, whether the applicant had engaged in good or bad conduct. This is why, in the Government's opinion, if the applicant had challenged all the refusals, a penitentiary judge could have disagreed with the governors' assessment of whether or not the applicant had deserved a reward and accordingly could have quashed at least some of the refusals.

75. The Government also made a general statement that the complaints lodged by the applicant with the Prison Service and with the Ombudsman "should not be regarded as [constituting] the exhaustion of domestic remedies" under Article 35 § 1 of the Convention.

76. Lastly, the Government submitted that since the applicant's grievance raised a general question of law rather than a question of practice that was limited to the applicant's detention facilities, the applicant should have challenged the constitutionality of the relevant provisions of the Code by means of a constitutional complaint. The availability and the effectiveness of this remedy had been confirmed, in the Government's view, by the judgments of the Constitutional Court concerning various issues arising from the State depriving certain people of their liberty. In this connection, the Government referred to the Constitutional Court's judgments of 24 July 2006 in respect of case no. SK 58/03 and of 10 June 2008 in respect of case no. SK 17/07 (see paragraphs 50-53 above). The Government argued that in the event that the applicant's constitutional complaint had been successful, the applicant could have then brought a civil action under Article 417^1 of the Civil Code seeking redress for damage caused by the application of unconstitutional law.

77. The Government invoked the principle of subsidiarity and invited the Court to reject the application on the grounds of non-exhaustion of domestic remedies.

78. The applicant submitted that, in practice, no effective remedy existed against a prison governor's refusal to grant a conjugal visit. After his first interlocutory appeal before the penitentiary court, the applicant had been informed that conjugal visits could be authorised only if he improved his conduct. All the requests that had followed had continued to be refused, despite the applicant's clear commitment to be on his best behaviour in prison.

2. The third party's submissions

79. The third party intervener, the Helsinki Foundation for Human Rights (*Helsińska Fundacja Praw Człowieka*) ("the Foundation") expressed doubts as to the availability and effectiveness of the remedy under Article 7 of the Code. As could be seen from the text of that provision and from the doctrine, a prisoner could challenge a decision issued by his prison's governor only on the grounds of unlawfulness and not of its merits.

3. The Court's assessment

(a) General principles on exhaustion of domestic remedies

80. In accordance with Article 35 § 1 of the Convention, the Court may only deal with an issue after all domestic remedies have been exhausted. The purpose of Article 35 is to afford the Contracting States the opportunity

of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V; *Hentrich v. France*, 22 September 1994, § 33, Series A no. 296-A; and *Remli v. France*, 23 April 1996, § 33, *Reports* 1996-II). Thus, the complaint submitted to the Court must first have been made to the appropriate national courts, at least in substance, in accordance with the formal requirements of domestic law and within the prescribed time-limits (see *Micallef v. Malta* [GC], no. 17056/06, § 55, ECHR 2009). To hold otherwise would be to duplicate the domestic process with proceedings before the Court, which would hardly be compatible with the subsidiary character of the Convention (see *Gavril Yosifov v. Bulgaria*, no. 74012/01, § 42, 6 November 2008). Nevertheless, the obligation to exhaust domestic remedies requires only that an applicant make normal use of remedies that are effective, sufficient and accessible in respect of his Convention grievances (see *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004, and *John Sammut and Visa Investments Limited v. Malta* (dec.), no. 27023/03, 28 June 2005).

81. In terms of the burden of proof, it is up to the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time (see *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 71, 17 September 2009; *Vernillo v. France*, judgment of 20 February 1991, § 27, Series A no. 198; and *Dalia v. France*, judgment of 19 February 1998, § 38, *Reports* 1998-I). Once this burden has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from this requirement (see *Akdivar and Others v. Turkey*, 16 September 1996, § 68, *Reports* 1996‑IV; *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99 et al, § 69, ECHR 2010; *McFarlane v. Ireland* [GC], no. 31333/06, § 107, 10 September 2010; *Vučković and Others v. Serbia* (preliminary objection) [GC], no. 17153/11 and 29 other cases, § 77, 25 March 2014; and *Dankevich v. Ukraine*, no. 40679/98, § 107, 29 April 2003).

(b) Application of these principles to the present case

82. The Court observes that in the instant case an issue arises because during three terms of his detention and more precisely, from 11 September 2009 until 22 November 2010, 24 January until 14 June 2011 and from 15 July until an unspecified date in November 2011, the applicant was not granted a single unsupervised visit from his wife in a private room.

83. In the circumstances of the case, his grievance, namely the inability to intimately meet with his wife in these three periods, did not stem from any general prohibition under the law and it was not an entrenched state of

affairs since material circumstances relevant to the assessment of whether or not the applicant deserved a reward in the form of a conjugal visit were variable (contrast *Bannikov v. Latvia*, no. 19279/03, § 71, 11 June 2013). The alleged hindrance to the applicant's intimate visits with his wife must therefore be viewed as a series of instantaneous and isolated incidents resulting from each and every decision not to authorise a conjugal visit on a particular date as sought by the applicant.

84. The applicant started serving his criminal sentence on 11 September 2009 (see paragraph 8 above). He filed his first request for a conjugal visit on 25 September 2009 (see paragraph 21 above). It was rejected four days later (see paragraph 21 above). Two more requests for such a visit were rejected before the introduction of his application to the Court on 25 November 2009 (see paragraph 25 above). The applicant lodged his first interlocutory appeal against the sixth refusal (dated 17 March 2010). He did this shortly after 18 March 2010 (see paragraph 33 above), that is, four months after bringing the application before the Court. The Rzeszów Regional Court gave its decision on 30 April 2010 (see paragraphs 22 and 35 above). It appears that the applicant filed a similar appeal in September 2011 (see paragraph 36 above) and that around November 2011 he was for the first time granted a conjugal visit (see paragraph 20 above).

(i) As regards the Article 7 appeal

85. The Court would first reiterate that in so far as there exists at the national level a remedy enabling the domestic courts to address, at least in substance, the argument of a violation of a given Convention right, an applicant is, as a rule, in duty bound to exercise this remedy before he applies to the Court (see *Baumann v. France*, no. 33592/96, § 47, ECHR 2001‑V (extracts)). It is only in the event when the last stage of such remedies is reached shortly after the application is lodged with the Court but before the Court is called upon to pronounce itself on admissibility, that the latter is free to consider that the applicant has exhausted the domestic remedies in timely manner (see *Ringeisen v. Austria*, judgment of 16 July 1971, series A no. 13, p. 38, § 91; *Gulijev v. Lithuania*, no. 10425/03, § 30, 16 December 2008; *Çaçan v. Turkey (dec.)*, no. 33646/96, 28 March 2000 and *Tebieti Mühafize Cemiyyeti; and Israfilov v. Azerbaijan* (dec.), no. 37083/03, 8 November 2007).

86. In the circumstances as described above (see paragraph 79 above), the present case does not fall into this exception. The interlocutory appeal against the prison governor's decision not to grant a conjugal visit which can be lodged with a regional court under Article 7 of the Code (see paragraph 46 above) is a one-off remedy which is accessible directly to any prisoner concerned. This remedy was available to the applicant at all times and could address in an effective and meaningful manner, taking account of

the Convention requirements, his grievance about the discretionary nature of conjugal visits stemming from their classification as rewards or forms of motivation, thus going to the issue of the lawfulness of the impugned refusals. Moreover, as the Government pointed out (see paragraph 69 above), the applicant's requests for a conjugal visit had been examined in the light of changing circumstances – namely, whether the applicant had engaged in good or bad conduct. This argument is also supported by the fact that, in the present case, the scope of the examination of the applicant's appeal by a penitentiary judge had indeed gone beyond unlawfulness and involved the assessment of the applicant's individual circumstances, thus very much going to the merits of the impugned refusals (see paragraph 35 *in fine*, above).

87. In view of these considerations, the Court finds that, in the circumstances of the instant case, the applicant did not give the penitentiary court an opportunity to put right the violation alleged against the prison authorities other than in respect of two requests for an unsupervised visit with his wife.

(ii) As regards the constitutional complaint

88. Furthermore on the issue of lawfulness, the Government argued that, in addition to the interlocutory appeals lodged in respect of two refusals to grant a conjugal visit, the applicant should have also brought a constitutional complaint and then, had he succeeded, a related civil action in tort (see paragraph 71 above).

89. The Court observes that the two Constitutional Court's judgments referred to by the Government (see paragraphs 50-53 above), were indeed triggered by constitutional complaints of detainees and resulted in the derogation of the unconstitutional provisions and a change in their interpretation and implementation by domestic courts. The fact remains, however, that these cases do not correspond to the subject-matter of the present application or to the circumstances of the applicant in the case at hand.

90. The Court also stresses that the applicant was seeking to obtain conjugal visits while he was in prison. Consequently, only a remedy capable of providing a timely rectification of his situation could be considered adequate and effective.

91. The Constitutional Court, if it had been invited to rule on a penitentiary judge's decision to refuse the applicant a conjugal visit sought, would have inevitably examined the matter long after the events and, anyhow, would not have had jurisdiction to quash the impugned decision and to bring about the enforcement of such a visit.

92. The general and intended consequence of the Constitutional Court's judgments in Poland is that they result in the reopening of cases which had been decided on the basis of an unconstitutional provision or rule of law

(see *Szott-Medyńska and Others v. Poland* (dec.), no. 47414/99, 9 October 2003; *Pachla v. Poland* (dec.), no. 8812/02, 8 November 2005; *Więcek v. Poland* (dec.), no. 19795/02, 17 January 2006; *Tereba v. Poland* (dec.), no. 30263/04, 21 November 2006; and *Hösl-Daum and Others v. Poland* (dec.), no. 10613/07, 7 October 2014 and paragraph 81 above). However, the Government did not provide persuasive explanations that a constitutional complaint can lead to the change of the situation of a person seeking to obtain a conjugal visit in prison if the legal basis of the procedure in question is declared contrary to the Constitution by the Constitutional Court.

93. Accordingly, in the instant case the Government, upon whom the burden of proof lies, have not satisfied the Court that a constitutional complaint and a related civil action would have provided reasonable prospects of a successful outcome (contrast *Hinczewski v. Poland*, no. 34907/05, §§ 44-48, 5 October 2010) and constituted a practical and effective means by which the applicant could have challenged the lawfulness of the authorities' refusal to allow him private visits from his wife in the sense of offering him timely and reasonable prospects of correcting the alleged constitutional shortcomings in the impugned state of affairs while it was ongoing (compare *Porowski v. Poland*, no. 34458/03, § 99, 21 March 2017).

(c) Conclusion on admissibility

94. Consequently, the Court considers that the part of the application which concerns at least ten requests for a conjugal visit rejected by the prison authorities during the first-term of his post-conviction detention, at least two such requests rejected during the second-term and at least two such requests rejected during the third-term of his detention (see paragraphs 11, 14, 17 and 18 above) is inadmissible because of the applicant's failure to have a recourse to the effective remedy under Article 7 of the Code.

95. It follows that this part of the application must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

96. The Court considers that the part of the application concerning the two refusals to grant conjugal visits against which the applicant appealed under Article 7 of the Code (refusals of: 18 March 2010 and 20 September 2011; see paragraphs 33 and 36 above), cannot be rejected under Article 35 § 1 of the Convention for failure to exhaust domestic remedies. To this end, the Court dismisses the Government's argument that, in addition to the interlocutory appeals lodged in respect of two refusals to grant requests for a conjugal visit, the applicant should have also lodged a constitutional complaint and subsequently a related civil action in tort (see, *mutatis*

mutandis, *Ndidi v. the United Kingdom*, no. 41215/14, §§ 69 and 70, 14 September 2017).

97. The Court furthermore notes that as regards those two above-mentioned refusals to grant conjugal visits the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. This part of the application is also not inadmissible on any other grounds and must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

98. The applicant submitted that the restriction on his right to receive private conjugal visits in prison was unjustified and disproportionate. In particular, he claimed that the alleged interference had been destructive to his family life and had prevented him and his wife from having more children. The applicant also stressed that maintaining contact with family through supervised visits, telephone calls and correspondence was different from maintaining family and marriage bonds. The latter was not possible in prison, where no physical contact with his wife was permitted during supervised visits and where unsupervised visits in a separate room were not granted. Lastly, the applicant submitted that the fact that under the law, conjugal visits constituted a reward or a motivational measure to be granted at the discretion of a prison governor rendered them practically impossible to obtain.

(b) The Government

99. The Government submitted that under Article 8 of the Convention, the States had not been under an obligation to ensure the possibility of prisoners receiving conjugal visits. In this respect they referred to the Commission's decision in the case of *E.L.H. and P.B.H. v. the United Kingdom* ((dec.), nos. 32094/96 and 32568/96, 22 October 1997) and also to the Court's judgments in the cases of *Aliev v. Ukraine* (no. 41220/98, § 188, 29 April 2003), and *Dickson v. the United Kingdom* ([GC], no. 44362/04, § 81, ECHR 2007-V).

100. The Government drew the Court's attention to the practical impossibility of ensuring unlimited conjugal visits for all prisoners in Poland, where the number of people deprived of liberty was close to the statutory maximum limit (in terms of overcrowding). The current regulation of conjugal visits in prison as a reward or motivational measure (and not as a blanket right) took into account both the State's limited resources and prisoners' personal needs, in view of their ultimate goal of rehabilitation.

101. They furthermore argued that the applicant had not been deprived of contact with his family and that any limitation of such contact (including the refusals to authorise conjugal visits) had been in accordance with the law and in pursuit of legitimate aims – namely, to: ensure discipline among prisoners; avoid the trafficking of illicit objects and substances; diminish the risk of a prisoner escaping or engaging in insubordination; and ensure that the denial of conjugal visits was seen as a punishment and therefore had a deterrent effect. It was also submitted that the interference had been necessary in a democratic society.

102. In the Government's submission, the applicant's requests had always been duly examined in the light of his conduct and the nature of his offences. The applicant had a record of reprehensible behaviour. He had received punishments for breaches of prison discipline; on two occasions such breaches had amounted to a criminal offence. He had been convicted of violent crimes – namely robbery and battery. Moreover, rewards that the applicant had eventually received – namely the authorisation of additional supervised visits from his family and commendation from the prison governor – had not brought about the intended effect, as the applicant's conduct had again deteriorated. The Government also noted that Rzeszów Prison, in which the applicant had spent most of the time during the three terms of his post-conviction detention, was the largest prison facility in the region with 334 guards, ten civilian employees and the capacity to hold 1,001 detainees. Lastly, the Government pointed out that the applicant had been deprived of intimate contact with his wife only for relatively short periods of time, given that he had been at liberty from November 2010 until January 2011 and from June until July 2011.

103. The Government concluded that, against this background, allowing the applicant to receive conjugal visits would have been unjustified and would have had a demotivating effect both on the applicant and the prison population in general.

(c) The third-party interveners

104. Written comments submitted on 16 May 2012 by the Foundation contain an overview of the domestic law and practice concerning the operation of the system of prisoners' conjugal visits.

105. Firstly, the Foundation submitted that (i) strict requirements that a reward be granted only if a prisoner had displayed outstanding conduct and that a motivational measure be granted only if it was particularly justified by extraordinary family or individual circumstances, and (ii) the lack of rooms adapted for conjugal visits and insufficient procedural safeguards, meant that securing such a visit was practically impossible.

106. To this effect, the following country statistics, prepared by an expert academic, were produced. On the basis of the records available, the expert noted that unsupervised conjugal visits in a private room had been

authorised in Poland: zero times between 1998 and 2002; three times in 2003; zero times in 2004; twice in 2005, three times in 2006; six times in 2007; eleven times in 2008; twenty-two times in 2009; 9,282 times in 2010; 12,041 times in 2011; and 2,747 times between January and May 2012. According to the third party, the increase in the years 2010-2012 had been the result of the setting-up of a new system under which decisions on visits to prisoners were electronically registered.

107. The above-mentioned figures for the years 2010-2012 had constituted the total number of conjugal visits granted to 3,557, 4,016 and 1,558 persons deprived of liberty in each of those years, respectively. It followed that this reward and motivational measure had in fact been available to only 5% of the prison population in Poland.

108. The number of applications for a conjugal visit that had been refused was unknown.

109. Secondly, the Foundation observed that the discretionary nature of decisions to grant conjugal visits had created an unwanted discrepancy between prison facilities. In 2011, out of the total number of 191 prisons and remand centres, twenty-four of those facilities had not granted a single conjugal visit by way of a reward, and seventy-six facilities had not granted such a visit as a motivational measure.

110. Thirdly, to enable certain categories of convicted prisoners to maintain their family ties, prison authorities could issue detainees a special pass allowing them to leave a detention facility for a maximum duration of thirty hours (under Article 138 § 1 (7) of the Code) and a licence for leave of a maximum duration of fourteen days (under Article 138 § 1 (8)). The number of persons who had obtained such permits had been: 42,750 in 2007; 41,241 in 2008; 39,036 in 2009; 34,778 in 2010; and 32,782 in 2011. In principle, to be eligible for such a reward a prisoner had to have completed at least half of his prison sentence in such a manner as to be eligible for conditional or early release.

2. The Court's assessment

(a) General principles

111. The Court reaffirms its settled case-law to the effect that 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. It is inconceivable that a prisoner should forfeit those rights and freedoms merely because of his status as a person detained following conviction (see *Hirst v. the United Kingdom* (no. 2) [GC], no. 74025/01, §§ 69-70, ECHR 2005-IX; *Dickson,* cited above, § 67, ECHR 2007-V; and *Stummer v. Austria* [GC], no. 37452/02, § 99, ECHR 2011).

112. The Court has also had occasion to recognise the legitimate aim of a policy of progressive social reintegration of persons sentenced to imprisonment (see *Mastromatteo v. Italy* [GC], no. 37703/97, § 72, ECHR 2002-VIII; *Maiorano and Others v. Italy*, no. 28634/06, § 108, 15 December 2009; *Schemkamper v. France*, no. 75833/01, § 31, 18 October 2005; and *Boulois v. Luxembourg* [GC], no. 37575/04, § 83, ECHR 2012). At the same time, the Court has admitted that States may grant benefits created as an incentive to prisoners. Such benefits may constitute privileges that can be granted or refused as the authorities see fit (see *Boulois*, cited above, § 97). Privileges may encompass in particular measures like prison leave (see *Boulois*, cited above, § 98) or an early release (see *Szabó v. Sweden* (dec.), no. 28578/03, ECHR 2006-VIII; *Tereshchenko v. Russia*, no. 33761/05, § 107, 5 June 2014; and *Macedo Da Costa v. Luxembourg* (dec.), no. 26619/07, § 22, 5 June 2012).

113. The Court has held that it is "an essential part of both private life and the rehabilitation of prisoners that their contact with the outside world be maintained as far as practicable, in order to facilitate their reintegration in society on release, and this is effected, for example, by providing visiting facilities for the prisoners' friends and by allowing correspondence with them and others" (see *Ciorap v. Moldova*, no. 12066/02, § 107, 19 June 2007). The Court has also observed that, regarding visiting rights, it is an essential part of a prisoner's right to respect for family life that the prison authorities enable him, or, if need be, assist him, to maintain contact with his close family. At the same time, it has to be recognised that some measure of control of prisoners' contacts with the outside world is called for and is not of itself incompatible with the Convention. Such measures could include the limitations imposed on the number of family visits, supervision over those visits and, if so justified by the nature of the offence and the specific individual characteristics of a detainee, subjection of the detainee to a special prison regime or special visits arrangements (see *Khoroshenko v. Russia* [GC], no. 41418/04, § 123, ECHR 2015, with further references).

114. The Court, like the Commission previously (see *X. v. the Federal Republic of Germany*, no. 3603/68, Commission decision of 4 February 1970; *G.S. and R.S. v. the United Kingdom*, no. 17142/90, Commission decision of 10 July 1991; and *E.L.H. and P.B.H. v. the United Kingdom*, nos. 32094/96 and 32568/96, Commission decision of 22 October 1997), has noted with approval the reform movements in several European countries to improve prison conditions by facilitating long-term (also called "conjugal") visits. However, the Court has stressed that the refusal of such visits may be regarded as justified for the prevention of disorder and crime within the meaning of Article 8 § 2 of the Convention (see *Aliev*, cited above, and *Nazarenko v. Latvia*, no. 76843/01, § 26, 1 February 2007). The Court has confirmed that the Convention does not require the Contracting States to make provision for such visits. Accordingly, this is an area in

which the Contracting States enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals (see *Dickson,* cited above*,* § 81, and *Epners-Gefners v. Latvia*, no. 37862/02, § 62, 29 May 2012). In *Aliev v. Ukraine* the Court has recognised that the denial by the prison authorities to allow the applicant to have the possibility of a private, physical contact with his wife was not incompatible with the Convention, being a justified measure for the preservation or order and the prevention of crime (*Aliev*, cited above, §§ 185-190).

115. The Court has already clarified that, in relation to disciplinary regimes and assessments of individual conduct, it may be difficult to frame laws with high precision and that a certain degree of flexibility may even be desirable to enable the national courts to develop the law in the light of their assessment of what measures are necessary in the particular circumstances of each case (see *Goodwin v. the United Kingdom*, 27 March 1996, § 33, Reports 1996-II). It is a logical consequence of the principle that laws must be of general application that the wording of statutes is not always precise. The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague. The interpretation and application of such enactments depend on practice (see *Gorzelik and Others v. Poland* [GC], no. 44158/98, § 64, ECHR 2004-I, and *Oleksandr Volkov v. Ukraine*, no. 21722/11, 9 January 2013).

(b) Application of these principles to the present case

(i) Scope of the case

116. In the instant case, the Court will examine the applicant's complaint under Article 8 of the Convention regarding two refusals by prison authorities dated 18 March 2010 and on 20 September 2011 to grant extra conjugal visits (see paragraphs 33 and 36 above).

117. The Court notes that the applicant's Article 8 complaint is two-fold. It is, in part, directed at the law on the granting of conjugal visits to prisoners. The applicant argues that regulating such visits not as a right, but as a reward to be granted at the discretion of a prison governor, essentially renders the law in question unforeseeable, visits inherently and practically impossible to obtain, and the system as a whole disproportionate. The other part of the applicant's complaint turns on the particular circumstances of the authorities' refusal to accept that the applicant deserved, taking into account his conduct in prison, to be granted the conjugal visits sought (see paragraph 98 above).

(ii) The regime of conjugal visits in domestic law

118. The Court notes that the domestic law explicitly qualifies the conjugal visits as rewards (*nagrody*), in terms of additional benefits or privileges that may be granted as a reward for an outstanding prisoner's good behaviour or as a form of motivation aimed at improving the prisoner's behaviour (see paragraph 61 above). The grant of a conjugal visit lies at the discretion of the prison governor or his deputy, their decision being linked to the individual behaviour of the applicant prisoner. The frequency and the duration of such visits are not specified in the Code of Execution of Criminal Sentences. Obtaining a conjugal visit is, under the domestic law, a privilege and not a right. Moreover, it is the fulfilment of conditions set forth in the law (the outstanding good behaviour) which should be ascertained in order for the visit to be granted. Therefore, the instant case has to be distinguished from the ones pertaining to supervised family visits under Article 217 § 1 of the Code of Execution of Criminal Sentences (see, for example, *Wegera v. Poland*, no. 141/07, 19 January 2010) or to compassionate leaves responding to punctual requirements of family life, arising in specific circumstances *(see Płoski v. Poland*, no. 26761/95, § 38, 12 November 2002; *Giszczak v. Poland*, no. 40195/08, § 36, 29 November 2011; and *Czarnowski v. Poland*, no. 28586/03, § 26, 20 January 2009).

119. The Court notes in this context that the United Nations Standard Minimum Rules for the Treatment of Prisoners encourage States to create systems of privileges appropriate for the different classes of prisoners in order to encourage good conduct, develop a sense of responsibility and secure the interest and cooperation of prisoners in their treatment. A system of privileges may be an important instrument for implementing a policy of progressive social reintegration of persons sentenced to imprisonment.

120. The Court also notes that European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment did not object to the Polish system of additional or extended visits as rewards for prisoners (see paragraphs 66 and 67 above).

121. The incentives for prisoners presuppose a broad normative formulation, which cannot expressly and exhaustively lay down all the details regarding the potential access to the incentives and reward measures. Given the nature of privilege, and not of a right, the access and the enjoyment of such measures will depend on the very specific circumstances of the case and the specific individual behaviour of the concerned person, which will have to be necessarily assessed on a case-by-case basis. Consequently, moreover, a domestic system of incentives inherently implies discretion in assessing the conduct of prisoners and granting or refusing certain benefits. In particular, a detailed regulation may limit the possibility of granting rewards in situations not provided for therein. At the same time, it is the granting of a reward which requires ascertaining whether the

specific conditions justifying it had been fulfilled. A requirement to reason more extensively the non-fulfilment of the generally couched requirements of outstanding good behaviour is not without difficulty. Moreover, the incentives in question will usually fall into the scope of private or family life protected by Article 8 of the Convention. Article 8 of the Convention cannot be interpreted as excluding a system of incentives granted to prisoners as rewards for good conduct.

(iii) Was there an interference?

122. In light of the Polish legal framework and in the particular circumstances of the present case, the Court finds that even if conjugal visits constitute a privilege, their refusal may be seen a particular type of interference with the applicant's right to respect for his family life within the meaning of the Convention (see, *mutatis mutandis*, *Płoski*, cited above, §§ 32 and 38; *Giszczak*, cited above, § 27; and *Ciorap*, cited above, § 111). However, while assessing the compatibility of this interference with Article 8, the Court has to take into account the fact that the impugned measure is an element of a system of privileges for prisoners with an inherent element of discretion.

(iv) Was the interference in accordance with the law and in pursuit of legitimate aim?

123. The Court notes that the interference was based on Articles 137 and 141 of the Code. It was therefore in accordance with the law.

124. The Court also accepts that, in restricting the applicant's access to private visits from his wife, the authorities pursued legitimate aims - namely to ensure discipline among prisoners and rehabilitation of prisoners.

(v) Did the national authorities strike a fair balance?

125. The Court must now ascertain whether the authorities' refusals to grant the applicant the conjugal visits in question were arbitrary or manifestly unreasonable.

126. The Court notes that the applicant outlined the motives for his respective requests by stating firstly, that an intimate visit was necessary for the preservation of his and his wife's marriage bonds (as opposed to the family relationship, which could be maintained by means of supervised visits, telephone calls and correspondence). Secondly, he stated the couple's wish to have another child. Thirdly, referring to the advanced stage of his resocialisation and his exceptional commitment, he submitted that he deserved a reward or, alternatively, a motivational measure, within the meaning of the relevant provisions (see paragraph 22 above).

127. Refusing the requests in question, the deputy governor of Rzeszów Remand Centre handwrote notes on those requests featuring the word

"refused". The first refusal in the instant case was submitted to the Court without its second page (see paragraph 26 above). The other refusal comprises a handwritten note made by the applicant's prison supervisor on 19 September 2011. This note reads: "The applicant's request is not approved; educational reasons; I informed the applicant of the possibility of applying for the above-mentioned visit under the rewards procedure; exceptional grounds lacking" (see paragraph 27 above).

128. The Court considers, in the first place, that the explanatory note that was made by the applicant's supervisor does not, strictly speaking, constitute a part of the decision not to grant a conjugal visit, since the only entity authorised under the law to issue (and to provide reasoning for) such a refusal is the head or deputy head of a detention facility.

129. Moreover, even if taken into consideration, this additional entry is nevertheless largely equivocal and repetitive compared to the other refusals issued over the course of the events in respect of this case.

130. The Court must next determine whether the decisions issued in respect of the applicant's interlocutory appeals remedied the above-mentioned deficiency – that is to say whether the penitentiary judge examined the applicant's situation in full and in an individualised manner and whether he provided the requisite reasoning.

131. The Court cannot rule on the content of the penitentiary judge's decision concerning the refusal of 20 September 2011 because a copy of it has not been submitted by the parties (see paragraph 38 above). As to the decision of 30 April 2010, the Court observes that the penitentiary judge made reference to the applicant's insolence and the numerous disciplinary punishments that he had incurred. That information was derived from a more detailed explanatory note on the merits of the complaint that had been produced for the purpose of the appellate proceedings by the deputy governor of Rzeszów Prison and by the prison's staff, who presumably had direct contact with the applicant (see paragraph 37 above). The penitentiary judge explained that such behaviour had disqualified the applicant from obtaining any reward. Moreover, it was hinted to the applicant, albeit in general terms, that a steady and active rehabilitation (rather than occasional displays of good conduct) was necessary for a conjugal visit to be granted. Lastly, the penitentiary judge considered that the refusal to authorise a conjugal visit had not hindered family bonding because such bonding was at the material time being maintained through supervised visits, correspondence and telephone calls (see paragraph 35 above).

132. In view of the above-mentioned elements, the Court finds that overall, the reasons given for the refusal of the applicant's requests for conjugal visits had been sufficient for the purpose of justifying a denial of a reward for outstanding good behaviour and that the applicant's conduct in prison and his family contacts at the material time had been taken into consideration.

133. It cannot therefore be said that the interference complained of stemmed from "a blunt instrument" which indiscriminately stripped one category of prisoners of their Convention rights or imposed a blanket or automatic restriction on all convicted prisoners (contrast, *mutatis mutandis*, *Hirst*, cited above, § 82).

134. Moreover, taking into account the records of the applicant's conduct in prison and in particular numerous disciplinary punishments (see paragraph 18 above), the Court cannot consider that the refusals in question were arbitrary or manifestly unreasonable.

135. There has, accordingly, been no violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 12 OF THE CONVENTION

136. The applicant submitted that one of the reasons for which he had applied for conjugal visits in prison had been his and his wife's wish to conceive another child. Consequently, with regard to the authorities' refusals to grant permission for conjugal visits *vis-à-vis* the applicant's right to found a family, the Court considered it appropriate to raise of its own motion the issue of Poland's compliance with the requirements of Article 12 of the Convention, which in its relevant part reads as follows:

> "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

137. This complaint, however, is linked to the one examined above. It follows that the part concerning those refusals to grant conjugal visits against which the applicant did not appeal must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies. The remaining part must be declared admissible. Having found no violation of Article 8, however, the Court considers that no separate issue arises under Article 12 of the Convention with regard to the above-mentioned two refusals to grant the applicant unsupervised visits from his wife (see *Dickson*, cited above, § 86).

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible in so far as it concerns the compliance with the Convention requirements of the two refusals to grant conjugal visits which have been the subject of appeals, and the reminder inadmissible;

2. *Holds* that there has been no violation of Article 8 of the Convention;

3. *Holds* that there is no need to examine the complaint under Article 12 of the Convention.

Done in English, and notified in writing on 1 July 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

{signature_p_2}

Liv Tigerstedt	Tim Eicke
Deputy Registrar	President