CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 5/03

TASCO LUC DE REUCK	Applicant
versus	
DIRECTOR OF PUBLIC PROSECUTIONS (WITWATERSRAND LOCAL DIVISION)	First Respondent
MINISTER OF HOME AFFAIRS	Second Respondent
MINISTER OF SAFETY AND SECURITY	Third Respondent
GOVERNMENT OF THE RSA	Fourth Respondent
FILM AND PUBLICATION BOARD	Fifth Respondent

Heard on : 14 May 2003

Decided on : 15 October 2003

JUDGMENT

LANGA DCJ:

Introduction

[1] The applicant, a film producer, appeared in the Randburg Regional Court where he was charged under section 27(1) of the Films and Publications Act 65 of 1996 (the Act), a provision which relates to child pornography. Early in the proceedings, the applicant raised objections regarding the constitutional validity of certain of the

provisions of the Act on which the charges were based. The trial was adjourned to enable the applicant to approach the Witwatersrand High Court (the High Court) for a ruling on the challenged provisions. The High Court however dismissed the applicant's challenge.[1] He now seeks leave from this Court to appeal directly to it against the decision of the High Court. The application is opposed by the respondents, who also oppose the appeal on the merits.

Standing

[2] In the High Court the respondents argued that the applicant lacked standing to challenge the impugned provisions of the Act at that stage of the proceedings. The High Court however upheld the applicant's right to challenge the constitutionality of section 27(1), read with the definition of "child pornography" in section 1, in his own interest on the ground that he was facing charges under those provisions.[2] In fact, the charges against the applicant related only to possession and importation of child pornography. The offences created by section 27(1) include, in addition, separate offences of creation, production and distribution of the material in question. The respondents have not sought to pursue their original objection in this Court. Since the wider challenge does not raise materially different issues, I consider that nothing further need be said about it.

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[1] *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)*, *and Others* 2003 (3) SA 389 (W); 2002 (12) BCLR 1285 (W).

[2] The judgment of the High Court on standing is reported as *De Reuck v Director of Public Prosecutions*, *Witwatersrand Local Division*, *and Others* 2002 (6) SA 370 (W).

Leave to Appeal

[3] The respondents opposed the application for leave to appeal directly to this Court on two main grounds. They contended firstly that the application did not have reasonable prospects of success and secondly that the nature of the case made it desirable that a decision of the Supreme Court of Appeal should first be obtained before this Court is called upon to decide on the issues. These objections are not well founded. The issues raised, particularly in relation to the rights to privacy and freedom of expression, are complex and the prospects of success either way cannot fairly be said to be self-evident. In any event, an enquiry into prospects of success, although important, is not the only enquiry to be undertaken in deciding whether or not to grant leave to appeal.[3] The test is whether it is in the interests of justice for the appeal to be brought to this Court.[4] Of relevance to this determination, as was stated in *Islamic Unity Convention v Independent Broadcasting Authority and Others*,[5] is the question whether the grounds of appeal raise a constitutional issue of importance on

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[3] *Fraser v Naude and Others* 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC) para 7; *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) para 3; *S v Boesak* 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) para 12; *Ingledew v Financial Services Board: In Re Financial Services Board v Van Der Merwe and Another* 2003 (4) SA 584 (CC); 2003 (8) BCLR 825 (CC) para 31.

[4] Section 167(6)(b) of the Constitution provides:

> "(6) National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court–
>
> (a) . . .
>
> (b) to appeal directly to the Constitutional Court from any other court."

[5] 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) paras 15-16.

which a decision by this Court is desirable.[6] In my view, the determination of the constitutionality of the child pornography provisions in section 27(1) is such a matter.

[4] Where leave is sought to appeal to this Court from any court other than the Supreme Court of Appeal, it becomes necessary to consider the need for a prior decision of the Supreme Court of Appeal.[7] In this regard it is relevant to note that the legal questions involved are all constitutional issues[8] and there is a public interest in their early resolution.[9] The circumstances of this case are not dissimilar from those in *Islamic Unity Convention* where the Court had to consider the appropriateness of granting leave to appeal, and the following was said:

> "The present case involves a comparison of a piece of legislation with a provision of the Constitution and an evaluation of their compatibility. It is not concerned with the development of the common law but with the direct application of the Constitution. This is therefore a case where the benefit of first obtaining the views of the SCA may readily be outweighed by other considerations."[10]

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[6] *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) para 14; *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) para 28; *Ingledew* above n 3 para 36.

[7] Id *Khumalo* para 13; *Islamic Unity Convention* above n 5 paras 15-17.

[8] *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) para 32; *Member of the Executive Council for Local Government and Development Planning, Western Cape, and Another v Paarl Poultry Enterprises CC t/a Rosendal Poultry Farm* 2002 (3) SA 1 (CC); 2002 (2) BCLR 133 (CC) para 7. Cf *South African Municipal Workers Union v City of Cape Town and Others* 2002 (4) SA 451 (CC); 2002 (10) BCLR 1083 (CC) para 3; and *Wallach v High Court of South Africa and Others* CCT 2/03 (as yet unreported, delivered on 4 April 2003) para 7.

[9] Id *MEC*, *Western Cape* para 7; *Islamic Unity Convention* above n 5 para 18.

[10] Above n 5 para 17.

I conclude that it is in the interests of justice that leave to appeal directly to this Court be granted.

The issues

[5] The applicant's case in both the High Court and this Court was that the provisions of section 27(1) read with the definition of child pornography in section 1 of the Act, constituted a limitation of the constitutional rights to privacy,[11] freedom of expression[12] and equality.[13] He contended that the limitation was not justifiable, in particular because the provisions in question were not only overbroad, but were also vague. The respondents denied that any of the rights mentioned above were limited by the impugned provisions. In the alternative, they contended that if the provisions were found to be a limitation of the rights concerned, such limitation was justified and therefore constitutionally valid.

[6] Before dealing in detail with the submissions made on behalf of the parties, it will be convenient to give a brief summary of the legislative scheme in order to provide context to the issues to be decided. It should be noted at the outset that the impugned provisions are concerned specifically with child pornography and not pornography in general.

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[11] Section 14 of the Constitution.

[12] Section 16 of the Constitution.

[13] Section 9 of the Constitution.

The legislative scheme

[7] The Act repealed the Indecent or Obscene Photographic Matter Act 37 of 1967 and the Publications Act 42 of 1974 and created a new comprehensive regulatory framework for films and publications.[14] It provides for the establishment of a Film and Publication Board (the Board),[15] that is responsible for the classification of both films[16] and publications.[17] No film may be distributed or exhibited in public unless it has been classified by the Board.[18] The classification of publications is, however, not mandatory, but if a complaint is received concerning a particular, hitherto unclassified publication, the Board is required to make a decision whether or not it should be classified.[19]

[8] Criteria for the classification of films and publications are contained in the schedules to the Act. A publication must be classified XX, X18, R18, or F18 if it satisfies the criteria of the schedules respectively governing those classifications.[20] Similarly, a film must be classified XX, X18 or R18 if it falls within the appropriate

[14] Section 33 read with schedule 12.

[15] Section 3 of the Act.

[16] Chapter 4.

[17] Chapter 3.

[18] Section 26(1)(a).

[19] Section 17(1).

[20] Section 17(1) read with schedules 1-5 and 10.

schedules.[21] If a publication does not fall within any of the relevant schedules, the Board must refuse to classify it, and if a film falls outside all the relevant schedules the Board must issue a classification to that effect.[22] For purposes of this case, only the XX classification for publications and films is relevant.[23]

[9] A film or publication will be classified XX if it satisfies either the criteria relating to sexually explicit or extremely violent materials, or those relating to promotion of religious hatred.[24] We are not concerned with the latter in this case. The criteria for an XX classification in respect of a sexually explicit or extremely violent publication are as follows:

> "**Schedule 1**
> XX CLASSIFICATION FOR PUBLICATIONS
> A publication shall be classified as XX if, judged within context–
> (1) it contains a visual presentation, simulated or real of–
>
> (a) child pornography;
> (b) explicit violent sexual conduct;
> (c) bestiality;
> (d) explicit sexual conduct which degrades a person and which constitutes incitement to cause harm; or
> (e) the explicit infliction of or explicit effect of extreme violence which constitutes incitement to cause harm;

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[21] Section 18(4) read with schedules 6-8 and 10.

[22] See section 17 (heading) and section 18(4)(b)(i).

[23] Materials not satisfying the XX criteria are subject to regulation, for example through the imposition of age restrictions, rather than outright prohibition.

[24] Schedule 10.

(2) it or any independent part thereof, describes predominantly and explicitly the acts defined in clause (1)(a).

. . .

Schedule 5

ART AND SCIENCE EXEMPTION FOR PUBLICATIONS

The XX or X18 classification shall not be applied in respect of a *bona fide* scientific, documentary, literary or, except in the case of Schedule 1(1)(a), an artistic publication, or any part of a publication which, judged within context, is of such a nature."

[10] What these provisions indicate is that bona fide scientific, documentary or literary publications are exempt from being classified XX. Artistic publications are also exempt unless they contain a visual presentation of child pornography. Substantially the same regime applies to the XX classification of films. Bona fide scientific, documentary or dramatic films are exempt; artistic films are also exempt unless they contain a scene or scenes of child pornography.[25]

[11] Section 25(a) makes it an offence to distribute a publication that has been classified XX; section 26 likewise prohibits the exhibition and the broadcasting of a film that has been so classified.

[12] Since the classification of publications is not mandatory, section 28(1) creates a parallel offence of "knowingly" distributing a publication "which contains a visual presentation or a description referred to in Schedule 1, read with Schedule 5".

[25] Schedule 9.

Similarly, section 26(4)(a) makes it an offence to broadcast knowingly "a film which has not been classified but which falls within Schedule 6 read with Schedule 9".

[13] Section 27 contains an array of offences concerned only with child pornography. Subsection 1 was amended in 1999 following the report of a task team that was appointed to recommend measures to counter the spread of child pornography, particularly on the Internet. The section provides that:

> "(1) A person shall be guilty of an offence if he or she knowingly–
>
> (a) creates, produces, imports or is in possession of a publication which contains a visual presentation of child pornography; or
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> (b) creates, distributes, produces, imports or is in possession of a film which contains a scene or scenes of child pornography.
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> (2) A person shall not be convicted of a contravention of subsection (1), unless the State proves that the Board has not given a decision which is to the effect that the publication or film referred to in that subsection does not contain a representation or a scene or scenes referred to in subsection (1).
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> (3) No prosecution shall be instituted in respect of a contravention of subsection (1), and no search warrant shall be issued in terms of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), in respect of a publication or film which may be involved in such a contravention, without the written authority of the attorney-general concerned."

Child pornography is defined in section 1 as follows:

> "'child pornography' includes any image, real or simulated, however created, depicting a person who is or who is shown as being under the age of 18 years, engaged in sexual conduct or a display of genitals which amounts to sexual exploitation, or participating in, or assisting another person to engage in sexual conduct which amounts to sexual exploitation or degradation of children".

[14] It appears that none of the scheduled grounds that exempt a publication from the XX classification[26] is available as a defence if a person is charged under section 27(1)(a) in respect of a publication which contains a visual presentation of child pornography. The same position obtains where a person is charged under section 27(1)(b) in respect of a film which contains a scene or scenes of child pornography.

[15] Lastly, the Act provides for exemptions which may be granted by the executive committee of the Board in respect of certain offences. Of relevance for present purposes is section 22(1), which provides that:

> "The executive committee may on receipt of an application in the prescribed form, subject to such conditions as it may deem fit, exempt in writing any person or institution from sections 25, 27 and 28 if it has good reason to believe that *bona fide* purposes will be served by such an exemption."

Sections 25, 27 and 28 include all the offences relating to publications, save for section 29, which contains provisions concerning hate speech amongst other things. Sections 23 and 24 provide for other types of exemption that may be granted in respect of specific films, film distributors and adult premises. Those provisions are not in issue in this case.

[26] Above para 9.

What is child pornography?

[16] The central issue is the interpretation of child pornography as defined in section 1 and employed in relation to publications and films in section 27(1)(a) and (b), respectively. The definition states that child pornography "includes any image . . . " and goes on to list a variety of different images. In order to arrive at a proper meaning, a range of different issues must be determined, namely:

(a) the effect of "includes";

(b) the primary meaning of child pornography;

(c) the meaning of "person";

(d) the meaning and effect of the terms "sexual exploitation" and "degradation"; and

(e) the relevance of context.

The effect of "includes"

[17] The question is whether the word "includes" in this context has the effect that the list of images in the definition is exhaustive of what constitutes child pornography for purposes of the Act. The most common sense of "includes" is non-exhaustive, signifying that the list extends the meaning of the term being defined.[27] In *R v Debele*,[28] the Court recognised that the word may also signify that the list provides an exhaustive explanation of the term being defined.

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[27] *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) para 20.

[28] *R v Debele* 1956 (4) SA 570 (A) at 575B-575H. See also *Ndlovu* id para 20.

[18] The correct sense of "includes" in a statute must be ascertained from the context in which it is used.[29] *Debele*[30] provides useful guidelines for this determination. If the primary meaning of the term is well known and not in need of definition and the items in the list introduced by "includes" go beyond that primary meaning, the purpose of that list is then usually taken to be to add to the primary meaning so that "includes" is non-exhaustive. If, as in this case, the primary meaning already encompasses all the items in the list, then the purpose of the list is to make the definition more precise. In such a case "includes" is used exhaustively. Between these two situations there is a third, where the drafters have for convenience grouped together several things in the definition of one term, whose primary meaning - if it is a word in ordinary, non-legal usage - fits some of them better than others. Such a list may also be intended as exhaustive, if only to avoid what was referred to in *Debele* as

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[29] *Ndlovu* above n 27 para 20. As part of the context, I have considered the Afrikaans text of section 1 of the Act, which provides:

> "Tensy uit die samehang 'n ander betekenis blyk, beteken in hierdie Wet-
> . . .
> 'kinderpornografie' ook 'n beeld, werklik of nageboots, ongeag hoe dit geskep is, wat 'n persoon onder 18 jaar, of uitgebeeld as onder 18 jaar, uitbeeld wat deelneem aan seksuele gedrag of 'n vertoon van geslagsdele wat neerkom op seksuele uitbuiting, of wat deelneem aan seksuele gedrag wat neerkom op seksuele uitbuiting of vernedering van kinders of hulp verleen aan 'n ander persoon om dit te doen."

The words "beteken . . . ook" may appear non-exhaustive, if they are considered in isolation. In the context of bilingual statutes, however, the pair "includes" / "beteken . . . ook" has often been construed as exhaustive. *Debele* above n 28 at 575B-D; *R v Tshetaundzi* 1960 (4) SA 569 (A) at 572F-G; *De Beers Holdings (Pty) Ltd v Commissioner for Inland Revenue* 1986 (1) SA 8 (A) at 32B-33C; Cf *Santam Versekeringsmaatskappy Bpk v Kemp* 1971 (3) SA 305 (A) at 320F-H.

[30] Above n 28 at 575H-576C.

"'n moeras van onsekerheid" (a quagmire of uncertainty) in the application of the term.[31]

[19] Pornography is notoriously difficult to define and child pornography no less so. For this reason alone it is unlikely that the legislature intended merely to add meanings to the term on the assumption that its primary meaning was not in need of definition. Rather, the purpose of the list would seem to be to give the word a more precise meaning. That this is in fact the legislative intention is suggested by the contrast between the definition of "child pornography" and some other definitions in section 1, which provide that a term "includes" certain things "without derogating from the ordinary meaning of that word".[32] Although the legislature could have avoided ambiguity by stating that child pornography "means" only the images listed, the use of "includes" in the definition is consistent with an intention that the list should refine, and thus be coloured by, the primary meaning of child pornography.

The primary meaning of "child pornography"

[20] According to *The New Shorter Oxford English Dictionary*,[33] "pornography" means:

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[31] Id at 576B.

[32] See the definitions of "distribute" and "in public" in section 1 of the Act. Of course "includes" is used non-exhaustively in "'this Act' includes the regulations made in terms of section 31". This is a standard drafting formulation and provides no ground for inferring that the sense of "includes" in the definition of "child pornography" is the same.

[33] Vol 2, Clarendon Press, Oxford 1993.

> "The explicit description or exhibition of sexual subjects or activity in literature, painting, films, etc., in a manner intended to stimulate erotic rather than aesthetic feelings; literature etc. containing this."

This is a useful guide. I would observe, however, that erotic and aesthetic feelings are not mutually exclusive. Some forms of pornography may contain an aesthetic element. Where, however, the aesthetic element is predominant, the image will not constitute pornography. With this qualification, the dictionary definition above fairly represents the primary meaning of "pornography". "Child pornography" bears a corresponding primary meaning where the sexual activity described or exhibited involves children. In my view, the section 1 definition is narrower than this primary meaning of child pornography.

[21] The section 1 definition is, in several respects, narrower than the primary meaning. It is in fact more precise:

(a) it refers to "any image", thereby excluding written descriptions; and

(b) it lists various forms of conduct that may not be depicted; I shall refer to these as "prohibited acts". This is narrower, and more precise, than the dictionary's reference to "explicit . . . exhibition of sexual subjects or activity".

It follows that the prohibited acts are a closed list of what constitutes child pornography for purposes of the Act.

[22] Child pornography is defined as images "depicting" those prohibited acts. A threshold question is the perspective from which it is to be determined what an image

depicts. Legal certainty and the practicalities of proof favour an objective test based on the perspective of a "reasonable viewer" over those tests that consider the subjective state of mind of the author or the accused.[34]

The meaning of "person"

[23] The image, which may be "real or simulated, however created", must depict a "person". Counsel were rightly in agreement that this includes imaginary as well as real persons. There was unchallenged evidence on behalf of the state that virtual child pornography exists on the Internet which depicts wholly imaginary children. An effective interpretation of the Act requires that "person" includes at least the imaginary persons that appear in such pseudophotographs. Moreover, the terms "film", "publication" and "visual presentation" which are elements of the child pornography offences in section 27(1), are defined as referring to a wide range of media, including paintings, drawings and the Internet. Many of these media lend themselves to work from the imagination. The term "person" in section 1 is accordingly intended to include imaginary persons. It is clear that no child is physically harmed in the production of an image of an imaginary "person". This is a matter I will return to in due course.

[34] I agree in this regard with the approach adopted by the Supreme Court of Canada in *R v Sharpe* (2001) 194 DLR (4th) 1 para 43.

The meaning and effect of the terms "sexual exploitation" and "degradation"

[24] Child pornography comprises images of four prohibited acts. Disentangling the description of each from the syntax of the definition is a task of some difficulty. The text of the definition is reproduced once more for convenience:

> "'child pornography' includes any image, real or simulated, however created, depicting a person who is or who is shown as being under the age of 18 years, engaged in sexual conduct or a display of genitals which amounts to sexual exploitation, or participating in, or assisting another person to engage in sexual conduct which amounts to sexual exploitation or degradation of children".

It is necessary to determine what is qualified by the phrases "which amounts to sexual exploitation" and "which amounts to . . . degradation of children".

[25] Child pornography is restricted to an image and section 27 is therefore aimed at conduct in relation to that image that falls within the ambit of the definition in section 1. In other words, section 1 sets out to define the characteristics of the image in respect of which the prohibition in section 27 applies. The definition in section 1 contemplates two categories of images. There are certain characteristics which apply to all the images contemplated in the section while there are other characteristics which apply to one or other category of them and which assist in defining that category. There are two characteristics which are common to all images. The image–

(a) may be real or simulated regardless of how it is created; and

(b) must be that of a person who is or is shown as being under the age of 18 years.

[26] In summary, I would say that the characteristics common to all images require simply that the image must be that of a child. I will reflect these essential characteristics by referring in this judgment to the child image.

[27] The first category of child images contemplated by the definition contains the following characteristics:

(a) the image must depict a child engaged in sexual conduct or the display of genitals; and

(b) the image must be one which amounts to sexual exploitation.

[28] The characteristics of the second category of images contemplated in the definition are that:

(a) the child must be depicted as participating in, or assisting another person to engage in sexual conduct; and

(b) the image must amount to sexual exploitation or to degradation of children.

[29] It will be noted that the conduct required to be depicted in each category of image is different. The second category of image embraces a broader category because it is caught in the definition even if it does not amount to sexual exploitation but to the degradation of the child.

[30] An image will amount to sexual exploitation if its purpose is to bring about or encourage sexual exploitation. The phrase "amounts to" is one of relatively broad

import. In the context of the definition, the words "sexual exploitation" encompass the exploitation of the sexual urge of a human being and the exploitation of children for sexual purposes. Here exploitation has a negative characteristic and implies either a negative purpose or result or a negative cause by which the sexual urges of human beings are manipulated.

[31] The dictionary definition of pornography cited earlier in this judgment is relevant here. It says that pornography is:

> "[t]he explicit . . . exhibition of sexual subjects or activity . . . in a manner intended to stimulate erotic rather than aesthetic feelings . . .".

[32] The stimulation of erotic rather than aesthetic feelings is an essential element of the definition of child pornography. Any image that predominantly stimulates aesthetic feelings is not caught by the definition. It does require, however, that the image viewed objectively and as a whole has as its predominant purpose the stimulation of erotic feelings in certain human beings who may conveniently be referred to as the target audience. How does one determine whether the predominant purpose of an image is to stimulate erotic rather than aesthetic feelings in the target audience? Evidence of the intention of the author is irrelevant to this determination. The purpose must be determined from the perspective of the reasonable viewer. The image must therefore, be seen by the reasonable viewer as having as its predominant purpose the stimulation of erotic rather than aesthetic feelings in a target audience. It must be emphasised that the image need not, and in most instances will not, stimulate erotic feelings in the reasonable viewer.

The relevance of context

[33] In developing his submissions, counsel for the applicant submitted that the Act impliedly prohibited courts from referring to context when determining whether a publication contained "a visual presentation of child pornography" (section 27(1)(a)) or whether a film contained "a scene or scenes of child pornography" (section 27(1)(b)). He relied on the fact that the phrase "judged within context", which occurs in the schedules governing the XX classification, had been omitted from the definition in section 1. Such an omission is not, in my view, decisive of legislative intention.[35] Nor do subsections (1)(a) and (b) of section 27 have the effect claimed by the applicant. Those paragraphs provide that once a publication or a film has respectively been found to contain a visual presentation or a scene of child pornography, that publication or film may then be the subject matter of an offence. They do not imply that any reference to context has been excluded from the foregoing enquiry into whether the visual presentation or scene in question is in fact child pornography. Indeed, it is not possible to determine whether an image as a whole amounts to child pornography without regard to context.

[34] It is probable that other parts of the film or publication alleged to contain child pornography may indicate whether the predominant purpose of the material, objectively construed, is to stimulate sexual arousal among its target viewers. The Act

[35] See *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2003 (4) SA 1 (CC); 2003 (5) BCLR 476 (CC) para 40, where it was emphasised that *inclusio unius est exclusio alterius* is not a rigid rule.

should be interpreted to allow consideration of such contextual evidence when it is relevant since the statute does not, in my view, preclude it.

[35] I turn now to deal with the interpretation of each prohibited act. An image that purports or is alleged to "depict" a prohibited act must do so explicitly. An image is "depicted" if it is presented for the viewer to see, and is not merely suggested. Requiring the depiction to be explicit is also consistent with the Act's scheme of classification. Child pornography is classified XX unless it falls within a scheduled exemption. Both XX and X18, the next most restrictive classification, are concerned largely with explicit sexual conduct.[36]

[36] Several prohibited acts involve "sexual conduct". Schedule 11 provides the following definition:

> "For the purpose of these Schedules 'sexual conduct' means genitals in a state of stimulation or arousal; the lewd display of genitals; masturbation; sexual intercourse, which includes anal sexual intercourse; the fondling, or touching with any object, of genitals; the penetration of a vagina or anus with any object; oral genital contact; or oral anal contact."

Counsel for the applicant argued that this definition could not be used within the definition of "child pornography", since the latter is in section 1 and not in a schedule to the Act. He submitted that "sexual conduct" in section 1 bore a broader and more vague meaning which might include mildly sexual conduct such as kissing.

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[36] Schedules 1 and 2 in respect of publications and schedules 6 and 7 in respect of films.

[37] I do not agree with this submission. Schedules to an Act form part of the enactment and are binding except where there is a clear conflict with a relevant section in the body of the Act.[37] It follows that when the same words are used in a section and in a schedule they will bear the same meaning, unless the context indicates that a different meaning was intended. Both in its section 1 context and in the schedules, "sexual conduct" is a criterion used to evaluate materials for purposes of classification.[38] The words "[f]or the purpose of these Schedules" date from the original Act prior to its amendment in 1999. They were not limiting words since all references to "sexual conduct", including those in the provisions that related to child pornography,[39] were then contained in the schedules. In my view, if the legislature had intended to change the meaning of "sexual conduct" when it defined child pornography in the 1999 amendment, it would have given a second definition or used a different phrase entirely. Furthermore, reading the schedule 11 definition of "sexual conduct" as applicable to section 1 results in an interpretation of child pornography

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[37] *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) para 33; *African and European Investment Co Ltd v Warren and Others* 1924 AD 308 at 360.

[38] Schedules 1, 2, 6 and 7.

[39] Clause (1)(a) of schedule 1 (publications) and clause (1) of schedule 6 (films). The term "child pornography" was not used in the original Act, and the wording of the section 27 offences in relation to films and publications referred to the clauses in the respective schedules mentioned in this note.

that better conforms to the right to freedom of expression by specifying that only certain forms of explicit sexual conduct may not be depicted.[40]

[38] I now summarise my approach to the question whether an image constitutes child pornography for the purposes of section 27(1). The overarching enquiry, objectively viewed, is whether the purpose of the image is to stimulate sexual arousal in the target audience. This entails considering the context of the publication or film in which the image occurs as a visual presentation or scene. The court conducts the enquiry from the perspective of the reasonable viewer. The image will not be child pornography unless one or more of the four prohibited acts listed below is explicitly depicted for this purpose. The person "who is shown as being under the age of eighteen years" in the image may be real or imaginary. The prohibited acts are:

(a) a child engaged in sexual conduct;

(b) a child engaged in a display of genitals;

(c) a child participating in sexual conduct; and

(d) a child assisting another person to engage in sexual conduct.

The equality challenge

[39] It is convenient to deal first with the applicant's submissions based on the right to equality.[41] His main argument was as follows: mere possessors of a publication

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[40] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) para 22.

[41] Section 9 of the Constitution provides:

charged under section 27(1)(a) are treated more harshly than distributors of an as yet unclassified publication charged under section 28(1).[42] Except in relation to art, the latter group may raise the schedule 5 defences[43] even if the publication is found to be child pornography. These defences are not available under section 27(1)(a) to mere possessors of the same publication. Similarly, mere possessors of a film charged under section 27(1)(b) are treated more harshly than broadcasters of an as yet unclassified film charged under section 26(4)(a),[44] because the schedule 9 defences[45]

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3) National legislation must be enacted to prevent or prohibit unfair discrimination.
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[42] Section 28(1) of the Act provides:

> "Any person who knowingly distributes a publication which contains a visual presentation or a description referred to in Schedule 1, read with Schedule 5, shall be guilty of an offence."

[43] Above para 10.

[44] Section 26(4)(a) provides, in relevant part:

> "Any person . . . who knowingly broadcasts a film which has not yet been classified but which falls within Schedule 6 read with Schedule 9, or Schedule 10, shall be guilty of an offence."

Schedule 6 provides, in relevant part:

> "A film shall be classified as XX if, judged within context, it contains a scene or scenes, simulated or real, of any of the following:
>
> (1) child pornography;
>
> . . .".

Schedule 9 provides:

(except art) are available to the latter but not the former. In each case the applicant claimed irrational differentiation, alternatively unfair discrimination, against mere possessors.

[40] The difficulty with this submission is that it ignores the overall purpose of section 28(1). Schedule 1 contains the list of materials, the distribution of which is targeted by section 28(1). It contains, in addition to child pornography, several other classes of sexually explicit or violent material. Its scope is wider therefore than the material targeted by section 27, although it is narrowed somewhat by the exemptions in schedule 5.[46] Thus section 28(1) should be characterised as a measure which bans for distribution a range of publications that is broader, in most respects, than those banned for possession by section 27(1)(a). This differentiation is connected with the legitimate government objective of combating the harm caused by pornographic and violent materials by targeting those who distribute such materials. Section 9(1) of the Constitution is satisfied if that connection is rational.[47]

> "The XX or X18 classification shall not be applicable to a *bona fide* scientific, documentary, dramatic or, except in the case of Schedule 6(1), an artistic film or any part of a film which, judged within context, is of such a nature."

Schedule 10 is not presently relevant.

[45] Id schedule 9.

[46] Above para 9.

[47] In *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* 1999 (2) SA 1 (CC); 1999 (2) BCLR 139 (CC) para 17 the Court explained that–

> "[t]he only purpose of rationality review is an inquiry into whether the differentiation is arbitrary or irrational, or manifests naked preference and it is irrelevant to this inquiry whether the scheme chosen by the Legislature could be improved in one respect or another." [footnote omitted].

[41] The differentiation thus scarcely manifests arbitrariness or a naked preference for distributors. Moreover, a publication which contains child pornography must have as its purpose, the stimulation of sexual arousal among its target viewers through explicit visual depiction of any of the four prohibited acts. It is most unlikely, then, to be of a "bona fide scientific, documentary [or] literary" nature so as to qualify for exemption under schedule 5.

[42] The respondents correctly submitted that in most cases someone who knowingly distributes a publication also knowingly possesses it, and that he or she may therefore be charged under section 27(1)(a) instead of section 28(1).[48] The impact on mere possessors (an unlisted ground in section 9(3) of the Constitution), as against distributors who do not possess, has not been shown to be unfair. When mere possessors and broadcasters of films are compared, it appears that broadcasters always knowingly possess and hence are liable under both section 27(1)(b) and section 26(4)(a).

[43] The applicant raised two further equality arguments. The first concerned equal protection in relation to publications, on the basis that it is a matter of chance whether there has been a complaint against a publication leading to a decision by the Board that may provide a defence under section 27(2). That subsection reads as follows:

[48] The most effective way of combating child pornography is to target possession. See *Prince v President, Cape Law Society, and Others* 2002 (2) SA 794 (CC); 2002 (3) BCLR 231 (CC) para 116.

> "A person shall not be convicted of a contravention of subsection (1), unless the State proves that the Board has not given a decision which is to the effect that the publication or film referred to in that subsection does not contain a representation or a scene or scenes referred to in subsection (1)."

[44] The applicant submitted that, where there has been such a decision, the schedule 5 defences may benefit the accused. A proper interpretation of section 27(2) indicates, however, that it is concerned only with the Board's initial determination of whether the publication constitutes child pornography, and not with any subsequent application of schedule 5.[49] Accordingly, section 27(2) is a rational measure that protects material that the Board has found not to be child pornography.[50]

[45] The challenge based on the right to equality must accordingly fail.

The right to freedom of expression

[46] The applicant argued that section 27(1) of the Act infringed both the right to freedom of expression and the right to privacy as protected by the Constitution.

[47] Section 16(1) of the Constitution provides:

> "Everyone has the right to freedom of expression, which includes–
>
> (a) freedom of the press and other media;
>
> (b) freedom to receive or impart information or ideas;

[49] See schedule 1 and schedule 5, quoted in para 9 above.

[50] *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) para 26.

(c) freedom of artistic creativity; and

(d) academic freedom and freedom of scientific research."

The respondents, quite correctly in my view, did not seek to rely upon the specific exclusions in section 16(2).[51] In *Islamic Unity Convention*,[52] this Court emphasized the fact that any expression that is not specifically excluded by section 16(2) enjoys the protection of the right.[53]

[48] The respondents dispute that child pornography, as defined by the Act, is expression. Relying on the approach of the United States Supreme Court[54] where certain categories of expression are unprotected forms of speech, the respondents argued such materials do not serve any of the values traditionally considered as underlying freedom of expression, namely, truth-seeking, free political activity and self-fulfilment.[55] This argument must fail. In this respect, our Constitution is different from that of the United States of America. Limitations of rights are dealt with under section 36 of the Constitution and not at the threshold level. Section 16(1)

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[51] Section 16(2) of the Constitution provides:

"The right in subsection (1) does not extend to–
(a) propaganda for war;
(b) incitement of imminent violence; or
(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

[52] Above n 5.

[53] Id para 33.

[54] See for example, *New York v Ferber* 458 U.S. 747 (1982); *Ashcroft v The Free Speech Coalition* 122 U.S. 1389 (2002).

[55] *Islamic Unity Convention* above n 5 para 26.

expressly protects the freedom of expression in a manner that does not warrant a narrow reading. Any restriction upon artistic creativity must satisfy the rigours of the limitation analysis.

[49] The respondents submitted further that, even if the materials in question constitute expression, section 16 of the Constitution does not protect the right to receive such expression. This question was left open by this Court in *Case* in relation to the corresponding right under the interim Constitution.[56] Section 16(1)(b) of the Constitution now specifically provides for the right "to receive or impart information or ideas".[57] This Court has endorsed the broad approach of the European Court of Human Rights, to this aspect of the right,[58] namely, that it is applicable:

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[56] *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC); 1996 (5) BCLR 609 para 92.

[57] Section 15 of the interim Constitution did not have this provision.

[58] Article 10 of the European Convention on Human Rights provides:

> "(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

> ". . . not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. . .".[59]

[50] The criminalisation of the creation, production, importation, distribution and possession of the material that falls within the definition of child pornography, as discussed above, limits the right to freedom of expression. Whether the limitation is justifiable remains to be considered under a limitation analysis.[60]

The right to privacy

[51] The applicant claims the protection of the right to privacy specifically for the possession and importation of works of art created from the imagination and artistic films in which the actors are over 18 years old. Section 14 of the Constitution provides:

> "Everyone has the right to privacy, which includes the right not to have–
>
> (a) their person or home searched;
>
> (b) their property searched;
>
> (c) their possessions seized; or
>
> (d) the privacy of their communications infringed."

[59] *Islamic Unity Convention* above n 5 para 28 quoting *Handyside v United Kingdom* (1976) 1 EHRR 737 at 754.

[60] Paras 56-83 below.

[52] In *Case*,[61] all the members of this Court held that the crime of possessing "indecent or obscene photographic matter" (a much wider range of materials than those at issue in the present case) violated the right to privacy under the interim Constitution. The majority of the Court in that matter, however, agreed that a law prohibiting possession of a narrower category of erotic materials would limit the right to privacy, but could be upheld if it satisfied the requirements of the limitation clause. It flows from this decision that the impugned provisions infringe the right to privacy and their constitutionality will depend on whether the requirements of the limitation clause in section 36 of the Constitution are fulfilled.

[53] An alternative submission by the respondents was that, even if the rights to freedom of expression and privacy were implicated, section 27(1) did not limit them. Instead the section, read with the exemption procedure in section 22, merely regulated the exercise of those rights. Section 22 provides for a procedure whereby a person who wishes to possess, import, create, produce or distribute child pornography may apply for an exemption to do so.[62] In my view, this submission has no merit. The mere possibility that, absent an exemption, a person may be convicted under section 27(1) amounts to a threat to the rights involved. The exemption procedure is, in my view, relevant to the question of limitations and I shall discuss it further below.

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[61] Above n 56.

[62] Its provisions are discussed in more detail below. See paras 72, 76-79.

Section 28 of the Constitution

[54] It was argued that section 28(2) of the Constitution, which provides that a child's best interests "are of paramount importance in every matter concerning the child", is relevant to the present enquiry. In the view I take of the matter, it is not necessary to decide this in the present case.

[55] In the High Court judgment, the view is expressed that persons who possess materials that create a reasonable risk of harm to children forfeit the protection of the freedom of expression and privacy rights altogether, and that section 28(2) of the Constitution "trumps" other provisions of the Bill of Rights. I do not agree. This would be alien to the approach adopted by this Court that constitutional rights are mutually interrelated and interdependent and form a single constitutional value system. This Court has held that section 28(2), like the other rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and justifiable in compliance with section 36.[63]

Limitation analysis

[56] I proceed to the limitation analysis of the two rights limited by section 27(1), namely, freedom of expression and privacy. Section 36(1) of the Constitution provides:

[63] *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC); 2001 (2) BCLR 152 (CC) paras 27-30.

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including–
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose."

It is well established that courts applying section 36(1) are required to undertake a proportionality enquiry,[64] in the course of which they consider factors including, but not limited to, those listed in sub-paragraphs (a)-(e).

[57] The first question is whether section 27(1), read with the definition of child pornography, is a "law of general application" as required by section 36(1). This Court has held that this requirement derives from an important principle of the rule of law, namely that "rules be stated in a clear and accessible manner".[65] The applicant's complaint concerned clarity: he submitted that the definition of "child pornography" in section 1 was too vague to satisfy this requirement. Having analysed and considered that definition above, I am satisfied that it is sufficiently clear and does constitute a law of general application.

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[64] *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) para 104; *S v Manamela and Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) paras 32-33.

[65] *Dawood and Another v Minister of Home Affairs and Others, Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) para 47.

Limitation analysis: freedom of expression

[58] The applicant accepts that the legislature may, consistently with the Constitution, prohibit the possession, importation, creation and production of child pornography in certain circumstances. The question this Court has to answer is whether the limitation occasioned by section 27(1) is justifiable. To do so, the nature of the right and the extent of the limitation, on the one hand, and the purpose of the limitation on the other need to be considered.[66]

The nature and extent of the limitation

[59] Freedom of expression is an important right in our Bill of Rights. It

> ". . . lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters . . .".[67] [footnotes omitted]

Seen from this perspective, the limitation of the right caused by section 27(1) does not implicate the core values of the right. Expression that is restricted is, for the most part, expression of little value which is found on the periphery of the right and is a

[66] *Manamela* above n 64 paras 65-66.

[67] *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC) para 7, cited in *Islamic Unity Convention* above n 5 para 26.

form of expression that is not protected as part of the freedom of expression in many democratic societies.[68]

[60] The applicant did not suggest that the prevention of the creation and possession of child pornography was not a legitimate government purpose. He contended, however, that the statute in the present case goes further than is necessary for this purpose. I deal with this when I consider the relationship between the limitation and its purpose. But first it is necessary to address the purpose of the legislation.

The purpose of the legislation

[61] In determining the importance of section 27(1) of the Act, it is necessary to examine its objective as a whole. The purpose of the legislation is to curb child pornography which is seen as an evil in all democratic societies. Child pornography is universally condemned for good reason. It strikes at the dignity of children, it is harmful to children who are used in its production, and it is potentially harmful because of the attitude to child sex that it fosters and the use to which it can be put in grooming children to engage in sexual conduct. I will deal with each of these in turn.

[62] Dignity is a founding value of our Constitution.[69] It informs most if not all of the rights in the Bill of Rights and for that reason is of central significance in the limitations analysis. As this Court held in *Dawood*:

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[68] For an example of the position in the United States see *Ferber* above n 54 at 763-764.

> "The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a *value* fundamental to our Constitution, it is a justiciable and enforceable *right* that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour."[70] [footnotes omitted].

[63] Similarly, article 1 of the Universal Declaration of Human Rights stresses the importance of human dignity. It states: "All human beings are born free and equal in dignity and rights." Children merit special protection by the state and must be protected by legislation which guards and enforces their rights and liberties. This is recognised in section 28 of our Constitution.[71] Children's dignity rights are of special importance. The degradation of children through child pornography is a serious harm which impairs their dignity and contributes to a culture which devalues their worth.

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[69] Human dignity is enshrined as one of the founding values of our Constitution in section 1. See also *Makwanyane* above n 64 para 328.

[70] *Dawood* above n 65 para 35.

[71] Section 28(1)(d) provides that "Every child has the right to be protected from maltreatment, neglect, abuse or degradation".

Society has recognised that childhood is a special stage in life which is to be both treasured and guarded. The state must ensure that the lives of children are not disrupted by adults who objectify and sexualise them through the production and possession of child pornography. There is obvious physical harm suffered by the victims of sexual abuse and by those children forced to yield to the demands of the paedophile and pornographer, but there is also harm to the dignity and perception of all children when a society allows sexualised images of children to be available. The chief purpose of the statutory prohibitions against child pornography is to protect the dignity, humanity and integrity of children.

[64] Little need be said about the second purpose of section 27 which is to protect children from being used in the production of child pornography. The expert evidence in this case confirms that abusing children in this way is severely harmful to them.[72] The psychological harm to the child who was photographed is exacerbated if he or she knows that the photograph continues to circulate among viewers who use it to derive sexual satisfaction.[73]

[65] Thirdly, there is a reasonably apprehended risk of harm from child pornography. The state produced evidence to suggest that images of children engaged in sexual conduct may be used in one of the three ways to harm children, firstly, to

[72] This conclusion has also been reached in the United States, see *Osborne v Ohio* 495 US 103, 109-111; 110 US 1691, 1696-97 (1990).

[73] This conclusion too has been reached in the United States, id at 1697; and in Canada, see *Sharpe* above n 34 para 92.

"groom" children for sexual abuse by showing them acts other children have purportedly performed; secondly, to reinforce cognitive sexual distortions, i.e. the belief that sex with children is acceptable; and finally for paedophiles to fuel their fantasies prior to committing an act of sexual abuse. The affidavit of Superintendent Pienaar details a number of cases in which South African paedophiles used child pornography to "groom" children whom they abused. On the other hand, the evidence of cognitive distortions and fuelling of fantasies is not supported by empirical observation. It may well be unethical for medical researchers to expose paedophiles to such materials in order to investigate these phenomena. Nor is this necessary, in my view, as common sense indicates that these effects will occur in some cases.

[66] The question of reasonable apprehension of harm was considered in *S v Jordan*.[74] In that case it was argued, in the context of a limitation of the right to privacy, that some of the harm was caused not by prostitution itself but by its criminalisation, and that legalisation or regulation could lead to a net reduction of such harm.[75] Although the state did not empirically refute these claims, the Court nevertheless found that the state was entitled to criminalise prostitution as a reasonable means of combating the harm. The harm of child abuse is real and ongoing and the state is under a constitutional obligation to combat it. To hold otherwise would place the state in jeopardy of having to close the gate, as it were,

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[74] *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amicus Curiae)* 2002 (6) SA 642 (CC); 2002 (11) BCLR 1117 (CC).

[75] Id para 87.

after the horse has bolted and might signal a breach by the state of its obligation towards children.

[67] I conclude that the state has established three legitimate objectives which the limitation aims to serve, namely, protecting the dignity of children, stamping out the market for photographs made by abusing children and preventing a reasonable risk that images will be used to harm children.

[68] I turn now to the question whether there are less restrictive means available to the state to achieve these purposes. Statutes dealing with child pornography in the United Kingdom[76] and Germany[77] penalise the possession of photographs and "pseudophotographs" only.

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[76] In England, section 160 of the Criminal Justice Act 1988 (as amended) penalizes the possession of an indecent "pseudophotograph" of a child. The term is defined in section 7 of the Protection of Children Act 1978 as follows:

> "(7) 'Pseudo-photograph' means an image, whether made by computer-graphics or otherwise howsoever, which appears to be a photograph.
>
> (8) If the impression conveyed by a pseudo-photograph is that the person shown is a child, the pseudo-photograph shall be treated for all purposes of this Act as showing a child and so shall a pseudo-photograph where the predominant impression conveyed is that the person shown is a child notwithstanding that some of the physical characteristics shown are those of an adult.
>
> (9) References to an indecent pseudo-photograph include—
>
> > (a) a copy of an indecent pseudo-photograph; and
> > (b) data stored on a computer disc or by other electronic means which is capable of conversion into a pseudo-photograph."

[77] In Germany, StGB § 184(5) penalizes the possession of child pornography that depicts "tatsächliches order wirklichkeitsnahes Geschehen", i.e. real or near-real events.

[69] These may amount to less restrictive means. The English and German statutes would exclude any imaginative image which is not a photograph or a pseudophotograph. This requires presiding officers to ask the question "Is it a photograph or a pseudophotograph?" rather than "Is it art?" On the other hand, what precisely is a pseudophotograph may be difficult to determine. Section 27 has adopted instead a test whereby a judge is required to consider whether the material would, from the perspective of a reasonable viewer, have as its predominant purpose the stimulation of erotic feeling. I am not persuaded that this approach is significantly more invasive of the right to freedom of expression than the approach adopted in the United Kingdom and Germany.

[70] I am however persuaded that the relatively narrow infringement of expression is outweighed by the important legislative purposes performed by section 27, together with the legislative safeguards provided,[78] as well as the difficulty of legislating in this area at all.

[71] The applicant, however, pointed to two categories of overbreadth which he argued went beyond the legitimate purposes of the state in limiting the right to freedom of expression. The first relates to the documentary film-maker who possesses child pornography for the purposes of making a documentary film on child pornography; and the second relates to lawyers and others who are in possession of child pornography in order to defend a person charged under section 27(1). These

[78] For example, section 22.

examples of overbreadth, the applicant argued, rendered section 27(1) an unjustifiable limitation of freedom of expression. I consider these two examples separately below.

[72] In determining whether section 27(1) is overbroad, the exemption procedure set out in section 22 of the Act is relevant. Section 22 permits a person who wishes to possess or otherwise deal with child pornography in breach of section 27 to apply to do so to an executive committee of the Board.[79] This means that section 27 does not impose a blanket prohibition, but permits exemptions if an applicant can persuade the Board that "it has good reason to believe that bona fide purposes will be served by such an exemption".[80]

[73] I turn now to consider the position of researchers and documentary film producers who possess child pornography as "raw material" for their academic or documentary project. The applicant claimed that such persons should be able to raise a defence of "legitimate purpose" if charged with possession or importation of the material concerned.

[74] According to the applicant, film-makers or researchers may wish to have access to some of the crudest forms of child pornography if this is reasonably necessary for the project they are pursuing. The state's objectives in prohibiting researchers and

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[79] Above para 15.

[80] Section 22(1) of the Act.

film-makers from possessing or importing such images are the same as its objectives in relation to the general prohibition and importation bans which have already been discussed. The objective of protecting and affirming the dignity of children remains of primary importance. The objective of stamping out the market in child pornography remains valid in relation to researchers or film-makers who obtain child pornography, although it must be acknowledged that they represent a minuscule proportion of the market. Equally relevant is the objective of combating the risk of grooming, cognitive distortion and the fuelling of fantasies.

[75] It follows from the above remarks that a blanket defence for any film-maker or researcher who reasonably needs to possess or import child pornography is not constitutionally required. The question then arises whether the Constitution requires a qualified defence for researchers and film-makers or whether a general prohibition on the possession or importation of such materials may be maintained intact.

[76] The real question is whether the section 22 exemption procedure is a sufficient safeguard for the right, regard being had to the legitimate government objective. As I have said, section 22 confers the discretion upon the executive committee of the Board to grant an exemption if "*bona fide* purposes" will be served thereby. It is a broad discretion, insofar as the Act does not provide any express guidelines for its exercise. The discretion may, in the situations we are considering, be used to limit the freedom of expression right of an applicant for exemption whose project involves child pornography. It is in my view legitimate to confer such a discretion upon the

executive committee of the Board which is an expert in matters relating to films and publications. Moreover the Board is required to scrutinize applications against the legislative standard set - that "*bona fide* purposes will be served" by the applicant's possession of child pornography. Guidelines for the exercise of the discretion are therefore established.[81]

[77] Regarding the nature and extent of the limitation, it should be noted that researchers and film-makers will not be convicted if they have received an exemption under section 22. Given the nature of their interest in the material, it is not a disproportionate burden for researchers and film-makers to apply for exemption under section 22.

[78] An application for exemption under section 22 offers ample opportunity to inform the Board why the exemption must be granted. The applicant may make oral or written submissions, and may be legally represented.[82] Moreover, there are remedies for those aggrieved by the refusal of an exemption. While a section 22 decision does not appear to be subject to the Act's provisions for appeal to the Review Board or the High Court,[83] it could be reviewed by a court.

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[81] *Dawood* above n 65 para 54.

[82] Section 19.

[83] Sections 20 and 21.

[79] These observations illustrate that the section 22 procedure does permit the conducting of research into child pornography provided good cause is shown. What the provisions are concerned with are the narrow area of child pornography and the material connected with a market in which children are abused and which poses a reasonable risk of harm in the hands of the average possessor. In the result, I am satisfied that the nature and extent of the limitation is not severe.

[80] Finally, I must consider whether less restrictive means could not have been used. The applicant proposed a "legitimate purpose" defence which could be raised by, amongst others, documentary film-makers or researchers who possessed or imported child pornography that was reasonably necessary to their projects. Counsel for the applicant indicated that similar defences existed in a number of foreign jurisdictions.[84]

[81] The main difficulty with this suggestion is that it is unlikely to be an *effective* less restrictive means. The defence may well be abused, notwithstanding the fact that courts will require evidence from the accused and scrutinize its credibility. These difficulties were alluded to by the English Court of Appeal in *R v Atkins*[85] where the defence of possessing indecent photographs of children for a "legitimate reason" was discussed:

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[84] In Canada, see section 163.(3) ("acts serving the public good") of the Canadian Criminal Code, discussed in *Sharpe* above n 34 para 70; in England, section 160(2)(a) of the Criminal Justice Act 1988 and section 1(4)(a) of the Protection of Children Act 1978, discussed in *R v Atkins* [2000] 2 Cr. App. R. 248 at 257.

[85] *Atkins* above n 84.

> "The question of what constitutes 'a legitimate reason' . . . is a pure question of fact (for the magistrate or jury) in each case. The central question, where the defence is legitimate research, will be whether the defendant is essentially a person of unhealthy interests in possession of indecent photographs in the pretence of undertaking research or by contrast a genuine researcher with no alternative but to have this sort of unpleasant material in his possession. In other cases there will be other categories of 'legitimate reason' advanced. They will each have to be considered on their own facts. Courts are plainly entitled to bring a measure of scepticism to bear upon such an enquiry: they should not too readily conclude that the defence has been made out."[86]

Once a defence of "legitimate purpose" has been raised, the prosecution will have to disprove it beyond a reasonable doubt. This may entail proving that the accused had an "unhealthy interest" in the images, in the sense explained in the passage from *Atkins* above. It may be very difficult to establish this.

[82] The result of a "legitimate purpose" defence would then be that people may exploit the defence as a cover. Such persons pose a reasonable risk of harm. The assessment of risk does not attach to the particular person who is charged, but considers the average probability that, among all the people who possess child pornography, some will use it to harm children. The proposed "legitimate purpose" defence seeks to undo this form of risk assessment by requiring an individualized risk to be proved on the part of a researcher, a film-maker or someone pursuing a similar project. Drawing an analogy with other possession offences may illustrate how the "legitimate purpose" defence would undermine the effectiveness of the general

[86] Id at 257.

prohibition. Consider, for example, a "legitimate purpose" defence which allowed amateur chemists to possess dangerous drugs.

[83] In my view, the less restrictive means suggested by the applicant are not sufficiently effective to warrant their adoption. Taking this into account in the overall assessment of proportionality, I consider that it is reasonable and justifiable for the rights of researchers and film-makers in relation to possession and importation of child pornography to be limited by section 27(1) of the Act, read with section 22.

Overbreadth: lawyers and other legitimate possessors

[84] Finally, the applicant contended that section 27(1) reaches too far because police officers, lawyers and judicial officers who possess the document in the course of the investigation and prosecution of an accused person would commit an offence. It is true that there is no express provision in the legislation to the effect that people in this category can possess section 27(1) prohibited images with impunity. It does not follow however that police officers, lawyers and judicial officers would necessarily be committing an offence in the circumstances envisaged. The determination of whether they do involves questions concerned with the issues of lawfulness, *mens rea*, justification, necessity and the constitutional concept of a fair trial. In the circumstances, the Court must consider whether this question needs to be determined in this case.

[85] The applicant is not a police officer, lawyer or judicial officer who is alleged to be in possession of the material in order to participate in the investigation or prosecution of an offence alleged to be committed by someone else. This Court has, however, repeatedly made plain that the subjective position of a particular applicant is irrelevant to the determination of the validity of a statutory provision; a statutory provision is objectively either valid or invalid.[87] The applicant has been charged in terms of section 27(1) and has made an application to set aside the whole section. The objective theory of constitutional invalidity entitles him to an order setting aside section 27(1) or to some other appropriate relief should the section be found to be inconsistent with the Constitution. This would be so even if the basis of the finding of constitutional invalidity had nothing to do with his subjective circumstances.

[86] The objective theory requires us to consider all the bases upon which an applicant contends for constitutional invalidity or inconsistency. This enquiry can be conducted in the present case on the hypothesis that the point made by the applicant is good and that section 27(1) is inconsistent with the Constitution on this score. This Court has held that if a statutory provision is held to be inconsistent with the Constitution, the appropriate relief is that which does least damage to the legislative purpose.[88] Accordingly, notional severance is ordinarily to be preferred to striking down a legislative provision.

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[87] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) para 29; *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (4) BCLR 441 (CC) paras 26-28.

[88] *National Director of Public Prosecutions and Another* v *Mohamed NO and Others* 2002 (4) SA 843 (CC); 2002 (9) BCLR 970 (CC) para 29.

[87] Even in the unlikely event of a finding that section 27(1) is inconsistent with the Constitution because it does not provide a defence for police officers, lawyers and judicial officers and others in these circumstances, it would not result in section 27(1) being set aside. It would be possible and less intrusive of the legislative function to address the inconsistency through notional severance or reading in. It is not appropriate or necessary therefore for this Court to consider this attack in any further detail.

[88] I conclude, therefore that it has been established that, section 27(1) constitutes a reasonable and justifiable limitation on the section 16 right to freedom of expression.

Limitation analysis: right to privacy

[89] The next question is whether the limitation of the right to privacy is justifiable. Once again the applicant argued that the limitation was not justifiable.

[90] Although possession and consumption of child pornography often takes place in the inner sanctum of the home, the legislative purposes identified above remain of great importance. It should not be overlooked that many of the resultant acts of abuse against children take place in private. In other words, where the reasonable risk of harm to children is likely to materialise in private, some intrusion by the law into the private domain is justified.[89] Moreover, since child pornography is frequently being

[89] See *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 (CC); 2000 (1) BCLR 86 (CC) paras 16-18.

imported via the Internet and possessed on computers, the ease with which such possessors may become distributors at the touch of a button, as it were, should be taken into account.[90] This exacerbates the risk of harm and further justifies the intrusion of the Act into the private sphere.

[91] For these reasons and for those given in my consideration of the justifiability of the limitation of the right to freedom of expression, I find that the limitation of the right to privacy is also justifiable.

Order

[92] The following order is accordingly made:

1. The application for leave to appeal is granted.
2. The appeal is dismissed.

Chaskalson CJ, Goldstone J, Madala J, Mokgoro J, Moseneke J, Ngcobo J, O'Regan J, Yacoob J concur in the judgment of Langa DCJ.

[90] Van Bueren, "The constitutional rights of children" (March/April 2003) *Amicus Curiae* Issue 46 at 30.

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