

THE RIGHT TO RESPECT FOR PRIVATE LIFE - CASE OF TRAJKOVSKI AND CHIPOVSKI V. MACEDONIA

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INTRODUCTION

One of the human rights protected by the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) is the right to respect for private and family life (Council of Europe, 1950). This right is defined with the Article 8 that contains two paragraphs. The first paragraph represents a general provision that everyone has the right to respect for his private and family life, his home and his correspondence, while the second paragraph stipulates that 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.

The right to privacy is difficult to define but has come to include a wide range of overlapping and interrelated rights protecting the individual's freedom as long as his/her actions do not interfere with the rights and freedoms of others. The right to privacy is the right to individual autonomy that is violated when states interfere with, penalise or prohibit actions which essentially only concern the individual. The right to privacy encompasses the right to protection of a person's intimacy, identity, name, gender, honour, dignity, appearance, feelings and sexual orientation and extends to the home, the family and correspondence. The right to privacy

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may be limited in the interests of others and under specific conditions, provided that the interference is not arbitrary or unlawful (humanrights.is, n.d.).

This right embodies the right to a name, the right to change one's civil status and to acquire a new identity, and protection against telephone tapping, collection of private information by a State's security services and publications infringing privacy (coe.int, n.d.). The European Court of Human Rights (the ECHR) has never offered a clear and precise definition of what is meant by private life: in its view it is a broad concept, incapable of exhaustive definition. What is clear is that the notion of private life is much wider than that of privacy, encompassing a sphere within which every individual can freely develop and fulfil his personality, both in relation to others and with the outside world (Roagna, 2012: 12).

THE RELEVANT INTERNATIONAL MATERIALS

The right to respect for private life and the right to the protection of personal data are closely related. Both strive to protect similar values, i.e. the autonomy and human dignity of individuals, by granting them a personal sphere in which they can freely develop their personalities, think and shape their opinions. They are thus an essential prerequisite for the exercise of other fundamental freedoms, such as freedom of expression, freedom of peaceful assembly and association, and freedom of religion (European Union Agency for Fundamental Rights and Council of Europe, 2018:19). Consequently, several international materials address the issue of the private life, as well as the personal data. For example, the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Council of Europe, 1981), also known as "the Data Protection Convention", defines the "personal data" as any information relating to an identified or identifiable individual ("data subject"). In addition, the Data Protection Convention stipulates that personal data that are being processed shall be stored for specified and legitimate purposes and not used in a way incompatible with those purposes, as well as the personal data should be preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored. Regarding the special categories of data (racial origin, political opinions or religious or other beliefs, data concerning health or sexual life), the Data Protection Convention prescribes that such data may not be processed automatically unless domestic law provides appropriate safeguards. And finally, when it comes to the data security, than an appropriate security measures should be taken for the protection of personal data stored in automated data files against accidental or unauthorised destruction or accidental loss as well as against unauthorised access, alteration or dissemination.



Another relevant document regarding the use of personal data, but this time in the police sector, is the Recommendation No. R (87) 15 of the Committee of Ministers of the Council of Europe (Council of Europe - Committee of Ministers, 1987). As noted, the collection of personal data for police purposes is subject of the Principle 2, stating that it should be limited to such as it is necessary for the prevention of a real danger or the suppression of a specific criminal offence, with a note that any exception should be the subject of specific national legislation. Furthermore, the storage of personal data should be limited to accurate data and to such data that are necessary to allow police bodies to perform their lawful tasks within the framework of national law and their obligations arising from international law (Principle 3). The Recommendation No. R (87) 15 also gives attention to the length of storage and updating of data (Principle 7), whereas measures should be taken so that personal data kept are deleted if they are no longer necessary for the purposes for which they were stored, with a note that following criteria should be taken into account: the need to retain data in the light of the conclusion of an inquiry into a particular case; a final judicial decision, in particular an acquittal; rehabilitation; spent convictions; amnesties; the age of the data subject, and particular categories of data.

In 1992 another Recommendation was adopted, i.e. the Recommendation No. R (92) 1 of the Committee of Ministers on the use of analysis of deoxyribonucleic acid (DNA) within the framework of the criminal justice system (Council of Europe - Committee of Ministers, 1992a), defining that samples collected for DNA analysis and the information derived from such analysis for the purpose of the investigation and prosecution of criminal offences must not be used for other purposes. Moreover, samples taken for DNA analysis and the information so derived may be needed for research and statistical purposes, however the identity of the individual cannot be ascertained implying that the names or other identifying references must therefore be removed prior to their use for these purposes. The Recommendation No. R (92) 1 further states that the circumstances, in which the samples for DNA analysis are being taken, should be determined by the domestic law with a note that in some states this may necessitate a specific authorisation from a judicial authority. When it comes to the storage of samples and data, the Recommendation No. R (92) 1 points out that samples or other body tissue taken from individuals for DNA analysis should not be kept after the rendering of the final decision in the case for which they were used, unless it is necessary for purposes directly linked to those for which they were collected. In addition, the results of DNA analysis should be deleted when it is no longer necessary to keep it for the purposes for which it was used. However, the results of DNA analysis and the information so derived may be retained where the individual concerned has been convicted of serious offences against the life, integrity or security of persons, with a note that in such cases strict storage periods should be defined by domestic



law. Also, when the person so requests or when the sample cannot be attributed to an individual (for example when it is found at the scene of an offence), samples and other body tissues, or the information derived from them, may be stored for longer periods. On the other hand, where the security of the state is involved, the domestic law may permit retention of the samples, the results of DNA analysis and the information so derived even though the individual concerned has not been charged or convicted of an offence, but in such cases strict storage periods should be defined by domestic law.

The Explanatory memorandum to the above Recommendation (Council of Europe - Committee of Ministers, 1992b), further states that since the primary aim of the collection of samples and the carrying out of DNA analysis on such samples is the identification of offenders and the exoneration of suspected offenders, then the data should be deleted once persons have been cleared of suspicion. So, the question that follows is how long the DNA findings and the samples on which they were based can be stored in the case of a finding of guilt. In addition, the Explanatory memorandum notes that all member States keep a criminal record and that such record may be used for the purposes of the criminal justice system, and points out that there may be an exceptions permissible under certain strict conditions (when there has been a conviction; when the conviction concerns a serious criminal offence against the life, integrity and security of a person; the storage period is limited strictly; the storage is defined and regulated by law; the storage is subject to control by Parliament or an independent supervisory body).

THE RELEVANT ECHR'S PRACTICE

When it comes to the ECHR's practice about the right to respect for private life, several cases stand out. The first one is the Case of *S. and Marper v. the United Kingdom* (ECHR, 2008), in which ECHR found out that there was a violation of the Article 8, stating that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in this case, fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society. In the present case, the applicants' fingerprints and cellular samples were taken and DNA profiles obtained in the context of criminal proceedings brought on suspicion of attempted robbery in the case of the first applicant and harassment of his partner in the case of the second



applicant. The data were retained on the basis of legislation allowing for their indefinite retention, despite the acquittal of the former and the discontinuance of the criminal proceedings against the latter. The ECHR reiterated that the mere retention and storing of personal data by public authorities, however obtained, are to be regarded as having a direct impact on the private-life interest of an individual concerned, irrespective of whether subsequent use is made of the data. ECHR also paid attention to the risk of stigmatisation, stemming from the fact that persons in the position of the applicants, who have not been convicted of any offence and are entitled to the presumption of innocence, are treated in the same way as convicted persons. Therefore, ECHR considered that the retention of the un-convicted persons' data may be especially harmful in the case of minors such as the first applicant, given their special situation and the importance of their development and integration in society.

Another relevant judgement is the one about the *Case of Gaughran v. the United Kingdom* (ECHR, 2020a), in which a violation of Convention's Article 8 was established. ECHR ruled that the respondent State has overstepped the acceptable margin of appreciation in this regard and the retention at issue constituted a disproportionate interference with the applicant's right to respect for private life and cannot be regarded as necessary in a democratic society. In essence, the ECHR found out that the indiscriminate nature of the powers of retention of the DNA profile, fingerprints and photograph of the applicant as person convicted of an offence, even if spent, without reference to the seriousness of the offence or the need for indefinite retention and in the absence of any real possibility of review, failed to strike a fair balance between the competing public and private interests. The State retained a slightly wider margin of appreciation in respect of the retention of fingerprints and photographs. However, that widened margin was not sufficient for it to conclude that the retention of such data could be proportionate in the circumstances, which include the lack of any relevant safeguards including the absence of any real review.

In the next *Case of Rotaru v. Romania* (ECHR, 2000), ECHR wanted to ascertain whether domestic law defines the circumstances in which the Romanian Intelligence Service could store and make use of information relating to the applicant's private life. Having in mind the domestic law, ECHR concluded that there was no provision that laid down any limits on the exercise of those powers (what kind of information may be recorded; the categories of people against whom surveillance measures such as gathering and keeping information may be taken; the circumstances in which such measures may be taken or the procedure to be followed; there were no limits on the age of information held; or the length of time for which it may be kept). For these reasons, ECHR noted that the Romanian system for gathering and archiving information did not provide safeguards, nor



supervision procedure. Therefore, the ECHR concluded that the holding and the use of information on the applicant's private life by the Romanian Intelligence Service were not "in accordance with the law", and ruled that there had been a violation of Article 8.

Contrary to the above cases, in the Case of *Gardel v. France* (ECHR, 2009), ECHR ruled that there has been no violation of Convention's Article 8, despite the fact that applicant was registered in the Sex Offenders Register, i.e. it was struck a fair balance between the competing private and public interests at stake and that the respondent State did not overstep the acceptable margin of appreciation in that regard. In this case, the applicant was automatically placed on the register under the transitional provisions of the 2004 Law, in view of the crime of which he had been finally convicted. He was duly notified of his placement on the register and took note of the obligations imposed on him. ECHR observed that the data were deleted automatically on expiry of period of twenty or thirty years depending on the severity of the sentence, which started to run as soon as the decision which gave rise to placement on the register ceases to have effect. In addition, the person concerned may apply to the public prosecutor to have the data concerning him or her deleted if conserving the data no longer appears necessary (the purpose of the register, the nature of the offence, the age of the person concerned when it was committed, the length of time that has elapsed and the person's current personality). ECHR thought that the period of time for which the data were kept was not disproportionate to the aim pursued in storing the information, from the aspect of the given practical opportunity to the applicant of lodging an application for removal of the stored data from the date on which the decision giving rise to their entry in the register ceases to have effect.

THE CIRCUMSTANCES OF CASE OF *TRAJKOVSKI* *AND CHIPOVSKI* AND THE ECHR'S RULING

Having in mind the above, as well as the ECHR's case law, if the Article 8 is chosen as a search criteria through HUDOC database (provides an access to the ECHR's case-law), it can be noted that so far there have been eight Macedonian cases regarding the Article 8 in which a violation was established. One of them is the Case of *Trajkovski and Chipovski* (ECHR, 2020b). In essence, this cases focuses on several aspects of the respect for private life, i.e. disproportionate character of indefinite retention of DNA profiles of convicted persons, blanket and indiscriminate nature of the powers of retention, the lack of consideration of the nature or gravity of the offence or other circumstances, absence of a specific



review of the necessity of data retention, as well as the lack of possibility to request deletion of data.

It is interesting to note that this case was raised by two separate applications, however given their similar factual and legal background - ECHR considered that the applications should be joined. The first applicant was Mr. Jovche Trajkovski (born in 1982; lived in Skopje; Application No. 53205/13 dated 16.08.2013) and the second applicant was Mr. Dimitar Chipovski (born in 1979; lived in Skopje; Application No. 63320/13 dated 04.10.2013). They were both Macedonian citizens, which complained that the regulatory framework on the basis of which the authorities had collected, processed and stored their DNA material was incompatible with the requirements under the Convention's Article 8. In essence, they complained that there had been no legislative framework that clearly regulated procedures regarding the DNA material - to take, use, process, store and delete. Such situation meant that the "quality of law" requirement under the Article 8, was not met by the legislative that was referred by the national authorities.

As for the first applicant Mr. Trajkovski, on February 11, 2010 he was taken to a police station by two police officers, because while he was walking down a street, he was holding a steering wheel lock. In the police station, a mouth swab was taken from him, but police officers did not give him any explanation. Based on the taken sample, the DNA findings were used as evidence against him in the criminal procedure in which he was convicted of aggravated theft (theft of a car radio) and was given a suspended prison sentence.

On 12.04.2010 the Personal Data Protection Directorate ("the Directorate"), dismissed the complaint that was submitted by Mr. Trajkovski, who alleged that the police officers had violated his right to privacy arguing that the cellular material from his mouth had been taken unlawfully (without a court order and without his consent), as well as the police had no legal right to take and retain his DNA material. The Directorate pointed out to several legal acts, like the Law on Personal Data Protection (2005, 2008, 2010, 2011, 2014, 2015, 2016, 2018), the Law on police (2006, 2009, 2012, 2014, 2015, 2016, 2018), and the Rules on police Conduct (2007), and noted that in order to prevent and detect crime, the police were authorised to take, retain and process the personal data of an individual when there was a reasonable suspicion that he/she had committed a punishable crime, as well as to establish the identity of a person on the basis of a DNA sample. The procedure continued in front of the Administrative Court, but once again on June 06, 2012 the applicant's complaint was dismissed, based on the Directorate's arguments and the Law on police. In addition, on January 24, 2014 the Higher Administrative Court upheld the lower court's decision.

Concerning Mr. Chipovski, the second applicant, a mouth swab was taken from him while he was in a police station. Namely, on October 08, 2009 he was



arrested under the allegations of theft, subsequently he was interrogated and was a part of an identity parade. He was convicted of aggravated theft and was given a suspended prison sentence (in 2014 when the procedure was reopened), with a note that the analysis of his DNA material was not submitted as evidence against him. Same as Mr. Trajkovski, on July 21, 2010 the Directorate dismissed his complaint (on May 26, 2010 he complained that the police had violated his right to privacy by taking and processing his DNA material), with an explanation that the police had undertaken investigative measures because he was suspected of committing aggravated theft. So, when the police took a DNA sample from his mouth and afterwards submitted a criminal complaint against him, the police acted in accordance with the law.

An identical decision was made by the Administrative Court. On June 06, 2012 it dismissed the complaint submitted by Mr. Chipovski (he stressed that there was no legislative regulation of the collection, storage and processing of DNA material; no legislation on the use of DNA or the time-limits for storing it; the collection and processing of his DNA had not been justified or necessary because there were other means to establish his identity). In addition, the Higher Administrative Court on March 12, 2013 dismissed his appeal and upheld the lower court's decision that the police had acted in accordance to the law when it collected and processed personal data, i.e. DNA material, since Mr. Chipovski had been suspected of committing a crime.

The ECHR in its ruling noted that DNA profiles clearly constitute data pertaining to one's "private life", and based on the Convention's Article 8 Paragraph 1, their retention amounts to an interference with the right to respect for one's private life. Therefore, ECHR addressed the following questions to the parties (ECHR, 2016):

- Was the interference with the applicants' right to respect for their private life, in respect of taking and storing their DNA material, "in accordance with the law"?
- Was the legislation that was applied in the applicants' cases accessible and sufficiently precise for the purposes of Article 8 of the Convention?
- If so, was that interference "necessary in a democratic society" under the terms of that provision?

Additionally, ECHR asked the Government to provide more details as to the conditions and arrangements for the taking, storing and use of DNA samples in criminal proceedings. Having in mind facts of the case, the given answers from both of the parties, as well as the Macedonian legislation, the ECHR unanimously ruled that there was a violation of the Convention's Article 8. In essence, the ECHR acknowledged the fact that DNA material is personal data, and raised the



question whether its retention represents an interference into the right to private life from the three aspects, i.e.:

- Lawfulness - As for the Macedonian legal framework (Law on Personal Data Protection; Law on Police; Rules on Police Conduct; Law on Criminal Procedure, 2010, 2012), ECHR noted that the retention of DNA material was not very precisely defined, and also observed that it did not find it necessary to decide whether the applicable rules met the “quality of law” requirements within the meaning of Convention’s Article 8 Paragraph 2.
- Legitimate aim - ECHR concluded that the purpose of the retention of DNA material was the detection and prevention of crime. The first aim is to link a particular person to a particular crime, and the second aim is fulfilled by its retention in order to assist in the future identification of offenders.
- Necessary in a democratic society - ECHR addressed the issue whether the retention of the applicants’ DNA material was proportionate and whether it has created a fair balance between the competing public and private interests. Therefore, ECHR pointed out that both of the applicants were convicted, with a note that their DNA samples and DNA profiles derived from those samples were taken in view of the criminal proceedings brought against them on suspicion of aggravated theft (the conviction of the first applicant was based on the DNA findings, which was not the case for the second applicant since his DNA material was not used as evidence against him). As for the national legislation, ECHR concluded that it did not set a specific time-limit for the retention of DNA data of the applicants as convicted persons. In the same line was the Government’s response - DNA profiles were recorded in relevant registers and were retained for a certain time, i.e. until the fulfilment of purpose for which it were taken. ECHR concluded that such provisions can be variously interpreted, and also observed that the Law on Police was amendment in direction that DNA data will be stored in the relevant register permanently. However, such provisions - according to ECHR - had allowed retention period of DNA profiles to be indefinite. In addition, regarding the collection, storage and retention of DNA records there were no criteria or circumstances (nature or gravity of the offence, received a penalty, previous arrests, etc.). Furthermore, the ECHR noted that the police was authorized to delete personal data from the registers, but the law did not define the conditions and procedure under which the data can be deleted, as well as there was no provision provided for the person concerned to initiate a procedure for deletion of data concerning him / her (nature of the offence, age of the person, time that has passed, person’s current personality, etc.).



From the above, ECHR concluded that there was no fair balance between the competing public and private interests, and that the retention of the DNA profiles represented a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society. In that line, ECHR pointed out that powers of retention of the DNA profiles of the applicants (as persons convicted of an offence), were not just blanket with an indiscriminate nature, but also were accompanied with the absence of sufficient safeguards available to the applicants.

CONCLUSION

'Privacy' is generally understood as part of individual existence, free from public attention, in which one is not disturbed or observed by other people. 'Private life' consequently derives from such definition as a wider conception related to personal, intimate, individual space (Saktorová, 2019: 86). Given the tendency of the ECHR to interpret the Convention as a 'living document', its case law has made the concept of private life so broad and 'not susceptible to exhaustive definition', to which DNA profiles as protected personal data have been included (Tuazon, 2021: 4).

Finally, it can be argued that there are two opposite but essential interests. One is human rights and privacy and the other is law enforcement for public safety and security. It is, therefore, important to take appropriate measures for balancing the constitutional guarantee of a right to privacy and other human rights with the government's duty to ensure public safety as well as secure the well-being of the people in their jurisdiction (Parven, 2013: 41). Genetic data, however, can be taken from an individual's remains long after their death and can continue to identify that individual as well as an expanding pool of individuals to whom they were related and, crucially, who are still alive. Genetic data can thus reduce privacy on a long-term basis and can reveal the genetic characteristics and relationships of an expanding group of individuals over successive generations (Costello, 2022: 2).

The above given remarks are in the same line with the ruling in the Macedonian case *Trajkovski and Chipovski*, in which the ECHR established that the applicants' right to respect for private life was violated by the state authorities, especially from the aspect that there were no sufficient safeguards prescribed in the domestic law, as well as from the aspect of the necessary in a democratic society. That is the reason why, the situation in question, was evaluated by the ECHR as imbalance between the public and private interests, implying that Convention's Article 8 has been violated.



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