Trajkovski and Chipovski v. North Macedonia
Respect for private life: Taking, Processing and Retaining DNA Samples

Analysis by Jasmina Dimitrieva, Assistant Professor University Goce Delcev Stip
of the ECtHR judgment „Trajkovski and Chipovski v. North Macedonia“ (application nos. 53205/13 and 63320/13) of 13 February 2020.

Facts of the case

The case concerns collection, use and retention of DNA material of two convicts, whose applications were jointly examined by the European Court of Human Rights (ECtHR). While the findings of the DNA sample were used as evidence against the first applicant (a recidivist) during his trial, the DNA profile was not adduced as evidence against the second applicant during his trial in 2014. Both applicants were found guilty of aggravated theft and sentenced to a suspended prison sentence. The applicants' complaints and appeals to the Personal Data Protection Directorate, the Administrative Court and the Higher Administrative Court were to no avail.

Domestic Law

The Personal Data Protection Act[1] stipulates, *inter alia*, that personal data shall only serve a lawful purpose and shall be kept only until that purpose is fulfilled. The Police Act[2] empowers the police to take, process, destroy and permanently retain DNA material. The Criminal Procedure Act[3] and the Rules of Police Conduct[4] stipulate, *inter alia,* that DNA material can be collected with aim to identify suspects of crimes. The 2014 Instruction on the manner and methods for forensic registration and identification of persons and unidentified corpses of the Ministry of Internal Affairs regulates the taking, processing and storing of DNA samples and profiles in greater detail.

The applicants' complaint before the ECtHR

The applicants complain about a breach of their right to private life guaranteed under Article 8 of the ECHR[5] on the account of the taking, processing and retaining their DNA materials. They challenge the quality of the legislation governing the collection, use, retention and removal of the DNA materials from the database. According to them, the applicable legislation at the time was unclear, imprecise and unforeseeable, while the relevant guidelines were inaccessible. In addition, there were no rules about the retention time of the DNA material, and no sufficient safeguards were put in place against the abuse of the DNA material.

The counter-arguments of the Government

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1 Official Gazette nos. 7/2005, 103/2008, 124/2010, 135/2011, 43/2014, 153/2015, 99/2016 and 64/2018.

2 Official Gazette nos.114/2006, 6/2009, 145/2012, 41/2014, 33/2015, 31/2016, 106/2016, 120/2016, 21/2018 and 64/2018.

3 Official Gazette nos. 150/2010 and 100/2012.

4 Official Gazette no. 149/2007.

5 Article 8 reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Government argues that:

1. The Interference with the private life of the applicants was in accordance with the law that was sufficiently precise and foreseeable. The legislation was subsequently amended and provides a retention time, destruction of the DNA material and clear safeguards against any unlawful use of the DNA material.
2. The law pursued a legitimate aim, that is, detecting and preventing a crime.
3. The measure used (taking of the DNA sample, its processing, use and retention) was proportionate to the legitimate aim sought and enabled the identification of the perpetrators.
4. The applicants' DNA material was not used for any other purpose, and no evidence to the contrary was adduced.

The ECtHR's assessment on the merits of the case

1. **Is there an interference with the right to respect for private life?**

The ECtHR notes that according to its case-law, the retention of the DNA material amounts to an interference under Article 8 para 1 of the ECtHR (S. and Marper v. the United Kingdom ([GC], applications nos. 30562/04 and 30566/04, para 67-77, ECHR 2008). The ECtHR concludes that there is an interference with the applicants' right to respect for private life.

2. **Is the interference lawful?**

The ECtHR notes that the interference with the right to respect for private life of the applicants was based on the Personal Data Protection Act, the Police Act and the Rules on Police Conduct. These pieces of legislation empower the police to take, process, use and store DNA information with aim to establish the identity of a crime suspect, without his/her consent and regardless of the gravity of the offence. The DNA information was to be retained until the purpose of the collection was fulfilled.

The ECtHR considers that the issue whether or not the applicable law meets the "quality of law" requirements (e.g., precision, consistency, foreseeability, accessibility) within the meaning of Article 8 para 2 of the ECtHR (S. and Marper, cited above, para 99) is connected to the broader issue of whether the interference is necessary in a democratic society (see below).

3. **Does the interference pursue a legitimate aim?**

The ECtHR agrees with the Government that the retention of DNA material pursues the legitimate aim of crime detection and prevention, and serves to link a suspect to a committed crime and to identify the perpetrator.

4. **Is the interference necessary in a democratic society?**

The ECtHR recognises the importance of the taking and retention of the DNA material of the applicants (who were convicted for aggravated theft) for crime detection and combating recidivism. Nonetheless, it considers that the retention and storage of the DNA material bears a direct impact on the private-life of the individuals, irrespective of its subsequent use by the authorities. The ECtHR turns to examine whether or not the retention of the applicants' DNA material under the national legislation is proportionate and strikes a fair balance between the competing public interest and private interest of the applicants.

On the basis of the analysis of the domestic law, the ECtHR concludes that the respondent State permits indefinite retention period of the DNA profiles. It notes the absence of any defined

conditions, criteria and procedures, which would further regulate the collection and retention of the DNA data. The ECtHR also notes the absence of legal provisions stipulating the right to a specific review of the necessity of the DNA material retention and the right to request the removal of the DNA-related data from the database.

The ECtHR unanimously found a breach of Article 8 on the account of blanket and indiscriminate nature of the powers of retention of the DNA materials and absence of sufficient safeguards against possible abuse of the DNA – related data. It concludes that the respondent State fails to strike a fair balance between the competing public interest and the private interests of the applicants and that it has overstepped the acceptable margin of appreciation in this regard.

Comment

The right to respect for private life is a complex, multifaceted right guaranteed by Article 8 of ECHR. It foresees a positive obligation for the ratifying states to respect private life of individuals in their territory. The ECtHR case-law defines the notion of private life as broad and non-exhaustive. Private life, *inter alia*, covers multiple aspects of physical and social identity, ethnicity, health situation and means for personal identification (S. and Marper v. the United Kingdom [GC], para 66, cited-above).

The protection afforded by the ECHR Article 8 of private life can be restricted only when the interference is justified under its para 2.[6] First, the interference must be in accordance with law. Second, it is only allowed for achieving one of the legitimate aims enumerated in Article 8 para 2, that is, in the interests of national security, public safety or the economic well-being, 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. Third, the interference must be compatible with a democratic society, meaning that the measure undertaken by the state must not be disproportionate to the legitimate aim sought. It is a fairness balancing test between the public interest (e.g., crime prevention) and private interest (protection of private life). The state must demonstrate the existence of a pressing social need in this regard.

In the instant case, the ECtHR invokes its general principles defined in its landmark judgments, such as S. and Marper v. the United Kingdom [GC], cited-above. In this Grand Chamber judgment (para 112) the ECtHR states that: "… the protection afforded by Article 8 of the ECHR would be unacceptably weakened if modern science techniques were allowed at any cost and without carefully balancing the potential benefits of the extensive use of such techniques against important private-life interests…". Although DNA analysis is considered as the most effective technique for the identification of the perpetrator and elimination of the innocent as suspects, the ECtHR requires the states to use this technique with caution.

In para 119 of the above judgment S. and Marper v. the United Kingdom [GC], the ECtHR has already pronounced itself that DNA profiles must not be stored indefinitely. Moreover, the ECtHR found that the blanket and indefinite retention of DNA profiles failed to strike a fair balance between the competing public and private interests (para 125), much like in the instant case of Trajkovski and Chipovski v. North Macedonia. However, the facts of the former case differ from the latter case, in that the applicants were acquitted or the proceedings against them were discontinued.

In the judgment Trajkovski and Chipovski v. North Macedonia, the ECtHR based its analysis on its prior case law stating that the taking, processing and retention of the DNA profiles must be tailored in accordance with the nature and gravity of the crime and there must be a procedure in place for

6 Van Dijk and others, Theory and Practice of the European Convention on Human Rights, p.537, 1998.

the individuals to request their DNA profiles to be destroyed (Aycaguer v. France, application no. 8806/12 paras 38, 44 and 45). In addition, the ECtHR requires that the domestic law puts in place efficient safeguards to protect the DNA profiles from misuse and abuse (Gardel v. France, application no. 16428/05, para 62).

In the instant case of Trajkovski and Chipovski v. North Macedonia, the ECtHR found that the respondent State has overstepped the margin of appreciation, which according to the ECtHR doctrine is allowed to the ratifying states in view of the local conditions. For the States to remain within the margin of appreciation, which is their space for manoeuvre, the ECtHR requires for the domestic law to include procedural safeguards. Such procedural safeguards were found missing from the legal framework in the instant case.

The judgment Trajkovski and Chipovski v. North Macedonia requires a legislative intervention so that this judgment receives a proper execution. First, the applicable legislation must fulfil the quality of law requirements. All pieces of the applicable legislation must be sufficiently precise and clear, they must be consistent and accessible to the citizens, so that the consequences of the taking of DNA sample are clear and foreseeable. Second, the legislative intervention should take into consideration the general principles and all issues examined by the ECtHR in the above judgment. In particular, in the taking, use, processing and retention of the DNA sample and profile the following should be taken into consideration: the nature and gravity of the crime, the age of the offender/accused, conviction, recidivism or acquittal of the accused, clear deadlines by when the DNA samples and/or profile can be retained depending on the particular circumstances of the case, a procedure to request destruction/deletion of the DNA sample and profile, and effective safeguards against any abuse of the DNA-related data. Although in the instant case, the ECtHR did not examine who had the access to the DNA materials of the applicants, if the access was limited and if the persons with such access were bound by confidentiality, still those points will have to be addressed by any future legislative intervention.