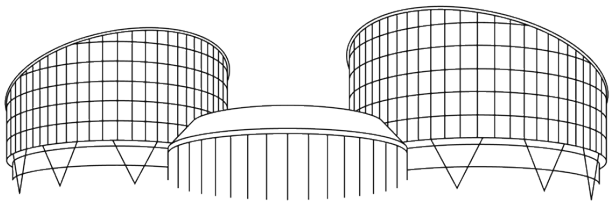

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

DECISION

Applications nos. 7841/08 and 57900/12
Antonio PERUZZO against Germany and
Uwe MARTENS against Germany

The European Court of Human Rights (Fifth Section), sitting on 4 June 2013 as a Chamber composed of:

Mark Villiger, *President,*
Angelika Nußberger,
Boštjan M. Zupančič,
Ann Power-Forde,
André Potocki,
Paul Lemmens,
Helena Jäderblom, *judges,*

and Claudia Westerdiek, *SectionRegistrar,*

Having regard to the above applications lodged on 16 January 2008 by the applicant Peruzzo and on 1 September 2012 by the applicant Martens respectively,

Having deliberated, decides as follows:

THE FACTS

1. The applicant in the first case, Mr Antonio Peruzzo (hereinafter also referred to as "the first applicant"), is an Italian national, who was born in 1957 and lives in Freienbach, Switzerland. He was represented before the Court by the law firm Endriß, Müller, Malek, Phleps & colleagues, Freiburg, Germany.

2. The applicant in the second case, Mr Uwe Martens (hereinafter also referred to as "the second applicant"), is a German national, who was born in 1976 and lives in Nuremberg.

A. The circumstances of the case

3. The facts of the case, as submitted by the applicants, may be summarised as follows.

1. General context of the applications

4. The instant applications relate to decisions by the domestic courts ordering the taking of cellular material from the applicants, who had both been convicted of criminal offences in the past. The measures were ordered pursuant to Article 81g of the Code of Criminal Procedure (*Strafprozessordnung* - see Relevant domestic law below) outside pending criminal proceedings at the prosecution authorities' request with a view to determining the applicants' DNA profiles for identification purposes on the occasion of future criminal proceedings.

5. The courts ordered in each case that in the event the applicants should refuse to voluntarily provide cellular material by means of a saliva sample, a blood sample was to be taken from them by a doctor in accordance with Article 81a § 1 of the Code of Criminal Procedure (see Relevant domestic law below). They further specified that any cellular material obtained from the applicants had to be handed over to the expert in charge of its examination without disclosing the applicants' identity, that the sample was to be used exclusively for the molecular genetic examinations referred to in Article 81g of the Code of Criminal Procedure and that it was to be destroyed without delay once it was no longer required for establishing the applicants' DNA profiles.

2. The proceedings in respect of Mr Peruzzo (application no. 7841/08)

6. In its related decision of 2 February 2007 with respect to Mr Peruzzo the Freiburg District Court noted that the first applicant had been convicted by a judgment of the Karlsruhe Regional Court dated 25 January 2006 of six counts of drug trafficking and been sentenced to an aggregate prison sentence of five years and nine months. On four occasions the crime had been preceded by the offence of illicit importation of drugs and on two occasions the first applicant had in addition instigated the illicit importation of drugs. The District Court further pointed to two previous convictions of Mr Peruzzo in Switzerland for having infringed the Swiss Narcotics Law. It referred in this context to judgments by the Horgen District Court (*Bezirksgericht*) dated 10 February 1982 and by the Schwyz Canton Criminal Court dated 22 April 2005 imposing a prison sentence of two

years and 8 months and a suspended prison sentence of 15 months respectively.

7. In view of the seriousness of the offences committed in the past and the resulting negative criminal prognosis for the first applicant, the Freiburg District Court found that the order to take a DNA sample from him and the execution of such measure were proportionate.

8. By a decision of 25 April 2007 the Freiburg Regional Court, endorsing the Freiburg District Court's decision, dismissed the first applicant's related appeal and held that the conditions for the taking of an DNA sample pursuant to Article 81g § 1 of the Code of Criminal Procedure were met in the instant case. In the Regional Court's opinion the considerable length of the prison sentence imposed on the first applicant by the Karlsruhe Regional Court in 2006 showed that the underlying drug offences constituted serious crimes in the meaning of the said provision. In this connection and in particular in view of the considerable amount of drugs that had been trafficked it was irrelevant that the applicant had "only" dealt with marihuana. The Regional Court further found that there were grounds to assume that criminal proceedings concerning serious offences would have to be conducted against the applicant in the future. The first applicant's negative criminal prognosis followed in particular from the fact that his conviction in 2006 had not only related to a single spontaneously committed offence of drug trafficking but to a series of offences committed over the period from May 2004 to January 2005. Moreover, he had previously been convicted of similar offences in Switzerland. The fact that his first conviction by the Horgen District Court dated back as long as 1982 did not put into question his negative criminal prognosis. It had been demonstrated by the judgment of the Schwyz Canton Criminal Court dated 22 April 2005 that the applicant had committed further drug-related offences in the period from 2002 to 2003 in Switzerland, i.e. prior to his conviction in Germany in 2006. The Regional Court further specified that the applicant's potential expulsion to Switzerland did not have an impact on its assessment of the case. Pursuant to German criminal law crimes of the kind at issue were subject to German jurisdiction even when committed abroad. Moreover, the fact that an individual had his place of residence abroad did not prevent him from committing offences in Germany.

9. By written submissions to the Freiburg Regional Court dated 9 May 2007 the first applicant argued that there was nothing to indicate that he would commit further offences similar to the ones that had been at the origin of his previous convictions. He invoked in particular that the crimes referred to by the Freiburg District Court in its decision of 2 February 2007 dated back several years and that he had already served prison sentences of a considerable duration in this respect. Furthermore, since he was supposed to be expelled to Switzerland after having served half of his prison sentence,

it was unlikely that he would reoffend in Germany and take the risk of having to serve the residual term of his prison sentence as a consequence.

10. On 11 May 2007 the Freiburg Regional Court held that the first applicant's submissions did not provide any additional arguments that would require it to deviate from its previous decision of 25 April 2007.

11. By a decision of 14 August 2007 (file no. 2 BvR 1340/07) the Federal Constitutional Court dismissed the applicant's constitutional complaint without providing reasons.

3. The proceedings in respect of Mr Martens (application no. 57900/12)

12. In its decision of 24 May 2012 with respect to Mr Martens the Nuremberg District Court, referring to the latter's criminal record since 1999, held that the repeated commission of offences by the second applicant in the past had reached a degree of unlawfulness equal to the commission of an offence of considerable significance within the meaning of Article 81g of the Code of Criminal Procedure. In 1999 the second applicant had been convicted by the Nuremberg District Court of having caused bodily harm by dangerous means (*gefährliche Körperverletzung*) and had been sentenced to a suspended prison sentence of seven months. By a judgment of 18 May 2006 the Erlangen District Court had found him guilty of two counts of attempted coercion (*versuchte Nötigung*) and had imposed a fine of 900 euros payable in 60 daily instalments. On 19 March 2008 the same court had convicted the second applicant of a further offence of having caused bodily harm by dangerous means and sentenced him to a suspended prison sentence of one year. Finally, by a judgment of the St. Pölten Regional Court (*Landgericht*), Austria, of 12 May 2011, he had been found guilty of having persistently stalked a woman and had been sentenced to ten months' imprisonment. As regards the two incidents involving bodily harm in 1999 and 2008 the Nuremberg District Court specified that the second applicant had sprayed tear or pepper gas into his respective victims' faces from a short distance leaving one victim with painful skin irritations and the other with an eye inflammation.

13. In the Nuremberg District Court's opinion the manner in which the offences had been committed showed that the second applicant had a tendency to compromise considerably the physical well-being of others and that further serious criminal offences were to be expected from him in the future. The court further found that having regard to the intervals in which the offences had been committed, it could be expected that the second applicant would repeatedly commit further offences similar to the ones that had been at the origin of the criminal proceedings instituted against him in the past. Having regard to the nature of the offences at issue it was conceivable that DNA traces would be left at the scene of a future crime and the measure ordered by the court was thus justified and necessary for the

purpose of establishing identity and gender on the occasion of future criminal proceedings.

14. By written submissions dated 26 May 2012 the applicant appealed the District Court's decision. He maintained in particular that the offences committed by him in the past had not been of a gravity that justified an interference with his personal rights under Article 81g of the Code of Criminal Procedure. He further complained that the District Court had not complied with his request to hear him in person and had not adequately reasoned its decision.

15. By a decision of 5 July 2012 the Nuremberg-Fürth Regional Court dismissed the appeal holding that the conditions for the taking of a DNA sample pursuant to Article 81g of the Code of Criminal Procedure had been clearly met in the instant case and that the District Court's order had consequently been proportionate. The Regional Court held that, firstly, the two incidents involving bodily harm that had been at the origin of the second applicant's convictions in 1999 and 2008 constituted serious offences in the meaning of the said provision. On each of these occasions the second applicant had shown aggressive behaviour towards third persons without having been particularly provoked by the latter. Both offences had been committed in a similar way and demonstrated a significant criminal energy on the part of the second applicant and his potential for aggression.

The Regional Court further recalled that Article 81g of the Criminal Code put the repeated commission of offences on an equal footing with the commission of a serious crime for the purpose of justifying the taking of a DNA sample. The Regional Court pointed out that the legislator had specified in this context that repeated offences in the context of so-called stalking of the type that had been at the origin of the second applicant's conviction by judgment of the St. Pölten Regional Court in 2011, constituted an example where the repeated commission of an offence reached a degree of unlawfulness that was equal to the commission of a serious offence. The second applicant's previous convictions further showed that he had a tenacious and incorrigible character which was also reflected in his partly confused and incomprehensible submissions to the Regional Court in the instant proceedings. Having regard to the second applicant's numerous past convictions, his personality and the circumstances under which the offences had been committed, the Regional Court found that there clearly remained a risk that criminal proceedings concerning similar offences would have to be conducted against him in the future.

16. On 17 July 2012 the Erlangen District Court, at the prosecution authorities' request, revoked the suspension of the second applicant's prison sentence imposed by its judgment dated 19 March 2008 (see paragraph 12 above). With reference to the conviction for stalking by the St. Pölten Regional Court dated 12 May 2011 which had meanwhile become final, the District Court argued that the fact that the second applicant had reoffended

in the course of his probationary period demonstrated that a suspended sentence was not sufficient to counter the risk of recidivism.

17. By a decision of 29 August 2012 (file no. 2 BvR 1934/12) the Federal Constitutional Court declined to consider the applicant's constitutional complaint of 24 August 2012 against the Nuremberg-Fürth Regional Court's decision of 5 July 2012 without providing reasons. It further held that, as a consequence, there was no need to decide on the applicant's request for interim measures.

4. Subsequent developments

18. While the applicants' submissions suggest that the court orders were subsequently executed and DNA samples taken from each of them, neither of the applicants has specified on which date the intervention occurred and whether the samples were obtained by means of saliva or blood samples.

B. Relevant domestic and international law and practice

1. Relevant domestic law and pratice

(a) The Code of Criminal Procedure

19. Article 81a to f of the German Code of Criminal Procedure (*Strafprozessordnung*) provide for the taking of DNA samples for the purpose of convicting suspects within the scope of pending criminal proceedings. By contrast, Article 81g regulates the taking of cellular material from suspects and convicts with a view to determining their DNA profile for use in future criminal proceedings. Article 81g § 1 in its current version, as also applicable at the time of the proceedings at issue, provides for such measure if a person is suspected of having committed or has been convicted of a criminal offence of considerable significance (*Straftat von erheblicher Bedeutung*) or of a crime against sexual self-determination and in the event the nature of the offence or the way it was committed, the personality of the concerned person or other information provide grounds for assuming that criminal proceedings will be conducted against him or her in future in respect of a criminal offence of considerable significance. Under these conditions cellular material may be obtained from the person concerned and subjected to molecular and genetic examination with a view to determining his or her DNA profile (*DNA-Identifizierungsmuster*) or gender for identification purposes in future criminal proceedings.

It is further specified in the provision that the repeated commission of criminal offences may reach a degree of unlawfulness (*Unrechtsgehalt*) that is tantamount to a criminal offence of considerable significance. This alternative ground for the taking of cellular material has been introduced

into Article 81g § 1 by the Act on the revision of forensic DNA-analysis dated 12 August 2005 (*Gesetz zur Novellierung der forensischen DNA-Analyse*, Federal Gazette I, p. 2360). According to the explanatory memorandum to the Act the repeated commission of offences does not automatically reach the same level of significance as a serious crime. An order for the taking of cellular material under this alternative is only admissible in the event the circumstances of a particular case taken together provide evidence that the repeated commission of offences reaches the same degree of unlawfulness as a serious crime in the meaning of the provision. While, for instance, repeated fare evasion for public transport would as a rule not reach such threshold, this could, by contrast, be the case in the event of repeated trespassing in the context of stalking.

20. The second paragraph of Article 81g stipulates that cellular material obtained may be used only for the aforementioned molecular and genetic examination and shall be destroyed without delay once it is no longer required for that purpose. Information other than that required for establishing the DNA profile or the gender may not be ascertained during the examination and tests to establish such information shall be inadmissible. Without the written consent of the person concerned, the taking of cellular material may be ordered only by a court and, in case of imminent danger (*Gefahr im Verzug*), by the public prosecution authorities including the officials assisting it (section 152 of the Courts Constitution Act). Without the written consent of the person concerned, the molecular and genetic examination of cellular material may be ordered only by a court. The related court order shall specify in each case the determining facts relevant to ascertaining the seriousness of the criminal offence at issue, the information giving rise to the assumption that the accused will be the subject of criminal proceedings in the future, as well as an evaluation of the relevant circumstances.

21. Pursuant to Article 81g read in conjunction with the second paragraph of Article 81f of the Code of Criminal Procedure the courts shall appoint the experts responsible for the examination of the DNA material and determination of DNA profiles. The experts have to meet certain requirements with a view to ensuring their independence from the investigating authority as well as their professional integrity. They shall provide for the technical and organisational safeguards to ensure that inadmissible molecular and genetic examinations and unauthorised access to data are excluded. The cellular material to be examined shall be given to the expert with no indication of the name, address or date or month of birth of the data subject.

22. Article 81g § 5 states that the data obtained may be stored at the Federal Criminal Police Office (*Bundeskriminalamt*) and be used in accordance with the relevant provisions of the Federal Criminal Police Office Act (*Bundeskriminalamtgesetz*). Data may only be transmitted for the

purpose of criminal proceedings, preventive aversion of dangers (*Gefahrenabwehr*) or international legal assistance in respect thereof.

23. In the event of the taking of cellular material by means of a blood sample Article 81a of the Code of Criminal Procedure apples *mutatis mutandis*. The taking of blood samples is to be effected by a physician in accordance with the rules of medical science, provided no detriment to the concerned person's health is to be expected. Blood samples or other body cells taken may be used only for the purposes set out in the Code of Criminal Procedure and shall be destroyed without delay as soon as they are no longer required for such purposes.

(b) The Federal Criminal Police Office Act

24. Since 1998 the Federal Criminal Office maintains a national DNA database in which DNA profiles obtained in compliance with Articles 81a to g of the Code of Criminal Procedure are stored. The Federal Criminal Police Office Act contains rules on the storage and use of such DNA profiles. According to section 2 of the Federal Criminal Police Office Act, the Federal Criminal Police Office in its capacity as central agency for police information and intelligence in connection with the prevention and prosecution of criminal offences of federal, international or considerable significance, shall collect and analyse all relevant information for carrying out such task. Pursuant to Section 8 § 5 of the Act a convict's personal data may be saved in files for the use in future criminal proceedings in the event particular circumstances give reason for believing that the person concerned will commit criminal offences of considerable significance. Personal data taken from an individual suspected of having committed a criminal offence have, as a rule, to be deleted in the event the proceedings against the concerned person have been definitely discontinued or once the suspect has been acquitted (section 8 § 3). The data compiled in the national DNA database may be made available to the Federal and *Länder* police authorities and according to section 11 of the Act the public prosecution authorities may retrieve information from the database for the purpose of administering criminal justice. Section 32 of the Federal Criminal Police Office Act stipulates that personal data saved in files have to be deleted once their storage has become inadmissible or in the event the retention of the data is no longer necessary for the performance of the Federal Criminal Police Office's task. While there are no statutorily prescribed maximum time-limits for the retention of DNA profiles, the Federal Criminal Office is obliged to review at regular intervals whether stored personal data are to be corrected or deleted. The time-limits fixed for this purpose shall not exceed ten years with respect to adults, five years with respect to juveniles and two years as regards children while taking into account in each case the purpose for which the data has been stored as well as the nature and gravity of the circumstances of the case.

(c) Case-law of the Federal Constitutional Court

25. By a judgment of 14 December 2000 (2 BvR 1741/99; 2 BvR 276/00 and 2 BvR 2061/00) the Federal Constitutional Court held that the provision of Article 81g of the Code of Criminal Procedure was constitutional. It emphasised that the scope of the provision was limited to the determination of a suspect's or convict's DNA profile for the purpose of establishing identity in future criminal proceedings and that the cellular material obtained in this respect had to be destroyed once the DNA profile was determined. The DNA profile as such did not allow for conclusions to be drawn as regards the personal characteristics of a concerned individual such as his or her hereditary dispositions, character traits or diseases and did not enable for an individual's personal profile to be established. In the Constitutional Court's opinion the core area of personality (*Kernbereich der Persönlichkeit*) that enjoyed absolute protection under constitutional law was thus not affected by the measures permitted under Article 81g.

The Constitutional Court found, however, that the determination, retention and future use of DNA profiles constituted an interference with the constitutionally guaranteed right to self-determination over personal data (*informationelles Selbstbestimmungsrecht*). Any restriction of such right was only permitted if prescribed by law and in the event it was justified by an overriding public interest and complied with the principle of proportionality. The Constitutional Court specified in this respect that while Article 81g was not aimed at the prevention of future criminal offences, it did however facilitate the investigation of future crimes of considerable significance and thus served the proper administration of justice. The Constitutional Court further held that the provision was sufficiently precise to qualify as a law from a constitutional point of view. The term "criminal offence of a considerable significance" could be found in a number of provisions of the Code of Criminal Procedure and had been defined in the established case law of the domestic courts as comprising crimes of medium gravity (*mittlere Kriminalität*) which seriously compromised law and order and were of a nature that could considerably affect the population's sense of legal certainty (*Rechtssicherheit*).

The court finally held that the precautionary ("*vorsorglich"*) taking of evidence permitted under Article 81g did not infringe the principle of proportionality. The taking of such evidence could only be ordered in the event the concerned person had previously been convicted of an offence of considerable significance and in the event there were concrete indications that further proceedings concerning criminal offences of considerable significance were to be conducted against him or her in the future. Moreover, by strictly limiting the use of cellular material collected for the purposes defined in the Article and by making its destruction compulsory once the concerned person's DNA profile was established, the legislator had provided for safeguards to prevent abuse of cellular material obtained.

The Constitutional Court specified that when ordering a measure pursuant to Article 81g the domestic courts had to establish and clarify the circumstances of each particular case. In their assessment they had to take into account the available criminal files and records with respect to the person concerned and had to provide plausible reasons for their assumption that it was likely that the latter would commit further crimes of considerable significance in the future.

26. By a subsequent judgment dated 14 August 2007 (2 BvR 1293/07) the Federal Constitutional further held that the possibility of ordering the taking of a DNA sample in the event the repeated commission of criminal offences showed a degree of unlawfulness similar to the commission of a serious criminal offence - an alternative introduced by the Act on the revision of forensic DNA-analysis dated 12 August 2005 - did not give rise to concerns from a constitutional point of view. With reference to the explanatory memorandum to the said Act (see above paragraph 19), the Federal Constitutional Court noted that this alternative did not allow the domestic courts to automatically conclude that the repeated commission of offences justified an order for the taking of cellular material. By contrast, the domestic courts were obliged to have regard to the specific circumstances of the individual case and in particular the personality of the person concerned and the manner in which the offences had been committed. On this basis they had to proceed to an overall assessment of the degree of unlawfulness reflected in the offences committed and to be expected in the future while always observing the principle of proportionality in their decision-making.

2. Relevant international law and practice

27. For a summary of relevant Council of Europe and European Union legal instruments and an overview of relevant national legislation in a selection of Council of Europe member states, reference is made to the Court's judgment in *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, §§ 41 to 53, ECHR 2008.

COMPLAINTS

28. The applicants complained under Article 8 of the Convention that the taking and retention of DNA material for the purpose of establishing their identity within the scope of potential future criminal proceedings constituted an inadmissible and disproportionate interference with their right to respect for private life, namely their right to informational privacy (*informationelles Selbstbestimmungsrecht*).

The first applicant argued in this connection that the notion of "criminal offences of considerable significance" employed in Article 81g of the Code of Criminal Procedure referred to an undetermined legal concept that was open to interpretation. It was not sufficiently clear and foreseeable what type of criminal offences fell within the ambit of the provision and the resulting interference had thus not been "prescribed by law" within the meaning of Article 8 § 2. It was further questionable whether such interference had pursued a legitimate aim as required by the said provision. In any event, the taking of a "genetic fingerprint" was such a substantial interference with an individual's right to respect for private life that it could only be justified for the purpose of the future prosecution of serious criminal offences. In the first applicant's opinion the importation and trafficking of cannabis products, that only represented minor health hazards and were of limited addictive potential, did not qualify as a serious offence in this respect. The interference with his right to private life resulting from the Freiburg District Court's order had consequently been disproportionate in breach of Article 8 of the Convention.

The second applicant similarly maintained that having regard to the nature of the criminal offences committed by him in the past and the intervals between them, the measure ordered by the Nuremberg District Court could not be justified under Article 81g of the Code of Criminal Procedure. Such measure had consequently been disproportionate in breach of Article 8 § 2 of the Convention.

29. Relying on Article 6 § 2 of the Convention the applicants contended that the domestic courts' assumption, as reflected in their impugned decisions, that the applicants would commit further criminal offences in the future, infringed the principle of the presumption of innocence.

30. The applicants moreover complained that the measures ordered by the domestic courts had been discriminatory and that the underlying court proceedings had been unfair in breach of Article 6 of the Convention. The second applicant invoked in particular that the Nuremberg District Court had not complied with his request to hear him personally. Invoking Articles 3 and 5 § 1 (b) of the Convention the second applicant maintained in addition that the implementation of the domestic courts' decisions without his consent constituted a breach of his right to liberty and physical integrity. He finally submitted that the fact that his constitutional complaint had been to no avail showed that he had not disposed of an effective domestic remedy in respect of the aforementioned complaints in breach of Article 13 of the Convention.

THE LAW

31. Pursuant to Rule 42 § 1 of the Rules of the Court, the Court decides to join the applications given their similar factual and legal background.

A. The applicants' complaints under Article 8 of the Convention

32. The applicants maintained that the taking of cellular material with a view to determining and processing their DNA profiles on the basis of the domestic court's impugned decisions and the retention of the data obtained constituted a disproportionate interference with their right to private life in breach of Article 8 of the Convention, which 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."

In its examination of the complaints the Court starts from the assumption that the said court orders were enforced and the impugned measures implemented (see paragraph 18 above).

33. The Court has previously held that the taking of cellular material and its retention as well as the determination and retention of DNA profiles extracted from cellular samples constitute an interference with the right to respect for private life within the meaning of Article 8 § 1 of the Convention (see *S. and Marper*, cited above, §§ 71 to 77, ECHR 2008; *Van der Velden v. the Netherlands* (dec.), no. 29514/05, 7 December 2006; and *W. v. the Netherlands* (dec.), no. 20689/08, 20 January 2009).

34. Such interference will be in breach of Article 8 of the Convention unless it can be justified under its paragraph 2 as being "in accordance with the law", as pursuing one or more of the legitimate aims listed therein, and as being "necessary in a democratic society" in order to achieve the aim or aims concerned.

1. In accordance with the law

35. According to the Court's established case-law, the expression "in accordance with the law" requires that the impugned measure should have some basis in domestic law, and also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects. A rule is "foreseeable" if it is formulated with sufficient precision to enable any individual – if need be with appropriate advice – to regulate his conduct (see *Rotaru v. Romania* [GC],

no. 28341/95, §§ 52 and 55, ECHR 2000-V). For domestic law to meet these requirements, it must afford adequate legal protection against arbitrariness and accordingly indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise (see *Malone v. the United Kingdom*, 2 August 1984, §§ 66-68, Series A no. 82; *Rotaru*, cited above, § 55; and *Amann v. Switzerland* [GC], no. 27798/95, § 56, ECHR 2000-II). The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed (*Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 84, ECHR 2000-XI, with further references).

36. The Court observes that the orders for the taking of cellular material from the applicants with a view to determining and processing their DNA profiles were based on national law, namely Article 81g of the German Code of Criminal Procedure. While it was not disputed by the applicants that such legal basis for the impugned court orders meets the requirement of accessibility, the first applicant maintained that the conditions under which the provision allows for an order by the domestic courts to take cellular material were not stipulated in a sufficiently precise manner. He contended in particular that the notion of "criminal offences of considerable significance" was open to interpretation and it was thus not foreseeable what type of criminal offences fell within the ambit of the provision.

37. The Court refers in this context to the aforementioned decision of the Federal Constitutional Court dated 14 December 2000 (see paragraph 25 above) stating that the said terminology is to be found in a number of provisions of the Code of Criminal Procedure and that its scope has been defined by the established case law of the domestic courts as comprising crimes of medium gravity which seriously compromise law and order and are of a nature that may considerably affect the population's sense of legal certainty. As regards the taking of DNA samples from recidivist offenders provided for under the second alternative of Article 81g § 1, the Court recalls that domestic law allows for such measure in the event the repeated commission of offences reaches a level of unlawfulness tantamount to a crime of a considerable significance. The law thus refers back to the same notion of crimes of medium gravity and the related definition as set out in the domestic courts' established case law.

38. While this definition may give rise to interpretation itself, the Court considers that it is nevertheless foreseeable for an individual that a conviction for repeated drug trafficking accompanied by illicit importation of drugs triggering a prison sentence of over five years, as was at issue in the first applicant's case, does constitute a crime of at least medium gravity and may consequently give rise to a court order pursuant to Article 81g of the Code of Criminal Procedure. Similar considerations apply with respect

to the second applicant to the extent the order for the taking of his DNA sample was based on the seriousness of offences committed by him in the past such as causing bodily harm by dangerous means. Moreover, as regards the Nuremberg Court's finding that the second applicant's persistent stalking of a woman qualified as repeated commission of an offence under the second alternative of Article 81g § 1 of the Code of Criminal Procedure, the Court notes that it was exactly this type of offence the legislator referred to in the explanatory memorandum to the said provision with a view to illustrating its scope of application (see paragraph 19 above).

39. The Court further observes that the applicants have not raised any grievances as regards the level of precision of Article 81g of the Code of Criminal Procedure taken together with the relevant provisions of the Federal Criminal Police Office Act to the extent these provisions regulate the modalities and duration of storage of DNA profiles obtained as well as their use. It finds that, in any event, these questions are closely related to the issue whether the interference resulting from the impugned measures was necessary in a democratic society and will accordingly examine them within the scope of its related analysis in paragraphs 41 to 50 below.

2. Legitimate aim

40. Concerning the legitimate aim served by the impugned measure, the Court has previously held that the compilation and retention of DNA profiles serve the legitimate aims of the prevention of crime and the protection of the rights and freedoms of others (see *S. and Marper*, cited above, § 100). While the Federal Constitutional Court in its decision of 14 December 2000 held that the measures permitted under Article 81g of the Code of Criminal Procedure did not aim at the prevention of future criminal offences, it did, nevertheless, specify that such measures pursued the purpose of facilitating the investigation of future crimes.

3. Necessary in a democratic society

41. The Court considers that the interferences into the applicants' private lives as a result of the impugned orders of the domestic courts can be said to have been "necessary in a democratic society" for the legitimate aim pursued.

It reiterates that this requirement is met if the interference at stake answers a "pressing social need" and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are "relevant and sufficient". A margin of appreciation must be left to the national authorities in their assessment whether the interference is necessary in this respect. The breadth of such margin varies and depends on a number of factors including the nature of the Convention right in issue, its importance for the individual, the nature of

the interference and the object pursued by the interference. The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights (see *Connors v. the United Kingdom*, no. 66746/01, § 82, 27 May 2004, with further references). Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted (see *Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR 2007-...).

42. The Court has already pointed to the substantial contribution which DNA records have made to law enforcement and the fight against crime in recent years (see *Van der Velden*, cited above, and *S. and Marper*, cited above, § 105). It has on the other hand emphasised the fundamental importance the protection of personal data has for a person's enjoyment of his or her right to respect for private and family life, as guaranteed by Article 8 of the Convention. The Court has specified in this connection that domestic law must afford appropriate safeguards to prevent any such use of personal data as may be inconsistent with the guarantees of this Article. The need for such safeguards is all the greater where the protection of personal data undergoing automatic processing is concerned, not least when such data are used for police purposes. The domestic law should notably ensure that such data are relevant and not excessive in relation to the purposes for which they are stored; and 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. The domestic law must also afford adequate guarantees that retained personal data is efficiently protected from misuse and abuse. These considerations are especially valid as regards the protection of special categories of more sensitive data and more particularly of DNA information, which contains the person's genetic make-up of great importance to both the person concerned and his or her family (see *S. and Marper*, cited above, § 103, with reference to the relevant provisions of the related Council of Europe instruments; and *B.B. v. France*, no. 5335/06, § 61, 17 December 2009).

43. The Court refers in this context to its findings in *S. and Marper* (cited above, § 119), which concerned the retention of DNA records of two applicants who had not been convicted of a criminal offence. In that case the Court was struck by the blanket and indiscriminate nature of the power of retention of DNA records in England and Wales whereby the material could be retained without time-limits and irrespective of the nature or gravity of the offence or the personal circumstances of the individual involved. The Court notes that, however, the instant applications can be distinguished from the *S. and Marper* case under several aspects.

44. Firstly, the present cases deal with the taking, storing and retaining of DNA records obtained from persons who have been convicted of criminal offences. Furthermore, the Court observes that, pursuant to Article 81g § 1 of the Code of Criminal Procedure, DNA material can only be taken

from persons convicted of an offence of a certain gravity or in the event the repeated commission of offences has reached a similar level of gravity and if, in addition, there are grounds to assume that criminal proceedings will have to be conducted against the convict in respect of similar offences in the future. In their assessment whether these requirements for an order to obtain DNA material are met, the domestic courts are obliged to take into account the circumstances of the particular case, the personality of the convict and have to provide reasons for their assumption that criminal proceedings will be conducted against the latter in respect of similar offences in the future.

45. Moreover, pursuant to the said provision any cellular material obtained may be used only for the purpose of establishing a DNA profile. The identity of the individual from whom the DNA sample has been obtained is not disclosed to the experts charged with drawing up the DNA profile who are furthermore under an obligation to take adequate measure with a view to preventing any unauthorised use of cellular material examined. The cellular material itself has to be destroyed without delay once it is no longer needed for the purpose of establishing the DNA profile. Only the DNA profiles extracted from such cellular material may be kept in the Federal Criminal Police Office's data base.

46. In addition, while there are no statutorily prescribed maximum time-limits for the storage of DNA profiles, the Federal Criminal Office is, however, obliged to review at regular intervals whether the continued storage of the data is still necessary for the performance of its task or otherwise to be deleted. The time-limit fixed for this purpose shall not exceed ten years with respect to adults while taking into account in each case the purpose for which the data had been stored as well as the nature and gravity of the circumstances of the case. The Court finds that in view of the fact that DNA profiles may only be obtained from convicts who have committed offences reaching a certain level of gravity, the said time-limit is not unreasonable. It further notes in this connection that the applicants have not contended that they would not have an opportunity to apply for the deletion of data stored on the ground that the statutory requirements for its retention are not or no longer met. A decision by the Federal Criminal Office refusing such request could be made subject to judicial review by the administrative courts in accordance with the general provisions of administrative procedural law.

47. Considering, moreover, that the DNA profiles retained may only be disclosed to the relevant authorities for the purposes of criminal proceedings, the preventive aversion of dangers and for international legal assistance in respect thereof (see paragraph 22 above), the Court is satisfied that Article 81g of the Code of the Criminal Procedure read in conjunction with the relevant provisions of the Federal Criminal Police Office Act provides for appropriate safeguards against blanket and indiscriminate taking and retention of DNA samples and profiles as well as for adequate

guarantees for an effective protection of retained personal data from misuse and abuse.

48. The Court further considers that there is nothing to establish that the domestic courts or authorities in the proceedings at issue have not observed such guarantees. The domestic courts based their finding that the offences committed by the respective applicant had reached the threshold of gravity required by Article 81 g of the Code of Criminal Procedure on the particular circumstances of each case and provided relevant and sufficient reasons for their assumption that criminal investigations with respect to similar offences were to be conducted against them in the future and that, as a consequence, the taking of their DNA samples and retention of the extracted DNA profiles were justified and proportionate.

49. Having regard to the above considerations, the Court finds that the domestic rules on the taking and retention of DNA material from persons convicted of offences reaching a certain level of gravity, as applied in the case of the present applicants, strike a fair balance between the competing public and private interests and fall within the respondent State's acceptable margin of appreciation. Accordingly, the measures ordered by the impugned court decisions at issue constitute a proportionate interference with the applicants' right to private life and can be regarded as necessary in a democratic society.

50. It follows that the complaint is manifestly ill-founded and must be rejected accordingly pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

B. The applicants' complaints under Article 6 § 2 of the Convention

51. The applicants further contended that the domestic courts' assumption, as reflected in their impugned decisions, that criminal proceedings would have to be conducted against them in the future, infringed the principle of the presumption of innocence. They relied on Article 6 § 2 of the Convention which reads as follows:

> "2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

52. The Court reiterates that a "charge", for the purposes of Article 6 of the Convention, may in general be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence" (see, among other references, *G.K. v. Poland*, no. 38816/97, § 98, 20 January 2004) or any measure carrying the implication of such an allegation and substantially affecting the situation of the suspect (see *Šubinski v. Slovenia*, no. 19611/04, § 62, 18 January 2007, and *Eckle v. Germany*, 15 July 1982, § 73, Series A no. 51).

53. The Court notes that in the instant case the impugned decisions by the domestic courts referred to past convictions of the applicants as well as

their future criminal prognosis without implying any allegation that the applicants would be suspected of reoffending.

54. The Court concludes that at the time of the proceedings at issue there is nothing to demonstrate that the applicants were "charged with a criminal offence" in the meaning of Article 6 § 2 of the Convention.

55. It follows that, even assuming the exhaustion of domestic remedies with respect to both applicants, this part of the complaints is also manifestly ill-founded and must likewise be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

C. The remainder of the applicants' complaints

56. Without invoking a particular Article of the Convention, the applicants further maintained that the measures ordered by the impugned court decisions were discriminatory. Relying on Article 6 of the Convention they complained that the underlying proceedings before the Court had been unfair. The second applicant invoked in particular that he had not been heard personally by the District Court. He maintained in addition that the implementation of the courts' decisions without his consent had infringed his right to liberty and physical integrity in breach of Articles 3 and 5 § 1 (b) of the Convention. The second applicant finally submitted that the fact that his constitutional complaint had been to no avail showed that he had not disposed of an effective domestic remedy in respect of his aforementioned complaints in breach of Article 13 of the Convention.

57. The Court has examined the remainder of the applicants' complaints as submitted by them. However, having regard to all material in its possession, the Court finds that, even assuming the exhaustion of domestic remedies, they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention.

58. It follows that this part of the applicants' complaints must equally be rejected as manifestly ill-founded in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court by a majority

Decides to join the applications;

Declares the applications inadmissible.

Claudia Westerdiek
Registrar

Mark Villiger
President