

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

FIFTH SECTION

CASE OF DRELON v. FRANCE

(Applications nos. 3153/16 and 27758/18)

JUDGMENT

Art 8 • Private life • Collection of data on sexual behaviour of potential blood donor based on speculation, and excessive length of data retention by public body • Applicant deferred from blood donation on basis of law requiring contraindication for men who had had sexual intercourse with another man • Relevant and sufficient reasons of blood safety • Mere speculation due to applicant's refusal to provide information on his sexual behaviour during pre-donation medical interview • Margin of appreciation exceeded

STRASBOURG

8 September 2022

FINAL

08/12/2022

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.



In the case of Drelon v. France,

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

Síofra O'Leary*, President*,
Mārtiņš Mits,
Stéphanie Mourou-Vikström,
Lətif Hüseynov,
Arnfinn Bårdsen,
Mattias Guyomar,
Kateřina Šimáčková*, judges*,

and Martina Keller, *Deputy Section Registrar,*

Having regard to:

the applications (nos. 3153/16 and 27758/18) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a French national, Mr Laurent Drelon ("the applicant"), on 8 January 2016 and 8 June 2018;

the decision to give notice of the applications to the French Government ("the Government");

the parties' observations;

Having deliberated in private on 5 July 2022,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The applications concern, first, the collection and retention of personal data reflecting the applicant's presumed sexual orientation and, second, the rejection of his offers to donate blood. The applicant complained of a violation of Articles 8 and 14 of the Convention.

THE FACTS

2. The applicant was born in 1970 and lives in Paris. He was represented by Mr P. Spinosi, a lawyer practising in Paris.

3. The Government were represented by their Agent, Mr F. Alabrune, Director of Legal Affairs at the Ministry of European and Foreign Affairs.

I. THE APPLICANT'S ATTEMPTS TO GIVE BLOOD AND THE COLLECTION OF HIS PERSONAL DATA

4. On 16 November 2004 the applicant attempted to give blood at a donation site operated by the Île-de-France branch of the French blood donation service (*Établissement français du sang* – "the EFS"), a State-run body. During a pre-donation medical interview, he was asked whether he had

ever had sexual intercourse with another man. He refused to answer and, as a result, his offer to give blood was rejected.

5. During the interview, personal data on the applicant were entered into a computer database specific to the organisation. These included his identification and contact details. The database entry also showed that he was subject to a contraindication to blood donation under code "FR08", which was used at the material time for men who had had sexual intercourse with another man (see paragraphs 59 and 60 below).

6. On 9 August 2006 the applicant made another attempt to give blood. He was told that he was listed under code "FR08" and was deferred. At his request he was given a copy of his personal data. A section on applicable "disqualifications" indicated that the contraindication to donation in issue had been registered on 16 November 2004. It also specified that the disqualification was valid until 2278.

7. On 26 May 2016 the applicant tried once again to give blood. To this end, he presented biological tests dated 15 March and 3 May 2016 showing that he was not infected with HIV-1, HIV-2 or HCV. He was again rejected and the doctor who interviewed him merely noted that his previous offers to give blood had been rejected due to his presumed homosexual behaviour.

II. THE CRIMINAL COMPLAINT BY THE APPLICANT WITH AN APPLICATION TO JOIN THE PROCEEDINGS AS A CIVIL PARTY (APPLICATION NO. 3153/16)

8. On 6 February 2007 the applicant lodged a criminal complaint for discrimination, together with an application to join the proceedings as a civil party, with the senior investigating judge of the Paris *tribunal de grande instance*, complaining about the refusals to accept him as a blood donor in 2004 and 2006 and the fact that the EFS had registered his presumed homosexual behaviour.

9. On 22 February 2008 the investigating judge examining the complaint found that these facts did not amount to a criminal offence and refused to open a criminal investigation.

10. On an appeal by the applicant against this refusal, the Investigation Division of the Paris Court of Appeal ruled on 15 September 2009 that the facts complained of did not constitute discrimination within the meaning of Articles 225-1 et seq. of the Criminal Code. The court did, however, find that the investigating judge should have ascertained whether those facts might constitute the offence provided for in Article 226-19 of the Criminal Code, which at the material time criminalised "the act, except in the cases provided for by law, of recording or retaining in electronic format, without the express consent of the person concerned, personal data ... on health or sexual orientation". The court thus set aside the refusal to open a criminal investigation in that respect.

11. As a result, an investigation into the processing of the applicant's data was carried out under the instructions of the investigating judge. In particular, the investigators interviewed the applicant, the donation site manager and the EFS's legal director.

12. In a memorandum drawn up on 9 February 2010 at the instance of the investigators, the EFS confirmed that in 2004 its Île-de-France branch operated a database containing such personal data as contraindications to blood donation. The automatic data processing had been disclosed to the National Commission on Data Processing and Civil Liberties (*Commission nationale de l'informatique et des libertés* – "the CNIL") in advance and implemented on the basis of a regulation published in the regional prefecture's compendium of administrative decisions. The EFS further explained that donor selection criteria at the material time were set out in the medical and technical documentation shared by all its branches. The codes used in the database to designate contraindications (particularly the code "FR08"), however, were specific to the Île-de-France branch. The EFS also specified that the applicant's personal data had been transferred in 2007 to another database operated by the branch as part of the roll-out of a new IT tool. While the codification had changed, a specific code was still used for the contraindication in issue.

13. The investigating judge interviewed the applicant. The EFS and the donation site manager were given the status of "legally assisted witness" (*témoin assisté*).

14. On 21 November 2012 the criminal proceedings were discontinued.

15. The applicant appealed against that decision.

16. In a judgment delivered on 18 April 2013 the Investigation Division upheld the decision. First, it noted that the classification of contraindications to blood donation was provided for in an order issued on 10 September 2003 for the application of Article L. 1223-3 of the Public Health Code, and that the processing of the data in issue had been disclosed to the CNIL on 31 July 2000. It inferred from this that the legislature had intentionally made an exception to the prohibition laid down in Article 226-19 of the Criminal Code and that it was thus not a criminal offence to collect the data in issue.

17. Second, the Investigation Division found that the applicant had been informed in 2004 that data on his sexuality might be retained by the EFS. In that connection, it observed that the health questionnaire that potential donors were asked to fill out prior to their medial interview at the material time ended with the following note:

> "... you are hereby informed that certain information requested from you, in particular in the pre-donation questionnaire and the pre-donation interview, will be recorded in electronic format by the *Établissement français du sang*, as will certain personal information collected during the blood donation itself. ... You have the right to access [these data] and, if they are inaccurate, to have them rectified or deleted."

The Investigation Division further noted that similar information was displayed inside the donation site.

18. The applicant appealed on points of law against the judgment, arguing in particular a violation of Articles 8 and 14 of the Convention.

19. At the applicant's request, a preliminary ruling on constitutionality was sought from the Constitutional Council with respect to Article L. 1223-3 of the Public Health Code and Article 226-19 of the Criminal Code.

20. In its decision of 19 September 2014 the Constitutional Council held that the provisions submitted to it for review were compatible with the Constitution. It pointed out, as a secondary consideration, that it was not the purpose of Article L. 1223-3 of the Public Health Code to make an exception for the offence provided for in Article 226-19 of the Criminal Code, but rather that of section 8 of the Law of 6 January 1978 (see paragraph 37 below).

21. The Court of Cassation then dismissed the applicant's appeal in a judgment of 8 July 2015, giving the following reasons:

> "Although the Investigation Division wrongly cited Article L. 1223-3 of the Public Health Code and the Order of 10 September 2003 ... when finding that the offence provided for in Article 226-19 of the Criminal Code was not applicable in the present case, its decision should not necessarily be overruled, because the matter in issue, as assessed by the judges in the exercise of their unfettered discretion, falls within the scope of section 8(II) 6° of the Law of 6 January 1978, which states that the prohibition under subsection I thereof on the collection and processing of personal data concerning, in particular, individuals' health or sex life does not apply to processing that is (i) required for the purposes of preventive medicine, medical diagnosis, the provision of care or treatment or the management of health services, and (ii) performed by a health professional or another person subject to the obligation of professional secrecy. It follows that, even without Mr Drelon's express consent to the recording or retention of his personal data, the behaviour of the health professionals and facilities of which he complained does not fall within the scope of the offence provided for in Article 226-19 of the Criminal Code, which itself refers to statutory exceptions to the prohibition on recording sensitive personal data in electronic format. ...
>
> ... [T]he Investigation Division did not violate any of the European legislation referred to in the grounds of appeal [and in particular Articles 8 and 14 of the Convention], because the exception to the requirement of obtaining an individual's consent for the recording and retention of personal data relating to health or sexual orientation, pursuant to the provisions of Article 226-19 of the Criminal Code and section 8 of the Law of 6 January 1978 taken together, is a measure that is legitimate, necessary to protect people's health, defined by law with sufficient precision so as to avoid arbitrariness, and suitable as matters stand for ensuring a not unbalanced reconciliation between respect for privacy and protection of public health. ..."

III. ACTIONS CHALLENGING THE ORDERS DEFINING CONTRAINDICATIONS TO BLOOD DONATION (APPLICATION NO. 27758/18)

22. From 2009 onwards, the contraindications to blood donation were defined by the Minister of Health by means of ministerial orders (see

paragraph 61 below). The applicant challenged the list on two occasions, on the basis that it provided for a contraindication to donation for men who had had sexual intercourse with another man.

A. The dispute relating to the rejection of the request to repeal the Order of 12 January 2009

23. The applicant first sought the repeal of the Order of 12 January 2009. The Minister of Health rejected this request.

24. The applicant then brought judicial-review proceedings before the *Conseil d'État* to have the rejection set aside. However, the order in issue was repealed while the proceedings were pending and the *Conseil d'État* noted, in a decision of 18 July 2016, that they had become without object.

B. The application for judicial review of the Order of 5 April 2016

25. By an application of 10 June 2016 the applicant then brought a judicial-review claim asking the *Conseil d'État* to strike down the Order of 5 April 2016, which had modified the selection criteria for blood donors (see paragraph 63 below).

26. The applicant first argued that the contraindication in issue was in breach of Directive 2004/33/EC and the principle of non-discrimination enshrined in Article 21 of the Charter of Fundamental Rights of the European Union, read in the light of Articles 8 and 14 of the Convention and the Court's case-law, and in breach of the constitutional principle of equality. He then asserted that that reason for contraindication to blood donation violated the constitutional principle of the protection of human dignity. In that connection, he claimed that giving blood was an "act of human solidarity" and that deferring people from donation on the grounds of their sexual orientation was stigmatising and demeaning. Lastly, he submitted that that reason for contraindication to donation entailed specific registration of homosexual men who had attempted to give blood, which he considered to be in breach of the rules of constitutional, EU and treaty law protecting the right to respect for private life.

27. On 28 December 2017 the *Conseil d'État* dismissed his claim, giving the following reasons for its decision:

> "5. In accordance with recitals 2 and 24 of Directive 2002/98/EC of the European Parliament and of the Council of 27 January 2003, the Minister of Health must take all precautionary measures when determining contraindications to blood donation in order to minimise any risk of transmission of infectious diseases. Given how serious the consequences of such a transmission to a blood recipient could be, and the need to preserve the doner-recipient trust underpinning the blood donation and transfusion system, the health authorities have a duty to prioritise measures best able to ensure recipients' safety when a risk cannot be ruled out based on the scientific and epidemiological data available. These measures may include selecting blood donors

based on objective risk-exposure criteria, without such selection constituting illegal discrimination against certain potential donors.

The grounds of the applications:

6. Appendix II to the order in issue sets contraindications to blood donation based on the risk for either the donor or the recipient. In terms of the risk of transmitting an infectious agent to the recipient, various situations that may have exposed the potential donor to a sexually transmitted infection are listed, differentiating between several types of sexual behaviour for homosexual and heterosexual individuals of both sexes and, for each hypothesis, defining the appropriate length of the contraindication period following exposure to the risk. In particular, the order repeals former provisions providing for a permanent contraindication for all men who have had sexual intercourse with another man and replaces them, for whole-blood donations, with a twelve-month contraindication as of the last episode of sexual intercourse with another man and, for apheresis plasma donations with a subsequent quarantine period, with a four-month contraindication as of the end of any four-month period in which the donor has had sexual intercourse with more than one male partner – the same length of time as the contraindication period, for all donation types, for people who have had sexual intercourse with more than one partner of the opposite sex.

7. First, the case-file material shows that, based on the work of French public health surveillance body *Institut de veille sanitaire* used by the Minister of Social Affairs and Health, the proportion of individuals infected with human immunodeficiency virus (HIV) among men who have had sexual intercourse with another man may be estimated at 14%, a prevalence some 70 times higher than in the heterosexual population, where the rate is 0.2%. Similarly, the proportion of newly infected individuals in 2012 may be estimated at 1% of men who had had sexual intercourse with another man, a figure some 115 times higher than in the heterosexual population.

8. The case-file material also shows that there is a twelve-day period on average, known as the 'window period', during which an individual may have been infected with HIV but displays undetectable levels of the virus even with the most effective screening tests, which are based on viral genome detection. Similar periods of varying duration are also observed for other sexually transmitted infections. ...

9. Furthermore, an analysis of donations from 2011 to 2013 in which HIV was detected – despite their being made by regular, formerly seronegative donors – revealed that 62% of such individuals were men who had had sex with another man and given blood regardless of the permanent contraindication in force at the time. Based on research conducted notably in Canada and Australia on compliance with contraindications in those countries, it was estimated that the adoption of a twelve-month contraindication in France would have little impact on the transfusion risk observed at the time, which stood at around one infected donation in 3.45 million. However, no data are available to assess compliance with a shorter contraindication period or, where appropriate, the impact thereon of criteria based on a more in-depth analysis of sexual behaviour, such as whether protection was used during intercourse. Such information would have to be assessed during the pre-donation interview and could be experienced as an intrusion into the individual's private life.

...

12. It follows from the foregoing that, given the seriousness of the risk as well as the measures that could reasonably be implemented and the lack of data available to assess the impact of a shorter contraindication period on the risk of transfusion-transmission of HIV and other sexually transmitted infections, the Minister of Social Affairs and

Health, working on the grounds not of sexual orientation but rather of sexual behaviour as provided for in Directive 2004/33/EC, did not take an illegal discriminatory measure by replacing the former permanent contraindication for any man who has had homosexual intercourse with a contraindication, for whole-blood donations, of twelve months as of the last episode of sexual intercourse with another man – a similar period, moreover, to that used by half of the ten European Union member States that have ceased applying a permanent contraindication ... Consequently, the arguments alleging a violation of Articles 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 21 of the Charter of Fundamental Rights of the European Union, the purposes of Commission Directive 2004/33/EC of 22 March 2004, the principles of equality and respect for human dignity, and the provisions of Articles L. 1211-6-1 and R. 1221-5 of the Public Health Code, must be dismissed.

13. Second, contrary to what has been contended, the order in issue neither provides for nor in itself entails the collection or retention of personal data on potential donors rejected due to a contraindication. The argument alleging a violation of the right to respect for private life must therefore also be dismissed."

RELEVANT LEGAL FRAMEWORK AND PRACTICE

28. The legal framework governing personal data protection and blood donor selection will be presented in turn.

I. PERSONAL DATA PROTECTION

A. International law

29. The Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 108, "the 1981 Convention") was ratified by France on 24 March 1983 and entered into force on 1 October 1985. The relevant provisions are as follows:

Article 5 – Quality of data

"Personal data undergoing automatic processing shall be:

a. obtained and processed fairly and lawfully;

b. stored for specified and legitimate purposes and not used in a way incompatible with those purposes;

c. adequate, relevant and not excessive in relation to the purposes for which they are stored;

d. accurate and, where necessary, kept up to date;

e. 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."

Article 6 – Special categories of data

"Personal data ... concerning health or sexual life, may not be processed automatically unless domestic law provides appropriate safeguards ..."

Article 9 – Exceptions and restrictions

"...

2. Derogation from the provisions of Articles 5, 6 and 8 of this Convention shall be allowed when such derogation is provided for by the law of the Party and constitutes a necessary measure in a democratic society in the interests of:

a. ...

b. protecting the data subject or the rights and freedoms of others."

B. European Union law

1. Secondary legislation

30. The relevant provisions of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995 L 281, pp. 31-50, as in force at the material time, provided:

Article 6

"1. Member States shall provide that personal data must be:

... (c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;

(d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified;

(e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. ..."

Article 7

"Member States shall provide that personal data may be processed only if:

(a) the data subject has unambiguously given his consent; or

... (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed ..."

Article 8: The processing of special categories of data

"1. Member States shall prohibit ... the processing of data concerning health or sex life.

2. Paragraph 1 shall not apply where:

(a) the data subject has given his explicit consent to the processing of those data, ...

> 3. Paragraph 1 shall not apply where processing of the data is required for the purposes of preventive medicine, medical diagnosis, the provision of care or treatment or the management of health-care services, and where those data are processed by a health professional subject under national law or rules established by national competent bodies to the obligation of professional secrecy or by another person also subject to an equivalent obligation of secrecy. ..."

31. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119, pp. 1-88, entered into force on 25 May 2018.

32. Moreover, Directive 2002/98/EC of the European Parliament and of the Council of 27 January 2003 setting standards of quality and safety for the collection, testing, processing, storage and distribution of human blood and blood components and amending Directive 2001/83/EC, OJ 2003 L 33, pp. 30-40, contains provisions requiring certain donor selection data to be retained:

Article 18: Eligibility of donors

> "... 2. The results of the donor evaluation and testing procedures shall be documented ..."

Article 24: Data protection and confidentiality

> "Member States ... shall ensure:
>
> (a) that data security measures are in place as well as safeguards against unauthorised data additions, deletions or modifications to donor files or deferral records, and transfer of information; ..."

2. Case-law of the Court of Justice of the European Union ("the CJEU")

(a) The requirement for processed data to be accurate

33. In its *Rijkeboer* judgment of 7 May 2009, the CJEU found that the right to respect for private life, which Directive 95/46/EC was intended to protect, "mean[t] that the data subject [might] be certain that his personal data [were] processed in a correct and lawful manner, ... in particular, that the basic data regarding him [were] accurate and that they [were] disclosed to authorised recipients" (judgment C-553/07, EU:C:2009:293, §§ 46-49).

34. In its Opinion 1/15 of 26 July 2017 on a draft agreement between Canada and the European Union on the transfer and processing of Passenger Name Record data, the Grand Chamber of the CJEU clarified that this requirement was inferred directly from Article 7 of the Charter of Fundamental Rights of the European Union, which enshrined the right to respect for private life (EU:C:2017:592, § 219).

35. In its *Nowak* judgment of 20 December 2017 the CJEU ruled that the assessment of whether personal data were accurate and complete had to be

made in the light of the purpose for which that data had been collected (C-434/16, EU:C:2017:994, § 53).

(b) The data retention period

36. In its judgment of 8 April 2014 in *Digital Rights Ireland and Seitlinger and Others*, the Grand Chamber of the CJEU found that EU legislation requiring that personal data be retained must circumscribe the period of retention for each of the categories of data concerned on the basis of their possible usefulness for the purposes of the objective pursued or according to the persons concerned, based on objective criteria (C-293/13, EU:C:2014:238, §§ 63-64).

C. Domestic law

37. At the material time, the relevant provisions of Law no. 78-17 of 6 January 1978 on data processing, files and civil liberties were as follows:

Section 6

"Only personal data that meet the following conditions may be processed:

1° The data are collected and processed fairly and lawfully;

2° They are collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes. ...;

3° They are adequate, relevant and not excessive with regard to the purposes for which they are collected and any further processing;

4° They are accurate, complete and, where necessary, up to date; ...

5° They are kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected and are processed."

Section 8

"I.- It is prohibited to collect or process personal data ... concerning the health or sex life of data subjects.

II.- In so far as the purpose of the processing so requires for certain categories of data, the prohibition provided for in subsection I shall not apply to the following:

1° Processing for which the data subject has given express consent ...;

...

6° Processing required for the purposes of preventive medicine ... or the management of health services and performed by a health professional or another person who, in the performance of his or her duties, is subject to the obligation of professional secrecy provided for in Article 226-13 of the Criminal Code; ..."

38. This version is taken from the Law of 6 January 1978, which transposed Directive 95/46/EC (see paragraph 30 above) into domestic law.

The Law of 6 January 1978 has since been amended several times. In particular, Law no. 2018-493 of 20 June 2018 brought the legislation into line with Regulation (EU) 2016/679 (see paragraph 31 above).

39. With specific respect to data processing for blood donation, the Order of 10 September 2003 ratifying the regulation of the French Health Care Product Safety Agency (*Agence française de sécurité sanitaire des produits de santé* – "the AFSSaPS") setting the principles of best practices to be adopted by blood transfusion facilities, contained the following provisions:

> **3.1. Donor file**
>
> "Donor identification data are recorded in the electronic donor data file, which includes, in particular, donation history along with the following information:
> - the date, type and number of each donation;
> - any temporary or permanent contraindications to donation, using coding;
> - any reactions in the donor during or after the donation;
> - the results of biological analyses and screening tests performed during previous donations; and
> - where appropriate, data contributing to the donor's medical and biological monitoring.
>
> To ensure these data remain confidential, their content, the way they are used and the personnel authorised to modify or consult them are set out in a procedure.
>
> The file or section thereof made available at the donation venue must contain all information required to ensure donor and product safety.
>
> The donor's file is consulted, checked and completed during each donation."

40. These provisions were cited in the decision of the AFSSaPS's Director General delivered on 6 November 2006.

41. The automatic data processing performed by the EFS was later authorised by the CNIL in decision no. 2011-395 of 8 December 2011, when the data were pooled in a single national database. The decision specifies that one purpose of such processing is to identify "any temporary or permanent medical contraindications by category, any risk of blood-borne or sexually transmitted infectious agents, and any strictly necessary comments relating to such risk".

II. BLOOD DONOR SELECTION

A. International law and practice

1. Publications of the World Health Organization ("the WHO")

42. Resolutions WHA58.13 and WHA63.12, adopted on 23 May 2005 and 21 May 2010 by the World Health Assembly, urge member States to implement stringent criteria for donor selection in order to retain only donors at the lowest risk of carrying a blood-borne pathogen.

43. Furthermore, the WHO published *Guidelines on Assessing Donor Suitability for Blood Donation* in 2012, drawing on the work of a group of experts. Without taking a stance on the deferral from blood donation for men who have had sexual intercourse with another man, it recommends (p. 88):

> "[Permanent deferral] criteria for high-risk sexual behaviours in a particular country or region should be determined and reviewed frequently, based on the residual risk of transfusion-transmitted viral infections, taking into account changes in disease epidemiology, improvements in available technologies for donation testing and on-going research."

2. Council of Europe instruments

44. Recommendation No. R (95) 14 of the Committee of Ministers on the protection of the health of donors and recipients in the area of blood transfusion, adopted on 12 October 1995, reiterates "the importance of good donor selection, avoiding any possible discrimination". It emphasises the need to avoid "donations by persons ... whose behaviour ... is likely to increase the risk of infection for the recipient", referring in particular to the risk of transmission of HIV and hepatitis viruses.

45. In Resolution CM/Res(2008)5 on donor responsibility and on limitation to donation of blood and blood components, adopted on 12 March 2008, the Committee of Ministers stresses the donor's "duty" to be transparent with blood establishments about transfusion risk factors. As a corollary, it places emphasis on the need to keep information provided by the donor confidential and on the donor's "right to withdraw from donation at any time during the procedure ... without any need to explain this decision". It recommends that donor selection be performed "bearing in mind the right of blood recipients to the protection of their health, and the resulting obligation to minimise the risk of transmission of infectious diseases. These rights and obligations override any other considerations, including individuals' willingness to donate blood".

46. Lastly, Resolution CM/Res(2013)3 on sexual behaviours of blood donors that have an impact on transfusion safety, adopted by the Committee of Ministers on 27 March 2013 based on scientific research compiled by a group of experts, observes that "persons engaging in male-to-male sexual acts and sex workers in many European countries are at the upper end of the risk scale for acquiring HIV and other sexually transmitted transfusion-relevant infections". It notes that "currently available epidemiological data do not make it possible to define the precise risk of acquiring a transfusion-relevant infection with respect to donors' individual risky sexual behaviour". On that basis, the Committee of Ministers recommends "[deciding] on a temporary deferral policy for a given risky sexual behaviour only when having demonstrated that this sexual behaviour does not put the donors at high risk of acquiring severe infectious diseases that can be transmitted by blood".

B. European Union law

1. Secondary legislation

47. The preamble to Directive 2002/98/EC of the European Parliament and of the Council of 27 January 2003 setting standards of quality and safety for the collection, testing, processing, storage and distribution of human blood and blood components and amending Directive 2001/83/EC, OJ L 33, pp. 30-40, contains the following recitals:

> "(2) ... In order to safeguard public health and to prevent the transmission of infectious diseases, all precautionary measures during [the] collection [of blood and blood components] ... need to be taken making appropriate use of scientific progress in the detection and inactivation and elimination of transfusion transmissible pathogenic agents."

> "(24) Blood and blood components used for therapeutic purposes ... should be obtained from individuals whose health status is such ... that any risk of transmission of infectious diseases is minimised ..."

48. Articles 18 and 19 of the directive require blood establishments systematically to evaluate eligibility for blood donation based on an examination, including an interview, carried out by a health professional before any donation of blood.

49. Article 29 (d) of Directive 2002/98/EC authorises the European Commission to set the deferral criteria for blood donation and update such criteria based on technical and scientific progress.

50. On that basis, Annex III of Commission Directive 2004/33/EC of 22 March 2004 implementing Directive 2002/98/EC of the European Parliament and of the Council as regards certain technical requirements for blood and blood components, OJ 2004 L 91, pp. 25-39, provides for blood donation deferral in the event of sexual behaviour putting the donor at high risk of acquiring severe infectious diseases that can be transmitted by blood. The deferral may be permanent or temporary, depending on the circumstances (points 2.1 and 2.2.2).

2. Case-law of the Court of Justice of the European Union ("the CJEU")

51. In the *Léger* case (judgment of 29 April 2015, C-528/13, EU:C:2015:288), the CJEU was asked to give a preliminary ruling in a case concerning a decision to defer blood donation based on the Order of 12 January 2009, which at the material time provided for a permanent contraindication for men who had had sexual intercourse with another man (see paragraph 61 below).

52. First, the CJEU considered that Directive 2004/33/EC left member States a margin of discretion when determining what sexual behaviours justified a permanent deferral from blood donation (§ 39).

53. Second, the CJEU noted that a member State might, without infringing the principle of non-discrimination under Article 21 of the Charter of Fundamental Rights of the European Union ("the Charter"), provide for a permanent deferral from blood donation for men who had had sexual relations with another man, where it was established, on the basis of current medical, scientific and epidemiological data, and having regard to the prevailing situation in that State, that such sexual behaviour put those persons at a high risk of acquiring severe infectious blood-borne diseases and that, with due regard to the principle of proportionality, there were no effective techniques for detecting those infectious diseases or, in the absence of such techniques, any less onerous methods than such a contraindication for ensuring a high level of health protection of the recipients (§§ 40-69).

54. In that connection, the CJEU held that it was for the referring court to determine whether a donor selection process based on a more precise identification of sexual behaviour could enable a less onerous contraindication to blood donation than a permanent contraindication for the entire group of men who had had sexual relations with a man (§§ 66-69).

55. Following that judgment, in judgment no. 0903177 of 8 March 2016 the Strasbourg Administrative Court set aside the decision deferring blood donation for Mr Léger. It found that the Order of 12 January 2009, which had been used to justify the decision to defer donation, violated the principle of proportionality enshrined in Article 52 of the Charter by systematically and permanently prohibiting blood donation for men who had had sexual intercourse with other men, without distinction as to donors' individual sexual behaviour or to the period of time since they last had homosexual intercourse. In particular, the Administrative Court considered that there was nothing to prevent the introduction of mechanisms in the blood donor selection process with a view to obtaining targeted and relevant information on risky sexual behaviour by homosexual men.

C. Domestic law and practice

56. Articles 16-3 et seq. of the Civil Code and Articles L. 1211-2 et seq. of the Public Health Code provide that parts and products of the human body may only be collected from a donor acting voluntarily, disinterestedly and anonymously. Article L. 1221-1 of the Public Health Code further provides that "blood transfusion shall be performed in the interests of the recipient and be governed by the ethical principles of voluntary and anonymous donation and lack of personal gain".

57. The EFS is a State-run body under the supervision of the Minister of Health. With regard to the civil population, its responsibilities include blood collection and transfusion-chain safety pursuant to Article L. 1222-1 of the Public Health Code. It performs its duties through a network of regional branches with no legal personality.

58. The regulations governing blood donor selection changed over the course of the events in issue and after the applications were lodged.

59. On 16 November 2004 the legal framework was governed by the Order of 10 September 2003 cited above (see paragraph 39 above). The appendix thereto contained the following provisions:

IV. – DONOR SELECTION
... 1. Pre-donation interview and examination

"Each donation shall be preceded by an interview with and an examination of the potential donor. These two steps are essential for blood safety and seek to identify:
- any condition contraindicating blood collection, to protect the donor;
- any transfusion-transmitted condition, to protect the recipient.

... Donor selection shall be performed by an authorised individual using up-to-date medical and technical documentation."

60. The medical and technical documentation referred to in the order has not been produced by the parties. It is, however, established that at the material time the EFS would permanently defer blood donation for men who reported having had sexual intercourse with another man.

61. The contraindications to blood donation were subsequently defined by the Minister of Health by means of ministerial orders. The first such order was issued on 12 January 2009. It expressly provided for a permanent contraindication to donation for any "man having had sexual intercourse with another man".

62. Article L. 1211-6-1 of the Public Health Code, established by the Law of 7 July 2011 and amended by the Law of 26 January 2016, subsequently clarified:

"No one shall be deferred from blood donation for reasons other than medical contraindications.

No one shall be deferred from blood donation on the grounds of sexual orientation."

63. The blood donor selection criteria were then amended by the Order of 5 April 2016, published in the Official Gazette of 10 April 2016. Appendix II to the order provided, "for men [having had on one or more occasions] sexual intercourse with another man", a temporary contraindication of twelve months as of the last episode of sexual intercourse, for whole-blood or apheresis donations, and a temporary contraindication of four months as of the end of any four-month period in which the donor had had more than one sexual partner, for apheresis plasma donations with a subsequent quarantine period. Article 3 of the order provided: "This order will enter into force three months after its publication in the Official Gazette of the French Republic, with the exception of the selection criteria relating to the risk of infection from the West Nile virus, which will enter into force the day after its publication in the Official Gazette of the French Republic". The relevant provisions therefore entered into force on 10 July 2016.

64. The contraindication period for whole-blood donations was reduced to four months by an order issued on 17 December 2019.

65. That period was ultimately abolished by an order issued on 11 January 2022. While certain types of risky sexual behaviour continue to trigger a deferral from donation under the order, they are now defined irrespective of gender or sexual orientation (with categories such as multiple partners and paid sexual relations).

D. Comparative law material

66. Opinion no. 123 of France's National Ethics Advisory Committee on Life and Health Sciences (*Comité consultatif national d'éthique pour les sciences de la vie et de la santé*), produced by the applicant, states that in March 2015 all European Union member States deferred blood donation for potential donors who had engaged in risky sexual behaviour. However, no single definition of such behaviour was used. Sexual intercourse between men resulted in a permanent deferral in eighteen member States. In the United Kingdom, Sweden, Finland, Slovakia and Hungary, that same sexual behaviour triggered a temporary deferral of one year. Only Italy, Spain and Poland defined risky sexual behaviour without referring to male homosexual intercourse.

67. Outside the European Union, it was noted that Russia had also removed all reference to homosexuality in the definition of contraindications to blood donation. In addition, Canada, Australia, New Zealand, Japan, Brazil, Argentina and South Africa applied temporary deferrals of varying lengths specifically to men who had had sexual intercourse with another man.

68. Furthermore, recent changes could be observed in the law and practices of several Council of Europe member States. Some States had stopped defining contraindications to donation by reference to homosexual behaviour (Greece, Hungary and Lithuania). Others had reduced the length of the relevant temporary deferral (Austria, Denmark, Finland and Ireland) or eliminated such a deferral for homosexual men in a long-term monogamous relationship (Germany, the Netherlands and the United Kingdom).

THE LAW

I. JOINDER OF THE APPLICATIONS

69. Having regard to the similar subject matter of the two applications, the Court finds it appropriate to examine them jointly in a single judgment.

II. THE COLLECTION AND RETENTION OF DATA ON THE APPLICANT'S SEXUALITY

70. In applications nos. 3153/16 and 27758/18 the applicant first complained that the EFS had collected and retained personal data reflecting his presumed sexual orientation. He claimed that there had been an infringement of his right to respect for his private life and, in the processing of his data, discrimination on the grounds of sexual orientation.

71. The Court will examine these two complaints in turn.

A. Alleged violation of Article 8 of the Convention

72. The applicant submitted that the data reflecting his presumed sexual orientation had been collected and retained by the EFS in conditions that breached Article 8 of the Convention, which provides:

> "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 ... for the protection of health ... or for the protection of the rights and freedoms of others."

1. Admissibility

73. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

2. Merits

(a) The parties' submissions

74. The applicant complained that the EFS had registered him as being subject to the contraindication to blood donation applicable at the material time to men who had had sexual intercourse with another man. Disputing the collection and retention of personal data on his presumed homosexual behaviour, the applicant alleged that there had been both an interference with his right to respect for his private life and a breach of the positive obligations under Article 8.

75. With regard to the negative obligations, the applicant argued that the data processing in question had no foreseeable legal basis. In that connection, he pointed to the domestic courts' doubts as to what legal grounds would remove the actions in issue from the scope of the offence provided for in Article 226-19 of the Criminal Code.

76. The applicant also disputed the legitimacy and the necessity of the interference. He claimed that there were no relevant and sufficient reasons to justify retaining the contraindication to donation in issue. In that connection,

he submitted that the registration was intended to enable the application of the permanent contraindication to blood donation for homosexuals in force at the material time, which he argued was discriminatory. He further advanced that the personal data reflected his presumed sexual orientation and were therefore sensitive. He disputed the fact that the data had been collected solely on the grounds of his refusal to answer questions about his sexuality. In addition, he affirmed that the data in issue had been collected without his consent, that they were intended to be retained indefinitely and that there was no effective procedure for rectifying or erasing them. He concluded that no appropriate safeguards were in place for the processing of such sensitive data and that the interference was disproportionate.

77. With regard to the positive obligations, the applicant complained that the respondent State had failed to punish effectively the violations of the right to data protection complained of, particularly under the criminal law.

78. The Government accepted that there had been interference in the applicant's private life owing to the collection and retention of the data in issue. They argued, however, that such data processing was provided for foreseeably and accessibly in Article 226-19 of the Criminal Code and in section 8(II) 6° of the Law of 6 January 1978. They further submitted that the permanent contraindication to blood donation applicable at the material time to men who had had sexual intercourse with another man was clear and that the EFS was consequently required to have an IT system which enabled it to enforce the measure. Lastly, the Government contended that the disputed data processing was necessary to protect public health.

(b) The Court's assessment

(i) General principles

79. The Court reiterates that the retention of data relating to the "private life" of an individual falls within the application of Article 8 § 1 (see *Leander v. Sweden*, 26 March 1987, § 48, Series A no. 116, and *Amann v. Switzerland* [GC], no. 27798/95, § 65, ECHR 2000-II). That broad concept encompasses elements such as gender identification, sexual orientation and sexual life (see, *inter alia*, *E.B. v. France* [GC], no. 43546/02, § 43, 22 January 2008).

80. Such interference will breach Article 8 unless it is "in accordance with the law", it pursues a legitimate aim and achieving that aim is, moreover, "necessary in a democratic society".

81. According to the Court's well-established case-law, the wording "in accordance with the law" requires the impugned measure to have some basis in domestic law that is compatible with the rule of law. That legal basis must be accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – if need be, with appropriate advice – to regulate his or her conduct. 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 v. Romania* [GC], no. 28341/95, § 55, ECHR 2000-V; *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 95, ECHR 2008; and *L.H. v. Latvia*, no. 52019/07, §§ 47-59, 29 April 2014).

82. The Court summarised the applicable principles for examining the necessity of collecting and retaining personal data in the *S. and Marper* case (judgment cited above, §§ 101-04). Such a measure must be proportionate to the legitimate aim pursued and justified by "relevant and sufficient" reasons. The domestic law must also afford "appropriate safeguards" to prevent any such use of personal data as may be inconsistent with the guarantees of Article 8 (ibid., § 103). In this connection, the Court takes into account the stipulations of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data ("the 1981 Convention") (see *Z v. Finland*, 25 February 1997, § 95, *Reports of Judgments and Decisions* 1997-I, and *S. and Marper*, cited above, §§ 103 and 107). To verify whether a measure infringing the principle of personal data protection is "necessary in a democratic society", the Court examines whether it meets any of the requirements listed in Article 5 of that Convention, including minimising stored data, ensuring data are accurate, restricting data use and limiting data retention periods. In particular, the domestic law should ensure that processed 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 (ibid., § 103). Such considerations are especially valid as regards the protection of special categories of more sensitive data referred to in Article 6 of the 1981 Convention (ibid.).

83. With regard more specifically to the requirement that the collected data be accurate and kept up to date, the Court has heard several cases where the authorities retained inaccurate or allegedly inaccurate data (see, in particular, *Cemalettin Canlı v. Turkey*, no. 22427/04, §§ 34-37, 18 November 2008, on the presence of inaccurate information in a police report, and *Rotaru*, cited above, § 36, on the holding by an intelligence service of a register containing incorrect information on the applicant's past). False or incomplete personal data collected and retained by the authorities may make day-to-day life more problematic for the data subject (see *Khelili v. Switzerland*, no. 16188/07, § 64, 18 October 2011) or be defamatory (see *Rotaru*, cited above, § 44). Misuse of such data may be aggravated by non-compliance with certain procedural safeguards provided by domestic law for the protection of the individual's rights (see, for the piecemeal disclosure of inaccurate police-report information to the judicial authorities, *Cemalettin Canlı*, cited above, §§ 42-43).

84. The Court leaves a margin of appreciation to the competent national authorities in such matters; the breadth of this margin 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 (see *S. and Marper*, cited above, § 102). The Court also takes into account whether the consent of the individual was obtained or sought when the intrinsically private information was collected, retained or used (ibid., § 104, and *Avilkina and Others v. Russia*, no. 1585/09, §§ 48-49, 6 June 2013). The Court has thus held that the disclosure of information on HIV carrier status (see *Z v. Finland*, cited above, § 96) and the unlimited retention and use of fingerprint and DNA information for police purposes (see *S. and Marper*, cited above, §§ 104 and 112) performed without the consent of the person concerned call for careful scrutiny on its part.

(ii) Application to the present case

(α) Whether a negative obligation or a positive obligation is in issue

85. The Court reiterates that the main object of Article 8 is to protect the individual against arbitrary interferences by the public authorities. As the EFS is a State-run body (see paragraph 57 above), the Court will examine the complaint from the angle of the negative obligations (see *Libert v. France*, no. 588/13, § 41, 22 February 2018; see also, by contrast, *Bărbulescu v. Romania* [GC], no. 61496/08, §§ 109-11, 5 September 2017, and *Söderman v. Sweden* [GC], no. 5786/08, §§ 78-79, ECHR 2013).

(β) Whether there has been an interference

86. In the present case, the Court notes that personal data showing that the applicant had been attributed a contraindication to blood donation, used under domestic law at the material time for men who had had sexual intercourse with another man, were collected and retained in a database initially operated by one of the branches of the EFS. In the Court's view, that data contained explicit information on the applicant's sex life and presumed sexual orientation. The fact that the contraindication had been registered by a mere reference to a code rather than an explicit description of sexual conduct is not decisive. In addition, any data collected in 2004 were to be retained until 2278. The Court thus considers – and it is also common ground between the parties – that there has been an interference with the applicant's right to respect for his private life.

(γ) Whether the interference had a legal basis

87. The Court notes that section 8(II) 6º of the Law of 6 January 1978, in the version applicable to the dispute, provided for an exception, for medical purposes, to the prohibition under subsection I thereof on collecting and processing data on the health or sex life of individuals. In particular, those

provisions authorised the processing of such data when necessary for the "management of health services" and granted domestic authorities a discretionary power to set up such a database. It remains to be determined whether that legal basis was sufficiently foreseeable and accessible from a blood donor's perspective and whether it provided adequate protection against arbitrary interference.

88. In the Court's opinion, the foreseeability of this legal basis has to be assessed in its legal context. The Court notes that, at the material time, Article 18 of Directive 2002/98/EC required the results of donor evaluation and testing procedures to be documented (see paragraph 32 above). Furthermore, the Order of 10 September 2003 provided for the keeping of an "electronic donor data file" containing "any temporary or permanent contraindications to donation, using coding", in respect of individual donors (see paragraph 39 above). The Court concludes that that legal framework, taken as a whole, defined with sufficient precision the scope of discretion conferred on the domestic authorities and the manner of its exercise and thus enabled the applicant to regulate his conduct, that is, either to pursue or to renounce his offer of donating blood in full knowledge of the consequences. The Court therefore considers that the interference in issue was "in accordance with the law".

(δ) Whether the interference pursued a legitimate aim

89. In the Court's opinion, the interference in issue pursued at least one of the legitimate aims listed in Article 8 § 2, namely the protection of health. In this connection, the Court is mindful of the fact that a large number of people had been contaminated by HIV or by hepatitis viruses through the transfusion of unsafe blood products, in France as in many other Contracting States, before techniques for the detection, inactivation and elimination of pathogens were developed and made widespread. The international legal instruments cited above (see paragraphs 44-54 above) were adopted in response to that major health crisis and pursued the same objective of protecting public health. Moreover, the Court reiterates that the positive obligations arising from Article 2 of the Convention require a regulatory framework under which hospitals have to ensure the protection of their patients' lives by taking the appropriate measures (see *G.N. and Others v. Italy*, no. 43134/05, §§ 80, 85-95, 1 December 2009; *Oyal v. Turkey*, no. 4864/05, §§ 53-54, 23 March 2010; and *Karchen and Others v. France* (dec.), no. 5722/04, 4 March 2008).

(ε) Whether the interference was necessary

90. The Court must first examine whether the interference in issue was justified by relevant and sufficient reasons.

91. On this point, the Government argued that the data in issue had been collected and retained to ensure effective compliance with the contraindication to blood donation in place at the material time for men who had had sexual intercourse with another man. They maintained that the contraindication was not based on sexual orientation, but rather on sexual behaviour that correlated with a high transfusion risk according to various medical and epidemiological studies.

92. The applicant contended, on the contrary, that the interference was not justified by relevant and sufficient reasons. In addition, he complained that the donor selection criterion that led to the collection and retention of the personal data in issue was discriminatory.

93. In the light of the explanations provided by the Government, the documents produced and the international legal instruments cited above (see paragraphs 44-54 above), the Court finds that the collection and retention of personal data relating to the results of blood donor selection procedures, and in particular to any grounds for deferral from donation, contributed to ensuring blood safety. Without it being necessary to investigate whether other donor selection criteria could have been used (see, *mutatis mutandis*, *S. and Marper*, cited above, § 117), the Court is of the view that the collection and retention of the data in issue was based on relevant and sufficient reasons.

94. To assess whether the interference in issue was proportionate and struck a fair balance between the competing public and private interests, the Court must next examine whether the domestic law provided appropriate safeguards.

95. In view of the sensitivity of the personal data in issue, which included indications of the applicant's sexual behaviour and orientation (see paragraph 86 above), the Court considers that it is particularly important to ensure that they meet the quality requirements laid down in Article 5 of the 1981 Convention. It is particularly important for such data to be accurate and, where necessary, kept up to date; to be appropriate, relevant and not excessive in relation to the purposes of the processing; and to be preserved for no longer than is necessary. Moreover, the Court notes that the data in issue, which concerned the applicant's privacy, had been collected and retained without the applicant's explicit consent – a fact which the respondent Government did not dispute. The matter therefore calls for careful scrutiny on the part of the Court (see *S. and Marper*, § 104, and *Z v. Finland*, § 96, both cited above).

96. First, the Court considers that the accuracy of the personal data has to be assessed in the light of the purpose for which they were collected. In the data processing in issue, the purpose of this category of data was to ensure compliance with a specific contraindication to donation, which at the time was permanently prescribed by domestic law. To that end, there had to be a precise and accurate factual basis. However, the applicant was attributed a specific contraindication for men who had had sexual intercourse with another man solely on the ground that he had refused to answer questions

relating to his sex life during the pre-donation medical interview. None of the elements submitted to the doctor's assessment would have allowed such a conclusion to be drawn about his sexual behaviour. It was nevertheless this reason for deferral from donation that was recorded and retained. The Court infers from this that the data collected were based on mere speculation, without any proven factual basis. In this connection, the Court reiterates that the onus was on the authorities to demonstrate the accuracy of the data collected (see *Khelili*, cited above, §§ 66-70). Moreover, the Court notes that the data in question were not updated following the applicant's protests and complaint.

97. In addition, the Court stresses that it is inappropriate to collect personal data relating to an individual's sexual behaviour and orientation on the sole basis of speculation or presumption. Moreover, in order to achieve the objective of blood safety, it would have been sufficient, in the view of the Court, to keep a record of the applicant's refusal to answer the questions relating to his sexuality, as that factor alone would have been sufficient to justify a refusal to allow him to give blood.

98. Second, the Government have not demonstrated that, at the material time, the retention period for the data in issue was regulated in such a way that it could not exceed the time necessary for the purposes of the data collection. The Court notes that at the time the data in issue were collected in 2004, the IT tool used by the EFS provided for their retention until 2278 (see paragraph 6 above), thus making it possible to use them repeatedly. As of 26 May 2016, almost twelve years after their collection, the data relating to the ground of deferral were still in the file. In this connection, the Court emphasises that the data retention period has to be regulated for each of the categories of data concerned and it has to be revised if the purposes of the data collection have changed. In the light of the EFS's consistent practice, the Court notes that the excessive length of the data retention period made it possible for that data to be used repeatedly against the applicant, thus resulting in his automatic deferral from blood donation.

99. In view of the foregoing, the Court finds that the respondent State has exceeded its margin of appreciation in the matter.

100. There has thus been a violation of Article 8 of the Convention on account of the collection and retention of the personal data in issue.

B. Alleged violation of Article 14 in conjunction with Article 8

101. The applicant also argued that the way his data were processed – in accordance with the Court of Cassation's interpretation of Article 226-19 of the Criminal Code in the present case – constituted discrimination on the grounds of his presumed sexual orientation, which he considered a breach of Article 14 of the Convention taken in conjunction with Article 8.

102. In the light of its findings under Article 8, the Court considers that it is not necessary to examine this complaint separately under Article 14 in conjunction with Article 8.

III. THE REJECTION OF THE APPLICANT'S OFFERS TO GIVE BLOOD

103. The applicant's second complaint, in application no. 27758/18, concerned the decisions rejecting his offers to donate blood in 2004, 2006 and 2016.

104. The applicant disputed the foreseeability, the appropriateness and the necessity of the contraindication to donation applicable under domestic law at the material time to men who had had sexual intercourse with another man. He argued that that donor selection criterion targeted the male homosexual population indiscriminately, whereas it should have been defined with consideration to the transfusion risk arising from the potential donor's individual sexual behaviour and to the increasing reliability of the compulsory screening tests performed on each donation. He further complained of discrimination on the grounds of his presumed sexual orientation. He relied on Article 8 of the Convention, taken alone and in conjunction with Article 14.

105. The Court will examine the two complaints together.

A. The parties' submissions as to the admissibility of the complaints concerning a violation of Articles 8 and 14 of the Convention

106. The primary submission of the Government was that the applicant was claiming a right to give blood that Article 8 did not guarantee. They argued that blood donation could only be conceived of as an act of disinterested solidarity and not as a fundamental right. They also advanced that access to blood donation did not fall within the ambit of Article 8, pointing to the ancillary nature of Article 14. The Government thus concluded that those complaints were incompatible *ratione materiae* with the provisions of the Convention.

107. The applicant submitted, on the contrary, that the freedom to give blood was an expression of his right to personal autonomy, his right to make decisions about his own body, the right to self-determination, the possibility of establishing and developing relationships with others and the right to respect for human dignity, rights which were protected by Article 8.

B. The Court's assessment on the admissibility of the complaints concerning a violation of Articles 8 and 14 of the Convention

1. Compliance with the six-month time-limit

108. As a preliminary point, the Court must of its own motion examine whether the complaint was lodged in a timely manner (see, *inter alia*, *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 138, 20 March 2018). It notes that the applicant lodged his complaint, relating to donation deferral measures taken against him on 16 November 2004 and 9 August 2006, through an application on 8 June 2018. The applicant only disputed these measures before the domestic courts as part of his criminal complaint with an application to join the proceedings as a civil party. A final decision on the merits of the case was handed down on 8 July 2015. In so far as it concerns the deferral decisions cited above, this complaint was therefore out of time and must be declared inadmissible pursuant to Article 35 §§ 1 and 4 of the Convention.

2. Other grounds for inadmissibility

109. With regard to the deferral from donation of 26 May 2016, the Court notes that domestic law allowed the applicant to challenge directly any such decisions taken against him before the Administrative Court (see, for example, paragraph 55 above), but he did not do so, preferring instead to lodge, on 10 June 2016, a judicial review claim against the Order of 5 April 2016. The Court also observes that the applicant did not make the argument to the *Conseil d'État* that the provisions of the Convention guaranteed a right or a freedom to give blood. While the Court doubts that all domestic remedies were exhausted, it notes that the respondent Government have not relied on this argument.

110. Furthermore, the Court does not consider it necessary to rule on the applicability *ratione materiae* of the provisions relied on, since the complaints cited above are, in any event, inadmissible as being manifestly ill-founded for the following reasons.

111. The Court observes that the applicant's reasoning essentially sought to challenge the temporary contraindication to blood donation applied to men who had had sexual intercourse with another man, as provided for by the Order of 5 April 2016. The Court notes, however, that the Order of 5 April 2016 did not come into force until 10 July 2016 in respect of the contraindications for potential donors who may have been exposed to a sexually transmitted infection (see paragraph 63 above). It follows that the applicant cannot rely on a violation of Articles 8 and 14 taken in conjunction that is alleged to have stemmed from the implementation, against him, of a regulatory order that had not yet entered into force on the date of the refusal to donate blood that he has challenged before the Court.

112. The Court notes, in addition, that the rejection of the applicant's offer to donate blood on 26 May 2016 resulted from the automatic application by the EFS of a contraindication to donation which had been included in the data processing system since 2004 and which was the result of the collection and retention, under the terms of the Order of 10 September 2003, of data which were demonstrably inaccurate (see paragraphs 7, 96 and 98 above). Indeed, the applicant argued – and the Government did not dispute – that the doctor had merely registered his data in the database in issue during the pre-donation interview on 26 May 2016, without taking any other elements into consideration in the specific circumstances. In the Court's view, this rejection was a repercussion of the previously found violation of Article 8 of the Convention.

113. The Court concludes that, assuming Articles 8 and 14 are applicable, these complaints are manifestly ill-founded and must be dismissed pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

114. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

115. The applicant claimed 50,000 euros (EUR) in respect of alleged non-pecuniary damage.

116. The Government argued that the finding of a violation would constitute in itself sufficient just satisfaction. In the alternative, it considered that the Court should not award the applicant more than EUR 1,000 in respect of any non-pecuniary damage associated with an inability to give blood.

117. The Court finds that the applicant has undoubtably sustained non-pecuniary damage and awards him EUR 3,000 in this respect, plus any tax that may be chargeable on that amount.

B. Costs and expenses

118. The applicant also claimed EUR 12,000 for the costs and expenses incurred in the proceedings before the Court. He supported this claim using two bills presented when the applications were lodged. He specified that he had received free legal assistance before the Court of Cassation and the *Conseil d'État*.

119. The Government left it to the Court's discretion to decide whether the costs and expenses claimed were reasonable.

120. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the relative similarity of the joined applications, the Court considers it reasonable to award the sum of EUR 9,000 for the proceedings before the Court, plus any tax that may be chargeable to the applicant on that amount.

C. Default interest

121. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank plus three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;

2. *Declares* admissible the complaint in applications nos. 3153/16 and 27758/18 concerning the violation of Article 8 of the Convention on account of the collection and retention by the *Établissement français du sang* of personal data reflecting the applicant's presumed sexual orientation, and inadmissible the remainder of the complaints in application no. 27758/18;

3. *Holds* that there has been a violation of Article 8 of the Convention on account of the collection and retention of the applicant's personal data by the *Établissement français du sang*;

4. *Holds* that there is no need to examine separately the admissibility and merits of the complaint concerning the alleged violation of Article 14 of the Convention taken in conjunction with Article 8 on account of how the applicant's personal data were collected and retained;

5. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 9,000 (nine thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in French, and notified in writing on 8 September 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Martina Keller Deputy Registrar	Síofra O'Leary President