



Two trade unionists convicted for having refused to undergo biological testing for inclusion in a DNA database should have lodged an appeal on points of law

In its decision in the case of [Dagregorio and Mosconi v. France](#) (application no. 65714/11) the European Court of Human Rights has unanimously declared the application inadmissible. The decision is final.

The applicants are two trade unionists who took part in the occupation and immobilisation of the SNCM ferry “Pascal Paoli” during the company takeover by a financial operator. The case concerned their refusal to undergo biological testing, the results of which were to be included in the national computerised DNA database (FNAEG). The applicants, having been convicted at first instance and on appeal, did not lodge an appeal on points of law.

The Court emphasised that in the absence of any judicial precedent applicable to the applicants’ situation, there was doubt as to the effectiveness of an appeal on points of law owing to a decision given by the Constitutional Council. The Court considered that it was therefore a point which should have been submitted to the Court of Cassation. The mere fact of harbouring doubts as to the prospects of a given appeal succeeding was not sufficient reason for omitting to use the remedy in question.

Principal facts

The applicants, Felix Dagregorio and Alain Mosconi, are French nationals who were born in 1961 and 1967 respectively and live in Brando and Bastia (France).

Following the takeover of the *Société nationale Corse Méditerranée* (SNCM) by a financial operator, the SNCM’s crews, including Mr Dagregorio and Mr Mosconi in their capacity as representatives of the Union of Corsican Workers, occupied and immobilised the vessel “Pascal Paoli”.

On 2 December 2009 the Marseilles Criminal Court imposed suspended sentences on Mr Dagregorio and Mr Mosconi, of one year’s and six month’s imprisonment respectively, for the apprehension, kidnapping, illegal restraint or unlawful detention of several individuals and usurpation of the command of a vessel.

On the basis of Articles 706-54 and 706-56 of the Code of Criminal Procedure (CCP), Mr Dagregorio and Mr Mosconi were ordered to report for biological testing, intended to identify their DNA. This information was to be included in the national computerised DNA database (FNAEG). Mr Dagregorio and Mr Mosconi refused.

On 19 October 2010 the Bastia Criminal Court sentenced them to one month’s imprisonment. The Bastia Court of Appeal upheld the judgments, finding that “the public authority’s interference in the exercise of the right to respect for private life provided for by the French legislature in accordance with Articles 706-54 to 706-56 of the CCP is not contrary to the provisions of Article 8 of the European Convention on Human Rights”. Varying the sentence on the basis that the offences of which Mr Dagregorio and Mr Mosconi had been convicted in 2009 had not been committed for base motives or in an ordinary criminal context, the Appeal Court fined them one thousand euros.

Mr Dagregorio and Mr Mosconi did not lodge an appeal on points of law, on the basis that there was no chance of such an appeal succeeding.

Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 13 October 2011.

Relying on Article 8 (right to respect for private life), the applicants considered that their conviction for refusing to undergo biological testing amounted to a disproportionate interference with their right to respect for their private life and their physical integrity.

Relying on Article 14 (prohibition of discrimination) read in conjunction with Article 8, they alleged discrimination, emphasising that only individuals suspected or convicted of a certain category of criminal offence were subject to biological testing. Under Article 11 (freedom of assembly and association), they alleged that there has been a violation of their trade-union freedom. Lastly, under Article 14 in conjunction with Article 11, they submitted that the authorities should not have treated them in the same way as the persons targeted by the legislature when the FNAEG had been set up.

The decision was given by a Chamber of seven, composed as follows:

Angelika **Nußberger** (Germany), *President*,
Erik **Møse** (Norway),
Nona **Tsotsoria** (Georgia),
André **Potocki** (France),
Síofra **O’Leary** (Ireland),
Mārtiņš **Mits** (Latvia),
Gabriele **Kucsko-Stadlmayer** (Austria), *Judges*,

and also Milan **Blaško**, *Deputy Section Registrar*.

Decision of the Court

Article 8

The Court noted, in particular, that on 16 September 2010 the Constitutional Council, to which the Court of Cassation had referred a request for a preliminary ruling on constitutionality, had given a decision to the effect that Articles 706-54 to 706-56 of the Code of Criminal Procedure were in conformity with the Constitution, albeit setting out an interpretative reservation. The Constitutional Council had held that it was incumbent on the legislature to make the duration of storage of the personal data in question proportional to the nature and/or seriousness of the offences in question.

The Court deduced that Mr Dagregorio and Mr Mosconi could have appealed to the Court of Cassation for a ruling on the application of the impugned provisions, taking into account the interpretative reservation set out by the Constitutional Council. That reservation referred to an obligation to ensure proportionality in appraising the duration of storage of personal data. However, the applicants had lodged no such appeal.

It transpired that at the material time, following the judgments of the Bastia Court of Appeal, before the time-limit on lodging an appeal on points of law had expired, the Court of Cassation had not yet adjudicated on the question in issue in the light of the interpretative reservation set out by the Constitutional Council. The applicants therefore failed to demonstrate that their remedy had reasonably appeared inadequate and ineffective.

In the Court’s opinion, in the absence of any judicial precedent applicable to the applicants’ situation, there was doubt as to the effectiveness of an appeal on points of law owing to a decision given by the Constitutional Council: it was therefore a point which should have been submitted to the Court of Cassation. The mere fact of harbouring doubts as to the prospects of a given appeal succeeding was not sufficient reason for omitting to use the remedy in question.

The application had to be rejected for non-exhaustion of domestic remedies.

The decision is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.