...

THE FACTS

The applicant, Mr Hendrik Jan van der Velden, is a Netherlands national who was born in 1965 and lives in Dordrecht. He was represented before the Court by Mr G. van Buuren, a lawyer practising in Weert.

A. The circumstances of the case

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

On 22 April 2003 the Roermond Regional Court (*arrondissementsrechtbank*) found the applicant guilty of having committed five bank robberies and of having stolen four cars. It convicted him of extortion and theft by means of breaking and entering, and sentenced him to six years' imprisonment. It further ordered his confinement in a custodial clinic (*terbeschikkingstelling met bevel tot verpleging van overheidswege*). In its decision to issue this order, the Regional Court had regard to two reports drawn up by a neuropsychologist and a psychiatrist, according to whom the risk of the applicant reoffending was high.

In view of the applicant's extortion conviction, and pursuant to section 8 in conjunction with section 2, subsection 1, of the DNA Testing (Convicted Persons) Act (*Wet DNA-onderzoek bij veroordeelden*; "the Act"), the public prosecutor, on 8 March 2005, ordered that cellular material be taken from the applicant – who was at that time detained in a penitentiary institution in Dordrecht – in order for his DNA profile to be determined. A mouth swab was taken from the applicant on 23 March 2005.

The applicant lodged an objection (*verweerschrift*) against the decision to have his DNA profile determined and processed, that is, entered into the national DNA database. He submitted that his DNA profile had never played any role in the investigation of the offences of which he had been convicted. Although it was true that he had threatened to use violence, he had never actually done so. He was therefore of the opinion that his DNA profile could not serve any useful purpose in the prevention, detection, prosecution and trial of criminal offences he might have committed. According to the applicant, the determination and storage of his DNA profile amounted to the imposition of an additional penalty after he had already been convicted, and moreover on the basis of a law which was not

in force at the time of his conviction. He alleged a breach of Article 7 of the Convention. He further relied on the right to respect for his private life as guaranteed by Article 8 of the Convention, arguing that, even having regard to the interests of public order and of the prevention of crime, there was no strict necessity in his case for the authorities to have his DNA profile at their disposal. Finally, there was no single good reason why the applicant had to be distinguished from other persons in the Netherlands who were not required to have their DNA profile entered into the national database. To this extent there was thus discrimination as prohibited by Article 14 of the Convention.

Having heard the public prosecutor and counsel for the applicant, the Roermond Regional Court dismissed the objection on 21 April 2005. It considered that the exception contained in section 2(1)(b) of the Act (see below) did not apply: the applicant had a lengthy criminal record and two confinement orders imposed on him were still in place. It did not follow from the fact that no DNA profile of the applicant had been drawn up in previous investigations that his DNA could not serve any investigatory interests at the present time. Moreover, it could not be maintained that the risk of the applicant reoffending was so negligible that on that basis the compilation and processing of a DNA profile could not possibly serve any useful purpose.

The Regional Court, noting that at the hearing counsel for the applicant had conceded that the obligation to provide cellular material did not constitute a punishment, considered that the applicant could not successfully rely on the principle of *nulla poena sine lege*. It further held in this connection that the impugned measure did not place the applicant in a more disadvantageous position than that to which he had exposed himself when he committed a criminal offence, since the seriousness of the intervention (the manner in which cellular material was taken) was not sufficiently burdensome. Although the entry of a DNA profile in a DNA database might lead to a more speedy prosecution of the applicant in respect of criminal offences (to be) committed by him, this did not justify protecting him against a retroactive application of the Act.

The Regional Court was further of the opinion that the impugned order was not in breach of Article 8 of the Convention. The order had been given in accordance with the law and, bearing in mind that the aim of the Act was to be able to solve more crimes and to prevent recidivism as much as possible, it was necessary in the interests of public safety, the prevention of criminal offences and the protection of the rights and freedoms of others.

Finally, the Regional Court found that there was no question of a violation of the principle of equality, since the Act provided that a DNA profile would be compiled of every convicted person who satisfied the criteria laid down in the Act. The applicant was no worse off than a person whose DNA profile was not included in the database, given that the fact that

perpetrators of criminal offences could be traced sooner if their DNA profile was contained in the database did not constitute an interest worthy of legal protection, and since neither category were allowed to commit criminal offences.

No appeal lay against this decision.

B. Relevant domestic law

The statutory maximum prison sentence is nine years for the offence of extortion, and six years for theft by means of breaking and entering (Articles 317 and 311 of the Criminal Code – *Wetboek van Strafrecht*).

The Criminal Code provides for the following principal penalties (*hoofdstraffen)*: imprisonment, detention, and fine; and for the following additional penalties (*bijkomende straffen*): deprivation of certain rights, forfeiture, and publication of the court judgment. Furthermore, the following measures (*maatregelen*) may be imposed pursuant to the Criminal Code: withdrawal from circulation of seized goods, confiscation of illegally obtained advantage, order to pay compensation, committal to a psychiatric hospital, a TBS order (*terbeschikkingstelling*; see *Brand v. the Netherlands*, no. 49902/99, §§ 23-24, 11 May 2004), and placement in an institution for persistent offenders.

The DNA Testing (Convicted Persons) Act came into force on 1 February 2005.

Section 2(1) of the Act requires the public prosecutor at the Regional Court that has given judgment at first instance to order a sample of cellular material to be taken from a person who has been convicted of an offence carrying a statutory maximum prison sentence of at least four years. Section 8(1) stipulates that the Act applies to persons on whom a custodial sentence or measure had been imposed at the time when the Act came into force, unless the validity of this sentence or measure had already expired at that time.

According to the explanatory memorandum to the Act (*Memorie van Toelichting*; Lower House of Parliament, no. 28,685, 2002-03 session, no. 3), the seriousness of the offence(s) involved justified determining and processing a DNA profile of the convicted person in order to contribute to the detection, prosecution and trial of criminal offences committed by him or her and, if possible, to prevent him or her from committing criminal offences again.

Section 2(1)(b) sets out an exception: no order for sample collection will be made if, in view of the nature of the offence or the special circumstances under which it was committed, it may reasonably be assumed that the determination and processing of the DNA profile will not be of significance for the prevention, detection, prosecution and trial of criminal offences committed by the person in question. It appears from the explanatory

memorandum to this provision that the first exception of subsection (1)(b), relating to the nature of the offence, may apply when a person has been convicted of a crime for the resolution of which DNA investigations can play no meaningful role; perjury or forgery, for instance. The second exception, relating to the special circumstances under which the offence was committed, may apply to a convicted person who is highly unlikely to have previously committed an offence in respect of which DNA investigation might be of use and who will not be able to do so in future, for example due to serious physical injury. It may also apply to the case of a woman who has never had any dealings with the law and who, after having been ill-treated by her husband for years, finally inflicts grievous bodily harm on him or kills him.

Section 2(5) of the Act stipulates that DNA profiles are only to be processed for the purpose of the prevention, detection, prosecution and trial of criminal offences. It further states that rules as to the processing of DNA profiles and cellular material are to be laid down by Order in Council (*algemene maatregel van bestuur*), after the Dutch Data Protection Agency (*College Bescherming Persoonsgegevens*) has been heard. The rules in question are set out in the DNA (Criminal Cases) Tests Decree (*Besluit DNA-onderzoek in strafzaken*). It regulates how and by whom samples are to be taken; how they are to be kept, sealed and identified; how and by whom the DNA profile is to be drawn up; and which authorities are allowed to make use of the data stored in the DNA database. The Decree further lays down rules on the duration of the retention of a DNA profile and cellular material. This depends on the offence of which the individual concerned has been convicted. The data of persons convicted of an offence carrying a statutory sentence of six years or more is retained for thirty years. For less serious offences carrying sentences of up to six years, cellular material and DNA profiles may be retained for a maximum period of twenty years.

If execution of the order for the taking of cellular material so requires, the public prosecutor may issue a warrant for the arrest of the individual concerned (section 4(1)). Clothing worn, and objects carried, by the arrested person may be examined if this is necessary for the establishment of his or her identity. For the same purpose, the prosecutor may also order the detention of the arrested person for two periods of six hours each (outside the hours between 12 midnight and 9 a.m.). Once the identity of the arrested convicted person has been established, he or she may be detained for a maximum of six hours in order for the cellular material to be taken (section 4(1), (5) and (6)).

The individual concerned may lodge an objection against the determination and processing of his or her DNA profile with the Regional Court within fourteen days after the sample has been taken or after he or she has been served with the notification, required by section 6(3) of the Act,

that sufficient cellular material has been collected for a DNA profile to be determined and processed (section 7(1)).

COMPLAINTS

1. The applicant complained under Article 7 of the Convention that the order given by the public prosecutor, the taking of a sample of cellular material and the storage of the DNA profile derived therefrom in the DNA database had amounted to an extra penalty which it had not been possible to impose at the time he committed the offences of which he was convicted.

2. He further complained that the impugned measure infringed Article 8 of the Convention, in that it constituted an unjustified interference with his right to respect for his private life.

3. Finally, the applicant argued that he had been the victim of discrimination as prohibited by Article 14 of the Convention.

THE LAW

1. The applicant complained that, after his conviction and sentencing, a further penalty – not available at the time he committed the offences – was imposed on him following the entry into force of the DNA Testing (Convicted Persons) Act. He relied on Article 7 of the Convention which, in so far as relevant, provides as follows:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> ..."

The question may arise whether the applicant can be said to have exhausted domestic remedies as required by Article 35 § 1 of the Convention. This requirement entails that complaints intended to be made subsequently at the international level be raised, at least in substance, at the domestic level (see, among other authorities, *Fressoz and Roire v. France* [GC], no. 29183/95, § 37, ECHR 1999-I). While it is true that the applicant, in the proceedings before the Roermond Regional Court, argued that the order imposed on him contravened Article 7 of the Convention, the Court nevertheless notes that in the course of the hearing before that court, his representative conceded that the measure at issue did not constitute a punishment. However, the Court considers that it is not necessary to

determine this issue, since the complaint is in any event inadmissible for the following reasons.

The Court notes that the DNA Testing (Convicted Persons) Act came into force after the applicant had committed the offences for which he was convicted and sentenced. The only relevant question is, therefore, whether the order to provide cellular material and the compilation and storage of the applicant's DNA profile can be considered a "penalty" within the meaning of the second sentence of Article 7 § 1 (see *Adamson v. the United Kingdom* (dec.), no. 42293/98, 26 January 1999).

The Court reiterates that the concept of "penalty" in Article 7 of the Convention is an autonomous concept: it is for the Court to determine whether any particular measure is a "penalty". The second sentence of Article 7 § 1 indicates that the starting point of such a determination is whether the measure in question was imposed following conviction of a "criminal offence". Other relevant factors are the characterisation of the measure under domestic law, its nature and purpose, the procedures involved in its making and implementation, and its severity (see *Welch v. the United Kingdom*, 9 February 1995, §§ 27-28, Series A no. 307-A).

As already noted above, there is a clear link in the present case between the conviction and the impugned measure: the provisions of the Act automatically applied to the applicant because, at the time of the entry into force of the Act, he was serving a sentence following his conviction of a criminal offence carrying a statutory maximum prison sentence of at least four years.

As to the domestic characterisation of the impugned measure, the Court notes that a separate law, the DNA Testing (Convicted Persons) Act, was enacted in order to allow for DNA testing of convicted persons to take place. Although this element is not by itself sufficient to conclude that DNA testing as prescribed in the Act is not characterised as belonging to the realm of criminal law, it is nevertheless to be noted that an order for DNA testing to be carried out is not listed among the penalties and measures provided for in the Criminal Code (see "Relevant domestic law" above).

The Court further observes that the applicant has not indicated to what extent the measure has a "punitive" nature or purpose under Article 7, other than that it was imposed following a criminal conviction. It notes in this context that the aim of the Act, as set out in the explanatory memorandum, is "the prevention, detection, prosecution and trial of criminal offences" – that is, criminal offences that the convicted person has previously committed or may commit in the future, and not the particular criminal offence of which he or she was convicted. Having regard to the stated aim of the Act and also to the nature of the Act's requirements, the Court considers that the purpose of the measure in question is to assist in the solving of crimes, including bringing their perpetrators to justice, since, with the help of the database, the police may be able to identify perpetrators

of offences faster, and to contribute towards a lower rate of reoffending, since a person knowing that his or her DNA profile is included in a national database may dissuade him or her from committing further offences. The Court considers that, seen in this light, the Act merely employs the applicant's conviction as a criterion by means of which he could be identified as a person who has shown himself capable of committing an offence of a certain severity, rather than that the measure in question is to be seen as intending to inflict a punishment upon him in relation to the particular offences of which he has been convicted.

As for the procedures involved in the imposition of the order and its implementation, the Court accepts that it was imposed on the applicant by a public prosecutor, that is, an official belonging to the criminal-justice system. Nevertheless, the order was imposed as a matter of law, with no additional procedure, following conviction of an offence carrying a statutory maximum prison sentence of at least four years. Beyond the requirement to provide cellular material, no further procedures were involved in the implementation of the order on the part of the applicant. It is moreover to be noted that in case of a failure to comply with the order, the Act provides for the arrest of the person concerned and for his or her detention for a limited period in order for his or her identity to be established and cellular material to be obtained. There is thus no question of the original sentence, imposed at the time of the conviction which rendered the convicted person liable to DNA testing pursuant to the Act, being increased (see *Welch*, cited above, § 14).

Finally, as to the severity of the measure imposed, the Court reiterates that the severity of a measure is not decisive (ibid., § 32). In any case, it does not find that the obligation to provide cellular material can, in itself, be regarded as severe.

Overall, the Court considers that, given in particular the way in which the measure imposed by the Act operates completely separately from the ordinary sentencing procedures, and the fact that it does not, ultimately, require more than a mouth swab from the applicant, it cannot be said that the measure imposed on him amounted to a "penalty" within the meaning of Article 7 of the Convention.

It follows that Article 7 is not applicable in the present case, so that this part of the application is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3.

2. The applicant also alleged a violation of Article 8 of the Convention, which, in so far as relevant, provides as follows:

> "1. Everyone has the right to respect for his private ... life ...
>
> 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."

While the applicant conceded that the measure was in accordance with the law and served a legitimate aim, he argued that it was not necessary in a democratic society, given that DNA material or his DNA profile had never played a role in the investigation, prosecution or trial of criminal offences committed by him. The measure was therefore disproportionate.

The Court should first consider whether the impugned measure amounted to an interference with the rights protected by Article 8 since, if this is not the case, there is no need for a justification of the measure. As far as the taking of a mouth swab in order to obtain cellular material from the applicant is concerned, the Court accepts that this amounted to an intrusion on the applicant's privacy. As regards the retention of the cellular material and the subsequently compiled DNA profile, the Court observes that the former Commission held that fingerprints did not contain any subjective appreciations which might need refuting, and concluded that the retention of that material did not constitute an interference with private life (see *Kinnunen v. Finland*, no. 24950/94, Commission decision of 15 May 1996, unreported). While a similar reasoning may currently also apply to the retention of cellular material and DNA profiles, the Court nevertheless considers that, given the use to which cellular material in particular could conceivably be put in the future, the systematic retention of that material goes beyond the scope of neutral identifying features such as fingerprints, and is sufficiently intrusive to constitute an interference with the right to respect for private life set out in Article 8 § 1 of the Convention.

The Court next reiterates that, according to its settled case-law, the expression "in accordance with the law" not only requires that the impugned measure should have some basis in domestic law, but 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, *inter alia*, *Rotaru v. Romania* [GC], no. 28341/95, §§ 52 and 55, ECHR 2000-V).

It is true that at the time the applicant committed the offences of which he was convicted, the DNA Testing (Convicted Persons) Act had not yet come into force. Nevertheless, there is no suggestion that the criminal-law provisions which were in force at that time were not sufficiently clear for the applicant to be aware that the acts he was committing constituted criminal offences and to enable him to regulate his conduct. By the time the interference with the applicant's right to respect for his private life took place, the Act had come into force, and the measure in question is set out in clear terms under the Act. The Court is therefore satisfied that the impugned measure was "in accordance with the law".

The Court further has no difficulty in accepting that the compilation and retention of a DNA profile served the legitimate aims of the prevention of crime and the protection of the rights and freedoms of others. This is not altered by the fact that DNA played no role in the investigation and trial of the offences committed by the applicant. The Court does not consider it unreasonable for the obligation to undergo DNA testing to be imposed on all persons who have been convicted of offences of a certain severity. Neither is it unreasonable for any exceptions to the general rule which are nevertheless perceived as necessary to be phrased as narrowly as possible in order to avoid uncertainty.

Finally, the Court is of the view that the measures can be said to be "necessary in a democratic society". In this context it notes in the first place that there can be no doubt about the substantial contribution which DNA records have made to law enforcement in recent years. Secondly, it is to be noted that while the interference at issue was relatively slight, the applicant may also reap a certain benefit from the inclusion of his DNA profile in the national database in that he may thereby be rapidly eliminated from the list of persons suspected of crimes in the investigation of which material containing DNA has been found.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

3. Finally, the applicant complained that the measure at issue constituted discrimination in that there was no good reason why he should be treated differently from other persons in the Netherlands who were not obliged to have their DNA profile determined and included in a national database. He relied on Article 14 of the Convention, which reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The Court reiterates that, for the purposes of Article 14, a difference in treatment between persons in analogous or relevantly similar positions is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Moreover, the Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see *Camp and Bourimi v. the Netherlands*, no. 28369/95, § 37, ECHR 2000-X).

The Court observes that it does not appear that the applicant was treated any differently from other persons convicted of an offence carrying a statutory maximum prison sentence of at least four years and deprived of their liberty in connection with that conviction at the time the Act came into force.

Even if it were accepted that the applicant's situation was analogous or relevantly similar to that of persons who do not have to undergo DNA testing, and that the different treatment to which he was subjected was based on the fact that he was a convicted person, the Court is of the opinion that the difference of treatment at issue was justified. In this context it has regard to the aim of the DNA testing of a specific category of convicted persons, as described above (see "Relevant domestic law" above).

It follows that this complaint is likewise manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.