



A conviction for refusing to be included in the national computerised DNA database is contrary to the right to respect for private life

In today's **Chamber** judgment¹ in the case of [Aycaguer v. France](#) (application no. 8806/12) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 8 (right to respect for private life) of the European Convention on Human Rights.

The case concerned the applicant's refusal to undergo biological testing, the result of which was to be included in the national computerised DNA database (FNAEG).

The Court firstly observed that on 16 September 2010 the Constitutional Council had given a decision to the effect that the provisions on the FNAEG were in conformity with the Constitution, subject *inter alia* to "determining the duration of storage of such personal data depending on the purpose of the file stored and the nature and/or seriousness of the offences in question". The Court noted that, to date, no appropriate action had been taken on that reservation and that there was currently no provision for differentiating the period of storage depending on the nature and gravity of the offences committed.

Secondly, the Court ruled that the regulations on the storage of DNA profiles in the FNAEG did not provide the data subjects with sufficient protection, owing to its duration and the fact that the data could not be deleted. The regulations therefore failed to strike a fair balance between the competing public and private interests.

Principal facts

The applicant, Jean-Michel Aycaguer, is a French national who was born in 1959 and lives in Ossès (France).

On 17 January 2008 Mr Aycaguer took part in a protest organised by an agricultural trade union and a mutual-based land alliance on the occasion of a professional meeting in the *département* of Pyrénées-Atlantiques. This event was held in a tense political and trade-union context. At the end of the meeting scuffles broke out between the demonstrators and the gendarmerie.

Mr Aycaguer was placed in police custody and brought before the Bayonne Criminal Court, charged with intentional violence not entailing total unfitness for work against a public servant person and using or threatening to use a weapon, in this instance an umbrella. Mr Aycaguer was sentenced to two months' imprisonment, suspended.

On 24 December 2008, following a request from the prosecutor's office, Mr Aycaguer was ordered to undergo biological testing, on the basis of Articles 706-55 and 706-56 of the Code of Criminal Procedure. On 19 May 2009 he was summoned to appear before the criminal court for failing to provide a biological sample and on 27 October 2009 the Bayonne *tribunal de grande instance*

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day. Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

ordered him to pay a fine of 500 euros. The Pau Court of Appeal upheld that judgment. Mr Aycaguer lodged an appeal on points of law, which was dismissed.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private life), Mr Aycaguer alleges that there has been a breach of his right to respect for his private life on account of the order to provide a biological sample for inclusion in the FNAEG and the fact that his refusal to comply with that order has resulted in a criminal conviction

The application was lodged with the European Court of Human Rights on 20 January 2012.

Judgment was given by a Chamber of seven judges, 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),

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

Decision of the Court

Article 8

The Court pointed out that the mere fact of storing data on a person’s private life amounted to an interference within the meaning of Article 8. DNA profiles contained a huge amount of unique personal data.

From the outset the Court specified that it was fully aware that in order to discharge their duty to protection of the public, the national authorities had to maintain databases which very effectively helped to suppress and prevent specific offences, and in particular sex offences, which was why the FNAEG had been set up.

The Court noted that Mr Aycaguer had not so far been included in the FNAEG because he had refused to undergo biological testing as required by law and that he had been convicted on that basis.

Although the interference was prescribed by French law and pursued a legitimate aim, it should be noted that pursuant to Article R. 53-14 of the Code of Criminal Procedure, the duration of storage of DNA could not exceed forty years in the case of persons convicted of offences which the Government considered to display “a specific degree of seriousness”. The Court noted that those “forty years” in principle constituted a maximum period which should have been adjusted by a separate decree. Since no such decree was ever issued, the forty-year period is, in practice, treated as equivalent to a norm rather than a maximum.

The Court went on to observe that on 16 September 2010 the Constitutional Council issued a decision to the effect that the provisions relating to the impugned computer file were in conformity with the Constitution, subject *inter alia* to “determining the duration of storage of such personal data depending on the purpose of the file stored and the nature and/or seriousness of the offences in question”. The Court noted that, to date, appropriate action had been taken on that reservation. It observed that no differentiation was currently provided for depending on the nature and/or

seriousness of the offence committed, despite the major disparity in the situations potentially arising, as witness the case of Mr Aycaguer. The latter's actions had occurred in a political and trade-union context and merely concerned hitting unidentified gendarmes with an umbrella. Such offences were very different from other very serious offences such as sex offences, terrorism, crimes against humanity or trafficking in human beings.

As regards the deletion procedure, this only applied to suspects, not convicted persons such as Mr Aycaguer. The Court considered, however, that convicted persons too should be entitled to apply for the deletion of their stored data.

The Court further considered that, owing to its duration and the lack of a possibility of deletion, the current regulations on the storage of DNA profiles in the FNAEG did not provide the data subject with sufficient protection and therefore did not strike a fair balance between the competing public and private interests.

Lastly, the Court found that the respondent State overstepped its margin of appreciation in this sphere. Mr Aycaguer's conviction for having refused to undergo biological testing the result of which was to be included in the FNAEG amounted to a disproportionate infringement of his right to respect for private life, and therefore could not be deemed necessary in a democratic society.

There had therefore been a violation of Article 8 of the Convention.

[Just satisfaction \(Article 41\)](#)

The Court held that France was to pay the applicant 3,000 euros (EUR) in respect of non-pecuniary damage and EUR 3, 000 in respect of costs and expenses.

The judgment 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.