SUPREME COURT OF NORWAY

J U D G M E N T

given on 26 June 2019 by the Supreme Court composed of

Justice Bergljot Webster
Justice Wilhelm Matheson
Justice Per Erik Bergsjø
Justice Wenche Elizabeth Arntzen
Justice Sven-Jørgen Lindsetmo

HR-2019-1226-A (case no. 19-014740SIV-HRET)
Appeal against Borgarting Court of Appeal's judgment 14 November 2018

A	(Counsel John Christian Elden)
v.	
The State represented by the Ministry of Justice and Public Security	(The Office of the Attorney General – Counsel Knut-Fredrik Haug-Hustad)

(1) Justice **Bergsjø:** The case concerns the validity of a decision to retain the DNA profile of a person convicted of tax fraud. The question is whether such retention is a disproportionate interference with his private life under Article 8 of the European Convention on Human Rights (the Convention).

(2) On 13 November 2012, A was sentenced to one year and six months of imprisonment, of which six months were suspended, for violations of the Tax Assessment Act. In addition, he was sentenced to pay a fine of NOK 225 000. Both A and the Public Prosecution Authority appealed, but the judgment became legally binding after A withdrew his appeal.

(3) A was primarily convicted of tax evasion during the period 2001–2006. In its reasoning, the District Court argued that A had deliberately underreported share capital gains of around NOK 4.7 million and net wealth just exceeding NOK 4.5 million. The tax advantage is estimated to around NOK 1.5 million in the form of reduced income tax and NOK 53 000 in the form of reduced net wealth tax. A was also convicted of having contributed to a partner's underreporting of an excess of NOK 700 000 during the period 2003–2006. Because his partner carried out a voluntary disclosure and thus avoided punishment, this amount was not taken into account in the sentencing of A. Finally, A was convicted of having contributed to three co-workers in Eltek underreporting a total of NOK 425 000 in 2002.

(4) On 31 October 2013, Økokrim (the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime) decided that A's DNA profile was to be "retained in the identity database (the DNA database) in accordance with instructions from the Director of Public Prosecutions of 1 October 2013". A did not receive the decision until in April 2016, after which he submitted a complaint to the Director of Public Prosecutions. The complaint was dismissed. In the decision of 21 June 2016, which is being reviewed in this case, the Director of Public Prosecutions gave the following reason for the dismissal:

> **"The judgment against A was given in 2012 and became legally binding in the same year. The assessment of whether he was to be registered in the DNA database must be made according to the guidelines applicable at that time (provided in a letter of 15 August 2008), see guidelines in a letter of 17 October 2013 item I, final paragraph. The threshold for retention under the previous guidelines was somewhat higher than that under the current guidelines, but so that any person sentenced to unconditional imprisonment for more than 60 days would be registered, see item III.2.2. A is sentenced to one year of unconditional imprisonment, and it follows from both former and current guidelines that he is to be registered."**

(5) In the decision, the Director of Public Prosecutions also discussed the application of Article 8 of the Convention. He stated that the guidelines of 15 August 2008 established a threshold for retention which, in his opinion, was not in conflict with Article 8. He also gave the following comment to the Grand Chamber ruling by the European Court of Human Rights 4 December 2008 *S. and Marper v. the United Kingdom*:

> **"The ruling … provides guidelines on factors and considerations to be balanced against each other in the assessment of whether the measure is regarded as 'necessary in a democratic society'. These are taken into account in the assessment of Norwegian legislation. The said case concerns retention of fingerprints and DNA profile, as well as storage of biological material, subsequent to criminal cases that had ended with acquittal and charges dropped, respectively, and the individual balancing that was made have thus only limited relevance to Norwegian rules on DNA retention. The Director of Public Prosecutions finds that statements in this ruling do not imply that it is incompatible with Article 8 of the Convention**

to database in the DNA database persons who have been sentenced to imprisonment, regardless of the nature of his or her offence."

(6) The Director of Public Prosecutions found that there were no special reasons why retention should not take place. He pointed out in particular that the long period passed since the conviction could not be regarded as a special reason.

(7) Biological samples were taken from A on 12 September 2016. He showed up at the police station and had a swab taken from his mouth. Kripos (the National Criminal Investigation Service) retained his DNA profile on 26 September 2016.

(8) On 21 September 2016, A brought an action against the State contending that the Decision of the Director of Public Prosecution of 21 June 2016 was invalid and a disproportionate interference with his private life, see Article 8 (2) of the Convention. Oslo District Court found that the interference was not disproportionate and ruled in favour of the State on 7 June 2017. A was ordered to cover the State's costs.

(9) A appealed to Borgarting Court of Appeal against the District Court's application of the law. In addition to claiming that the interference was disproportionate, he claimed that the DNA retention did not have sufficient legal basis. After written proceedings, the Court of Appeal concluded as follows on 14 November 2018:

"1. The appeal is dismissed with regard to item I of the conclusion of the District Court's judgment.

2. Each of the parties carries its own costs in the District Court and in the Court of Appeal."

(10) The Court of Appeal found that the DNA retention had sufficient legal basis. As for the proportionality of the interference, the Court of Appeal expressed doubt, but arrived at the same conclusion as the District Court.

(11) A has appealed to the Supreme Court against the Court of Appeal's application of the law, claiming that the DNA retention lacks a legal basis, and that the interference is a violation of Article 8 (2) of the Convention.

(12) On 21 February 2019, the Supreme Court's Appeals Selection Committee arrived at the following conclusion:

"Leave to appeal is granted as concerns the issue of whether retention of A's DNA profile in the DNA database (the identity database) constitutes a disproportionate interference under Article 8 of the Convention on Human Rights. Apart from that, leave to appeal is refused."

(13) The appellant – *A* – contends:

(14) The DNA retention is a disproportionate interference and a violation of Article 8 (2) of the Convention. The decision by the Director of Public Prosecutions of 21 June 2016 must thus be set aside as invalid.

(15) We are dealing with violation of a fundamental right, and the Convention States' margin of appreciation in such cases is limited. Legislation on DNA retention in fact allows an indefinite retention of DNA profiles, without the possibility of removal and individual assessments of

the private circumstances of the convicted person. Since the Director of Public Prosecutions is the appellate instance, the right of appeal is not genuine. The right to a court hearing is also in many cases illusionary, as a civil action – with a risk of carrying both own and the counterparty's costs – is the only option. Registration may take place regardless of whether the person is convicted of an offence that entails an increased risk of relapse into "DNA relevant" crime. Thus, the interference is "blanket and indiscriminate" and thus a violation of Article 8 (2) of the Convention.

(16) In the case at hand, the interference serves no practical purpose and is not an effective and necessary measure for the State. In addition, the Director of Public Prosecutions has not made an individual assessment of the necessity of retention. An overall assessment of the conflicting considerations indicates that the retention is a disproportionate measure.

(17) A has submitted this prayer for relief:

> **"The decision of the Director of Public Prosecutions of 21 June 2016 is to be declared invalid.**
>
> **A is to be awarded costs."**

(18) The respondent – *the State represented by the Ministry of Justice and Public Security* – contends:

(19) The retention of A's DNA profile is not a disproportionate measure and does not violate his rights under Article 8 of the Convention. Thus, there is nothing in the decision of the Director of Public Prosecutions to suggest it should be declared invalid.

(20) The case law of the Court of Human Rights demonstrates that DNA retention, at the outset, is a proportionate measure towards the convicted person. However, a limitation of the right of retention is established – the interference threshold – and the privacy of the registered person must be effectively safeguarded. Norwegian legislation meets these requirements.

(21) In the individual assessment of proportionality, it must be emphasised that DNA retention is a modest measure. The retention restrictions have been thoroughly discussed by the legislature, and meet the requirement of "appropriate safeguards against blanket and indiscriminate taking and retention of DNA samples". A's privacy is also effectively safeguarded, as he may request removal, appeal against the decision and bring it before the courts for a review. The crucial point is that he has been convicted of a serious offence, not that DNA is irrelevant in the investigation of tax fraud.

(22) The State represented by the Ministry of Justice and Public Security has submitted this prayer for relief:

> **"1. The appeal is to be dismissed.**
>
> **2. The State represented by the Ministry of Justice and Public Security is to be awarded costs in the District Court, the Court of Appeal and in the Supreme Court."**

(23) *My view on the case*

(24) The question, as mentioned, is whether the registration of A's DNA profile is a disproportionate interference with his rights under Article 8 of the Convention on Human

Rights. The Supreme Court has full jurisdiction to review this issue, see Supreme Court judgment HR-2018-2133-A paragraph 46.

(25) Before I turn to the legal issues raised, I will give a further description of the DNA profiles we are dealing with.

(26) *DNA profiles used in criminal justice*

(27) Section 45-2 (1) of the Police Databases Regulations defines a DNA profile as follows:

> **"DNA profile: the result of an analysis of biological samples to establish a person's identity. The DNA profile is presented as a combination of numbers. Profiles retained in the DNA database are referred to as identity profiles, investigation profiles and trace profiles."**

(28) In Norwegian Official Report 2005: 19 *Act relating to retention of DNA profiles for the criminal justice purposes,* the so-called DNA Committee describes in chapter 3 what DNA is and how the profiles are analysed and used. I generally refer to that description. In addition, in Proposition to the Odelsting No. 19 (2006−2007) item 3.1.1 page 10, the Ministry gives a short description of the DNA profiles used in Norwegian criminal justice. Here, it is stated that the elected analysis method is "only suited for identification", and that no information on features or health emerges from the analysis.

(29) The Norwegian Institute of Public Health states in an article called "Questions and answers on DNA analyses in criminal cases" that a DNA profile is a combination of numbers based on a genetic analysis of biological material, such as skin cells and blood. The Institute continues by stating that the profiles consist of one set of markers that are unique for the person in question. It is stated that in Norway – like in most other European countries – we operate with 17 different markers. These markers do not give any other information about the person than gender. In the article, the Norwegian Institute of Public Health compares the combination of numbers in a DNA profile to "an extended and more reliable national identity number", and states the following with regard to the application:

> **"By comparing a DNA profile from a biological trace with a DNA profile from a reference sample, it is possible to say whether the two profiles have the same origin. This principle forms the basis for all identification work in connection with criminal cases, paternity cases and disasters."**

(30) In the same article, the Norwegian Institute of Public Health stresses that these DNA profiles do not say anything about hereditary traits and health risks. I trust that the presentation in the article is undisputed and will rely on it from now on. Against this background, I take it that the DNA profile used in Norwegian criminal justice also does not indicate skin colour, eye colour, height and physique. Based on the information provided, I also take this to mean that it may clarify familial bonds with a large degree of certainty. However, what is essential is that the profile may determine a person's identity.

(31) Finally, I note that it has been stated before the Supreme Court that DNA profiles are retained in a locked database to which only 13 Kripos employees have access. Names and other personal data are retained in a different database. The databases are connected by a unique number related to the DNA profile.

(32) *Overview of the Norwegian legislation and its development*

(33) As an introduction to my further discussion, I find it appropriate to give an overview of applicable legislation for DNA retention and its development. I will revert with more details on the most important provisions in the individual assessment of proportionality.

(34) By Act of 22 December 1995 No. 79, provisions were given on the right of DNA retention were given in section 160a of the Criminal Procedure Act. According to subsection 1, a central DNA database could be retained with DNA profiles "of persons convicted of violation of the Penal Code, chapter 14, 19, 22 or 25, or of attempted violation". The right of retention was thus limited to persons who had been convicted under the provisions in the chapters on felony against public safety, sexual crimes, crimes against life, body and health, as well as extortion and robbery.

(35) In 2004, a Committee was appointed to evaluate the amendments to these rules – the DNA Committee. Its mandate included assessing whether it should be possible to retain DNA profiles in more types of cases, and whether indictment should be an adequate criterion for retention. In November 2005, the Committee issued Norwegian Official Report 2005: 19, to which I have already referred. Section 3 of a draft new Act relating to DNA databases in criminal justice allowed retention of the DNA profile of any person "that has been subjected to penalty under criminal law or avoided prosecution under section 69 of the Criminal Procedure Act for an offence which by law carries a custodial sentence", see page 73 of the Report.

(36) In Proposition to the Odelsting No. 19 (2006−2007) the Ministry of Justice and the Police wanted to extend the right of retention as proposed by the DNA Committee, but so that it would still be regulated in section 160 a of the Criminal Procedure Act. In the Proposition, the Ministry discussed whether indictment should be sufficient for retention and which offences would qualify for that. The application of the human rights was addressed in item 3.1.4. I will revert to these assessments, but I quote for the time being the following from pages 19-10 of the Proposition:

> **"Against this background, the Ministry finds that there is a need for a more precise and strategic regulation of what should and should not qualify for retention – in line with the current state of the law where both a "must rule" and a "may rule" apply, see section 11a–2 of the prosecution instructions. The Ministry therefore finds that the most expedient solution would be to allow extensive, but optional, retention by law. With such an approach, it will be possible to restrict retention and regulate it more concisely in separate regulations. The approach also considers the possibility that extension may take place gradually. In light of the statements by the hearing instances, it may for instance be relevant to preclude the less serious offences, such as minor violations of the Road Traffic Act and of police bylaws. As for other offences, retention can be made optional. However, the intention is to make retention easier under regulations compared to under current rules, so that the database has the intended effect. The exact demarcation is postponed until the prosecution instructions work."**

(37) The Ministry proposed that section 160 a of the Criminal Procedure Act should allow retention of the DNA of any person "subjected to penalty for an offence which by law carries a custodial sentence". The proposal was adopted without amendments on this point, see Recommendation to the Odelsting No. 23 (2007−2008) page 10.

(38) When A was convicted in 2012, DNA retention was still regulated in section 160 a of the Criminal Procedure Act. Subsection 1 read:

> **"Any person subjected to penalty for an offence which by law carries a custodial sentence, can be registered in the identity database. Registration in the identity database may not take place until the ruling is legally binding or the case is finally resolved. Before that, samples taken in accordance with section 158 can be retained in the investigation database. An offence for which a small fine has been imposed, does not qualify for retention."**

(39) As demonstrated, the provision allowed retention of DNA on certain conditions, but no obligation. Furthermore, retention could only take place in connection with conviction for offences of a certain gravity. A person that was only suspected, indicted or prosecuted, could not be registered in the identity database.

(40) According to section 160 a subsection 6, information in the DNA database could only be used in criminal justice, however so that rules could be adopted on the use for research purposes. Subsection 7 gave a general legal basis for making further provisions, among other things on retention, deletion and the right to appeal.

(41) In chapter 11 of the prosecution instructions, the Ministry gave further provisions on the DNA retention. The right of retention was regulated in section 11a-1. Subsection 3 regulated retention in a manner coinciding with the criteria in section 160 a of the Criminal Procedure Act. In section 11a-12, jurisdiction to issue further guidelines was granted to the Director of Public Prosecutions.

(42) In accordance with this right, the Director of Public Prosecutions issued new guidelines in a circular letter of 15 August 2008 – RA-2007-569. Chapter III of the circular letter contains provisions on retention in the identity database, and in the chapter's section 2, the following is stated in the introduction:

> **"The guidelines apply to persons that have been finally convicted with effect from and including 1 September 2008. For convictions prior to this date, the previous rules and guidelines apply. The following persons shall from the same date be registered in the identity database, unless under extraordinary circumstances:**
>
> **1. Any person that from and including 1 September 2008 has been sentenced by a Norwegian court to unconditional imprisonment or detention for more than 60 days. Registration shall take place irrespective of which offence the person has been convicted …"**

(43) In subsection 2 the Director of Public Prosecutions states that retention should "only exceptionally" be omitted "if a person falls within the scope of the guidelines", and that the reservation "extraordinary circumstances" is meant to cover "atypical situations unlikely to occur and where retention is clearly not expedient". This is justified by a wish to avoid "a difficult assessment of the specific need for registration of the individual offender".

(44) The Police Databases Act was adopted in 2010, but section 12 – essential in the case at hand – was not implemented until September 2013. Section 160 a subsections 4 – 6 was continued without amendments in the Police Databases Act section 12 subsection 2, see the special comments to the provision in Proposition to the Odelsting No. 108 (2008−2009) page 299. Subsection 6, stating that data can only be used for criminal justice purposes, was also kept. In the Proposition item 4.3.1, the Ministry discusses the application of Article 8 of the Convention, to which I will revert.

(45) Section 4 of the Police Databases Act sets out that data can "only be processed for the purpose for which they have been gathered or for other police-related purposes", unless otherwise provided by law or in accordance with law. According to section 5, data may only be processed when "necessary for such purposes as are mentioned in section 4". In the context of the case at hand, "personal data" means any information or assessment relating to a natural person, see section 2 (1) and the special comments to the provision on page 291 in the Proposition.

(46) Based on various provisions in the Police Databases Act, including section 12, the Police Databases Regulations were adopted in September 2013. Chapter 45 contains provisions on the DNA database. According to section 45-1, a DNA database shall be kept, consisting of an identity database, a research database and a trace database. The stated purpose is to "contribute to solving crime by facilitating comparison of DNA profiles for identification purposes in criminal justice". Section 45-6 regulates further the types of data that can be retained in the various databases, and states that the identity database may only contain DNA profiles of persons as mentioned in section 12 subsection 2 of the Police Databases Act. In addition, detailed rules are provided on data processing, access and surrender, transparency and right of appeal. I quote the provision on removal in section 45-17 subsection 1:

> **"Data in the identity database shall be removed if the registered person has been finally acquitted after a reopening. Otherwise, an identity profile shall be deleted no later than 5 years after the person in question has died, or earlier if retention is clearly no longer expedient. …"**

(47) I also mention section 45-18, stating that biological samples having formed the basis for analyses of DNA profiles must be destroyed "as soon as the profile has been registered or the purpose of the analysis has been achieved". This is also set out in section 158 subsection 2 of the Criminal Procedure Act. The right to appeal is regulated in 45-20.

(48) The Director of Public Prosecutions issued new guidelines for retention of DNA in a circular letter of 17 October 2013 – RA-2012-2261. In the letter's introduction, it was stated that the Director of Public Prosecutions has decided to lower the threshold for retention in the identity database "considerably". It is also stated that the circular letter is the result of a balancing of conflicting interests:

> **"The below guidelines have been adopted after a balancing of various interests, where the wish to combat and solve crime, privacy considerations and capacity are central. DNA is undoubtedly a useful instrument in the prevention of crime involving physical injuries and other serious crime. Unfortunately, Norwegian authorities do currently not possess research-based and accurate data on the number of persons committing repeated offences of various kinds or on the direct significance of the identity database in the solving of cases. Based on experience and response from the police, it is nonetheless clear that a number of serious offences are committed by persons already convicted of offences of various levels of gravity. Also preliminary findings in the evaluation of the DNA reform initiated by the Police Directorate, show that DNA is a valuable instrument in cases where physical evidence is gathered."**

(49) According to subsection 1 (1) of item II, the following persons shall be registered in the identity database:

> **"a) Any person in this country who has been sentenced to *preventive detention, unconditional imprisonment* (including partial sentence), *juvenile sentence* or**

community sentence. **Registration shall take place irrespective of which offence the conviction concerns.**

The same applies to any person who has been *transferred to compulsory mental health care or compulsory care.*

b) **Any person who has been given a *suspended sentence* for violation or attempted violation of the Penal Code 2005 sections 231-232, provisions in chapter 26, sections 282-283, sections 271-275, section 322 cf. section 321 or section 328 cf. section 327. The same applies to provisions in the Penal Code 1902 (i.e. section 162, chapter 19, section 219, sections 228-233, section 258 cf. section 257 or section 268 cf. section 267).**

c) **Any person sentenced to a *fine* or who has accepted a *fine* issued by the Norwegian prosecution authority for violation or attempted violation of provisions in the Penal Code 2005 chapter 26, section 322 cf. section 321 or section 328 cf. section 327. The same applies to provisions in the Penal Code 1902 (i.e. chapter 19, section 258 cf. section 257 or section 268 cf. section 267).”**

(50) At the outset, this provision does not allow the use of discretion. According to subsection 3, however, retention can only be avoided under “extraordinary circumstances in each case suggesting that retention is clearly not expedient”.

(51) According to the circular letter, this applies to persons whose case has been finally resolved from and including 1 October 2013, and the previous guidelines apply to convictions from before this date. This implies in principle that the validity of the resolution in A’s case must be assessed according to the circular letter from 2008. At the same time, the parties agree that the provisions in the new circular letter must apply to the extent they are more favourable to him. The same must apply when choosing between the rules in the prosecution instructions and those in the Police Databases Regulations. I will keep to the Police Databases Regulations, unless, due to the above, there is reason to do otherwise. Because section 12 of the Police Databases Act coincides with section 160 a of the Criminal Procedure Act as it read in 2013, I will from now on only refer to the first mentioned.

(52) *Article 8 of the European Convention on Human Rights and assessment of proportionality in connection with retention of DNA etc.*

(53) Article 8 of the European Convention on Human Rights reads:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

(54) Registration of a person’s DNA profile is an intrusion into a person’s private life. According to Article 8 of the Convention, such a measure can only be taken if it has a legal basis, a legitimate purpose and if it is expedient, see the Supreme Court judgment HR-2017-1130-A paragraph 42. In the case at hand, it is undisputed that retention has a legitimate purpose as it may contribute in the prevention of crime. Moreover, by the court of appeal’s judgment it has been decided with a binding effect that the legal basis meets the quality requirements made.

The validity of the decision of the Director of Public Prosecution thus only depends on whether the retention of A's DNA profile is a disproportionate measure against him.

(55) *The requirement of proportionality* is expressed through the wording "necessary in a democratic society". In the Supreme Court judgment HR-2015-206-A paragraph 60, it is stated that the assessment of proportionality "must focus on the balance between the protected individual interests on the one side and the legitimate societal needs justifying the measure on the other". Of particular interest in the case at hand is that the requirement of necessity is linked to the consideration of "preventing disorder and crime".

(56) In addition, I will refer to the description of the requirement of proportionality given in the Court of Human Rights' Grand Chamber ruling 4 December 2008 *S. and Marper v. the United Kingdom* paragraph 101 et seq. That case concerned, exactly, the proportionality of retention of the DNA profiles of two applicants. Applicant S. was an eleven-year old boy who had been arrested and indicted for robbery. He was later acquitted. The other applicant – Marper – had been indicted for abusing his partner, but the case was dropped after a settlement was reached. In paragraph 101, the Court of Human Rights describes the requirement of proportionality as follows:

> **"An interference will be considered 'necessary in a democratic society' for a legitimate aim if it answers a 'pressing social need' and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are 'relevant and sufficient'."**

(57) Against this background, the necessity of the interference must be included in the balancing, and it must be verified that the legislature's assessments are relevant and adequate. The Court also emphasises in paragraph 103 that domestic law must afford appropriate safeguards to prevent any use of personal data as may be inconsistent with the guarantees of Article 8. Legislation must secure that the storage of such data is relevant and not excessive in relation to the purposes for which they are stored. In the same paragraph, the Court also stresses that the retained personal data must be efficiently protected from misuse and abuse.

(58) On the other hand, the Court establishes in paragraph 104 that the prevention of crime may prevail in the balancing. The discussion of the general starting points is rounded off as follows in the paragraph:

> **"The interests of the data subjects and the community as a whole in protecting the personal data, including fingerprint and DNA information, may be outweighed by the legitimate interest in the prevention of crime (see Article 9 of the Data Protection Convention). However, the intrinsically private character of this information calls for the Court to exercise careful scrutiny of any State measure authorising its retention and use by the authorities without the consent of the person concerned (see, *mutatis mutandis, Z v. Finland*, cited above, section 96)."**

(59) The Convention States' *margin of appreciation* seems to be limited in this area. In *S. and Marper* paragraph 102, the Court emphasises that this margin "will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights". I do not find that our case deals with key rights such as those referred to by the Court. The Court makes a similar statement in its ruling 22 June 2017 *Aycaguer v. France*, which also concerned DNA retention, that the margin of appreciation is normally narrower where a particularly important aspect of someone's life or identity is in issue, see paragraph 37. In this regard, I also refer to ruling 18 September 2014 *Brunet v. France* paragraph 34. That case

concerned personal data other than DNA profiles, but is nonetheless relevant to the case at hand.

(60) On the background of these general starting points, I will consider more specifically the Court's view on the proportionality of DNA retention. First, the Court of Human Rights acknowledges the *important function of DNA in the prevention of crime*. In *S. and Marper*, the Court states in paragraph 105 that it is "beyond dispute that the fight against crime, and in particular against organised crime and terrorism, which is one of the challenges faced by today's European societies, depends to a great extent on the use of modern scientific techniques of investigation and identification". The Court follows up in paragraph 106 by recognising the importance of DNA profiles in the detection of crime.

(61) Similar statements are given in other rulings. I will confine myself to mentioning *Aycaguer*, where this is commented in paragraph 34. Here, the Court fully realises that in order to protect their population as required, the national authorities can legitimately set up databases as an effective means of helping to punish and prevent certain offences, …".

(62) However, the Court requires that the right of retention must be limited. Once more, I consider the Grand Chamber ruling *S. and Marper* to be a natural reference. In paragraph 110, the Court points out that England, Wales and Northern Ireland appear to be the only jurisdictions to allow the indefinite retention of fingerprint and DNA samples of "any person of any age suspected of any recordable offence". In paragraph 119, the Court follows up by stating that it is "struck by the blanket and indiscriminate nature of the power of retention in England and Wales".

(63) The term "blanket and indiscriminate" is also used in other rulings by the Court. In the inadmissibility ruling 4 June 2013 *Peruzzo and Martens v. Germany* paragraph 43, the Court applies this criterion when comparing that specific case to *S. and Marper v. the United Kingdom*. I also refer to *Brunet v. France* paragraph 36. The implication of this must be that the right of retention should be regulated under domestic law based on precise criteria.

(64) The Court's case law also highlights that domestic law must offer adequate guarantees on rule of law and privacy. This general starting point is formulated as follows in *Peruzzo and Martens v. Germany* paragraph 42:

> **"The Court has specified in this connection that domestic law must afford appropriate safeguards to prevent any such use of personal data as may be inconsistent with the guarantees of this Article."**

(65) The Court's rulings give guidance as to which factors and issues are relevant in the assessment of proportionality. First, the Court seems to stress in particular whether the retention concerns the DNA profile of a person who has been *convicted*. In *S. and Marper v. the United Kingdom*, the applicants had, as mentioned, not been convicted of any crime. In paragraph 22, the Court mentions the presumption of innocence and the risk of stigmatisation:

> **"Of particular concern in the present context is the risk of stigmatisation, stemming from the fact that persons in the position of the applicants, who have not been convicted of any offence and are entitled to the presumption of innocence, are treated in the same way as convicted persons. In this respect, the Court must bear in mind that the right of every person under the Convention to be presumed innocent includes the general rule that no suspicion regarding an accused's innocence may be voiced after his acquittal…"**

(66) In *Peruzzo and Martens v. Germany* paragraph 43 et seq., the Court explains why the result must differ from the result in *S. and Marper v. the United Kingdom*. It is first stressed that both Peruzzo and Martens had been convicted of criminal offences, see paragraph 44. I also refer to judgment 18 April 2013 *M.K. v. France* paragraph 42 and *Brunet v. France* paragraph 37.

(67) Furthermore, the Court accentuates the *gravity of the offence*. In *S. and Marper v. the United Kingdom*, the Court is struck by the rules in England and Wales allowing retention of DNA "irrespective of the nature or gravity of the offence with which the individual was originally suspected", see paragraph 119. Similarly, in the inadmissibility ruling 7 December 2006 *van der Velden v. the Netherlands* item 2, the Court states that it is not unreasonable to impose DNA testing on all persons who have been convicted of offences "of a certain seriousness". And, in the inadmissibility ruling 20 January 2009 *W. v. the Netherlands*, "a certain gravity" is used under the discussion of Article 8.

(68) The appellant emphasises the fact that A has not been convicted of an offence where DNA may contribute to solving the case. This raises the question whether the *nature of the offence* is relevant in the assessment of proportionality.

(69) As I just mentioned, in *S. and Marper v. the United Kingdom* paragraph 119, the Court emphasised the fact that domestic law allows retention irrespective of "the nature or gravity of the offence". A similar formulation is used in *Aycaguer v. France* paragraph 43, while I do not find references to the nature of the offence in the other rulings to which the parties have referred. I am not aware of any ruling that lays down a requirement that DNA profiles may only be retained if a person has been convicted of an offence where DNA may contribute to resolving the case – a "DNA relevant" offence. On the other hand, the Court has not had any reason to establish such a requirement. I note that all rulings on DNA retention seem to involve crime where DNA may contribute to solving the case, such as violence, robbery, drug offences and sexual assault.

(70) The way I interpret the Court's rulings, the nature of the offence may be relevant in the overall assessment of proportionality. At the same time, nothing suggests that the "DNA relevance" of the offence alone should be decisive.

(71) *The right of removal and removal routines* are central in many rulings by the Court. In *S. and Marper v. the United Kingdom*, the Court pointed out that the domestic law allowed "indefinite retention" of DNA profiles, see paragraph 110. I also refer to the judgment 17 December 2009 *Gardel v. France*. That case concerned retention of personal data in what is called "The Sex Offenders Database". Under the French rules, the data would be removed no later than 30 years after the most serious offences, while it was possible to appeal the retention decision, see paragraphs 17 and 68. The applicant had been sentenced to 15 years of imprisonment for sexual abuse of a minor. The Court found that the applicant's rights under Article 8 of the Convention had not been violated and seems, in paragraph 69, to have placed particular emphasis on the removal routines:

> **"The Court considers that this judicial procedure for the removal of data provides for independent review of the justification for retention of the information according to defined criteria (see *S. and Marper*, cited above, section 119) and affords adequate and effective safeguards of the right to respect for private life…"**

(72) In this regard, I also refer to *Brunet v. France* paragraph 41.

(73) The Court's case law demonstrates that *the storage of the profiles, the access to the data and confidentiality* are aspects to be included in the assessment of proportionality. This was stressed in *S. and Marper v. the United Kingdom*, see paragraph 103. Similarly, the Court referred to this aspect in its inadmissibility ruling *W. v. the Netherlands*. On page 7 of this ruling, the Court points out that the DNA profile had been stored "anonymously and encoded".

(74) The parties seem to agree that *the right of appeal and right to judicial review* are also aspects to be included in the assessment of proportionality. I agree. To me, this is implicit in the Court's discussions in several cases of removal routines, see for instance the quoted paragraph 69 in *Gardel v. France*.

(75) Generally, there is no doubt that the *intensity of the interference* is essential in the balancing. In *van der Velden v. the Netherlands*, the Court stated on page 7 that "the interference at issue was relatively slight". *Brunet v. France* paragraph 39 can be interpreted differently, but it related to personal data other than DNA and is not entirely clear. I, on the other hand, find it quite clear that the current outlook on retention of personal data is more serious than only a few years ago. Another issue is that the manner in which the samples are taken cannot be characterised as burdensome. I will revert to this.

(76) Finally, I mention that the appellant has compared the Norwegian rules to those in other European countries. In my view, the status of the law in other states is not without interest in a case like the one at hand. However, the significance of the case law of other states is primarily that the Court considers it in its rulings, so that opinions of the law widely supported among the Convention States affect the status of the law. Against this background, I do not see the need to present the rules applicable in other countries.

(77) *The legislature's considerations*

(78) As I have mentioned, the legislature's considerations and balancing are central in the assessment of proportionality, see for instance paragraph 101 in *S. and Marper v. the United Kingdom*. Thus, I find it appropriate to give an overall outline of statements in the preparatory works concerning the application of Article 8 of the Convention on Human Rights.

(79) In Norwegian Official Report 2005: 19 item 4.5 The DNA Committee assessed limitations for retention under international law, including the application of Article 8 of the Convention. After long discussions, the Committee concluded that retention of a person's DNA profile was an interference with private life under the provision. The Committee found – based on the limitations and impediments applicable at the time – that the measure was proportionate, see page 37.

(80) As mentioned, in Proposition to the Odelsting No. 19 (2006−2007), the Ministry of Justice and the Police proposed an extension of the right of DNA retention. In item 3.1.4, the Ministry discusses the application of Article 8 of the Convention. Initially, it is stated that some hearing instances had requested a more thorough assessment of this issue, in particular the proportionality. The Ministry concluded that retention is an interference within the meaning of the provision, and then stated:

> **"As for the taking of DNA samples, the measure – swabbing the inside of a person's mouth – must be characterised as modest for the person concerned. The DNA retention itself is also a**

small measure: First, the database is a pure identity database, containing no data that may disclose features other than gender. The retention therefore has limited privacy implications, which is strengthened by the fact that the DNA samples (the very DNA material) according to the Ministry's proposal cannot be retained after the DNA profile (the number code) has been retained. It is true that the DNA profile is retained together with information regarding the basis for the retention (a final decision establishing that the person has committed an offence), but these personal data are safely stored and subject to strict control. It is only the data controller (the head of Kripos) or a person authorised by him, who may access the database, and the database must at all times be protected from access by and kept away from third parties, see section 11a–6 subsection 2 of the prosecution instructions. In addition, the person that has been registered must immediately be notified thereof, and any person is entitled to know whether the database contains data about him or her, and the type of data. The right of access, the right to object and the restrictions on surrender have been central in the Court's assessment of whether public databases with personal data are in accordance with Article 8 of the Convention on Human Rights."

(81) The Ministry then balances the interference against the purpose of increasing the clear-up rate:

> **"On the other hand, the use of DNA seems to be necessary and highly appropriate in light of the purpose sought – to increase the clear-up rate in criminal cases. The DNA profile is an important (and sometimes crucial) piece of evidence in criminal cases where biological traces can be found, as it gives trustworthy identification of the perpetrator. Thus, there is reason to believe that the number of confessions will increase where searches in the databases give DNA results, whereas innocent people can be ruled out. In this way, DNA evidence will to some extent prevent incorrect indictments and convictions. A considerable extension of the right of retention allowing searches against the identity and trace database will reduce the length and scope of the investigation and liberate police resources."**

(82) The Ministry continues by pointing out that, in the assessment of necessity, one must take into account that "the crime picture has recently changed in a negative direction, and that this development may continue in the years to come". In support of extending the right of retention, the Ministry mentions other developments, such as better organised criminal groups, cooperation between criminal networks, internationalisation, more brutality and professionalism as well as specialisation of criminals. The Ministry maintains that there is "a strong demand for efficient tools to fight this development", and that "an extended DNA database will give a higher clear-up rate". The discussion is concluded as follows:

> **"Against this background, the modest inference with private life is – in the Ministry's view – reasonable considering the goal the public authorities wish to achieve. The measure is thus considered 'necessary in a democratic society'. The Ministry also notes that the proportionality will be reassessed when the threshold for retention is further regulated."**

(83) I also refer to the discussion of which offences qualify for retention in item 3.4.4.2 on page 19−20, which I have mentioned earlier. Here, the Ministry stresses that it is «crucial to find a good balance between the need for effective exploitation of the potential of DNA retention for better and quicker solving of cases, a sensible use of resources, and the protection of the individual's privacy". It is also pointed out that the rules should be simple to apply and not too dependent on individual appraisal.

(84) The application of Article 8 of the Convention was also considered in connection with the adoption of the Police Databases Act. In Proposition to the Odelsting No. 108 (2008−2009), the proportionality assessment is more expanded and nuanced than the one I just referred to. In item 4.3.1 on page 39, the Ministry states:

> **"The police's registration and the data processing in general contribute vastly to the prevention of crime, particularly in connection with the police's preventive activities. The requirement of proportionality must nonetheless be guiding in the drafting of rules forming the basis for the police's data processing. It must be a fundamental principle that authorisations are not granted beyond what is necessary to achieve the goal of the measure. Since the prevention of crime is a wide purpose, a proportionality assessment may be required despite the necessity of the measure to combat crime. For instance, it may be expedient to adjust the police's authorisations to the seriousness of the offence, so that the authorisations are granted accordingly. Although all forms of crime in principle are a threat to the democratic society, society will not benefit from excessive police surveillance."**

(85) As I see it, the Ministry has thoroughly assessed the proportionality of the DNA retention. Relevant considerations have been addressed and balanced. The Ministry has envisioned that DNA retention must not exceed what is necessary to maintain the purpose of preventing crime, and with that suggested that the seriousness of the crime must be considered. However, I can find nothing to indicate that retention should be reserved for offences of a certain character, as long as the offence has the required level of gravity.

(86) In my view, these considerations must be emphasised in the assessment of the measure towards A. Against this background, I turn to the more individual assessment of proportionality.

(87) *The assessment of proportionality*

(88) Crucial for the validity of the retention decision is the proportionality of the specific measure towards A, se *S. and Marper* paragraph 106. At the same time, I have demonstrated that the limitations and safeguards under domestic law must be central in the assessments. I will therefore also compare the Norwegian rules – which I have already presented – to the requirement derived from the case law of the Court of Human Rights.

(89) At the outset, the case concerns retention of a DNA profile revealing the gender of the registered person, and which is "only suited for identification", see Proposition to the Odelsting No. 19 (2006−2007) page 10. It says nothing about hereditary traits, health risk, looks or physique. In this regard, I repeat that the biological samples are destroyed as soon as the profile has been retained or the goal of the investigation has been achieved, see the Criminal Procedure Act section 158 subsection 2 and section 45-18 of the Police Databases Regulation. This is a safeguard against later misuse and spreading of sensitive data. The biological samples taken from A are destroyed in line with this. The sampling in itself cannot be regarded as an interference – one swab has been taken from A's mouth with a cotton stick or a mouth sponge.

(90) Furthermore, it seems to be generally accepted that retention of DNA profiles is an efficient means to increase the clear-up rate and to prevent crime. This is much highlighted in preparatory works, whereas it is trusted that the importance of DNA in criminal justice only increases along with the crime picture. The Court has in a number of rulings recognised the significance of DNA in the fight against crime. In *S. and Marper* paragraph 104, the Court concluded that the interest in the prevention of crime may outweigh the interests of the data subject in the assessment of proportionality, see also paragraphs 105 and 106.

(91) Before the Supreme Court, this point has been illustrated by the recidivism statistics from Statistics Norway – "Persons charged in base year, by type of principal offence in base year and with recidivism in the base year". The statistics show a considerable risk of relapse in all

principal offence categories. Here, it is particularly interesting that the risk of relapse is as high as 39.9 percent, also within the group of persons convicted of economic crime. It is also worth noting that the convicted persons in this group to some extent fall back on other types of crime, including crime where DNA may contribute to solving the case, such as robbery and theft, violence, sexual assault and drug offences. Although the risk of relapse into such crime is relatively modest, the figures show that the consideration of preventing crime is not only relevant in cases where the person is convicted of a "DNA relevant" offence.

(92) The Court of Human Rights' case law establishes that domestic law must contain precise restrictions on DNA retention and offer rule of law and privacy guarantees. In this regard, I note that section 12 subsection 2 (1) of the Police Databases Act only allows retention of DNA profiles of persons who "have been sentenced to a penalty". In other words, suspicion or indictment is not sufficient. A has been sentenced to a penalty by the District Court's legally binding judgment. The case at hand therefore differs from that in the judgments of the Court of Human Rights, such as *S. and Marper v. the United Kingdom* and *Brunet v. France*.

(93) Furthermore, Norwegian rules require that a penalty must have been imposed for an offence of a certain gravity. The requirement under section 12 subsection 2 no. 1 is that the person in question must have been sentenced "for an act which by law carries a custodial sentence". The retention of A's DNA profile followed the guidelines in the Director of Public Prosecutions' circular letter from 2008, where the criterion, as mentioned, was a sentence to unconditional imprisonment or detention for more than 60 days. A has been sentenced to imprisonment for one year and six months, of which six months are suspended.

(94) I believe that our rules on this point meet the criteria established in the case law of the Court of Human Rights, and that it is clear that A has been convicted of an offence that, at the outset, is serious enough for DNA retention. To use the terminology in the Court's decision in *van der Velden v. the Netherlands*, it concerns an offence "of a certain seriousness". I repeat that the legislature has thoroughly assessed which offences are to qualify for retention, see Proposition to the Odelsting No. 19 (2006−2007) item 3.4.4.2.

(95) Admittedly, A is not convicted of any type of offence where DNA normally contributes to solving the case. However, as I have already touched upon with regard to the rulings of the Court of Human Rights, this is but one factor in a broader assessment. In addition, the figures from Statistics Norway indicate that persons convicted of economic crime are more likely to commit new offences than previously unpunished persons. This increased risk also applies to relapse into "DNA relevant" crime.

(96) According to section 45-17 of the Police Databases Regulations, DNA profiles are not automatically deleted until five years after the registered person has died. There are no provisions on reassessment of the need of time intervals. I therefore take it that the retention is indefinite, see for instance *M.K. v. France* paragraph 45. At the outset, this clearly suggests disproportionality.

(97) In my view, however, this cannot be decisive due to the right of removal under section 45-17. Under this provision, data may only be deleted "if continued retention is clearly no longer necessary". From the State's speech before the Supreme Court, I understand that the registered person, in accordance with the provision, may demand deletion and have his or her case assessed individually. Although the criteria for deletion appear restrictive, they function as a safety valve that must be emphasised in the overall assessment.

(98) In this regard, I repeat that retention decisions may be appealed to a superior prosecuting authority under section 45-20 of the Police Databases Regulations, which is an opportunity A has taken. The Director of Public Prosecutions is the prosecuting authority. A has submitted that the right to appeal is thus not real, since the Director of Public Prosecutions has also produced the guidelines for retention of DNA profiles. I do not agree. It is not unusual that an appellate instance is responsible for the rules invoked in the appeal. I trust that the right of appeal is practiced in accordance with the rule of law.

(99) The right of judicial review is an additional guarantee, of which this case is an example. In my view, it is not crucial that the registered person has been referred to civil proceedings.

(100) In my balancing of interests, I also emphasise the privacy safeguards incorporated in the rules. I have already mentioned that a very limited number of persons actually have access to the DNA profiles. Section 12 subsection 6 of the Police Databases Act states that the information in the DNA database may only be used for criminal justice purposes. According to section 45-11 of the Police Database Regulations, access to the DNA profiles must be limited to "a small number of persons with special authorisation to search in the database if required for investigation purposes". Chapter 45 of the Regulations contains detailed provisions on processing responsibility, data processing, access and surrender, duty of disclosure and transparency, as well as blocking, removal and storage.

(101) A contends that the safeguards in the Police Databases Regulations became void with the Supreme Court's Appeals Selection Committee's order HR-2018-2241-U. That case concerned a request for paternity exclusion. The registered father had previously given a DNA sample in a criminal case, and his profile was retained in the DNA database. The majority of the Appeals Selection Committee found that section 24 of the Children Act had to prevail over section 12 subsection 6 of the Police Databases Act, to allow gathering of data from the police's DNA database in the paternity matter, see paragraph 26.

(102) As I see it, the use of information from the DNA database also in paternity matters may be an extra burden to the registered person. Yet, this cannot be decisive in the assessment of proportionality. It concerns a narrow exception from the rule that DNA profiles may only be used in criminal justice. In this regard, I also note that the interests of the child and those of the father will not systematically conflict when it comes to clarifying paternity, see paragraph 25 of the Appeals Selection Committee's order.

(103) After an overall assessment of conflicting interests in the case at hand, I conclude that the retention of A's DNA profile is not a disproportionate interference with his rights under Article 8 (2) of the Convention. I attach great importance to the fact that he has been convicted of a serious offence, which statistically entails an increased risk of recidivism, also into "DNA relevant" crime. The rules restrict the right of retention in a sufficiently precise manner and are not "blanket and indiscriminate". In my view, it is also essential that the Norwegian rules allow removal after an individual assessment, whereas detailed provisions on access, blocking, transparency and storage constitute necessary privacy safeguards. The appeal should thus be dismissed.

(104) *Costs etc.*

(105) The State is the successful party, and is in principle entitled to costs under the main rule in section 20-2 subsection 1 of the Dispute Act. However, the case has raised issues of principle that needed clarification, and considering the relative strength between the parties, costs should not be awarded in any instance, see section 20-2 subsection 3 of the Dispute Act.

(106) I vote for this

J U D G M E N T :

1. The appeal is dismissed.

2. Costs are not awarded in any instance.

(107) Justice **Arntzen:** I have concluded that the appeal should succeed.

(108) I support Justice Bergsjø's thorough review of the Norwegian rules and of Article 8 of the Convention, but my view on the individual assessment of proportionality differs from his.

(109) In a number of rulings, the Court of Human Rights has summarised the assessment of proportionality in connection with DNA retention, most recently in its judgment 22 June 2017 *Aycaguer v. France* paragraph 38:

> **"38. Personal data protection plays a primordial role in the exercise of a person's right to respect for his private life enshrined in Article 8 of the Convention. Domestic law must afford appropriate safeguards to prevent any such use of personal data as may be inconsistent with the guarantees of that Article. The need for such safeguards is all the greater where the protection of personal data undergoing automatic processing is concerned, not least when such data are used for police purposes. The domestic law should, in particular, ensure that such data are relevant and not excessive in relation to the purposes for which they are stored, and preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored. The domestic law should also comprise safeguards capable of effectively protecting the personal data recorded against inappropriate and wrongful use (see B.B., cited above, section 61), while providing a practical means of lodging a request for the removal of the data stored (see *B.B.*, cited above, section 88 and *Brunet*, …"**

(110) This shows that DNA retention must at all times be relevant and necessary for its purpose. The use of the data for other purposes may also be important in the assessment of proportionality.

(111) In the case at hand, the disputed DNA retention was occasioned by a conviction for gross tax fraud during the period 2001 to 2006. Although the offence was serious, it is not a type of offence that can be solved by the help of DNA (DNA relevant offence). The main question is which significance to attribute to the *type* of offence in the assessment of proportionality under Article 8 of the Convention.

(112) First, I note that the legislature has not assessed which types of offences should make basis for retention. In Proposition to the Odelsting No. 19 (2006–2007) item 3.4.4.2 the Ministry states that:

> **"extensive retention [will] be highly resource-demanding and expensive. The retention must have a clear utility function. Both the Director of Public Prosecutions and Oslo Police District emphasise that the extended retention which both the majority and (to a smaller degree) the minority intend to implement, will have the consequence that persons who are hardly at risk of committing new crime, will also be registered."**

(113) This is why the Ministry in the next paragraph highlights the need of "a more precise and strategic regulation of what should and what should not qualify for retention". It is assumed that the right of retention is "narrowed down and made more concise in regulations", but apart from a few examples, no further guidelines are provided for this constriction.

(114) The guidelines as to which offences qualify for retention are provided in the circular letter from the Director of Public Prosecution. The letter states that any person convicted unconditional imprisonment, *must* be registered in the DNA database "regardless of the offence of which the person has been convicted."

(115) In my view, the notion that the nature of the offence is without relevance as long as unconditional imprisonment has been imposed, lacks justification. When the DNA database was established in 1995, the so-called DNA Committee assessed whether the right of retention should be based on the type of offence, statutory maximum penalty or the sentence. A limitation based on the two latter options was dismissed as "inexpedient" since such factors say nothing about "the possibility of finding traces in connection with the offence that are suited for DNA testing", see Norwegian Official Report 1993: 33 page 30. The Ministry, on the other hand, found "for reasons of principle that the offence categories should be stated directly in the law", see Proposition to the Odelsting No. 55 (1994–1995) page 10. This is why the right of retention in section 160 a of the Criminal Procedure Act until the amendment in 2008 was limited to convictions for certain categories of DNA relevant crime.

(116) The utility value of registering all persons that have been convicted of unconditional imprisonment is unclear. As set out in the introduction to the last circular letter from the Director of Public Prosecutions of October 2013, there were "unfortunately no research-based and accurate data on the number of persons committing new offences of various kinds and on the direct significance of the identity database in the solving of cases". Justice Bergsjø has referred to Statistics Norway's recidivism figures from 2009. To me, it seems that the risk of relapse into DNA related crime is low for persons previously convicted of economic crime. In this case, the court of appeal trusts that the "likelihood that retention of a person's DNA will contribute to solving crime committed later is small" when it comes to tax fraud. The State has not had any objections to this assessment.

(117) There is no case law from the Court of Human Rights directly considering the relevance of the nature of the offence in the assessment of proportionality. Apart from general statements about the relevance of «the nature or gravity of the offence», to which also Justice Bergsjø refers, *Aycaguer v. France* from 2017 is probably closest to the situation in the case at hand. The question is whether the applicant, after being given a two months' suspended sentence for having made blows with his umbrella at police officers during a trade union rally, could be imposed to surrender biological samples to be registered in the DNA database. Paragraph 43 reads:

> **"Thus, the Court notes that no differentiation is currently provided for according to the nature and/or seriousness of the offence committed, notwithstanding the significant disparity in the situations potentially arising under Article 706-55 CPP. The applicant's situation bears witness to this, with events occurring in a political/trade-union context, concerning**

> **mere blows with an umbrella directed at gendarmes who have not even been identified (…), contrasting with the seriousness of the acts liable to constitute the very serious offences set out in Article 706-55 CPP, such as sex offences, terrorism, crimes against humanity and trafficking in human beings, to mention but a few. To that extent the instant case is very different from those specifically relating to such serious offences as organised crime (see *S. and Marper* …) or sexual assault (see *Gardel, B.B.* and *M.B.* …).”**

(118) As to the right of removal, the Court states in paragraph 44 that

> **“convicted persons should also be given a practical means of lodging a request for the removal of retained data (…). That remedy should be made available … in order to ensure that the data storage period is proportionate to the nature of the offences and the aims of the restrictions” (in Article 8 of the Convention).**

(119) With reference to the retention period’s duration of 40 years and the lack of a possibility of removal, the Court stated in paragraph 45 that the retention system did not strike a fair balance between the competing public and private interests.

(120) I deduce from this that the nature of the offence is an aspect of the assessment of proportionality, which harmonises best with the necessity criterion Article 8 of the Convention.

(121) A problem with the Norwegian retention system is that the nature of the offence is without relevance in cases like A’s, both as to whether retention is to take place and in the assessment of any later request for removal. Only if the registered person becomes unable to commit an offence – typically due to illness or age – the retention may according to information provided be removed. This implies that the duty to remove the data in the DNA database “no later than 5 years after the person is dead”, see section 45-17 subsection 1 of the Police Databases Regulations, to a large extent will function “as a norm rather than a maximum”, cf. the wording in *Aycaguer v. France* paragraph 42. The dismissal of A’s complaint – ten years after the criminal acts had stopped – is thus illustrative.

(122) In my assessment of proportionality, I also emphasise the Appeal Selection Committee’s order HR-2018-2241-U, which today implies that the right of access under section 24 of the Children Act prevails over the limitation in section 12 subsection 6 of the Police Databases Act that information in the DNA database can only be used for criminal justice purposes.

(123) Ever since the establishment of the DNA database in 1995, the Police Databases Act has contained a prohibition against using the data for purposes other than criminal justice. The fact that the prohibition has been a central premise for the legislature is reflected in the preparatory works. Already in Norwegian Official Report 1993: 31 page 29, the DNA Committee considered the “theoretical possibility” that familial bonds could be traced via the DNA database. In Norwegian Official Report 2005: 19 page 47 it is simply assumed that the DNA database is a “pure identity database” for criminal justice purposes only. In this regard, the Ministry comments in Proposition to the Odelsting No. 19 (2006–2007) page 19 that it has no privacy reservations against the proposition of the Committee’s majority, “the way the database is used today – exclusively as an identity database”.

(124) When the legal basis for retention was moved in 2010 from section 160 a of the Criminal Procedure Act to section 12 of the Police Databases Act, secondary use of the data – i.e. use for other purposes – was discussed in light of the specificity of purpose principle in privacy law and in Article 8 of the Convention, see Proposition to the Odelsting No. 108 (2008–2009)

page 51 et seq. It should be noted that under the *general* provision on specificity of purpose in section 3 of the Act, data collected for police purposes may also be processed for other police purposes, if provided by law. The special provision in section 12 subsection 6 that the data in the DNA database "shall only be used for criminal justice purposes" is *stricter* than section 4. This limitation shows in my view that the stated purpose in connection with the use of the DNA database was intended to be absolute.

(125) This shows that the legislature has not considered – and has thus not chosen – a retention system that will also be available for civil use. This aspect of the legislative process will in itself will be significant in the assessment of proportionality, see the Grand Chamber ruling 22 April 2013 *Animal defenders international v. the United Kingdom* 108. In addition, the possibility to use the DNA database for civil purposes also, makes the retention more intrusive. In this regard, I refer to the Grand Chamber ruling 4 December 2008 *S. and Marper v. the United Kingdom*, where the Court of Human Rights states the following in paragraph 75 on the use of DNA databases for familial searching:

> **"The Court notes in this regard that the Government accepted that DNA profiles could be, and indeed had in some cases been, used for familial searching with a view to identifying a possible genetic relationship between individuals. They also accepted the highly sensitive nature of such searching and the need for very strict controls in this respect. In the Court's view, the DNA profiles' capacity to provide a means of identifying genetic relationships between individuals (see paragraph 39 above) is in itself sufficient to conclude that their retention interferes with the right to the private life of the individuals concerned. The frequency of familial searches, the safeguards attached thereto and the likelihood of detriment in a particular case are immaterial in this respect."**

(126) Paragraph 39, as the Court of Human Rights refers to, concerns familial searching for *criminal justice* purposes:

> **"Familial searching is the process of comparing a DNA profile from a crime scene with profiles stored on the national database, and prioritising them in terms of 'closeness' to a match. This allows possible genetic relatives of an offender to be identified. Familial searching might thus lead to revealing previously unknown or concealed genetic relationships."**

(127) The possibility to search in the DNA database for entirely civil purposes, i.e. establishment of paternity under section 24 of the Children Act, comes in addition to, and in principle goes beyond, familial searching for criminal justice purposes.

(128) The circumstances I have now highlighted demonstrate in my view that the retention of A's DNA profile is a disproportionate measure. Although he has been convicted of serious offences, the likelihood that retention in this regard will contribute to solve cases in the future, is small. As long as the nature of the offence is significant neither for the initial retention nor for the possibility to have the profile removed, I doubt that the retention is sufficiently relevant and necessary for its purpose. When, on top of that, the DNA database may also be used for purely civil purposes, I find that the limits for what is proportionate have been exceeded.

(129) Against this background, I have concluded that A's DNA profile should be removed, and that he should be awarded costs in all instances.

Acting Justice **Lindsetmo:** I agree with Justice Bergsjø in all material respects and with his conclusion.

Justice **Matheson:** Likewise.

Justice **Webster:** Likewise.

Following the voting, the Supreme Court gave this

J U D G M E N T :

1. The appeal is dismissed.

2. Costs are not awarded in any instance.