SUPREME COURT OF NORWAY

J U D G M E N T

given on 9 December 2020 by the Supreme Court composed of

Justice Jens Edvin A. Skoghøy
Justice Henrik Bull
Justice Wenche Elizabeth Arntzen
Justice Espen Bergh
Justice Kine Steinsvik

HR-2020-2372-A, (case no. 20-045136SIV-HRET)
Appeal against Gulating Court of Appeal's judgment 20 December 2019

A (Counsel Christoffer Adrian Falkeid)

v.

The State represented by the Ministry
of Justice and Public Security (Counsel Knut-Fredrik Haug-Hustad)

(1) Justice **Bull:**

Issues and background

(2) The case concerns the validity of an administrative decision to retain a DNA profile in the police's DNA database. The issue is whether such retention is a disproportionate interference with private life and a violation of Article 8 of the European Convention on Human Rights (ECHR).

(3) On 4 August 2016, A was sentenced to 18 days in prison and ordered to pay a fine of NOK 40 000 for attempted driving with excess alcohol. The alcohol level in his blood was analysed at 0.175 per cent. After the judgment had become final, the police decided on 13 January 2017 in accordance with the Police Databases Act to have A's DNA profile retained in the police's DNA database. He was requested to provide a DNA sample and, at the same time, informed of his right to complain. A complained against the decision, without stating any grounds. On 5 October 2017, the Regional Public Prosecution Office in Rogaland rejected his complaint, arguing briefly that the police's decision to retain his DNA was "in line with the legal basis and the guidelines provided for such a measure". After some discussion between the police and A, A gave a DNA test at the police station on 4 April 2017.

(4) Next, A brought an action against the State represented by the Ministry of Justice and Public Security, requesting that his DNA profile be deleted. On 21 December 2018, Haugaland District Court ruled as follows:

> "1. The State represented by the Ministry of Justice and Public Security is to ensure deletion of A's DNA profile in the DNA database. Time for performance is 30 days of the service of this judgment.
>
> 2. The State represented by the Ministry of Justice and Public Security is to cover A's costs in the District Court of NOK 9 220. Date for performance is 14 days of the service of this judgment."

(5) The State represented by the Ministry of Justice and Public Security appealed to Gulating Court of Appeal. In the Court of Appeal, A requested, instead, that the Public Prosecutions Office's decision to retain his DNA be declared invalid. On 20 December 2019, Gulating Court of Appeal ruled as follows:

> "1. The claim against the State represented by the Ministry of Justice and Public Security is dismissed.
>
> 2. Costs in the District Court are not awarded."

(6) A has appealed to the Supreme Court, challenging the Court of Appeal's application of the law.

The parties' contentions

(7) The appellant – *A* – contends:

(8) The retention of A's DNA profile in the police's DNA database because of a sentence for attempted driving with excess alcohol is a violation of Article 8 ECHR on the right to respect for private life. The measure is a disproportionate interference with this right.

(9) According to case law from the European Court of Human Rights – the ECtHR – retention of a DNA profile is a serious interference with a person's right to respect for private life, and the Convention States have a narrow margin of appreciation to determine what constitutes proportional interference. This is also expressed in the Supreme Court judgment HR-2019-1226-A. The facts of the case must be assessed individually and balanced against the legitimate purpose of the retention practice, which is to prevent crime and disorder.

(10) The seriousness of the offence is key in the assessment of proportionality in this case. As such, the Norwegian set of rules sets a very low threshold for retention. Section 12 subsection 2 of the Police Databases Act permits registration of all persons who have been sentenced for an act that carries a custodial sentence. For capacity reasons, this threshold has been slightly increased by the Director of Public Prosecutions, but it is still low. Although ordering DNA registration after driving with excess alcohol will in itself not always be disproportionate, the, after all, limited seriousness of A's offence clearly suggests that in this case it is.

(11) The virtually indefinite storage period – five years after the death of the data subject – and the scant possibility of having one's DNA profile deleted, also indicate that the retention of A's DNA profile is disproportionate.

(12) In addition, after the Supreme Court ruling HR-2018-2241-U allowing the use of a DNA profile in the police's DNA database in a paternity case, there is a risk that retained DNA profiles will be used for other purposes than administration of criminal justice.

(13) The legislature's own proportionality assessment is based on an erroneous perception of DNA retention as a moderate interference with private life, and can thus not be afforded weight. The basis for the assessment is incorrect.

(14) When considering the facts of the case in the light of ECtHR case law, particularly the judgment 13 February 2020 *Gaughran v. the United Kingdom,* also concerning driving with excess alcohol, the conclusion must be that the registration of A is disproportionate and incompatible with Article 8 ECHR. The Norwegian criteria for retaining the DNA of criminal convicts are similar to those applicable in the UK, and in *Gaughran*, the ECtHR found that the retention was disproportionate.

(15) A has requested the Supreme Court to rule as follows:

> "1. Rogaland Prosecution Authority's administrative decision of 5 October 2017 is invalid.
>
> 2. A is awarded costs in the District Court and in the Court of Appeal."

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

(17) Retaining A's DNA profile in the police's DNA database is not incompatible with Article 8 ECHR.

(18) Several of A's more general objections against the Norwegian system were assessed in HR-2019-1226-A, where the Supreme Court found that the characteristics pointed out did not render the measure a disproportionate interference with the right to respect for private life. Subsequent ECtHR rulings on the same issue confirm that the Supreme Court's assessment was correct.

(19) The only absolute requirement set by the ECtHR, is that the threshold must not be so low as to result in "blanket and indiscriminate" retention. This is not the case for the Norwegian practice, due to, among other things, the requirement of a legally binding judgment and a certain level of gravity.

(20) *Gaughran v. the United Kingdom* demonstrates that the ECtHR does not consider the Norwegian storage period of five years after the data subject's death to be indefinite – as opposed to the UK system with no time limit at all. Although the possibility of deletion is restricted, it does not make the Norwegian system a disproportionate interference with private life. In addition, in the wake of HR-2019-1226-A, the Director of Public Prosecutions has stressed the significance of applying the set of rules in accordance with Norwegian and ECtHR case law.

(21) The Supreme Court ruling HR-2018-2241-U on the use of a DNA profile in a paternity case dealt with an unusual situation, and gives little guidance on the general possibility of using DNA for other purposes than administration of criminal justice. Even the use that was accepted has now been proposed prohibited in a discussion paper from the Ministry of Justice and Public Security.

(22) The legislature's proportionality assessment was thorough and carefully discussed by the Supreme Court in HR-2019-1226-A.

(23) Nor may an overall assessment of all aspects of the case render the retention of A's DNA profile, based on his conviction for attempted driving with excess alcohol, disproportionate and incompatible with the ECHR. *Gaughran v. the United Kingdom* supports this conclusion.

(24) The State represented by the Ministry of Justice and Public Security has requested the Supreme Court to rule as follows:

> "The appeal is dismissed."

My opinion

Legal starting points – the Supreme Court judgment HR-2019-1226-A

(25) The question of whether the Norwegian system for retention of DNA profiles in the police's DNA database may be justified under Article 8 ECHR on the right to respect for private life was carefully considered in the Supreme Court's judgment HR-2019-1226-A. That case concerned DNA retention on the basis of a prison sentence of eighteen months, six of which were suspended, and a fine of NOK 225 000 for violation of the Tax Assessment Act. With a 4–1 vote, the Supreme Court ruled that the measure was not incompatible with Article 8 ECHR. The judgment also provides an outline of the system of DNA retention, the applicable set of rules, the legislative history and the ECtHR's rulings on the application of Article 8

ECHR in relation to retention practices in the administration of criminal justice in other European countries. Referring to this outline, I will only give a brief presentation of the Norwegian system and relevant ECtHR case law.

(26) Amongst the new issues raised in this case, is the fact that A has received a much milder sentence than the data subject in HR-2019-1226-A. Furthermore, new rulings have been issued by the ECtHR that further clarify the ECtHR's view of the proportionality of DNA retention in connection with offences.

The retention system

(27) According to section 12 of the Police Databases Act, the police shall keep a DNA database consisting of a convicted offenders database, a known suspects database and a crime-scene samples database. All persons convicted of an offence that carries a custodial sentence, may be registered in the DNA database. However, in the preparatory works, Proposition to the Odelsting No. 19 (2006–2007) pages 19–20, it is expressed that the legal basis should not necessarily be fully exploited, partially for capacity reasons and partially because it was probably unnecessary. The further limitation has in practice been left to the Director of Public Prosecutions. Since the guidelines issued by the latter are the ones that govern the retention practice, I find that these must form the basis for the further assessment of the application of Article 8 ECHR.

(28) According to the guidelines from the Director of Public Prosecutions of 17 October 2012 Part II, all persons who have received an unconditional prison sentence or alternative punishment such as preventive detention, youth sentence or community sentence, shall be registered. In certain cases, this is also applies to those who have received a suspended prison sentence or accepted a fine. This concerns drug offences, sexual offences, certain types of violence or aggravated theft and robbery. The guidelines set out that although the criteria for DNA retention are met, "retention may be *waived* if extraordinary circumstances in the individual case indicate that such a measure is clearly not expedient". Apart from that, these guidelines do not allow for individual assessments of necessity or expediency, but since retention in A's case is conditional on a binding and unconditional prison sentence, there is an indirect element of individual assessment with regard to the seriousness of the offence.

(29) Section 55 of the Police Databases Act gives the data subject a right to appeal to a superior body. As I have mentioned, the subject matter in dispute in the case at hand is the Regional Prosecution Office's decision subject to A's initial complaint.

(30) The retention system itself is detailed in HR-2019-1226-A paragraphs 27–31. As set out therein, a DNA profile consists of 17 markers that are unique for the person in question. However, apart from gender, the markers do not contain information suited to determine appearance, or other genetic characteristics or health risks.

(31) Name and personal information are registered in a different database, and the databases are connected by a unique number linked to the relevant DNA profile. DNA profiles are stored in a closed database to which only a few persons at Kripos (the National Criminal Investigation Service) have access.

(32) According to section 45-18 of the Police Databases Regulations, the biometric material constituting the analytical basis for the DNA profile must be destroyed as soon as the registration has been carried out.

(33) The DNA profile makes it possible to disclose kinship. However, according to information provided, retained DNA profiles are not used for so-called family and kinship matches, as that has been considered to be outside of the scope of the Police Databases Act. In Norway, no searches are made for relatives of a non-registered perpetrator from whom biometric material has been found, in order to find the perpetrator.

(34) According to section 12 subsection 6 of the Police Databases Act, information in the DNA database shall only be used for criminal justice purposes. Nonetheless, the Supreme Court allowed in HR-2018-2241-U, with a dissenting opinion, the use of a DNA profile in a paternity case where there was already a legal basis for coercive DNA sampling, if necessary by use of physical force. In the individual case, however, it was not feasible because the person was registered as having moved from Norway to an unknown residence. The ruling thus concerned a very specific case, and should not be interpreted to imply that DNA profiles in the police databases may be used more widely for other purposes than administration of criminal justice. Moreover, in a consultation paper of 26 June 2020, the Ministry of Justice and Public Security proposed introducing an express prohibition also against such use as in the case just mentioned.

(35) It follows from section 45-17 of the Police Databases Regulations that a DNA profile is retained in the database up to five years after the death of the data subject, unless "continuing retention it is clearly no longer expedient". However, as the police do not regularly assess the expediency of continuing their own measures, it is up to the data subject to request deletion. A possible rejection may be appealed to a superior prosecuting authority, see section 45-20. General rules on the right to have one's case heard in court also apply. On 14 November 2019, A's request for deletion put forward in September the same year was rejected, but this decision is not the subject matter in dispute. In general, requests for deletion appear to be rare; as of September 2020, Kripos had only registered two such requests in the DNA database. I will return to the criteria for deletion in connection with the proportionality assessment pursuant to Article 8 ECHR.

Is the retention incompatible with Article 8 ECHR?

(36) Article 8 ECHR 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."

(37) It is clear that retention of a person's DNA profile in the police's DNA database constitutes an interference with that person's private life. As set out in HR-2019-1226-A paragraphs 54 and

55, three conditions must thus be fulfilled in order for the measure not to violate Article 8 ECHR: It must be in accordance with the law, it must fulfil a legitimate aim and it must be proportionate. It is clear and undisputed that the requirements of a legal basis and a legitimate aim – the prevention of crime – are met. The question is whether the proportionality requirement is met, as Article 8 sets out that the measure must be necessary in a democratic society.

(38) I mention that Article 102 of the Constitution contains a provision on the right to respect for private life inspired by Article 8 ECHR. In case law, it is established that this Article 102 must be interpreted in the light of Article 8 ECHR, see the Supreme Court judgment HR-2016-2554-P (*Holship*) paragraph 81. However, as the Constitution has not been invoked in the case at hand, I will not elaborate on this.

(39) There are a number of ECtHR rulings on the proportionality of DNA retention in criminal cases. In HR-2019-1226-A, the Supreme Court found that proportionality must be determined based on an overall assessment, where key factors are the gravity and nature of the offence triggering the registration duty, the storage period, the possibility of deletion, the right to complain and to have the case heard in court, and the manner in which the data are stored and used. Later ECtHR rulings on the proportionality of DNA retention confirm that this is a correct approach. The main issues in the case at hand have been the nature and seriousness of the offence and the retention period balanced against the possibility of deletion.

(40) In HR-2019-1226-A paragraph 69, the Supreme Court found that Article 8 ECHR does not imply that a DNA profile may only be retained if the person has been convicted of a "DNA relevant" offence, i.e. an offence where DNA may contribute to resolving the case. This must stand. It is true that in *Gaughran v. the United Kingdom*, the ECtHR found that the registration of Gaughran in the DNA database after being fined for driving with excess alcohol was disproportionate. However, this was decided after an overall proportionality assessment, not because the criterion for retention – in practice a conviction for an offence that carries a custodial sentence – was unacceptable in itself.

(41) Moreover, DNA is not necessarily without interest in the investigation of cases concerning driving with excess alcohol. For instance, if it is unclear who was behind the wheel during the ride, biometric material may be found that under the circumstances must be assumed to stem from the driver.

(42) Apart from the requirement that the power of retention must not be "blanket and indiscriminate", see Grand Chamber judgment 4 December 2008 *S. and Marper v. the United Kingdom* paragraph 125, the ECtHR has not set an absolute lower threshold for DNA retention. In the mentioned case, DNA could be retained even after "minor or non-imprisonable offences", and based on suspicion alone, see the judgment's paragraph 119.

(43) Nonetheless, the retention of A's DNA based on a sentence of 18 days of imprisonment with the addition of a fine for attempted driving with excess alcohol must be said to result from a rather low threshold. The lower the threshold for retention, the more weight must be afforded to the other characteristics of the system in the proportionality assessment. And it is in fact these other characteristics, particularly the length of the retention period and the possibility of deletion, that seem to be essential in the ECtHR's proportionality assessments.

(44) In HR-2019-1226-A paragraph 96, it was assumed that when the registration, as a starting point, remains for five years after the death of the data subject, the retention period is in practice indefinite. Whether the retention period is indefinite is significant in the ECtHR's rulings on DNA retention. In *Gaughran v. the United Kingdom* paragraph 53, cf. paragraph 82, the ECtHR distinguishes between retention until the death of the data subject – a system practiced by several countries – and indefinite retention. In paragraph 81, the reason seems to be that genetic data retained after the death of the data subject continues to impact on the privacy of individuals biologically related to the data subject. From the data subject's perspective, however, retention for the rest of his or her life is perceived as indefinite and a more severe measure than a shorter retention period. Relevant here is judgment 22 June 2017 *Aycaguer v. France* paragraph 42, where the ECtHR states that a forty-year retention period in principle constitutes "indefinite storage, or at least as a norm rather than a maximum … particularly in the case of persons of mature age".

(45) What seems to have triggered the decisions of the ECtHR both in *Aycaguer v. France* and *Gaughran v. the United Kingdom*, is the retention period combined with the data subject's lack of a possibility to request deletion. I refer to *Aycaguer* paragraph 44 and *Gaughran* paragraphs 94 and 96. In *Aycaguer* paragraph 44, the ECtHR stated that such a remedy "should be made available … to ensure that the storage period is proportionate to the nature of the offences and the aims of the restrictions". Correspondingly, in *Gaughran* paragraph 94, it was pointed out that data were retained without reference to the seriousness of the offence and without regard to any continuing need to retain that data indefinitely:

> "There is no provision allowing the applicant to apply to have the data concerning him deleted if conserving the data no longer appeared necessary in view of the nature of the offence, the age of the person concerned, the length of time that has elapsed and the person's current personality …. Accordingly, the review available to the individual would appear to be so narrow as to be almost hypothetical …."

(46) This statement was likely not meant to set as a minimum requirement that it must be possible to balance these factors against each other on a free basis. Depending on other characteristics of the system, there must be a certain national leeway to decide on the threshold for deletion. As I see it, the statement must nonetheless be interpreted as a requirement of a rather broad assessment of the proportionality of continuing retention.

(47) As mentioned, it follows from section 45-17 of the Police Databases Regulations that the DNA profile must be deleted from the database "if continuing retention is clearly no longer expedient". According to a presentation for the King in Council in connection with the adoption of the provision, PRE-2014-12-19-1827 item 5, this might take place if "subsequent incidents, such as health issues, render the person incapable of committing criminal acts". In the light of the statements in ECtHR case law, this is in my view an overly strict standard.

(48) However, based on the Court of Appeal's judgment in the case adjudicated by the Supreme Court in HR-2019-1226-A, and the District Court's judgment in the case at hand, the Director of Public Prosecutions has instructed Kripos, in a letter of 17 January 2019, to observe Norwegian and ECtHR case law when applying section 45-17 of the Police Databases Regulations. This is in practice an enjoinder that the deletion practice be compatible with the ECHR. The Director of Public Prosecutions followed this up in a decision 28 September 2020 concerning a complaint against retention. The complaint was accepted after an overall assessment of the time elapsed between the conviction and the retention, the nature and seriousness of the offence and the fact that no offences were later registered on the convicted

person. Although this decision concerned a complaint against retention, and not the question of allowing a request for deletion, it nonetheless clarifies the scope of the discretion entrusted to Kripos also in deletion matters, according to the Director of Public Prosecutions' letter 17 January 2019.

(49) Against this background, one may ask whether it would be expedient to amend the wording in section 45-17 of the Police Databases Regulations. I assume, however, that the current state of the law implies that the possibility of deletion in the future will be governed by the guidelines that follow from Supreme Court and ECtHR case law.

(50) When balancing the threshold for retention against the retention period and the possibility of deletion based on a substantive proportionality assessment, I conclude that the retention of A's DNA profile in the police's DNA database does not constitute a disproportionate interference with his private life under Article 8 ECHR.

(51) I have previously described the aspects of the retention system related to securing the information and the possibility of using it for other purposes than administration of criminal justice. These aspects were also considered by the Supreme Court in HR-2019-1226-A, and can therefore, in my view, not lead to any other result.

Conclusion

(52) I vote for the following

J U D G M E N T :

The appeal is dismissed.

Justice **Arntzen:** I agree with Justice Bull in all material respects and with his conclusion.

(53) Justice **Steinsvik:** Likewise.

(54) Justice **Bergh:** Likewise.

(55) Justice **Skoghøy:** Likewise.

(56) Following the voting, the Supreme Court gave this

J U D G M E N T :

The appeal is dismissed.