

Automated national file of genetic prints (FNAEG) and article 8 of the ECHR: prohibition to condemn a person who refused to give DNA sample for the period when French law did not provide the possibility of obtaining the erasure of DNA markers.

08/12/2021



Ruling of 8 December 2021, appeal no. 20-84.201

Quashing without referral

RULING OF THE COUR DE CASSATION (COURT OF CASSATION) OF 8 DECEMBER 2021, APPEAL NO. 20-84.201

It follows from Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the ECHR ruling Aycaguer v. France, 22 September 2017, no. 8806/12, that storing the DNA markers of a convicted or suspected person constitutes an interference with their private life. The storage of this data is only legitimate in the prevention and punishment of offences if it is provided for by law and accompanied by guarantees for concrete means of obtaining an erasure or deletion of their DNA marker data. A ruling is rendered liable for quashing if said ruling, in order to declare the convicted offender guilty of refusing to submit to the taking of a biological reference sample, states that the domestic provisions comply with the requirements of the said Convention - following the amendment of Article 706-54-1 of the Criminal Procedure Code adopted by Act No. 2019-222 of 23 March 2019, which now gives convicted offenders the option of petitioning the public prosecutor for deletion of their DNA markers from the automated national database - since the refusal to do so was committed before the entry into force of this law. On the one hand, when the concerned party refused to submit to the biological reference sample, the domestic DNA data retention system's compliance with the Convention on the Protection of Human Rights and Fundamental Freedoms could not be assessed as of 27 December 2017 by taking into consideration a later text. On the other hand, this domestic system only became compliant with the Convention when Executive Order No. 2021-1402 of 29 October 2021 came into force. This order set the deadline by which convicted offenders could request erasure of their DNA markers.

QUASHING WITHOUT REFERRAL

Mr SOULARD, President,

F R E N C H R E P U B L I C

IN THE NAME OF THE FRENCH PEOPLE

RULING OF THE COUR DE CASSATION (COURT OF CASSATION), CRIMINAL CHAMBER,

8 DECEMBER 2021

Mr [S] [V] lodged an appeal against the ruling of the *cour d'appel* (Court of Appeal) of Paris, Chamber 2-9, dated 1 July 2020. The ruling had sentenced him to a ninety-day fine of EUR. 4 per day for refusing to submit to the taking of a biological reference sample.

An additional written statement and a personal written statement were submitted.

In the report of Ms Barbé, Reporting Judge, the observations of SCP Célice, Texidor, Périer, lawyer for Mr [S] [V], and the conclusions of Ms Bellone, Advocate-General Referee, after the arguments at the public hearing of 10 November 2021, at which were present Mr Soulard, President, Ms Barbé, Reporting Judge, Mr de Larosière de Champfeu, Chamber Judge, and Ms Sommier, Chamber Registrar. Pursuant to Article 567-1-1 of the Criminal Procedure Code,

the Criminal Chamber of the *Cour de cassation* (Court of cassation), composed of the above-mentioned President and Judges, delivered the present ruling after deliberating in accordance with the law.

Facts and procedure

1. The following results from the ruling under appeal and the documents of the proceedings.
2. In a ruling that became final on 25 June 2014, the Criminal Court found Mr [S] [V] guilty of the theft of six bottles of champagne from a supermarket on 30 December 2013, which were allegedly returned at the cash register, and sentenced him to pay a fine of EUR. 500. It also sentenced him to a 15-day suspended prison sentence for refusing to submit to the taking of a biological reference sample as a person suspected of an offence leading to their inclusion in the automated French national file of genetic prints (FNAEG).
3. Having been summoned on two occasions for sampling by the police on the instructions of the public prosecutor, he was summoned to appear before the Criminal Court for refusing to submit, once again on 27 December 2017, to the taking of a biological reference sample to analyse and identify genetic markers. By a ruling dated 6 July 2018, the Court found him guilty of the offence of which he was accused and sentenced him to pay a ninety-day penalty of EUR. 4 per day.
4. Mr [V] lodged an appeal, and the public prosecutor lodged a cross-appeal.

Reviewing pleas

On the plea in the personal written submission and the plea in the supplementary written submission

Statement of pleas

5. The plea in the personal written submission objects to the ruling under appeal insofar as it found Mr [V] guilty of refusing to submit to the taking of a biological reference sample, whereas the reform introducing the option of deleting the data entered in the FNAEG database was enacted after Mr [V]'s accused offences occurred. The *cour d'appel* (Court of Appeal) could not take this fact into account, without infringing Article 112-1 of the Penal Code, as a means of rejecting the findings that declare the procedure for collecting and storing his genetic data, and the file itself, as unlawful.
6. The plea in supplementary written submission objects to the ruling under appeal insofar as it found Mr [V] guilty of refusing to submit to the taking of a biological reference sample for analysis and identification upon being found guilty of an offence entailing an entry in the automated French national database of genetic prints and had been sentenced as such to pay in penalty a fine of EUR. 4 per day for 90 days, whereas:

"1°/ Unless a more lenient criminal law is applied immediately, the legal aspect of the offence is evaluated based on the day the acts were committed. In this case in point, Mr [V], who was prosecuted for refusing to the taking of a biological reference sample on 27 December 2017, argued that the rules governing such samples were insufficiently protective of the right to privacy guaranteed by Article 8 of the European Convention on Human Rights, particularly concerning the length of time for which the collected DNA markers were stored and the conditions for their erasure. In order for the *cour d'appel* (Court of Appeal) to find Mr [V] guilty on the basis of the data erasure options made available by Article 706-54-1 of the Criminal Procedure Code - resulting from Article 85 of Act No. 2019-222 of 23 March 2019 - which was subsequent to the accused offences, the *cour d'appel* (Court of Appeal) infringed Article 8 of the European Convention on Human Rights; Articles 112-1, 706-54, 706-54-1, 706-55, 706-56 of the Penal Code; and Articles 591 and 593 of the Criminal Procedure Code.

2°/ In the absence of implementation decrees, a law can come into force only when it is sufficiently precise in and unto itself. In this case in point, Article 85 of Act No. 2019-222 of 23 March 2019, which introduced Article 706-54-1 into the

Criminal Procedure Code, provided the option to erase DNA markers. It refers to a Council of State decree, issued after consulting with *Commission nationale de l'informatique et des libertés* (French national commission on information systems and freedom), to set the time limit from which erasure may be requested by the person in question. In order to provide sufficient grounds for a conviction against Mr [V], the *cour d'appel* (Court of Appeal) infringed Article 8 of the European Convention on Human Rights; Articles 706-54, 706-54-1, 706-55, 706-56 of the Penal Code; and 591 and 593 of the Criminal Procedure Code, by affirming that "the fact that the implementation order had not yet been issued should not be taken to signify that these new legislative provisions would fail to provide a concrete option for requesting data erasure, which could be exercised at a later date", when the lack of a deadline after which erasure can be requested renders the provision providing for the principle of deletion inapplicable."

Court's response

7. The pleas are joined.
8. In view of Articles 8 of the European Convention on Human Rights, 112-1 of the Penal Code, 706-54 to 706-56 and R. 53-14 of the Criminal Procedure Code:
9. According to Article 8 of the European Convention on Human Rights, everyone has the right to respect for their private and family life, their home and their correspondence. There shall be no interference by a public authority with the exercise of this right unless such interference is provided for by law and in a democratic society is necessary in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or criminal actions, for the protection of health or morals or for the protection of the rights and freedoms of others.
10. The European Court of Human Rights has ruled (ECHR, ruling of 22 September 2017, *Aycaguer v. France*, no. 8806/12) that storing DNA markers of a convicted or suspected person constitutes an interference with their private life. This interference is legitimate as part of ensuring the prevention and sanctioning of offences, so long as it is provided for by law and accompanied by safeguards in favour of the persons whose data are thus stored, who must be able, in particular, even if they are convicted, to benefit from a concrete option of obtaining the erasure of their data from the file.
11. According to Article 706-54 of the Criminal Procedure Code, the DNA markers of persons convicted of one of the offences referred to in Article 706-55 of the same code, which includes theft, are stored in a national automated database of genetic prints.
12. According to Article 706-54-1 of the same code, enacted by Act No. 2019-222 of 23 March 2019, DNA markers of convicted persons may be removed from the file on the orders of the public prosecutor, acting at the request of the person in question. Subject to being considered inadmissible, the latter may only make an erasure request at the end of a period that has been fixed by a decree in the Council of State issued after the opinion of the *Commission nationale de l'informatique et des libertés* (French national commission on information systems and freedom).
13. In order to find the appellant guilty of refusing to submit to the taking of a DNA reference sample, the *cour d'appel* (Court of Appeal) stated that, after having been convicted of theft in a ruling dated 25 June 2014, he refused, on 27 December 2017, to submit to the taking of a genetic sample intended to be used for DNA reference.
14. In response to the appellant, who argued that he had refused to submit to the requested sample because the domestic provisions governing the storage of DNA markers seemed to him to fail to meet the requirements of the European Convention on Human Rights, the judges stated that the domestic provisions now met the requirements of the Convention, Article 706-54-1 of the Criminal Procedure Code, enacted by Act No. 2019-222 of 23 March 2019, offering convicted persons the option of requesting the public prosecutor to order the erasure of their DNA

markers from the national automated database where they are recorded.

15. In so pronouncing, the *Cour d'appel* (Court of appeal) disregarded the above-mentioned texts.
16. Indeed, when the concerned party refused to submit to the biological reference sample, the domestic DNA retention system's compliance with the European Convention for Human Rights could not be assessed as of 27 December 2017 by taking into consideration a later text.
17. Moreover, this domestic system for taking samples and storing DNA markers only became compliant with the Convention when Executive Order No. 2021-1402 of 29 October 2021 came into force. This order set the deadline by which convicted offenders could request erasure of their DNA markers.
18. Consequently, the case is subject to quashing.

Scope and consequences of the quashing

19. The quashing will take place without referral. The *Cour de cassation* (Court of cassation) is able to apply the rule of law directly and put an end to the dispute, as set out in Article L. 411-3 of the Judicial Code.

ON THESE GROUNDS, the Court:

QUASHES and SETS ASIDE, all provisions of the aforementioned ruling by the *cour d'appel* (Court of appeal) of Paris, dated 1 July 2020; DECLARES that there is no need to refer back the case;

RECALLS that, as a result of this decision, the first instance ruling loses all enforceability;

ORDERS the printing of this ruling, its transcription in the registry of the *cour d'appel* (Court of appeal) of Paris and its mention in the margin or following the ruling that was set aside;

Thus decided and ruled by the *Cour de cassation* (Court of cassation), Criminal Chamber, and issued by the President the eighth of December, two thousand twenty one.

President : Mr Soulard

Reporting Judge : Ms Barbé, Judge

Advocate-General referee : Ms Bellone

Lawyer(s) : SCP Célice, Texidor, Périer

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