EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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Collection and retention, by the French blood donation service (EFS), of personal data reflecting applicant's presumed sexual orientation without proven factual basis: violation of Article 8 of the Convention

In today's **Chamber** judgment[1] in the case of Drelon v. France (application no. 3153/16) the European Court of Human Rights held, unanimously, that there had been:

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

The applications concerned, first, the collection and retention, by the French blood donation service (EFS) of personal data reflecting the applicant's presumed sexual orientation – together with the rejection of his criminal complaint for discrimination – and, second, the refusal of his offers to donate blood, together with the dismissal by the *Conseil d'État* of his judicial review application challenging an order of 5 April 2016 which amended the selection criteria for blood donors.

Addressing the first application, the Court found that the collection and retention of sensitive personal data constituted an interference with the applicant's right to respect for his private life. That interference had a foreseeable legal basis as the authorities' discretionary power to set up a health database for such purpose was sufficiently regulated by the then applicable Law of 6 January 1978. Whilst the collection and retention of personal data concerning blood donor candidates contributed to guaranteeing blood safety, it was nevertheless particularly important for the sensitive data involved to be accurate, up-to-date, pertinent and non-excessive in relation to the goals pursued; and the data retention period had to be limited to what was necessary.

The Court observed, first, that even though the applicant had refused to answer the questions about his sex life during the medical examination prior to the blood donation, the data included a contraindication to giving blood that was specific to men who had intercourse with other men. It concluded that the data in question was based on mere speculation without any proven factual basis. Secondly, after noting that the Government had not shown that the data retention period (until 2278 at the time) had been regulated in such a way that it could not exceed the period necessary for the aim pursued, the Court found that the excessive retention period had made it possible for the data to be used repeatedly against the applicant, thus entailing his automatic exclusion from being a blood donor.

There had thus been a violation of Article 8 of the Convention on account of the collection and retention of the personal data concerned.

As to the second application, the Court rejected as out of time the complaints about the decisions excluding the applicant from blood donation on 16 November 2004 and 9 August 2006. As regards the decision of 26 May 2016 the Court found that the applicant could not invoke a violation of Articles 8 and 14 of the Convention in respect of the order of 5 April 2016 as it was not yet in force on the date of the refusal in question.

A legal summary of this case will be available in the Court's database HUDOC (link)

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

COUNCIL OF EUROPE
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Principal facts

The applicant, Laurent Drelon, is a French national who was born in 1970 and lives in Paris (France).

On 16 November 2004 the applicant attempted to donate blood at a collection site of the French Blood Donation Service, the Établissement Français du Sang (EFS). During a preliminary medical interview, he was asked whether he had ever had sex with another man. He refused to answer and his request to give blood was rejected. During the interview, his personal data were entered into a computer database. The entry showed that the relevant contraindication to donating blood, code FR08, used at the time for men who had had sexual intercourse with men, had been applied to him.

On 9 August 2006 the applicant made a new request. He was told that he was listed under code FR08 and was excluded from giving blood.

On 6 February 2007 he lodged a criminal complaint for discrimination, with an application to join the proceedings as a civil party, complaining about the refusals to accept him as a blood donor in 2004 and 2006 and the fact that the EFS had registered his presumed homosexuality.

The investigating judge refused to open a criminal investigation. On an appeal by the applicant against this refusal, the Investigation Division of the Paris Court of Appeal ruled on 15 September 2009 that the facts complained of did not constitute the criminal offence of discrimination, but that the investigating judge should have ascertained whether they might constitute the offence of recording or retaining sensitive personal data without the consent of the person concerned, as classified under Article 226-19 of the Criminal Code.

After further investigations, the criminal proceedings were discontinued.

On 18 April 2013 the Investigation Division upheld that decision.

The Court of Cassation dismissed the applicant's appeal on points of law on the grounds that the data-processing at issue was provided for in section 8(II) 6° of the Law of 6 January 1978 and therefore did not fall within the scope of the offence classified under Article 226-19 of the Criminal Code.

From 2009 onwards, the contraindications to blood donation were defined by the Minister of Health by means of ministerial orders.

On 26 May 2016 the applicant tried once again to give blood, but in vain. Mr Drelon then challenged the list of contraindications to donation on two occasions, on the basis that it excluded men who had had sexual intercourse with other men. He first sought the repeal of the order of 12 January 2009. The Minister of Health rejected this request and he brought judicial review proceedings to have the decision quashed. However, the order at issue was repealed while the proceedings were pending and the *Conseil d'État* noted, in a decision of 18 July 2016, that they had become without object.

By an application of 10 June 2016 Mr Drelon then brought a judicial review claim asking the *Conseil d'État* to strike down the order of 5 April 2016, which had modified the selection criteria for blood donor candidates. On 28 December 2017 the *Conseil d'État* dismissed his claim. It found that, in view of the statistical and epidemiological data discussed before it and in the light of scientific knowledge, the Minister of Health had not taken an illegal discriminatory measure in providing for a contraindication which excluded blood donation for 12 months in the case of men who had had sexual intercourse with other men.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life), the applicant submitted that the data reflecting his presumed sexual orientation had been collected and retained by the EFS (French

blood donation service) in conditions which breached this Article of the Convention. Then relying on Article 8 alone and in conjunction with Article 14 (prohibition of discrimination), he complained in his application no. 27758/18 of the decisions refusing his requests to donate blood in 2004, 2006 and 2016.

The applications were lodged with the European Court of Human Rights on 8 January 2016 and 8 June 2018.

Judgment was given by a Chamber of seven judges, composed as follows:

Síofra **O'Leary** (Ireland), *President*,
Mārtiņš **Mits** (Latvia),
Stéphanie **Mourou-Vikström** (Monaco),
Lətif **Hüseynov** (Azerbaijan),
Arnfinn **Bårdsen** (Norway),
Mattias **Guyomar** (France),
Kateřina **Šimáčková** (the Czech Republic),

and also Victor **Soloveytchik**, *Section Registrar.*

Decision of the Court

Article 8

The Court found that section 8(II) 6° of the Law of 6 January 1978 had constituted the legal basis for the interference with the applicant's right to respect for his private life and that the applicable legal framework, taken as a whole, defined with sufficient precision the scope of – and procedures for exercising – the discretion conferred on the domestic authorities with regard to the creation of health databases.

In the light of the explanations provided by the Government, the documents produced and the applicable international instruments, the Court found that the collection and retention of personal data relating to the results of procedures for selecting blood donor candidates contributed to ensuring blood safety and were therefore based on relevant and sufficient grounds.

In view of the sensitivity of the personal data at issue, the Court considered it particularly important that they should meet the quality requirements laid down in Article 5 of the Convention of 28 January 1981. The data had to be accurate, up-to-date, appropriate, relevant and not excessive in relation to the purposes of the data-processing; and their retention should not exceed the period necessary. The Court further noted that the data at issue, which concerned the applicant's privacy, had been collected and retained without his express consent, thus calling for a stringent examination.

The Court observed, firstly, that the applicant's data entry had been attributed a contraindication specific to men who had sex with men, solely because he had refused to answer questions relating to his sex life during the pre-donation medical interview. None of the elements submitted to the doctor's assessment had allowed such a conclusion to be drawn about his sexual behaviour. The Court concluded that the data collected had been based on mere speculation and had no proven factual basis.

The Court emphasised that it was inappropriate to collect personal data relating to sexual behaviour and orientation on the basis of mere speculation or presumption. In order to achieve the objective of blood safety, it would have been sufficient, in its view, to keep a record of the applicant's refusal to answer questions relating to his sexuality, as that factor alone was capable of justifying a refusal to admit him as a blood donor.

Secondly, the Court found that the Government had not shown that, at the relevant time, the retention of the data at issue had been regulated in such a way that it could not exceed the period necessary for the purposes for which they had been collected. At the time of the requested collection, the IT tool used by the EFS provided for retention until 2278. The Court noted, in the light of the EFS's consistent practice, that the excessive length of the data retention made it possible for the data to be used repeatedly against the applicant, resulting in his automatic exclusion from donating blood.

There had thus been a violation of Article 8 of the Convention on account of the collection and retention of the personal data at issue.

Article 8 taken separately and in conjunction with Article 14

As a preliminary point, the Court noted that the applicant had submitted a complaint concerning his exclusion from blood donation on 16 November 2004 and 9 August 2006 in his application of 8 June 2018 (no. 27758/18). In so far as it concerned the above-mentioned exclusion decisions, the Court found that this complaint was out of time and declared it inadmissible.

With regard to the rejection of 26 May 2016, the Court noted that domestic law allowed the applicant to challenge directly any such decisions taken against him before the Administrative Court, but he had not done so, preferring instead to lodge, on 10 June 2016, a judicial review claim against the order of 5 April 2016.

The Court emphasised that the applicant's reasoning essentially sought to challenge the temporary contraindication to donating blood applied to men who had had sexual intercourse with other men, as provided for by the order of 5 April 2016. However, it noted that the order had not come into force until 10 July 2016. It followed that the applicant could not rely on a violation of Articles 8 and 14 in combination that was alleged to have stemmed from the implementation, against him, of a regulatory order that had not yet entered into force on the date of the refusal to donate blood that he was challenging before the Court.

The Court observed, in addition, that the refusal to allow the applicant to donate blood on 26 May 2016 had resulted from the automatic application by the EFS of a contraindication to donation which had been included in the data processing system since 2004 and which was the result of the collection and retention, under the terms of the order of 10 September 2003, of data which were demonstrably inaccurate. In the Court's view, this was a repercussion of the previously found violation of Article 8 of the Convention.

Just satisfaction (Article 41)

The Court held that France was to pay the applicant 3,000 euros (EUR) in respect of non-pecuniary damage and EUR 9,000 for costs and expenses.

The judgment is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.