Portugal, Tribunal Constitucional (Constitutional Court) - Case 333/2018, 27 June 2018

Deciding bodies and decisions

Portugal, Tribunal Constitucional (Constitutional Court) - Case 333/2018, 27 June 2018

Area of law

Data protection - data retention

Subject matter

Is the collection of data from a DNA database is lawful processing?

Summary Facts Of The Case

The plaintiff has argued that the provision pursuant to article 8 (3) of the Profile DNA Database Act violates the CPR.

The mentioned provision determines that a DNA sample can be collected from a convicted criminal by police authorities, following to a judicial decision. However, this can only happen if the following conditions occur: (*i*) commission of a criminal offense out of malice and not out of negligence and (*ii*) sentence of imprisonment for at least three years.

The court must decide if the sample collection under the mentioned circumstances can be regarded as an adequate, necessary and proportionate measure.

The court starts by giving account of the jurisprudential and normative framework.

As far as the normative framework is concerned, the court highlights the purpose pursued by the Profile DNA Database Act. It Is mentioned that the creation of a DNA database has improved the chances of identifying the responsible for the commission of a criminal offence. However, the efficacy of such tool depends on the number of samples collected. Additionally, the court mentions that the right to information is guaranteed before the sample collection, according to art. 10 (1) of the Personal Data Protection Act and art. 13 of the GDPR.

Regarding the jurisprudential framework, the court considers the case-law produced by European Court of Human Rights. Among other statements, the referred court has consistently prohibited a general and indiscriminate power of DNA data retention. Moreover, according to the European Court of Human Rights, one must ensure a fair balance between the public interest in the retention of DNA data and the fundamental rights restricted.

Clearly influenced by the mentioned case-law, the court concludes that the Profile DNA Database Act does not entail a general and indiscriminate power of DNA data retention.

Concerning the fair balance between the competing interests, the court concludes that the purposes pursued by this measure (achievement of justice and discovery of truth) have constitutional dignity. The court highlights that the creation of a DNA database reduces the number of unresolved criminal investigations, allowing the identification of both perpetrators and innocents.

Moreover, the court underscores that the DNA database has the sole purpose of identifying the author of future crimes. Therefore, the sample taken only collects the necessary data for identification, leaving aside health or hereditary information.

Finally, the court explains that article 30 (4) of the CPR does not forbid punishments that entail the loss of civil rights. The referred article only prohibits the loss of civil rights as an automatic result of a conviction, without a judge's intervention. Bearing in mind such provision, the court clarifies that the sample collection requires a judicial authorization and that this measure was not created to function as an additional sanction.

In conclusion, from the court's point of view, even though some fundamental rights were restricted, the creation of a DNA profile database was an adequate, necessary and proportionate measure.

Relation to the scope of the Charter

Even though the case has a relation with article 8 of the Charter, this article is not mentioned in the court's decision. Unfortunately, this is a quite common phenomenon: despite mentioning and applying EU sources such as Directive 95/46/EC and article 10 of Regulation (EU) 2016/679, the court completely obliterates the Charter. Nevertheless, the court mentions article 8 of the European Convention on Human Rights.

Impact on Jurisprudence

As mentioned before, there was no interaction between the national court and CJEU. However, the Profile DNA Database Act was amended during the trial [Law no. 90/2017, de 22th August].

According to the first version of article 8 (2), the sample collection could only be authorized by the judge after the final judgement.

According to the current version, the authorization ought to be given with the conviction.

However, as stated in the court's decision, this amendment aimed to improve the database's efficacy, considering that the initial results fell short of the expectations.

The court does a consistent interpretation between the Profile DNA Database Act and the case-law produced by the European Court of Human Rights.

Bearing in mind that the creation of the DNA database entailed a restriction of some fundamental rights, the court evaluates if that decision can be regarded as an adequate, necessary and proportionate measure. For this proportionality judgement, and using a comparative reasoning, the court pays special attention to the referred case-law. The court does a consistent interpretation of

the Profile DNA Database Act with the case-law produced by the European Court of Human Rights. Bearing in mind that the creation of the DNA database entailed a restriction of some fundamental rights, the court evaluates if that decision can be regarded as an adequate, necessary and proportionate measure. For this proportionality judgement, and using a comparative reasoning, the court pays special attention to the referred case-law.

Sources - ECtHR Case Law

Judgement *Van der Velden v. the Netherlands* (case no. 29514/05), 7th December 2006;
Judgement *S. and Marper v. the United Kingdom* (case no. 30562/04 and 30566/04), 4th December 2008;
Judgement *Rotaru v. Romania* (case no. 28341/95), de 4th May 2000;
Judgement *Peruzzo and Martens v. German* (case no. 7841/08 and 57900/12), 4th June 2013.
Judgement *Aycaguer v. France* (case no 8806/12), 22th June 2017
