

UPDATES FROM THE REGIONAL HUMAN RIGHTS SYSTEMS

EUROPEAN COURT OF HUMAN RIGHTS

Indefinite Retention of DNA Samples Violates the Right to Privacy

The Grand Chamber decided unanimously in *S. and Marper v. the U.K.* that there are limits on the use of modern technologies in criminal justice systems. The U.K. government set out on a path to build an extensive database of DNA samples, DNA profiles and fingerprints in order to fight crime more effectively. According to the Criminal Justice and Police Act of 2001, the police had a right to collect, and retain indefinitely, fingerprints and DNA samples from anybody under investigation. At the time of the December 4, 2008 judgment, the government had the DNA profiles of 4.5 million persons on file.

The government kept DNA profiles from both petitioners in the case, even though criminal investigations were eventually terminated. S., a juvenile, was charged with attempted robbery but was acquitted on trial. Marper was charged with harassment but reconciled with his partner, and charges were not pressed. They both unsuccessfully applied for their private data to be destroyed. The U.K.'s highest court decided that mere retention of fingerprints and DNA samples did not constitute an interference with the right to privacy.

The European Court disagreed, and pointed to the highly personal nature of DNA samples, which contained sensitive information about an individual. The same applied to DNA profiles from which information such as a person's ethnic origin can be determined, as well as fingerprints which allow precise identification of a person. Consequently, simple storing of such data must be justified in terms of paragraph 2 of Article 8 of the European Convention on Human Rights.

The crux of the case laid in balancing the petitioners' privacy interests with the state's legitimate goal of preventing crime. The outcome of the case was practically

decided when the Court stated that the margin of appreciation, that is a degree of deference accorded to national authorities, in this case was narrow because of the fundamental importance of the protection of personal data for enjoyment of private life. It also relied on the common standard among European states, none of which allowed for indefinite retention of this type of data regardless of the seriousness of the crime. Framing the issue in this way, the Court had no problem declaring that the blanket and indiscriminate nature of the data retention powers struck an unfair balance between the competing public and private interests, and therefore violated Article 8 of the Convention.

The Court may have too quickly dismissed the U.K.'s argument that comparisons with other European countries were not of much relevance because the U.K. has led the vanguard in developing the use of DNA samples to detect crime. Yet potentially, the most important pronouncement in the case was that "any [s]tate claiming a pioneer role in the development of new technologies bears special responsibility for striking the right balance [between competing public and private interests]." The Court thus put a heavy burden of proof on pioneering states. The U.K. government responded to the judgment by announcing plans to vary the timescale of retaining DNA evidence based on the seriousness of the offense, and possibly the age of and risk posed by the individual.

States Must Fight Internet Crime Effectively

The Court explored the limits of anonymity on the internet in *K.U. v. Finland*. The case involved an advertisement of a sexual nature featuring a 12 year old boy on an internet dating site. The father of the boy asked the police to identify the person in order to bring charges. Despite the fact that the posting of the ad was a crime, the service provider refused to disclose information about the perpetrator, as it considered itself bound by the confidentiality of telecommunications as provided by Finnish law. The boy claimed in his appli-

cation to the Court that his private life was affected by the advertisement and that the state did not effectively protect him by not being able to prosecute the perpetrators.

It is no longer disputed that under the European Convention on Human Rights there are positive obligations for states arising from effective protection of private life of its inhabitants. This includes an obligation to protect persons under the state's jurisdiction from interferences into private life by third parties.

As the government demonstrated that other remedies were available to the applicant, such as civil damages from the service provider, the crucial question was whether the incident required a criminal response. The government argued that the advertisement was a minor crime and so it had the authority to give precedence to free speech and anonymity on the internet.

The Court disagreed in a unanimous decision on December 2, 2008. Even though states are free to choose the means by which to ensure respect for private life, grave interferences require an effective response. Considering the applicant's young age and vulnerability, the Court stressed the seriousness of the offense, which constituted a potential threat to his physical and mental welfare. The Convention requires states to implement a system that effectively deters the sexual abuse of children because of the abhorrence of such a wrongdoing. Even though the posting of such an ad was a crime, its deterrent effect was seriously reduced by the legislation that made it practically impossible for the police to identify the perpetrator. Thus, the Finnish legislation violated Article 8 of the Convention by protecting the anonymity of internet users in such cases.

The Court acknowledged that freedom of speech and protection of privacy of internet users is important, but not absolute. It must yield on occasion to other legitimate imperatives, such as the prevention of disorder and crime, or the protection of the rights and freedoms of others. The Court apparently had little sympathy with such an exercise of freedom of speech, which it

described as reprehensible. The judgment serves as an important guidance for states trying to balance the privacy of internet users with other legitimate aims.

States Free to Restrict Wearing of Religious Symbols

The Grand Chamber of the Court upheld a ban on headscarves at Turkish universities in *Leyla Sahin v. Turkey*. In the 2005 opinion, the majority ruled that such a ban violated neither the right to freedom of religion nor the right to education of the students. The judgment was widely criticized as being too deferential to the state. A blanket ban aimed at defending the secularity of the state and protection of women from external pressures seemed to be disproportionate in the case of mature university students. In the subsequent case of *Köse and Others v. Turkey*, the Court similarly held that a ban on wearing headscarves at secondary schools did not violate the European Convention on Human Rights because it protected adolescents at an impressionable age. In a series of cases in the autumn of 2008 against France, the Court confirmed its strong deference to states regarding restrictions on wearing religious symbols.

In the identical cases of *Dogru v. France* and *Kervanci v. France*, the Court indirectly examined the French legislation that prohibits wearing religious symbols in all primary and secondary public schools. The applicants were 11 and 12 year old children who were expelled from school because they repeatedly refused to take off their headscarves in physical education classes. On December 4, 2008, the Court found that such an interference with their freedom of religion did not overstep the margin of appreciation of the state.

In view of the young age of the applicants and the need to protect them and other children from external pressures, the outcome of the judgment seems to be correct. Yet, the Court's heavy reliance on the protection of secularism as a justification for the ban is troubling. Without more careful scrutiny into whether the measures in question were really necessary, and a clear elaboration of what secularism means, there is a risk of states placing overly broad restrictions on the freedom of religion in the name of secularism.

The Court's unwillingness to scrutinize more closely restrictions on wearing religious symbols is exemplified by the Court's decision in *Mann Singh v. France* on November 13, 2008. Mr. Singh, a practicing Sikh, refused to take off his turban for his driver's license photograph as required by a 2004 law. All his previous driver's license pictures showed him in a turban. The Court found the application inadmissible. It ruled that such an interference with his freedom of religion was justified because bareheaded photographs were needed by the authorities in charge of public safety and law and order, particularly in the context of checks carried out under the road traffic regulations.

To dismiss the case as manifestly ill-founded in one paragraph seems to be too superficial. Many questions were left unanswered, such as whether a photograph without a turban would really be more effective, as such an individual would likely be wearing one when stopped by police. Why is a bareheaded picture so necessary now when it was not in the past? These are certainly issues that deserved a careful consideration at the merits stage.

As demonstrated by these cases, the Court's position seems to be that unless manifestly unreasonable or disproportionate, states enjoy considerable leeway in restricting the public exercise of religion.

INTER-AMERICAN SYSTEM

IACHR Demands the Protection of Human Rights Defenders in *Valle Jaramillo and others v. Colombia*

On November 27, 2008 the Inter-American Court of Human Rights (Court) decided the case of *Valle Jaramillo and others v. Colombia*. In that decision, the Court's finding of violations of a number of rights in the American Convention on Human Rights (Convention) in relation to the 1998 murder of a prominent human rights defender served as a stern warning to Colombia to take the protection of human rights defenders seriously. The decision comes amidst a flurry of international attention critiquing Colombia's poor human rights record.

Valle Jaramillo was killed in February 1998 when anonymous gunmen broke into his office and shot him in the head. Some of his family members were forcibly

detained and threatened during the attack and suffered intimidation for many years afterward. Prior to his death, Valle Jaramillo spoke out against the criminal activities of paramilitary and security forces in Antioquia Department, which at that time was governed by current Colombian President Alvaro Uribe. According to the Commission, the execution of Valle Jaramillo was not an isolated incident, but occurred within a context of systematic persecution of human rights defenders and a general lack of protective measures and safeguards. In the decade since the incident, Colombia sentenced three civilians in absentia but failed to initiate a criminal investigation into the responsibility of security forces. The incident carries significant political relevance in light of allegations by local media that Uribe was complicit in opposition massacres in Antioquia while he served as governor.

The Court considered alleged violations of the rights to life (Article 4), humane treatment and personal integrity (Article 5), personal liberty (Article 7), a fair trial (Article 8), honor and dignity (Article 11), freedom of thought and expression (Article 13), protection of the family (Article 17), freedom of movement and residence (Article 22), and judicial protection (Article 25), in regards to Valle Jaramillo and his family members. The state of Colombia issued a partial admission of responsibility for some of the alleged violations, recognizing that it had failed to fulfill its duty to guarantee many of the rights allegedly violated. Despite accepting this partial admission, the Court exercised its discretion to make a determination on the merits of the case.

The Court found that the state violated the rights of Valle Jaramillo and his family, including some rights beyond the scope of Colombia's admission. In particular, Colombia violated Valle Jaramillo's rights to personal liberty, personal integrity, and life by failing to fulfill its responsibility to protect human rights defenders in the face of real, immediate, and avoidable risk. In addition, and beyond the scope of the state's admission, the Court found that the State violated Valle Jaramillo's family members' rights to freedom of movement because they were forced to live outside their home country due to fear of persecution. Furthermore, the Court found a violation of judicial protections

and fair trial rights of the family members because the investigation and prosecutions were ineffective. The prolonged period of proceedings resulted in convictions of only three civilians who were not even within the custody of Colombian authorities, and consequently, were not serving any sentence. The Court awarded compensatory damages of around \$215,000 USD and demanded that the state ensure the security of family members and conduct an expedient investigation into state responsibility for the murder.

Court Rebuffs Venezuelan Judicial Ethics, and Venezuela Rejects the Ruling

The Court issued judgment in the matter of *Apitz Barbera et al v. Venezuela* on August 5, 2008. The judgment surrounded a controversial action taken by a Venezuelan court in October 2003. At that time, a disciplinary body removed three judges from Venezuela's First Court of Administrative Disputes for the allegedly erroneous granting of an *amparo* remedy, or a protection of a constitutional right, against an administrative act. The disempowered judges contended that their dismissal was motivated by ideology and that they were denied access to the procedures through which they could effectively contest their removal. They alleged that Venezuela had not sufficiently informed them of the grounds for dismissal, had not provided access to a hearing by a competent and impartial tribunal, and had not protected their due process guarantees.

The Venezuelan government established the disciplinary body that removed the judges during the 1999 constitutional transition and the adoption into force of the Bolivarian Constitution. With jurisdiction over administrative issues, the First Court ruled unanimously to grant a precautionary application for protection from an administrative act, and was charged by the disciplinary body with having committed an inexcusable judicial error. Accordingly, the sanction of removal was imposed upon the entire bench of that case. Two of the judges brought challenges to their dismissal based on lack of jurisdiction and an appeal for a constitutional protection and annulment. The *amparo* protection was denied to the two judges, and the annulment had not yet been reviewed on the merits. The judges subsequently brought the case to

the Inter-American Commission, where it progressed to the Inter-American Court.

The Court found that Venezuela had not secured the rights of the judges to impartial hearings and to knowledge of the grounds for their dismissal. The Court also found that, with regard to the two judges who had attempted domestic proceedings, the State violated the right to be heard within a reasonable time and the right to effective recourse. The Court ordered that Venezuela reinstate the three judges into positions of equivalent stature and that it ensure the expeditious passage of a national code of judicial ethics.

Although the Court's decision made a strong statement on the importance of judicial ethics, the Venezuelan Supreme Court officially rejected the ruling. The Supreme Court accused the Inter-American Court of usurping the State's powers and of unacceptably intervening in domestic proceedings. According to the Supreme Court, undermining the firmness of the decisions against the ex-judges could lead to institutional chaos. Amnesty International has said that the Supreme Court's ruling sends a dangerous message that human rights are optional. It remains unclear if or when the Inter-American Court will exercise its mandate to monitor compliance with the judgment.

Court Emphasizes State's Duty to Investigate in *Tiu Tojin v. Guatemala*

In its decision of November 26, 2008 in the case of *Tiu Tojin v. Guatemala*, the Court reinforced the responsibility of states to investigate crimes and end impunity. The case concerned the forced disappearance of Maria Tiu Tojin and her daughter, Josefa, which took place in 1990 as part of a systemic conflict between military forces and Mayan indigenous communities. The Court held that Guatemala violated the rights of Tiu Tojin, including the rights to life (Article 4), humane treatment (Article 5), personal liberty (Article 7), fair trial (Article 8) and judicial protection (Article 25). Additionally, the Court found that Guatemala violated the rights of children (Article 19) with regards to Tiu Tojin's daughter, and breached its legal responsibilities of fair process and judicial protection in relation to Tiu Tojin's other family members.

The state of Guatemala displayed a positive and cooperative attitude towards the case and officially recognized its international responsibility for violating each of the rights alleged. The Court noted that Guatemala formally apologized, erected a monument in memory of Tiu Tojin, issued compensation to relatives, and reimbursed costs associated with the proceedings at the Commission level.

Notwithstanding the state's positive contribution, however, the Court proceeded to make a determination of the facts of the disappearance. The Court found that the arrest and disappearance of Tiu Tojin and her daughter were motivated by their indigenous Mayan identity. As a result of the internal armed conflict which took place from 1962 through 1996, displaced Mayan families, including Tiu Tojin and her daughter, were forced into the mountains where many were later arrested and detained by state security forces. Some were transferred to displaced-person camps, but many were disappeared in this process for suspected guerilla involvement. The specific fate of Tiu Tojin and her daughter is unclear.

Following this determination of the truth of the situation, the Court highlighted that the investigation and prosecution of those responsible was severely prolonged; no significant progress was made in over sixteen years. Although Guatemala asserted that the complexity of the case, rather than inaction or unwillingness, caused this delay, the Court emphasized the legal obligations of Guatemala to combat impunity despite the difficulties in investigating these complicated crimes. The Court ordered Guatemala to not only investigate the events that led to the violations and to identify and prosecute those responsible, but also to conduct a search for the persons or remains of Tiu Tojin and her daughter.

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