2 As 164/2019 - 30 CZECH REPUBLIC JUDGMENT ON BEHALF OF THE REPUBLIC The Supreme Administrative Court decided in a panel composed of the president of the panel JUDr. Miluš Došková and judges JUDr. Karel Šimka and Mgr. Eva Šonková in the legal matter of the plaintiff: Ministry of the Interior, with headquarters in Prague 7, Nad Štolou 3, against the defendant: Office for the Protection of Personal Data, with headquarters in Prague 7, Plk. Sochora 27, against the decision of the chairperson of the defendant dated 11/05/2018, no. UOOU-00148/13-107, on the plaintiff's cassation complaint against the judgment of the Municipal Court in Prague dated 16/05/2019, no. 6 A 88/2018 - 45, as follows: I. The appeal is dismissed. II. The plaintiff is not entitled to compensation for the costs of the cassation appeal. III. The defendant is not awarded compensation for the costs of the cassation appeal. Reasoning: I. Determination of the case [1] The judgment of the Municipal Court in Prague (hereinafter referred to as the "municipal court") indicated in the header dismissed the plaintiff's action against the decision of the defendant's chairwoman, which rejected the plaintiff's motion and confirmed the defendant's decision of 20 March. 2018, No. UOOU-00148/13-100 (hereinafter referred to as "decision of the administrative body of the first instance"). The administrative body of the first instance found the plaintiff guilty of committing an administrative offense pursuant to § 45 paragraph 1 letter e) of the then valid Act No. 101/2000 Coll., on the protection of personal data (hereinafter referred to as the "Act on the Protection of Personal Data"), in connection with the processing of sensitive personal data without a legal title, which resulted in a breach of the controller's obligations set out in § 9 of the Personal Data Protection Act, for which the plaintiff was fined CZK 240,000 and ordered to pay the costs of the proceedings. The administrative body of the first instance concluded that it is not necessary to store the DNA profile in the National DNA Database (hereinafter referred to as the "DNA database") for persons who have not been legally convicted, regardless of the way the criminal prosecution is terminated. This applies to persons J.H., V.H. and Ing. J. Š.. In the case of J. P., the necessity of further storage is not fulfilled with regard to the nature of the criminal act of obstructing the execution of an official 2 As 164/2019 decision, which does not show a sufficient degree of social harm and danger to society. In D. Š. and P. Š., the plaintiff then acknowledged the misconduct. The president of the defendant agreed with the defendant's conclusions when she further added that despite the absence of an explicit mention in the law, the nature of the crime is still the most important aspect determining the range of persons whose sample will be kept in the DNA database. The nature of the crime is determined by the importance of the protected interest, the circumstances under which the crime was committed, and the further preservation of the sample is determined by its actual usefulness for detecting the perpetrator of a specific crime. With reference to the previous decision of the municipal court, the

criterion of necessity and seriousness of the crime is given by the type of social harm, the way the crime was committed and the probability of leaving a biological trace at the scene of the crime, as well as the repetition of the attack or the recurrence of intentional criminal activity. Thus, the subjective aspect of the crime in the form of intent cannot be accepted as the sole criterion for further processing of sensitive data, but other aspects must also be taken into account. Deliberate commission of a crime is sufficient from the point of view of collecting personal data, but not for the purposes of their further processing. II. Decision of the municipal court [2] The municipal court rejected the lawsuit in the challenged judgment, because the administrative bodies of both levels reached the correct conclusions. According to the court, for three of the six persons (J.H., Ing. J.Š. and V.H.), whose sensitive data were processed, the criminal prosecution was stopped due to effective remorse or acquittal, which is why the persons in question must be regarded as innocent, and therefore the continued processing of their personal data in the DNA database is illegal. The same applies to the fourth person (J.P.), who was prosecuted for the criminal offense of obstructing the execution of an official decision, which is not a criminal activity serious enough in its nature to require the preservation of a DNA profile, compared to violent or drug-related criminal activity, moreover it wasn't even a relapse. He referred to his conclusions assessed in the previous stages of the proceedings by the Supreme Administrative Court in the judgment of 24 October 2017, No. 8 As 134/2016 – 38, which, when reviewing the legality of the previous judgment of the municipal court, stated that the court in question, when assessing the necessity of another processed sensitive data in accordance with Act No. 273/2008 Coll., on the Police of the Czech Republic (hereinafter referred to as the "Police Act"), taking into account not only the subjective aspect of the crime, but also the nature of the crime committed. The municipal court thus considered it unnecessary to once again deal with the controversy over whether further processing of personal data is necessary when using the institute of effective remorse or in the case of the criminal offense of obstructing the execution of an official decision. III. Content of the cassation complaint and the defendant's statement [3] In the cassation complaint against the judgment specified above, the plaintiff (hereinafter referred to as the "complainant") stated that it was unreviewable [§ 103 para. 1 letter d) Act No. 150/2002 Coll., Administrative Code of Court, hereinafter referred to as "s. r. s. "]. This is because the municipal court did not sufficiently deal with the assessment of the necessity of preserving the DNA profile neither in the criminal offense of obstructing the execution of an official decision nor in the situation where the institute of effective remorse is used; he thus referred to the previous decision in the case without further context. [4] Furthermore, the complainant objected that there was an incorrect assessment of the legal issue [§ 103 par. 1 letter a) s. r. s.]. The municipal court's judgment violated

the principle of proportionality when assessing the conflict between the right to privacy and the right to security, the protection of which contributes to the preservation of personal data in the DNA database, in which the personal rights of the perpetrators of crimes are not ultimately threatened to a disproportionate extent. The processing of personal data by the police is an effective means of preventing recidivism, the risk of which is met primarily by perpetrators of intentional 2 As 164/2019 - 31 crimes, for whom there is an increased probability of the future need for identification based on the traces left behind. Keeping DNA profiles is then a reasonable interference with the rights of the individual to achieve the goal of preventing, searching and detecting criminal activity and punishing the perpetrators and thus fulfilling the tasks of the police. The criterion of necessity depends on the subjective aspect of criminal activity and the nature of the merits decision in criminal proceedings. If the retention of personal data were limited only to serious crimes of a violent or drug-related nature, the police would not be able to fulfill their statutory role. When assessing recidivism, it is also not possible to limit oneself to homogeneous recidivism, but to recidivism in general, when there is an escalation of criminal activity from less serious to more serious. With regard to the growing share of recidivists in the commission of criminal activity, the usefulness of keeping personal data of perpetrators of all intentional crimes is increasing. [5] When assessing the necessity of processing personal data, the police take into account the criminal history of the person in question as well as any other ongoing criminal proceedings, as well as other aspects. The criminal offense of obstructing the execution of an official decision (J.P.) is a criminal activity that in general violates or threatens the proper exercise of public authority or its functioning, it can also be a criminal offense of participation in a criminal organization. Such a serious criminal activity justifies the retention of personal data, even with regard to the intention, which is a sign of the factual nature of criminal acts of this nature, not guaranteeing that there will be no recurrence. In the present case, in addition, it involved the performance of an activity that was prohibited, which was intended to prevent the further commission of criminal activity. The named person repeatedly committed the mentioned criminal activity, was repeatedly convicted for it in the past and was also investigated for property crime, in which it can be assumed that there will be criminal traces, which by comparison with the records, it would be possible to detect and convict the perpetrator. [6] One cannot agree with the assessment of the necessity criterion only in relation to specific criminal acts, as this would only allow homogeneous recidivism, but non-homogeneous recidivism is very common, as is the criminal development of the offender. In such a situation, it is impossible to agree with the evaluation of the previous criminal activity as trivial. The processing of DNA profiles creates prerequisites for a successful fight against recidivists. The city court itself did not respect its legal opinion stated in the

previous judgment, where a general recidivism of intentional criminal activity and, in the case of another person, the crime of forgery and alteration of a public document were sufficient to fulfill the criterion of necessity. Court practice does not evaluate the fulfillment of the above-mentioned criterion only by means of correction of violent or drug-related crime, but only by the form of culpability in the form of intent. [7] The municipal court also incorrectly evaluated the nature of effective remorse for the purpose of meeting the criterion of the necessity of further processing of personal data, by not offering any consideration on this issue. The person in question first had to admit that he had committed the crime, under the pressure of impending punishment. From a criminological point of view, it is a perpetrator, only his punishment was waived. An essential attribute of crime and criminology is the commission of an intentional crime. Thus, it is necessary to examine not only the formal type of decision, but also its content. A valid conviction is not a condition for the necessity of further storage of personal data, what is essential is conduct contrary to criminal law with intentional culpability not excluding similar conduct in the future. [8] In his statement on the cassation complaint, the defendant referred to the contested judgment, with which he agreed. For the purposes of further processing of personal data in the DNA database, in order to fulfill the criterion of necessity, it is necessary to assess not only the subjective aspect of the crime, but also the nature and seriousness of the crime in question, which the complainant did not do. The restriction of the right to privacy of the persons concerned in order to ensure the safety of others did not occur in the manner foreseen by law. The defendant's approach does not prevent DNA profiles of perpetrators of crimes other than violent crimes from being further processed in the database, if the criterion of necessity in the form of taking into account the nature and seriousness of the crime is met. The complainant mentions the repetition of criminal activity of the same type at J.P. for the first time in the cassation complaint, which is why it is an inadmissible objection. The examination of 2 As 164/2019 for property crime is then completely irrelevant. He did not agree with the complainant's opinion that further processing of personal data is possible regardless of the nature of the decision on the merits. The principle of the presumption of innocence can only be met when a valid conviction is taken into account. The aforementioned conclusions were already confirmed by the administrative courts in the previous stages of the proceedings. IV. Assessment of the cassation complaint by the Supreme Administrative Court [9] The Supreme Administrative Court first examined the formal requirements of the cassation complaint. He established that the complainant is the person authorized to file it (§ 102 s. s. s.), the cassation complaint was filed in time (§ 106 para. 2 s. s. s.) and the complainant is represented by a lawyer (§ 105 para. 2 s. r. s.). [10] The Supreme Administrative Court assessed the merits of the cassation complaint within the limits of its scope and the

reasons applied, while examining whether the challenged judgment does not suffer from defects that it would have to take into account as an official duty (§ 109 par. 3 and 4 s. ř. s.) , concluding that this is not the case. [11] The Supreme Administrative Court first dealt with the objection that the contested judgment cannot be reviewed [IV. /AND; § 103 paragraph 1 letter d) s. ř. s.] and further an objection in the form of an incorrect assessment of a legal question by the court causing illegality [IV. /B; § 103 paragraph 1 letter a) s. r. s.]. IV. /A [12] The complainant saw the non-reviewability of the judgment in the fact that the municipal court did not sufficiently explain its reasoning regarding the absence of fulfillment of the criteria for the necessity of further processing of personal data in the DNA database in cases where the criminal prosecution ends not with a final conviction, but with the use of the institute of effective remorse, or . there was a conviction for the criminal offense of obstructing the execution of an official decision. The objection is unfounded. [13] First of all, it should be noted that due to non-reviewability, the judgment of the regional court should only be annulled when the conclusions on which it was based cannot be drawn from it, or its conclusions are contradictory. The cassation of the judgment of the regional court for unreviewability is therefore an extreme step (resolution of the extended senate of the Supreme Administrative Court of 5 December 2017, no. 2 As 196/2016 - 123, publ. under no. 3668/2018 Coll. NSS). In the decision-making practice of the Supreme Administrative Court, the conclusion has already crystallized that such a judgment, or decisions made by administrative authorities in earlier stages of the proceedings, which refers to the reviewable conclusions of either administrative authorities as a whole, cannot be considered unreviewable (judgment of the Supreme Administrative Court of 27/07/2007, No. 8 Afs 75/2005 – 130, publ. under No. 1350/2007 Coll. NSS), or at the appellate administrative body when referring to and identifying with the conclusions of the administrative body of the first instance (judgment of the Supreme Administrative Court dated 31.10. . 2014, No. 6 As 161/2013 – 25, published as other decisions of the Supreme Administrative Court at www.nssoud.cz), because the decisions of administrative authorities must be considered as a whole (judgment of the Supreme Administrative Court of 27.2. 2013, No. 6 Ads 134/2012 – 47). The Supreme Administrative Court sees no reason why the aforementioned approach should not be applied to the current situation as well, when the municipal court in the justification of the judgment referred to its previous decision, which it made in the proceedings between the same participants only in its earlier phase, which was moreover subjected to a subsequent review by the Supreme Administrative Court. Such a later judgment is not unreviewable if such conclusions are stated in the judgment to which the municipal court refers for brevity and familiarity of the participants with its conclusions. After reviewing the judgment of the Municipal Court in Prague dated

13/04/2016, No. 3 A 86/2013 – 99, it should be noted that the considerations on disputed issues are given on page 8, while they are completely the same as in the present contested judgment. He briefly referred to the previous judgment because its legality was verified by the Court of Cassation. 2 As 164/2019 - 32 [14] The complainant wrongly believes that the city court's position on the question of applying the criterion of necessity in the case of the institution of effective remorse had to be justified in detail in the contested judgment. The incorrectness of the complainant's reasoning is due to the fact that the municipal court considered the final conviction of the perpetrator of the crime to be a key criterion. If he made such a conclusion, then it was completely legitimate and logical that he did not deal with the further processing of personal data of an "offender" who was not actually convicted. The essence of the city court's idea is that the further processing of personal data in the DNA database requires a valid conviction for an intentional crime, which has demonstrably not happened in the case of the three persons named above. In such a case, the controversy with the argumentation of the complainant would be completely superfluous. [15] The same applies to the argumentation of the complainant in the criminal offense of obstructing the execution of an official decision. In relation to him, the city court stated that it does not consider the crime in question to be so serious that, despite the existence of a valid conviction of the perpetrator for such an act, further processing of his personal data in the DNA database is necessary. Although the municipal court's reasoning in the contested judgment is relatively brief (in line with the previous judgment), it nonetheless contains relevant opinions that led the court to its conclusion that the objections were groundless. He did not consider it necessary to further process J.P.'s personal data in view of the absence of recidivism, at the same time he assessed the nature of the said crime in comparison with criminal activity of a more socially serious nature - violent and drug-related. If the complainant then mentioned the recidivism of the person in question to support his procedure, this is an inadmissible argument according to Section 104, paragraph 4 of the Civil Code, because nothing prevented the complainant from using it as part of the legal objections, which he did not do. Now, the said question cannot be reviewed on the basis of a cassation complaint. In the contested judgment, the municipal court maintained its legal opinion, which was justified in the same way as in the earlier decision in the case, while the reference to its previous decision cannot be considered as a reference without further context, but precisely as a supporting argument, since its considerations were, from its point of view, successfully subjected to review by the Supreme Administrative Court. IV. /B [16] The cassation ground consisting in an incorrect assessment of the legal issue was seen by the complainant in the insufficient consideration of the company's interest in the prosecution of criminal activity and prioritization of the interest of the persons concerned, whose

personal data were processed in the DNA database. The objection is unfounded. [17] There is also no dispute that keeping the DNA profile of a criminal in the DNA database is an interference with his right to privacy, nor is there any dispute that it is in the interest of society to combat socially harmful behavior in the form of criminal activity, which undoubtedly corresponding tools are also used, including DNA databases. However, in this direction, it is necessary to start from the legislation contained primarily in the Police Act. [18] According to Section 65, paragraph 1 of the Act on the Police, as amended, "the police may, in carrying out their tasks for the purpose of future identification of a person a) accused of committing an intentional crime or a person who has been informed of the suspicion of committing such a crime (…) , take dactyloscopic fingerprints, detect body features, perform body measurements, take visual, audio and similar recordings and take biological samples enabling information on genetic makeup to be obtained. ". Paragraph 5 then stipulates that "the police will dispose of personal data obtained in accordance with paragraph 1 as soon as their processing is not necessary for the purposes of preventing, searching or detecting criminal activity or prosecuting criminal offenses or ensuring the security of the Czech Republic, public order or internal security." " [19] According to Section 79, paragraph 1 of the Police Act, "the police may process personal data, including sensitive data, without the consent of the person to whom the data relates (…) if this is necessary for the performance of its tasks. 2 As 164/2019 [20] Above all, it is necessary to point out the essence of the difference between § 65 of the Police Act and § 79 of the Police Act. In the first case, the conditions for taking a biological sample are set, in the second, the conditions for its further processing. One can agree with the conclusion of the municipal court, moreover, not disputed between the complainant and the defendant, that it is only possible to take biological samples from alleged perpetrators of intentional criminal activity (more precisely, persons accused of such crimes or who have been informed of the suspicion of their commission), after all, it is clear follows from the cited Section 65, Paragraph 1 of the Police Act. The discrepancy between them is in the scope and nature of the criteria, the fulfillment of which is necessary for further processing. [21] The key concept in this regard is the concept of "necessity for the performance of tasks", when it should be noted that the subjective aspect of the criminal offense in connection with which the biological sample was taken is not explicitly stated as a condition for further processing of personal data. Since the concept of "necessity" is a vague concept, the meaning of which needs to be filled with specific content, the decisive assessment in the present case is what should be considered in order to be able to draw a conclusion about the legitimacy of further processing of personal data. In this respect, the complainant completely ignores the answers to the questions already considered by the city court once in the present case, albeit at an

earlier stage of the proceedings and on the initiative of the defendant's cassation complaint. This is because he maintains a consistent opinion throughout that, in addition to the subjective aspect of the crime, the nature and seriousness of the crime, the way it was committed, the circumstances under which it was committed, and the risk of recidivism, as well as the risk of recidivism, must also be taken into account, which is also related to the assessment of the personality of the perpetrator of the crime . The approach of the municipal court shows the necessity of individualizing the assessment of each individual case while simultaneously respecting the necessary condition in the form of the commission of an intentional criminal activity. Furthermore, his previous decision resulted in the consideration of a specific degree of social harm, whether in the form of the damage caused above, resulting in the fulfillment of the elements of a qualified factual basis, or the commission of a violent criminal activity, as well as the nature of the criminal activity, in which he came to the conclusion of a high degree of latency . It cannot be overlooked that the above-mentioned assessment was chosen by the city court in connection with the previously raised legal objections of the complainant himself, which in specific cases the city court found to be justified precisely with regard to the above-mentioned facts. [22] Further processing of personal data in the form in which the complainant considers them to be legal is, however, in the opinion of the Supreme Administrative Court unsustainable. This is especially the case due to the absence of individualization of each specific case (in the present case, for four named persons out of six). If the municipal court previously stated the reasons for which the applicant's action was found to be legal (and the defendant's decision was not), it should be seen that the individualizing approach of the municipal court was also supported in points [26] and [36] of the judgment of the Supreme Administrative Court cited in point [2] of this judgment. Otherwise, there would not be the slightest reason for a different legal arrangement and diction of § 65 and § 79 of the Police Act, if the only criterion for the further processing of personal data should be only the subjective aspect of the crime, which is otherwise one of the necessary conditions for the collection itself personal data. The objections with which the complainant tries to support the legality of his procedure in the case of four of the six persons whose DNA samples were the subject of the current proceedings are not based on any individual elements of the case, with the exception of general references to the imminent risk of recidivism for perpetrators of intentional criminal activity, or possible criminal escalation activities from less serious to more serious, without, however, in relation to any of the mentioned persons, any arguments being presented in the earlier stages of the proceedings, from which it would be possible to infer that such general criteria were individualized "tailored" to each of the mentioned persons. [23] The above applies in particular to the three persons named above, for whom the criminal prosecution was

terminated not by a final conviction, but by the application of the institute of effective remorse, which must therefore be viewed as if they were innocent, regardless of the fact that such a fact is not even the subject of evidence 2 As 164/2019 - 33 of the Criminal Code. Contrary to the opinion of the complainant, the Supreme Administrative Court is of the opinion that the form of the decision is essential here. Indeed, the complainant completely purposefully ignores the fact that the condition for the application of the institute of effective remorse is not any agreement about guilt, but only the additional fulfillment of an obligation, the violation of which is the fault of the accused or defendant, but not yet convicted. Such persons cannot be viewed from the point of view of substantive law as perpetrators, because it is possible to perceive them in this way only after a final finding of guilt by a court judgment, not by the classification of such a person by a resolution to initiate criminal prosecution or in an indictment. The situation could be different in the case of the suspension of criminal prosecution, where it would be possible to weigh the reasons for the suspension; however, this is not the case. In the case of J.P., as a person who had been finally convicted, a specific argumentation was not put forward that would respect the need to individualize each individual case that the Supreme Administrative Court could deal with (the argumentation raised was inadmissible) and neither did the municipal court in the contested judgment, if it was act as a repeat offender (the argument was not even raised there). [24] It cannot also be overlooked that the municipal court did not limit itself in any way to whether or not it would necessarily be a same-sex recidivism. According to him, the essential thing is that it is an intentional criminal activity (for the purpose of collecting the offender's biological sample) and that there must be facts that arise from the necessity of their further processing, while recidivism is not necessary, as follows from the previous judgment, if it happened other points of view that supported the complainant's position - for example, the nature of the criminal activity or its violent character. Finally, even the municipal court mentions at least general recidivism (paragraph 36 of the contested judgment), so it does not comment on the necessity of recidivism only for crimes of a violent or drug nature or recidivism of the same kind, which is in accordance with the judgment of the Municipal Court in Prague, no. No. 10 A 30/2010, approved by the judgment of the Supreme Administrative Court of 30 April 2014, No. 4 As 168/2013 – 40, cited by the complainant, or in other judgments cited on page 9 of the cassation complaint. The polemic focusing only on the alleged possibility of further processing of personal data only in the case of violent or drug-related crimes completely misses the argument of the municipal court. [25] Although the applicant himself stated in the cassation complaint that the criminal history of the person in question and other criteria should be taken into account, he did not do so in any of the four relevant cases (apart from the two in which the applicant admitted wrongdoing). In the present

case, his argument was based only on criminological or criminological experience or knowledge or general pointers to facilitate the performance of the police's task; however, this is not enough to justify an interference with the right to privacy in order to strengthen the element of protection of society against the commission of criminal activity, however it is clear to the Supreme Administrative Court that the role of the police is irreplaceable and in many cases its work is difficult. [26] Although the municipal court did not directly mention the principle of proportionality, the contested judgment is undoubtedly violated by it, as it assessed the intensity of interference with the rights of the persons concerned in the present case (it dealt with the "necessity" of further processing of personal data, which is nothing more than an assessment of the duration of the need to interfere with the rights of the individual in relation to the performance of the tasks of the police) and found no reason to prioritize society's interest in facilitating the role of the police in the future, as no specific indications were presented that this would be necessary. Nor can the general classification of the crime of obstructing the execution of an official decision in a specific chapter of the Criminal Code, together with other more serious crimes, be considered such an indication. This is the case precisely with regard to the necessity of individualization, which had to be dealt with, which the municipal court did in full accordance with the law. [27] From the above, it is clear that judicial practice does not assess the fulfillment of the criterion of necessity exclusively by the intention to commit a criminal offense, however this is a necessary condition, if 2 As 164/2019 is to be concerned with the further processing of personal data and not only their collection. The argument of the complainant is also unfounded if he said that similar behavior in the future is not excluded. The logic of the matter is the opposite. Not that a similar action in the future should not be excluded in order to justify an ongoing interference with the rights of an individual, but the person of the perpetrator, the way of committing the crime, his criminal history and the concretely established circumstances must support the conclusion that, on the contrary, there is a risk of repeating the crime whether they can be expected and the retention of DNA samples or other personal data is significant for the assessment of this impending criminal activity. The risk of repeating criminal activity or its escalation is never ruled out, even for perpetrators of negligent criminal activity. In addition, not every perpetrator of intentional criminal activity will reoffend, which is why a completely logical conclusion must be made that, in the case of such a perpetrator, further processing of personal data was certainly not necessary for the fulfillment of police tasks. If every processing of personal data should only be assessed retrospectively, there would be no need for specific adjustments different from the collection of personal data itself. All these considerations testify to the legality of the judgment of the municipal court, which assessed the matter comprehensively, taking into account the need to

assess individual cases individually, not as a lump sum, as the complainant did. His conclusion on the fulfillment of the facts of the offense according to § 45 paragraph 1 letter e) of the Personal Data Protection Act is correct. V. Conclusion [28] With regard to the above-mentioned argumentation, the Supreme Administrative Court came to the conclusion that the cassation complaint is unfounded and rejected it (§ 110 para. 1 s. ř. s. in fine). [29] Reimbursement of the costs of the proceedings was decided in accordance with § 60, paragraph 1 of the Code of Criminal Procedure in conjunction with § 120 of the Code of Criminal Procedure, as the plaintiff was not successful in the case, and the defendant, as a successful party to the proceedings, then had no costs associated with this cassation proceeding did not arise. Lesson learned: No appeals are admissible against this judgment. In Brno on April 2, 2020, JUDr. Miluše Došková, president of the senate