Ref. UOOU-01001 / 16-21

DECISION

Chairwoman of the Office for Personal Data Protection, as the appellate body competent pursuant to § 2,

§ 29 and § 32 of Act No. 101/2000 Coll., On the protection of personal data and on the amendment of certain acts,

and pursuant to § 10 and § 152 of Act No. 500/2004 Coll., the Administrative Procedure Code, decided on 25 May 2016

according to § 152 par. 5 let. b) of Act No. 500/2004 Coll., as follows:

Dismissal of the party to the proceedings, Czech Republic - Ministry of the Interior, IČ: 00007064, with its registered office

Nad Štolou 936/3, 170 34 Prague 7, against the decision of the Office for Personal Data Protection

Ref. UOOU-01001 / 16-15 of March 29, 2016, is rejected and the contested decision

is confirmed.

Justification

The contested decision of the Office for Personal Data Protection (hereinafter referred to as the "Office") was the Czech

Republic

of the Republic - Ministry of the Interior, IČ: 00007064, with its registered office at Nad Štolou 936/3, 170 34 Prague 7

(hereinafter referred to as the “party to the proceedings”), ordered to dispose of the genetic material and DNA profile from the

National

DNA database of Mr. S.

The administrative proceedings were initiated on the initiative of Mr. S. The Office took place on 17 August 2015

Mr S.'s lawyer turned to the DNA profile

appointed by the Police of the Czech Republic. The lawyer stated that her client was

within the framework of criminal proceedings in 2012, genetic material was seized, which was subsequently inserted into

National DNA database. The criminal prosecution concerned a criminal offense pursuant to Section 345 (2), (3)

letter c) and e) of Act No. 40/2009 Coll., Criminal Code (false accusation). Judgment of the Regional

court in Ústí nad Labem ref. 4 To 155 / 2013-150 of 11 December 2013 was the complainant

in this case, he was acquitted on the ground that the act was not identified in the application

criminal offense.

On 27 April 2015 the complainant requested the Police of the Czech Republic to liquidate the seized genetic material, but the police rejected his request on the grounds that further processing his personal data appear to be necessary for the performance of police tasks. That fact was based, inter alia, on the applicant's criminal past, who was convicted of a criminal offense in 1985 Unauthorized use of a foreign motor vehicle and drunkenness, in 1986 he was convicted for the offense of forgery and alteration of an authentic instrument and non-compliance with a levy obligation, and in In 1994 he was convicted of the crime of fraud.

Office Inspector PaedDr. Jana Rybínová called on a legal one within the pre-control actions to the complainant's representative to send a copy of his criminal record and further proof requests for disposal of genetic material. The police of the Czech Republic were then asked to send the current version of the internal regulation, the instruction of the police president, which takes the collection and processing data in the National DNA Database is managed.

On the basis of the collected documents, the proceedings were initiated with the participant on 27 January 2016 administrative proceedings on the imposition of remedial measures in the sense of § 40 of Act No. 101/2000 Coll. On On March 29, 2016, the contested decision, which was the participant, was issued proceedings ordered to dispose of the complainant's genetic material and DNA profile held at the National Court of Appeal DNA database.

According to the first-instance administration, the initial removal of genetic material was complainant in accordance with § 65 par. 1 let. a) of Act No. 273/2008 Coll., on the Czech Police Republic, as at the time the applicant had been charged with an intentional criminal offense. However, after the final acquittal, the party was in the administrative view the first-instance authority is obliged to remove the DNA profile, as the purpose of this processing and there was no legal title for its further processing. Administrative body of the first refers in this connection to the judgment of the European Court of Human Rights in S. and Marper v. The United Kingdom, complaints Nos 30562/04 and 30566/04, which he considered

the preservation of the DNA profiles of persons who have been acquitted of a criminal offense, such as

disproportionate and contrary to Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The applicant's criminal history as a reason for further keeping his DNA profile in National

the DNA database, the administrative authority stated that the party to the proceedings applies the legislation in question

retroactively, ie. to acts committed at a time when the legislation allowing the collection of DNA for

did not exist for the purpose of future identification. If this interpretation is strictly observed, it would

The Police of the Czech Republic was authorized to collect and store genetic material of all persons

who have been convicted of an intentional crime in the past.

On 13 April 2016, the party filed a proper appeal against the said decision.

He does not agree with the remedial measure imposed and argues as follows:

According to the party to the proceedings, the administrative body of the first instance misunderstands the concept

future identification as used in Section 65 of Act No. 273/2008 Coll. This institute is necessary

interpreted from a criminological point of view when the purpose of the collection and further preservation of the DNA profile

does not relate only to a specific proceeding, but relates to the person to whom the

criminological knowledge can reasonably be expected to commit crime in the future.

The complainant has been repeatedly convicted of intentional crime in the past, so it is

about a recidivist offender, and it is not decisive when the crime took place.

According to the party, the time that has elapsed since the last crime was committed is not

decisive and there is no reason to take it into account. For criminal reasons, it is up to the complainant

should be seen as a recidivist for whom the preservation of the DNA profile for future purposes

identification in the performance of police tasks. It is also important that the criminal in question

the acts were committed intentionally, and from a criminological point of view it is the perpetrators

increased likelihood of recidivism.

The assessment of the justification for maintaining the profile of a particular person is then primarily within the scope

Police of the Czech Republic. The contested decision thus significantly affected the

without taking into account the specificities of their work.

The judgment of the European Court of Human Rights in S. and Marper v. The United Kingdom

the party submits that its findings cannot be fully applied to the case under review, as

in the case of the complainant, this is a person convicted of several offenses.

In this case, the European Court of Human Rights assessed the preservation of DNA profiles of persons

who have not been convicted.

The party to the proceedings also refers to the case law of the Czech courts, in particular to the decision

Of the Supreme Administrative Court of 30 April 2014 Ref. 4 As 168/2013. In this judgment

The Supreme Administrative Court annulled the previous decision of the Office and found the processing of the DNA profile

for a specific perpetrator of intentional crime as admissible. With reference to the above

The judgment of the Supreme Administrative Court states that the right to privacy

it is not boundless, it must be compared with other legally protected in a specific case

interests, such as, in particular, the right to life, personal security, the inviolability of the home or protection

property. Compliance with the imposed measure, liquidation of the complainant's profile, would lead to a breach

proportionality and the principle of proportionality, as this would unduly interfere with

at the expense of the complainant's right to privacy.

On the question of the retroactive scope of the legislation in question, the party to the proceedings merely stated that the police

it cannot be charged that the legislation in question at the time the complainant committed the offense,

did not exist. The fact that the complainant is a repeat offender does not change this fact.

In conclusion, the participant concludes that it does not find in its procedure, for the reasons stated above

violation of the law, and therefore proposes the contested decision as illegal in accordance with § 90

paragraph 1 (a) a) of Act No. 500/2004 Coll. cancel.

I reviewed the contested decision in its entirety, including the process that preceded it

its release.

No error was found in the procedure of the first instance body, which, moreover, was not

the party to the proceedings does not object.

With regard to the individual factual objections of the party to the proceedings, I state the following:

It is certainly a fact that the purpose of the National DNA Database is not to record the profiles of

who have committed a particular criminal offense, but persons for whom such processing is justified with regard to

on the assumption that the crime will recur in the future. Criminological knowledge about the rate

recurrences, including heterogeneous recurrences, are also relevant. When processing personal

data for the purpose of future identification of each person, however, the Police of the Czech Republic is in accordance

with § 65 paragraph 5 of Act No. 273/2008 Coll. obliged to destroy this data as soon as their next

processing is no longer necessary for the purposes of the prevention, search or detection of criminal offenses

activities or prosecution of criminal offenses or ensuring the security of the Czech Republic,

public policy or internal security. In other words, the Police of the Czech Republic is obliged

take into account, as appropriate, the specificities of each case and assess whether further processing is necessary

data necessary for the performance of their tasks, as required in particular by Section 79 (1) of the Act

No. 273/2008 Coll.

In this case, at the age of eighteen, the applicant had misused a foreign vehicle and continued to commit it

the crime of drunkenness, at the age of nineteen he did not fulfill his obligation to pay and forged or

amended the authentic instrument. More than thirty years have passed since these crimes were committed.

In view of these facts, in the view of the Appellate Body, no further retention appears

the complainant's genetic profile as justified, as these are less serious offenses,

a long time has passed since their commission.

In 1994, the complainant was convicted of fraud in which he committed little or less damage,

ie. damage in the amount of at least six times and at most nineteen times the minimum wage according to

Government Decree effective at the time [this is Government Decree No. 53/1992 Coll., according to his

§ 2 paragraph 1 letter b) the minimum monthly wage was set at CZK 2,200, resp. CZK]. To be

in this case, it is clearly a more serious crime, given its nature (non - violent)

property crime), the amount of damage and above all

its committing,

for more than 20 years, the complainant has not committed any crime, resp. party to the proceedings

that since

3/8

in the present case

he did not prove such a fact, the preservation of the complainant's profile also with regard to this fact

does not appear to be reasonable and justified.

According to the Appellate Body, the party to the proceedings argues, and in practice proceeds, considerably

formally and in a template, if only on the basis of the fact that a certain person has committed

intentional offense, without taking into account its nature, the time elapsed since the offense,

and other relevant facts automatically concludes that it is a recidivist for whom it is possible

highly likely to assume the continuation of the crime. This conclusion

in the opinion of the appellate body, it cannot

due to

to his circumstances. After all, the judgment of the Supreme Administrative Court of 30 April

2014 Ref. 4 As 168 / 2013-40, which the party to the proceedings argue and which generally finds to be legal

and notes the general obligation of perpetrators to tolerate crime

keeping their data, including genetic data, in police databases, in point 32

notes that the solution adopted by him concerns a specific case and the Supreme Administrative Court

does not rule out a different result of the proportionality and sufficiency test of the legal basis

in other cases differing in material respects. Legality of data processing in the National

they then assess the DNA database with regard to the specific circumstances of each individual case

administrative courts in other decisions, for illustration, reference may be made here to the current ones

Judgment of the Municipal Court in Prague of 13 April 2016 Ref. 3A 86 / 2013-99.

The above-mentioned judgment of the Supreme Administrative Court was issued in the matter of data processing

persons convicted in 2005 of several crimes, tax cuts, fees and the like

compulsory payments, which caused large-scale damage, and copyright infringement

right. The person was also prosecuted for other crimes, intentional violations

duties in the management of third-party property, obstruction of official decisions and fraud, while prosecuting

for these criminal offenses, in accordance with § 172 para. a) of Act No. 141/1961 Coll.

stopped because the punishment that the prosecution could lead to was completely irrelevant next door

a sentence which has already been imposed on the accused for another act or which is expected to punish him.

In other words, he was the perpetrator of several intentional crimes, taking his profile

was entered into the National DNA Database at the time he served the sentence, ie not

with a large time lag.

For the sake of completeness, it is necessary to mention another judgment of the administrative court in a similar case,

specifically

Judgment of the Municipal Court in Prague of 26 November 2015 Ref. 5A 321 / 2011-57. Also

in this case, the court annulled the decision of the Office finding that the processing was unlawful

personal and sensitive data of a certain person in the National DNA Database. In assessing the matter

the court explicitly stated that “it is necessary to examine in particular the nature and gravity of the offense

the importance of the protected interest which has been affected by the offense,

the manner in which the act was committed and its consequences, the circumstances in which the act was committed, the

person

the offender, the degree of his fault and his motive, intention or goal, etc .; based

In assessing those aspects, the competent authorities shall decide on persons whose DNA profile

will be included in the database. ”The case of a person who was in 2004 was assessed

has been convicted of two criminal offenses and has been convicted

damage caused to other people's property in the amount of CZK 12,000,000. This was also the case

about a serious offender who has committed more than one crime

significant damage to legally protected interests and since the commission of the crime

no longer has passed.

This is in comparison with the crimes committed by the complainant in the present case

more serious crimes, which were much more intensely affected by the rights of others and in general

to the values protected by criminal law.

According to the Board of Appeal, the time that has elapsed since the commission of the previous crimes

authority is not entirely irrelevant, as the party to the proceedings states. This circumstance is not possible

assessed only from a forensic point of view, as the party to the proceedings does, but also in general from a point of view

can

principles and purpose of criminal law. According to the doctrine, one of the functions of punishment is also a rehabilitation

function,

according to which the punishment should also serve to correct the offender. This function of punishment is therefore

necessary

reflect and, at least to a fundamental extent, distinguish between persons for whom redress with regard to

the frequency of the offense evidently did not occur, and persons from whom the offense

the last (or only) crime has elapsed for a long time without criminal activity

continued, and in which

therefore assume a change in behavior and a lower rate

the likelihood of recidivism. Given the nature of the offenses that

the complainant committed, and in particular for the period which has elapsed since the last of them and which he does

more than twenty years, in the opinion of the Appellate Body, there is no preservation of the complainant's DNA profile

in this case reasonable and proportionate.

After all, it is exactly twenty years in accordance with § 34 par. a) of Act No. 40/2009 Coll. even the longest

limitation period for the commission of the most serious criminal offenses. Conviction for the most serious

criminal offenses for which an exceptional penalty may be imposed may then be imposed pursuant to § 105 para. (a) of this

fifteen years after the sentence has been served, if the person concerned has

life, or, if the convicted person has proved after the execution or pardon of the sentence or

The statute of limitations of his performance by his very good conduct that he has corrected can thus be complied with

with the third paragraph of the same provision. According to the criminal law in force at the time
when Mr. S. was convicted (Act No. 140/1961 Coll.), then the deadline for smoothing the conviction
for the most severely punished offenses, according to § 69 par. a) of that Act for ten years.
Mr. S. was last convicted in 1994 for the crime of fraud, which was
the damage caused is not small. For this crime he could be sentenced to imprisonment on
six months to three years, or to a fine.
As follows from the above, the criminal offense for which Mr S. was committed in 1994
convicted would already be time-barred, just as the past period fulfills the conditions for extermination
conviction. Therefore, if it is generally possible to look at the nominee as if he were not
convicted, the Appellate Body does not consider it appropriate and justified for those offenses which
could be erased, to draw further consequences in terms of including the DNA profile in the National
DNA database. In other words, the nominee is generally seen as not convicted,
however, for some entities, here the party to the proceedings, resp. Police of the Czech Republic, fiction
non-conviction is not relevant and the person concerned is further assessed and assessed taking into account
to his previous crime. Based on this evaluation, his
privacy in an extremely important way, though
they are
processed in police records.
The fact that the party's approach summarized in the previous paragraph is from a legal point of view
inadmissible, can be deduced, for example, from the judgment of the Supreme Court of 27 September 2006 ref. 8 Tdo
1069/2006, which explicitly stated: "In general, it can be argued that legal fiction that
The perpetrator sees as if he has not been convicted, it has the meaning that the conviction used this fiction
concerned has ceased to exist legally. In other words, with the fact that he was the perpetrator for an earlier crime
convicted, no further criminal consequences will continue to be associated,
and not only those which the law explicitly stipulates in the provision of § 35 par. 3 of the Penal Code. disciple. Would
in a logical contradiction, to regard such a conviction in certain contexts as if

did not exist legally and would be treated as such in other contexts

continue. "

As stated in the contested decision, after Mr S. was charged, his removal was

biological sample for the purposes of future identification on the basis of § 65 par. a) of the Act

No. 273/2008 Coll. admissible, the party to the proceedings had such data processing at its disposal

sufficient legal title. At the time this prosecution was final

terminated without the nominee being found guilty of a criminal offense, however

party to the proceedings with a legal title to further process the biological sample and the results obtained from it

its genetic

information

information on the genetic equipment of the named was not authorized, resp. this processing was

unjustified, disproportionate and therefore illegal on the basis of the above.

To disproportionate or unjustified interference in the competence of the Police of the Czech Republic, as

argues that the party in the proceedings did not. The Office is in line with

their competencies according to Act No. 101/2000 Coll. authorized to assess the legality of the processing

personal and sensitive data by the Police of the Czech Republic. If on the basis of relevant documents

If the processing of a person's data is illegal, he is obliged to the administrator

order that the situation be remedied, which in some cases can only be achieved

liquidation of the data in question. In the proceedings prior to the adoption of the contested decision,

collected relevant data for assessing the lawfulness of personal data processing

complainant, the assessment made by the administrative authority of the first instance

is justified and does not deviate from the competences that are legal to the Office

entrusted by the order. For these reasons, there can be no objection to interference with the competence of the Czech Police

Republic to comply.

In this context, the Appellate Body considers it appropriate to refer to the current judgment

Of the Municipal Court in Prague, specifically the judgment of 13 April 2016 ref. 6A 5 / 2013-76-89

according to which "it is appropriate in this case to manage such a set of information (is meant

The National DNA Database) was subject to the supervisory authority of the defendant (ie the Office) and that

he himself set out more binding rules for such handling of personal data during the inspection ”(paragraph 34).

The judgment of the European Court of Human Rights in S. and Marper v. The United States

Kingdom and the party's argument that the findings of the Court in this case cannot be applied, since

in the case of Mr S., he is a person convicted of several criminal offenses, it is possible

so much that the European Court of Human Rights has in the present judgment

did not deal with the convictions of the complainants; after all, one of them was at the time of sampling

eleven years. According to the appellate body, that judgment must be interpreted as meaning that:

it is illegal to further preserve a DNA profile taken away as a result of criminal proceedings against

a person on suspicion of having committed a criminal offense, if the result of that criminal offense

the proceedings are not a final conviction of the person concerned. The judgment has been interpreted in this sense

and the administrative authority of the first instance.

The question of the retroactive effect of the legislation in question, which is also the subject of the contested decision

argues so much that the authority of the police to withdraw for the purposes of future identification

biological samples enabling the acquisition of information on genetic equipment was in Czech

of the legal order is enshrined in the amendment to the Police Act made by Act No. 60/2001 Coll.

With effect from 19 February 2001, it brought an adjustment to the present day

has not changed significantly. Before this date, a similar regulation in Czech law

did not exist.

Keeping a genetic profile in the National DNA Database is certainly a strong intervention in personalities

rights of every human being. With regard to the constitutional principle of the legality of the exercise of state power, also with

regard to

According to the case law of the European Court of Human Rights1, there must be

allows, among other things, predictable so that the perpetrator of the crime can be in his time

preparation or committing awareness of all the consequences that may have for him, ie. and its classification

personal data to police databases. At the time of the crime by

the complainant did not have this legislation, so the complainant could not have been aware that

1 Reference may be made, for example, to the judgment in Dragojević v. Croatia, complaint no. 68955/11,

ECtHR judgments, such as Malone v. the United Kingdom, complaint 8691/79, and Sunday

Times v. UK, complaint 6538/74, which deals with the essentials and qualities of the intervention legislation

human privacy by the state and its security forces. The ECtHR later applied these rules to management

state databases or records, cf. Rotaru v. Romania, complaint 28341/95, or

Amann v. Switzerland, complaint 27798/95.

as a result of his activities, his DNA profile will subsequently be kept by the police, as current

internal regulation up to his 100 years of age2.

The retrospective effect of this legislation, although not, is unlike retrospective

effectiveness of substantive criminal law standards, explicitly prohibited3, represents a strong

interference with the complainant's rights, which the complainant could not have foreseen in any way and, if necessary, his

conduct

adapt.

Retroactivity is generally said to be “one of the legal requirements of legal certainty

and the basic principles defining the category of the rule of law and thus the confidence of citizens in the law is

inadmissibility of retroactive effect of legal norms “4.

The Constitutional Court also dealt with the retroactive effect of legal norms, especially in the judgment

of 4 February 1997, file no. Pl. ÚS 21/96, in which he stated, among other things: “On the basic principles

defining the category of the rule of law, includes the principle of protecting citizens' trust in the law and with it

the related principle of non-retroactivity… For true retroactivity therefore

the lex posterior abolishes (does not recognize) legal effects during the period of validity of the legis prioris, or

evokes or associates the rights and obligations of entities with such facts as at the time

legis In the case of retroactivity, false

the new law does not have legal consequences for the past, but either elevates the past

facts under the condition of future legal consequence (simple exclusivity) or modifies

for the future legal consequences under previous laws established… For retroactivity right

the principle of general inadmissibility applies, from which there are strictly limited exceptions to admissibility,

on the contrary, the principle of general admissibility applies to false retroactivity, from which there are exceptions to it

inadmissibility. "

It is also possible to cite the finding of 13 June 2012, file no. III. ÚS 611/01, where the Constitutional Court

He stated that “although the prohibition of retroactivity of legal norms is in Article 40 (6) of the Charter of Fundamental Rights

rights and freedoms is explicitly regulated only in the field of criminal law (according to the

the criminality of the offense is assessed and the sentence is imposed according to the law in force at the time the offense was

committed

committed, and a later law will apply if it is more favorable to the offender), it is necessary

from Article 1 of the Constitution to infer the effect of this prohibition also to other branches of law. "

The above can be summarized as follows in the procedure of the party to the proceedings, respectively. police, can no doubt

find the retroactive effect of the legislation. Given its nature (false

retroactivity) and the subject of the standard, which is the inclusion of a name in one of the police databases,

therefore, from a legal point of view, not a punishment, but a preventive or generally forensic measure,

the Appellate Body does not consider that criminal offenses committed by specific persons before the entry into force

the above-mentioned Act No. 60/2001 Coll. could not be taken into account at all. Criminalization

past from the period before the effectiveness of Act No. 60/2001 Coll. however, taking into account the requirement

predictability of law, including the regulation of state interference with human privacy and general

The problem of the retroactive effect of law should not be general and standardized

applied rule, but should take into account the specificities of each case, in particular

the seriousness of the offenses and the time that has elapsed since they were committed. He considers it incorrect

The appellate body approaches that any intentional crime committed at any time in the past

automatically justifies the inclusion of the profile of the person concerned in the National DNA Database. How

mentioned above, the party to the proceedings in the case of processing personal and sensitive data of Mr. S.

in the National DNA Database did not take into account the specifics of the case, resp. did not draw the correct conclusion

from them

having regard to the justification and proportionality of such invasion of privacy.

2 Art. 75 of the Instruction of the Police President of 2 December 2014, on identification acts.

3 Cf. Article 40 para. 6 of the Charter of Fundamental Rights and Freedoms and § 1 of the Criminal Code.

4 Knapp, V. Theory of Law. Prague: C. H. Beck, 1995.

Objection of the party to the proceedings that the absence of relevant legislation at the time of the commission of the criminal

the complainant's actions is not his fault, resp. the fault of the police is completely irrelevant. The party to the proceedings,

resp. The Police of the Czech Republic is obliged to apply the legal order as a whole, even with regard to

basic principles and rules of the rule of law in the sense outlined above.

Based on all the above facts, I have decided as stated in the statement

of this Decision.

Lessons learned:

pursuant to the provisions of Section 91 (1) of the Act

Against

No. 500/2004 Coll., Administrative Procedure Code, cannot be revoked.

Prague, May 25, 2016

For correctness of execution:

Martina Junková

official stamp imprint

JUDr. Ivana Janů, v. R.

chairwoman