



Lack of clarity in the law meant the taking of a DNA swab during a murder investigation violated the Convention

In today's **Chamber** judgment¹ in the case of [Dragan Petrović v. Serbia](#) (application no. 75229/10) the European Court of Human Rights held,

unanimously, that there had been **no violation of Article 8 (right to respect for private life)** of the European Convention on Human Rights as regards a police search of the applicant's apartment, and **by six votes to one**, that there had been a **violation of Article 8** of the European Convention owing to the taking of a DNA saliva sample from the applicant.

The case concerned a police search of the applicant's flat and the taking of a DNA sample during a murder investigation.

The Court found in particular that the search warrant had been specific enough and had been attended by adequate and effective safeguards against abuse during the search itself. For instance, the applicant, his lawyer and the owner of the apartment had been present during the search.

However, it found that the taking of the DNA saliva sample had not been "in accordance with the law" within the meaning of Article 8. The measure had been carried out under a previous Code of Criminal Procedure, which had only authorised that blood samples could be taken, or "other medical procedures" carried out. Furthermore, the Code had been updated in 2011 with new safeguards related to DNA mouth swabs, an implicit acknowledgement that they had been lacking previously.

Principal facts

The applicant, Dragan Petrović, is a Serbian national who was born in 1985 and lives in Subotica (Serbia).

In July 2008 the police received information that the applicant might have been involved in the severe beating and subsequent death of an elderly man. On the basis of that information, an investigating judge, in two separate decisions, ordered a search of the applicant's flat and the taking of a saliva sample from him for a DNA analysis.

The search was to focus on objects taken following the murder, notably a "black leather jacket", and "shoes and other objects" which could be connected to the crime. The police eventually found two handguns in the flat, about which the applicant denied having any knowledge.

The DNA saliva test was required to see for comparison with DNA data found at the murder scene. The judge authorised the police to take the sample, or a sample of the applicant's blood, by force if necessary, with the assistance of medical professionals. In the presence of his lawyer the applicant agreed to give a saliva sample to the officers. It would appear, however, that no official record of how the order was carried out was produced by the police.

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.

In August 2008 the police informed the investigating judge that it had decided to press charges against the applicant for illegal possession of firearms. The authorities found no match between the applicant's DNA sample and the biological traces found at the crime scene.

In August 2008 the applicant lodged an appeal with the Constitutional Court alleging a violation of his right to respect for his home and his private life, referring to Article 8 of the Convention and Articles 25 and 40 of the Constitution. The Court dismissed his appeal on the merits in October 2010.

Complaints, procedure and composition of the Court

The applicant complained that the search and taking of the DNA sample had violated his rights protected by Article 8 (right to respect for private life, family and the home) of the Convention.

The application was lodged with the European Court of Human Rights on 6 December 2010.

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

Jon Fridrik **Kjølbro** (Denmark), *President*,
Faris **Vehabović** (Bosnia and Herzegovina),
Iulia Antoanella **Motoc** (Romania),
Branko **Lubarda** (Serbia),
Carlo **Ranzoni** (Liechtenstein),
Stéphanie **Mourou-Vikström** (Monaco),
Jolien **Schukking** (the Netherlands),

and also Andrea **Tamietti**, *Section Registrar*.

Decision of the Court

Article 8

The Court first rejected the Government's objections that the applicant had lodged his application outside the six-month time-limit and that he had not exhausted domestic remedies, finding in particular that an appeal to the Constitutional Court was an effective remedy, which he had used.

On the merits of the case, the Court first dealt with the question of the search of the applicant's flat. It held that the search had been an interference with his right to respect for his home which had been provided for by law and had served a legitimate aim. The question was therefore whether it had been proportionate, that is whether it had been "necessary in a democratic society".

It noted that the search warrant had been issued in the context of a murder investigation and had been specific in what the police had been seeking, namely a black leather jacket, shoes and other objects related to the crime. The Court therefore disagreed with the applicant's argument that the search warrant had been vague.

The Court also found that the applicant had been afforded adequate and effective safeguards against any abuse during the search itself, in particular because he, his lawyer and the owner of the apartment had been present when it was carried out. Moreover, the lawyer had signed the seizure certificate and the official record of the search-and-seizure operation, raising no objections to the search procedure as such, only to the reasoning of the warrant.

The Court concluded that the interference in question had thus been "necessary in a democratic society" and there had been no violation of Article 8 owing to the police search of the apartment.

Dealing next with the taking of the DNA sample, the Court found that that act had amounted to an interference with the applicant's right to respect for his private life. The fact that he had agreed to

the procedure was of no relevance as he had only done so under the threat that otherwise a saliva or blood sample would be taken by force.

The Court noted that the order for the DNA sample had not referred to any legal provision, while the relevant Article of the Code of Criminal Procedure, Article 131 §§ 2 and 3, only provided that a court could order that a blood sample be taken, or that “other medical procedures” be carried out if that was deemed medically necessary to establish facts “of importance” to a criminal investigation. In addition, according to the case file, the authorities had failed to prepare an official record of the procedure, failing to comply with Article 239 of the Code of Criminal Procedure.

The Court also noted that Article 131 §§ 2 and 3 had lacked various safeguards related to the taking of DNA samples, which had subsequently been introduced in the amended 2011 Code of Criminal Procedure. Those new safeguards included a specific reference to the taking of mouth swabs, the need to use an expert to carry out the procedure, and a limit on the range of people from whom mouth swabs could be taken without consent.

The Court thus considered that by putting more detailed provisions in the 2011 Code, the respondent State had itself implicitly acknowledged the need for tighter regulation in this area.

The Court concluded that the interference with the applicant’s private life by taking the DNA sample had not been in accordance with the law and there had been a violation of Article 8.

Article 6

The applicant also complained that he had been denied the right to be informed promptly and in detail by the authorities of the fact that he was suspected of a specific criminal offence, contrary to Article 6 § 3 (a) of the Convention.

Accepting that the applicant’s submissions on this point were a separate complaint rather than an addition to his arguments under Article 8, the Court found that the applicant had never raised this question domestically. This part of the application therefore had to be rejected for non-exhaustion of domestic remedies.

Just satisfaction (Article 41)

The Court held by six votes to one that Serbia was to pay the applicant 1,500 euros (EUR) in respect of non-pecuniary damage and EUR 1,200 in respect of costs and expenses.

Separate opinions

Judge Mourou-Vikström expressed a dissenting opinion which is annexed to the judgment.

The judgment is available only in English.

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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.