LJN: BJ8705, Europees Hof voor de Rechten van de Mens, 20-01-2009, 20689/08

Databank: NJ 2009, 411

DNA-onderzoek bij minderjarige veroordeelde. Geen schending art. 8 EVRM.

Samenvatting: Bij een minderjarige veroordeelde is celmateriaal afgenomen ter vaststelling van een DNA-profiel en opslag in een nationale DNA-databank.
EHRM: Het verkrijgen van celmateriaal door middel van het afnemen van wangslijm en de opslag van dat materiaal alsook het vaststellen van een DNA-profiel levert een inbreuk op op de persoonlijke levenssfeer, tenzij deze inbreuk kan worden gerechtvaardigd op grond van art. 8 lid 2 EVRM. In de onderhavige zaak is het afnemen van celmateriaal van de klager en het vaststellen en het verwerken van zijn DNA-profiel gegrond op nationale wetgeving en derhalve bij wet voorzien. Voorts is de betreffende maatregel noodzakelijk in een democratische samenleving. Het Hof verwijst o.a. naar S. en Marper t. het Verenigd Koninkrijk, NJ 2009, 410. In tegenstelling tot de laatste zaak is er in deze zaak sprake van opslag en bewaren van een DNA-profiel van een veroordeelde ter zake van een strafbaar feit. Gelet op het feit dat de Wet DNA-onderzoek bij veroordeelden waarborgen biedt tegen oneindige en ongedifferentieerde opslag van DNA-gegevens en bovendien het DNA-materiaal anoniem en gecodeerd wordt opgeslagen en de verdachte slechts met zijn opgeslagen DNA-profiel wordt geconfronteerd als hij eerder al een strafbaar feit heeft gepleegd of in de toekomst zal plegen, ziet het Hof geen reden om af te wijken van zijn eerdere bevindingen in de zaak Van der Velden wegens het gegeven dat de verdachte een minderjarige betreft. Het Hof acht de klager niet-ontvankelijk. Geen schending van art. 8 EVRM.

Rechters: Josep Casadevall, Elisabet Fura-Sandströ m, Boš tjan M. Zupanč ič , Alvina Gyulumyan, Egbert Myjer, Luis Ló pez Guerra, Ann Power

Uitspraak

W.
tegen
Nederland

De feiten:
mishandeling tot een voorwaardelijke jeugddetentie, een werkstraf van 30 uur en een leerstraf van 20 uur. Na deze veroordeling heeft de officier van justitie bevolen celmateriaal bij W. af te nemen om DNA-onderzoek te doen ingevolge de Wet DNA-onderzoek bij veroordeelden. W. maakt hiertegen bezwaar en beroept zich op art. 8 EVRM en de artikelen 3 en 40 van het Verdrag inzake de Rechten van het Kind (IVRK). De rechtbank verwerpt het bezwaar en overweegt dat aan alle wettelijke eisen is voldaan en de officier van justitie DNA-materiaal had mogen verzamelen ondanks het feit dat het hier om een minderjarige gaat. De rechtbank verwijst naar de parlementaire behandeling van de Wet DNA-onderzoek bij veroordeelden, waarin is geconcludeerd dat geen strijd is met de fundamentele rechten als neergelegd in de Grondwet of in internationale verdragen, in het bijzonder art. 8 EVRM.
Voor wat betreft het IVRK moeten het belang van de minderjarige en het opsporingsbelang van de staat tegen elkaar worden afgewogen. In dat kader overweegt de rechtbank dat verdachte het slachtoffer ernstig had verwond, dat hij al eerder 20 uur taakstraf had verricht wegens mishandeling en dat hij in de tussentijd is aangehouden op verdenking van poging tot doodslag. Onder deze omstandigheden wegen de belangen van de staat op tegen die van de veroordeelde. Daarbij komt dat de DNA-databank niet openbaar is en slechts toegankelijk is wanneer aan strenge criteria is voldaan. De

minderjarige dient hierop een klacht in bij het Europees Hof voor de Rechten van de Mens.

EHRM:

The facts
The applicant, Mr W., is a Dutch national who was born in 1991 and lives in Heerlen. He was represented before the Court by Mr C. Ingelse, a lawyer practising in Maastricht.

A.The circumstances of the case
The facts of the case, as submitted by the applicant, may be summarised as follows.
On 15 February 2007 the Juvenile Judge (kinderrechter) for criminal cases of the Maastricht Regional Court (rechtbank) found the applicant guilty of causing bodily harm (mishandeling). The applicant was sentenced to a suspended term of juvenile detention (voorwaardelijke jeugddetentie), a community service order (werkstraf) of 30 hours and a training order (leerstraf) of 20 hours.
In view of the applicant's conviction, and pursuant to article 2 paragraph 1 of the DNA Testing (Convicted Persons) Act (Wet DNA-onderzoek bij veroordeelden; 'the Act'), the public prosecutor, on 7 June 2007, ordered that cellular material be taken from the applicant in order for his DNA profile to be determined. A mouth swab was taken from the applicant on 18 July 2007.
On 31 July 2007 the applicant, pursuant to article 7 of the Act, lodged an objection (bezwaarschrift) against the decision to have his DNA profile determined and processed, i.e. entered into a national DNA database. He submitted that, in accordance with Article 8 of the Convention and Article 40 of the Convention on the Rights of the Child of 20 November 1989, the personal interests of a minor should be balanced against the general interests of society when it was being considered whether to apply the Act to that minor, and within that balancing exercise the interests of the minor should be the primary consideration pursuant to Article 3 of the Convention on the Rights of the Child. The applicant submitted that regard should be had to the age of the convicted person at the time of the commission of the crime, the seriousness of the offence, the circumstances under which the offence had been committed, the risk of the convicted person reoffending and other personal circumstances of the convicted person.
The applicant further argued that the public prosecutor had failed to strike a proper balance of the interests involved. In particular, the public prosecutor had failed to take into account that the applicant had only been 15 years old when he committed the offence, that the offence had consisted of the administration of one blow with his fist, that the applicant was performing well at school and that he showed no risk at all of reoffending. The applicant also claimed that the storage of his DNA profile would not be beneficial for the possible detection, prevention or conviction of future crimes committed by him and that the exception contained in article 2 paragraph 1 sub b of the Act (see below) should therefore apply.
On 2 November 2007 the Maastricht Regional Court, having heard the public prosecutor and counsel for the applicant in camera, dismissed the applicant's objection. It considered that, if all requirements stipulated in the Act had been met, the public prosecutor was obliged to collect a DNA sample from the applicant regardless of the fact that he was a minor. As regards the applicant's claim of a violation of Article 8 of the Convention, the Regional Court referred to the parliamentary discussions (parlementaire behandeling) on the adoption of the Act, which had concluded that the Act did not breach fundamental rights enshrined in the Constitution and international treaties. The Regional Court adopted these conclusions and the Article 8 argument was accordingly dismissed. The Regional Court further noted that the Convention on the Rights of the Child had not featured in the parliamentary discussions. Being of the view that the determination and processing of the DNA profile of a minor could adversely affect that minor's interests, the Regional Court considered that it ought to interpret the provisions of the Act in the light of the text and aim of the Convention on the Rights of the Child. With reference to Article

3 of that Convention, it found that where the determination and processing of a minor's DNA profile were concerned, the interests of the minor and the general interests of the State in the prevention and detection of crime should be weighed against each other. The Regional Court went on to observe that it appeared from the file that the applicant had severely injured his victim, that he had already performed 20 hours of community service to avoid criminal prosecution relating to an earlier charge of causing bodily harm, and that at the hearing the public prosecutor had disclosed that the applicant had in the meantime been apprehended on suspicion of attempted manslaughter. The Regional Court held that in these circumstances the interests of the State outweighed those of the applicant. It further considered that the determination and processing of the applicant's DNA profile would not result in any adverse effects for the applicant relating to his young age since the DNA database was not public and stringent criteria on access to it were in place.
No appeal lay against the decision of the Regional Court.

B.Relevant domestic law and practice
The statutory maximum prison sentence for the offence of assault causing bodily harm is two years (article 300 paragraph 1 of the Criminal Code, Wetboek van Strafrecht). In the event that grievous bodily harm is caused, the statutory maximum prison sentence is four years (article 300 paragraph 2 of the Criminal Code).
The DNA Testing (Convicted Persons) Act entered into force on 1 February 2005.
Article 2 paragraph 1 of the Act requires the public prosecutor at the Regional Court that has given judgment at first instance to order that a sample of cellular material be taken from, inter alia, a person who has been convicted of one of the offences listed in article 67 paragraph 1 sub b of the Code of Criminal Procedure (Wetboek van Strafvordering). Assault causing bodily harm is one of those offences.
According to the explanatory memorandum to the Act (Memorie van Toelichting; House of Representatives, no. 28,685, 2002-03 session, no. 3), the seriousness of the offence(s) involved justifies determining and processing a DNA profile of the convicted person in order to contribute to the detection, prosecution and trial of criminal offences committed by him or her and, if possible, to prevent him or her from again committing criminal offences.
Paragraph 1 sub b of article 2 of the Act sets out two exceptions. No order for sample collection will be made if, in view of the nature of the offence or the special circumstances under which it was committed, it may reasonably be assumed that the determination and processing of the DNA profile will not be of significance for the prevention, detection, prosecution and trial of criminal offences committed by the person in question. It appears from the explanatory memorandum to this provision that the first exception of paragraph 1 sub b, relating to the nature of the offence, may apply when a person has been convicted of a crime for the solution of which DNA investigations can play no meaningful role — perjury or forgery, for instance. The second exception, relating to the special circumstances under which the offence was committed, may apply to a convicted person who is most unlikely previously to have committed an offence in respect of which DNA investigation might be of use and who will not be able to do so in the future, for example due to serious physical injury or in the case of a woman who has never had any dealings with the law and who, after having been ill-treated by her husband for years, finally inflicts grievous bodily harm on him or kills him.
Article 2 paragraph 5 of the Act stipulates that DNA profiles are only to be processed for the purpose of the prevention, detection, prosecution and trial of criminal offences. It further states that rules as to the processing of DNA profiles and cellular material are to be laid down by Order in Council (algemene maatregel van bestuur), after the Dutch Data Protection Agency (College Bescherming Persoonsgegevens) has been heard. The rules in question have been set out in the DNA (Criminal Cases) Tests Decree (Besluit DNA-onderzoek in strafzaken). It regulates how and by whom samples are to be taken; how they are to be kept, sealed and identified; how and by whom the DNA profile is to be drawn up; and which authorities are allowed to make use of the data stored in the DNA database. The Decree further lays down rules on the duration of the retention of a DNA

profile and cellular material. This depends on the offence of which the individual concerned has been convicted. The data of persons convicted of an offence carrying a statutory maximum sentence of six years or more is retained for thirty years. For less serious offences carrying sentences of up to six years, cellular material and DNA profiles may be retained for a maximum period of twenty years.
The individual concerned may lodge an objection against the determination and processing of his or her DNA profile with the Regional Court within 14 days after the sample has been taken or after he or she has been served with the notification, required by article 6 paragraph 3 of the Act, that sufficient cellular material has been collected for a DNA profile to be determined and processed (article 7 paragraph 1).
The documents relating to the enactment of the Act contain no references to the Convention on the Rights of the Child. However, in a parliamentary discussion which took place on 18 March 2004 the Minister of Justice said that he saw no reason to exempt juveniles from the application of the Act or to establish a different regulation for them, since the chance of a convicted person reoffending was no less in the case of a minor than in that of an adult (Handelingen Tweede Kamer — Records of the House of Representatives — 18 March 2004, p. 60-3933-3934).
The compatibility of the Act with the Convention on the Rights of the Child was discussed in the House of Representatives when, in 2005, a number of amendments — not relevant to the present case — to the Act were proposed. On that occasion the Minister of Justice replied to written questions of Members of Parliament that the Convention on the Rights of the Child intended for juvenile criminal law to provide an educational perspective in which the reaction to the commission of criminal offences by juveniles ought to be based on rehabilitation, the offering of a second chance and correction of, or compensation for, a failed upbringing. According to the Minister, the taking of cellular material for the purpose of DNA investigation was not contrary to those principles. On the contrary, he considered that the processing of their DNA profile in the national database could contribute to their social rehabilitation. He therefore saw no need to amend the Act in this context (Kamerstukken (Parliamentary Documents), 2005–2006, 26,271, nr. 36, p. 16).
After the entry into force of the Act, different Regional Courts reached different decisions on objections lodged by minors against the determination and processing of their DNA profiles. Whereas some Regional Courts considered that the full application of the Act to persons who had been underage when convicted sat ill with the Convention on the Rights of the Child in view of its stigmatising effect, others found that DNA testing following a conviction was not detrimental to a child's feelings of dignity and self-worth and did not stand in the way of the child's reintegration into society. One Regional Court subscribing to this latter view considered that application of the Act to a minor did not entail adverse consequences since information relating to the determination and processing of a DNA profile was not public and would only be used in a specific criminal case; the DNA profile was stored in the DNA database anonymously and coded; and the minor would subsequently not be confronted with his DNA profile unless it appeared — as a result of a comparison of his or her DNA profile with DNA profiles of traces found in unsolved criminal cases — that he or she had previously committed one or more offences or committed another offence in the future. It was concluded that no stigmatising affect attached to the processing of DNA profiles and cellular material of juveniles. Moreover, to the extent that the Act aimed at dissuading convicted persons from reoffending, the processing of their DNA profile in the DNA database might have a preventive effect on the behaviour of minors (Rotterdam Regional Court, 17 November 2005, Landelijk Jurisprudentienummer — National Case-law (database) number, 'LJN' — AU7070).
In view of the differing decisions taken by different Regional Courts, the Procurator General at the Supreme Court (Hoge Raad) lodged an appeal in cassation with that court in the interest of the law (cassatie in het belang der wet) in two cases (not including the present one). In its judgment of 13 May 2008 (LJN BC8231), in which it had regard to the explanatory memorandum to the Act and the parliamentary discussions on the adoption of the Act, the Supreme Court considered that the basic premise of the text, goal as well as the tenor of the Act was that cellular material be taken from every

convicted person within the meaning of article 2 paragraph 1 of the Act. The Act did not differentiate between underage and adult convicts and the system of the Act did not allow for any further balancing of interests. The public prosecutor was obliged to issue an order for cellular material to be taken unless one of the exceptions set out in paragraph 1 of article 2 applied. The Supreme Court concluded that the system, as intended by the legislator, of a wide opportunity for the taking of cellular material with only two exceptions that were to be narrowly interpreted, did not provide room for a generic exception for minors. Moreover, such a generic exception could also not be derived from the Convention on the Rights of the Child.

Complaints
The applicant, who requested the Court to let itself be guided by provisions relating to minors laid down in the Convention on the Rights of the Child as well as other international instruments, complained under Article 8 of the Convention of a violation of his right to respect for his private life. He argued that the interference with this right was not in accordance with the law since no heed had been paid in the adoption of the Act to Article 3 of the Convention on the Rights of the Child according to which, in all actions concerning children, the best interests of the child shall be a primary consideration. Moreover, in any balancing of interests that was to be carried out, the interests of the minor should in principle weigh the heaviest. However, in the case of the applicant, his interests as a minor had not been taken into account.
The applicant further alleged a violation of Article 6 § 1 of the Convention in conjunction with Article 13 of the Convention in that the taking of DNA material constituted a serious intrusion into his privacy and physical integrity which he had had to endure as part of his 'civil obligations'. For this reason, the process ought to be under the jurisdiction of an independent judge and not that of the public prosecutor. Furthermore, the lack of a possibility to appeal against the actual taking of cellular material or against the decision of the Regional Court constituted a violation of Article 13.
Invoking Article 6 §§ 2 and 3 of the Convention, the applicant argued that the taking from him of cellular material and the determination and processing of his DNA profile violated the presumption of innocence, the right to due process and his right not to incriminate himself.
Finally, the applicant complained of a violation of the principle of equality under Article 14 of the Convention since DNA material of convicted persons only was stored and not of all people living in the Netherlands.

The law

A.Alleged violation of Article 8 of the Convention
The applicant contended that the taking of cellular material and the determination and processing of his DNA profile constituted an interference with his right to respect for his private life that was not in accordance with the law or necessary in a democratic society. The applicant invoked Article 8 of the Convention, which reads in its relevant parts:

'1.

Everyone has the right to respect for his private … life…

2.

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

The Court has previously found that both the obtaining of cellular material by way of taking a mouth swab and the retention of that material as well as the determination of a DNA profile constitutes an interference with the right to respect for private life (see Van der Velden v. the Netherlands (dec.), no. 29514/05, 7 December 2006). Such interference will be in breach of Article 8 of the Convention unless it can be justified under paragraph 2 of Article 8 as being 'in accordance with the law', as pursuing one or more of the legitimate aims listed therein, and as being 'necessary in a democratic society' in order to achieve the aim or aims concerned.
According to the Court's established case-law, the expression 'in accordance with the law' requires that the impugned measure should have some basis in domestic law, and also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects (see Rotaru v. Romania [GC], no. 28341/95, § 52, ECHR 2000-V). The Court observes that the taking of cellular material from the applicant and the determination and processing of his DNA profile were based on a national law. The Court reiterates that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law. More specifically, it is not for the Court to rule on the validity of national laws in the hierarchy of domestic legislation (see also Kruslin v. France, 24 April 1990, § 29, Series A no. 176-A). This also applies where international treaties are concerned; it is for the implementing party to interpret the treaty, and in this respect it is not the Court's task to substitute its own judgment for that of the domestic authorities, even less to settle a dispute between the parties to the treaty as to its correct interpretation (see Slivenko v. Latvia [GC], no. 48321/99, § 105, ECHR 2003-X).
Noting that the applicant has not raised any grievances as regards the accessibility of the Act, the Court would merely observe that the measure in question was set out in clear terms under the Act.
The Court is therefore satisfied that the impugned measure was "'in accordance with the law'" .
Concerning the legitimate aim served by the impugned measure, the Court perceives no cause to reach a different conclusion in the present case from the one it reached in earlier cases (see inter alia Van der Velden (cited above) and S. and Marper v. United Kingdom [GC], nos. 30562/04 and 30566/04, 4 December 2008, § 100 (NJ 2009, 410; red.)), where it considered that the compilation and retention of a DNA profile served the legitimate aims of the prevention of crime and the protection of the rights and freedoms of others.
Furthermore, the Court considers that measures such as the measure complained of can be said to be "'necessary in a democratic society'" . In its Van der Velden decision the Court already pointed to the substantial contribution which DNA records have made to law enforcement in recent years, and noted that while the interference at issue was relatively slight, the applicant might also reap a certain benefit from the inclusion of his DNA profile in the national database in that it allowed for a rapid elimination of the applicant as a possible suspect of a particular crime in the investigation of which material containing DNA had been found. The Court finds that these considerations apply equally in the present case, where the person whose DNA profile is to be compiled and stored in the database is a minor.
The Court has further had regard to its findings in S. and Marper v. the United Kingdom (cited above, § 119), which concerned the retention of DNA records of two applicants who had not been convicted of a criminal offence. In that case the Court was struck by the blanket and indiscriminate nature of the power of retention of DNA records in England and Wales whereby the material could be retained without time-limits and irrespective of the nature or gravity of the offence or the personal circumstances of the individual involved. The Court notes however that, contrary to the S. and Marper case, the present case deals with the issue of storing and retaining DNA records of persons who have been convicted of a criminal offence. Furthermore the Court considers that, pursuant to the provisions of the DNA Testing (Convicted Persons) Act, DNA material can only be taken from persons convicted of an offence of a certain gravity, and that the DNA

records can only be retained for a prescribed period of time that is dependent on the length of the statutory maximum sentence that can be imposed for the offence that has been committed. The Court is therefore satisfied that the provisions of the Act contain appropriate safeguards against blanket and indiscriminate retention of DNA records. Considering, moreover, that the DNA material is stored anonymously and encoded, and that the applicant will only be confronted with his stored DNA record if he has previously committed another criminal offence or commits one in the future, the Court sees no reason to diverge from its findings in Van der Velden on account of the mere fact that the applicant is a minor.
It follows that the complaint is manifestly ill-founded and must be rejected accordingly pursuant to Article 35 §§ 3 and 4 of the Convention.

B. Alleged violation of Article 6 §§ 2 and 3, Article 13 in conjunction with Article 6 § 1 and Article 14 of the Convention
The applicant raised complaints under the above provisions in relation to the decision to take a sample of cellular material from him and to the determination and processing of his DNA profile.
The Court reiterates that, according to the admissibility criteria laid down in Article 35 § 1, an applicant is obliged to exhaust domestic remedies before lodging a complaint with the Court. This requirement equally entails that complaints raised at the international level have to be raised first, at least in substance, in the domestic proceedings (see among others Akdivar and Others v. Turkey, judgment of 16 September 1996, Reports of Judgments and Decisions 1996-IV, § 66).
The Court has had regard to the objection filed by the applicant in the national proceedings on 31 July 2007 and the subsequent decision of the Regional Court and it considers that the applicant did not raise the complaints now brought before the Court at the national level. These complaints are therefore inadmissible for non-exhaustion of domestic remedies and must be rejected in accordance with Article 35 § 1 of the Convention.
For these reasons, the Court unanimously
Declares the application inadmissible.