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January 2009

# Chronicle of case-law (2000-2009) : the European Court of Human Rights and the protection of patient's data

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**CHRONICLE OF CASE-LAW :**
**THE EUROPEAN COURT OF HUMAN RIGHTS**
**AND THE PROTECTION OF PATIENT'S DATA**
**(1st January 2000 – 24 June 2009)**

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## Right to self-determination

After having indicated that the notion of personal autonomy was an important principle underpinning the application of the guarantees offered by Article 8 (the right to respect for private life) ([1]), the Court has formally consecrated the existence of the right to self-determination ([2]). Now, the open question is to know whether this includes the right to informational self-determination ([3]).

## The link between privacy and data protection : the necessity to protect medical data

The Court insists on the fact that that the protection of personal data, not least medical data, is of fundamental importance to the enjoyment of the right to respect for private and family life, having in view that respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the European Convention on Human Rights. Therefore, the domestic law must afford appropriate safeguards to prevent any such communication or disclosure of personal health data as may be inconsistent with the guarantees in Article 8 ([4]).

Later, this principle (for which it was not evident to consider that it does not concern only medical data) has been explicitly extended to all personal data ([5]). The need for such safeguards is all the greater where the protection of personal data undergoing automatic processing is concerned, not least when such data are used for police purposes ([6]).

The collection, storage and potential disclosure of data relating to the private life of an individual, fall into the scope of Article 8 ([7]). The mere storage of such data already amounts

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[1] E.C.H.R., 29 April 2002, Pretty v United Kingdom, n° 2346/02. It repeated it in the case of Van Kück v Germany (12 June 2003, n° 35968/97). See also: E.C.H.R., 17 February 2005, K.A. & A.D. v Belgium, n° 42758/98 & 45558/99.

[2] E.C.H.R., 7 March 2006, Evans v United Kingdom, n° 6339/05. This judgment was confirmed by the high chamber on the 10 of April 2007. See also: E.C.H.R., 20 March 2007, Tysiac v Poland, n° 5410/03; 1st July 2008, Daroczy v Hungary, n° 44378/05.

[3] Amongst others, see : A. ROUVROY and Y. POULLET, “The right to Informational Self-Determination and the Value of Self-Development : Reassessing the Importance of Privacy for Democracy”, in S. GURTWIRTH & al. (ed.), *Reinventing Data Protection*, Springer Netherlands, 2009, p. 45.

[4] E.C.H.R., 25 February 1997, Z. v Finland, n° 22009/93 ; 27 August 2007, M.S. v Sweden, n° 20837/92 ; 10 October 2006, LL v France, n° 7508/02; 17 July 2008, I. v Finland, n° 20511/03; 25 November 2008, Biriuk v Lithuania, n° 23373/03. The later concerns the publication of a paper on the health condition of the applicant with indication relating to her sexual life.

[5] E.C.H.R., 4 December 2008, S. & Marper v United Kingdom, n° 30562/04 & 30566/04.

[6] E.C.H.R., 4 December 2008, S. & Marper v United Kingdom, n° 30562/04 & 30566/04.

[7] E.C.H.R., 16 February 2000, Amann v Switzerland, n° 27798/95; 31 May 2005, Antunes Rocha v Portugal, n° 64330/01. See also : E.C.H.R., 4 May 2000, Rotaru v Roumania, n° 28341/95.

to interference in the right to respect for private life ([8]) whether these data are used or not ([9]). Fingerprints, DNA profiles and cellular samples, are personal data and their storage also amounts to interference in the right to respect for private life ([10]). The information contained in a medical document relate to one's private life since that information, being of a personal and sensitive nature, directly concerns one's health. This information, which are of a medical nature, are personal data as defined in the European Convention n° 108 for the protection of individuals with regard to automatic processing of personal data ([11]).

Member States have the obligation to enforce a legal framework imposing to hospitals, whether public or private, the adoption of appropriate measures in order to ensure the protection of their patients' private life ([12]).

We must underline the utmost importance given by the Court to the compliance with the national rules aiming at protecting the right to respect for private life. And the more these rules are detailed, the more the Court is inclined to consider established the violation of Article 8 when these rules are not respected ([13]). In the case of I. v Finland, the Court insisted on the fact that, in its view, what was decisive was that the records system in place in the hospital was clearly not in accordance with the national law. It also stressed the fact that this element was not given due weight by the Finnish Courts. The Court noted in the same time that the Finnish Government did not give any explanation why the guarantees provided by the national law were not observed in the instant hospital.

**Use of public information**

Public information may relate to private life when they are systematically collected and stored in files held by public authorities ([14]), even if they concern the distant past of the person ([15]). This interpretation complies with the notion of private life developed by the Convention of 28 January 1981 of the Council of Europe ([16]). To store and disclose an incorrect police report to a jurisdiction amounts to interference in the right to respect for private life ([17]).

**Personal identity**

Private life includes personal identity ([18]).

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[8] E.C.H.R., 16 February 2000, Amann v Switzerland, n° 27798/95; 4 December 2008, S. & Marper v United Kingdom, n° 30562/04 & 30566/04. See also : E.C.H.R., 29 June 2006, Panteleyenko v Ukraine, n° 11901/02 : the storing and use of information related to the private life of an individual by a public authority amount to interference with the right to respect for private life.

[9] E.C.H.R., 16 February 2000, Amann v Switzerland, n° 27798/95, § 69 : "(…) The further use of the stored information does not matter."

[10] E.C.H.R., 4 December 2008, S. & Marper v United Kingdom, n° 30562/04 & 30566/04.

[11] E.C.H.R., 10 October 2006, L.L. v France, n° 7508/02.

[12] E.C.H.R., 2 June 2009, Codarcea v Roumania, n° 31675/04.

[13] On this aspect, consult : E.C.H.R., 17 July 2003, Perry v United Kingdom, n° 63737/00 ; 29 June 2006, Panteleyenko v Ukraine, n° 11901/02 ; 17 July 2008, I. v Finland, n° 20511/03.

[14] E.C.H.R., 4 May 2000, Rotaru v Roumania, n° 28341/95; 31 May 2005, Antunes Rocha v Portugal, n° 64330/01 ; 6 June 2006, Segerstedt-Wiberg & others v Sweden, n° 62332/00.

[15] E.C.H.R., 4 May 2000, Rotaru v Roumania, n° 28341/95; 18 November 2008, Cemalettin Canli v Turkey, n° 22427/04.

[16] E.C.H.R., 18 November 2008, Cemalettin Canli v Turkey, n° 22427/04. The Court already made the link with the Treaty n° 108 in the case of 16 February 2000, Amann v Switzerland, n° 27798/95 and of 4 May 2000, Rotaru v Roumania, n° 28341/95.

[17] E.C.H.R., 18 November 2008, Cemalettin Canli v Turkey, n° 22427/04.

[18] E.C.H.R., 24 June 2004, Von Hannover v Germany, n° 59320/00; 28 April 2009, Karako v Hungary, n° 39311/05.

The preservation of mental stability is an indispensable precondition to effective enjoyment of the right to respect for private life. The later requires that everyone should be able to established details of their identity as individual human beings. It implies that everyone has a vital interest in obtaining information necessary to discover the truth concerning important aspects of one's personal identify, such as the identity of one's parents ([19]). The determination of one's paternity contributes without any doubt to the personal development of a child and is also part of the child's private life ([20]). Birth, and in particular the circumstances in which a child is born, forms part of the child's, and subsequently the adult's, private life. However, due consideration has to be given to a woman's interest in remaining anonymous in order to protect her health by giving birth in appropriate medical conditions and therefore cannot be denied ([21]). In the Court's opinion, people also have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development ([22]). This refers to the cases of Gaskin and M.G. ([23]). In the case of M.G., the applicant complained about the restrictions he faced when demanding access to his social record. The Court decided that his social record concerned his private life and that his interest in getting access to was as strong as in the case of Gaskin. The Court noted that if the applicant got an access to his social record, he did not have a right to access it, and furthermore that he was denied the possibility to challenge the access restrictions before an independent body.

Hence, the denial for a DNA analysis concerns the applicant's private life ([24]). However, the protection of third persons may preclude them being compelled to make themselves available for medical testing of any kind, including DNA testing ([25]). A system which has no means of compelling an alleged father to comply with a Court order for DNA tests to be carried out, can in principle be considered to be compatible ([26]). However, the lack of any procedural measure to compel the alleged father to comply with the Court order is only in conformity with the principle of proportionality if it provides alternative means enabling an independent authority to determine the paternity claim speedily, and if consequences are deduced from the refusal of the supposed father to undergo DNA testing ([27]). Up to day, the Court has considered that it would be excessive to consider that DNA testing on a corpse would interfere in the rights of Article 8 of a deceased estate. The Court added that it was no more prepared to recognize any interference in the private life of the deceased ([28]). This statement was repeated in the case of Jäggi ([29]).

On the other hand, the last name plays a crucial function in the identification of a person. However, even if a person may have very good reasons for wanting to change it, the law

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[19] E.C.H.R., 7 February 2002, Mikulic v Croatia, n° 53176/99. This judgment is in line with the case-law of 7 July 1989, Gaskin v United Kingdom. See also : 13 February 2003, Odièvre v France, n° 42326/98 ; 30 May 2006, Ebru & Tayfun Engin Colak v Turkey, n° 60176/00; 20 December 2007, Phinikaridou v Cyprus, n° 23890/02.

[20] E.C.H.R., 30 May 2006, Ebru & Tayfun Engin Colak v Turkey, n° 60176/00. In this case, the Court refers to the teachings from the cases of Mikulic & Odièvre. The Court confirmed that the right to know one's ancestors falls within the scope of private life (13 July 2006, Jäggi v Switzerland, n° 58757/00).

[21] E.C.H.R., 13 February 2003, Odièvre v France, n° 42326/98.

[22] E.C.H.R., 13 February 2003, Odièvre v France, n° 42326/98; 20 December 2007, Phinikaridou v Cyprus, n° 23890/02.

[23] E.C.H.R., 24 September 2002, M.G. v United Kingdom, n° 39393/98.

[24] E.C.H.R., 13 July 2006, Jäggi v Switzerland, n° 58757/00.

[25] E.C.H.R., 30 May 2006, Ebru & Tayfun Engin Colak v Turkey, n° 60176/00.

[26] E.C.H.R., 30 May 2006, Ebru & Tayfun Engin Colak v Turkey, n° 60176/00.

[27] E.C.H.R., 7 February 2002, Mikulic v Croatia, n° 53176/99. This judgment is in line with the case-law of Gaskin. In the same sense, see also : E.C.H.R., 30 May 2006, Ebru & Tayfun Engin Colak v Turkey, n° 60176/00; 20 December 2007, Phinikaridou v Cyprus, n° 23890/02.

[28] Decision of 15 May 2006, Estate of KFM v Denmark, n° 1338/03.

[29] E.C.H.R., 13 July 2006, Jäggi v Switzerland, n° 58757/00.

may restrict this possibility in the public interest such as by instance the necessity to ensure the accuracy of population registries or to secure the means for personal identification and to link the persons bearing a same name to a same family ([30]).

### Disclosure of medical data

In the case of Panteleyenko ([31]), an Ukrainian Court asked and obtained from a psychiatric hospital confidential information related to the state of the mental health of the applicant and related to her medical treatment. These information were afterwards disclosed by the Ukrainian Court to the parties and to the other persons attending the hearing. The Court reminded that that amounted to interference in the right to respect for private life by a public authority. The interference was judged as unjustified from then on the Ukrainian Court did not respect the national rules applicable to the processing of psychiatric data and the data being of no use for the resolution of the case. Regarding the disclosure of a patient's data, the health practitioner may not claim being even indirectly victim of a violation of Article 8 that guarantees rights closely linked to the very person of the patient ([32]).

In another case, the Court reminded that the admissibility and the use by a judge of medical documents in evidence amount to interference in the right to respect for private life ([33]). With respect to this, the Court noted that divorce is a proceeding during which information on the intimacy of private and family life may be revealed and where it is in fact part of a court's duty to interfere in the couple's private sphere in order to weigh up the conflicting interests and settle the dispute before it. However, in the Court's view, any unavoidable interference in this connection should be limited as far as possible to that which is rendered strictly necessary by the specific features of the proceedings and by the facts of the case. In this affair, it was only on an alternative and secondary basis that the domestic courts used the disputed medical document in justifying their decisions. It thus appeared that they could have declared it inadmissible and still reached the same conclusion without using the disputed document. Hence, the interference in the right to respect for private life, in view of the fundamental importance of the protection of personal data, was not proportionate to the aim pursued and was therefore not "necessary in a democratic society for the protection of the rights and freedoms of others" ([34]).

### Security of medical data

A nurse saw her contract of employment not renewed after rumors regarding her medical condition had been spreading in the hospital where she worked. She failed in obtaining compensation for her damages before the Finnish Courts. The later considered that she did not prove the existence of non-authorized accesses to her medical record kept in the same hospital where she worked. The Court considered that it was excessive to ask her to proof the causal relation between the deficiencies in the access security rules and the disclosure of information about her medical condition when these deficiencies were established.

The Court noted that it was plain that had the hospital provided a greater control over access to health records by restricting access to health professionals directly involved in the applicant's treatment or by maintaining a log of all persons who had accessed the applicant's medical file, she would have been placed in a less disadvantaged position before the Finnish

[30] E.C.H.R., 1[er] July 2008, Daroczy v Hungary, n° 44378/05.
[31] E.C.H.R., 29 June 2006, Panteleyenko v Ukraine, n° 11901/02.
[32] E.C.H.R., 20 April 2006, Defalque v Belgium, n° 37330/02. The applicant complained about an investigation against him which originates in the disclosure of a medical record to the National Institute for Sickness and Invalidity Insurance without the patient's consent.
[33] E.C.H.R., 10 October 2006, L.L. v France, n° 7508/02.
[34] For a similar case but with an opposite conclusion: N.N. & T.A. v Belgium, 13 May 2008, n° 65097/01.

Courts. It must be repeated that, for the Court, what was decisive was that the records system in place in the hospital was clearly not in accordance with the national rules that were applicable, a fact that was not given due weight by the Finnish Courts. The Court noted that the Finnish Government did not explained why the guarantees provided by the Finnish law were not observed in the instant hospital.

One of the main teachings of the case of I v Finland is that the mere possibility to claim compensation for damages caused by an alleged unlawful disclosure of personal data is not a sufficient measure to protect the right to respect private life. What is required in this connection is a practical and effective protection excluding any possibility of unauthorized access occurring in the first place ([35]). Member States, hospitals and health practitioners are now clearly warned!

**Access to medical information**

Personal information relating to a patient undoubtedly belongs to private life and, as such, the question of the patient's access thereto falls within the ambit of Article 8 ([36]).

In the case of Uslu, the Court accepted that the applicant has an interest in obtaining a copy of the report issued by the prison doctor following his visit, as well as the relevant registry page regarding his admission to the prison clinic so that he could be properly involved in the choice of the medical care to be provided. The Court observed that the applicant (a detainee) was refused a copy of the doctor's report issued after his medical examination at the prison clinic and the relevant registry page regarding his admission there. It appeared that this decision was taken on the basis of a practice (with reference to a Ministry of Justice circular) whereby no copies of official prison documents were to be given to detainees on grounds of security and public order. As the Government did not submit any observations on the legal basis and the manner in which this practice of restricting access to documents to prisoners was applied, nor have they submitted any particular justification for such a measure, the Court were unable to weigh the relevant competing individual and public interests, or assess the proportionality of the restriction at issue. In these circumstances and taking into account, particularly, the nature of the documents requested by the applicant, the Court considered that it can not find any security or public order considerations that would justify overriding the applicant's interest in having a copy of them. Having regard to these considerations, the Court was of the view that a fair balance was not struck between the competing general and individual interests and that there had, accordingly, been a violation of Article 8 ([37]).

In the case of K.H. & others, the applicants complained about the violation of their right of effective access to information concerning their health and reproductive status ([38]). As such, the Court considered that the claim is linked to their private and family lives ([39]). Regarding the access to information, the Court recalled that it has established the existence of a positive obligation in this sense in several circumstances, among others, where applicants sought access to information about risks to one’s health and well-being resulting from environmental pollution (the case of Guerra), information which would permit them to assess any risk resulting from their participation in nuclear tests (the case of McGinley and Egan) or tests involving exposure to toxic chemicals (the case of Roche). The Court held, in particular, that a positive obligation arose to provide an “effective and accessible procedure” enabling the applicants to have access to “all relevant and appropriate information”. Similarly, such a positive obligation was found to exist where applicants sought access to information to social

[35] E.C.H.R., 17 July 2008, I. v Finland, n° 20511/03.
[36] E.C.H.R., 20 January 2009, Uslu v Turkey (n° 2), n° 23815/04.
[37] E.C.H.R., 20 January 2009, Uslu v Turkey (n° 2), n° 23815/04.
[38] E.C.H.R., 28 April 2009, K.H. & others v Slovakia, n° 32881/04.
[39] E.C.H.R., 28 April 2009, K.H. & others v Slovakia, n° 32881/04.

service records containing information about their childhood and personal history (the cases of Gaskin and of M.G.). Bearing in mind that the exercise of the right to respect for private and family life must be practical and effective, the Court took the view that such positive obligations should extend, in particular in cases like in the K.H. & others' one where personal data are concerned, to the making available to the data subject of copies of his or her data files. It considered that it can be accepted that it is for the file holder to determine the arrangements for copying personal data files and whether the cost thereof should be borne by the data subject. However, the Court does not consider that data subjects should be obliged to specifically justify a request to be provided with a copy of their personal data files; it is rather for the authorities to show that there are compelling reasons for refusing this facility. In the case of K.H. & others, the applicants obtained judicial orders permitting them to consult their medical records in their entirety, but they were not allowed to make copies of them. The Court had therefore to determine whether in that respect the authorities complied with their positive obligation and, in particular, whether the reasons invoked for such a refusal were sufficiently compelling to outweigh the Article 8 right of the applicants to obtain copies of their medical records. Although it was not for the applicants to justify the requests for copies of their own medical files, the Court nevertheless underlined that the applicants considered that the possibility of obtaining exclusively handwritten excerpts of the medical files did not provide them with effective access to the relevant documents concerning their health. The original records, which could not be reproduced manually, contained information which the applicants considered important from the point of view of their moral and physical integrity as they suspected that they had been subjected to an intervention affecting their reproductive status. The Court also observed that the applicants considered it necessary to have all the documentation in the form of photocopies so that an independent expert, possibly abroad, could examine them, and also in order to safeguard against the possible inadvertent destruction of the originals are of relevance (as to the latter point, the Court underlined the fact that it can not be overlooked that the medical file of one of the applicants had actually been lost). The Court considered that the purpose of avoiding any abuse when making copies of medical records is not sufficiently compelling, with due regards to the aims set out in the second paragraph of Article 8 to outweigh the applicants' right to obtain copies of their medical records. In particular, the Court did not see how the applicants, who had in any event been given access to the entirety of their medical files, could abuse information concerning their own persons by making photocopies of the relevant documents. As to the argument relating to possible abuse of the information by third persons, the Court has already found in a previous case that the protection of medical data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention and that respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. However, the Court added that the risk of such abuse could have been prevented by means other than denying copies of the files to the applicants. For example, communication or disclosure of personal health data that may be inconsistent with the guarantees in Article 8 can be prevented by means such as incorporation in domestic law of appropriate safeguards with a view to strictly limiting the circumstances under which such data can be disclosed and the scope of persons entitled to accede to the files ([40]).

In the case of Codarcea ([41]), the Court reminds that Article 8 covers questions related to the access to information which would permit to assess any sanitary risks to which the person could have been exposed.

**Protection of medical correspondence**

40 E.C.H.R., 28 April 2009, K.H. & others v Slovakia, n° 32881/04.

41 E.C.H.R., 2 June 2009, Codarcea v Roumania, n° 31675/04.

The checking of a convicted prisoner correspondence with his external medical specialist amounts to interference with the right to respect for correspondence. In assessing whether interference was “necessary”, regard has to be paid to the ordinary and reasonable requirements of imprisonment. The Court specified that some measure of control over prisoners' correspondence is called for and is not of itself incompatible. The Court took into consideration the necessity to protect medical data and the special circumstances of the case (notably the applicant’s life-threatening medical condition for which he has required continuous specialist medical supervision by a neuro-radiologist). In light of the severity of the applicant's medical condition, the Court considered that uninhibited correspondence with a medical specialist in the context of a prisoner suffering from a life-threatening condition should be afforded no less protection than the correspondence between a prisoner and an MP. In its finding, the Court referred to the Court of Appeal's concession that it might, in some cases, be disproportionate to refuse confidentiality to a prisoner's medical correspondence and the changes that have since been enacted to the relevant domestic law. The Court also had regard to the submissions of the applicant on this point, namely that the Government has failed to provide sufficient reasons why the risk of abuse involved in correspondence with named doctors whose exact address, qualifications and bona fides are not in question should be perceived as greater than the risk involved in correspondence with lawyers. In view of the above, the Court found that the monitoring of the applicant's medical correspondence, limited as it was to the prison medical officer, did not strike a fair balance with his right to respect for his correspondence in the circumstances ([42]).

**Publication of photographs and papers, private life and freedom of speech**

The concept of private life includes elements relating to personal identity such as one’s name or image ([43]). The publication of a person’s photograph falls within the scope of private life ([44]), even if this person is a public figure ([45]). The publication of articles concerning a person also falls within the scope of Article 8 ([46]).

Regarding the scope of private life, the Court makes a distinction between “ordinary” and “public” persons ([47]). Concerning “ordinary” persons, the zone of interaction with other persons which relates with private life, even in a public context, has to receive a broaden interpretation in comparison with the extent that could be recognized to a “public” person. The fact that an “ordinary” person is prosecuted for criminal matters does not diminish the protection offered by Article 8 ([48]).

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[42] E.C.H.R., 2 June 2009, Szuluk v The United Kingdom, n° 36936/05.

[43] E.C.H.R., 13 January 2009, Giorgi Nikolaishvili v Georgia, n° 37048/04. See also : Decision of 21 February 2002, Wolfgang Schüssel v Austria, n° 42409/98 (the former Prime Minister complained about an electoral poster reproducing his face half-mixed with Jorg Haider’s one).

[44] E.C.H.R., 24 February 2009, Toma v Roumania, n° 42716/02; 13 January 2009, Giorgi Nikolaishvili v Georgia, n° 37048/04; 23 October 2008, Khuzin & others v Russia, n° 13470/02 ; 15 November 2007, Pfeifer v Austria, n° 12556/03 ; 17 October 2006, Gourguenidze v Georgia, n° 71678/01 ; 19 September 2006, White v Sweden, n° 42435/02 ; 11 January 2005, Sciacca v Italy, n° 50774/99 (the applicant complained about the disclosure of her photograph during a press conference organized by the Italian Prosecutor and the Financial Squad). See also : E.C.H.R., 25 September 2001, P.G. & J.H. v United Kingdom,n° 44787/98, § 58.

[45] E.C.H.R., 15 November 2007, Pfeifer v Austria, n° 12556/03.

[46] E.C.H.R., 19 September 2006, White v Sweden, n° 42435/02.

[47] See also in this sense : E.C.H.R., 13 January 2009, Giorgi Nikolaishvili v Georgia, n° 37048/04.

[48] E.C.H.R., 11 January 2005, Sciacca v Italy, n° 50774/99.

The interference in the right to respect for private life in relation with the publication of a photograph has to be considered taking into account the public or private object of the issue, and the extent of its use ([49]).

That is, Article 8 may include the positive obligation to ensure the protection of private life when third persons make use of their freedom of speech. The lack of judicial remedy regarding the publication of information related to private affairs may constitute a breach of Article 8 ([50]). Where appropriate, a severe restriction to the compensation that can be claimed for a breach of the right to respect for private life may be seen as a violation of Article 8 ([51]).

On the other hand, the freedom of speech also includes the publication of photographs ([52]). Relying on the distinction between "ordinary" and "public" persons, the Court specified that the freedom of speech does not benefit from a broadened interpretation when the person was "unknown" from the public. The Court added that the limits to the admissible criticisms to an "ordinary" person are not so as broad as when it comes to a public person who exposed herself or himself inevitably and conscientiously to a more close control of his or her actions, and has therefore to show a greater tolerance towards criticisms ([53]).

When the publication of articles and photographs falls within the scope of private life, the protection of private life had to be balanced against the freedom of expression ([54]), taking into account the difference between "ordinary" and "public" persons. However, the Court has moderated the impact of this distinction when it stated that everyone, including those known of the public, should benefit from a "legitimate expectation" of protection and respect for private life ([55]). The Court noted that an increased vigilance in protecting private life is necessary to contend with new communication technologies which make it possible to store and reproduce personal data ([56]).

When balancing the right to respect for private life and the freedom of speech, the Court always takes into consideration the contribution made by photos or articles in the press to a debate of general interest to society ([57]). In the case of Biriuk which relates to the publication of an article on the medical condition of the applicant with indication on her sexual life ([58]), the Court considered that, as the purpose of publication was the satisfaction of the prurient curiosity of a particular readership and the commercial interests of the newspaper, the publication can not be deemed to contribute to any debate of general interest to society.

**Protection of a person's image**

In the case of Reklos and Davourlis ([59]), the applicants complained about the photograph of their son in the hospital maternity without their consent and the retention of the negatives by

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49 E.C.H.R., 17 October 2006, Gourguenidze v Georgia, n° 71678/01.
50 Decision of 21 February 2002, Wolfgang Schüssel v Austria, n° 42409/98.
51 E.C.H.R., 25 November 2008, Biriuk v Lithuania, n° 23373/03 ; 25 November 2008, Armonas v Lithuania, n° 36919/02.
52 E.C.H.R., 17 October 2006, Gourguenidze v Georgia, n° 71678/01.
53 E.C.H.R., 17 October 2006, Gourguenidze v Georgia, n° 71678/01. In the same sense, 14 October 2008, Petrina v Roumania, n° 78060/01.
54 E.C.H.R., 24 June 2004, Von Hannover v Germany, n° 59320/00 ; 19 September 2006, White v Sweden, n° 42435/02.
55 E.C.H.R., 24 June 2004, Von Hannover v Germany, n° 59320/00.
56 E.C.H.R., 24 June 2004, Von Hannover v Germany, n° 59320/00.
57 E.C.H.R., 24 June 2004, Von Hannover v Germany, n° 59320/00. In this sense also : E.C.H.R., 17 October 2006, Gourguenidze v Georgia, n° 71678/01.
58 E.C.H.R., 25 November 2008, Biriuk v Lithuania, n° 23373/03.
59 E.C.H.R., 15 January 2009, Reklos and Davourlis v Greece, n° 1234/05, § 35.

the photographer. The Court began its reasoning by stating that Article 8 may involve the adoption of measures designed to protect a person's picture against abuse by others. It then emphasizes that in the present case the applicants' son did not knowingly or accidentally lay himself open to the possibility of having his photograph taken in the context of an activity that was likely to be recorded or reported in a public manner. The Court noted that on the contrary, the photographs were taken in a place that was accessible only to the doctors and nurses of the clinic and the baby's image, recorded by a deliberate act of the photographer, was the sole subject of the offending photographs.

The Government focused its arguments on the fact that the images were not published but simply reproduced with a view to being sold to the baby's parents. The Government thus alleged that, as there had been no publication of the offending images, there could not have been any infringement of the baby's personality rights. In order to answer to this objection, the Court had to ascertain whether, although the offending images were not published, there was nevertheless interference with the applicants' son's right to the protection of private life. For that purpose the Court examines the substance of the right to the protection of one's image, especially as in previous cases the Court has dealt with issues specifically involving the publication of photographs, whether of politicians or public figures (the Court referred to the cases of Schüssel and Von Hannover) or even of private persons (the Court referred to the case of Sciacca). With respect to this, the Court states that a person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers. The right to the protection of one's image is thus one of the essential components of personal development and presupposes the right to control the use of that image. Whilst in most cases the right to control such use involves the possibility for an individual to refuse publication of his or her image, it also covers the individual's right to object to the recording, conservation and reproduction of the image by another person. As a person's image is one of the characteristics attached to his or her personality, its effective protection presupposes, in principle and in circumstances such as those of the present case, obtaining the consent of the person concerned at the time the picture is taken and not simply if and when it is published. Otherwise an essential attribute of personality would be retained in the hands of a third party and the person concerned would have no control over any subsequent use of the image.

In the present case, the Court first observed that, as regards the conditions in which the offending pictures were taken, the applicants did not at any time give their consent, either to the management of the clinic or to the photographer himself. In this connection, it noted that the applicants' son, not being a public or newsworthy figure, did not fall within a category which in certain circumstances may justify, on public-interest grounds, the recording of a person's image without his knowledge or consent. On the contrary, the person concerned was a minor and the exercise of the right to protection of his image was overseen by his parents. Accordingly, the applicants' prior consent to the taking of their son's picture was indispensable in order to establish the context of its use. The management of the clinic did not, however, seek the applicants' consent and even allowed the photographer to enter the sterile unit, access to which was restricted to the clinic's doctors and nurses, in order to take the pictures in question.

In addition, the Court found that it was not insignificant that the photographer was able to keep the negatives of the offending photographs, in spite of the express request of the applicants, who exercised parental authority, that the negatives be delivered up to them. Admittedly, the photographs simply showed a face-on portrait of the baby and did not show the applicants' son in a state that could be regarded as degrading, or in general as capable of infringing his personality rights. However, the key issue was not the nature, harmless or otherwise, of the applicants' son's representation on the offending photographs, but the fact that the photographer kept them without the applicants' consent. The Court considered then

that the baby's image was retained in the hands of the photographer in an identifiable form with the possibility of subsequent use against the wishes of the person concerned and/or his parents.

And finally, the Court noted that, during the examination of the case at issue, the domestic courts failed to take into account the fact that the applicants had not given their consent to the taking of their son's photograph or to the retention by the photographer of the corresponding negatives. In view of the foregoing, the Court concluded that the Greek courts did not, in the present case, sufficiently guarantee the applicants' son's right to the protection of his private life.

**Police genetic database**

Taking of a mouth swab, in order to obtain cellular material, amounts to interference in the right to respect for private life. Given the use to which this material could conceivably be put in the future, its systematic retention goes beyond the scope of neutral identifying features such as fingerprints, and is sufficiently intrusive to constitute interference in the right to respect for private life. However, it is not unreasonable for the obligation to undergo DNA testing to be imposed on all persons who have been convicted of offences of a certain seriousness ([60]).

It has to be reminded that fingerprints, DNA profiles and cellular samples are personal data and that their storing also amounts to interference in the right to respect for private life. Their storage constitutes a disproportionate interference in the right to respect for private life and can not be regarded as necessary in a democratic society when this power of retention is general and indiscriminate ([61]).

**Procedure to get access to information**

In the case of Roche ([62]), the applicant participated to the testing on armed forces personnel of mustard and nerve gas in Porton Down. He complained about inadequate access to information about the tests performed on him. The Court agreed with him considering that the issue of access to information which could either have allayed his fears or enabled him to assess the danger to which he had been exposed, was sufficiently closely linked to his private life as to raise an issue under that qualification. The Court considered that a positive obligation arose to provide an "effective and accessible procedure" enabling the applicant to have access to "all relevant and appropriate information" which would allow him to assess any risk to which he had been exposed during his participation in the tests. The Court indicated that it could not be considered that a disclosure procedure linked to litigation could, as a matter of principle, fulfill the positive obligation of disclosure to an individual, such as the present applicant, who has consistently pursued such disclosure independently of any litigation. This is an obligation of disclosure not requiring the person to litigate to obtain it. In conclusion, the Court considered that the United-Kingdom failed in providing an effective and accessible procedure enabling the applicant to get access to all relevant and appropriate information that would allow him to assess any risk to which he had been exposed during his participation in the tests.

**Investigation on the sexual orientation**

[60] Decision of 7 December 2006, Van der Velden v The Netherlands, n° 29514/05.

[61] E.C.H.R., 4 December 2008, S. & Marper v United Kingdom, n° 30562/04 et 30566/04.

[62] E.C.H.R., 19 October 2005, Roche v United Kingdom, n° 32555/96.

The investigation on the sexual orientation of the applicants and their subsequent dismissal from the Royal Navy on the base of their homosexuality, amount to a direct interference in their right to respect for private life that could not be justified ([63]).

**Psychiatric reports**

In the case of Worwa ([64]), the Court considered that the ordering of multiple medical reports on the mental state of the applicant at very short intervals in connection with a number of similar cases pending before the same jurisdiction, amounted to interference in her right to respect for private life. However, even if ordering a psychiatric report in order to determine the mental state of a person charged with an offence remains a necessary measure and one which protects individuals capable of committing offences without being in full possession of their mental faculties, the State authorities are required to make sure such a measure does not upset the fair balance that should be maintained between the rights of the individual, in particular the right to respect for private life, and the concern to ensure the proper administration of justice.

**Choice of a child's forename**

The choice of a child's forename by its parents came within their private sphere ([65]).

**Change of name**

Names retain a crucial role in a person's identification. However, even if there may exist genuine reasons prompting an individual to wish to change his or her name, legal restrictions on such a possibility may be justified in the public interest; for example in order to ensure accurate population registration or to safeguard the means of personal identification and of linking the bearers of a given name to a family ([66]).

**Confidentiality of electronic communications**

The confidentiality of electronic communications may be not absolute. This can be illustrated by the case of a 12-year-old boy victim of a malevolent person who placed in his name an advertisement of a sexual nature on a dating site on the Internet. The Finnish law prevented the service provider to disclose the identity of the author of the advertisement. The Court took into consideration the real threat to the physical and mental welfare of the young child and his vulnerability at that moment. It considered that the case was not trivial and the behavior criminal. The mere possibility to obtain compensation from the service provider was not enough ([67]): what is required is a remedy enabling the actual offender to be identified and brought to justice. The Court stated that even if the freedom of speech and the confidentiality of communications are important and even if the users of electronic communications and of Internet services must have the guaranty that their private life and freedom of speech are

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[63] E.C.H.R., 22 October 2002, Perkins et R. v United-Kingdom, n° 43208/98 et 44875/98. See also : 22 October 2002, Beck, Copp & Bazeley v United-Kingdom, n° 48535/99, 48536/99 & 48537/99. I do not imply that sexual orientation should be seen as medical information. But this kind of information may be collected during medical examination. Therefore, the reason for mentioning this case-law.

[64] E.C.H.R., 27 November 2003, Worwa v Poland, n° 26624/95.

[65] E.C.H.R., 6 September 2007, Johansson v Finland, n°10163/02.

[66] E.C.H.R., 1st July 2008, Daroczy v Hungary, n° 44378/05. See also : Decision of 20 March 2001, TAIEB v France, n° 50614/99.

[67] The Court insists, rightly, on the criteria of the "effectiveness" of the protection, considering that the only possibility of a further compensation is not enough (in this sense also : E.C.H.R., 17 July 2008, I. v Finland, n° 20511/03).

respected, these guaranties are not absolute and they should yield to other legitimate imperatives ([68]).

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68 E.C.H.R., 2 December 2008, K.U. v Finland, n° 2872/02.