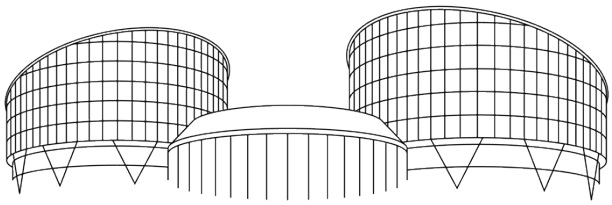

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF GARDEL v. FRANCE

(Application no. 16428/05)

JUDGMENT

STRASBOURG

17 December 2009

FINAL

17/03/2010

This judgment has become final under Article 44 § 2 of the Convention.

In the case of Gardel v. France,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Peer Lorenzen, *President*,
Renate Jaeger,
Jean-Paul Costa,
Rait Maruste,
Mark Villiger,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska, *judges*,
and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 24 November 2009,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 16428/05) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a French national, Mr Fabrice Gardel ("the applicant"), on 30 April 2005.

2. The applicant, who had been granted legal aid, was represented by Mr P. Souchal, a lawyer practising in Nancy. The French Government ("the Government") were represented by their Agent, Mrs E. Belliard, Director of Legal Affairs, Ministry of Foreign Affairs.

3. The applicant complained, in particular, of his placement on the national register of sex offenders following his conviction. He relied on Article 7 of the Convention.

4. On 1 October 2007 the Court decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 3 of the Convention).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1962 and is currently in prison in Montmédy.

6. Following a complaint lodged on 18 February 1997 by the parents of a young girl, S., the applicant was charged with the rape and sexual assault of a minor under 15 years of age by a person in a position of authority.

7. During the investigation he made several requests for additional investigative measures to be taken, which were refused by the investigating authorities.

8. On 15 April 2003 an investigating judge at the Bar-le-Duc *tribunal de grande instance* issued an order discontinuing the proceedings in respect of the sexual assault charges, as the limitation period had expired. The judge committed the applicant for trial on a charge of rape of a minor under the age of 15 by a person in a position of authority over the victim.

9. On 30 October 2003 the Meuse Assize Court sentenced the applicant to fifteen years' imprisonment and stripped him of all his civil, civic and family rights for ten years.

10. The applicant did not appeal against that decision but lodged an application for a retrial, producing a number of documents which he claimed placed his guilt in doubt.

11. On 9 March 2004 Law no. 2004-204 established the national automated register of sex offenders ("the Sex Offenders Register").

12. On 11 April 2005 the Criminal Cases Review Board rejected the applicant's application for a retrial.

13. On 28 February 2005 the applicant applied to the Créteil Post-sentencing Court to have his sentence suspended. On 17 June 2005 the application was refused on the grounds that, according to the expert medical reports, "the applicant's survival is not in doubt, nor is his state of health incompatible in the long term with detention. Therefore, as matters stand, he does not meet the requirements of Article 720-1-1 of the Code of Criminal Procedure and is not eligible for the measure in question". The court pointed out that the applicant's sentence was due to run until 27 May 2019 and that his criminal record mentioned another conviction for sexual abuse of a minor under the age of 15 by a person in authority (a sentence of six years' imprisonment and a judicial and social supervision order imposed by the Nancy Court of Appeal on 29 August 2002 for sexual assault of a minor). The court also took into consideration medical reports according to which the applicant suffered from congenital heart disease which made any physical activity impossible. The report advocated his placement under an enhanced prison regime with an individual cell, no exercise or physical activity, a salt-free diet and regular medication. The court also referred to a psychiatric expert report from November 2004 according to which the applicant's psychological development "appears very limited in so far as he has failed to reflect on his own conduct. He has expressed no feelings of guilt or responsibility for the offences which he denies committing. A course of psychotherapy would help him develop more satisfactory relationships in the future with the people he comes into contact with".

14. On 13 October 2005 the post-sentencing division of the Paris Court of Appeal upheld this judgment.

15. On 22 November 2005 the applicant was informed by a police officer from l'Haÿ-les-Roses police station that his name was being entered in the Sex Offenders Register on account of his conviction by the Meuse Assize Court, in accordance with the transitional provisions of the above-mentioned Law of 9 March 2004. The official notification was worded as follows:

> "I, the undersigned, Mr Fabrice Gardel, hereby acknowledge that I have today been notified of my inclusion in the Sex Offenders Register on account of the [sentence] of imprisonment imposed on 30 October 2003 by the Meuse Assize Court, and that I am accordingly required, under Article 706-53-5 of the Code of Criminal Procedure, to:
>
> 1. provide proof of my address: ...
>
> Once a year either to the authority managing the register (the Ministry of Justice) ... or to my local police or gendarmerie station ..., during the month in which my birthday falls or during the month of January if my date of birth is not known or not established. ...
>
> I expressly acknowledge having been informed that:
>
> I have been finally convicted of an offence carrying a sentence of ten years or more. Accordingly, I am required to provide proof of my address by reporting in person every six months. ...
>
> I take note of the fact that if I leave the country my obligation to report in person will be suspended for the duration of my stay abroad but that I must continue to provide proof of my address by means of a registered letter with recorded delivery to the authority managing the Sex Offenders Register ... accompanied by documents certifying my address and signed by the local consular authority.
>
> 2. declare any change of address within fifteen days at the latest, in the same manner.
>
> I acknowledge having been informed:
>
> (i) that I must provide proof of my address for the first time within fifteen days of this notification, unless the latter is issued less than two months before the first day of the month of my birth, referred to above, or I am already required to provide proof of my address on an annual basis;
>
> (ii) that failure to comply with these obligations is punishable by a term of two years' imprisonment and a fine of 30,000 euros;
>
> (iii) that any breach of these obligations will lead to an alert being issued to the judicial authorities and the police or gendarmerie which may result in my inclusion on the list of wanted persons and may be accompanied by a criminal prosecution;

(iv) that, pursuant to Article R. 53-8-13, the proof of address and declaration of change of address provided for by Article 706-53-5 shall take the form of any document less than three months old in my name which gives proof of my home address, such as a bill or invoice;

(v) that if the document produced refers to the address of another person, it must be accompanied by a statement written and signed by the latter confirming that I am staying at that address.

I further acknowledge having been informed that I have the following rights:

(i) under the Data Protection Act and Article 706-53-9, I may obtain a copy of all the information concerning me in the register by applying to the public prosecutor in whose district I am resident;

(ii) if the decision forming the basis for my placement on the register was issued by a foreign judicial authority, I may apply to the public prosecutor at the Nantes *tribunal de grande instance* to have the information in the register rectified or deleted or to have the frequency of reporting reduced to once a year, in accordance with Articles R 53-8-27 et seq."

II. RELEVANT DOMESTIC LAW AND PRACTICE

16. The national automated register of sex offenders ("the Sex Offenders Register" – FIJAIS), which was established in 2004, is a criminal identification register similar to the national fingerprint database (FAED), the national genetic database (FNAEG) and the national criminal records (CJN), the last of which have been in existence the longest. An information paper on police registers tabled before the National Assembly on 24 March 2009 noted an upsurge in the number of such registers. The working party chaired by Mr Alain Bauer noted that there were around forty-five in 2008 compared with thirty-four in 2006, and that another dozen or so were "in the pipeline".

The Ministry of Justice is responsible for and manages the Sex Offenders Register. It is maintained by the National Criminal Records Department in Nantes, under the supervision of the judge in charge of the national criminal records.

A. The Sex Offenders Register

17. The national automated register of perpetrators of sexual crimes was established by Law no. 2004-204 of 9 March 2004 on adaptation of the justice system to changing trends in criminal offending. It is aimed at preventing repeat sexual offences, making it easier to identify offenders and allowing them to be traced quickly at any time.

A series of transitional measures lay down detailed arrangements for the placement on the register of persons who committed such offences prior to the entry into force of the above-mentioned Law. The provisions are applicable to persons who committed such offences before the date of promulgation of the Law but were the subject, after that date, of one of the decisions referred to in Article 706-53-2 of the Code of Criminal Procedure (see paragraph 18 below). They can also be applied to persons serving a custodial sentence before the promulgation of the Law (at the request of the public prosecutor).

1. The Code of Criminal Procedure ("the CCP")

18. The relevant provisions of the CCP read as follows:

Article 706-47

"The provisions of this Title shall apply to proceedings concerning the murder, whether or not premeditated, of a minor preceded or accompanied by rape, torture or acts of barbarity or for the offences of sexual assault or sexual abuse of a minor, living on the immoral earnings of a minor or paying a minor for sexual services ...

These provisions shall also apply to proceedings concerning the crime of murder, whether or not premeditated, accompanied by torture or acts of barbarity, the crimes of torture or acts of barbarity and the crime of murder, whether or not premeditated, committed as a repeat offence."

Article 706-53-1

"The national automated register of perpetrators of sexual or violent crimes shall constitute a database of personal information held by the Criminal Records Department under the authority of the Minister of Justice and the supervision of a judge. In order to prevent repeat offences of the kind referred to in Article 706-47 and to facilitate identification of the perpetrators of such offences, the information referred to in Article 706-53-2 shall be gathered, stored and communicated to authorised persons in accordance with the arrangements laid down in this Chapter."

Article 706-53-2

"Subject to the provisions of the last paragraph of this Article, and in so far as they relate to one or more of the offences referred to in Article 706-47, details of an individual's identity and home address or successive home addresses and, where applicable, other residences shall be entered in the register where the individual concerned has been the subject of:

1. A conviction, whether or not final, including conviction *in absentia*, or a declaration of guilt accompanied by an order dispensing him or her from sentence or adjourning sentence;

2. A decision, whether or not final, delivered under sections 8, 15, 15-1, 16, 16 *bis* and 28 of Ordinance no. 45-174 of 2 February 1945 on juvenile delinquency;

3. An agreed penalty scheme provided for by Article 41-2 of this Code, the implementation of which has been certified by the public prosecutor;

4. A decision discontinuing the proceedings or discharging or acquitting the person concerned on the basis of the first paragraph of Article 122-1 of the Criminal Code;

5. A criminal charge, accompanied by a court supervision order, where the investigating judge has ordered the entry of the decision in the register;

6. A decision of the same kind as those referred to above which was delivered by a foreign court or judicial authority and which, under the terms of an international convention or agreement, was notified to the French authorities or was enforced in France following the transfer of the convicted person.

The register shall also contain information concerning the judicial decision forming the basis for placement on the register and information on the nature of the offence. The decisions referred to in points 1 and 2 shall be entered in the register on delivery.

Decisions concerning the offences referred to in Article 706-47 which carry a sentence less than or equal to five years' imprisonment shall not be entered in the register, except where expressly ordered by the court or, in the case of points 3 and 4, by the public prosecutor."

Article 706-53-4

"Without prejudice to application of the provisions of Articles 706-53-9 and 706-53-10, the information referred to in Article 706-53-2 concerning an individual shall be deleted from the register on the death of the person concerned or on expiry of the periods laid down below, calculated from the date on which all the decisions entered in the register cease to have effect:

1. A period of thirty years in the case of a serious crime or a major offence carrying a sentence of ten years' imprisonment;

2. A period of twenty years in all other cases.

The information in question shall not be deleted as the result of an amnesty or rehabilitation, or under the rules relating to the removal of convictions from the criminal records.

This information may not, by itself, be used as evidence of recidivism.

Information entered in the register under points 1, 2 and 5 of Article 706-53-2 shall be deleted from the register in the event of a final decision discontinuing the proceedings, a final discharge or a final acquittal. Information entered under point 5 shall also be deleted in the event of the cessation or lifting of the court supervision order."

Article 706-53-5

"All persons whose identity is recorded in the register shall be bound, as a security measure, by the obligations set forth in this Article.

The person concerned shall be required, by means of a registered letter with recorded delivery addressed to the authority managing the register, or by registered letter with recorded delivery addressed to the local police or gendarmerie station, or by reporting in person, to:

1. provide proof of his or her address once a year;

2. declare any change of address within fifteen days at the latest.

If the person concerned has been finally convicted of a serious crime or a major offence carrying a sentence of ten years' imprisonment, he or she must provide proof of address every six months by reporting to the local police or gendarmerie station or the gendarmerie or police headquarters in his or her *département* of residence, or to any other department designated by the prefecture.

Failure to comply with the obligations laid down in this Article shall be punishable by two years' imprisonment and a fine of 30,000 euros."

Article 706-53-6

"Any person whose identity has been recorded in the register shall be informed accordingly by the judicial authority, either in person or by registered letter to the last reported address.

The person concerned shall be informed on that occasion of his or her obligations under Article 706-53-5 and the penalties he or she faces in the event of failure to comply.

Where the person concerned is in detention, the information provided for by this Article shall be provided on his or her final release or prior to the first measure relaxing the conditions of the sentence."

Article 706-53-7
as amended by section 15 of Law no. 2008-174 of 25 February 2008

"The information contained in the register shall be directly accessible, via a secure telecommunications system, to:

1. The judicial authorities;

2. The criminal investigation police, in the context of proceedings concerning the crimes of deliberately endangering human life, abduction or kidnapping or one of the offences referred to in Article 706-47, and for the purpose of taking the measures provided for in Articles 706-53-5 and 706-53-8;

3. The prefects and State administrative authorities listed in the decree provided for by Article 706-53-12, for the purposes of administrative decisions concerning recruitment, posting, authorisation, approval or permission in relation to activities or professions involving contact with minors and for the purpose of supervising the carrying-on of such activities or professions. ...

The information in the register shall also be made available to mayors and presidents of the *département* councils and regional councils, via the prefects, for the purposes of the administrative decisions referred to in point 3 relating to activities and professions involving contact with minors and for the purpose of supervising the carrying-on of such activities or professions."

Article 706-53-8

"In the manner specified in the decree provided for by Article 706-53-12, the authority managing the register shall inform the Ministry of the Interior directly of any new entry in the register or change of address, or if a person on the register has not provided proof of his or her address within the prescribed period. The Ministry shall forward the information without delay to the competent police or gendarmerie department.

The police or gendarmerie may conduct all relevant checks and lodge whatever requests are necessary with the public authorities with a view to verifying or tracing the person's address.

If it transpires that the person concerned is no longer at the address indicated, the public prosecutor shall enter his or her name on the list of wanted persons."

Article 706-53-9

"Persons who furnish proof of their identity shall be provided with all the information concerning them in the register, on application to the public prosecutor at the *tribunal de grande instance* for their place of residence."

Article 706-53-10
as amended by the Law of 5 March 2007

"Persons whose identity is recorded in the register may request the public prosecutor to rectify or order the deletion of the information concerning them if the information is inaccurate or it is no longer necessary to conserve it in view of the purpose of the register, regard being had to the nature of the offence, the age of the person concerned when it was committed, the interval that has elapsed and the current personality of the person concerned.

A request for information to be deleted shall be inadmissible where the information concerned (repealed by section 43 of Law no. 2007-297 of 5 March 2007, with effect from 7 March 2008) '*remains in Bulletin no. 1 of the criminal record of the person concerned or*' concerns judicial proceedings which are still pending (section 43 of Law no. 2007-297 of 5 March 2007), 'in so far as the person concerned has not been rehabilitated or the measure giving rise to the entry in the register has not been deleted from Bulletin no. 1'.

If the public prosecutor does not order the rectification or deletion of the information, the person concerned may apply for this purpose to the liberties and detention judge. An appeal shall lie against the latter's decision to the President of the Investigation Division.

Before ruling on the request for rectification or deletion, the public prosecutor, the liberties and detention judge and the President of the Investigation Division may order whatever checks they deem necessary, including an expert medical report on the person concerned. If the information in the register concerns a serious crime or a major offence carrying a sentence of ten years' imprisonment and committed against a minor, no decision to delete the information may be taken in the absence of such an expert report. ..."

Article 706-53-12

"The detailed arrangements for application of the provisions of this Chapter shall be laid down by decree of the *Conseil d'Etat* after consultation of the National Data Protection Commission.

The decree shall specify, in particular, the circumstances in which the register shall record the enquiries relating to it and the occasions when it was consulted."

Article R53-8-34

"A record shall be kept in the register for three years of information concerning entries and enquiries relating to it, specifying the status of the person or authority making the entry or enquiry.

This information shall be accessible only to the judge in charge of the department maintaining the register or to persons to whom he or she gives express permission.

Statistics may be compiled on the basis of this information."

2. Case-law of the Constitutional Council

19. In its ruling no. 2004-492 DC of 2 March 2004, the Constitutional Council held as follows:

"... the recording of a person's identity in the [Sex Offenders Register] ... is designed ... to prevent repeat offences of this kind and to facilitate the identification of the perpetrators of such offences. It follows that placement on the register is not a sanction but a public-order measure." (§ 74)

The Constitutional Council further held, with regard to the entry of information in the register and its consultation and use:

"... regard being had firstly to the safeguards provided by the conditions on the use and consultation of the register and the fact that the power to enter or delete personal data rested with the judicial authority, and secondly to the seriousness of the offences giving rise to the entry of personal data in the register and the rate of reoffending with this type of offence, the impugned provisions were such as to reconcile respect for

private life and the protection of public order in a manner that clearly struck a fair balance." (§ 87)

Lastly, it held:

"... the requirement for persons on the register to give periodic notice of their home address or the address where they are resident does not constitute a sanction, but rather a public-order measure aimed at preventing reoffending and facilitating the identification of offenders. The very purpose of the register makes it necessary to check the addresses of the persons concerned on an ongoing basis. The burden imposed on them in order to ensure that such checks are carried out does not constitute a non-essential [measure] for the purposes of Article 9 of the 1789 Declaration ..." (§ 91)

3. Case-law of the Court of Cassation

20. In a judgment of the Criminal Division of 12 March 2008, the Court of Cassation ruled on the nature of placement on the register (see also *Cass. crim.* 31 October 2006, *Bull. crim.* no. 267). It held as follows:

"Whereas ... in ordering placement on the Sex Offenders Register, the Court of Appeal accurately applied section 216 of the Law of 9 March 2004, according to which the provisions concerning placement on the register apply to offences committed before the date of promulgation of the Law. This section is not in breach of the Convention provisions relied on, as placement on the Sex Offenders Register, which is merely a security measure and not a penalty, is not subject to the principle prohibiting the retrospective application of more severe provisions of substantive law. ..."

The Court of Cassation has upheld the automatic nature of placement on the register in the case of offenders sentenced to more than five years' imprisonment (*Cass. crim.* 16 January 2008).

4. Supervisory working party on police and gendarmerie registers

21. In December 2008 this working party submitted a report to the Minister of the Interior, the Overseas Departments and Territories and the Territorial Authorities entitled: "Tightening procedures to improve the protection of freedoms". According to the report, 20,222 names had been entered in the Sex Offenders Register when it was established in June 2005; by October 2008 the number of entries was 43,408.

B. The automated national criminal records

1. General provisions

22. Articles 768 to 781 of the CCP deal with the operation of the national criminal records. These record convictions imposed by the criminal courts, as well as some commercial, administrative and disciplinary convictions which entail incapacity. A person's criminal record is divided

into three headings. The information contained in the criminal record is provided in the form of bulletins.

Bulletin no. 1 (Article 774 CCP) records all the files in the criminal record, in other words all the person's convictions. It may be issued only to the judicial authorities.

Bulletin no. 2 (Article 775 CCP) contains most of the convictions for criminal offences with the exception, in particular, of youth convictions, foreign rulings, convictions for minor offences and suspended sentences once the probationary period has expired. A request can be made to the judge for a conviction not to be entered in Bulletin no. 2 (although it will remain in Bulletin no. 1). This bulletin is made available only to certain administrative and military authorities (prefects, military authorities, heads of public companies, etc.) on specific grounds.

Bulletin no. 3 (Article 777 CCP) records the most serious convictions for major offences, and especially custodial sentences of over two years. This bulletin is the only one of which the person concerned may obtain a copy.

2. The rehabilitation procedure

23. The Criminal Code provides for a rehabilitation procedure for convicted individuals, enabling a conviction to be deleted from the criminal records before expiry of the statutory period (forty years). Article 133-1 of that Code states that rehabilitation erases the conviction.

24. Article 133-13 lays down the conditions for automatic rehabilitation:

Article 133-13

"A convicted individual who has not been the subject of a further criminal conviction within the periods set out below shall be automatically rehabilitated:

...

3. In the case of a single prison sentence not exceeding ten years or multiple prison sentences not exceeding five years in total, after a period of ten years calculated from the date on which the sentence ends or from the date of expiry of the limitation period.

..."

25. The CCP lays down the arrangements governing the judicial rehabilitation procedure:

Article 785, first paragraph

"During the lifetime of the convicted person, an application for rehabilitation may be made to the courts only by the person concerned or, if he or she is disqualified, by his or her legal representative. In the event of the person's death and where the statutory conditions are met, the application may be pursued by his or her spouse, ascendants or descendants or may even be lodged by them, within one year of the person's death."

Article 786
as amended by Law no. 2004-204 of 9 March 2004 (entry into force 1 January 2005)

"The application for rehabilitation may be made only after five years in the case of persons convicted of a serious crime ...

This period shall be counted ... in the case of persons who have received a custodial sentence, from the date of their final release or, in accordance with the provisions of Article 733, third paragraph, the date of their conditional release where the latter was not revoked subsequently ..."

26. The rules governing the removal of an offence from the criminal records are as follows:

Article 769

"... Files concerning convictions which have been erased by an amnesty or have been overturned shall be deleted from the criminal records ... The same shall apply ... to files concerning convictions ... imposed more than forty years previously where there have been no further convictions for any category of criminal offence.

The following shall also be deleted from the criminal records:

...

8. Convictions in respect of which the offender has been granted judicial rehabilitation, where the court expressly orders the removal of the conviction from the records in accordance with the second paragraph of Article 798."

III. RELEVANT INTERNATIONAL LAW

A. Council of Europe instruments

27. The 1981 Council of Europe Convention for the protection of individuals with regard to automatic processing of personal data ("the Data Protection Convention") defines "personal data" as any information relating to an identified or identifiable individual. The Convention provides, *inter alia*, as follows:

Preamble

"...

Considering that it is desirable to extend the safeguards for everyone's rights and fundamental freedoms, and in particular the right to the respect for privacy, taking account of the increasing flow across frontiers of personal data undergoing automatic processing;

...

Article 5 – Quality of data

Personal data undergoing automatic processing shall be:

...

b. stored for specified and legitimate purposes and not used in a way incompatible with those purposes;

c. adequate, relevant and not excessive in relation to the purposes for which they are stored;

...

e. preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored.

Article 6 – Special categories of data

Personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, may not be processed automatically unless domestic law provides appropriate safeguards. ...

Article 7 – Data security

Appropriate security measures shall be taken for the protection of personal data stored in automated data files against accidental or unauthorised destruction or accidental loss as well as against unauthorised access, alteration or dissemination."

28. Recommendation No. R (87) 15 of the Committee of Ministers regulating the use of personal data in the police sector (adopted on 17 September 1987) provides, *inter alia*, as follows:

Principle 2 – Collection of data

"2.1. The collection of personal data for police purposes should be limited to such as is necessary for the prevention of a real danger or the suppression of a specific criminal offence. Any exception to this provision should be the subject of specific national legislation.

...

Principle 3 – Storage of data

3.1. As far as possible, the storage of personal data for police purposes should be limited to accurate data and to such data as are necessary to allow police bodies to perform their lawful tasks within the framework of national law and their obligations arising from international law.

...

Principle 7 – Length of storage and updating of data

7.1. Measures should be taken so that personal data kept for police purposes are deleted if they are no longer necessary for the purposes for which they were stored.

For this purpose, consideration shall in particular be given to the following criteria: the need to retain data in the light of the conclusion of an inquiry into a particular case; a final judicial decision, in particular an acquittal; rehabilitation; spent convictions; amnesties; the age of the data subject, particular categories of data."

B. Comparative law

29. In March 2004 the Senate of the French Republic published a "Comparative law study" (no. 133) concerning the treatment of sexual offences committed against minors. The report stated that "a sex-offenders register exists only in England and Wales". In Germany, there is no Federal register but two *Länder* (Bavaria and Bremen) have their own registers. The Bavarian register, known as HEADS (*Haft-Entlassenen-Auskunfts-Datei-Sexualstraftäter*), can be accessed only by police officers and judges. In the United Kingdom, data concerning offenders sentenced to more than thirty months' imprisonment are kept indefinitely and there is no possibility of having the data deleted (Sexual Offences Act 2003, section 82).

THE LAW

I. PRELIMINARY OBJECTION OF FAILURE TO EXHAUST DOMESTIC REMEDIES

30. The applicant complained of his placement on the Sex Offenders Register, of which he had been notified on 22 November 2005. He relied on Article 7 of the Convention. This complaint was also the subject of questions from the Court concerning Article 8 of the Convention.

31. The Government pleaded failure to exhaust domestic remedies. They pointed out, as expressly mentioned in the notification form given to the applicant, that he could have applied to the public prosecutor for a rectification under Article 706-53-10 of the Code of Criminal Procedure ("the CCP"), on the basis of his allegations of a violation.

32. In the applicant's submission, those provisions could not be construed as providing a remedy against placement on the register as such.

Accordingly, that option could not be said to constitute an effective remedy against placement on the Sex Offenders Register.

33. The Court notes that a question arises concerning the effectiveness of the remedy relied on by the Government. It agrees with the applicant that an application for rectification merely enables possible substantive errors in the details of the person concerned to be corrected. As to the deletion of the information provided for by law, it is apparent from Articles 706-53-4 and 706-53-10 of the CCP (see paragraph 18 above) that this is subject to formal and substantive conditions which will need to be examined in the light of the safeguards afforded to persons placed on the register against abuse and arbitrariness. The Court considers that this aspect is more closely linked to examination of the merits of the complaint under Article 8 of the Convention. It also observes that the Government raised further objections regarding the admissibility of each of the complaints; it will therefore examine their admissibility below.

II. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

34. The applicant complained of his placement on the Sex Offenders Register and of the retrospective application of the Law of 9 March 2004, which imposed more stringent obligations on him than those existing at the time of his conviction, in breach of Article 7 § 1 of the Convention. That provision reads as follows:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

35. The Government contended that the Court lacked jurisdiction *ratione materiae* to examine this complaint. In their submission, placement on the Sex Offenders Register did not constitute a "penalty" within the meaning of the Court's case-law, with the result that Article 7 was not applicable.

36. The Government did not dispute the fact that the Law of 9 March 2004 had not come into force either when the offence had been committed or when the applicant had been convicted. Nevertheless, they argued that the measure complained of did not constitute a "penalty" within the meaning of Article 7. They sought to demonstrate this by referring to the criteria established by the Court's case-law, in particular in *Welch v. the United Kingdom* (9 February 1995, § 27, Series A no. 307-A) and *Jamil v. France* (8 June 1995, § 30, Series A no. 317-B). While the Court had found, in *Jamil*, that imprisonment in default was a penalty, on the ground that "[t]he sanction imposed on Mr Jamil was ordered by a criminal court, was intended to be deterrent and could have led to a punitive deprivation of liberty" (§ 32), it had also ruled that special supervision was not comparable to a criminal sanction since it was designed to prevent the commission of

offences (they referred to *Raimondo v. Italy*, 22 February 1994, § 43, Series A no. 281-A). In the Government's submission, that was precisely the aim of security measures including placement on the Sex Offenders Register. They could be defined as social protection measures designed to prevent persons from reoffending or to remove a source of danger. They were based not on the offender's guilt but on the danger he or she represented. Hence, placement on the Sex Offenders Register was carried out "as a security measure" (Article 706-53-5 of the CCP) and was not a sanction. Point 4 of Article 706-53-2 of the CCP provided for a person's details to be entered in the register even where a decision had been given discontinuing the proceedings or discharging or acquitting the person concerned on the basis of the first paragraph of Article 122-1 of the Criminal Code, according to which "persons who, at the time of the offence, were suffering from a psychiatric or neuropsychiatric disorder which deprived them of the ability to discern or control their actions [were] not criminally liable".

37. The applicant submitted that placement on the Sex Offenders Register entailed obligations imposed by legislation that had not existed at the time of his conviction. That amounted to a heavier penalty than the one applicable at the time the offence had been committed.

38. The Court observes that the applicant was placed on the Sex Offenders Register as a result of the entry into force of the Law of 9 March 2004. His inclusion in the register occurred after his conviction. The measure in question entailed an obligation for the applicant to provide proof of his address every six months and to report any change of address within fifteen days at the latest.

39. The Court must ascertain whether placement on the Sex Offenders Register can be considered as a "penalty" within the meaning of Article 7 § 1 of the Convention or whether it constitutes a measure falling outside the scope of that provision (see *Ibbotson v. the United Kingdom*, no. 40146/98, Commission decision of 21 October 1998, unreported, and *Adamson v. the United Kingdom* (dec.), no. 42293/98, 26 January 1999, as regards placement on a register of sex offenders and, *mutatis mutandis*, *Van der Velden v. the Netherlands* (dec.), no. 29514/05, ECHR 2006-XV, as regards the retention by the authorities of DNA samples taken from the applicant).

40. In that connection the Court reiterates that the concept of a "penalty" in Article 7 is an autonomous one and that the Court remains free to go behind appearances and assess for itself whether a particular measure amounts in substance to a "penalty" within the meaning of that provision. The wording of Article 7 § 1, second sentence, indicates that the starting-point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a "criminal offence". Other factors that may be taken into account as relevant in this connection are the characterisation of the measure in question under

national law; its nature and purpose; the procedures involved in the making and implementation of the measure; and its severity (see *Welch*, cited above, §§ 27 and 28).

41. In the present case the Court notes first of all that the applicant's placement on the Sex Offenders Register was indeed the result of his conviction on 30 October 2003, since placement on the register is automatic in the case of persons who, like the applicant, have been sentenced to a prison term of over five years for a sexual offence.

42. As to the legal characterisation in domestic law, the Court observes that according to the Constitutional Council the measure in question constitutes a "public-order measure" rather than a sanction and that, in accordance with the unequivocal provisions of Article 706-53-1 of the CCP, the Sex Offenders Register is designed to prevent persons who have committed sexual offences or violent crimes from reoffending and to ensure that they can be identified and traced (see paragraphs 18 and 19 above).

43. As regards the purpose and nature of the measure complained of, the Court notes that the applicant regarded the fresh obligation imposed on him as punitive. However, the Court considers that the main aim of that obligation was to prevent reoffending. In that regard, it considers that the fact that a convicted offender's address is known to the police or gendarmerie and the judicial authorities by virtue of his or her inclusion in the Sex Offenders Register constitutes a deterrent and facilitates police investigations. The obligation arising out of placement on the register therefore has a preventive and deterrent purpose and cannot be considered to be punitive in nature or as constituting a sanction.

44. Furthermore, the Court notes that, while the applicant faces a two-year prison sentence and a fine of 30,000 euros (EUR) if he fails to comply with that obligation, another set of proceedings, completely independent of the proceedings leading to his conviction on 30 October 2003, would then have to be initiated, during which the competent court could assess whether the failure to comply was culpable (see, conversely, *Welch*, cited above, § 14).

45. Lastly, as regards the severity of the measure, the Court reiterates that this is not decisive in itself (see *Welch*, cited above, § 32). It considers, in any event, that the obligation to provide proof of address every six months and to declare any change of address within fifteen days at the latest, albeit for a period of thirty years, is not sufficiently severe to amount to a "penalty".

46. In the light of all these considerations, the Court is of the view that placement on the Sex Offenders Register and the obligations arising out of it do not amount to a "penalty" within the meaning of Article 7 § 1 of the Convention and should be considered as a preventive measure to which the principle set forth in that provision, namely that the law should not have retrospective effect, does not apply.

47. Accordingly, the applicant's complaint under Article 7 of the Convention must be rejected as being incompatible *ratione materiae* with the provisions of the Convention, pursuant to Article 35 §§ 3 and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

48. The complaint under Article 7 of the Convention also gave rise to questions from the Court concerning Article 8 of the Convention, which, in its relevant parts, provides:

> "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 ... 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."

A. The parties' submissions

49. The Government stressed at the outset that the applicant had not expressly raised the complaint under Article 8 of the Convention in his initial application. Should the Court wish nonetheless to examine the case from the standpoint of Article 8, the Government submitted that the French authorities had not breached that provision.

50. The Government further emphasised that the constraint placed on the applicant as a result of his inclusion in the Sex Offenders Register could not be said to constitute interference with his private and family life since it was confined to the requirements laid down by Article 706-53-5 of the CCP (see paragraph 18 above).

51. They argued that the measure in question did indeed have a legal basis, in the form of the Law of 9 March 2004, which set out the implications of placement on the Sex Offenders Register for the persons concerned. The measure was aimed at preventing disorder and crime, in particular in relation to minors (Article 706-53-1 of the CCP).

52. Lastly, the Government submitted that society's interest in the prevention of sexual offences had to be weighed against the seriousness of the infringement of the applicant's right to respect for his private life. In their view, the establishment of the Sex Offenders Register was part of the gradual introduction of a specific set of rules governing sexual offences, which was justified by the comparatively recent increase in awareness concerning the special character of such offences. The latter stemmed from the fact that these offenders often had personality disorders, which were a real factor in reoffending, and from the particular suffering caused to the

victims, especially if they were minors at the time of the offence. Hence, the national authorities had put in place a combination of punitive and preventive measures. The establishment of the Sex Offenders Register in that connection had been aimed at filling gaps in the system of prevention in relation to the particularly serious category of sexual offences. The Government added that it was clear from the Court's case-law that the Court did not dispute States' right, in seeking to prevent offending, to gather and store personal data provided that "there exist[ed] adequate and effective guarantees against abuse" (they referred to *Leander v. Sweden*, 26 March 1987, § 60, Series A no. 116).

53. In the instant case, in the Government's submission, the applicant had enjoyed all the guarantees provided by the law. He had been informed by the judicial authority of his placement on the register, which was supervised by a judge. Only persons who had committed the serious sexual offences referred to in Article 706-47 of the above-mentioned Code were affected, and only such offences automatically gave rise to placement on the register.

54. As to the other guarantees provided for by the law, the Government pointed out that the length of time for which the information was kept (twenty or thirty years) depended on the seriousness of the offence. This was a maximum period, and the persons concerned could request the deletion from the register of the information concerning them. The request could be made to three authorities: the public prosecutor, the liberties and detention judge and the President of the Investigation Division. This three-pronged approach constituted a triple guarantee. In the instant case, the fact that the applicant's conviction was entered in his criminal record made any request for deletion of the information in the Sex Offenders Register inadmissible. However, the applicant had the option of applying for judicial rehabilitation, which would wipe the conviction from the criminal records. Moreover, the Sex Offenders Register could be consulted only by certain authorities that were bound by a duty of confidentiality, and in precisely defined circumstances. Lastly, it was not possible to compare the data in the Sex Offenders Register with data held elsewhere.

55. The Government concluded that the safeguards accompanying placement on the register were such that it amounted to interference which was necessary in a democratic society within the meaning of Article 8 § 2 of the Convention.

56. In the applicant's view, the information contained in the register was not for public consumption. The constraints imposed by the legislation were not minimal but restricted the convicted person's freedom of movement.

B. The Court's assessment

57. The Court reiterates that since it is master of the characterisation to be given in law to the facts of the case, it does not consider itself bound by the characterisation given by an applicant or a government. By virtue of the *jura novit curia* principle, it may consider of its own motion complaints under Articles or paragraphs not relied on by those appearing before it. In other words, a complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on (see *Guerra and Others v. Italy*, 19 February 1998, § 44, *Reports of Judgments and Decisions* 1998-I, and *Berktay v. Turkey*, no. 22493/93, § 168, 1 March 2001). The Government's objection of inadmissibility should therefore be dismissed.

The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

58. As to the rest, the Court observes that the Sex Offenders Register contains data concerning the applicant's private life. The register comes under the responsibility of the Ministry of Justice and is supervised by the judge who manages the criminal records. The Court stresses that it is not its task at this stage to speculate on the sensitive nature or otherwise of the information gathered or on the possible difficulties experienced by the applicant. According to its case-law, the storing by a public authority of information relating to an individual's private life amounts to interference within the meaning of Article 8. The subsequent use of the stored information has no bearing on that finding (see, *mutatis mutandis*, *Leander*, cited above, § 48, and *Kopp v. Switzerland*, 25 March 1998, § 53, *Reports* 1998-II). More specifically, the Court has already ruled that the requirement for persons convicted of sexual offences to inform the police of their name, date of birth, address or change of address falls within the scope of Article 8 § 1 of the Convention (see *Adamson*, cited above).

59. The Court observes that the parties did not dispute that the interference in question had been in accordance with the law and had pursued the legitimate aim of preventing disorder and crime (ibid.). It must therefore examine whether the interference was necessary from the standpoint of the requirements of the Convention.

60. Since the national authorities make the initial assessment as to where the fair balance lies in a case before a final evaluation by this Court, a certain margin of appreciation is, in principle, accorded by this Court to those authorities as regards that assessment. The breadth of this margin varies and depends on a number of factors including the nature of the activities restricted and the aims pursued by the restrictions (see *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 88, ECHR 1999-VI).

61. Accordingly, where a particularly important facet of an individual's existence or identity is at stake, the margin of appreciation accorded to a State will in general be restricted.

62. The protection of personal 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. The domestic law must therefore afford appropriate safeguards to prevent any such use of personal data as may be inconsistent with the guarantees of this Article (see, *mutatis mutandis*, *Z v. Finland*, 25 February 1997, § 95, *Reports* 1997-I). In line with its findings in *S. and Marper v. the United Kingdom* ([GC], nos. 30562/04 and 30566/04, § 103, ECHR 2008), the Court is of the view that 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. The domestic law should notably ensure that such data are relevant and not excessive in relation to the purposes for which they are stored and that they are preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored (see paragraphs 27 and 28 above, in particular Article 5 of the Data Protection Convention and the Preamble thereto and Principle 7 of Recommendation No. R (87) 15 of the Committee of Ministers regulating the use of personal data in the police sector). The domestic law must also afford adequate guarantees to ensure that retained personal data are efficiently protected from misuse and abuse.

63. The Court cannot call into question the preventive purpose of a register such as the one on which the applicant was placed after being sentenced to fifteen years' imprisonment for the rape of a minor. The aim of that register, as it has already pointed out, is to prevent crime and in particular to combat recidivism and, in such cases, to make it easier to identify offenders. Sexual abuse is unquestionably an abhorrent type of wrongdoing, with debilitating effects on its victims. Children and other vulnerable individuals are entitled to State protection, in the form of effective deterrence, from such grave types of interference with essential aspects of their private lives (see *Stubbings and Others v. the United Kingdom*, 22 October 1996, § 64, *Reports* 1996-IV).

64. At the same time, European penal policy is evolving and attaching increasing importance, alongside the aim of punishment, to the rehabilitative aim of imprisonment, particularly towards the end of a long prison sentence (see *Dickson v. the United Kingdom* [GC], no. 44362/04, § 75, ECHR 2007-V). Successful rehabilitation means, among other things, preventing reoffending (see the report of the Council of Europe's Commissioner for Human Rights cited in *Léger v. France* (no. 19324/02, § 49, 11 April 2006)).

65. In the instant case the applicant was automatically placed on the register under the transitional provisions of the 2004 Law, in view of the

crime of which he had been finally convicted. He was duly notified of his placement on the register and took note of the obligations imposed on him.

66. As to the obligation to provide proof of address every six months and of any change of address, on pain of a prison sentence and payment of a fine, the Court has previously held that this did not give rise to an issue from the standpoint of Article 8 of the Convention (see *Adamson*, cited above).

67. As regards the length of time for which the information is kept, the Court notes that it is either twenty or thirty years depending on the severity of the sentence.

68. As pointed out by the Government, these are maximum periods. Although the thirty-year period in the instant case is considerable, the Court observes that the data are deleted automatically on expiry of that period, which starts to run as soon as the decision which gave rise to placement on the register ceases to have effect. The Court further notes that the person concerned may apply to the public prosecutor to have the data concerning him or her deleted if conserving the data no longer appears necessary in view of the purpose of the register, regard being had to the nature of the offence, the age of the person concerned when it was committed, the length of time that has elapsed and the person's current personality (Article 706-53-10 of the CCP, see paragraph 18 above). The prosecutor's decision can be appealed against before the liberties and detention judge and subsequently before the President of the Investigation Division.

69. The Court considers that this judicial procedure for the removal of data provides for independent review of the justification for retention of the information according to defined criteria (see *S. and Marper*, cited above, § 119) and affords adequate and effective safeguards of the right to respect for private life, having regard to the seriousness of the offences giving rise to placement on the register. Admittedly, the storing of the data for such a long period could give rise to an issue under Article 8 of the Convention. However, the Court notes that the applicant will in any event have a practical opportunity of lodging an application for removal of the stored data from the date on which the decision giving rise to their entry in the register ceases to have effect. In these circumstances, the Court is of the view that the period of time for which the data are kept is not disproportionate to the aim pursued in storing the information.

70. As to the rules on the use of the register and the range of public authorities which have access to it, the Court notes that the latter has been extended on several occasions and is no longer limited to the judicial authorities and the police; administrative bodies now also have access (Article 706-53-7 of the CCP, see paragraph 18 above). The fact remains, nevertheless, that the register may only be consulted by authorities that are bound by a duty of confidentiality, and in precisely defined circumstances. In addition, the present case does not lend itself to examination *in concreto*

of the issue of the availability of the register for consultation for administrative purposes.

71. In conclusion, the Court considers that the applicant's placement on the Sex Offenders Register struck a fair balance between the competing private and public interests at stake and that the respondent State did not overstep the acceptable margin of appreciation in that regard. Accordingly, there has been no violation of Article 8 of the Convention in the instant case.

IV. OTHER ALLEGED VIOLATIONS

72. Relying on Articles 6, 13, 14 and 17 of the Convention, the applicant, who claimed that he was innocent, complained of the manner in which the investigation of his case had been carried out, the fact that his requests for investigative measures and expert reports had been refused by the investigating judge and the refusal by the Criminal Cases Review Board of his application for a retrial. In a letter of 3 November 2005, he also complained of the refusal of his application for suspension of his sentence, arguing that his state of health was incompatible with detention. Lastly, in a letter of 5 December 2005, the applicant alleged under Article 3 of the Convention that his continued detention amounted to torture.

73. Having regard to all the evidence in its possession and in so far as it has jurisdiction to examine these complaints, the Court finds no appearance of a breach of the rights and freedoms guaranteed by the provisions relied upon. It therefore considers that these complaints are manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning Article 8 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 8 of the Convention.

Done in French, and notified in writing on 17 December 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President