

Data Protection in Sport – the Relevant Case Law of the ECourtHR

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The ECHR rights at stake

▶ **Article 6 ECHR: Right to a fair trial**

“1. In the determination of his **civil rights and obligations** or of **any criminal charge** against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. (...)

2. (...)”

The ECHR rights at stake (contin.)

▶ **Article 13 ECHR: Right to an effective remedy**

“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an **effective remedy before a national authority** notwithstanding that the violation has been committed by persons acting in an official capacity.”

The ECHR rights at stake (contin.)

- ▶ **Article 8 ECHR: Right to respect for private and family life**
 1. Everyone has the right to respect for his **private and family life**, his home and his correspondence.
 2. There shall be no **interference** by a public authority with the exercise of this right except such as is **in accordance with the law** and is **necessary in a democratic society in the interests of** national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

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Article 8 ECHR: Relevant tests

▶ **Interference:**

- ▶ Legal basis? (“in accordance with the law”)
- ▶ Legitimate aim? (“in the interest of...”)
- ▶ Necessity in a democratic society, including proportionality of the measure?

▶ **Positive obligations?**

Article 8 ECHR: Applicability and scope

▶ *Amann v. Switzerland* (16 February 2000):

« 65. The Court reiterates that the storing of data relating to the ‘private life’ of an individual falls within the application of Article 8 § I (...). It points out that the term ‘private life’ must not be interpreted restrictively (...)

66. In the present case, the Court notes that a card was filled in on the applicant on which it was stated that he was a « contact with the Russian embassy » and did « business of various kinds with the [A.] company (...).

67. The Court finds that those details undeniably amounted to data relating to the applicant’s ‘private life’ and that, accordingly, Article 8 is applicable to this complaint (...).»

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Article 8 ECHR: Applicability and scope (contin.)

- ▶ **What types of data are covered by Article 8 ECHR?**
- ▶ ECourtHR refers to the 1981 Council of Europe's *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data*:
 - ▶ Article 2 defines « personal data » as « any information relating to an identified or identifiable individual ».
 - ▶ Broad scope: medical and health data, data reflecting sexual orientation, DNA information and fingerprints, GPS data, financial data (*G.S.B. v. Switzerland*, 22 December 2015), etc.

Article 8 ECHR: Applicability and scope (contin.)

▶ **Need for special protection in relation to personal, in particular medical data:**

▶ *Z. v. Finland* (25 February 1997), § 95:

“In this connection, the Court will take into account that the **protection of personal data, not least 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 (...). Respecting the **confidentiality of health data is a vital principle** in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general (...).”

▶ See also *M.S. v. Sweden* (27 August 1997), § 41.

Article 8 ECHR: Interference

- ▶ What can constitute an interference?
 - ▶ **Broad concept**, including interception of communications, phone tapping and mass surveillance.
 - ▶ **Disclosure of personal data to the public**
 - ▶ Example: *Z. v. Finland* (cited above):
 - ▶ **Disclosure of the applicant's condition as HIV-positive in criminal proceedings against the husband.**
 - ▶ Violation of Article 8 ECHR: Disclosure of applicant's identity and HIV infection in the text of the Court of Appeal's judgment made available to the press was not necessary in a democratic society.
 - ▶ In particular, the domestic law did not afford appropriate safeguards to prevent any such communication or disclosure of such data.

Article 8 ECHR: Interference (contin.)

- ▶ Further examples for public disclosure of personal data:
 - ▶ *M.S. v. Sweden* (cited above)
 - ▶ *Panteleyenko v. Ukraine* (29 June 2006)
 - ▶ *Armonas v. Lithuania* and *Biriuk v. Lithuania* (25 November 2008).

Article 8 ECHR: Interference (contin.)

- ▶ **Collection and retention of personal data:**
- ▶ *S. and Marper v. United Kingdom* (4 December 2008):
“67. The **mere storing of data** relating to the private life of an individual amounts to an interference within the meaning of Article 8 (...). The subsequent use of the stored information has no bearing on that finding (...).”

Article 8 EHCR: Interference (contin.)

▶ Example:

▶ *L.H. v. Latvia* (29 April 2014):

- ▶ The applicant alleged, in particular, that the **collection of her personal medical data by a State agency – the Inspectorate of Quality Control for Medical Care and Fitness for Work (MADEKKI) – without her consent had been an interference** with the exercise of her right to respect for her private life.
- ▶ The ECtHR agreed with the applicant and found a violation of Article 8 ECHR because the applicable law had failed to indicate with sufficient clarity the scope of discretion conferred on competent authorities and the manner of its exercise.

Article 8 ECHR: Interference (contin.)

- ▶ **Collection of data by interfering into the private sphere in the fight against doping (« whereabouts »):** *National Federation of Sportspersons' Associations and Unions (FNASS) and Others v. France* (18 January 2018):

« 157. (...) the Court notes the varied and exhaustive nature of the information which the applicants are required to provide concerning their private lives, and which covers all the public and private spaces they frequent. The information in fact relates to the places in which all their activities are carried out, both professional (for instance, training venues) and those unrelated to sport (...)

158. The privacy of the places where private life is conducted, in other words respectd for the home, is also affected by the whereabouts system (...).

159. In view of the foregoing, the Court considers that the whereabouts requirement constitutes interference with the applicants' exercise of their rights under the first paragraph of Article 8. »



Article 8 ECHR: Legal basis

▶ Need for appropriate safeguards in the field of data protection:

▶ *S. and Marper* (cited above), § 99:

« [The Court] reiterates that it is as essential, in this context, as in telephone tapping, secret surveillance and covert intelligence-gathering, to have clear, detailed rules governing the scope and application of measures, as well as minimum safeguards concerning, *inter alia*, duration, storage, usage, access of third parties, procedures for preserving the integrity and confidentiality of data and procedures for its destruction, **thus providing sufficient guarantees against the risk of abuse and arbitrariness (...).** »

Article 8 ECHR: Legal basis (contin.)

▶ *Rotaru v. Romania* (4 May 2000), § 57:

« 57. (...) for instance, **the (...) Law does not define** the kind of information that may be recorded, the categories of people against whom surveillance measures such as gathering and keeping information may be taken, the circumstances in which such measures may be taken or the procedure to be followed. Similarly, the Law does not lay down limits on the age of information held or the length of time for which it may be kept. (...)»

(...) The Court notes that **this section contains no explicit, detailed provision** concerning the persons authorised to consult the files, the nature of the files, the procedure to be followed or the use that may be made of the information thus obtained. »

Article 8 ECHR: Legitimate aim

- ▶ **Many private and public interests recognized by the ECourtHR, such as:**
 - ▶ Detection and, therefore, prevention of crime (among many others, *S. and Marper v. U.K.*, § 100, or *Aycaguer v. France*, 22 June 2017, § 36).
 - ▶ Prevention of disorder (*Khelili v. Switzerland*, 18 October 2011, §§ 59-60).
 - ▶ Protection of the rights and freedoms of others (*ibidem.*).
 - ▶ Protection of national security (*Leander v. Sweden*, 26 March 1987, § 49).
 - ▶ Protection of economic well-being of the country (*M.S. v. Sweden*, 27 August 1997, § 38).

Article 8 ECHR: Legitimate aim (contin.)

- ▶ In the fight against doping: *FNASS and Others* (cited above):

«165. ...the **Court accepts that the whereabouts requirement is designed to address issues concerning ‘health’, within the meaning of the second paragraph of Article 8, with regard to both professional and amateur athletes and with a particular focus on young people.**

166... The Court observes that the need to tackle doping has always been recognised in the sporting word ... fair play and equality of opportunity as being fundamental to the fight against doping. The Court considers that what the Government describe as « morals », in the context of efforts to ensure equal and meaningful competition in sports, is also linked to the legitimate aim of ‘protection of the rights and freedoms of others’ ... »



Article 8 ECHR: Necessity in a democratic society

▶ General principles:

▶ *S. and Marper* (cited above), §§ 101-102:

“101. An interference will be considered “necessary in a democratic society” for a legitimate aim if it answers a “**pressing social need**” and, in particular, if it is **proportionate to the legitimate aim** pursued and if the reasons adduced by the national authorities to justify it are “**relevant and sufficient**” (...).

102. A **margin of appreciation** must be left to the competent national authorities in this assessment. (...) The margin will tend to be narrower where the right at stake is crucial to the individual’s effective enjoyment of intimate or key rights (...). **Where a particularly important facet of an individual’s existence or identity is at stake, the margin allowed to the State will be restricted (...).**”



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Article 8 ECHR: Necessity (contin.)

- ▶ **Fair balance must be struck between the conflicting interests at stake. Two examples in the field of sport:**
 - ▶ *FNASS and Others* (cited above), § 191:
 - ▶ «The Court does not underestimate the impact of the whereabouts requirements on the applicants' private lives. Nevertheless (...) [r]educing or removing the requirements of which the applicants complain would be liable to increase the dangers of doping to their health and that of the entire sporting community, and would run counter to the European and international consensus on the need for unannounced testing. **The Court therefore finds that the respondent State struck a fair balance between the different interests at stake and that there has been no violation of Article 8 [ECHR].»**

Article 8 ECHR: Necessity (contin.)

- ▶ **Prevention of sexual abuse, in particular of girls and minors:**
- ▶ Relevance of the *CoE Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (« Lanzarote Convention »)* :
 - Article 5 § 3: **Duty to screen:** « Each Party shall take the necessary legislative or other measures ...to ensure that the conditions to accede to those professions who are exercise implies regular contacts with children ensure that the candidates to these professions have not been convicted of acts of sexual exploitation or sexual abuse of children. »
 - Article 37: **Duty to record and store national data on convicted sexual offenders**

Article 8 ECHR: Necessity (contin.)

- ▶ Relevant case (outside of sports):
 - *B.B. v. France, Gardel v. France, and M.B. v. France* (17 December 2009):
 - **The applicants had all been sentenced to imprisonment for rape of 15 year old minors by a person in a position of authority. They complain about their inclusion in the automated national judicial database of sex offenders.**
 - Court held that the system of inclusion in the database had struck a fair balance and recognized the prevention-related objectives of the database.
 - Length of conservation (30 years max.) was not disproportionate to the aim.
 - Moreover, the applicants had an effective possibility of submitting a request for the deletion of the data.
 - Finally, the consultation of such data by the court, police and administrative authorities was subject to a duty of confidentiality and was restricted to precisely determined circumstances.

Article 8 ECHR: Positive obligations

- ▶ **Right to an effective and accessible procedure enabling the applicant to have access to relevant information:**

- ▶ For example: *Roche v. U.K.* (19 October 2005):

- ▶ The applicant developed health problems which he thought were the result of his participation in mustard and nerve gas tests conducted under the auspices of the British Armed Forces at Porton Down Barracks in the 1960s.

“157. The Court observes that, in addition to the primarily negative undertakings in Article 8 ECHR, there may be positive obligations inherent in effective respect for private life (...).

167. (...) the Court considers that the State has not fulfilled the positive obligation to provide an effective and accessible procedure enabling the applicant to have 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.”



Article 8 ECHR: Positive obligations (contin.)

- ▶ Another example: *K.H. and Others v. Slovakia* (28 April 2009):
 - ▶ The applicants, eight women of Roma origin, could not conceive any longer after being treated at gynaecological departments in two different hospitals, and suspected that it was because they had been sterilised during their stay in those hospitals.
 - ▶ They complained that they could not obtain photocopies of their medical records.
 - ▶ Court concluded that given that the applicants had obtained judicial orders permitting them to consult their medical records in their entirety, having denied them the possibility to make photocopies of those records had not been sufficiently justified by the authorities.
 - ▶ **To avoid the risk of abuse of medical data it would have been sufficient to put in place legislative safeguards with a view to strictly limiting the circumstances and the scope of persons entitled to have access.**

Final remarks and a look ahead

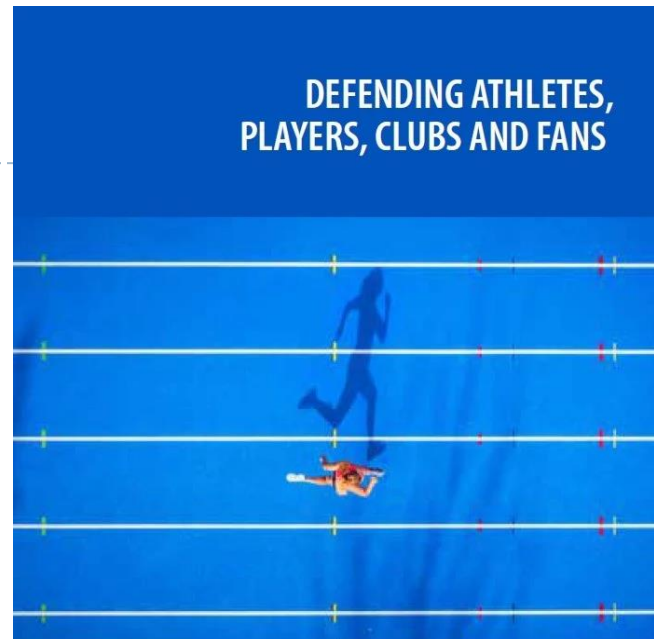
- ▶ Relevance of Articles 6 and 13, but in particular of Article 8 ECHR, in the domain of data protection.
- ▶ General applicability of the principles elaborated by the Court to the field of sport.
- ▶ Broad scope of « data » covered under Article 8 ECHR.
- ▶ Generally strong protection offered by the Court in the field of data protection, in particular when sensitive data are concerned.
- ▶ Interest of data protection might collide with other public or private interests, for example the rights of minors to be protected against violence and sexual abuse, or the legitimate fight against doping.
- ▶ The Court imposes on States Parties special safeguards concerning the protection of personal data, in particular through the requirement of a precise legal basis for an interference and the imposition of positive obligations on States Parties.
- ▶ **Potential challenges for the Court:**
 - ▶ Anti-doping rules (other than the « whereabouts » requirement)
 - ▶ Facial recognition and crowd control

For more information:

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Defending Athletes, Players,
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