

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application nos. 30562/04 and 30566/04
by S. and Michael MARPER
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 16 January 2007 as a Chamber composed of:

Mr J. CASADEVALL, *President*,
Sir Nicolas BRATZA,
Mr G. BONELLO,
Mr K. TRAJA,
Mr S. PAVLOVSKI,
Mr J. ŠIKUTA,
Mrs P. HIRVELÄ, *judges*,
and Mr T.L. EARLY, *Section Registrar*,

Having regard to the above applications lodged on 16 August 2004,

Having regard to the decision to join the applications of 10 May 2005,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant in application no. 30562/04 was born in 1989, and lives in Sheffield. The applicant in application no. 30566/04 was born in 1963, and also lives in Sheffield. Both applicants are United Kingdom citizens, and both are represented before the Court by Mr P. Mahy, solicitor, of Messrs Howells, Sheffield.

A. The circumstances of the case

The facts of the applications, as they have been submitted by the parties, may be summarised as follows.

The applicant in application no. 30562/04 was arrested on 19 January 2001 and charged with attempted robbery. His fingerprints and DNA samples¹ were taken. He was acquitted on 14 June 2001.

The applicant in application no. 30566/04 was arrested on 13 March 2001 and charged with harassment of his partner. His fingerprints and DNA samples were taken. Before a pre-trial review took place, he and his partner had become reconciled, and the charge was not pressed. On 11 June 2001, the Crown Prosecution Service served a notice of discontinuance on the applicant's solicitors, and on 14 June the case was formally discontinued.

Each applicant asked for the fingerprints and DNA samples to be destroyed, and in each case the police refused. The applicants applied for judicial review of the police decisions not to destroy, and on 22 March 2002 the Administrative Court (Rose LJ and Leveson J) rejected the

application ([2002] EWHC 478 (Admin)]. The Court of Appeal upheld the decision of the Administrative Court by a majority of two (Lord Woolf CJ and Waller LJ) to one (Sedley LJ) [[2003] EWCA Civ 1275]. As regarded the necessity of retaining DNA samples, Lord Justice Waller stated:

“...fingerprints and DNA profiles contain only limited personal information. The physical samples potentially contain very much greater and more personal and detailed information. The anxiety is that science may one day enable analysis of samples to go so far as to obtain information as to an individual's propensity to commit certain crime and be used for that purpose within the language of the present section. It might also be said that the law might be changed in order to allow the samples to be used for purposes other than those identified by the section. It might also be said that while samples are retained there is even now a risk that they will be used in way that the law does not allow.. S, it is said, the aims could be achieved in a less restrictive manner... Why cannot the aim be achieved by retention of the profiles without the retention of the samples.

The answer to Liberty's points is as I see it as follows. First the retention of samples permits a) the checking of the integrity and future utility of the DNA database system; (b) a re-analysis for the up-grading of DNA profiles where new technology can improve the discriminating power of the DNA matching process; (c) re-analysis and thus an ability to extract other DNA markers and thus offer benefits in terms of speed, sensitivity and cost of searches in the database; (d) further analysis so as to be able to identify any analytical or process errors. It is these benefits which must be balances against the risks identified by Liberty. In relation to those risks, the position in any event is that any change in the law would have to be convention compliant; second any change in practice would have to be convention compliant; and third unlawfulness must not be assumed. In my view thus the risks identified are not great, and such as they are they are outweighed by the benefits in achieving the aim of prosecuting and preventing crime. Lord Justice Sedley considered that the Chief Constable was required to consider whether in each particular case the individual concerned was free of any taint of suspicion. He also noted that the difference between the retention of samples and DNA profiles was that the retention of samples would enable more information to be derived than was present at possible.

Lord Steyn, giving the lead judgment of the House of Lords on 22 July 2004, noted the legislative history of Section 64(1A) of the Police and Criminal Evidence Act 1984 (“PACE”), in particular the way in which it had been introduced by Parliament following public disquiet about the previous law, which had provided that where a person was not prosecuted or was acquitted of offences, the sample had to be destroyed and the information could not be used. In two cases compelling DNA evidence that linked one suspect to a rape and another to a murder could not be used, as at the time the matches were made both defendants had either been acquitted or a decision made not to proceed for the offences for which the profiles had been taken: as a result neither suspect could be convicted.

Lord Steyn noted that the value of retained fingerprints and samples taken from suspects was considerable. He gave the example of a case in 1999, in which DNA information from the perpetrator of a crime was matched with that of “I” in a search of the national database. The sample from I should have been destroyed, but had not been. I pleaded guilty to rape and was sentenced. If the sample had not been wrongly detained, the offender might have escaped detection. Lord Steyn also referred to statistical evidence from which it appeared that almost 6,000 DNA profiles had been linked with crime scene stain profiles which would have been destroyed under the former provisions. The offences involved included 53 murders, 33 attempted murders, 94 rapes, 38 sexual offences, 63 aggravated burglaries and 56 cases involving the supply of controlled drugs. On the basis of the existing records, the Home Office statistics estimated that there was a 40% chance that a crime scene sample will be matched immediately with an individual's profile on the database. This showed that the fingerprints and samples which could now be retained had in the last three years' played a major role in the detection and prosecution of serious crime.

Lord Steyn also noted that PACE deals separately with the taking of fingerprint and samples, the retention of them, and the use of them.

As to the Convention analysis, Lord Steyn inclined to the view that the mere retention of fingerprints and DNA samples did not constitute an interference with the right to respect for private life, but stated that, if he were wrong in this view, he regarded any interference as very modest indeed. Questions of whether in the future retained samples could be misused were not relevant in respect of contemporary use of retained samples in connection with the detection and prosecution of crime. If future scientific developments required it, judicial decisions could be made, when the need occurred, to ensure compatibility with the Convention. The provision limiting the permissible use of retained material to “*purposes related to the prevention or detection of crime ...*” did not broaden the permitted use unduly, because it was limited by its context.

If the need arose to justify the modest interference with private life arose, Lord Steyn agreed with Lord Justice Sedley in the Court of Appeal that the purposes of retention – the prevention of crime and the protection of the right of others to be free from crime – were “provided for by law”, as required by Article 8.

As to the justification for any interference, the applicants had argued that the retention of fingerprints and DNA samples created suspicion in respect of persons who had been acquitted. Counsel for the Home Secretary had contended that the aim of the retention has nothing to do with the past, that is, with the offence a person was acquitted of, but that it was to assist in the investigation of offences in the future. The applicants would only be affected by the retention of the DNA samples if their profiles matched those found at the scene of a future crime. Lord Steyn saw five factors which led to the conclusion that the interference was proportionate to the aim: (i) the fingerprints and samples were kept only for the limited purpose of the detection, investigation and prosecution of crime; (ii) the fingerprints and samples were not of any use without a comparator fingerprint or sample from the crime scene; (iii) the fingerprints would not be made public; (iv) a person was not identifiable from the retained material to the untutored eye, and (v) the resultant expansion of the database by the retention conferred enormous advantages in the fight against serious crime.

In reply to the contention that the same legislative aim could be obtained by less intrusive means, namely by a case-by-case consideration of whether or not to retain fingerprints and samples, Lord Steyn referred to Lord Justice Waller's comments in the Court of Appeal that “[i]f justification for retention is in any degree to be by reference to the view of the police on the degree of innocence, then persons who have been acquitted and have their samples retained can justifiably say this stigmatises or discriminates against me – I am part of a pool of acquitted persons presumed to be innocent, but I am treated as though I was not. It is not in fact in any way stigmatising someone who has been acquitted to say simply that samples lawfully obtained are retained as the norm, and it is in the public interest in its fight against crime for the police to have as large a database as possible”.

Lord Steyn did not accept that the difference between samples and DNA profiles affected the position.

The House of Lords further rejected the applicants' complaint that the retention of their fingerprints and samples subjected them to discriminatory treatment in breach of Article 14 of the Convention when compared to the general body of persons who had not had their fingerprints and samples taken by the police in the course of a criminal investigation. Lord Steyn held that, even assuming that the retention of fingerprints and samples fell within the ambit of Article 8 so

as to trigger the application of Article 14, the difference of treatment relied on by the applicants was not one based on “status” for the purposes of Article 14: the difference simply reflected the historical fact, unrelated to any personal characteristic, that the authorities already held the fingerprints and samples of the individuals concerned which had been lawfully taken. The applicants and their suggested comparators could not in any event be said to be in an analogous situation. Even if, contrary to his view, it was necessary to consider the justification for any difference in treatment, Lord Steyn held that such objective justification had been established: first, the element of legitimate aim was plainly present, as the increase in the database of fingerprints and samples promoted the public interest by the detection and prosecution of serious crime and by exculpating the innocent; secondly, the requirement of proportionality was satisfied, section 64 (1A) of PACE objectively representing a measured and proportionate response to the legislative aim of dealing with serious crime.

B. Relevant domestic law and practice

The Police and Criminal Evidence Act 1984 (PACE) contains powers for the taking of fingerprints (principally section 61) and samples (principally section 63). By section 61, fingerprints may only be taken without consent if an officer of at least the rank of superintendent authorises the taking, or if the person has been charged with a recordable offence or has been informed that he will be reported for such an offence. Before fingerprints are taken, the person must be informed that the prints may be the subject of a speculative search, and the fact of the informing must be recorded as soon as possible. The reason for the taking of the fingerprints is recorded in the custody record. Parallel provisions relate to the taking of samples (Section 63).

As to the retention of such fingerprints and samples (and the records thereof), section 64 (1A) of PACE was substituted by Section 82 of the Criminal Justice and Police Act 2001. It provides as follows:

“Where - (a) fingerprints or samples are taken from a person in connection with the investigation of an offence, and (b) subsection (3) below does not require them to be destroyed, the fingerprints or samples may be retained after they have fulfilled the purposes for which they were taken but shall not be used by any person except for purposes related to the prevention or detection of crime, the investigation of an offence, or the conduct of a prosecution. ...

(3) If - (a) fingerprints or samples are taken from a person in connection with the investigation of an offence; and (b) that person is not suspected of having committed the offence, they must except as provided in the following provisions of this Section be destroyed as soon as they have fulfilled the purpose for which they were taken.

(3AA) Samples and fingerprints are not required to be destroyed under subsection (3) above if (a) they were taken for the purposes of the investigation of an offence of which a person has been convicted; and (b) a sample or, as the case may be, fingerprint was also taken from the convicted person for the purposes of that investigation.”

Section 64 in its earlier form had included a requirement that if the person from whom the fingerprints or samples were taken in connection with the investigation was cleared of that offence, the fingerprints and samples, subject to certain exceptions, were to be destroyed “as soon as practicable after the conclusion of the proceedings”.

The subsequent use of materials retained under Section 64 (1A) is not regulated by statute, other than the limitation on use contained in that provision. In *Attorney General's Reference (No 3 of 1999)* [2001] 2 AC 91, the House of Lords had to consider whether it was permissible to use in evidence a sample which should have been destroyed under the then text of Section 64 PACE. The House considered that the prohibition on the use of an unlawfully retained sample “for the

purposes of any investigation” did not amount to a mandatory exclusion of evidence obtained as a result of a failure to comply with the prohibition, but left the question of admissibility to the discretion of the trial judge.

C. Council of Europe materials

Recommendation No. R(87)15 regulating the use of personal data in the police sector (adopted on 17 September 1987) states, *inter alia*:

“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.”

Recommendation No. R (92) 1 on the use of analysis of deoxyribonucleic acid (DNA) within the framework of the criminal justice system (adopted on 10 February 1992) states, *inter alia*:

3. *Use of samples and information derived therefrom*

Samples collected for DNA analysis and the information derived from such analysis for the purpose of the investigation and prosecution of criminal offences must not be used for other purposes. ...

Samples taken for DNA analysis and the information so derived may be needed for research and statistical purposes. Such uses are acceptable provided the identity of the individual cannot be ascertained. Names or other identifying references must therefore be removed prior to their use for these purposes.

4. *Taking of samples for DNA analysis*

The taking of samples for DNA analysis should only be carried out in circumstances determined by the domestic law; it being understood that in some states this may necessitate specific authorisation from a judicial authority...

8. *Storage of samples and data*

Samples or other body tissue taken from individuals for DNA analysis should not be kept after the rendering of the final decision in the case for which they were used, unless it necessary for purposes directly linked to those for which they were collected.

Measures should be taken to ensure that the results of DNA analysis are deleted when it is no longer necessary to keep it for which it was used. The results of DNA analysis and the information so derived may, however, be retained where the individual concerned has been convicted of serious offences against the life, integrity or security of persons. In such cases strict storage periods should be defined by domestic law.

Samples and other body tissues, or the information derived from them, may be stored for longer periods:

- when the person so requests; or
- when the sample cannot be attributed to an individual, for example when it is found at the scene of a crime;

Where the security of the state is involved, the domestic law of the member state may permit retention of the samples, the results of DNA analysis and the information so derived even though the individual concerned has not been charged or convicted of an offence. In such cases strict storage periods should be defined by domestic law.”

The Explanatory Memorandum to the Recommendation stated, as regards Recommendation 8:

47. The working party was well aware that the drafting of Recommendation 8 was a delicate matter, involving different protected interests of a very difficult nature. It was necessary to strike the right balance between these interests. Both the European Convention on Human Rights and the Data Protection Convention provide exceptions for the interests of the suppression of criminal offences and the protection of the rights and

freedoms of third parties. However, the exceptions are only allowed to the extent that they are compatible with what is necessary in a democratic society. ...

49. Since the primary aim of the collection of samples and the carrying out of DNA analysis on such samples is the identification of offenders and the exoneration of suspected offenders, the data should be deleted once persons have been cleared of suspicion. The issue then arises as to how long the DNA findings and the samples on which they were based can be stored in the case of a finding of guilt.

50. The general rule should be that the data are deleted when they are no longer necessary for the purposes for which they were collected and used. This would in general be the case when a final decision has been rendered as to the culpability of the offender. By “final decision” the CAHBI thought that this would normally, under domestic law, refer to a judicial decision. However, the working party recognised that there was a need to set up data bases in certain cases and for specific categories of offences which could be considered to constitute circumstances warranting another solution, because of the seriousness of the offences. The working party came to this conclusion after a thorough analysis of the relevant provisions in the European Convention on Human Rights, the Data Protection Convention and other legal instruments drafted within the framework of the Council of Europe. In addition, the working party took into consideration that all member states keep a criminal record and that such record may be used for the purposes of the criminal justice system... It took into account that such an exception would be permissible under certain strict conditions:

- when there has been a conviction;
- when the conviction concerns a serious criminal offence against the life, integrity and security of a person;
- the storage period is limited strictly;
- the storage is defined and regulated by law;
- the storage is subject to control by Parliament or an independent supervisory body...”

COMPLAINTS

The applicants both alleged violation of Articles 8 and 14 of the Convention. They considered that the very retention of the material concerning them was in breach of the right to respect for private life, and that the breach was aggravated by the fact that the information is actively being used in criminal investigations.

The applicants also alleged a violation of Article 14 of the Convention, taken together with Article 8. They contended that as persons who had been, but were no longer, suspected by the police of a crime, they were in the same position as the rest of the unconvicted population of the United Kingdom or those whose samples were still required to be destroyed but that they were treated differently for reasons which were not compatible with Article 14.

THE LAW

The applicants complain under Articles 8 and 14 of the Convention about the retention of fingerprints and DNA samples and profiles which have been retained pursuant to Section 64 (1A) of the Police and Criminal Evidence Act 1984 (“PACE”). Article 8 provides, so far as relevant, as follows:

“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 ... for the prevention of disorder or crime...”

Article 14 provides:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

A . The parties' submissions

1. The respondent Government

a. Article 8 of the Convention

The Government submitted that it was of vital importance that law enforcement agencies took full advantage of available techniques of modern technology and forensic science in the prevention, investigation and detection of crime for the interests of society generally. Real evidence of this kind was of inestimable value, as both cogent and objective, in the fight against crime and played a crucial role in the detection of the guilty e.g. detection rates for burglary were 14% but where DNA samples were recovered they rose to 48%. Since the amended power of retention, they asserted that approximately 11,688 offences had been detected, involving over 7,859 offenders, using DNA evidence that would previously have been removed from the DNA database (including 92 murders, 48 attempted murders and 116 rapes). The benefits to the criminal justice system were enormous, not only permitting the detection of the guilty but eliminating the innocent and correcting and preventing miscarriages of justice.

The Government considered that the mere retention of fingerprints, DNA profiles and samples for the limited use permitted under section 64 of PACE did not fall within the ambit of the right to respect for private life under Article 8 § 1 of the Convention. Such information did not interfere with physical and psychological integrity or an individual's right to personal development, to establish and develop relationships with other human beings or the right to self-determination.

The Government emphasised that the permitted extent of the use of the material was clearly and expressly limited both by the legislation and the technological processes of DNA profiling and the nature of the DNA profile extracted. The profile was merely a series of numbers which provided a means of identifying a person against bodily tissue, containing no materially intrusive information about an individual or his personality. The DNA database was a collection of such profiles which could be searched using material from a crime scene and a person would be identified only if and to the extent that a match is obtained against that sample. Likewise, fingerprints, DNA profiles and samples were not records susceptible to any subjective commentary capable of forming the legitimate subject of complaint. Even if such retention were capable of falling within the ambit of Article 8 § 1 the extremely limited nature of any adverse effects rendered the retention not sufficiently serious to constitute an interference.

As to the second paragraph, any interference was justified as being in accordance with law as expressly authorised by statute and proportionate for the legitimate purpose of the prevention of disorder or crime and/or the protection of the rights and freedoms of others. The powers and restrictions on the taking of fingerprints and samples were carefully set out and formulated in PACE. The exercise of the discretion to retain fingerprints and samples was also, in any event, subject to the normal principles of law regulating discretionary power and subject to judicial review. Fingerprints, profiles and samples were only kept for specific limited statutory purposes and they were stored securely and subject to the safeguards identified. This struck a fair balance

between individual rights and the general interest of the community and fell within the State's margin of appreciation.

b. Article 14 of the Convention

The Government submitted that as Article 8 was not engaged Article 14 of the Convention was not applicable. Even if it were, there was no difference of treatment as all those in an analogous situation to the applicants” were treated the same and the applicants could not compare themselves with those who had not had samples taken by the police or those who consented to give samples voluntarily. In any event, any difference in treatment complained of was not based on “status” or a personal characteristic but on historical fact. If there was any difference in treatment, it was objectively justified and within the State's margin of appreciation.

2. The applicants

a. Article 8 of the Convention

The applicants submitted that the retention of fingerprints and DNA samples and profiles interfered with their right to respect for private life as this clearly was crucially linked to their individual identity and concerned a type of personal information that they were entitled to keep within their control. They considered that Strasbourg case-law supported this contention, as did a recent domestic decision by the Information Tribunal (*Chief Constables of West Yorkshire, South Yorkshire and North Wales Police v. the Information Commissioner*, 12 October 2005, at paragraph 173). They further emphasised that retention of the samples in particular involved a greater degree of interference with Article 8 rights as they contained full genetic information about a person. It was of no significance whether information was actually extracted from DNA samples in a particular case as an individual was entitled to a guarantee that such information which fundamentally belonged to him would remain private and not be communicated or accessible without his permission.

The applicants considered that, while the Government had provided evidence that DNA samples and profiles were used only for identification purposes in the context of crime prevention, this was not the only possible use, as, in their view, the legislation as drafted, namely “purposes related to the prevention or detection of crime” “use of the investigation of offence” etc had a potentially very wide and general scope and might include collation of detailed personal information outside the immediate context of the investigation of a particular offence. Consequently, their case involved a very substantial degree of interference with the right to private life, as illustrated by ongoing public debate and disagreement about the subject in the United Kingdom (see, for example, the concerns expressed by the Parliamentary Select Committee on Science and Technology in its report “*Forensic Science on Trial*”, 29 March 2005.).

The applicants contended that the retention of the three kinds of sample could not be regarded as “necessary in a democratic society” for the purpose of preventing crime, in particular as regarded the samples, as it was the DNA profiles that that were used to link individuals with evidence found at crime scenes. The real reason for the retention of samples had to be the possible future use to which the samples could be put. Further, the retention was disproportionate as it cast suspicion on persons who had been acquitted or discharged of crimes and there were insufficient procedural safeguards against abuse, in particular no independent decision making process or scrutiny when considering whether or not to order retention. Retention applied to all

cases, irrespective of the offences involved, no reasons were given for retaining the applicants' details and retention was for an indeterminate period.

Contrary to the assertion of the Government, this was an area of intimate concern to the individual to which a narrow margin of appreciation should apply.

b. Article 14 of the Convention

The applicants submitted that they were subject to discriminatory treatment as compared to others in an analogous situation, namely other unconvicted persons and those whose samples had still to be destroyed under the legislation. This treatment related to their status and fell within the ambit of Article 14 which had always been liberally interpreted. For the reasons set out in their submissions under Article 8, there was no reasonable or objective justification for the treatment, nor any legitimate aim or reasonable relationship of proportionality to the purported aim of crime prevention, in particular as regarded the samples which played no role in crime detection or prevention. It was an entirely improper and prejudicial differentiation to retain materials of persons who should be presumed to be innocent.

B. The Court's assessment

Having regard to the applicants' complaints and the parties' submissions, the Court finds that serious questions of fact and law arise, the determination of which should depend on an examination of the merits. The application cannot be regarded as manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Court unanimously

Declares the applications admissible, without prejudging their merits.

T.L. EARLY J. CASADEVALL

Registrar President

¹ DNA stands for deoxyribonucleic acid ; it is the chemical found in virtually every cell in the body and the genetic information therein, which is in the form of a code or language, determines physical characteristics and directs all the chemical processes in the body. Except for identical twins, each person's DNA is unique. DNA samples consist of what is taken by the police and any sub-samples or part samples retained from these after analysis. DNA profiles are digitised information which is stored electronically on the National DNA Database together with details of the person to whom it relates.

S. and MARPER v. THE UNITED KINGDOM DECISION

S. and MARPER v. THE UNITED KINGDOM DECISION