From *The Times – Sunday Times Online*

Storing innocents' samples is disproportionate

European Court of Human Rights
Published December 8, 2008

S and Marper v United Kingdom (Application Nos 30562/04 and 30566/04)

Before J-P.Costa, President, and Judges C. Rozakis, Sir Nicolas Bratza, P. Lorenzen, F. Tulkens, J. Casadevall, G. Bonello, C. Bîrsan, N. Vajic, A. Kovler, S. Pavlovschi, E. Myjer, D. Jociene, J. Šikuta, M. Villiger, P. Hirvelä and L. Bianku

Deputy Registrar M. O'Boyle

Judgment December 4, 2008

The blanket and indiscriminate nature of the powers of retention of fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences failed to strike a fair balance between the competing public and private interests.

Accordingly, the European Court of Human Rights held, unanimously, that as the retention in question constituted a disproportionate interference with the applicants' right to respect for private life and could not be regarded as necessary in a democratic society, there had been a violation of article 8 of the European Convention on Human Rights.

The applicants, S and Michael Marper, both British nationals, were born in 1989 and 1963 respectively. They lived in Sheffield.

The case concerned the retention by the authorities of their fingerprints, cellular samples and DNA profiles after criminal proceedings against them were terminated.

On January 19, 2001, S was arrested and charged with attempted robbery. He was aged eleven at the time. His fingerprints and DNA samples were taken. He was acquitted on June 14, 2001.

Mr Marper was arrested on March 13, 2001, and charged with harassment of his partner. His fingerprints and DNA samples were taken. On June 14, 2001 the case was formally discontinued as he and his partner had become reconciled.

Once the proceedings had been terminated, both applicants unsuccessfully requested that their fingerprints, DNA samples and profiles be destroyed: see (*The Times* July 23, 2004; [2004] 1 WLR 2196).

Alleged violation of article 8

The Court noted that fingerprints, DNA profiles and cellular samples constituted personal data within the meaning of the Council of Europe Convention of 1981 for the protection of individuals with regard to automatic processing of personal data.

The Court indicated that the domestic law had to afford appropriate safeguards to prevent any such use of personal data as could be inconsistent with article 8. It added that the need for such safeguards was

all the greater where the protection of personal data undergoing automatic processing was concerned, not least when such data were used for police purposes.

The interests of the individuals concerned and the community as a whole in protecting personal data, including fingerprint and DNA information, could be outweighed by the legitimate interest in the prevention of crime.

However, the intrinsically private character of that information required the Court to exercise careful scrutiny of any state measure authorising its retention and use by the authorities without the consent of the person concerned.

The issue to be considered was whether the retention of the fingerprint and DNA data of the applicants, as persons who had been suspected, but not convicted, of certain criminal offences, was necessary in a democratic society.

The Court took due account of the core principles of the relevant instruments of the Council of Europe and the law and practice of the other contracting states, according to which retention of data was to be proportionate in relation to the purpose of collection and limited in time.

Those principles had been consistently applied by the contracting states in the police sector, in accordance with the Data Protection Convention 1981 and subsequent recommendations by the Committee of Ministers of the Council of Europe.

As regards, more particularly, cellular samples, most of the contracting states allowed those materials to be taken in criminal proceedings only from individuals suspected of having committed offences of a certain minimum gravity.

In the great majority of the contracting states with functioning DNA databases, samples and DNA profiles derived from those samples were required to be removed or destroyed either immediately or within a certain limited time after acquittal or discharge. Some exceptions to that principle were allowed by some contracting states.

England, Wales and Northern Ireland appeared to be the only jurisdictions within the Council of Europe to allow the indefinite retention of fingerprint and DNA material of any person of any age suspected of any recordable offence.

The Court observed that the protection afforded by article 8 would be unacceptably weakened if the use of modern scientific techniques in the criminal justice system were allowed at any cost and without carefully balancing the potential benefits of the extensive use of such techniques against important private-life interests. Any state claiming a pioneer role in the development of new technologies bore special responsibility for striking the right balance.

The Court was struck by the blanket and indiscriminate nature of the power of retention in England and Wales. In particular, the data in question could be retained irrespective of the nature or gravity of the offence with which the individual was originally suspected or of the age of the suspected offender; the retention was not time-limited; and there existed only limited possibilities for an acquitted individual to have the data removed from the nationwide database or to have the materials destroyed.

The Court expressed a particular concern at the risk of stigmatisation, stemming from the fact that persons in the position of the applicants, who had not been convicted of any offence and were entitled to the presumption of innocence, were treated in the same way as convicted persons.

It was true that the retention of the applicants' private data could not be equated with the voicing of suspicions. None the less, their perception that they were not being treated as innocent was heightened by the fact that their data were retained indefinitely in the same way as the data of convicted persons, while the data of those who had never been suspected of an offence were required to be destroyed.

The Court further considered that the retention of unconvicted persons' data could be especially harmful in the case of minors such as the first applicant, given their special situation and the importance of their development and integration in society.

It considered that particular attention had to be paid to the protection of juveniles from any detriment that could result from the retention by the authorities of their private data following acquittals of a criminal offence.

In conclusion, the Court found that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, failed to strike a fair balance between the competing public and private interests, and that the respondent state had overstepped any acceptable margin of appreciation in that regard. Accordingly, the retention in question constituted a disproportionate interference with the applicants' right to respect for private life and could not be regarded as necessary in a democratic society. The Court concluded unanimously that there had been a violation of article 8.

Alleged violation of article 14

In the light of its conclusion under article 8, the Court considered unanimously that it was not necessary to examine separately the complaint under article 14.

Application of article 41

The Court considered that the finding of a violation, with the consequences that that would ensue for the future, could be regarded as constituting sufficient just satisfaction in respect of the non-pecuniary damage sustained by the applicants. It noted that, in accordance with article 46, it would be for the respondent state to implement, under the supervision of the Committee of Ministers, appropriate general and/or individual measures to fulfil its obligations to secure the right of the applicants and other persons in their position to respect for their private life.

The Court awarded the applicants €42,000 in respect of costs and expenses, less €2,613.07 already paid in legal aid.

Full text: http://www.echr.coe.int