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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Gaughran's (Fergus) Application [2012] NIQB 88

IN THE MATTER OF AN APPLICATION BY FERGUS GAUGHRAN FOR JUDICIAL REVIEW

Higgins LJ Girvan LJ and Coghlin LJ

GIRVAN LJ (delivering the Judgment of the Court)

Introduction

[1] This is a judicial review application brought by Fergus Gaughran ("the Applicant") who by these proceedings challenges the right of the Police Service of Northern Ireland ("the PSNI") to retain for an indefinite period fingerprints, a photograph, a DNA sample and a DNA profile ("the relevant data") taken from him after he was arrested on a charge of driving with excess alcohol. Unlike the situation of parties acquitted of an offence who have successfully challenged the lawfulness of the indefinite retention of such samples, the applicant was convicted of the offence with which he was charged. This is the first case in which the court has been called on to adjudicate on the lawfulness of the indefinite retention of such data following a conviction for a criminal offence which the applicant alleges to be a relatively minor criminal offence and which he claims is of insufficient gravity to justify indefinite retention of the material.

[2] Mr O'Donoghue QC and Mr McCartney appeared on behalf of the applicant and Mr McMillen QC and Mr Coll appeared for the Chief Constable of the PSNI ("the Respondent"). The court is indebted to counsel for their written and oral submissions on this matter which is one of some complexity.

The factual background

[3] The applicant was stopped at a vehicle checkpoint on 14 October 2008 between Crossmaglen and Camlough, Co Armagh. He was breathalysed, arrested and taken to a police station in Newry. A breath test was carried out at the police station and when analysed it showed a measurement of 65mgs of alcohol per 100ml of breath. The applicant in his grounding affidavits has asserted that he was extremely intoxicated while in the police station although this is not borne out by the level of the measurement. He was charged with driving with excess alcohol and pleaded guilty to that charge at Newry Magistrates' Court on 5 November 2008 when he was disqualified and fined.

[4] Throughout the procedures carried out in the police station the applicant was co-operative. After the breath test was taken he was informed by another police officer that he was required to take a photograph of the applicant and to take his fingerprints and a DNA sample. He was informed that this was standard procedure. He was not given any right to object either before or after those steps had been taken. The applicant asserts that if he had understood that he did not have to engage in the process he would have left the police station immediately without providing the material. The DNA sample was taken by buccal swab. He was not informed as to what would happen to the photograph, the fingerprints or the DNA sample taken. It is the applicant's case that he did not give informed consent to the taking of those materials.

[5] On 15 January 2009 the applicant's solicitors requested that the fingerprints the photograph and DNA sample should no longer be retained. Having received no such assurance that they would not be retained, the applicant sought leave to bring a judicial review challenge to the respondent's continued retention of the materials. In these proceedings the applicant seeks:

(a) a declaration that the indefinite retention of the data was unlawful and constituted an unjustifiable interference with his right to respect for private life under Article 8 of the convention; and

(b) an order of prohibition preventing the respondent from making any use of the relevant data.

The applicant had in his application sought an order of mandamus compelling the respondent and any other relevant authority having possession of the data to destroy the materials but Mr O'Donoghue indicated that that relief was no longer being sought.

[6] By order of Morgan J on 3 April 2009 the applicant was granted leave to apply for judicial review on the grounds set out in paragraphs 9(c) and (d) of the Order 53 statement. These grounds are expressed thus:

> "(c) The retention of the [data] for an indefinite period of time in the unregulated manner observed by the

European Court between paragraphs 105-125 of its Judgment in S and Marper v UK (4 December 2008) is not proportionate and does not strike a fair balance between competing public and private rights.

(d) A conviction for an offence of relatively minor gravity is very much the type of circumstance in which the Committee of Ministers in R(92)-1 gave a provisional view that there was no need for taking or retention of such samples. The European Court has been heavily influenced by that document and there is every reason to believe that they would continue to be influenced by the document and those observations and circumstances where they were dealing with the conviction of an individual for a minor offence in circumstances where the samples were taken not for the true purposes of investigating the offence but simply for the purpose of retaining data in connection with the individual."

[7] The order of 3 April 2009 omitted to record the terms upon which leave was granted and by a corrective order of 8 January 2010 Treacy J made clear that the applicant had leave to apply to a single judge in relation to those grounds. At that stage Treacy J did not have the benefit of the decision of the Divisional Court in Re JR 27 [2010] NIQB 12 in which the court concluded that the issues raised in such an application give rise to a criminal cause or matter necessitating a Divisional Court hearing.

The statutory context of the taking and retention of samples

[8] Article 63 of the Police and Criminal Evidence (Northern Ireland) Order 1989 as amended by the 2007 Amendment Order prescribes the circumstances in which a non-intimate sample may be taken from an individual. It is not in dispute that the buccal swab taken from the applicant to gather his DNA was a non-intimate sample. Such a sample may not be taken from a person without the appropriate consent given in writing. It may be taken (inter alia) without consent if the person is under arrest for a recordable offence and is in police detention and has not had a non-intimate sample of the same type taken previously in the course of the investigation. The article also contains other powers for the compulsory taking of samples, all in the context of defendants detained or charged or convicted of recordable offences. Regulation 2 of the Northern Ireland Criminal Records (Recordable Offences) Regulations 1989 provides that there may be recorded in Northern Ireland Criminal Records convictions for offences punishable with imprisonment and for certain other offences set out in paragraphs (a)-(e). While

there is a dispute as to whether the applicant had given informed consent to the taking of the samples, in these proceedings the issue relates to the retention rather than the taking of the samples and the case has proceeded on the basis that the taking of the samples was consensual.

[9] Article 63(1) provides that except as provided by Article 61 no person's fingerprints may be taken without appropriate consent in writing. They may be taken without the appropriate consent if he is detained in consequence of his arrest for a recordable offence. It is not in issue in these proceedings that the applicant's fingerprints were duly taken under Article 63(1).

[10] Under Article 64A a person who is detained at a police station may be photographed with the appropriate consent or, if withheld or it is not practicable to obtain it, without such consent. The applicant accepts that he consented to the taking of the photograph.

[11] Article 64 contains the statutory provisions relating to the destruction or retention of fingerprints and samples. Article 64(1A) provides:

> "Where –
>
> (a) fingerprints, impressions of footwear or samples are taken from a person in connection with the investigation of an offence; and
>
> (b) paragraph (3) does not require them to be destroyed,
>
> the fingerprints, impressions of footwear 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, the conduct of a prosecution or the identification of a deceased person or of the person from whom a body part came.

Succeeding provisions in Article 64 set out the circumstances in which samples and fingerprints must be destroyed and prohibit their use in circumstances where destruction is required. None of those provisions relating to the requirement to destroy come into play in the present instance because the applicant was convicted. For present purposes it should be noted that Article 64(1A) confers a permissive power on the respondent to retain the relevant materials which were taken in connection with the investigation of an offence and it contains a statutory limitation on the uses to which the police may put the material (that is to say the prevention or

detection of crime, the investigation of offences, the conduct of a prosecution or the identification of a deceased person or body parts).

[12] In the case of photographs taken pursuant to Article 64A the photographs may be used by or disclosed to any person for any purpose related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution or to the enforcement of a sentence and after being so used or disclosed may be retained but may not be used or disclosed except for a purpose so related.

The current practice and policy in relation to retention

[13] The current procedure and practice of the PSNI is to take photographs, fingerprints and a DNA sample from all persons who are arrested for a recordable offence. The PSNI considers that it should maintain that practice. It considers that the use of DNA and fingerprints is well established as a tool for the investigation of crime. Custody photographs can be used in the identification process to show to witnesses in controlled circumstances. They are also useful tools for ensuring that the arrested person is who he or she claims to be. The Northern Ireland Fingerprint Database holds fingerprints relating to approximately 300,000 persons. The Fingerprint Bureau is located within a secure police establishment. The UK National DNA Databank was established in 1995 and currently holds around six million subject profiles from UK wide police forces. The Northern Ireland DNA Database was established in September 1996. It is operated and maintained by FSNI. It is current policy to take DNA samples from all persons arrested for a recordable offence. As of June 2012 there are a total of 123,044 entries with a confirmed status. Members of the PSNI take the DNA samples from arrested persons and those DNA samples are transferred to the FSNI labs where a profile is extracted. The FSNI does not destroy or remove any DNA profile from the database without any instructions from the PSNI. Any changes in legislation and current practice to require destruction of samples and profiles would require a comprehensive IT solution to assist in establishing which samples and profiles are to be retained and which are to be disposed of. The amount of work involved would apparently be considerable and there would be a significant financial cost. A manual exercise would have to be carried out in respect of each and every profile, fingerprint and photograph in the database. If there is a requirement to distinguish within the class of those who have been convicted of a recordable offence so as to decide which of them are guilty of "less serious" offences than others the problems would be compounded. Until new legislation is enacted the respondent's view is that it would be impractical and imprudent to start any type of weeding out process.

[14] The Association of Chief Police Officers ("ACPO") has issued guidance entitled "Exceptional Case Procedure for the Removal of DNA fingerprints and PNC records" published on 16 March 2006. The exceptional case procedure states that exceptional cases will be rare. An example is given ("a dead body is found in a multi-occupancy dwelling and the cause of death is not immediately obvious, all occupants are arrested on suspicion of murder. Samples are taken from all. It later

transpires the deceased died of natural causes and no offence has occurred"). The document states that while it is not recommended that any pro-active exercise be undertaken to determine potentially exceptional cases, the DNA and fingerprint retention project maintains a library of circumstances that have been viewed as giving rise to exceptional cases.

[15] What is in issue in the present case is whether the current practice and policy which involve the retention without time limit of the applicant's relevant data is a disproportionate interference with his private life under Article 8. This challenge is made against the background of a bill currently before the Northern Ireland Assembly, the Criminal Justice Bill ("the Bill"), which if enacted would make provision for regulating this area on a statutory basis.

The Criminal Justice Bill

[16] Following a change in the law in England and Wales under the Protection of Freedoms Act 2012, Clause 7 of the Bill proposes amendment of Article 63A of PACE by insertion of the new article set out in Schedule 2. If enacted the new legislation would require the destruction of data unless their retention is specifically authorised under a power to be conferred by the new proposed Articles 63C-63J. So for present purposes the provisions of draft Article 63F would provide that, subject to special provisions for persons under 18, material relating to a person convicted of a recordable offence and taken (or in the case of a DNA profile derived from a sample taken) in connection with the investigation of the offence may be retained indefinitely. Thus the new legislation, if enacted, would put on a statutory basis what is currently happening on foot of the current practice and policy. The draft bill if enacted would set out new parameters for the retention of samples and fingerprints taken from persons subsequently not convicted of an offence and makes provision for very limited circumstances in which retention of such material would be permissible.

[17] In this application the court can only be concerned with establishing the lawfulness of the current practices and policies of the PSNI and it is not the function of this court, nor would it be appropriate for it, to comment on draft legislation pending before the legislature. The determination of this court in relation to the present application may, however, have implications for those involved in considering the draft legislation. That would be the inevitable outcome flowing from a court decision establishing or declaring the current state of the law.

The parties' contentions

The applicant's case

[18] Mr O'Donoghue QC subjected the provisions of Article 63 of PACE as amended by the 2007 Order to a careful analysis. Whereas, prior to the 2007 Order, a non-intimate sample could not be taken without the consent of the individual except

in circumstances where he had committed a serious arrestable offence as defined, under the amended provisions a non-intimate sample may now be taken from a person without the appropriate consent if he is in police detention in consequence of an arrest for a recordable offence or has been charged with a recordable offence or has been convicted of such an offence. Thus a central consideration in play in deciding whether to take a non-intimate sample is whether the person is suspected of having committed or has committed a recordable offence. The offence of driving with excess alcohol was not a serious arrestable offence but it is within the definition of a recordable offence. Counsel argued that there is no need to retain the DNA profile of a person convicted of such an offence which cannot be considered on any objective analysis as the kind of offence pointing to a higher risk of the individual concerned committing further offences as compared to unconvicted persons. Counsel challenged the policy of indefinite retention of such material following conviction and argued that the state had failed to provide a mechanism for a review of the need to continue to retain items belonging to a person in the applicant's position. There was, he contended, a breach of Article 8(1) and 8(2) of the Convention.

[19] An inflexible policy of indefinite retention based solely on whether a person has been convicted of a recordable offence is, counsel argued, too wide to be justifiable under Article 8(2). Any justification had to be in accordance with law in the manner set out in S and Marper. Counsel called in aid Council of Europe Recommendation R(92)(1) on the use of DNA in the criminal justice system which, he contended, envisaged that the fact of a conviction did not of itself provide a justification for indefinite retention. Similar considerations apply to the retention of fingerprints and, in the light of RMC and FJ v Commissioner for Police [2012] EWHC 1861, the retention of photographs. Any justification for the retention of data had to have regard to the gravity of the offence, to the propensity of an individual to commit crime, to the rehabilitation of individuals, to the reduction of the risk the individual presented to society, and to the likelihood of the data assisting in detection of future offending. In the context of the applicant none of these factors pointed to the need for indefinite retention. S and Marper was informed by (a) the highly personal nature of the information retained; (b) the highly important nature of the right to respect for private life; (c) the need for any intrusion into the right to be in accordance with domestic law and Article 8(2) and (d) the need for deletion when measures were no longer necessary to keep the material. The retention of data in respect of persons convicted of all recordable offences, some of which can be trivial, runs contrary to recommendation R(92)(1). Furthermore, there was no mechanism by which the affected individual could apply for a review of the need for the continued retention.

[20] Mr O'Donoghue QC referred to a number of Strasbourg authorities which he argued supported the view that time limitation to retention was necessary if a retention law and practice was to be proportionate – Van der Velden v Netherlands (29514-05); W v Netherlands 20689-08 and Gardel v France (16428-05). He also referred to recommendation R(87)15. Clause 2.1 thereof states that the collection of

personal data for police purposes should be limited to such as is necessary for the prevention of a real danger and the suppression of a specific criminal offence. Any exception to this provision should be subject to specific national legislation. Clause 7 provides that 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 are stored. Consideration should be given in particular to the criteria therein set out (the need to retain data in the light of the conclusion of the 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).

The respondent's case

[21] Mr McMillen QC accepted that the proposed changes under the Criminal Justice Bill would not affect the applicant's position. He said that it is intended to destroy DNA samples once an adequate profile has been extracted. He pointed out that the applicant's case was solely based on the proportionality finding in Marper. He argued that on a strict analysis, having regard to the timing of the applicant's application, the applicant's challenge should be viewed as a challenge to the retention of the material for 3 months after the conviction. On no view could that be considered to be disproportionate. Counsel invited the court to dismiss the application on that limited basis leaving it to the applicant to make a further application after a suitable period when the court could consider the matter against a more settled legislative and policy framework.

[22] Turning to the applicant's more wide ranging challenge to the lawfulness of retaining the materials, counsel submitted that having regard to the purposes for which the materials were held and the controls relating to access to them their retention was in accordance with law and had a legitimate aim. There was a pressing social need to combat crime. The state had a margin of appreciation in determining the necessity of retention. Counsel accepted that in Marper the European Court took an expansive view on the engagement of Article 8. An interference must reach a certain level of seriousness to engage Article 8. There must be an expectation of privacy. A person's expectation of privacy when he is being processed for an offence which *ex hypothesi* he knows he has committed is different from when he believes himself to be innocent. His consent is also relevant. The applicant would have known that the materials would be retained and could be used at a later time. A convicted person is in a quite different position from an unconvicted person. For this reason counsel argued that Article 8(1) was not engaged or breached in relation to this applicant.

[23] Mr McMillen stressed that Marper had nothing to say to the case of convicted persons. The state's interest in any interference with the privacy of convicted as opposed to unconvicted persons must be quite different. The issue of stigmatisation in relation to unconvicted persons does not arise. The court was in that case concerned with the blanket and indiscriminate nature of the retention of all samples of all unconvicted persons. In the present case the policy relates to the retention of

materials drawn from those convicted of a limited class of offences, namely recordable offences, a sub-category of crime which the legislature acting within its margin of appreciation has chosen to be the relevant category calling for unlimited retention. The state has a legitimate and heightened interest in retaining the relevant data of convicted persons.

[24] Mr McMillen recognised that in Re JR27 the police policy in relation to retention of photographs was held to be insufficiently clear to pass the quality of law test required for the purposes of Article 8.2. While counsel did not concede that the criticism of the policy in Re JR27 was correct, it was a matter still under active consideration by the respondent who should be allowed a period of time to bring the police procedures into conformity with Article 8.

[25] Counsel stressed that the DNA material was held securely by FSNI and was only accessible by certain staff, not by the police, who would be merely told if a match was found or not. No other police force or other agencies or non-governmental bodies had access to the material. The fact that a profile was on the system was not publicly known. None of the materials in question (whether DNA, fingerprints or photographs) could be used for anything other than limited statutory purposes.

[26] The respondent argued further that Strasbourg had not established that the retention of such material in respect of convicted persons would fall foul of Article 8 and the Marper decision was clearly restricted to a case of an unconvicted person. Counsel reminded the court of what Lord Hope stated in Ambrose v Harris [2011] 1WLR 2435, namely that the court's task is to identify as best it can the stance that the Strasbourg jurisprudence clearly takes on the issue. It is not for a domestic court to expand the scope of a Convention right further than what is justified by the jurisprudence of the Strasbourg Court. If Strasbourg has not yet spoken clearly enough on an issue the wiser course must be to wait until it has done so.

Discussion

[27] Having regard to the limited grounds on which leave was granted in the case and in the light of the arguments presented by the parties the issue which falls for determination is whether the indefinite retention by the PSNI of the relevant data pursuant to the current PSNI policy and practice contravenes the applicant's Convention right under Article 8 to respect for his private life. This issue involves, firstly, a consideration of the question whether the retention of the materials discloses an interference with the applicant's right to respect for his private life within the meaning of Article 8(1) of the Convention and, if so, secondly, whether the interference is justified under Article 8(2).

[28] Reference must be made to the conclusions reached by Strasbourg and the House of Lords and the Supreme Court in relation to the rights of unconvicted persons from whom relevant data has been taken. The thrust of Mr O'Donoghue's

argument was that the Strasbourg analysis in Marper points inexorably to the conclusion that in the case of this applicant in the light of his conviction indefinite retention of the relevant data is disproportionate.

[29] In R (S&R) Marper v Chief Constable of South Yorkshire Police (2004) 1WLR 219 (to which we shall refer as "Marper in the House of Lords") the applicants challenged the retention of fingerprints, cellular samples and DNA profiles after proceedings against them had led to acquittal or discontinuance. It was not in doubt that the taking of fingerprints and samples from those suspected of having committed a relevant offence was considered to be a reasonable and proportionate response to the scourge of crime (per Lord Steyn). The majority in the House of Lords concluded that in relation to the retention of the data there had been no interference under Article 8(1) with the applicant's right to respect for his private life. Baroness Hale, however, disagreed on that issue concluding that the materials were retained for the private and personal information which they contained. She concluded that Article 8(1) was engaged. The House concluded unanimously that the retention was in any event compatible with Article 8(2).

[30] The question came before the European Court of Human Rights in S & Marper v UK (2009) 48 EHHR 50 which upheld the applicants' complaints, finding that in the case of unconvicted persons the retention of the data at the termination of the proceedings was disproportionate under Article 8(2). There was a breach of Article 8(1) and the retention could not be justified as proportionate under Article 8(2). In para 119 the court said:

> "The court is struck by the blanket and indiscriminate nature of the power of retention in England and Wales. The material may be retained irrespective of the nature or gravity of the offence for which the individual was originally suspected or of the age of the suspected offender; fingerprints and samples may be taken and retained from a person of any age arrested in connection with a recordable offence which includes minor or non-imprisonable offences. The retention is not time limited, the material is retained indefinitely whatever the nature or seriousness of the offence of which the person was suspected. Moreover there exist only limited possibilities for an acquitted individual to have the data removed from the Nationwide Database or the materials destroyed; in particular, there is no provision for independent review of the justification for the retention according to defined criteria including such factors as the seriousness of the offence, previous arrests, the strength of the suspicion against the person and any other special circumstances."

The court went on to conclude in paragraph 125:

> "In conclusion the court finds 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, fails to strike a fair balance between competing public and private interests and that the respondent state has overstepped an acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicant's right to respect for private life and cannot be regarded as necessary in a democratic society. This conclusion obviates the need for the court to consider the applicant's criticism regarding the adequacy of certain particular safeguards, such as too broad an access to the personal data concerned and insufficient protection against the misuse or abuse of such data."

[31] It was in response to this conclusion that the United Kingdom Government embarked on statutory reform to take account of the court's findings. In England and Wales the matter has now been regulated by the 2012 Act and the Criminal Justice Bill in Northern Ireland, if enacted, would follow the same statutory path.

[32] This area of law was revisited by the Supreme Court in R (GC) v Metropolitan Police Commissioner (2011) 1WLR ("GC"). That case again related to individuals from whom relevant materials had been taken and who were subsequently acquitted or not prosecuted. Nothing is said in the judgments in that case that touches on the position of persons who have been convicted and from whom samples have been taken and are retained indefinitely. In GC the Supreme Court overruled the House of Lords' decision in Marper which had been overtaken by the Strasbourg decision. It concluded that the indefinite retention of the claimants' data was an unjustified interference with their rights under Article 8(1) but it held that since Parliament was seised of the matter it was neither just nor appropriate to make an order requiring a change in the legislative scheme within a specified period or for destruction of data which it might be lawful to retain under the scheme which Parliament might enact. Accordingly, the only relief was a declaration that the present guidelines were unlawful. Three members of the court (Lord Phillips, Lord Judge and Lord Dyson) opined that if Parliament did not produce revised guidelines within a reasonable time the claimants would be able to seek judicial review of the continuing retention of the data under the existing guidelines.

The Article 8(1) Issue

[33] It is necessary to distinguish between the process of the gathering of relevant data of this kind and the subsequent retention and use of the data. Whilst in JR 27 it was conceded that Article 8(1) did not come into play in relation to the taking of the materials the correct analysis is that of Lord Steyn in Marper in the House of Lords. He said:

> "It is true that the taking of fingerprints and samples involves an interference with the individual's private life within the meaning of Article 8(1) of the Convention. On the other hand such interference for the very limited statutory purposes is plainly objectively justified under Article 8(2)."

Obviously if a person is required or asked to provide a sample from his mouth and from his fingertips and to submit himself to a photograph of his face this involves him giving access to matter which is of a very personal nature.

[34] In this case if a true consent was given by the applicant to the provision of the data the taking of the relevant material was justified and consensual. If, in fact, the purported consent was not a true consent but one obtained under implied coercion or express or implied pressure against the background of the statutory right to obtain the materials, the gathering of the data was objectively justified for the reasons stated by Lord Steyn.

[35] If private data has been lawfully and justifiably generated it is difficult as a matter of logic to see why the data would cease to represent private information after its taking. Mr McMillen, however, contends that once the defendant is convicted he can have no expectation of privacy in respect of the material for he had become engaged in a public process and having committed the crime in respect of which he has been convicted he could not complain of the subsequent retention and use of the data. If counsel were correct in his contention, unless restricted by domestic law, the applicant would have no protection against any subsequent use or disclosure of the information obtained from the data. The statutory restrictions on the use to which the materials may be put and the administrative procedures in place to protect the use and publication of the material point to the state's concern to ensure that the information is entitled to a significant degree of protection. While this does not of itself show that Article 8(1) is engaged, what Baroness Hale says at paragraph [77] of her speech in Marper in the House of Lords underpins the logic of treating material admittedly private at the time of taking as continuing to be private thereafter:

> "If keeping and storing this information by the state were not an interference with the right guaranteed by Article 8(1), the consequences would be surprising. First it would not be necessary to find any justification for it under Article 8(2). Of course, mere keeping of the

> information is a lesser interference than using it, and may be easier to justify. But it would be surprising if the State were free to do this without demonstrating a legitimate aim and that it was necessary to keep the information in this way in pursuit of that aim. Secondly, if Article 8(1) is not engaged by the mere keeping of private information, then the state might be free to be thoroughly discriminatory in choosing which information to keep, without contravening Article 14. It would be surprising if a decision to keep all the information obtained from, say, black suspects but not from whites did not contravene Article 14. But unless the keeping falls within the ambit of Article 8 it would not do so."

[36] The true question, therefore, is not whether the retention of the material falls outside Article 8(1) but rather whether its indefinite retention is in the circumstances of this case a disproportionate interference with the applicant's Article 8 rights arising from the fact that the police have obtained and retained private information.

The Art 8(2) Issue

[37] The Strasbourg analysis in Marper on the issue of justification proceeded along the usual course of determining whether the interference was (a) in accordance with law, (b) pursued a legitimate aim and (c) was necessary in a democratic society. This last question involved the issue whether the retention was proportionate and struck a fair balance between the competing public and private interests. The question whether an interference is in accordance with law involves a consideration of the question whether there is a domestic law basis for the action and whether the quality of the domestic law is of such a nature as to satisfy the Convention requirement that the nature of the law must be such as to provide legal guarantees against the risk of abuse and arbitrariness.

[38] In this application, having regard to the limited grounds upon which leave was granted, the focus of the applicant's case was on the question of necessity and proportionality. In Marper Strasbourg considered that there was a close interconnection between the question whether the interference was necessary in a democratic society and the question whether the English statutory provisions (Section 64 of the English Act) met the quality of law requirements (see paragraph 99). In view of its analysis in paragraphs 105-126 it did not consider it necessary to decide whether the quality of law requirement was met.

[39] There clearly is a statutory power to retain the data. The retention pursues a legitimate aim, namely the prevention of crime and the detection of criminals. The focus of attention must be on the proportionality of indefinite retention. This case does not provide the occasion to determine whether there is in place a sufficiently clear and precise legal framework for the exercise of the discretionary power to

retain the material satisfying the quality of law requirements to which Strasbourg referred in paragraph 99 of Marper. Article 64(1A) permits a Convention compatible exercise of the discretionary power to retain but if the discretionary power is exercised in a disproportionate way the court will intervene (see GC). The question is whether in the context of this case the exercise of indefinite retention is disproportionate. In answering that question it is necessary to decide whether (a) the retention goes beyond what is necessary; (b) it has no rational connection between the public policy objective pursued and the means employed; and (c) it fails to strike a fair balance between the demands of the community and the requirements of the protection of an individual's fundamental rights.

[40] What is clear from Marper is that the court was not addressing the issue arising in this case. The court was at pains to point out that the only issue to be considered by the court was whether the retention of the fingerprints and DNA material and data of the applicants, persons who had been suspected but not convicted of certain criminal actions, was justified under Article 8(2) of the Convention (see paragraph 106). Thus the court said:

> "The court must consider whether the permanent retention of fingerprints and DNA data *of all suspected but unconvicted* persons is based on relevant and sufficient reasons." (italics added)

One cannot fairly and logically deduce from the court's analysis of the issue relating to the proportionality of retaining unconvicted persons' data the conclusion that Strasbourg was bound to come to a similar conclusion in relation to persons convicted of what the applicant claims to be a less than serious offence. The *ratio decidendi* in Marper relates solely to the position of unconvicted individuals. Nor is it justifiable to draw a conclusion from cases such as Van der Velden and W v Netherlands that because the national laws in those cases had time limitations on the retention of data in respect of offenders in relation to certain offences, and because Strasbourg considered no argument of disproportionality arose, that in some way Strasbourg was making clear that unlimited retention in respect of recordable crimes would be disproportionate. Strasbourg has not yet spoken on the issue which arises in this case.

[41] In Ambrose v Harris [2011] 1WLR 2435 Lord Hope pointed out that the court's task was "to identify as best it can where the jurisprudence of the Strasbourg Court clearly shows that it stands on the issue. It is not for this court to expand the scope of the Convention Rights further than the jurisprudence of Strasbourg justifies". Lord Kerr opined that rather than the court merely sheltering behind the fact that Strasbourg has so far not spoken on an issue and using that as a pretext for refusing to give effect to a right that is otherwise undeniable it should determine the extent of the individual's Convention right. He considered that it was not only open to the court to address and deal with the arguments on the merits but it was the duty of the court to do so. In that case the court submitted to close analysis the

Strasbourg case law on the issue of police questioning of suspects. It concluded that the Strasbourg jurisprudence did not lead to the conclusion that the suspects in that case should be entitled to access to a lawyer before making incriminating statements when they were not in custody. Nothing in the reasoning of the majority in the Supreme Court suggests anything other than that the court was seeking to establish to what the accused were entitled under the Convention rights in Article 6. In reaching this conclusion the majority examined the Strasbourg case law which did not compel the answer for which the defendants were arguing. The Supreme Court's analysis of the Convention law followed the conventional route and Lord Hope's remarks were no more than a warning that the domestic courts should not seek to anticipate Strasbourg's future rulings on an issue not yet decided by them. This does not mean that the domestic court is not bound to find an answer to the questions raised before it in a particular case in which there has been an alleged breach of a Convention right. In reaching that answer the court must be informed by existing Strasbourg authorities and by an application of existing principles.

[42] When reading Marper one must be careful to read its wording in its proper context. Thus, for example, when referring to the blanket and indiscriminate policy as being objectionable the court was clearly speaking of "the blanket and indiscriminate nature of powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences". Strasbourg was thus not saying that a blanket policy of retention the data of convicted persons would be unlawful. (See paragraph 125 of the court's conclusion referred to at paragraph [30] above.) What is implicit in its conclusion is that while an undifferentiated blanket policy of retaining all unconvicted person's data is objectionable, in the case of some unconvicted persons retention may be justifiable. The court's focus was solely and entirely on the issue of unconvicted persons and paragraph 119 of the judgment must be read in that context.

[43] Since Strasbourg has not spoken on the issue of convicted persons and since the question of the retention of their DNA and other material raises quite separate questions to those which were raised in Marper, in determining where the balance should be drawn in a case such as the present this court must approach the question without the benefit of a Strasbourg authority on point and must thus seek to determine the question of proportionality of the current policy in accordance with ordinary principles.

[44] In considering the issue of the proportionality of the policy of indefinite retention of the data of persons such as this applicant convicted of recordable offences the following factors must be taken into account:

(i) The building up of a database of such data from those convicted of offences provides a very useful and proven resource in the battle against crime by reason of the assistance it provides in identifying individuals. It is clear that the larger the database the greater the assistance it will provide. While a universal database would be of immense help in combatting crime, weighing

the private rights of individuals against the good which would be achieved by such a universal system requires the striking of a fair balance. Experience has shown that those who have committed offences may go on to commit other offences. A state decision to draw the line at those convicted of a substantial category of offences is entirely rational and furthers the legitimate aim of countering crime so as to protect the lives and rights of others.

(ii) The rights and expectations of convicted persons differ significantly from those of unconvicted persons. The striking of a balance between the public interest and the rights of a convicted or an unconvicted individual will inevitably be appreciably different. Strasbourg recognises that even in the case of some unconvicted persons retention for a period may be justifiable in the public interest.

(iii) A person can only be identified by fingerprints and DNA sample either by an expert or with the use of sophisticated equipment. The material stored says nothing about the physical make up, characteristics or life of the person concerned and it represents objective identifying material which can only be relevant or of use when compared with comparative material taken from a person lawfully subjected to a requirement to provide such material for comparison.

(iv) The use to which the material can be lawfully put is severely restricted by the legislation.

(v) As well as being potentially inculpatory the material may be exculpatory and thus in ease of a person such as the applicant. If it is inculpatory its use assists in the detection of someone likely to have been involved in crime which is a matter of deep interest to the public.

(vi) There is in place an exceptional case procedure which permits of a possibility of an application to have data removed.

(vii) Any differentiation within the system between categories of convicted persons calls for administrative action and has the potential for administrative complexity. Lord Steyn described how there was the potential for interminable and invidious disputes where differentiation is operated. While he was making that point in the context of differentiation between convicted and unconvicted persons (and thus was in error according to the Strasbourg court) the point retains its force in the context of differentiation between convicted persons. Carswell LCJ pointed out in Re McBride [1997] NI 269 at 274 that the legislature wished to have as wide a cover for the database as possible in order to give the police the best chance of detecting criminal offenders. Marper requires protections for unconvicted persons and the current legislation and policy have limited the retention of data to those convicted of recordable offences. To allow further exceptions would in the

view of the authorities undermine the effectiveness of the process which is designed to build up a database of those who have been involved in criminality to assist in the war against crime. Such a conclusion by the state authorities is legitimate and rational.

(viii) The current policy in fact does distinguish between (a) unconvicted persons and those convicted of offences which are not recordable and (b) those convicted of offences which are recordable. This represents a policy and legislative intent which is not blanket or indiscriminate as such but one which distinguishes between cases. The choice of that differentiation is one involving the exercise of judgment by the state authorities which seeks to balance, on the one hand, the very limited impact of retention and use of such material on a person's real private life and its minimal impact on the intimate side of his life and, on the other hand, the benefit to society flowing from the creation of as effective a database as legitimately possible to help in combatting crime. The choice to retain the data of those convicted of recordable offences represents the exercise of a balanced and rational judgment by the authorities.

(ix) In this case the offence committed by the applicant cannot, as the applicant asserts, be described as minor or trivial. It was an offence of a potentially dangerous anti-social nature. The criminal law has as one of its aims the protection of the lives of others and the consumption of alcohol by a driver endangers human life. Indeed the state under its operative duties under Article 2 must have in place laws which protect the lives of others. The offence was a recordable offence being one in respect of which a period of imprisonment could be ordered.

(x) Time limitations on the retention of data for particular categories of offences can be imposed as has occurred in some legal systems such as in the Netherlands (See W and Van der Velden). Different countries operate different policies in this field and some other countries follow practices similar to those followed in the United Kingdom. Any time restriction is inevitably somewhat arbitrary and it is difficult to point to any particular reason why one particular period as opposed to another should be chosen. To introduce time limitations for some offences simply to avoid a possible charge of disproportionality smacks of defensive policy making in a field which requires a proper balancing of the interests of the public against the consequences of criminal activity. The introduction of different time periods for different offences or for different sentences would clearly add to the administrative burden and would require changes and deletion of recorded data. This complexity would be aggravated in the case of those found guilty periodically of repeat offending in respect of minor offences. The removal of such data would give the offender no benefit other than the knowledge that his data is no longer recorded. As already noted the retention of the data represents a very minor intrusion into his private life.

(xi) The retention of the data serves the added purpose of discouraging a convicted offender from reoffending for the offender has the knowledge that the police have available data which could lead to his detection. The permanent retention of that data thus serves a useful long term purpose in that regard.

[45] These factors point to the conclusion that the policy of indefinite retention is not disproportionate and, accordingly, the applicant's application must be dismissed.