Neutral Citation No. [2010] NIQB 12 | *Ref:* **McCL7721**

Judgment: approved by the Court for handing down | *Delivered:* **08/02/10**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

BEFORE A DIVISIONAL COURT

IN THE MATTER OF AN APPLICATION BY JR 27 FOR JUDICIAL REVIEW

JUDGMENT No 1

Before Morgan LCJ , Weatherup J and McCloskey J

I INTRODUCTION

McCLOSKEY J

[1] The sole issue addressed in this judgment is whether these proceedings constitute a criminal cause or matter.

[2] This is an application for judicial review by a litigant to whom anonymity has been granted, by virtue of his age. The factual matrix, which is uncontentious, can be stated in brief compass. The Applicant is aged fourteen years. On 7th October 2008, he was arrested by the police by reason of his suspected involvement in a burglary. At the police station, in the presence of his solicitor, he was interviewed. Following interview, the Applicant provided two DNA samples and fingerprints and he was photographed (hereinafter described as "*the impugned measures*"). He neither consented nor objected to the impugned measures. Several weeks later, the Public Prosecution Service intimated that the Applicant would not be prosecuted.

[3] Next, by letter dated 18th December 2008, the Applicant's solicitors requested the police to remove from all relevant data bases and to destroy the following items:

(a) The DNA samples taken from the Applicant.

(b) All information – whether cellular, electronic, digital or in whatever format – originating from the DNA samples.

(c) The Applicant's fingerprints.

(d) All physical and digital photographs of the Applicant.

This letter also requested "*a written undertaking that the Chief Constable will not retain any of the above information in any format whatsoever after* [its] *destruction"*. The letter enclosed a copy of the decision of the European Court of Human Rights in ***S and Marper –v- The United Kingdom*** [Applications Nos. 30562/04 and 30566/04, 4th December 2008].

[4] This elicited a response on behalf of the Chief Constable, by letter dated 15th January 2009, containing the following material passage:

> "*The implementation of this judgment is a matter for the United Kingdom Government. It is anticipated that amendments will be made to the relevant legislation in due course. However, it is not possible at this stage to be certain what those amendments will be. In the meantime, the PSNI is obliged to act in accordance with the provisions of the Police and Criminal Evidence (Northern Ireland) Order 1989. These provisions do not require us to destroy any DNA or fingerprint samples currently held …*
>
> *Accordingly, when any changes are made to the relevant legislation, the PSNI shall comply with them in full. In the meantime, pending any such legislative amendments, it is not possible for the PSNI to accede to the requests set out in your letter.*"

The refusal enshrined in this letter (which makes no mention of the Applicant's photographs) stimulated the present application for judicial review. When this matter was heard, counsel for the Applicant (Mr. O'Rourke, appearing with Mr. Hutton) confirmed unequivocally that the subject of the challenge is the *retention* of the DNA samples, fingerprints and photographs of his client. As the above résumé makes clear, the Respondent in this matter is the Chief Constable of the Police Service for Northern Ireland (for whom Mr. McMillen of counsel appeared).

[5] The course of these proceedings to date is as follows:

(a) On 13th March 2009, a single judge of the High Court granted leave to apply for judicial review.

(b) On 2nd June 2009, there was a hearing before two judges of the High Court. On 5th June 2009, in a reserved ruling, the judges reached

differing conclusions on the question of whether this is a criminal cause or matter.

(c) On 12th June 2009, the court made an order of interim relief, whereby the Respondent was permitted to retain the relevant materials but was forbidden from making any further use of them, pending the final determination of the court.

(d) Subsequently, a court composed of three judges of the High Court was convened. This court acceded to the Respondent's request that the substantive hearing of this matter be deferred for a period, given the advanced stage which the process designed to culminate in new legislation, in response to the decision in ***S and Marper***, is said to have reached. (See paragraph [10], *infra*).

(e) At this interim stage, the same chamber of three judges has convened for the sole purpose of deciding the criminal cause or matter issue.

II POLICE POWERS: STATUTORY FRAMEWORK

[6] The text of the statutory powers which the Respondent purported to exercise in carrying out the impugned measures is set out in full in an appendix to this judgment. The relevant statutory provisions are arranged in Articles 61-64A of the Police and Criminal Evidence (Northern Ireland) Order 1989, as amended ("*PACE*"). These have been the subject of amendment on more than one occasion since their inception, to the extent that they now differ quite substantially from their original predecessors. Within these provisions are found the police powers relating to the taking, destruction and retention of a person's fingerprints, DNA samples (both intimate and non-intimate) and photographs. The exercise of the retention powers lies at the heart of both the Applicant's substantive challenge and the issue determined by this judgment..

Fingerprints: Summary

[7] Article 61 of PACE, as amended, provides that the fingerprints of an arrested person may be taken without consent if he has been arrested for a recordable offence; or if he has been charged with a recordable offence or informed that he will be reported for such an offence; or if he has been convicted of a recordable offence or cautioned in respect of a recordable offence which he has admitted; or if it is reasonably suspected that he is committing or attempting to commit an offence or has committed or attempted to commit an offence and certain other conditions are satisfied.

Intimate DNA Samples: Summary

Article 62 of PACE, as amended, provides that an intimate sample may be taken from an arrested person only with appropriate consent and where a police officer of at least the rank of inspector authorises this, based on reasonable grounds (a) for suspecting the involvement of the arrested person in a recordable offence and (b) believing that the sample will tend to confirm or disprove such involvement.

Non-Intimate DNA Samples: Summary

Article 63 of PACE, as amended, provides that a non-intimate sample may be taken from a person without the appropriate consent if he is being detained on the authority of a court; or is in police detention having been arrested for a recordable offence; or has been charged with a recordable offence or informed that he will be reported for such an offence; or has been convicted of a recordable offence. In the first of these three cases (only) an authorisation must be given by an officer of at least the rank of inspector who has reasonable grounds (a) for suspecting the involvement of the arrested person in a recordable offence and (b) for believing that the sample will tend to confirm or disprove such involvement.

Photographs: Summary

An arrested person may be photographed by a police constable, with or without the appropriate consent, in accordance with Article 64A of PACE. There are no express qualifying conditions. Any such photograph may be used or disclosed for any purpose related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution and may be retained thereafter, to be deployed subsequently for any of these purposes.

Destruction and Retention of Fingerprints, DNA Samples and Photographs

[8] As regards the destruction and retention of a person's fingerprints and DNA samples, an evolving legislative policy is clearly detectable. In its original inception, this policy was that a person's fingerprints or samples were to be destroyed where the person was no longer suspected of having committed an offence; or was the subject of a decision not to prosecute; or had not been found guilty following prosecution. Certain amendments of Article 64 of PACE, reflecting a dilution of the original legislative policy, followed. Ultimately, a substantial further amendment of Article 64 was effected by Section 83 of the Criminal Justice and Police Act 2001, which came into operation on 11 May 2001. As it is of central importance to the sole issue determined by this judgment, it is appropriate to reproduce the full text of the current version of Article 64:

"64. - (1A) 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.

(1B) In paragraph (1A)-

(a) the reference to using a fingerprint or an impression of footwear includes a reference to allowing any check to be made against it under Article 63A(1) and to disclosing it to any person;

(b) the reference to using a sample includes a reference to allowing any check to be made under Article 63A(1) against it or against information derived from it and to disclosing it or any such information to any person;

(c) the reference to crime includes a reference to any conduct which-

> *(i) constitutes one or more criminal offences (whether under the law of a part of the United Kingdom or of a country or territory outside the United Kingdom); or*
>
> *(ii) is, or corresponds to, any conduct which, if it all took Place in any one part of the United Kingdom, would constitute one or more criminal offences; and*

(d) the references to an investigation and to a prosecution include references, respectively, to any investigation outside the United Kingdom of any crime or suspected crime and to a prosecution brought in respect of any crime in a country or territory outside the United Kingdom.

(1BA) Fingerprints taken from a person by virtue of Article 61(6A) must be destroyed as soon as they have fulfilled the purpose for which they were taken.
(3) If-

(a) fingerprints, impressions of footwear 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 Article, be destroyed as soon as they have fulfilled the purpose for which they were taken.

(3AA) Samples, fingerprints and impressions of footwear are not required to be destroyed under paragraph (3) 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, fingerprint or (as the case may be) an impression of footwear was also taken from the convicted person for the purposes of that investigation.

(3AB) Subject to paragraph (3AC), where a person is entitled under paragraph (1BA) or (3) to the destruction of any fingerprint, impression of footwear or sample taken from him (or would be but for paragraph (3AA)), neither the fingerprint, nor the impression of footwear, nor the sample, nor any information derived from the sample, shall be used-

(a) in evidence against the person who is or would be entitled to the destruction of that fingerprint, impression of footwear or sample; or

(b) for the purposes of the investigation of any offence;

and paragraph (1B) applies for the purposes of this paragraph as it applies for the purposes of paragraph (1A).

(3AC) Where a person from whom a fingerprint, impression of footwear or sample has been taken consents in writing to its retention –

(a) that fingerprint, impression of footwear or sample need not be destroyed under paragraph (3); and

(b) paragraph (3AB) shall not restrict the use that may be made of the fingerprint, impression of footwear or sample or, in the case of a sample, of any information derived from it;

(c) that consent shall be treated as comprising a consent for the purposes of Article 63A(1C)

and a consent given for the purposes of this paragraph shall not be capable of being withdrawn.

This paragraph does not apply to fingerprints taken from a person by virtue of Article 61(6A).

(3AD) For the purposes of paragraph (3AC) it shall be immaterial whether the consent is given at, before or after the time when the entitlement to the destruction of the fingerprint, impression of footwear or sample arises.

(5) If fingerprints or impressions of footwear are destroyed

(a) any copies of the fingerprints or impressions of footwear shall also be destroyed; an

(b) a person authorised by the Chief Constable to control access to computer data relating to the fingerprints or impressions of footwear shall make access to the data impossible, as soon as it is practicable to do so.

(6) A person who asks to be allowed to witness the destruction of his fingerprints or impressions of footwear or copies of them shall have a right to witness it.

(7) If-

(a) paragraph (5)(b) falls to be complied with; and

(b) the person to whose fingerprints or impressions of footwear the data relate asks for a certificate that it has been complied with,

such a certificate shall be issued to him not later than the end of the period of 3 months beginning with the day on which he asks for it by the Chief Constable or a person

authorised by him or on his behalf for the purposes of this Article.

(8) Nothing in this Article-

(a) affects any power conferred by paragraph 18(2) of Schedule 2 to the Immigration Act 1971 or section 20 of the Immigration and Asylum Act 1999 (disclosure of police information to the Secretary of State for use for immigration purposes); or

(b) applies to a person arrested or detained under the terrorism provisions"

The effect of these amendments was to substitute for the original obligation to destroy fingerprints and samples a discretion to retain them in all cases except where Article 64(3) requires their destruction. DNA samples and fingerprints may also be retained where the person concerned consents in writing to this course. The amendments of Article 64 of PACE made by Section 83 mirror those (made by Section 82) of the corresponding English statutory provision, Section 64 of the Police and Criminal Evidence Act 1984. Thus there is consonance between the statutory regimes prevailing in the two jurisdictions.

[9] The statutory power to photograph a detained person is summarised in paragraph [7] above. The various provisions ancillary to this power, many of them newly created by more recent legislation, are contained in Article 64A of PACE. As regards the use and retention of photographs thus taken, Article 64A(4) and (5) provide:

"64A (4) A photograph taken under this Article-

(a) 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

(b) after being so used or disclosed, may be retained but may not be used or disclosed except for a purpose so related; and

(c) 'sentence' includes any order made by a court in Northern Ireland when dealing with an offender in respect of his offence.

(5) In paragraph (4)-

(a) the reference to crime includes a reference to any conduct which-

(i) constitutes one or more criminal offences (whether under the law of a part of the United Kingdom or of a country or territory outside the United Kingdom); or
(ii) is, or corresponds to, any conduct which, if it all took place in any one part of the United Kingdom, would constitute one or more criminal offences; and

(b) the references to an investigation and to a prosecution include references, respectively, to any investigation outside the United Kingdom of any crime or suspected crime and to a prosecution brought in respect of any crime in a country or territory outside the United Kingdom.".

As regards evolution, the most recent changes to Article 64A can be traced to the Anti-Terrorism Crime and Security Act 2001 (Section 93, which inserted Article 64A with effect from 14 December 2001); the Police (Northern Ireland) Act 2003 (Schedule 3, paragraph 6 which amended Article 64A(3) with effect from 8 April 2003; and the Police and Criminal Evidence (Amendment) (Northern Ireland) Order 2007 (Article 36, amending Article 64A with effect from 1 March 2007). As this extensive lineage demonstrates, Article 64A is a statutory provision within the field of criminal justice which has been the subject of frequent and substantial parliamentary attention and expansion during recent years.

The Decision in S and Marper –v- United Kingdom

[10] The Applicants , invoking Articles 8 and 14 ECHR, complained that their fingerprints, cellular samples and DNA profiles had been retained after the criminal proceedings against them had terminated with an acquittal or had been discontinued. The focus of their challenge was Section 64(1)A of the Police and Criminal Evidence Act 1984, which mirrors its Northern Irish counterpart, Article 64(1A) of PACE. The European Court upheld their complaint, finding that there was a disproportionate interference with their rights under Article 8. This is encapsulated in paragraph [125] of the judgment:

"*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 the competing public and private interests and that the Respondent State has overstepped any acceptable*

> *margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the Applicants' right to respect for private life and cannot be regarded as necessary in a democratic society.*"

In the wake of this decision, the United Kingdom Government embarked upon an exercise of statutory reform, which remains uncompleted. This is documented in the Home Office Consultation Paper, published in May 2009. This proposes, broadly, reduced statutory powers to retain DNA samples and fingerprints. It does not address the issue of photographs. At the time of delivering this judgment, the legislation remains unchanged.

III CRIMINAL CAUSE OR MATTER: STATUTORY FRAMEWORK AND HISTORY

[11] The full text of the statutory provisions bearing on this issue is contained in the Appendix to this judgment. Some of the provisions in question have a direct and immediate bearing, while others do not. Many of the statutory provisions contained in the Appendix have been included to facilitate a consideration of the presently operative provisions in their full historical context. They illuminate in particular the evolution of Divisional Courts within the High Court regime, the jurisdiction of the High Court in criminal causes and matters and the introduction and jurisdiction of a specially designated Court of Criminal Appeal. Relevant extracts from the most important of these statutory provisions are set out in paragraphs [12]–[17] below.

Judicature (Northern Ireland) Act 1978

[12] The mechanism of appealing from decisions of the High Court differs according to whether the decision is given in a civil or criminal matter, by virtue of Section 35 of the Judicature (Northern Ireland) Act 1978 ("*the 1978 Act*") which provides, insofar as material:

> "(1) *Subject as otherwise provided in this or any other statutory provision, the Court of Appeal shall have jurisdiction to hear and determine in accordance with rules of court appeals from any judgment or order of the High Court or a judge thereof.*
>
> (2) *No appeal to the Court of Appeal shall lie –*

(a) except as provided by the following provisions of this Part from any judgment of the High Court in any criminal cause or matter …"

The prohibition against an appeal from the High Court to the Court of Appeal in a criminal cause or matter is reinforced by Section 41, which provides, insofar as material:

> *"41. (1) Subject to the provisions of this section, an appeal shall lie to the [UK] Supreme `Court, at the instance of the defendant or the prosecutor-*
>
> *(a) from any decision of the High Court in a criminal cause or matter;*
>
> *(b) from any decision of the Court of Appeal in a criminal cause or matter upon a case stated by a county court or a magistrates' court.*
>
> *(2) No appeal shall lie under this section except with the leave of the court below or of the [UK] Supreme `Court; and, subject to section 45(3), such leave shall not be granted unless it is certified by the court below that a point of law of general public importance is involved in the decision and it appears to that court or to the [UK] Supreme `Court, as the case may be, that the point is one which ought to be considered by the [UK] Supreme `Court."*

Thus Sections 35 and 41 of the 1978 Act both contemplate expressly that the High Court may exercise jurisdiction in a criminal cause or matter. There is no prescription of this jurisdiction, nor is there any definition of the words "*criminal cause or matter*". Section 41 is supplemented by the detailed regulatory regime contained in Schedule 1.

[13] Under Part II of the 1978 Act, jurisdiction in applications for judicial review is conferred on the High Court. Section 16(5) provides:

> "*Except where a statutory provision otherwise provides, any jurisdiction of the High Court or a division thereof shall be exercised by a single judge*".

The procedural regime which governs applications for judicial review is contained in Order 53 of the Rules of the Court of Judicature of Northern Ireland, the genesis whereof is found in Section 18 of the 1978 Act. This is followed by Sections 19-25, which regulate a variety of matters pertaining to judicial review applications. It is clear from a consideration of Part II of the 1978 Act as a whole that the jurisdiction of

the High Court in applications for judicial review encompasses both civil and criminal matters. This is consonant with the historical development of this supervisory jurisdiction, which has at no time discriminated according to whether the act or decision of the inferior court or tribunal or other public authority under challenge was criminal or civil in character.

Order 53, Rules of the Court of Judicature of Northern Ireland

[14] In accordance with Section 18 of the 1978 Act, Rules of Court governing applications for judicial review were duly made. These are contained in Order 53 of the Rules of the Court of Judicature of Northern Ireland. From the perspective of composition of the court, Order 53, Rule 2 makes an important distinction between civil and criminal matters. Under the banner "Exercise of Jurisdiction in a Criminal Cause or Matter", it provides:

> *"2. - (1) Save as otherwise provided by this Order and subject to paragraph (3) and to rules 3(3) and 8(1), in a criminal cause or matter the jurisdiction of the Court on or in connection with an application for judicial review shall be exercised by three judges sitting together.*
>
> *(2) Where the Lord Chief Justice so directs, such jurisdiction may be exercised by two judges.*
>
> *(3) In vacation any jurisdiction under this rule may, where necessary, be exercised by a single judge.*
>
> *(4) No appeal shall lie from an order made by a judge exercising jurisdiction under paragraph (3), but an application may be made by motion within 10 days to the court, constituted in accordance with paragraph (1) or (2), to set aside or discharge the order and to substitute such other order as the Court may think fit.*
>
> *(5) Where in accordance with paragraph (2) a matter is heard before two judges and those judges differ in opinion, it shall be re-heard and determined by three judges.*
>
> *(6) Notwithstanding this rule, any jurisdiction on consent may be exercised by a single judge in accordance with section 16(5) of the Act.*
>
> *(7) A court of two or more judges exercising jurisdiction pursuant to this rule shall be called a Divisional Court.".*

Other examples of the impact which the distinction between criminal and civil proceedings has on the constitution of the High Court are readily found. Order 52, Rule 1 provides that the power to punish for contempt of court by an order of committal is exercisable only by a chamber of two or more judges. Similarly, where an application for a Writ of habeas corpus is made in a criminal cause or matter, it must be heard by a chamber of two or more judges where the judge who considers the matter initially does not order the release of the person restrained: see Order 54, Rule 4(2).

The MacDermott Report

[15] Some useful historical context is provided in the MacDermott Report ("Report of the Committee on the Supreme Court of Judicature of Northern Ireland", Cmnd. 4292), which forms the background to the Judicature (Northern Ireland) Act 1978. The report describes the High Court's jurisdiction to issue prerogative writs and orders and grant declaratory judgments and orders as "*important weapons in the legal armoury of the subject*" (see paragraph 103) and continues:

> "*104 In Northern Ireland, as in England, the prerogative writs have formed a valuable part of the protective and supervisory jurisdiction of the High Court and the ancient jurisdiction of the Court of Queen's Bench in relation thereto is now exercised on the Crown side of the Queen's Bench Division …*
>
> [The remedy of certiorari] *has in recent years been brought into the realm of administrative law in relation to bodies which do not claim to be and would not be recognised as courts but which, having a duty to act judicially, are subject to the controlling jurisdiction of the High Court.*"

The report further notes that the modern jurisdiction of the High Court is traceable to the Judicature Acts 1877-1897 and continues:

> "*87 This mode of conferring or defining jurisdiction followed the example set in 1873 with regard to the Superior Courts in England and the pattern was repeated when Section 40(1) of the* [Government of Ireland Act 1820] *provided that the High Court of Justice in Northern Ireland constituted under that Act should have and exercise all such jurisdiction as had previously been exercised by the High Court of Justice in Ireland and by the judges of that court.*"

[16] The MacDermott Report also gave specific consideration to the topic of Divisional Courts. It noted that under the Supreme Court of Judicature (Ireland) Act 1877, the jurisdiction of the High Court was exercisable by either a single judge or a Divisional Court. See paragraph 177:

> "*A Divisional Court consists of at least two judges. It hears all such causes and matters as are not to be heard by a single judge and deals with all business on the common law side which would have been proper to have been transacted or disposed of by the court sitting* ***in Banco*** *if the Act of 1877 had not been passed*".

It noted the modernisation which had been introduced in England by Section 60 of the Supreme Court of Judicature (Consolidation) Act 1925 and proposed the abolition of Divisional Courts, while making provision for certain classes of case to be heard by a chamber of at least two judges. Paragraph 183 continues:

> "*One alternative would be to recommend that the direct appeal to the House of Lords in criminal applications for* ***habeas corpus*** *be retained and re-enacted, substituting 'the High Court' for 'a Divisional Court', and that criminal applications for* ***habeas corpus*** *in the High Court be added to the proceedings to be heard by more than one judge.*"

However, the Committee declined to recommend this.

Thus the MacDermott's Committee's proposal was that while certain aspects of the jurisdiction of the High Court would be exercised by two judges, Divisional Courts would be abolished, with the Court of Appeal having jurisdiction to hear and determine appeals "*from any judgment or order of the High Court*" (see paragraph 231). In the event, the 1978 Act did not reflect this recommendation. There may well be a case for reinstating this proposal now and, as regards this issue, there is unanimity of opinion amongst the members of this present chamber of judges.

Nineteenth Century Judicature Acts, England and Ireland

[17] The relevant nineteenth and twentieth century statutes in both England and Ireland have consistently evinced an unmistakeable parliamentary intention that in cases where the High Court exercises jurisdiction in criminal matters, no appeal shall lie to the Court of Appeal. In England, Section 19 of the Judicature Act 1873 provided, in material part:

> "*The said Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as hereinafter mentioned, of Her Majesty's High Court of Justice, or of any judges or judge thereof, subject to the provisions of this Act …*"

Section 47 provided, insofar as material:

> *"The jurisdiction and authorities in relation to questions of law arising in criminal trials which are now vested in the Justices of either Bench and the Barons of the Exchequer … shall and may be exercised after the commencement of this Act by the judges of the High Court of Justice …*
>
> *The determination of any such question by the judges of the said High Court in manner aforesaid shall be final and without appeal;* ***and no appeal shall lie from any judgment of the said High Court in any criminal cause or matter****, save for some error of law apparent upon the record …"*

[Emphasis added].

> *"No appeal shall lie from any judgment of the said High Court in any criminal cause or matter …"*

In Ireland, these provisions were reflected subsequently in Section 50 of the Judicature Act (Ireland) 1877, which provided, in material part:

> *"The jurisdiction and authorities in relation to questions of law arising in criminal trials … shall and may be exercised after the commencement of this Act by the judges of the High Court of Justice, or five of them at the least …*
>
> *The determination of any such question by the judges of the said High Court in manner aforesaid shall be final and without appeal; and no appeal shall lie from any judgment of the said High Court in any criminal cause or matter, save for some error of law apparent upon the record …".*

In The Judicature Acts (Ireland), 2nd Edition (published over a century ago, in 1903), Wylie comments (p. 113):

> *"No appeal lies to the Court of Appeal in* ***any matter of a criminal character,*** *except for error on the record …*
>
> *And so also there is no appeal from an order of the King's Bench Division discharging a rule for a certiorari to bring up a summary conviction by justices for the purpose of quashing it on the ground of want of jurisdiction … ."*

Other examples, such as decisions of the High Court in cases stated by justices, are provided. Also worthy of note, in this context, are the statutory provisions relating to the creation and powers of a specially designated Court of Criminal Appeal, in both England and Northern Ireland (contained in the Appendix).

[18] Thus the statutory provisions which arise for consideration in the present case – Sections 35 and 41 of the 1978 Act – have extensive antecedents, traceable to the Judicature Act 1873 (in England) and the Judicature Act (Ireland) 1877. In these nineteenth century statutes, as in the 1978 Act, the dichotomy of courts exercising civil jurisdiction and courts exercising criminal jurisdiction is clearly expressed. However, throughout this period of one and a half centuries, the legislature has consistently had to grapple with the reality that, for historical reasons, the High Court, which has no original jurisdiction in criminal prosecutions, has consistently exercised *some* jurisdiction in assorted cases of a criminal character. The repeated legislative policy has been that, in such cases, there should be no appellate recourse to the Court of Appeal, which was designed to be an appellate court dealing with non-criminal cases. By virtue of the provisions of the 1978 Act, this policy survives until today. Thus, while the nineteenth century statutes and the 1978 Act belong to very different social and historical contexts, their provisions reflect a parliamentary policy which has remained unchanged during a period of one and a half centuries. The possibility of an appeal to the House of Lords in certain cases has also had an impact in this sphere, with the enactment of the Appellate Jurisdiction Acts 1876 and 1887. The differing mechanisms for appealing to the House of Lords (now the Supreme Court) are a reflection of the enduring division of civil and criminal cases.

[19] In the particular context of applications for judicial review, it is important, at the outset of the proceedings, to determine whether the matter is civil or criminal in nature, for two fundamental reasons. The first relates to ensuring that the court is correctly composed. The second is concerned with rights of appeal. In addition, it is appropriate to highlight that the procedural rights and safeguards enjoyed by litigants are not identical in civil and criminal matters: Article 6(3) ECHR stipulates a series of "*minimum rights*" conferred on everyone charged with a criminal offence which are not replicated as regards civil litigants. Whether this has any bearing on the court's characterisation of a judicial review application as civil or criminal in nature and, if so, the guidance thereby provided is a different question. In the instant case, the characterization of the Applicant's challenge as civil or criminal has no consequences for the conduct of the litigation itself. The procedure both before and at the hearing will be precisely the same irrespective of the classification and neither party will secure any benefit or suffer any detriment in consequence. This was acknowledged by counsel for both parties.

IV GUIDANCE FROM THE DECIDED CASES

[20] One of the earliest decisions belonging to this sphere is ***Ex parte Woodhall*** [1888] QBD 832, where Section 47 of the Judicature Act 1873 fell to be considered. The Court of Appeal had to decide whether it had jurisdiction to entertain a

purported appeal by a person committed to prison under Section 10 of the Extradition Act 1870 against a refusal of the Queen's Bench Division for a Writ of habeas corpus. Lord Esher MR stated, at p. 835:

> "*The result of all the decided cases is to shew that the words 'criminal cause or matter' in Section 47 should receive the widest possible interpretation. The intention was that no appeal should lie in any 'criminal matter' in the widest sense of the term, this court being constituted for the hearing of appeals in civil causes and matters*".

In the judgment of Bowen LJ particularly, there is due emphasis on the terms of Section 10 of the 1870 Act, which applied "*in the case of a fugitive criminal accused of an extradition crime*". His Lordship was prompted to ask, rhetorically (at p. 838):

> "*How can the matter be other than criminal from first to last?*"

The Court of Appeal held that this decision had been given in a "*criminal cause or matter*" within the meaning of Section 47, with the result that no right of appeal was available. All three judgments highlighted that the Court of Appeal *would* have jurisdiction to consider an appeal from decisions of the High Court in habeas corpus cases which were not criminal in nature.

[21] In ***Amand –v- Home Secretary and Another*** [1943] AC 147, a Netherlands subject was arrested under the Allied Forces (etc.) Order 1940, made under the Allied Forces Act 1940, pursuant to a statutory request by the Dutch Military Forces that he be detained and then surrendered to military escort, to be conveyed to the relevant Dutch Army Unit. The Applicant was detained by the police and the following day was brought before the Chief Metropolitan Magistrate, who released him on bail upon being informed that an application had been made the previous day for a Writ of habeas corpus. In due course, the Divisional Court refused this application. The Applicant purported to appeal to the Court of Appeal. At this time, the relevant statutory provision was Section 31(1) of the Supreme Court of Judicature (Consolidation) Act 1925 (the successor to Section 47 of the 1873 Act), which provided:

> "*No appeal shall lie –*
>
> *(a) except as provided by the Criminal Appeal Act 1907 or this Act from any judgment of the High Court in any criminal cause or matter*".

The Court of Appeal held that it had no jurisdiction to entertain an appeal. The House of Lords agreed. In as passage which has been considered in many later

cases, Viscount Simon LC, having considered some of the reported decisions, stated (at p. 156):

> "*It will be observed that these decisions … involve the view that the matter in respect of which the accused is in custody may be 'criminal' although he is not charged with a breach of our own criminal law and … although the offence would not necessarily be a crime at all if committed here.* ***It is the nature and character of the proceeding in which habeas corpus is sought which provide the test. If the matter is one the direct outcome of which may be trial of the Applicant and his possible punishment for an alleged offence by a court claiming jurisdiction, the matter is criminal***".

[Emphasis added].

This passage directs attention to *the underlying proceeding* viz. the legal framework arising out of which the application to the High Court is made. A similar emphasis is found in the speech of Lord Wright. Firstly, his Lordship provides some interesting reflections on the words "*cause or matter*" (at pp. 159-160):

> "*The words 'cause or matter' are, in my opinion, apt to include any form of proceeding. The word 'matter' does not refer to the subject matter of the proceeding, but to the proceeding itself. It is introduced to exclude any limited definition of the word 'cause'. In the present case, the immediate proceeding in which the order was made was not the cause or matter to which the section refers. The cause or matter in question was the application to the court to exercise its powers under the Allied Forces Act and the order and to deliver the Appellate to the Dutch military authorities. It is in reference to the nature of that proceeding that it must be determined whether there was an order made in a criminal cause or matter. That was the matter of substantive law. The Writ of habeas corpus deals with the machinery of justice and is essentially a procedural writ, the object of which is to enforce a legal right.*"

Lord Wright continued (p. 162):

> "*The principle which I deduce from the authorities I have cited and the other relevant authorities which I have considered is that if the cause or matter is one which, if carried to its conclusion, might result in the conviction of the person charged and in a sentence of some punishment,*

> *such as imprisonment or fine, it is a 'criminal cause or matter'. The person charged is thus put in jeopardy. Every order made in such a cause or matter by an English court is an order in a criminal cause or matter even though the order, taken by itself, is neutral in character and might equally have been made in a cause or matter which is not criminal. The order may not involve punishment by the law of this country, but if the effect of the order is to subject by means of the operation of English law the persons charged to the criminal jurisdiction of a foreign country, the order is, in the eyes of English law for the purposes being considered, an order in a criminal cause or matter …".*

His Lordship concluded that the impugned order lay within the embrace of this principle because it "*… subjected the Appellant to the risk of punishment by Dutch law*" (pp. 162-163).

Lord Porter, for his part, added that it is not necessary that the matter, in order to be characterized criminal, be "*criminal throughout*", continuing (at p. 164):

> "*It is enough if the proceeding in respect of which mandamus was asked is criminal e.g. the recovery of a poor rate is not of itself a criminal matter, but its enforcement by magistrates by warrant of distress is …*
>
> ***The proceeding from which the appeal is attempted to be taken must be a step in a criminal proceeding, but it need not itself of necessity end in a criminal trial or punishment. It is enough if it puts the person brought up before the magistrate in jeopardy of a criminal charge ...***".

[My emphasis].

[22] In my view, the unifying theme of the three speeches in ***Amand*** is what one might describe in shorthand as "the jeopardy principle". In short, the underlying process or proceeding is considered to be criminal in nature if it puts the affected person in jeopardy of being subjected to a criminal charge. Viscount Simon LC described this as "*the true effect*" of the two conditions formulated by Viscount Cave in ***In Re Clifford and O'Sullivan*** [1921] 2 AC 570, where orders were made by a general officer of the British Armed Forces for the holding of military courts for the purpose of giving effect to a proclamation by the Commander in Chief in Ireland that the unauthorized carrying of arms in (*inter alia*) County Cork was punishable by death. The Appellants, two civilians, were convicted by a military court of improperly carrying arms and sentenced to death. Their application to the Chancery Division for a Writ of Prohibition failed. The Court of Appeal in Ireland

dismissed their appeal, on the ground that it was not competent by virtue of Section 50 of the 1877 Act, the order having been made in a criminal cause or matter. The House of Lords held, by a majority, that the order of the Chancery Division was not made in a criminal cause or matter, because the hearing before the military court was in no sense a criminal proceeding. Viscount Cave noted the similarities between Section 50 of the Irish statute and Section 47 of its English counterpart and observed that as a result of decisions such as ***Ex parte Woodhall***, the words 'judgment of the High Court in any criminal cause or matter' –

> "*…should be construed in a wide sense and as including any judicial decision with regard to proceedings the subject matter of which is criminal …*
>
> *But in order that a matter may be a criminal cause or matter it must, I think, fulfil two conditions which are connoted by and implied in the word 'criminal'. It must involve the consideration of some charge of crime, that is to say, of an offence against the public law; and that charge must have been preferred or be about to be preferred before some court or judicial tribunal having or claiming jurisdiction to impose punishment for the offence or alleged offence.*"

Within this passage the genesis of the "jeopardy principle" is readily identifiable.

[23] A further notable contribution to the jurisprudence in this sphere is found in ***The Queen –v- Board of Visitors of Hull Prison, ex parte St. Germain and Others*** [1979] QB 425, where certain prisoners who were the subject of disciplinary awards imposed by the Board of Visitors brought an unsuccessful application for judicial review to the Divisional Court of the Queen's Bench Division. When they appealed, the Court of Appeal had to determine whether the court had jurisdiction to entertain the appeals, having regard to Section 31 of the Supreme Court of Judicature Act 1925. Megaw LJ treated ***Amand*** as the leading authority and, having quoted from the speech of Viscount Simon LC, stated (at p. 453):

> "*What emerges from these passages is that to stamp proceedings as being of a criminal nature there must be in contemplation the possibility of trial by a* ***court*** *for some offence …*
>
> *There must be at least the prospect that a judicial tribunal will try a criminal charge in order to give rise to a criminal cause or matter. A court martial is such a tribunal and offences against military law may be treated as crimes. In the present cases there was no judicial tribunal: emphatically there was none before which an offender was*

> *liable to be* ***convicted*** *of a criminal offence and punished for such an offence*".

In ***Re Coleman's Application*** [1988] NI 205, the Northern Ireland Court of Appeal espoused the views of Megaw LJ, as recorded subsequently by Carswell LCJ in ***Re Adair's Application*** [2003] NIQB 16, paragraph [2].

[24] In ***Carr –v- Atkins*** [1987] QB 963, orders were made under Section 9 of PACE 1984 by the Central Criminal Court for the production of certain documents constituting "*special procedure material*". Under Section 9, the general criterion for making such an order is that it be "*for the purposes of a criminal investigation*" and, by virtue of the provisions in Schedule 1, there must be reasonable grounds for believing that a serious arrestable offence had been committed and that the material is likely to be of substantial value to the investigation. By an application for judicial review, the Applicant sought an order quashing the impugned orders. The Divisional Court dismissed the applications. Before the Court of Appeal, the question arose whether the impugned orders had been made in a criminal cause or matter. The court answered this question affirmatively. The Master of the Rolls stated (at p. 966):

> "*It is quite clear that the legislature uses the phrase 'in a criminal cause or matter' as being a convenient description of matters which are not civil. It is very unfortunate that that phrase has given rise to a considerable conflict of judicial opinion as to its meaning, since if the legislature, by a simple form of words like this, is unable to divide the sheep from the goats, the criminal from the civil, great difficulties are created. But that is the position at the moment.*"

This passage serves as a helpful reminder that the exercise in which the court is engaged in the present case is one of statutory interpretation. Sir John Donaldson MR considered it "*clear beyond argument*" that the impugned orders were made "*in a criminal context*", while expressly recognizing that there were no extant underlying criminal proceedings. He added (at p. 968):

> "*It is essentially a statutory provision in aid of a criminal investigation designed, if the evidence will stand it, to lead to a criminal prosecution. But unless it is to be said that an order under the Act is either never or very rarely one which is by its nature a criminal cause or matter merely because of the stage at which the order is made,* ***then the fact that there are no criminal proceedings does not, in my judgment, matter****. That fact stems purely from the nature of the Act and the statutory provisions and does not affect the criminal characters of the proceedings*".

[Emphasis added].

The other members of the court concurred, Stephen Brown LJ adding that the fact of a criminal investigation was decisive. Interestingly, while reiterating that he entertained "*no doubt whatsoever*" that the impugned orders and all subsequent proceedings relating thereto were properly characterised orders in a criminal cause or matter, the Master of the Rolls, founding mainly on Lord Bridge's observations about ***Amand*** in ***Re Smalley*** (echoing, to some extent, the reservations which I express in paragraph [29], *infra*), pronounced some further dissatisfaction about the state of the law in this field, to the extent that leave to appeal to the House of Lords was granted. It would appear that, in the event, no appeal to the House of Lords eventuated.

[25] In ***The Queen –v- Blandford Justices, ex parte Pannent*** **[1990] 1 WLR 1490**, the Applicant was charged with certain offences in respect whereof he was remanded in custody by the Justices, on account of his refusal to accept conditional bail. Subsequently, bail was granted. Next, he applied for judicial review of the original remand decision, just before his trial, which then intervened. Following the trial, the Divisional Court quashed the remand decision adjourning the claim for damages. At this stage of the evolution of the appellate jurisdictional bar in play in the present proceedings, the relevant statutory provision was (and remains, in England) Section 18(1)(a) of the Supreme Court Act 1981, which provides:

> "*No appeal shall lie to the Court of Appeal – except as provided by the Administration of Justice Act 1960, from any judgment of the High Court in any criminal cause or matter*".

The Justices sought to appeal to the Court of Appeal, contending that given the termination of the criminal trial, the jurisdictional bar enshrined in Section 18(1)(a) of the Supreme Court Act 1981 did not apply. The Court of Appeal held that it did not have jurisdiction to consider the appeal. The main argument advanced was that when the judicial review application was heard by the Divisional Court, the criminal proceedings were no longer in existence. Taylor LJ, delivering the unanimous judgment of the court, stated (at pp. 1495 – 1496):

> "*If the Divisional Court's decision was not in a criminal cause or matter, in what type of proceeding was it made? It cannot have been a decision* ***in vacuo*** *and, for my part, I see no basis in principle or authority for attributing such a chameleon character to a cause or matter as to make it change from criminal to civil simply because the proceedings are concluded or because the review of the decision in such cause or matter may be too late to affect the outcome of the proceedings. In my opinion, the judgment of the Divisional Court in the present case was made in a criminal cause or matter*".

Lord Donaldson MR, emphasizing the words of Lord Esher MR "*at whatever stage of the proceedings the question arises*" [in ***Ex parte Woodhall*** 20 QBD 832, at p. 836], added that this formulation –

> "*… is apt to include the stage at which proceedings are in contemplation, the stage during which they are being prosecuted and the stage which follows following the giving of the judgment of the court, a stage at which it can be said that the court is functus officio*".

[At p. 1496g/h].

[26] In the modern era, one of the leading decisions is ***Cuoghi –v- Governor of Brixton Prison*** [1997] 1 WLR 1346, where the Applicant was the subject of criminal proceedings brought against him in Switzerland. He was committed under the Extradition Act 1989 to await the decision of the Secretary of State regarding his surrender. He brought an application for the issue of a Writ of habeas corpus and obtained an order for the issue of a letter of request to the Swiss judicial authorities under Section 3 of the Criminal Justice (International Co-operation) Act 1990, seeking assistance in requiring evidence in support of his application. Acceding to an application by the Swiss Government, the High Court made a further order setting aside the Section 3 order. The Applicant appealed to the Civil Division of the Court of Appeal, which considered as a preliminary issue whether the impugned order was made in a criminal cause or matter within the compass of Section 18(1)(a) of the Supreme Court Act 1981, which provides that no appeal shall lie to the Court of Appeal from any judgment of the High Court in any criminal cause of matter. Lord Bingham CJ, delivering the judgment of the court, identified "*three major questions*" for determination. These were:

(a) Do extradition proceedings fall within the statutory expression "*criminal cause or matter*"?

(b) Does an application for habeas corpus made in extradition proceedings fall within the statutory expression?

(c) Does an order relating to obtaining evidence for purposes of a habeas corpus application in extradition proceedings fall within the statutory expression?

The court supplied an affirmative answer to all three questions. The Lord Chief Justice stated, in the context of answering affirmatively the third question (at p. 1354b/c):

> "*First, it is a clear principle … that if the main substantive proceedings in question are criminal, proceedings ancillary*

> *or incidental thereto are similarly to be treated as criminal: hence the clear rule that habeas corpus applications incidental or ancillary to extradition proceedings are regarded as criminal because extradition proceedings are so regarded*".

His Lordship also emphasized the importance of the *entirety* of the passage in the speech of Viscount Simon LC set out in paragraph [20] above (at p. 1353c/d) and endorsed the following general tests (at p. 1355b):

> "*What is the purpose of the application? Is it a step in the process of bringing a Defendant to trial? Can it affect the conduct of the trial?*

The "application" to which the Lord Chief Justice is referring in this passage is the application made successfully by the Applicant under Section 3 of the 1990 Act (noted above), giving rise to the third of the "*three major questions*", to be determined.

[27] More recently, the criminal cause or matter debate featured again in the House of Lords in ***Government of the United States of America –v- Montgomery*** [2001] 1 WLR 196, in the context of restraint and confiscation orders made under Part VI of the Criminal Justice Act 1988. The House held that the proceedings in which such orders are made are civil in character. The main speech was delivered by Lord Hoffmann, who described the decision in ***Amand*** as "*the leading authority*" and quoted the relevant passage in the speech of Viscount Simon LC. He continued:

> "*[17] But I think … that Viscount Simon intended his second sentence to be illustrative of a case in which the 'nature and character of the proceedings' were criminal and not an exhaustive definition of such proceedings.*"

To this one may add that the second sentence is, contextually, directly referable to the underlying proceedings in ***Amand***. Lord Hoffmann continued:

> "*Indeed, I would doubt the wisdom of trying to formulate any definition of 'criminal cause or matter' to supplement the undefined expression used by Parliament*".

This statement serves as a reminder that this troublesome phrase has been undefined since the beginning of its statutory existence, with vast quantities of judicial ink expended in consequence. The decision in ***Montgomery*** also serves to remind one that, bearing in mind the doctrine of precedent, every court confronted with the kind of problem with which three judges are grappling in the present case must seek to identify and give effect to the *ratio decidendi* of ***Amand***.

[28] In cases where the issue to be determined by the present judgment arises, the court is not infrequently reminded of an earlier decision of the House of Lords, ***In***

Re Smalley [1985] AC 622. However, it seems to me appropriate to reflect on whether any guidance of substance is provided by this decision, for three reasons. Firstly, it was concerned with the meaning of a different statutory phrase, namely "*matters relating to trial on indictment*" in Section 29(3) of the Supreme Court Act 1981, which provides:

> "*In relation to the jurisdiction of the Crown Court, other than its jurisdiction in matters relating to trial on indictment, the High Court shall have all such jurisdiction to make orders of mandamus, prohibition or certiorari as the High Court possesses in relation to the jurisdiction of an inferior court*".

Secondly, in ***Smalley***, there were extant underlying criminal proceedings, the application for judicial review having arisen out of an order by a Crown Court judge estreating the recognizance of £100,000 provided by the Applicant for his brother, the accused. Thirdly, Lord Bridge said the following of the decision in ***Amand*** (at p. 634d/e):

> "***Amand's*** *case was concerned with an application for a Writ of habeas corpus by an alleged absentee without leave from the Netherlands army, who was liable by virtue of the Allied Forces Act 1940 and an Order in Council made thereunder … to be delivered into military custody of the Netherlands authorities. Your Lordships' House held that to be 'a criminal cause or matter'. I must frankly confess that I can find nothing in the speeches in that case which throws any light one way or the other on the totally different question whether an order estreating the recognizance of a surety for a defendant admitted to bail in criminal proceedings is covered by the same language. I do not find it necessary for present purposes to give a concluded answer to that question*".

For my part, I have reservations about whether decisions relating to Section 29(3) of the Supreme Court Act 1981 provide any reliable guidance on the question of whether, within the meaning of Section 41(1)(a) of the 1978 Act, any given proceedings in the High Court are properly characterised as being in "*a criminal cause or matter*".

[29] The criminal cause or matter conundrum has also featured in a number of Northern Ireland cases. The most comprehensive formulation of the test to be applied is found in the judgment of Weatherup J in ***Re JR 14's Application*** [2007] NIQB 102 where, as in the present case, the Applicant challenged a police decision not to destroy DNA samples, fingerprints and photographs obtained from him following arrest. Weatherup J concluded that this was a criminal cause or matter, formulating the applicable test in the following terms:

> "*[9] What is a criminal cause or matter? I define the test in these terms - Is the application before the Court ancillary or incidental to a substantive process which places the Applicant at risk of a criminal charge or punishment before a Court?*
>
> *[10] There are a number of steps to be taken in applying the test. First of all, it is necessary to distinguish between, on the one hand, the particular application that is before the Court and on the other hand the underlying substantive process in which the Applicant has become involved. In the present case the application is for an Order for the destruction of the samples and the underlying substantive process is the police investigation which involved the arrest and detention of the Applicant.*
>
> *[11] Secondly, it is necessary to determine whether the underlying substantive process may lead directly to a charge or punishment before a Court. Thirdly, it is necessary to establish whether the particular application which has been made to the Court is ancillary or incidental to that substantive process.*"

Notably, in the later decision of ***Re Alexander's Application*** [2009] NIQB 20, which involved consideration of the legality of the arrest and detention of the Applicants under PACE, the Divisional Court quoted the ***JR14*** formulation without demur and also gave effect to the reasoning in ***Carr –v- Atkins*** and ***Blandford Justices***: see paragraphs [31] – [35]. Kerr LCJ added:

> "*[36] We consider that there is much force in the view expressed in the* ***Blandford Justices*** *case that a process is either a 'criminal cause or matter' or it is not. It is not capable of having chameleon qualities whereby it changes status from one to the other depending on the specific facts at any particular stage of the proceedings. The underlying arrest and investigatory process is a criminal cause or matter and we consider that all four cases should be so regarded irrespective of what has occurred since the date of arrest*".

[30] I do not consider an exhaustive review of the other Northern Ireland decisions necessary, not least because each of them is properly to be regarded as an application of the general principles to its particular context. The importance of context in this field cannot be overstated. It seems to me that, contextually, there is no material distinction between the present case and the earlier cases of ***Re JR 14's Application*** and ***Re Moore and Poole's Applications*** [2005] NIQB 89. Subject

thereto, I consider that the other Northern Ireland decisions belonging to this sphere are, properly analysed, illustrations of the application of settled principles to their particular contexts. This has important implications for the operation of the doctrine of precedent, whose ingredients have recently been expounded by Lord Neuberger of Abbotsbury in the following terms:

> "*The essential feature of common law is that it is judge made. The common law is established and developed through the medium of judicial decisions, which apply or adapt principles laid down in earlier cases to contemporary problems. Inherent in this is the doctrine of precedent or, to use the Latin,* ***stare decisis*** *…*
>
> *Precedent involves rules or principles of law being made by decisions of the courts. In general a court is bound by the essential legal reasoning, or* ***ratio decidendi****, of decisions made by courts superior to it and it is either bound by or normally will follow the* ***ratio*** *of decisions of courts of co-ordinate jurisdiction.*"

[Halsburys Laws of England, Centenary Essays 2007, p. 70].

I refer also to the decision of the Court of Appeal in ***Re Rice's Application*** [1998] NI 265 (at pp. 269-270, per Carswell LCJ). Having regard to the doctrine of precedent, it seems to me that the touchstone for all decisions in this sphere must be the decision of the House of Lords in ***Amand***. Furthermore, bearing in mind the difficult questions which can sometimes arise in cases of this variety and the borderline nature of some of the decisions belonging to this sphere, I consider that the exercise of comparing the instant case with earlier decided cases, while unquestionably tempting, runs the risk of being an arid one, with possible resulting error.

[31] There is one particular aspect of the governing principles which I would highlight. In my view, it is not necessary that the underlying process take the form of what would conventionally be considered to be proceedings in a court or tribunal. This is clear not only from some of the comparatively more recent decisions – such as ***Carr***, ***Blandford Justices, JR 14*** and ***Alexander*** – but also the decision in ***Amand*** itself. As I have already highlighted (see paragraph [21]), the application for habeas corpus brought by the Dutch subject was initiated following his arrest by the police, prior to any involvement of the Magistrates Court. Thus the matter under challenge was the Applicant's arrest by the police, to be contrasted with any order or decision of an inferior court or tribunal. This particular feature of the governing principles emerges clearly from the various linguistic formulae which have been consistently employed in a lengthy line of authorities of undeniable pedigree – ***Woodhall, Clifford, Amand, Carr*** and ***Blandford Justices***.

V CONCLUSIONS

[32] There are certain features of the present context which must be acknowledged. In particular, *based on the available evidence*, the police investigation of the Applicant's conduct which stimulated the impugned measures is no longer a live one; the Applicant has been formally advised that he will not be prosecuted; and he is not the subject of any current police investigation. A further ingredient of significance in this context is that, notwithstanding the intimation that there will be no prosecution of the Applicant, the Respondent has purported to exercise a statutory discretion to retain his DNA samples and fingerprints. These are the main features of the present context. While the letter of decision dated 15th January 2009 (paragraph [4] *supra*) does not address the issue of the Applicant's photographs, it will be assumed *for present purposes* that the Respondent is purporting to exercise the discretion enshrined in Article 64A(4)(b) of PACE. The question to be confronted and resolved by the court is how the principles governing the determination of what constitutes a criminal cause or matter are to be applied to this matrix.

[33] In my view, the first key to the answer to this question is provided by the terms of the statutory powers which the Respondent has purported to exercise and the possible future implications for the Applicant of their exercise. Pursuant to Article 64(1)A of PACE, the Respondent has exercised a power to *retain* the Applicant's samples and fingerprints, which, in such circumstances –

> "*… 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*".

Similarly, per Article 64A(4)(b), the photographs of the Applicant taken under the umbrella of this statutory provision may be used or disclosed for any purpose related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution and, thereafter –

> "*… may be retained but may not be used or disclosed for a purpose so related*".

Thus, under each of the statutory regimes in play, the impugned measures have possible future implications for the Applicant (and others) with regard to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution.

[34] The second key to the correct answer to the question posed in paragraph [30] requires an intense focus on the impugned act, measure or decision. This must be examined in its full context. In the present case, the context to which the impugned measures belong encompasses possible future activities, all belonging exclusively to the criminal justice sphere. The principal features of the underlying process in the instant case are the suspicion that the Applicant had committed a criminal offence;

his consequential arrest, detention and questioning by the police; the acts of photographing him and taking his DNA samples and fingerprints; the later determination that he would not be prosecuted in respect of the index offence; the Respondent's decision to retain the Applicant's DNA samples, fingerprints and photographs; and the possibility of future criminal justice activities and measures relating to the Applicant, discussed in the immediately preceding paragraph.

[35] The next, and final, step in the exercise requires the court to identify and apply the governing legal rule to the matrix defined above. This does not entail the application of a statutory definition of the phrase "*criminal cause or matter*", as none exists. Furthermore, as noted by Lord Hoffmann in ***Montgomery***, no exhaustive definition of this phrase is to be found in the leading decisions. Having regard to the doctrine of precedent, I consider it incumbent on every court carrying out the present exercise to apply the ***Amand*** principles. It is undeniable that their application to individual contexts can sometimes present difficulties. However, the principles themselves are framed in tolerably clear terms.

[36] In my opinion, the governing principles are to be applied to the matrix in the present case in the following way:

(a) Adopting the language of Viscount Simon LC in ***Amand***, a possible and foreseeable outcome of the impugned measures is the prosecution and punishment of the Applicant for a criminal offence on some future date.

(b) In the language of Lord Wright in ***Amand***, if any of the impugned measures is "*carried to its conclusion*", the Applicant is at risk of future prosecution and punishment for a criminal offence.

(c) To borrow the phraseology of Lord Porter in ***Amand***, any of the impugned measures may properly be considered to be "*a step in a criminal proceeding*", which "*need not of itself of necessity end in a criminal trial or punishment*", it being sufficient that it "*… puts* [the Applicant] *in jeopardy of a criminal charge …*" at some future date.

(d) In the words of Megaw LJ in ***St. Germain***, by reason of any of the impugned measures there is "*… in contemplation the possibility of trial by a court for some offence … the prospect that a judicial tribunal will try a criminal charge …*".

(e) Bearing in mind the decision in ***Blandford Justices***, I consider that there is no sensible or logical distinction between a case where any of the impugned measures occurs in the course of criminal proceedings which, when the subsequent challenge materialises, are no longer in existence (on the one hand) and one where the impugned measure occurs as a prelude to a possible future process of a criminal nature or

possible future criminal proceedings which may, or may not, materialise (on the other).

(f) The impugned measures belong exclusively to the realm of the criminal justice process: none of them has any other legal family or home. There is no possible third characterization: the choice lies between civil and criminal. Applying the blunt formula of Sir John Donaldson MR in ***Carr –v- Atkins***, each of the impugned measures is something which *is not civil*. In addition, as stated by His Lordship "*… the fact that there are no criminal proceedings does not … matter*".

[37] In the result, given effect to the reasoning set out above, I conclude that the present application for judicial review is a criminal cause or matter. I would add that, being a court of co-ordinate jurisdiction, this court is bound by the decision in ***Re Alexander's Application*** which, in my view, has adopted and approved the reasoning of Weatherup J in ***Re JR 14's Application***, to the extent that this forms part of the *ratio decidendi* in ***Alexander***. While it follows, therefore, that I respectfully disagree with the decision in ***Re Moore and Poole's Applications***, I would observe that this issue seems to have arisen unexpectedly in the course of the hearing of those conjoined matters and, further, the judgment predated ***Re JR 14*** and ***Re Alexander***. Further, I apprehend that the review of the relevant statutory provisions, the legislative history and the reported decisions which this litigation has generated has probably been more extensive than in any other case decided in this jurisdiction.

[38] Undeniably, a key feature of the aforementioned conclusion is the present statutory context. In this respect, the court is aware that statutory reforms are in contemplation. It follows that this conclusion may have to be reconsidered at a later stage. If, for example, the new legislation were to provide that the DNA samples, fingerprints and photographs of a person such as the Applicant may be lawfully retained only for the purposes of scientific research (admittedly, an unlikely outcome), this would clearly affect the conclusion reached in this judgment. There is also a distinct possibility that the advent of new legislation will require the Respondent to make a fresh decision in the present case. This, too, could potentially affect the characterization of the present proceedings. Yet again, the supreme importance of *context* requires no emphasis.

MORGAN LCJ

[39] I have had the benefit of reading in draft the judgment of McCloskey J. I am grateful to him for his careful and extensive review of the statutory background and relevant authorities.

[40] The impugned decision in this case is the refusal of the respondent to remove from its database and destroy DNA samples, fingerprints and photographs (the

samples) obtained by the respondent on 7 October 2008 in connection with a police investigation concerning the applicant's involvement in a burglary. For the purposes of this application the investigation of the applicant's involvement in the alleged burglary and any possible prosecution or penalty arising from it had ceased some weeks later and certainly had so ceased by 15 January 2009, the date of the impugned decision.

[41] A criminal cause or matter can arise: --

(i) before any criminal proceedings are issued;
(ii) while such proceedings are pending; and
(iii) after such proceedings have arrived at an outcome.

In any given case there may be reasons for considering whether a particular application falls into more than one category.

[42] Amand v Home Secretary [1943] AC 147 is an example of the first category. The applicant had been arrested because he had not returned to his Dutch army unit. The arrest was to be followed by a court application to return the applicant to the criminal jurisdiction of a foreign country and thus put him in jeopardy of punishment. Carr v Atkins [1987] 3 WLR 529 is another example of this category. In that case an investigation in respect of criminal conduct was ongoing. There were reasonable grounds for believing that a serious arrestable offence had been committed and the material of which production was sought was likely to be of substantial value to that investigation.

[43] The common feature of both of these examples of the first category is that in each case there was an identifiable investigation or anticipated proceeding. Applying the words of Viscount Simon LC in Amand the matter in each case was one the direct outcome of which may be the trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so. It is important to note the word "direct". It connotes a relationship of proximity between the immediate application with which the court is concerned and the matter in respect of which the applicant may be placed in jeopardy. Weatherup J also used the word "directly" in the second of his tests set out in paragraph 11 of JR 14 and helpfully reproduced in paragraph 29 of the judgment of McCloskey J. As long as one can identify the underlying criminal investigation or proceeding any application associated with it should be given a wide meaning (see ex p Woodhall [1888] QBD 832).

[44] In this case there is no ongoing investigation concerning the applicant in respect of any offence. There are no proceedings in respect of him contemplated and this application is connected to nothing which could give rise to a trial as a direct outcome. At its height there is a possibility that the applicant may be investigated for offences in the future in which access to his DNA may be helpful for the purposes of that investigation. I do not consider that such a remote possibility

satisfies the need for proximity between the application before the court and the matter putting the applicant in jeopardy. I also consider that this analysis is supported by the principle formulated by Lord Wright in Amand.

> "The principle which I deduce from the authorities I have cited and the other relevant authorities which I have considered, is that if the cause or matter is one which, if carried to its conclusion, might result in the conviction of the person charged and in a sentence of some punishment, such as imprisonment or fine, it is a "criminal cause or matter." The person charged is thus put in jeopardy."

The first sentence refers to the matter being one which might result in the conviction of the person charged. The next sentence notes that the person charged is thus put in jeopardy. This applicant has not been charged with any offence which puts him in jeopardy. The reference to "person charged" supports the view that there must be a relationship between the application under consideration and some identifiable investigation or criminal proceedings concerning the applicant. I consider, therefore, that this analysis points strongly against this being an application which could fall within the first category.

[45] The second category of cases concerns those applications which can be said to be connected to underlying existing proceedings. I readily acknowledge that if this had been a challenge to the taking of the samples or their retention during the investigation this would have been a criminal cause or matter. The effect of the decision in Blandford Justices [1990] 1 WLR 1490, the force of which has been acknowledged by this court in Re Alexander and others [2009] NIQB 20, is that a challenge will still be a challenge in a criminal cause or matter even if the underlying proceedings have been resolved because the nature of the proceedings does not change. That, of course, does not arise in this case. There has been no challenge to the taking of the samples or their retention during the investigation. This application relates only to removal from the database and destruction after the underlying proceedings have come to a conclusion. This case cannot, therefore, fall into the second category.

[46] The third category of cases is that in which the challenge is launched after the determination of the investigation or proceedings. Those cases in which there is a challenge concerning the number of days that the applicant has to serve in custody as a result of the sentence imposed are obvious examples. The issue in such cases is the meaning of the sentence passed. The proceedings will clearly not lead directly to a trial but the nature and character of the proceedings is directly connected to the judicial determination of the sentence. That was the conclusion reached by this Court in Re Montgomery's Application [2008] NIQB 130. This test also recognises that the "direct outcome" test is not determinative of such proceedings, a point noted by Lord Hoffmann in Government of the United States Of America v Montgomery

[2001] 1 WLR 196. Another example of such a case is R(Aru) v Chief Constable of Merseyside Police [2004] EWCA Civ 199. That was a case where an applicant had allegedly accepted a caution in full knowledge of the consequences and then challenged the decision. His application was rejected at first instance and he sought to appeal to the Court of Appeal. The court of appeal rejected jurisdiction on the basis that his application concerned a criminal cause or matter and therefore it did not have jurisdiction by virtue of section 18(1)(a) of the Supreme Court Act 1981. The issue in that case was the validity of the outcome of the criminal investigation and the direct connection between the investigation and the issue under challenge was evident.

[47] In order to establish the nature and character of the proceedings in this case it is necessary to examine the statutory background, particularly the provisions of Article 64A of the Police and Criminal Evidence (Northern Ireland) Order 1989. Fortunately I find myself in agreement with McCloskey J at paragraph 8 of his judgment where he notes that these powers give a discretion to the respondent to retain the samples and an obligation to limit the use to which they can be put if retained. I accept that it is a precondition of a challenge of this nature that the samples were obtained in the course of a criminal investigation and that the statute prevents the use of the samples other than for the prevention and detection of crime, but what is now at issue is the review of a discretion which in my view is unconnected with any investigation or proceedings past, present or in contemplation.

[48] This analysis is it supported by the procedure followed in R(Doody) v Secretary Of State [1994] 1 AC 531. That was a challenge to the determination by the Secretary Of State of the tariff which the prisoner had to serve to satisfy the requirements of retribution and deterrence. By virtue of section 61 of the Criminal Justice Act 1967 the Secretary Of State was required to consult the Lord Chief Justice and the trial judge. The exercise of discretion was clearly dependent upon the life sentence passed in the underlying proceedings. The trial judge involved in those proceedings was by statute part of the consultation process in the determination of the tariff. Despite the prohibition in section 18(1)(a) of the Supreme Court Act 1981 preventing the Court Of Appeal hearing an appeal in a criminal cause or matter the case made its way to the House of Lords via the Court Of Appeal. The explanation lay in the fact that what was in issue was the exercise of a discretion independent of the underlying proceedings (see ex p Evans [1997] QB 443).

[49] I consider that exactly the same reasoning should be applied to this application. I note that in Marper [2006] UKHL 10 the issue before the court was identical to the issue in this application. The case was appealed to the Court of Appeal and then the House of Lords despite the provisions of section 18(1)(a) of the Supreme Court 1981. I consider that the procedure in that case was properly followed. I also consider that the issue was properly decided in Moore and Poole's Application [2005] NIQB 89. I have concluded that this is not a criminal cause or matter.

[50] As is apparent from the numerous authorities referred to in the judgments in this case this procedural issue has occupied a considerable amount of court time. The practical effect of the determination that an application is a criminal cause or matter is that the only appeal right available to the applicant requires certification that a point of law of general public importance is involved as well as leave of the court of first instance or the Supreme Court . In this jurisdiction there is no reason to believe that the provision of a right of appeal to the Court of Appeal in such cases would significantly increase the workload of the court. The requirement to appeal directly to the Supreme Court now seems anomalous.

WEATHERUP J

[51] I find myself in agreement with McCloskey J and would conclude that this is a criminal cause or matter. Much judicial time has been expended of late in consideration of this issue. The consequences of a finding that an application for judicial review is a criminal cause or matter are that at first instance the application shall be heard by three judges or, if the Lord Chief Justice so directs, two judges and an appeal lies directly to the Supreme Court rather than to the Court of Appeal. I agree with the Lord Chief Justice that the requirement to accord different treatment to a criminal cause or matter might be removed and all cases dealt with at first instance by a single judge, with a right of appeal to the Court of Appeal.

IN THE MATTER of an Application by JR 27
for Judicial Review

_____

APPENDIX OF STATUTORY PROVISIONS

_____

[Note: Emphasis added where appropriate]

1. Section 19, Judicature Act 1873

"The said Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, ***save as hereinafter mentioned***, of Her Majesty's High Court of Justice, or of any judges or judge thereof, ***subject to the provisions of this Act ...***"

2. Section 47, Judicature Act 1873

"The jurisdiction and authorities in relation to questions of law arising in criminal trials which are now vested in the Justices of either Bench and the Barons of the Exchequer … shall and may be exercised after the commencement of this Act by the judges of the High Court of Justice …

The determination of any such question by the judges of the said High Court in manner aforesaid shall be final and without appeal; ***and no appeal shall lie from any judgment of the said High Court in any criminal cause or matter***, save for some error of law apparent upon the record …"

3. Section 45, Judicature Act (Ireland) 1877

"Such causes and matters as are not proper to be heard by a single judge shall be heard by Divisional Courts of the said High Court of Justice, which shall for that purpose exercise all or any part of the jurisdiction of the said High Court …constituted by two or more of the judges thereof."

4. Section 46, Judicature Act (Ireland) 1877

"Subject to any Rules of Court … all such business belonging to the Queen's Bench, Common Pleas and Exchequer Divisions respectively of the said High Court, as according to the practice now existing in the Superior Courts of Common Law in Ireland would have been proper to be transacted or disposed of by the court sitting *in Banco* if this Act had not passed, may be transacted and disposed of by Divisional Courts …"

5. Section 48, Judicature Act (Ireland) 1877

"Subject to Rules of Court, any judge of the said High Court … may reserve any case, or any point in a case, for the consideration of a Divisional Court or may direct any case, or point in a case, to be argued before any such Court …"

6. Section 50, Judicature Act (Ireland) 1877

"The jurisdiction and authorities in relation to questions of law arising in criminal trials which are now vested in the justices of either Bench and the Barons of the Exchequer …

shall and may be exercised after the commencement of this Act by the judges of the High Court of Justice …

The determination of any such question by the judges of the said High Court in manner aforesaid shall be final and without appeal; and no appeal shall lie from any judgment of the said High Court in any criminal cause or matter, save for some error of law apparent upon the record …"

7. Section 51, Judicature Act (Ireland) 1877

"In proceedings in the Queen's Bench, Common Pleas and Exchequer Divisions respectively, every motion for a new trial of any cause or matter …

shall be heard before a Divisional Court; and no appeal shall lie from any judgment founded upon and applying any verdict unless a motion has been made or other proceeding taken before a Divisional Court to set aside or reverse such verdict, or the judgment, if any, founded thereon, in which case an appeal shall lie to the Court of Appeal from the decision of the Divisional Court upon such motion or other proceeding".

8. Section 1, Criminal Appeal Act 1907 [Long Title "An Act to Establish a Court of Criminal Appeal and to amend the Law in Criminal Cases"]

"(1) There shall be a Court of Criminal Appeal and the Lord Chief Justice of England and eight judges of the King's Bench Division of the High Court … shall be judges of that court.

(2) For the purpose of hearing and determining appeals under this Act … the court shall be duly constituted if it consists of not less than three judges and of an uneven number of judges …

(6) If in any case the Director of Public Prosecutions or the prosecutor or Defendant obtains the certificate of the Attorney General that the decision of the Court of Criminal Appeal involves a point of law of exceptional public importance, and that it is desirable in the public interest that a further appeal should be brought, he may appeal from that decision to the House of Lords, but subject thereto the determination by the Court of Criminal Appeal of any appeal or other matter which it has power to determine shall be final and no appeal shall lie from that court to any other court."

9. Section 3, Criminal Appeal Act 1907

"A person convicted on indictment may appeal under this Act to the Court of Criminal Appeal –

(a) against his conviction on any ground of appeal which involves a question of law alone; and

(b) with the leave of the Court of Criminal Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the court to be a sufficient ground of appeal; and

(c) with the leave of the Court of Criminal Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law."

10. **Section 40(1), Government of Ireland Act 1920**

"The Supreme Court of Judicature of Northern Ireland shall consist of two divisions, one of which under the name of His Majesty's High Court of Justice in Northern Ireland shall, in Northern Ireland, have and exercise all such jurisdiction as is now exercised by His Majesty's High Court of Justice in Ireland and by the judges of that court (including the land judges) and the other of which, under the name of His Majesty's Court of Appeal in Northern Ireland shall, in Northern Ireland, have and exercise all such jurisdiction as is now exercised by His Majesty's Court of Appeal in Ireland".

11. **Section 41(1), Government of Ireland Act 1920**

"Subject to the provisions of this Act … all enactments relating to the Supreme Court of Judicature in Ireland and the judges and officers thereof shall apply to the Supreme Court of Judicature in Southern Ireland and to the Supreme Court of Judicature in Northern Ireland respectively and the judges and officers thereof …

Provided that, where but for this provision an appeal under Section 51 of the Supreme Court of Judicature Act (Ireland) 1877 would lie to a Divisional Court … an appeal shall lie to the Court of Appeal in Southern Ireland or Northern Ireland as the case may be instead of a Divisional Court".

12. **Section 31, Supreme Court of Judicature (Consolidation) Act 1925**

"(1) No appeal shall lie [*to the Court of Appeal*] –

(a) except as provided by the Criminal Appeal Act 1907, or this Act, from ***any judgment of the High Court in any criminal cause or matter ...***"

13. **Section 1, Criminal Appeal (Northern Ireland) Act 1930**

"(1) There shall be a Court of Criminal Appeal in Northern Ireland (hereinafter in this Act referred to as 'the Court') and all the judges of the Supreme Court of Judicature of Northern Ireland shall be judges of the Court".

14. **Section 2, Criminal Appeal (Northern Ireland) Act 1930**

"A person convicted on indictment may appeal under this Act to the Court –

(1) Against his conviction on any ground of appeal which involves a question of law alone; and

(2) With the leave of the Court, or upon the Certificate of the judge who tried him that it is a fit case for appeal, against his conviction on any ground of appeal which involves a question of fact alone or a question of mixed law and fact, or on any other ground which appears to the court, or to the judge aforesaid, to be a sufficient ground of appeal; and

(3) With the leave of the Court, against the sentence passed on his conviction, unless the sentence is one fixed by law …

provided that a person sentenced to penal servitude and preventive detention in pursuance of the Prevention of Crime Act 1908 may appeal against the sentence without the leave of the Court".

15. Section 6, Criminal Appeal (Northern Ireland) Act 1930

"(1) If in any case the prosecutor or defendant obtains the Certificate of the Attorney General that the decision of the Court involves a point of law of exceptional public importance and that it is desirable in the public interest that a further appeal should be brought, he may appeal from that decision to the House of Lords, but subject thereto the determination by the Court of any appeal or other matter which they have power to determine shall be final and no appeal shall lie from the Court to any other court.

(2) An application to the Attorney General under this Section for a Certificate authorising an appeal to the House of Lords shall be made within a period of seven days from the date when the decision of the Court was given".

16. Section 1, Administration of Justice Act 1960

"***Appeal to House of Lords in criminal cases***

(1) Subject to the provisions of this Section, an appeal shall lie to the House of Lords, at the instance of the Defendant or the prosecutor –

(a) ***from any decision of a Divisional Court of the Queen's Bench Division in a criminal cause or matter;***

(b) from any decision of the Court of Criminal Appeal on an appeal to that court".

(2) No appeal shall lie under this Section except with the leave of the court below or of the House of Lords; and such leave shall not be granted unless it is certified by the court below that a point of law of general public importance is involved in the decision and it appears to that court or to the House of Lords, as the case may be, that the point is one which ought to be considered by that House".

17. Section 2, Northern Ireland Act 1962

(1) No appeal to the Court of Appeal shall lie –

(a) except as provided by the Administration of Justice Act 1960, ***from any judgment of the High Court in any criminal cause or matter ...".***

18. Section 8, Criminal Appeal (Northern Ireland) Act 1968

"***Appeal against conviction and sentence***

(1) A person convicted on indictment may appeal to the Court of Criminal Appeal against his conviction –

(a) on any ground which involves a question of law alone; and

(b) with the leave of the court, on any ground which involves a question of fact alone, or a question of mixed law and fact, or on any other ground which appears to the Court to be a sufficient ground of appeal;

But if the judge of the court of trial grants a certificate that the case is fit for appeal on a ground which involves a question of fact, or of mixed law and fact, an appeal lies under this subsection without the leave of the Court of Appeal.

(2) A person convicted on indictment may appeal to the Court of Criminal Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law; but an appeal under this subsection lies only with the leave of the Court of Criminal Appeal".

19. Section 16, Judicature (Northern Ireland) Act 1978

"(5) Except where a statutory provision otherwise provides, any jurisdiction of the High Court or a division thereof shall be exercised by a single judge".

20. Section 18, Judicature (Northern Ireland) Act 1978

"(1) Rules of court shall provide for a procedure, to be known as an application for judicial review, under which application may be made to the High Court for one or more of the following forms of relief, that is to say, relief by way of-

(a) an order of mandamus;
(b) an order of certiorari;
(c) an order of prohibition;
(d) a declaration;
(e) an injunction.

(2) Without prejudice to the generality of subsection (1), the rules shall provide-

(a) that leave of court shall be obtained before any application for judicial review, other than an application for an order of certiorari by the Attorney General acting on behalf of the Crown, is made;

(b) that such leave shall not be granted if, having regard to the nature of the persons and bodies against whom relief may be granted by way of an order of mandamus, prohibition or certiorari, the court is satisfied that the case is one in respect of which relief could not be granted by way of any such order;

(c) that, where leave is so obtained, the grounds relied on and the relief granted shall only be one or more of those specified in the application;

(d) that the court may direct, or grant leave for, the application to be amended to specify different or additional grounds or relief; and

(e) that the court may, subject to subsection (6), direct pleadings to be delivered or authorise or require oral evidence to be given where this appears to the court to be necessary or desirable.

(3) On an application for judicial review the court may grant any of the forms of relief mentioned in subsection (1)(a) to (e) which the applicant has claimed and to which he appears to be entitled whether or not he appears to be entitled to any of the other forms of relief so mentioned, whether claimed or not.

(4) The court shall not grant any relief on an application for judicial review unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

(5) Without prejudice to section 25 of this Act or to Article 159 of the Magistrates' Courts (Northern Ireland) Order 1981 where, on an application for judicial review, the court finds that-

(a) the sole ground of relief established is a defect in form or a technical irregularity; and

(b) no substantial wrong and no miscarriage of justice has occurred or no remedial advantage could accrue to the applicant,

the court may refuse relief and, where a lower deciding authority has exercised jurisdiction, may make an order, having effect from such time and on such terms as the court thinks just, validating any decision or determination of the lower deciding authority or any act done in consequence thereof notwithstanding that defect or irregularity.

(6) No return shall be made to orders of mandamus, prohibition or certiorari and no pleadings in prohibition shall be allowed but, subject to any right of appeal, such orders shall be final.

(7) For references in any statutory-provision coming into operation as respects Northern Ireland before 15th September 1965 to a writ of mandamus, prohibition or certiorari there shall be substituted references to the corresponding order and for references to the issue or award of any such writ there shall be substituted references to the making of the corresponding order."

21. Section 34, Judicature (Northern Ireland) Act 1978

"(1) The Court of Appeal shall be a superior court of record.

(2) There shall, subject to the provisions of this Act, be exercisable by the Court of Appeal –

(a) all such jurisdiction as was heretofore capable of being exercised by the Court of Appeal in Northern Ireland;

(b) all such jurisdiction as was heretofore capable of being exercised by the Court of Criminal Appeal;

(c) such other jurisdiction as is conferred by this Act or as may from time to time be conferred on the Court of Appeal by any subsequent statutory provision.

(3) The Court of Criminal Appeal shall cease to exist … "

22. Section 35, Judicature (Northern Ireland) Act 1978

"(1) Subject as otherwise provided in this or any other statutory provision, the Court of Appeal shall have jurisdiction to hear and determine in accordance with rules of court appeals from any judgment or order of the High Court or a judge thereof.

(2) No appeal to the Court of Appeal shall lie –

(a) except as provided by the following provisions of this Part from any judgment of the High Court in any criminal cause or matter …"

23. Section 41, Judicature (Northern Ireland) Act 1978

"(1) Subject to the provisions of this section, an appeal shall lie to the Supreme Court, at the instance of the defendant or the prosecutor-

(a) from any decision of the High Court in a criminal cause or matter;

(b) from any decision of the Court of Appeal in a criminal cause or matter upon a case stated by a county court or a magistrates' court.

(2) No appeal shall lie under this section except with the leave of the court below or of the Supreme Court; and, subject to section 45(3), such leave shall not be granted unless it is certified by the court below that a point of law of general public importance is involved in the decision and it appears to that court or to the Supreme Court, as the case may be, that the point is one which ought to be considered by the Supreme Court.

(4) For the purpose of disposing of an appeal under this section the Supreme Court may exercise any powers of the court below or may remit the case to that court.

(5) Schedule 1 shall have effect in relation to appeals under this section.

(6) In this section, sections 44 and 45 and Schedule 1-

(a) any reference to the defendant shall be construed-

(i) in relation to proceedings for an offence, and in relation to an application for an order of mandamus, prohibition or certiorari in connection with such proceedings, as a reference to the person who was or would have been the defendant in those proceedings;

(ii) in relation to any proceedings or order for or in respect of contempt of court, as a reference to the person against whom the proceedings were brought or the order was made;

(iii) in relation to a criminal application for habeas corpus, as a reference to the person by or in respect of whom that application was made,

and any reference to the prosecutor shall be construed accordingly;

(b) "application for habeas corpus" means an application for a writ of habeas corpus ad subjiciendum and references to a criminal application or civil application shall be construed accordingly as the application does or does not constitute a criminal cause or matter;

(c) "leave to appeal" means leave to appeal to the Supreme Court under this section;

(d) an appeal under this section shall be treated as pending until any application for leave to appeal is disposed of and, if leave to appeal is granted, until the appeal is disposed of and an application for leave to appeal shall be treated as disposed of at the expiration of the time within which it may be made, if it is not made within that time."

24. <u>Schedule 1, Judicature (Northern Ireland) Act 1978</u>

"1. - (1) Subject to sub-paragraph (2) an application to the court below for leave to appeal shall be made within the period of 28 days beginning with the relevant date; and an application to the Supreme Court for such leave shall be made within the period of 28 days beginning with the date on which the application is refused by the court below.

(1A) In sub-paragraph (1), "the relevant date" means-

(a) the date of the decision of the court below, or

(b) if later, the date on which that court gives reasons for its decision.

(2) The Supreme Court or the court below may, upon application made at any time by the defendant, extend the time within which an application may be made by him to the Supreme Court or the court below under sub-paragraph (1).

2. [rep. 2003 c.39 on 1 April 2005].

3. - (1) Without prejudice to any other power to grant bail, a person appealing or applying for leave to appeal from the Court of Appeal or the High Court under section 41 may be admitted to bail by the court below pending the appeal; and in relation to any recognizances to be entered into under Article 148 of the Magistrates' Courts (Northern Ireland) Order 1981 or under Article 63 of the County Courts (Northern Ireland) Order 1980 any reference in that section or that Article to the judgment of the Court of Appeal shall be construed as including a reference to the judgment of the Supreme Court or, if the case is remitted by the Supreme Court to the Court of Appeal, to the judgment of that court on the case as so remitted.

(2) Where application is made to the High Court or the Court of Appeal for leave to appeal, that court may give such directions as it thinks fit for discharging or enlarging any recognizances entered into by the applicant or any surety, under any statutory provision or otherwise, with reference to the proceedings of that court.

4. - (1) Where the defendant in any proceedings from which an appeal lies under section 41 would, but for the decision of the court below, be liable to be detained, and immediately after that decision the prosecutor is granted, or gives notice that he intends to apply for, leave to appeal, the court may make an order providing for the detention of the defendant or directing that he shall not be released except on bail, which may be granted by the court as under paragraph 3 so long as any appeal under section 41 is pending.

(2) An order under sub-paragraph (1) shall (unless the appeal has previously been disposed of) cease to have effect at the expiration of the period for which the defendant would have been liable to be detained but for the decision of the court below.

(3) Any order made under sub-paragraph (1) for the detention of a defendant who, but for the decision of the court below, would be liable to be detained in pursuance of an order or direction under the Mental Health (Northern Ireland) Order 1986 (other than Article 42, 43 or 45), shall be an order authorising his continued detention in pursuance of the order or direction under the said Order, and the provisions of the said Order with respect to persons so liable (including provisions as to the renewal of authority for detention and the removal or discharge of patients) shall apply accordingly.

(3A) Where an order is made under sub-paragraph (1) in the case of a defendant who, but for the decision of the court below, would be liable to be detained in pursuance of an interim hospital order under Article 45 of the Mental Health (Northern Ireland) Order 1986, the order may, if the court thinks fit, be one authorising his continued detention in hospital and in that event-

(a) sub-paragraph (2) shall not apply to the order;

(b) Part III of that Order shall apply as if he had been ordered under this paragraph to be detained in custody so long as any appeal under section 41 is pending and were detained in pursuance of a transfer direction together with a restriction direction; and

(c) if the defendant is detained by virtue of this sub-paragraph and the appeal by the prosecutor succeeds, paragraph (2) of the said Article 45 (power of court to make hospital order in the absence of an offender who is subject to an interim hospital order) shall apply as if the defendant were still subject to an interim hospital order.

(4) Where the court below has power to make an order under sub-paragraph (1) and either no such order is made or the defendant is released or discharged by virtue of subparagraph (2), (3) or (3A) before the appeal is disposed of, the defendant shall not be liable to be again detained as the result of the decision of the Supreme Court on the appeal.

5. - (1) Where a person subject to a sentence is admitted to bail pending an appeal under section 41, the time during which he is at large after being so admitted shall be disregarded in computing the term of his sentence.

(2) Subject to sub-paragraph (1), any sentence passed on an appeal under section 41 in substitution for another sentence shall, unless the Supreme Court or the court below otherwise directs, begin to run from the time when that other sentence would have begun to run.

6. - (1) Rules of court may be made-

(a) for determining the cases in which the powers of the Court of Appeal under section 41 and this Schedule may be exercised by a judge thereof,

(b) for prescribing the persons before whom and the manner in which a recognizance shall be entered into, or other security given, where bail is granted to a person under paragraph 3 or 4 pending an appeal under section 41 from a decision of the High Court or Court of Appeal, and the manner in which any such recognizance or security may be enforced;

(c) for authorising the recommittal of any person to whom bail is granted.

(2) A defendant who is detained pending an appeal under section 41 shall not be entitled to be present on the hearing of the appeal or of any proceedings preliminary or incidental thereto except where Supreme Court Rules or rules of court authorise him to be present or where the Supreme Court or the court below, as the case may be, gives him leave to be present."

25. <u>Section 16, Supreme Court Act 1981</u>

"(1) Save as otherwise provided by this or any other Act … the Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of the High Court.

26. <u>Section 18, Supreme Court Act 1981</u>

"(1) No appeal shall lie to the Court of Appeal –

(a) except as provided by the Administration of Justice Act 1960, ***from any judgment of the High Court in any criminal cause or matter***".

27. <u>Article 62 , Police and Criminal Evidence (NI) Order 1989</u>

[As amended, with effect from 1st March 2007]

"**62**. - (1) An intimate sample may be taken from a person in police detention only-
(a) if a police officer of at least the rank of inspector authorises it to be taken; and
(b) if the appropriate consent is given.

(1A) An intimate sample may be taken from a person who is not in police detention but from whom, in the course of the investigation of an offence, two or more non-intimate samples suitable for the same means of analysis have been taken which have proved insufficient-

(a) if a police officer of at least the rank of inspector authorises it to be taken; and
(b) if the appropriate consent is given.

(2) An officer may only give an authorisation under paragraph (1) or (1A) if he has reasonable grounds-
(a) for suspecting the involvement of the person from whom the sample is to be taken in a recordable offence; and
(b) for believing that the sample will tend to confirm or disprove his involvement.

(3) An officer may give an authorisation under paragraph (1) or (1A) orally or in writing but, if he gives it orally, he shall confirm it in writing as soon as is practicable.

(4) The appropriate consent must be given in writing.

(5) Where-
(a) an authorisation has been given; and
(b) it is proposed that an intimate sample shall be taken in pursuance of the authorisation,
an officer shall inform the person from whom the sample is to be taken-
(i) of the giving of the authorisation; and
(ii) of the grounds for giving it.

(6) The duty imposed by paragraph (5)(ii) includes a duty to state the nature of the offence in which it is suspected that the person from whom the sample is to be taken has been involved.

(7) If an intimate sample is taken from a person-
(a) the authorisation by virtue of which it was taken;
(b) the grounds for giving the authorisation; and
(c) the fact that the appropriate consent was given,
shall be recorded as soon as is practicable after the sample is taken.

(7A) If an intimate sample is taken from a person at a police station-
(a) before the sample is taken, an officer shall inform him that it may be the subject of a speculative search; and
(b) the fact that the person has been informed of this possibility shall be recorded as soon as practicable after the sample has been taken.

(8) If an intimate sample is taken from a person detained at a police station, the matters required to be recorded by paragraph (7) or (7A) shall be recorded in his custody record.

(9) In the case of an intimate sample which is a dental impression, the sample may be taken from a person only by a registered dentist.

(9A) In the case of any other form of intimate sample, except in the case of a sample of urine, the sample may be taken from a person only by one of the following-
(a) a medical practitioner;
(b) a registered health care professional.

(10) Where the appropriate consent to the taking of an intimate sample from a person was refused without good cause, in any proceedings against that person for an offence-
(a) the court, in determining-
(i) whether to commit that person for trial; or
(ii) whether there is a case to answer; and
(aa) a judge, in deciding whether to grant an application made by the accused under paragraph 4 of Schedule 1 to the Children's Evidence (Northern Ireland) Order 1995 (application for dismissal of charge of violent or sexual offence involving child in respect of which notice of transfer has been given under Article 4 of that Order); and

(b) the court or jury, in determining whether that person is guilty of the offence charged, may draw such inferences from the refusal as appear proper; and the refusal may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence against the person in relation to which the refusal is material.

(11) Nothing in this Article affects Articles 13 to 21 of the Road Traffic (Northern Ireland) Order 1995 or Articles 18 and 19 of the Road Traffic Offenders (Northern Ireland) Order 1996."

(12) Nothing in this Article applies to a person arrested or detained under the terrorism provisions; and paragraph (1A) shall not apply where the non-intimate samples mentioned in that paragraph were taken under paragraph 10 of Schedule 8 to the Terrorism Act 2000.

[NOTE : paragraph 12 was inserted by the Police (Amendment) (Northern Ireland) Order 1995, commenced by SR 1996 No 316 and substituted by the Terrorism Act 2000, Section 125 and Schedule 15, paragraph 8 (12), commenced by S.I. 2001 No 421].

28. <u>Article 63 , Police and Criminal Evidence (NI) Order 1989</u>

[As amended with effect from 1st March 2007]

"**63**. - (1) Except as provided by this Article, a non-intimate sample may not be taken from a person without the appropriate consent.

(2) Consent to the taking of a non-intimate sample must be given in writing.

(2A) A non-intimate sample may be taken from a person without the appropriate consent if-

(a) he is in police detention in consequence of his arrest for a recordable offence; and

(b) either he has not had a non-intimate sample of the same type and from the same part of the body taken in the course of the investigation of the offence by the police, or he has had such a sample taken but it proved insufficient.

(3) A non-intimate sample may be taken from a person without the appropriate consent if-

(a) he is being held in custody by the police on the authority of a court; and

(b) an officer of at least the rank of inspector authorises it to be taken without the appropriate consent.

(3A) A non-intimate sample may be taken from a person (whether or not he is in police detention or held in custody by the police on the authority of a court) without the appropriate consent if-

(a) he has been charged with a recordable offence or informed that he will be reported for such an offence; and

(b) either he has not had a non-intimate sample taken from him in the course of the investigation of the offence by the police or he has had a non-intimate sample taken from him but either it was not suitable for the same means of analysis or, though so suitable, the sample proved insufficient.

(3B) A non-intimate sample may be taken from a person without the appropriate consent if he has been convicted of a recordable offence.

(4) An officer may only give an authorisation under paragraph (3) if he has reasonable grounds-

(a) for suspecting the involvement of the person from whom the sample is to be taken in a recordable offence; and

(b) for believing that the sample will tend to confirm or disprove his involvement.

(5) An officer may give an authorisation under paragraph (3) orally or in writing but, if he gives it orally, he shall confirm it in writing as soon as is practicable.

(5A) An officer shall not give an authorisation under paragraph (3) for the taking from any person of a non-intimate sample consisting of a skin impression if—
(a) a skin impression of the same part of the body has already been taken from that person in the course of the investigation of the offence; and
(b) the impression previously taken is not one that has proved insufficient.

(6) Where-
(a) an authorisation has been given; and
(b) it is proposed that a non-intimate sample shall be taken in pursuance of the authorisation,
an officer shall inform the person from whom the sample is to be taken-
(i) of the giving of the authorisation; and
(ii) of the grounds for giving it.

(7) The duty imposed by paragraph (6)(ii) includes a duty to state the nature of the offence in which it is suspected that the person from whom the sample is to be taken has been involved.

(8) If a non-intimate sample is taken from a person by virtue of paragraph (3)-
(a) the authorisation by virtue of which it was taken; and
(b) the grounds for giving the authorisation,
shall be recorded as soon as is practicable after the sample is taken.

(8A) In a case where by virtue of paragraph (2A), (3A) or (3B) a sample is taken from a person without the appropriate consent-
(a) he shall be told the reason before the sample is taken; and
(b) the reason shall be recorded as soon as practicable after the sample is taken.

(8B) If a non-intimate sample is taken from a person at a police station, whether with or without the appropriate consent-
(a) before the sample is taken, an officer shall inform him that it may be the subject of a speculative search; and
(b) the fact that the person has been informed of this possibility shall be recorded as soon as practicable after the sample has been taken.

(9) If a non-intimate sample is taken from a person detained at a police station, the matters required to be recorded by paragraph (8), (8A) or (8B) shall be recorded in his custody record.

(9A) The power to take a non-intimate sample from a person without the appropriate consent is exercisable by a constable.

(10) Paragraph (3B) shall not apply to persons convicted before the date on which that paragraph comes into operation.

(10A) Where a non-intimate sample consisting of a skin impression is taken electronically from a person, it must be taken only in such manner, and using such devices, as the Secretary of State has approved for the purpose of the electronic taking of such an impression.

(11) Nothing in this Article applies to a person arrested or detained under the terrorism provisions.

(12) Nothing in this Article applies to a person arrested under an extradition arrest power.

29. Article 64, Police and Criminal Evidence (Northern Ireland) Order 1989

[As amended with effect from 1st March 2007]

64. - (1A) 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.

(1B) In paragraph (1A)-

(a) the reference to using a fingerprint or an impression of footwear includes a reference to allowing any check to be made against it under Article 63A(1) and to disclosing it to any person;

(b) the reference to using a sample includes a reference to allowing any check to be made under Article 63A(1) against it or against information derived from it and to disclosing it or any such information to any person;

(c) the reference to crime includes a reference to any conduct which-

(i) constitutes one or more criminal offences (whether under the law of a part of the United Kingdom or of a country or territory outside the United Kingdom); or

(ii) is, or corresponds to, any conduct which, if it all took Place in any one part of the United Kingdom, would constitute one or more criminal offences; and

(d) the references to an investigation and to a prosecution include references, respectively, to any investigation outside the United Kingdom of any crime or suspected crime and to a prosecution brought in respect of any crime in a country or territory outside the United Kingdom.

(1BA) Fingerprints taken from a person by virtue of Article 61(6A) must be destroyed as soon as they have fulfilled the purpose for which they were taken.

(3) If-

(a) fingerprints, impressions of footwear 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 Article, be destroyed as soon as they have fulfilled the purpose for which they were taken.

(3AA) Samples, fingerprints and impressions of footwear are not required to be destroyed under paragraph (3) 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, fingerprint or (as the case may be) an impression of footwear was also taken from the convicted person for the purposes of that investigation.

(3AB) Subject to paragraph (3AC), where a person is entitled under paragraph (1BA) or (3) to the destruction of any fingerprint, impression of footwear or sample taken from him (or would be but for paragraph (3AA)), neither the fingerprint, nor the impression of footwear, nor the sample, nor any information derived from the sample, shall be used-

(a) in evidence against the person who is or would be entitled to the destruction of that fingerprint, impression of footwear or sample; or

(b) for the purposes of the investigation of any offence;

and paragraph (1B) applies for the purposes of this paragraph as it applies for the purposes of paragraph (1A).

(3AC) Where a person from whom a fingerprint, impression of footwear or sample has been taken consents in writing to its retention -

(a) that fingerprint, impression of footwear or sample need not be destroyed under paragraph (3); and

(b) paragraph (3AB) shall not restrict the use that may be made of the fingerprint, impression of footwear or sample or, in the case of a sample, of any information derived from it;

(c) that consent shall be treated as comprising a consent for the purposes of Article 63A(1C)

and a consent given for the purposes of this paragraph shall not be capable of being withdrawn.

This paragraph does not apply to fingerprints taken from a person by virtue of Article 61(6A).

(3AD) For the purposes of paragraph (3AC) it shall be immaterial whether the consent is given at, before or after the time when the entitlement to the destruction of the fingerprint, impression of footwear or sample arises.

(5) If fingerprints or impressions of footwear are destroyed-

(a) any copies of the fingerprints or impressions of footwear shall also be destroyed; and

(b) a person authorised by the Chief Constable to control access to computer data relating to the fingerprints or impressions of footwear shall make access to the data impossible, as soon as it is practicable to do so.

(6) A person who asks to be allowed to witness the destruction of his fingerprints or impressions of footwear or copies of them shall have a right to witness it.

(7) If-

(a) paragraph (5)(b) falls to be complied with; and

(b) the person to whose fingerprints or impressions of footwear the data relate asks for a certificate that it has been complied with,

such a certificate shall be issued to him not later than the end of the period of 3 months beginning with the day on which he asks for it by the Chief Constable or a person authorised by him or on his behalf for the purposes of this Article.

(8) Nothing in this Article-

(a) affects any power conferred by paragraph 18(2) of Schedule 2 to the Immigration Act 1971 or section 20 of the Immigration and Asylum Act 1999 (disclosure of police information to the Secretary of State for use for immigration purposes); or

(b) applies to a person arrested or detained under the terrorism provisions

30. <u>Section 83, Criminal Justice and Police Act 2001</u>

[In operation from 11th May 2001]

"(1) Article 64 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (SI 1989/1341 (NI 12)) (destruction of fingerprints and samples) shall be amended as follows.

(2) For paragraphs (1) and (2) (obligation to destroy fingerprints and samples of persons who are not prosecuted or who are cleared) there shall be substituted—

'(1A) Where—

(a) fingerprints 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 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.

(1B) In paragraph (1A)—

(a) the reference to using a fingerprint includes a reference to allowing any check to be made against it under Article 63A(1) and to disclosing it to any person;

(b) the reference to using a sample includes a reference to allowing any check to be made under Article 63A(1) against it or against information derived from it and to disclosing it or any such information to any person;

(c) the reference to crime includes a reference to any conduct which—

(i) constitutes one or more criminal offences (whether under the law of a part of the United Kingdom or of a country or territory outside the United Kingdom); or

(ii) is, or corresponds to, any conduct which, if it all took place in any one part of the United Kingdom, would constitute one or more criminal offences;

and

(d) the references to an investigation and to a prosecution include references, respectively, to any investigation outside the United Kingdom of any crime or suspected crime and to a prosecution brought in respect of any crime in a country or territory outside the United Kingdom."

(3) In paragraph (3), for "paragraph (3A)" there shall be substituted "the following provisions of this Article.'

(4) For paragraphs (3A) and (3B) (power to retain samples for elimination purposes and restriction on use) there shall be substituted—

'(3AA) Samples and fingerprints are not required to be destroyed under paragraph (3) 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.

(3AB) Subject to paragraph (3AC), where a person is entitled under paragraph (3) to the destruction of any fingerprint or sample taken from him (or would be but for paragraph (3AA)), neither the fingerprint nor the sample, nor any information derived from the sample, shall be used—

(a) in evidence against the person who is or would be entitled to the destruction of that fingerprint or sample; or

(b) for the purposes of the investigation of any offence;

and paragraph (1B) applies for the purposes of this paragraph as it applies for the purposes of paragraph (1A).

(3AC) Where a person from whom a fingerprint or sample has been taken consents in writing to its retention—

(a) that sample need not be destroyed under paragraph (3); and

(b) paragraph (3AB) shall not restrict the use that may be made of the fingerprint or sample or, in the case of a sample, of any information derived from it;

and a consent given for the purposes of this paragraph shall not be capable of being withdrawn.

(3AD) For the purposes of paragraph (3AC) it shall be immaterial whether the consent is given at, before or after the time when the entitlement to the destruction of the fingerprint or sample arises.'

(5) In paragraph (8)(a) (saving for power conferred by Immigration Act 1971 (c 77)), after "1971" there shall be inserted "or section 20 of the Immigration and Asylum Act 1999 (c 33) (disclosure of police information to the Secretary of State for use for immigration purposes);".

(6) The fingerprints, samples and information the retention and use of which, in accordance with the amended provisions of Article 64 of the Order of 1989, is authorised by this section include—

(a) fingerprints and samples the destruction of which should have taken place before the commencement of this section, but did not; and

(b) information deriving from any such samples or from samples the destruction of which did take place, in accordance with that Article, before the commencement of this section."

31. Article 64A, Police and Criminal Evidence (Northern Ireland) Order 1989

[As amended, with effect from 1st March 2007]

"64A. - (1) A person who is detained at a police station may be photographed-
(a) with the appropriate consent; or
(b) if the appropriate consent is withheld or it is not practicable to obtain it, without it.
(1A) A person falling within paragraph (1B) may, on the occasion of the relevant event referred to in paragraph (1B), be photographed elsewhere than at a police station—
(a) with the appropriate consent; or
(b) if the appropriate consent is withheld or it is not practicable to obtain it, without it.
(1B) A person falls within this paragraph if he has been—
(a) arrested by a constable for an offence;
(b) taken into custody by a constable after being arrested for an offence by a person other than a constable;
(c) given a fixed penalty notice by a constable in uniform under Article 60 of the Road Traffic Offenders (Northern Ireland) Order 1996.
(2) A person proposing to take a photograph of any person under this Article-
(a) may, for the purpose of doing so, require the removal of any item or substance worn on or over the whole or any part of the head or face of the person to be photographed; and
(b) if the requirement is not complied with, may remove the item or substance himself.
(3) Where a photograph may be taken under this Article, the only persons entitled to take the photograph are constables.
(4) A photograph taken under this Article-
(a) 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
(b) after being so used or disclosed, may be retained but may not be used or disclosed except for a purpose so related; and
(c) "sentence" includes any order made by a court in Northern Ireland when dealing with an offender in respect of his offence.
(5) In paragraph (4)-
(a) the reference to crime includes a reference to any conduct which-
(i) constitutes one or more criminal offences (whether under the law of a part of the United Kingdom or of a country or territory outside the United Kingdom); or
(ii) is, or corresponds to, any conduct which, if it all took place in any one part of the United Kingdom, would constitute one or more criminal offences; and
(b) the references to an investigation and to a prosecution include references, respectively, to any investigation outside the United Kingdom of any crime or suspected crime and to a prosecution brought in respect of any crime in a country or territory outside the United Kingdom.

(6) References in this Article to taking a photograph include references to using any process by means of which a visual image may be produced; and references to photographing a person shall be construed accordingly.
(6A) In this Article, a "photograph" includes a moving image, and corresponding expressions shall be construed accordingly.

(7) Nothing in this Article applies to a person arrested under an extradition arrest power."

32. Order 54, Rule 2, Rules of the Court of Judicature of Northern Ireland

"(1) Save as otherwise provided by this Order and subject to paragraph (3) and to rules 3(3) and 8(1), in a criminal cause or matter the jurisdiction of the Court on or in connection with an application for judicial review shall be exercised by three judges sitting together.

(2) Where the Lord Chief Justice so directs, such jurisdiction may be exercised by two judges.

(3) In vacation any jurisdiction under this rule may, where necessary, be exercised by a single judge.

(4) No appeal shall lie from an order made by a judge exercising jurisdiction under paragraph (3), but an application may be made by motion within 10 days to the court, constituted in accordance with paragraph (1) or (2), to set aside or discharge the order and to substitute such other order as the Court may think fit.

(5) Where in accordance with paragraph (2) a matter is heard before two judges and those judges differ in opinion, it shall be re-heard and determined by three judges.

(6) Notwithstanding this rule, any jurisdiction on consent may be exercised by a single judge in accordance with section 16(5) of the Act.

(7) A court of two or more judges exercising jurisdiction pursuant to this rule shall be called a Divisional Court".