Neutral Citation No. [2010] NIQB 143 | *Ref:* **McCL8037**

Judgment: approved by the Court for handing down | *Delivered:* **23/12/10**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

_____

BEFORE A DIVISIONAL COURT

_____

JR 27's Application [2010] NIQB 143

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

_____

JUDGMENT NO. 2

_____

McCLOSKEY J

I INTRODUCTION

[1] In its earlier judgment herein (neutral citation [2010] NIQB 12), this court ruled, by a majority, that these proceedings constitute a criminal cause or matter. This is now the judgment of the court, to which all members have contributed, on the substantive issues raised by the Applicant's judicial review challenge.

II THE JUDICIAL REVIEW CHALLENGE

[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. By letter dated 21 November

2008, 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. Maguire QC and Mr. McMillen of counsel appeared).

[5] The course of these proceedings to date includes the following landmarks:

(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) In its judgment delivered on 8th February 2010 – [2010] NIQB 12 – the court ruled, by a majority, that these proceedings constitute a criminal cause or matter.

(f) Later, this court refused the Respondent's application for a further adjournment. The substantive hearing ensued.

As these proceedings have progressed, a significant decision of the English Divisional Court has materialised, on 16th July 2010: see ***GC and C the Commissioner of Police of the Metropolis*** [2010] EWHC 2225 (Admin). The import of this decision will be considered at a later stage in this judgment. The other development worthy of note has been the filing of a further affidavit on behalf of the Respondent addressing the issue of taking and retaining a photograph of the Applicant. The substance of this aspect of the evidence will be considered presently.

II RELEVANT POLICE POWERS: STATUTORY FRAMEWORK

[6] The text of the statutory powers which the Respondent purported to exercise in carrying out the impugned measures is somewhat prolix and, for convenience, 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 the Applicant's substantive challenge.

[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.

Fingerprints: Summary

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 and DNA Samples

[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 issues 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; 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."

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 of the corresponding English statutory provision (effected by Section 82 of the 2001 Act), Section 64 of the Police and Criminal Evidence Act 1984. Thus there is consonance between the statutory regimes prevailing in the two jurisdictions.

Use and Retention of Photographs

[9] The statutory power to photograph a detained person is summarised in paragraph [7] above. The various provisions conferring and 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."*

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.

III THE DECISIONS IN *S and MARPER*.

[10] The litigation generated by Messrs. S and Marper culminated in conflicting decisions of the House of Lords and the European Court of Human Rights. In ***R (S and Marper*) *–v- Chief Constable of South Yorkshire Police*** [2004] 1 WLR 2196, 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 Applicants failed at every domestic court tier – the Divisional Court, the Court of Appeal and the House of Lords. As appears from the opinions of their Lordships, the Applicants were challenging the *retention* of their fingerprints and DNA samples (as in the present proceedings). The main opinion was that of Lord Steyn. On the Article 8(1) issue, he concluded:

> "[31] *Looking at the matter in the round I incline to the view that in respect of retained fingerprints and samples Article 8(1) is not engaged. If I am wrong in this view, I would say that any interference is very modest indeed.*"

It is clear from the immediately succeeding paragraph – [32] – that Lord Steyn concluded unequivocally that there was no interference under Article 8(1). His Lordship then considered the separate issue of justification under Article 8(2) and, in particular, proportionality. *En route* to concluding that any interference was justified under Article 8(2), he formulated certain propositions:

> "[38] *The following propositions seem to be established: (i) the fingerprints and samples are kept only for the limited purpose of the detection, investigation, and prosecution of crime; (ii) the fingerprints and samples are not of any use without a comparator fingerprint or sample from the crime scene; (iii) the fingerprints and samples will not be made public; (iv) a person is not identifiable to the untutored eye simply from the profile on the database, any interference represented by the retention being minimal; (v) and, on the other hand, the resultant expansion of the database by the*

> *retention confers enormous advantages in the fight against serious crime. Cumulatively these factors suggest that the retention of fingerprints and samples is not disproportionate in effect."*

Lord Steyn further opined that, realistically, there were no less intrusive measures which would achieve the legislative purpose: see paragraph [39]. His conclusion was:

> [40] *I would, therefore, hold that if Article 8(1) is engaged, there is plainly an objective justification under Article 8(2)."*

The House also rejected the Applicant's Article 14 complaint. Finally, the argument that the Chief Constable was guilty of the public law misdemeanour of adopting a blanket policy was rejected. The main factor underpinning the principal conclusions of the House was the obvious public interest served by a greatly expanded DNA database.

[11] All members of the Judicial Committee concurred fully with Lord Steyn, with the exception of Baroness Hale, who disagreed on the sole issue of whether the taking and retention of a person's fingerprints, DNA profiles and samples infringes Article 8(1). Her reasoning was based on the notion of "*informational privacy*" which "*… derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit*" (per La Forest J in ***R –v- Dyment*** [1988] 2 SCR 417, at p. 429). Baroness Hale reasoned further:

> "[70*] … But the only reason that they are taken or kept is for the information which they contain. They are not kept for their intrinsic value as mouth swabs, hairs or whatever. They are kept because they contain the individual's unique genetic code within them. They are kept as information about that person and nothing else. Fingerprints and profiles are undoubtedly information. The same privacy principles should apply to all three."*

Thus, by a majority of four to one, the House of Lords held that the retention of the Applicants' fingerprints, cellular samples and DNA profiles did not interfere with their right to respect for private life under Article 8(1). Further, the House was unanimous that insofar as there was any such interference, it was justified under Article 8(2).

[12] The next chapter in the litigation initiated by Messrs. S and Marper was written by the European Court of Human Rights in ***S and Marper –v- United Kingdom*** [2009] 48 EHRR 50. The European Court upheld their complaint, finding that there was a disproportionate interference with their rights under Article 8. The Court concluded, firstly, that the retention of cellular samples, DNA profiles and fingerprints interfered with the Applicants' right to respect for their private lives,

within the meaning of Article 8(1): see paragraphs [77] and [86]. In the second stage of its reasoning, the Court did not doubt that the impugned retention was in accordance with the law and possessed the legitimate aim of detecting and preventing crime. Thirdly and finally, the Court examined the question of whether the permanent retention of the DNA data and fingerprints of all suspected, but unconvicted, persons could be considered proportionate. In finding that this was disproportionate, the Court stated:

> "[119] *In this respect, the Court is struck by the blanket and indiscriminate nature of the power of retention in England and Wales. The material may be retained irrespective of the nature or gravity of the offence with which the individual was originally suspected or of the age of the suspected offender; fingerprints and samples may be taken – and retained – from a person of any age, arrested in connection with a recordable offence, which includes minor or non-imprisonable offences. The retention is not time-limited; the material is retained indefinitely whatever the nature or seriousness of the offence of which the person was suspected. Moreover, there exist only limited possibilities for an acquitted individual to have the data removed from the nationwide database or the materials destroyed (see paragraph 35 above); in particular, there is no provision for independent review of the justification for the retention according to defined criteria, including such factors as the seriousness of the offence, previous arrests, the strength of the suspicion against the person and any other special circumstances.*"

In short, there were several concerns and objections which, cumulatively, gave rise to a finding of disproportionality. The omnibus conclusion of the European Court 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.*"

[13] It is apparent from the evidence that, in the wake of this decision, the United Kingdom Government embarked upon an exercise of statutory reform which, at this

remove of two years, remains uncompleted. This is documented in the Home Office Consultation Paper, published in May 2009, which proposes, broadly, reduced statutory powers to retain DNA samples and fingerprints. It does not address the issue of retention of photographs. At the time of delivering this judgment, the legislation remains unchanged. While the court has received some evidence about the apparent intentions of the two legislatures concerned, the Westminster Parliament and the Northern Ireland Assembly, it would appear that no final legislating decisions have been made, with the result that new legislation does not seem imminent. As recorded in paragraph [5] above, while the court initially adjourned these proceedings for a period in light of indications that new legislation might not be unduly delayed, a later adjournment application on behalf of the Respondent was refused.

IV THE ISSUES

[14] The court is of the opinion that there are two central issues which it must determine:

(a) Having regard to the clear conflict between the decisions of the House of Lords and the Strasbourg Court in the ***S and Marper*** case, what is the appropriate determination of the first limb of the Applicant's challenge, which relates to the retention of his fingerprints and DNA samples?

(b) Does the retention of the Applicant's photographic images by the Police Service, representing the second limb of his challenge, interfere with his right to respect for private life under Article 8(1) ECHR? If "yes", is such interference justified under Article 8(2)?

As will be immediately apparent, neither element of the **second** of these questions arose in ***S and Marper***. Accordingly, the challenge to the retention of the Applicants' photographic images by the Police Service constitutes a novel aspect of these proceedings.

V THE FIRST ISSUE: RETENTION OF THE APPLICANT'S FINGERPRINTS AND DNA SAMPLES

[15] It is not in dispute that the act of *taking* fingerprints and intimate DNA samples from the Applicant constituted a lawful exercise by the police of their powers under Articles 61 and 62 of PACE, as amended and did not interfere with his rights under Article 8(1) ECHR. There is no challenge to this discrete aspect of the Police Service's conduct. Rather, the focus of the Applicant's challenge is the *retention* of the fingerprints and samples. He contends that this infringes his right to respect for his private life under Article 8(1) and cannot be justified under Article 8(2).

[16] As set out in paragraph [8] above, Article 64(1A) of PACE regulates the topic of retention of a person's fingerprints and DNA samples. In brief compass, the scheme of Article 64(1A) is that, in certain defined cases, a person's fingerprints and samples must be destroyed by the police. The obligation to destroy, enshrined in Article 64(1A)(3), arises where a person's fingerprints or samples have been taken in connection with the investigation of an offence and such person is not suspected of having committed the relevant offence. Where these conditions are satisfied, the fingerprints and samples "… ***must ... be destroyed as soon as they have fulfilled the purpose for which they were taken***". The obligation to destroy is not absolute. It is, rather, subject to two express exceptions. The first is where the investigation in question culminates in the conviction of some other person from whom a sample or fingerprint was *also* taken. In this instance, the affected citizen will, typically, be a person who was originally suspected of having committed the offence but was not prosecuted or, if prosecuted, was not convicted. The second exception arises where the person in question consents in writing to retention of the fingerprints or samples. The remaining provisions of Article 64(1A) regulate the mechanics of destruction and provide certain safeguards for the affected person.

[17] As previously observed, the effect of the predecessor of Article 64(1A), in its original incarnation, was to create an obligation to destroy a person's fingerprints and samples. Ultimately, the legislative pendulum has swung to the substitution of a discretion conferred on the Police Service to retain a person's fingerprints and samples in all cases except where Article 64(3) requires their destruction. Thus there has been a marked evolution in the legislative policy. This is the statutory regime prevailing in both jurisdictions.

Kay –v- Lambeth Borough Council [2006] 2 AC 465

[18] In ***Kay***, the House of Lords provided clear guidance on how a lower court should proceed in a human rights case where there is a conflict between relevant decisions of the House and the Strasbourg Court. Where this conundrum occurs, it gives rise to a tension between the doctrine of precedent and the duty imposed on domestic courts by Section 3 of the Human Rights Act 1998 to take into account any relevant jurisprudence of the two Strasbourg institutions. Lord Bingham stated:

> "[43] … *As Lord Hailsham observed (ibid, p 1054), "in legal matters, some degree of certainty is at least as valuable a part of justice as perfection." That degree of certainty is best achieved by adhering, even in the Convention context, to our rules of precedent. It will of course be the duty of judges to review Convention arguments addressed to them, and if they consider a binding precedent to be, or possibly to be, inconsistent with Strasbourg authority, they may express their views and give leave to appeal, as the Court of Appeal did here. Leap-frog appeals may be appropriate. In this way, in my opinion, they discharge their duty under the 1998*

> *Act. But they should follow the binding precedent, as again the Court of Appeal did here.*"

Lord Bingham continued:

> "*[44] There is a more fundamental reason for adhering to our domestic rule. The effective implementation of the Convention depends on constructive collaboration between the Strasbourg court and the national courts of member states. The Strasbourg court authoritatively expounds the interpretation of the rights embodied in the Convention and its protocols, as it must if the Convention is to be uniformly understood by all member states. But in its decisions on particular cases the Strasbourg court accords a margin of appreciation, often generous, to the decisions of national authorities and attaches much importance to the peculiar facts of the case. Thus it is for national authorities, including national courts particularly, to decide in the first instance how the principles expounded in Strasbourg should be applied in the special context of national legislation, law, practice and social and other conditions. It is by the decisions of national courts that the domestic standard must be initially set, and to those decisions the ordinary rules of precedent should apply.*"

In paragraph [45], Lord Bingham acknowledged the existence of what he characterised "*one partial exception*". The essence of the exception is that a pre-1998 Act decision of the House of Lords **may** not be binding where it "*… could not survive the 1998 Act*".

[19] The example given by Lord Bingham to illustrate this limited exception is the decision of the House in ***X (Minors) –v- Bedfordshire County Council*** [1995] 2 AC 633, which had three particular features: judgment was given well before the advent of the 1998 Act, the Convention was not considered in any of the opinions and the unsuccessful Appellants were subsequently successful in Strasbourg, where they established a breach of Article 3 (see ***Z –v- United Kingdom*** [2001] 34 EHRR 97). This combination of factors prompted the Court of Appeal in ***D –v- East Berkshire Community NH Trust*** [2004] QB 558 to decline to follow the decision in ***X (Minors)***. Describing this as a "*bold course*", Lord Bingham observed that the House itself had not criticised this course when determining the appeal in ***D***. However, he described ***X (Minors)*** as "*a very exceptional case*" and, having noted the three factors highlighted above, continued:

> "[45] … ***On these extreme facts*** *the Court of Appeal was entitled to hold, as it did in paragraph 83 of its judgment in* ***D****, that the decision of the House* ***in X v Bedfordshire****, in relation to children, could not survive the 1998 Act. But*

> *such a course is not permissible save where the facts are of that extreme character.*"

[Emphasis added].

GC and C –v- Commissioner of Police of the Metropolis [2010] EWHC 2225

[20] The first limb of the Applicant's challenge in these proceedings was considered recently by the English Divisional Court in this decision. The strong parallels between the two cases emerge at the outset of the judgment of Moses LJ:

> "[2] *The issue is whether the policy of the Association of Chief Constables of Police (ACPO) of retention of biometric samples, DNA and fingerprints, for an indefinite period save in exceptional circumstances, breaches these two claimants' rights enshrined in Article 8 of the European Convention of Human Rights. The claimants contend that the policy applied by the Commissioner of Police, the defendant in these proceedings, and by other Chiefs of police across the country, is a blanket and indiscriminate policy which fails to allow consideration of individual factors and permits the indefinite retention of samples obtained in circumstances where neither of the claimants had been convicted of any offence. They contend that that policy amounts to a disproportionate interference with their right to respect for private life.*"

The court heard argument on behalf of the Commissioner of Police (the Respondent) and the Secretary of State, an interested party. The gist of their submission is encapsulated in the following passage:

> "[3] *The Commissioner and the Secretary of State, as an interested party, contends that this court is bound by the decision of the House of Lords in* ***Regina (S) v Chief Constable of the South Yorkshire Police Regina (Marper) v Chief Constable of the South Yorkshire Police*** *[2004] 1 WLR 2196. They contend that it is not open to this court to apply the decision of the European Court of Human Rights in* ***S and Marper v United Kingdom*** *[2009] 48 EHRR at 50. They contend, further, that the policy which is now pursued in relation to the retention of biometric samples is merely a temporary policy, pending legislation designed to take into account the decision of the European Court of Human Rights and conform with the Convention as interpreted by that court.*"

Moses LJ then recorded that all parties were in agreement that if the court were to accede to the central submission of the Commissioner and the Secretary of State, the

appropriate course would be to order a "leap frog" appeal to the Supreme Court. Having noted the difference of opinion between the European Court of Human Rights and the House of Lords as a result of ***S and Marper –v- United Kingdom***, Moses LJ continued:

> "[30] *In my judgment, this court is bound by the decision of the House of Lords. The doctrine of precedent and the legal certainty which that doctrine protects demands that this court follows the decision in* ***S and Marper***."

[21] In ***GC and C,*** the Divisional Court determined to give effect fully to the course advocated in paragraph [43] of ***Kay***. Accordingly, the outcome was a dismiss of the judicial review applications and the making of a certificate under Section 12(3) of the Administration of Justice Act 1979 that a point of law of general public importance was involved in their decision, being a point giving rise to the Divisional Court being bound by a previous decision of the House of Lords (***S and Marper***). As the terms of Section 12 make clear, such a certificate does not operate to grant permission to appeal to the Supreme Court. Rather, at a practical level, it avoids any intervening appeal to the Court of Appeal. The making of a certificate must be followed by an application to the Supreme Court for permission to appeal: see Section 13 of the 1969 Act. We note that the hearing in the Supreme Court is scheduled for 31 January 2010, As this judgment will presently explain, the leapfrog appeal mechanism under the 1969 Act is not available in the instant case.

First Issue: Conclusion

[22] By virtue of the doctrine of precedent, this court is bound by the decision in ***Kay***. It was argued, somewhat faintly, on behalf of the Applicant that the present case falls within the "*partial exception*" recognised in paragraph [45] of the opinion of Lord Bingham. This is a stringent and austere exception indeed. If there were the slightest doubt about this, it is resoundingly dispelled by the statement of Lord Phillips in ***R (Purdy) –v- Director of Public Prosecutions*** [2009] UKHL 45:

> "[45] *The Court of Appeal held that it was bound to follow the decision of this house and was not at liberty to apply the ruling of the Strasbourg Court.* ***No other course was open to it*** *…".*

[Emphasis added].

It seems to this court that the Judicial Committee was endorsing the following passage in the judgment of the Court of Appeal:

> "[54] *We have come to the conclusion that their Lordships intended to give the Court of Appeal very limited freedom, only in the most exceptional circumstances, to override what would otherwise be the binding precedent of the decision of*

the House. They clearly required more than the bare fact of the same parties being involved in order to bring the case within the very narrow confines of the very exceptional case, one of an extreme character, or of wholly exceptional circumstances, with the emphasis added by us to phrases from their Lordships' speeches. We are not seeking to be released from these strictures. The structure of judicial precedent, designed over the years, has served us well. The decisions of the European Court do not bind us. The decisions of the House of Lords do. By-passing or finding an alternative route around the decisions of the House of Lords, on the basis of the jurisprudence of the European Court would, in the ultimate analysis, be productive of considerable uncertainty. Therefore if the strictures are too tight, it is their Lordships who, if they think it appropriate, must release the knot. As it is, and in any event, we cannot bring this case within the required degree of exceptionality."

(See [2009] EWCA Civ 92].

[23] We are mindful of Lord Bingham's exposition of the correct approach to Section 2(1) of the Human Rights Act 1998 in ***R (Ullah) –v- Special Adjudicator*** [2004] 2 AC 323:

"[20] *In determining the present question, the House is required by section 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court: R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23, [2003] 2 AC 295, paragraph 26. This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of*

> *national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less."*

We are satisfied that this passage must now be read and given effect subject to the later decision of the House in ***Kay.*** There is no intrinsic incompatibility between the two approaches. Put simply, the ***Kay*** principle accommodates the doctrine of precedent within the framework of Section 2(1) and, by giving effect to it in the manner described by Lord Bingham in paragraph [43], first instance and appellate courts discharge the duties imposed on them under the 1998 Act.

[24] We conclude that, as regards the first limb of his challenge, the Applicant's case is plainly embraced by the ***Kay*** principle and possesses none of the characteristics of the narrow exception thereto. Accordingly, by virtue of the doctrine of precedent, it is incumbent on this court to give effect to the decision of the House of Lords in ***S and Marper***, with the result that the first limb of the Applicant's challenge cannot succeed. The effect of this conclusion must now be considered.

[25] Having thus concluded, a point of distinction between the present case and ***GC and C*** arises. As the final passages in the transcript of the decision in ***GC and C*** make clear, two appellate routes were open to the Applicants. The first was a "leapfrog" appeal to the Supreme Court under Section 12(3) of the 1969 Act. The second was the more conventional form of appeal to the Court of Appeal, with the permission of either the Divisional Court or the appellate court. The position in Northern Ireland differs. As a direct consequence of this court's earlier ruling that this is a criminal cause or matter, there is no appeal to the Court of Appeal. Rather, the only appeal from the decision of this court lies to the Supreme Court. This is the effect of Section 41 of the Judicature (NI) Act 1978, which provides, in material part:

> *" … 41.-(1) Subject to the provisions of this section, an appeal shall lie to 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 that court."

The procedural regime regulating appeals to the Supreme Court under Section 41 is contained in Schedule 1.

[26] While mindful that the instant case has been declared a criminal cause or matter, it is noteworthy that the formulation of the ***Kay*** principle does not discriminate between civil and criminal courts below the level of the Supreme Court. We consider that this must have been intentional, given the potential for Convention rights issues to arise in both civil and criminal cases. Furthermore, considering the importance of the doctrine of precedent in our legal system, we think it likely that in cases where a court is confronted with clearly conflicting Strasbourg and House of Lords/Supreme Court decisions, this circumstance *per se* will in many cases satisfy the statutory requirement in Section 41 that a point of law of general public importance which ought to be considered by the Supreme Court should be certified. We are of this opinion in the present case. Of course if, in some other case, the Supreme Court has already confronted, and resolved, the issue of the conflicting decisions – as in ***Purdy*** – certification will be plainly inappropriate as it would serve no useful purpose.

[27] The final issue to be resolved is whether, having determined to grant a certificate, this court should also give permission to appeal to the Supreme Court. In this respect, it would appear appropriate to balance five considerations in particular. The first is that the formulation of the ***Kay*** principle is couched in fairly strict terms. It seems unlikely, however, that it was intended to operate with absolute inflexibility. Whether this principle is indeed universal is an issue upon which the Supreme Court may wish to pronounce in a suitable case. As a minimum, it would appear to enshrine a strong general rule. The second consideration to be evaluated is that, applying a broader canvas, there is a long established practice whereby the Supreme Court and its predecessor, the House of Lords, undertakes the selection of appeals to be heard. This is the clear import of the statement of Lord Carswell in a recent appeal, ***In Re McE*** [2009] UKHL 15, paragraph [77], which firmly reaffirmed this entrenched practice (albeit in a somewhat different and unusual context). Lord Phillips concurred: see paragraph [3]. The third consideration is that the Supreme Court is scheduled to hear the appeal in ***GC and C*** some six weeks hence. The fourth consideration which we balance is that the second limb of the Applicant's challenge in these proceedings (the police photographs issue) gives rise to a new issue not decided in ***S and Marper***. Furthermore, it undoubtedly arises in the present case with greater focus and definition than in ***GC and C***. However, if the sole issue in these proceedings were the police retention of the Applicant's photographic images, we have certain reservations about whether this would surpass the exacting threshold of a point of law of general public importance which the Supreme Court should determine. Finally, we take into account also that the photographs issue features in the certified question in ***GC and C.*** Although the ingredients and contours of the photographs issue are not identical in the two cases,

they share certain similarities, giving rise to the possibility that the decision of the Supreme Court in ***GC and C*** will be determinative of the equivalent issue in these proceedings. Weighing all of these considerations, we propose to give effect to the ***Kay*** principle in this particular case by certifying a point of law of general public importance and refusing leave to appeal to the Supreme Court.

VI THE SECOND ISSUE: RETENTION OF THE APPLICANT'S PHOTOGRAPHIC IMAGES

[28] The fact sensitive nature of the second limb of the Applicant's challenge must be carefully exposed. The material facts bearing on this discrete issue are essentially uncontentious. In his affidavit, the Applicant avers that on the date in question, then aged fourteen years, he voluntarily attended a police station, accompanied by his solicitor. At the station, he accepted his solicitor's advice to withdraw his consent to attend. Next, he was arrested on suspicion of having committed an alleged burglary. He was then conveyed to a second police station where he was photographed and the other impugned measures were taken. He asserts that he did not consent to any of these. It would appear that he was released from police custody later that day. Some six weeks later, he received a notification from the Public Prosecution Service that he would not be prosecuted. When the Applicant's solicitors subsequently wrote to the Chief Constable (as recorded in paragraph [3] above), one of their requests was:

> "*We request that all physical and digital copies of any photographs of our client taken during after* [sic] *his arrest on 7th October 2008 be removed from any local PSNI database and the UK National Database and be destroyed*".

As already noted, the replying letter on behalf of the Chief Constable was silent on the discrete issue of photographs. This issue was, ultimately, addressed in an affidavit sworn by a senior police officer.

[29] It is agreed between the parties that the Applicant was photographed in police custody and that this generated what is commonly termed a "mug shot", with three views. It is the court's experience that, formerly, this type of photograph was produced in approximately passport size and physically attached to the top of the front page of the suspect's custody record. The affidavit evidence makes clear that, in this sophisticated era of digital photograph technology and computer databases, this is no longer the practice. In brief compass, the Police Service practice is that three separate profile photographs of the suspect are taken, out of the gaze of others. A digital camera is employed for this purpose. The images are then stored on a Police Service database. There they are associated with the suspect's detention record, also electronically stored. Access to this database is confined to specially trained and authorised Police Service personnel. The software requires a number of access steps to be taken by the user. At a practical level, these should operate as safeguards against misuse. Subsequently, the digitalised images can be deployed by

the Police Force *only for* the prevention or detection of crime, the investigation of offences or the conduct of prosecutions viz any of the statutory purposes.

[30] There is a specific Police Service retention policy and associated procedures. Under this policy, the period of retention of Article 64A photographs is dictated by whether the suspected offence is categorised serious or non-serious. This dichotomy does not follow the PACE statutory model. Rather, in common with all aspects of the practice (or policy) described in paragraph [**29**] above and the retention/destruction policy, "*serious crime*" is the subject of a purely internal Police Service definition. Perhaps surprisingly, there is nothing in the PACE Codes of Practice – which are statutory, published measures – relating to this subject. Serious crime is defined as including homicide, the more serious offences against the person, firearms offences, causing death or grievous bodily harm by dangerous driving, explosives offences and terrorist offences. Also embraced by the definition are robbery and aggravated burglary of an amount exceeding £20,000 (in each case), arson causing damage exceeding £100,000, rape and certain other serious sexual offences, kidnapping, abduction and blackmail. If the context in which a person is photographed is one of serious crime (as defined), the digitalised images are stored permanently. This appears to be, *ex facie*, an inflexible policy. Conversely, where the context in which a suspect is photographed is one of non-serious crime, the digitalised photographs are destroyed upon the expiration of seven years. In the specific case of a suspected young offender arrested on suspicion of an offence such as burglary (as in the Applicant's case) there is no prospect of a review of storage until such person attains the age of twenty-one years. At that stage, a so-called "*risk assessment*" should be undertaken.

[31] It is evident from the "Generic Risk Assessment Criteria" that an assessment of this kind embraces, potentially, a broad range of factors. This document is not easily construed. Broadly, its thrust appears to be that in those cases where, in accordance with the aforementioned policy, destruction becomes possible, there is an evaluation of the perceived risks attendant upon this course. The concept of "risk" is widely defined. The factors listed in the policy are all related to the "*occurrence*" or "*activity*" in question. It is incumbent on the reviewing officer to consider, *inter alia*, whether the precipitating occurrence/activity gave rise to loss of life; serious injury; serious damage to property; an adverse impact on the operational capacity *or* reputation of the Police Service; or media interest. One of the individual criteria is whether the precipitating occurrence/activity had an impact on Police Service policy and procedure. The last of the criteria is:

> "*Are the events anticipated to be the subject of subsequent litigation, internal/external enquiry or other investigation?*"

All of these criteria are couched in the form of questions. The reviewing officer is instructed in the following terms:

> "*If the answer to any of these questions is 'yes' then the retention period should be extended beyond that specified for the record category*".

Where the reviewing officer decides in favour of extension, each extension period must be recorded in writing, in reasoned form. The guidance continues:

> "*Record categories such as those relating to arrest and detention, serious crime, major incidents, major crime, sexual offences, child protection and domestic violence have a high risk associated with them. As a result staff need to be mindful of the consequences of disposing of records within these categories.*"

There appears to be ample scope for subjectivity in the assessments and actions of the reviewing officer and there is no obvious provision for oversight of his actions.

[32] In a nutshell, the Police Service seeks to justify its policy of retaining the digitalised photographs of a suspect such as the Applicant for a minimum period of seven years - and perhaps much longer - on the ground of the public interest in the detection, prevention, investigation and prosecution of criminal offences. A further justification proffered (in counsel's submissions only) is the potential for civil proceedings against the Police Service arising out of the typical scenario of arrest, detention and photographing of a suspect. It is highlighted, in this respect, that the statutory limitation period for actions in tort is six years (see Article 7 of the Limitation (NI) Order 1989) and this is capable of being extended in individual cases (per Article 50).

[33] In the particular case of the Applicant, the net effect of the Police Service policy appears to be that the digitalised images of his appearance, recorded when he was aged fourteen years, will be retained for a minimum period of seven years, at which stage a review, of uncertain outcome, will be undertaken internally. There are no prescribed procedures relating to how the review is to be conducted. In particular, there is no requirement to notify or involve the person affected and it would appear that, in practice, this does not occur. Furthermore, the policy contains no provisions or procedures governing requests for destruction of a person's digitalised images. Pending expiry of the seven year period, any access to the relevant database is controlled and is carried out internally. It is apparent that, during this initial period, some dissemination of the digitalised images is possible, in connection with the overarching purpose and justification noted in paragraph [32] above. Any such use or dissemination would, of course, have to fall within the boundaries of the statutory purposes enshrined in Article 64A of PACE. It is evident that this dissemination could extend beyond the confines of what appears to be a small "inner" circle of "authorised access" police officers – for example, in the context of future arrests and interviews, crime prevention publicity measures (a recent phenomenon in Northern Ireland) or prosecutions.

Interference with Article 8(1) ECHR?

[34] Against the evidential matrix summarised above, it is necessary to pose the first question which arises under the second limb of the Applicant's legal challenge. In summary form, this question is: does the retention of the Applicant's digitalised photographic images interfere with his right to respect for private life under Article 8(1) ECHR? As we shall explain presently, giving due recognition to the fact sensitive nature of the Applicant's challenge we consider the true question to be somewhat more intricate and detailed: see paragraph [47] *infra*. In considering this question, the guidance to be derived from the relevant decided cases, taking into account the court's obligation under Section 2(1) of the 1998 Act, may be fairly described as both general and specific in nature.

[35] At the general level, there are numerous pronouncements, by now familiar, by the European Court on what lies within the scope of the protection afforded by Article 8(1). In this respect, there is no appreciable difference between the jurisprudence of the European Court and that of the superior courts of the United Kingdom. The right to *respect for one's private life* is couched in broad, elastic and non-prescriptive terms. In any given case, its content and scope can prove obscure and elusive. In ***R (Countryside Alliance and Others) –v- Attorney General and Others*** [2007] UKHL 52, Lord Bingham analysed Article 8 in the following terms:

> "[10] … *the content of this right has been described as 'elusive' and does not lend itself to exhaustive definition. This may help to explain why the right is expressed as one to respect, as contrasted with the more categorical language used in other articles. But the purpose of the article is in my view clear. It is to protect the individual against intrusion by agents of the state, unless for good reason, into the private sphere within which individuals expect to be left alone to conduct their personal affairs and live their personal lives as they choose."*

Lord Rodger suggested the following formulation:

> "[91] … *Article 8(1) guarantees a prima facie right to … privacy. If someone complains of a violation of that right,* ***the essential touchstone may well be whether the person in question had a reasonable expectation of privacy…***
>
> *[101] … I have taken my cue from the idea that article 8(1) protects those features of a person's life which are integral to his identity."*

[Emphasis added]

The highlighted passage enshrines a test which has emerged as the guiding test to be distilled from the jurisprudence in this field. Also noteworthy is Lord Rodger's observation that the Anglo-Saxon notion of a right to privacy differed from the Convention right to respect for private life: see paragraph [92]. In the opinion of Baroness Hale, emphasis is placed on two separate, but related values described as "*fundamental*":

> *"[116] One is the inviolability of the home and personal communications from official snooping, entry and interference without a very good reason...*
>
> *The other is the inviolability of a different kind of space, the personal and psychological space within which each individual develops his or her own sense of self and relationships with other people. This is fundamentally what families are for and why democracies value family life so highly."*

[36] In ***Campbell –v- MGM*** [2004] UKHL 22, which concerned a newspaper article about a particular aspect of the Plaintiff's private life and the publication of associated photographs, Lord Nicholls, in his consideration of Article 8, coined the following formulation:

> "[21] *…Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy.*"

In a later passage, Lord Nicholls made the following noteworthy observation:

> "[31] *In general photographs of people contain more information than textual description. That is why they are more vivid. That is why they are worth a thousand words."*

Lord Hoffman, for his part, observed:

> "[50] "*What human rights law has done is to identify private information as something worth protecting as an aspect of human autonomy* and *dignity.*"

In paragraphs [73] – [74] of Lord Hoffmann's opinion, one finds a notable distinction between the act of photographing a person in public and the *use* to which the ensuing photographs can properly and legitimately be put. This gave rise to the conclusion:

> "[75] *In my opinion, therefore, the widespread publication of a photograph of someone which reveals him to be in a*

> *situation of humiliation or severe embarrassment, even if taken in a public place, may be an infringement of the privacy of his personal information.*"

This prompts the observation that a photograph which conveys to the relevant audience that its subject has obviously been arrested may, if published, cause embarrassment, sensitivity, shame and even humiliation.

[37] Agreeing with Lord Nicholls and Lord Hope, Baroness Hale also favoured the test of a reasonable expectation of privacy. This test, of course, requires an anterior finding that the information in play is of a private nature. Lord Carswell, in his opinion, made no distinction between publication of the intimate information concerning the Appellant and publication of the surreptitiously taken photographs: see paragraph [165]. The test which emerges from the opinions of their Lordships is whether a person of ordinary sensibility, placed in the same situation as the Plaintiff, would find the disclosure offensive. The test is, therefore, an objective one, omitting subjective impressions and reactions.

[38] Turning to the Strasbourg jurisprudence, examples of general formulations of principle by the European Court in Article 8 cases abound: see, for instance, ***Botta – v- Italy*** [1998] 26 EHRR 241, paragraphs [32] – [34]. These passages feature with some frequency in cases where it is argued that Article 8(1) requires the relevant public authority to take some positive action. This has some resonance in the present context, given that implicit in the Applicant's complaint that his rights under Article 8(1) are infringed by the retention of his photographic images is the suggestion that the Police Service should take the positive measure of destroying them. In ***S and Marper*** (*supra*), the European Court offered, under the rubric "General Principles", one of its most comprehensive expositions of the content and scope of Article 8(1):

> "[66] *The Court recalls that the concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person (see* ***Pretty v. the United Kingdom****, no. 2346/02, § 61, ECHR 2002 III,* 35 EHRR 1*, and* ***Y.F. v. Turkey,*** *no. 24209/94, § 33, ECHR 2003 IX,* 39 EHRR 34 *). It can therefore embrace multiple aspects of the person's physical and social identity (see* ***Mikulić v. Croatia****, no. 53176/99, § 53, ECHR 2002-I, BAILII:* [2002] ECHR 27 *). Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8 (see, among other authorities,* ***Bensaid v. the United Kingdom****, no. 44599/98, § 47, ECHR 2001,* 33 EHRR 10*, I with further references, and* ***Peck v. the United Kingdom****, no. 44647/98, § 57, ECHR 2003 I,* 36 EHRR 41 *).* ***Beyond a person's name, his or her private and family life may include other means of***

> ***personal identification and of linking to a family*** *(see mutatis mutandis* ***Burghartz v. Switzerland****, 22 February 1994, § 24, Series A no. 280 B; and* ***Ünal Tekeli v. Turkey,*** *no. 29865/96, § 42, ECHR 2004 X (extracts),* 42 EHRR 53*)".*

[Emphasis added].

The Court added:

> "[67] *The mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8 (see* ***Leander v. Sweden****, 26 March 1987, § 48, Series A no. 116,* 9 EHRR 433*). The subsequent use of the stored information has no bearing on that finding (****Amann v. Switzerland*** *[GC], no. 27798/95, § 69, ECHR 2000-II,* 30 EHRR 843*). However, in determining whether the personal information retained by the authorities involves any of the private-life aspects mentioned above, the Court will have due regard to the specific context in which the information at issue has been recorded and retained, the nature of the records, the way in which these records are used and processed and the results that may be obtained (see, mutatis mutandis****, Friedl****, cited above, §§49-51, and* ***Peck v. the United Kingdom****, cited above, § 59).*"

The "*data*" considered in ***S and Marper*** were, of course, cellular samples, DNA profiles and fingerprints.

[39] Progressing from the general to the specific, both the European Court and the European Commission have had occasion to pronounce on the subject of the police photographing a person, in the context of Article 8. There are five relevant decisions of the European Commission and one of the Court, duly summarised below.

(i) The decision in ***X –v- The United Kingdom*** [Application No. 5442/72], the earliest in this series, has clear parallels with the present case, inasmuch that the impugned contact consisted of the police photographing the Applicant upon her arrest in a public place and subsequently in a temporary police station. The Commission dismissed her case as manifestly ill founded, emphasizing the context in which the photographs were taken and the purpose, which concerned future identification of the Applicant on similar public occasions.

(ii) In ***McVeigh and Others –v- United Kingdom*** [1981] 5 EHRR 71, one of the Applicant's complaints was that, following arrest by the police, they were photographed. The Commission found that the act of

photographing the Applicants did not infringe Article 8(1). It then examined the question of whether the *retention* of photographs and fingerprints amounted to a violation. While expressing some doubt about whether the retention of a person's fingerprints and photographs constitute an interference under Article 8(1), the Commission did not expressly decide this issue, in light of its conclusion that this conduct was justified under Article 8(2).

(iii) In ***Kinnunen –v- Finland*** [Application No. 24950/94] the factual matrix, once again, entailed the arrest of the Applicant and the subsequent taking of his photograph and fingerprints by the police. The photographs were retained on the "National Police Register". This retention continued notwithstanding the prosecution of the Applicant and a verdict of not guilty. The relevant material and information had been deleted from the Police Department's file and the Register of Public Details some nine years after the event. In declaring the Application manifestly ill-founded, the Commission highlighted the arrest and detention context in which the photographs and fingerprints were taken and observed that the prosecution and acquittal of the Applicant were publicly known facts.

(iv) The Commission reached a similar conclusion in ***Friedl –v- Austria*** [1995] 21 EHRR 83, where the complaint was that the police had photographed the Applicant whilst involved in a demonstration in a public place. The Applicant complained about the act of photographing **and** the subsequent retention of his photograph in an administrative file which would not be destroyed until some thirteen years later. The Commission rejected his complaint. In thus concluding, the Commission highlighted the absence of any intrusion into the "*inner circle*" of the Applicant's private life, the public nature of the event during which the photographs were taken and the underlying purpose, which was to record the character of the manifestation and the actual situation prevailing at the material time. Furthermore, on the second of the two dates, the photographs served the additional purpose of furthering investigations into possible road traffic offences. Finally, no names of those identified in the photographs were recorded and there was no data processing retention.

(v) ***Murray –v- United Kingdom*** [1995] 19 EHRR 193 is another case where, following arrest by members of the armed forces, one of those detained was photographed without her consent. The Commission found a breach of Article 8(1) and, in its judgment, the European Court recorded a concession to this effect: see paragraph [86]. Emphasizing the important contextual factors of emergency legislation and the investigation and prevention of terrorist crime, the court held that the

impugned measure was justified under Article 8(2): see in particular paragraphs [91] – [93].

> (vi) In ***Von Hannover –v- Germany*** [2004] 16 BHRC 545, various German magazines published a series of photographs of Princess Caroline of Monaco. These depicted the Princess engaging in various recreational and public activities: horse-riding, cycling, playing tennis, walking and dining in a restaurant. The European Court held that her right to respect for private life had been infringed, drawing attention to the "*…zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life' …* ".

[40] The matrix of the taking, retention and use of police photographs of a suspect also featured in the context of an action for breach of confidence in ***Hellewell –v- Chief Constable of Derbyshire*** [1995] 1 WLR 804. There the Plaintiff, who had a substantial criminal record, was arrested by police and charged with theft and attempted theft. Following arrest, he was photographed and his fingerprints were taken. He was subsequently convicted of both offences. Some three years later, the police, responding to the concerns of local shopkeepers, supplied several photographs, including one of the Plaintiff. These photographs were not to be publicly displayed, but to be disseminated amongst shop staff only. The Plaintiff applied for an injunction and a declaration. His case was struck out and he appealed, unsuccessfully, to the High Court, which held that the facts pleaded were incapable of sustaining a cause of action for breach of confidence.

[41] Bearing in mind the contours of the Article 8 issues engendered by the present litigation, certain observations of Laws J are noteworthy (at p. 810):

> "*In my judgment, having regard to the general principles of the law of confidence … where the police take a photograph of a suspect such as that in question here, and do so at the police station in circumstances where at least the suspect's consent is not required, they are not, by law, free to make whatever use they will of the picture so obtained.* ***Such a photograph will, as I have said, convey to anyone looking at it the knowledge that its subject is or has been known to the police. That is not what I may call a public fact. It may be described, prima facie at least, as a piece of confidential information.*** *The circumstances in which the photograph is taken, where the suspect has no choice, save to insist that physical force be not used upon him, impose obligations on the police, breach of which may sound in an action at private law.*"

[Emphasis added].

Laws J then observed that the *use* to which photographs thus taken can properly be put is confined to the purposes of preventing and detecting crime, investigating alleged offences and apprehending suspected offenders. Notably, the formulation adopted by Laws J in this passage is materially indistinguishable from the statutory purposes framed in Article 64A of PACE (paragraph [9] (*supra*).

[42] Within the observations of Laws J one can identify clearly elements of the test of reasonable expectation which materialised in later jurisprudence, particularly in ***Campbell –v- MGM***. They also highlight the distinction between a police photograph and other types of photograph. In short, in the police cases, the emphasis is not so much on disclosure of a person's physical appearance at a certain point in time. Rather, the dissemination to any audience, however limited, of police photographs of a person disclose not only that person's physical appearance but also the fact that he was in police custody – which, in turn, will immediately convey that he had probably been arrested as a suspected offender. Furthermore, from the perspective of retention of an arrested person's photographic images, the application of the objective test suggests a logical and important distinction between a person whose arrest culminated in the generation or augmentation of a criminal record and a person of unblemished record who was released without charge.

[43] More recently, in ***R (Wood) –v- Metropolitan Police Commissioner*** [2009] 4 All ER 941, the Applicant was photographed by the police in a public place as part of an intelligence gathering operation. He complained that the taking and retention of his photographs by the police infringed his right to respect for private life guaranteed by Article 8(1). By a majority, the Court of Appeal held that, having regard to the narrow and time limited purpose for which the photographs had been taken, their indefinite retention by the police was disproportionate. The three members of the court were unanimous that both the taking and retention of the photographs infringed Article 8(1). The test applied by Laws LJ was whether the police had acted in a manner which the public would have expected. One may observe that there is, doubtless, some element of the hypothetical reasonable man on the Clapham omnibus in this test. His Lordship did not disagree with the decisions in ***X –v- United Kingdom*** and ***Friedl –v- Austria***. Distinguishing those cases, however, he applied the 'reasonable expectation' test and emphasized that the Applicant had been photographed when "*… going about his lawful business in the streets of London*": paragraph [45]. In thus concluding, he described the nature of the interference with the Appellant's private life as "*no more than modest*": paragraph [54]. There is a noteworthy passage in the judgment of Lord Collins:

> "[100] *Nevertheless, it is plain that the last word has yet to be said on the implications for civil liberties of the taking and retention of images in the modern surveillance society. This is not the case for the exploration of the wider, and very*

> *serious, human rights issues which arise when the state obtains and retains the images of persons who have committed no offence and are not suspected of having committed any offence.*"

The second dimension of the Applicant's challenge in the present proceedings clearly raises these wider questions to some extent.

[44] In ***S and Marper***, Lord Steyn referred to the decisions in ***McVeigh*** and ***Kinnunen*** (see paragraph [25]) and, on behalf of the Respondent, Mr. Maguire QC relied on these passages. At the outset of the passage in question, Lord Steyn stated:

> "[25] *There is no decision of the European Court of Human Rights on the question whether the retention of fingerprints or samples amounts to an interference with the right to respect for private life.*"

Lord Steyn then noted the conclusions reached by the Commission in ***McVeigh*** and ***Kinnunen***, describing them as "*relevant but far from conclusive*". Later he added:

> "[27] … *The question whether the retention of fingerprints and samples engages Article 8(1) should receive a uniform interpretation throughout Member States, unaffected by different cultural traditions. And the current Strasbourg view, as reflected in decisions of the Commission, ought to be taken into account.*"

It is clear from a consideration of Lord Steyn's opinion as a whole that His Lordship, in concluding that there was no interference under Article 8(1), was influenced by the two Commission decisions which concerned the retention of fingerprints *and photographs*.

[45] Most recently, in ***GC and C***, the photographs issue *did* arise, to some extent. As recorded in paragraphs [5] and [6] of the judgment, the circumstances entailed the voluntary attendance of the Applicant GC at a police station, his ensuing arrest founded on a suspicion of having committed common assault and the taking of his photograph, fingerprints and DNA samples, followed by his release on bail without charge. This Applicant had no criminal record and, subsequently, he was charged with, and acquitted of, rape. A careful examination of the judgment of Moses LJ suggests that the issue concerning the retention of GC's photographs was somewhat makeweight in nature: one notes in particular the word "*now*" in paragraph [22], the description of the pleaded challenge in paragraph [40] and the shortcomings in the evidence recorded in paragraph [41]. As regards this discrete issue, Moses LJ, having considered the decisions in ***X –v- United Kingdom*** and ***Wood***, stated:

> "[42] … ***Wood*** *is no authority for the proposition that Article 8 applies where photographs were taken on arrest. It powerfully suggests that it does not.*
>
> [43] *In my view, the taking of photographs in the circumstances in which GC's photographs were taken does not figure the application of Article 8. However, even if that conclusion was wrong,* ***the issues of justification for their retention cannot now properly be considered where the Commissioner has had no opportunity to give evidence as to justification***."

[Emphasis added].

Notably, Moses LJ added:

> "[45] *The absence of evidence as to justification makes it unwise for me to consider further the question of either the application of Article 8 or, if it applied, the justification for retention of photographs. It will be a matter for the Supreme Court to consider the extent to which it should consider, as a separate issue, the retention of photographs on the basis of evidence which is not presently before the court.*"

It is unclear whether there was any developed argument on the question of whether the statutory purposes authorising the retention of a suspect's photographic images were sufficient *per se* to amount to justification. The contrast in the present case is that the evidential matrix is complete, with the result that this court is equipped to examine fully the issue of justification, should it arise.

[46] A further noteworthy contribution to the jurisprudence generated by the increasingly prominent practice of photographing citizens in public places is found in the recent decision of the Irish High Court in ***Hickey –v- Sunday Newspapers Limited*** [2010] IEHC 349. There, the Plaintiffs and their recently born baby were photographed by a newspaper employee outside the Registry of Births, Deaths and Marriages in Dublin. Four days later, the photograph and an accompanying article were published in the Sunday newspaper concerned. The Plaintiffs failed to establish a breach of either their "*unenumerated*" constitutional right to privacy or their rights under Article 8 ECHR. What is noteworthy for present purposes is the observation of the learned President that this right derives from a particular aspect of the preamble to the Irish Constitution which expresses "*a clear commitment to maintaining the dignity of the person*". The court also took cognizance of the test devised by the House of Lords in ***Campbell –v- MGN*** (*supra*). Finally, the court placed some emphasis on the consideration that the birth of the child, his age and the identity of his parents were matters of public record *and* ascertainable by anyone from the Registry Office. In short, the newspaper's freedom of expression trumped the family's right to privacy.

Conclusion: Article 8(1)

[47] It is understandable that the Applicant does not challenge the act of ***taking*** his photograph, following arrest. The clear thrust of the relevant jurisprudence, both European and domestic, supports the view that in the kind of context under consideration, namely where a suspected offender is arrested by the police, there is ordinarily no interference with an arrested person's right to respect for private life under Article 8(1) when photographed by police. Bearing in mind the fact sensitive nature of the present challenge, the question to be addressed by the court in these proceedings is not the simple one of whether the retention by the police of the Applicant's photographic images infringes his rights under Article 8(1). Rather, the correct question, correctly formulated, is somewhat prolix, having a series of ingredients: **does an interference with Article 8(1) ECHR arise in circumstances where this fourteen-year-old boy, of previous good character, was arrested on suspicion of burglary, was photographed by police, was not prosecuted, has no prospect of his photographic images being destroyed until a minimum period of seven years has expired and is at risk of their indefinite retention on a Police Service database thereafter?**

[48] As noted above, the decision of the House of Lords in ***S and Marper*** did not determine this issue. Thus the operation of the doctrine of precedent does not oblige this court to answer the question posed above in the negative. We must consider, however, whether, by rational and logical extension, the decision of the House in ***S and Marper*** dictates a negative answer to the question. This approach requires us to consider whether, if the retention of photographs had been the subject of challenge in ***S and Marper***, the outcome would have been the same. An affirmative answer to this question gains momentum when one recalls that the Strasbourg jurisprudence considered in Lord Steyn's opinion concerned the retention of photographs (as well as fingerprints) *and* it is evident that some weight was accorded to these decisions. Furthermore, in ***Wood***, Laws LJ stated:

> "[58] *Plainly there might be a question whether this court should follow the House of Lords or the European Court of Human Rights in* [***S and Marper***]. *If this court were required to confront such a question, it would follow the House of Lords:* ***Lambeth London BC –v- Kay*** …
>
> *But in my judgment* [***S and Marper***] *is wholly distinguishable on its facts.*"

Implicit in this passage is a clear acknowledgment that, in certain factual contexts, there might be no material distinction in principle between the retention by police of a person's fingerprints and DNA samples (on the one hand) and his photographic image (on the other).

[49] We consider that there are two relevant exercises in comparison to be carried out. The first entails comparing the statutory regime in Northern Ireland for the retention of a person's photographic images with the statutory regime governing the retention of a person's fingerprints and DNA samples which was considered by the House of Lords in ***S and Marper***. When one juxtaposes Article 64A of PACE [Northern Ireland] with Section 642(A) of PACE [England], it is apparent that the two statutory regimes are materially indistinguishable. The sole point of distinction is the inclusion in the Northern Ireland regime of the additional statutory purpose of identification of a deceased person or a person from whom a body part emanated.

[50] The second exercise entails comparing the factual matrix in the present case with that in ***S and Marper***. Once again, no material point of distinction emerges. In the present case, the Applicant was arrested and photographed by the police in custody, following which no prosecution ensued. In ***S and Marper***, the matrix was the same, with the exception that one of the Applicants was prosecuted, resulting in an acquittal. Thus there are powerful statutory and factual parallels between the present case and ***S and Marper***. This suggests to us, as a matter of strong probability, that if the retention of either of the Applicants' photographic images had been in play in ***S and Marper***, the outcome would have been precisely the same. We consider that there is no material distinction *in principle* between the retention by the police of the two suspects' DNA samples and fingerprints, in ***S and Marper***, and the retention by the police of the Applicant's photographic images in the circumstances of the present case. This analysis impels us to conclude that the question posed in paragraph [47] must yield a negative answer. We conclude, therefore, that the retention by the Police Service of the Applicant's photographic images, in the terms framed above, does not interfere with his right to respect for private life under Article 8(1) ECHR.

Further discussion

[51] Realistically, we recognise the possibility that, in light of the decision of the European Court of Human Rights in ***S and Marper***, the Supreme Court, if seised of the question framed in paragraph [47] above regarding retention of the Applicant's photographic images, might not supply the same answer (as occurred, in a different context, in ***Purdy)***. Mindful of Lord Bingham's exhortation in ***Kay*** that, in this kind of situation, it is desirable that the lower court express its views and while recognising that this is not a paradigm ***Kay*** matrix, we would add the following.

[52] Applying the objective test of reasonable expectation, it is not in dispute that such expectation would encompass the photographing of the Applicant following his arrest. Furthermore, we consider that this expectation must embrace the retention of the photographic images for some period of time. Photographs serve no purpose unless they are retained. In our opinion, the hypothetical reasonable observer would expect the Police Service to retain the Applicant's photographic images for some time, rationally connected to one or more of the statutory purposes enshrined in Article 64A PACE - for example, the completion of further police

enquiries, the arrest and questioning of other suspects or, if applicable, the conduct of the prosecution of the Applicant. These would all be objectively reasonable expectations. But do these expectations extend to retention of the Applicant's photographic images in the terms outlined above?

[53] Placing due emphasis on the intensely fact sensitive nature of the present case, we answer this question as follows. True it is that the Applicant was arrested on suspicion of having committed an offence triable either summarily or on indictment. In this context, the objectively reasonable expectation would be that it was appropriate for the police to photograph him and to retain his photographic images for a certain period thereafter. In our view, the measurement of the permissible retention period is inextricably linked to the statutory purposes. By Article 64A of PACE, the Applicant's photographic images could be used or disclosed *only* for any purpose related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution and could *only* be retained thereafter, to be deployed subsequently for any of these purposes. These factors are to be placed on one side of the scales.

[54] On the other side of the scales, the lengthy, perhaps indefinite, retention by the police of the Applicant's photographic images seems incompatible with the broad and elastic formulations of the scope of Article 8(1) considered in paragraphs [34] – [37] above. As each person grows older, photographic images of their appearance at an earlier age will increasingly belong to their inner, private sanctum. The court is of the opinion that a person's physical appearance falls within the personal sphere protected by Article 8, as it is a means of identifying the individual and forging a link between the individual and exclusively private aspects of his life, including family membership and other matters and activities properly to be regarded as falling outwith the public gaze and belonging to a person's private sphere. The photographic images of the Applicant go further than simply displaying his physical appearance at a particular age: they disclose that he was in police custody when a young teenager. Thus they contain, and convey, both his physical appearance *and* the fact of police arrest and detention (Lord Nicholls' "thousand words"). A person's photographic image is, in the words of Baroness Hale, in ***S and Marper***, "*informational privacy*". Furthermore, it is no less unique than each person's genetic code. It is a fact of life that no two members of society truly share the same physical appearance: even genuinely identical twins are likely to develop differing physical appearances as they grow older.

[55] In addition to the above, it is necessary to consider those aspects of the retention policy of the Police Service relating particularly to review, duration, extension and destruction, rehearsed in paragraph [28] above. The court must also weigh the limited uses to which the Applicant's photographic images may be put, having regard to the relevant statutory constraints: see paragraph [6] *supra*. As explained in paragraph [50], the court's conclusion that there is no interference with the Applicant's right to respect for private life under Article 8(1) ECHR is based on our analysis of the decision of the House of Lords in ***S and Marper***. But for that

decision and our analysis of it, we consider that there is substantial force in the view that the retention of the Applicant's photographic images by the Police Service for a minimum period of seven years, which may be extended indefinitely, unconnected in any concrete or rational way with any of the statutory purposes, interferes with his right to respect for private life guaranteed by Article 8(1). We agree with the observation of Laws LJ in ***Wood*** that any such intrusion is relatively modest.

Article 8(2)

[56] Maintaining the hypothesis that our conclusion in paragraph [50] is wrong and mindful of the possibility that it might not survive the decision of the Supreme Court in ***GC and C***, the next question to be addressed is whether the retention of the Applicant's photographic images, in the terms recorded above, can be justified under Article 8(2), which provides:

> "*There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*"

This entails consideration of three specific requirements:

(a) Legitimate aim.

(b) Whether the regime in question is in accordance with the law.

(c) Proportionality.

Legitimate Aim

[57] As summarised in paragraph [7] above, where an arrested person is photographed any resulting photograph may be used or disclosed *only* 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 *only* for any of these purposes. We consider that each of these purposes is, indisputably, a legitimate aim under Article 8(2), clearly falling within "*the prevention of disorder or crime*" and "*the protection of the rights and freedoms of others*". Furthermore, we are satisfied that these aims were engaged at the time when the Applicant was photographed, following his arrest, and continue to be engaged under the umbrella of the Police Service retention policy and the related statutory purposes.

Proportionality

[58] The ingredients of the principle of proportionality were articulated by Lord Steyn in a celebrated passage in ***R –v- Secretary of State for the Home Department, ex parte Daly*** [2001] 2 WLR 1622. In short, the court must ask itself:

> "*Whether (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.*"

As foreshadowed in our earlier conclusions, we are of the opinion that, as regards the act of photographing the Applicant and retaining the subsequent images for a certain period thereafter, these conditions are satisfied. However, if Article 8(1) ECHR is engaged, we conclude that the indefinite retention by the Police Service of the Applicant's photographic images, for a minimum period of seven years and potentially for a period of many years, unconnected to any concrete measure or exercise linked to any of the statutory purposes, is plainly disproportionate. We consider that this manifestly fails Lord Steyn's three tests of statutory purpose justification, rational connection with the statutory purpose and minimal interference with the Applicant's right to respect for his private life. The image of using a sledge hammer to crack a barely visible nut springs readily to mind.

In Accordance with the Law

[59] In summary, in Convention terms, in order to qualify as a "*law*" the relevant rule or instrument must satisfy the fundamental requirements of accessibility and foreseeability. These requirements were expressed by Lord Hope in ***R (Purdy) –v- Director of Public Prosecutions*** [2009] UKHL 45, in paragraphs [40] – [43]. A brief quotation will suffice:

> "*[40] The Convention principle of legality requires the court to address itself to three distinct questions. The first is whether there is a legal basis in domestic law for the restriction. The second is whether the law or rule in question is sufficiently accessible to the individual who is affected by the restriction, and sufficiently precise to enable him to understand its scope and foresee the consequences of his actions so that he can regulate his conduct without breaking the law. The third is whether, assuming that these two requirements are satisfied, it is nevertheless open to the criticism that it is being applied in a way that is arbitrary because, for example, it has been resorted to in bad faith or in a way that is not proportionate.*"

It is clear that the requirement of accessibility entails the availability of a published text of the law in question: see ***Silver –v- United Kingdom*** [1983] 5 EHRR 347, paragraph [87].

[60] We consider that, as in ***Purdy***, the relevant "*law*", in the present context, possesses two constituent elements. The first is the primary legislation concerned, Article 64A of PACE. The second is the Police Service retention policy, outlined in paragraphs [29] – [33] above. As already observed, this is a purely internal policy. Its existence emerged only at a very late stage of these proceedings and it was previously unknown to the Applicant and the court. It is not a published document. Given these factors, we conclude that this "*law*" does not satisfy the Convention requirement of accessibility. Furthermore, it is couched in terms which may properly be described vague, obscure in places and somewhat arbitrary. Finally, its procedures make no provision for involving or communicating in any way with the affected citizen. For this combination of reasons, we conclude that the "*law*" in question also fails to satisfy the Convention requirement of foreseeability.

[61] In ***S and Marper***, the "*law*" under scrutiny consisted exclusively of the relevant primary legislation. It did not include the second constituent element which arises for consideration in the present case. Furthermore, in ***S and Marper***, the argument that Section 64(1A) of PACE was framed in insufficiently precise terms to satisfy the Convention principle of legality was rejected quite summarily: see paragraph [36], per Lord Steyn. We consider that this conclusion is not binding on this court, since the "*law*" under scrutiny in the present case contains the significant additional constituent element outlined above. This part of the "*law*" cannot, in our view, be dismissed as peripheral or inconsequential. Rather, it forms an integral part of the whole. We are satisfied that, given the Convention shortcomings identified, the treatment of this discrete issue in ***S and Marper*** does not preclude the conclusion expressed in paragraph [60] above.

VII SUMMARY OF CONCLUSIONS

[62] With reference to the issues formulated in paragraph [14] above, the court concludes:

(i) As regards retention by the police of the Applicant's fingerprints and DNA samples, we are bound to follow the decision of the House of Lords in ***S and Marper***. Accordingly, this aspect of the Applicant's challenge fails.

(ii) Having regard to the materially indistinguishable statutory and factual matrices in ***S and Marper*** and the present case, the retention by the Police Service of the Applicant's photographic images, in the terms outlined above, does not interfere with his right to respect for private

life protected by Article 8(1) ECHR. Thus Article 8(2) does not arise for consideration.

(iii) If our second conclusion is wrong, we would consider that any interference with the Applicant's right to respect for private life is not justified under Article 8(2): while such interference pursues the statutory aims, which are legitimate, the interference is not proportionate and is not in accordance with the law.

(iv) Pursuant to Section 41 of the Judicature (NI) Act 1978, we certify for determination by the Supreme Court the following point of law of general public importance:

> "***Whether [a] the continued retention of the Applicant's DNA samples and fingerprints on the Police Service of Northern Ireland database indefinitely and/or [b] the continued retention of the Applicant's photographic images on the same database for a minimum period of seven years and perhaps indefinitely infringes his right to respect for private life under Article 8 of the European Convention on Human Rights and Fundamental Freedoms, contrary to Section 6 of the Human Rights Act 1998.***"

(v) We refuse leave to appeal to the Supreme Court. Our main reason for doing so is that the hearing of the appeal in ***GC and C*** is imminent and has the potential to determine most of the issues which have arisen in the present proceedings. We are also mindful of the possibility, albeit slender, that the Applicant could successfully petition the Supreme Court for permission to appeal in sufficient time to enable the two cases to be conjoined or, perhaps, could belatedly seek permission to intervene. In any event, it will be open to the Supreme Court to decide whether the issues determined by this judgment warrant the grant of permission to appeal and, if so, how the appeal should be managed in consequence.

The court's order as to costs will be finalised after both parties have had an opportunity to address this issue.

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

APPENDIX OF STATUTORY PROVISIONS

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1. Intimate Samples

Article 62 , Police and Criminal Evidence (NI) Order 1989

[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].

2. Non-Intimate Samples

Article 63 , Police and Criminal Evidence (NI) Order 1989

[As amended with effect from 1st March 2007]

"**63**. - (1) Except as provided by this Article, a non-intimate sample ["Non-intimate samples"] 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.

Fingerprints

3. 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.

4. Photographs

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."

5. Destruction of Fingerprints and Samples

Section 83, Criminal Justice and Police Act 2001

[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."