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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

JR 27's Application [2009] NIQB 58

AN APPLICATION FOR JUDICIAL REVIEW BY

JR 27 (Retention of samples)

Weatherup J and Morgan J

WEATHERUP J

[1] On 13 March 2009 leave was granted to the applicant to apply for Judicial Review of the decision of the Chief Constable of the Police Service of Northern Ireland to retain the applicant's fingerprints and photographs and DNA. By the judgment of the European Court of Human Rights in Marper v The United Kingdom on 4 December 2008, it was held that the schemes for the retention of such samples in the UK is contrary to the right to respect for private life under Article 8 of the European Convention. The applicant now applies for interim relief by way of an order for the destruction of the samples held by the respondent or alternatively a substantive hearing of the application for Judicial Review as soon as possible. Mr O'Rourke appears for the applicant and Mr McMillen appears for the respondent.

[2] On the other hand the respondent seeks a stay of any substantive hearing, pending a change of the relevant legislation concerning the retention of samples. A consultation paper has been issued by the Government in response to the ECtHR decision in Marper and it is anticipated that amending legislation will be in place in early 2010. In the meantime the respondent offers an undertaking not to use the samples of the applicant that are retained pending the hearing of the substantive application for Judicial Review.

[3] The present situation is that there are conflicting decisions of the House of Lords and the ECtHR. In Marper v Chief Constable of South Yorkshire Police [2004] UKHL 39 the House of Lords held that the retention of the samples was compatible with the European Convention. In Marper v UK [2008] the ECtHR held on the same facts that the retention of the samples was incompatible with the European Convention.

[4] The approach of a domestic court to a conflict between the House of Lords and the ECtHR was considered by the House of Lords in Kay v The London Borough of Lambeth [2006] UKHL 10. The case concerned the right to respect for the home under Article 8 of the European Convention. The House was invited to reconsider and depart from an earlier decision in Harrow London Borough Council v Qazi [2003] UKHL 43. Two later decisions of the ECtHR were said to be inconsistent with Qazi, namely Connors v United Kingdom [2004] EHRR 189 and Blecic v Croatia [2004] EHRR 185.

[5] Lord Phillips stated –

(at paragraph 28) that the mandatory duty imposed on domestic courts by section 2 of the Human Rights Act 1998 was to take into account any judgment of the Strasbourg Court and any opinion of the Commission. Thus they are not strictly required to follow Strasbourg rulings, as they are bound to do by section 3(1) of the European Communities Act and as they are bound by rulings of superior courts in the domestic curial hierarchy. However by section 6 of the Human Rights Act it is unlawful for domestic courts as public authorities to act in a way that is incompatible with a Convention right, such as a right arising under Article 8. It is ordinarily the clear duty of our domestic courts, save insofar as they are constrained by primary domestic legislation, to give practical recognition to the principles laid down by the Strasbourg Court as governing the Convention rights and that Court is the highest judicial authority on the interpretation of those rights. The effectiveness of the Convention as an international instrument depends on the loyal acceptance by Member States of the principles that are laid down by the ECtHR.

(at paragraph 40) that the questions accordingly arise whether our domestic rules of precedent are or should be modified. Whether a court which would ordinarily be bound to follow the decisions of another court higher in the domestic curial hierarchy is or should be no longer bound to follow that decision if it appears to be inconsistent with a later ruling of the court in Strasbourg.

(at paragraph 43) that it will of course be the duty of the 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 should express their views and give leave to appeal. Leap frog appeals may be appropriate. In this way judges discharge their duty under the 1998 Act, but they should follow the binding precedent as the Court of Appeal did in Kay.

(at paragraph 44) that there is a more fundamental reason for adhering to our domestic rule. 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 this special context of national legislation, law, practice, social and other conditions. It is by the decisions of national courts that the domestic standard must be initially set and in those decisions the ordinary rules of precedent should apply.

(at paragraph 45) that to the above rule there is one partial exception. The Court of Appeal in D v East Berkshire Community NHS Trust [2004] QB 558 held that the decision of the House of Lords in X v Bedfordshire County Council [1995] 2 AC 633 could not survive the introduction of the Human Rights Act which had undermined the policy considerations that had largely dictated the House of Lords decision. However there were other considerations that made X a very exceptional case, namely the very children whose claims in negligence the House of Lords rejected as unarguable succeeded in Strasbourg in establishing a breach of Article 3 of the Convention and recovering what was by Strasbourg standards very substantial reparation - Z v United Kingdom [2001] 34 EHRR 97. On these extreme facts the Court of Appeal in D was entitled to hold that the decision of the House of Lords in X could not survive the Human Rights Act. But such a course is not permissible save where the facts are of that extreme character.

[6] In the present case we consider that the partial exception may apply as the House of Lords decision in Marper was based on the same facts as the Strasbourg Court decision in Marper. Applying the approach that was taken in Kay it might be said that this is one of those exceptional cases where the domestic court might elect to follow the decision of the Strasbourg Court rather than the House of Lords decision.

[7] Against that background we turn to consider the terms of the ECtHR ruling in Marper. The Court considered the compatibility of the retention of the samples with Article 8 and ultimately came to consider, from paragraph 101 of the judgment, whether such retention was necessary in a democratic society –

The Court referred to the Committee of Ministers Recommendation which stressed the need for an approach to the retention of samples which discriminated between different kinds of cases and for the application of strictly defined storage periods for data even in more serious cases (paragraph 110).

The Court stated its approach as being to consider whether the permanent retention of fingerprints and DNA of all suspected but unconvicted persons was based on relevant and sufficient reasons (paragraph 114).

The question was whether such retention was proportionate and struck a fair balance between the public and private interests (paragraph 118).

The Court was struck by the blanket and indiscriminate nature of the power of retention and attention was drawn to the permanent retention of fingerprints and DNA (paragraph 119).

The Court shared the view of the Nuffield Council as to the impact on young persons of the indefinite retention of their DNA material and noted the Council's concerns that the policies applied had led to the over-representation in the database of young persons and ethnic minorities who had not been convicted of any crime (paragraph 124).

The conclusion was that the blanket and indiscriminate nature of the powers did not strike a fair balance between the competing public and private interests and amounted to disproportionate interference (paragraph 125).

[8] The Government's response to the ECtHR decision in Marper was a Consultation Paper issued in May 2009 entitled 'Keeping the Right People on the DNA Database, Science and Public Protection'. The consultation period will expire in August 2009. At paragraph 2.2 the Consultation Paper states that the Government is committed to complying with the ruling in Marper; the preferred approach to achieving compliance with the judgment while maximising public protection is, in relation to young persons, at paragraph 6.18 and 6.19, a policy of deleting profiles of children who are convicted once only of minor offences and if a child commits a serious offence or two minor offences the profile will remain indefinitely as for adults; similarly for those arrested but not convicted of minor offences it is proposed that the profiles be deleted after six years or on eighteenth birthday whichever is the sooner; for serious, violent or sexual or terrorist related offences the same 12 year rule would apply to children and adults.

[9] Thus the Government is proposing to revoke the indefinite retention of samples and introduce limited retention in the case of young persons. This development leads the respondent to contend that if the proposals are to become law at the beginning of next year the facts of the applicant's case would lead to the limited retention of the applicant's samples. Would that strike the proper public interest/private interest balance for the purposes of Article 8 of the Convention? The most that we may say is that it may well do so but that, as with all legislation that is introduced, may yet have to be determined by the courts. The respondent proposes a quarantine of the

applicant's samples until this new legislation is in force. On the other hand the applicant proposes interim relief to destroy the samples.

[10] We have considered where the proper balance of convenience might lie in relation to the issues arising on the application for such interim relief. We do not propose to accede to the destruction of the samples. We reach this conclusion while being aware that there had been other cases where samples have been ordered to be destroyed. In the present state of the developments on this issue we reach the conclusion not to accede to the claim for interim relief because we are satisfied that the samples, while being retained, will not be used but will be placed in quarantine. The samples may be lawfully retained under the new legislation, although that remains to be seen when the new legislation has been drafted and introduced. Destruction of the samples at this point would amount in effect to substantive relief at this interim stage. Destruction of the samples would amount to an irrecoverable loss of what may prove to be a compatible scheme for the retention of this material.

[11] Further the applicant proposes a substantive hearing in advance of the introduction of the new legislation. Again we have concluded on balance not to accede to the early hearing but to adjourn the substantive hearing pending the new legislation. We do so for the same reasons that we have given for not destroying the samples at this interim stage. Accordingly we are against the applicant in relation to the claims for interim relief.

[12] A further issue has arisen in relation to whether this application involves a criminal cause to matter. The applicant contends that this is a criminal cause or matter and the respondents contends that it is not. We did not find this an easy issue to determine. However it is of importance because Order 53 Rule 2 provides for a Divisional Court of two or more judges to hear a case involving a criminal cause or matter and an appeal from the decision goes directly to the House of Lords and not to the Court of Appeal in Northern Ireland.

[13] The issue in this application for Judicial Review concerning the retention of the samples arose out of an investigation into a criminal offence that involved the arrest and detention of the applicant. When the dispute arose about the retention of the samples a determination had already been made that there would be no prosecution of the applicant. Therefore at the point in time when the dispute arose about the samples the applicant was no longer at risk that he would be convicted or punished in respect of the matters for which he had initially been arrested.

[14] I had occasion to look at the issue of criminal cause or matter in the context of an application to destroy fingerprints in JR14's Application [2007] NIQB 102. At that time the ECtHR decision in Marper was awaited. At paragraph 9 of JR14's Application I stated the test of a criminal cause or

matter in these terms. 'Is the application before the court ancillary or incidental to a substantive process which places the applicant at risk of a criminal charge or punishment before a court.' I considered that there were three steps in addressing that test. First of all it is necessary to distinguish between on the one hand the particular application that is before the court and on the other hand the underlying substantive process in which the applicant had been involved. In this case the particular application is concerned with the retention of samples. The underlying substantive process concerns the arrest and questioning of the applicant, which is clearly a criminal process. The second step is to determine whether the underlying substantive process may lead directly to a charge or punishment before a court. The arrest and questioning of the applicant clearly placed him at risk of a charge of a criminal offence and placed him at risk of conviction and punishment. However at the time that the issue arose about the retention of the samples the applicant was no longer at risk of conviction or punishment. Thirdly, it is necessary to establish whether the particular application which has been made to the court is ancillary or incidental to that substantive process. The issue of retention of samples arose out of the process and is clearly ancillary or incidental to that process. Thus the issue for present purposes relates to the second step above and concerns whether the applicant, having been at risk of conviction or punishment at one stage, must continue to be at such risk when matter in dispute arises.

[15] Moore and Poole's Application [2005] NIQB 89 concerned an application to destroy samples. Unlike JR14's Application but as in the present case, a decision had been taken not to prosecute the applicant. Girvan J stated -

> "I conclude that these applications do not constitute criminal causes or matters. Once decisions were taken that resulted in the discontinuance of the proceedings against Moore and the acquittal in the case of Poole the question of the applicants' rights, if any, to demand destruction of the samples and fingerprints raised matters of civil not criminal law."

The distinguishing features between JR14 and Moore and Poole was that in the latter case the decision had been taken not to prosecute one of the applicants and the other applicant had been acquitted and therefore the criminal proceedings had come to an end. In JR 14 the papers were with the Director's office and there was a prospect that there would yet be a decision in relation to a prosecution, so he remained at risk.

[16] The matter has been further considered recently by the Court of Appeal in Alexander's Application [2009] NICA 20 where the Court concluded that a challenge to an arrest on the basis that it was not 'necessary'

was a criminal cause or matter. The Court referred to JR14 and then to two other decisions. In Carr v Atkins [1987] QB 963 a Judge made an order requiring the applicant to produce certain financial documents. No criminal proceedings had been commenced. However it was clear that the decision in question had been taken in the criminal context and the applicant was at risk if a decision were to be made to prosecute him. In R v Blandford Justices [1990] 1WLR 1940 the applicant had been charged with public order offences and remanded in custody. He immediately applied for judicial review on the basis that the offences were not punishable with a custodial sentence. He was granted bail the next day and the Magistrates' Court proceedings had concluded when the application for judicial review came before the Court. The proceedings were held to concern a criminal cause or matter. Taylor LJ stated that once the applicant had been granted bail the review by the Divisional Court could not have affected the course of the criminal proceedings but there was no basis in principle or authority for attributing a 'chameleon character' to a cause or matter.

[17] The Court of Appeal in Alexander's Application saw much force in the approach taken in Blandford Justices that a process is either a criminal cause or matter or it is not; it is not capable of having chameleon qualities whereby it changes status from one to the other depending on the specific facts at any particular stage of the proceedings; the underlying arrest and investigatory process was a criminal cause or matter and the Court considered that the cases should be so regarded irrespective of what had occurred since the date of arrest.

[18] The question therefore in the present case is whether the application is a criminal cause or matter when the underlying process arose in the criminal context but the applicant is no longer at risk of conviction or punishment. I am inclined to the view that the emphasis is not so much on the applicant's position in the underlying process or the state of the process at a particular time but rather on the nature of that underlying process. In the present case the application arises out of the underlying process of the arrest and detention of the applicant for the purposes of a criminal investigation. The taking of the samples arose in the course of that criminal investigation. The retention of the samples obviously followed the taking of the samples. When the applicant made an issue of the continuing retention of the samples the applicant had ceased to be at risk of conviction or punishment in respect of that criminal investigation because a decision has been taken not to prosecute. I am inclined to take a different line to that taken by Girvan J in Moore and Poole's Application. On balance I conclude that this is a criminal cause or matter which would have permitted the application to proceed directly to the House of Lords by way of appeal. I invite Mr Justice Morgan to give his opinion.

Morgan J

[19] I agree with the order that Mr Justice Weatherup proposes and the reasons that he gives. I consider that the discretion of the court should be exercised as he proposes. Like him I have had considerably more difficulty with the criminal cause or matter issue. The question is whether there is an underlying process which exposes the applicant to the risk of charge of prosecution. I take that formulation essentially from that in JR14's Application. I am inclined to the view that where any underlying process has reached the stage where there is no longer risk to the applicant by way of charge or prosecution in those circumstances the matter is probably not a criminal cause or matter. Since this is an interlocutory matter the leave of this Court might be sought in relation to whether or not to appeal to the Court of Appeal on the civil basis. I for my part would refuse such leave on the basis that it would be appropriate to renew that application before the Court of Appeal who would then have to consider whether or not this is a criminal cause or matter.

Weatherup J

[20] Given that I have indicated that I am inclined to consider this to be a criminal cause or matter the appeal is to the House of Lords. However the Court of Appeal may resolve whether this is a criminal cause or a civil cause. As an interim application I too refuse leave to appeal to the Court of Appeal. The parties may apply to the Court of Appeal to determine the issue of criminal cause or matter and appeal accordingly.