

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**IN THE DIVISIONAL COURT**

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**QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

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**Wood's (David) Application [2014] NIQB 119**

**AN APPLICATION BY DAVID WOOD FOR JUDICIAL REVIEW**

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**Morgan LCJ, Girvan LJ and Weatherup J**

**WEATHERUP J** (delivering the judgment of the Court)

[1] The applicant applies for judicial review of a decision of a constable of the Police Service of Northern Ireland made on 24 March 2014 requiring the applicant, who has been charged with drugs offences, to provide a non-intimate sample for evidential purposes. Mr Sayers appeared for the applicant and Mr Coll for the Police Service of Northern Ireland, the respondent.

[2] The applicant was arrested on 13 May 2013 on suspicion of possession of drugs. On the same date the applicant was charged with cultivating cannabis, possessing a Class B controlled drug with intent to supply and possession of a Class B controlled drug. He appeared before Omagh Magistrates' Court on 14 May 2013 and was remanded in custody. Bail was granted on 4 December 2013. No evidential DNA sample was taken from the applicant in the course of the investigation.

[3] Police Constable Prime was appointed investigating officer on 23 October 2013. On 18 November 2013, while the applicant was on remand in custody at HMP Maghaberry, PC Prime, through Prison Liaison, requested that the applicant provide a casework DNA sample. The applicant refused that request on 5 December 2013.

[4] On 24 March 2014, further to the direction of the Public Prosecution Service, PC Prime made a request through the applicant's solicitors for the applicant to provide a non-intimate sample for evidential purposes. This request, which is the subject matter of this application for judicial review, was refused by the applicant.

[5] The relevant legislative provisions are contained in articles 63 and 63A of the Police and Criminal Evidence (Northern Ireland) Order 1989 as amended. The current form of the legislation provides as follows (with provisions of particular note for present purposes in italics):

*"Other samples*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(5A) An officer shall not give an authorisation under paragraph (3) for the taking from any person of a non-intimate sample consisting of a skin impression if –

(a) a skin impression of the same part of the body has already been taken from that person in the course of the investigation of the offence; and

(b) the impression previously taken is not one that has proved insufficient.

(6) Where-

(a) an authorisation has been given; and

(b) it is proposed that a non-intimate sample shall be taken in pursuance of the authorisation,

an officer shall inform the person from whom the sample is to be taken –

- (i) of the giving of the authorisation; and
- (ii) of the grounds for giving it.

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

(8) If a non-intimate sample is taken from a person by virtue of paragraph (3)-

- (a) the authorisation by virtue of which it was taken; and
- (b) the grounds for giving the authorisation,

shall be recorded as soon as is practicable after the sample is taken.

(8A) In a case where by virtue of paragraph (2A), (3A) or (3B) a sample is taken from a person without the appropriate consent-

- (a) he shall be told the reason before the sample is taken; and
- (b) the reason shall be recorded as soon as practicable after the sample is taken.

(8B) If a non-intimate sample is taken from a person at a police station, whether with or without the appropriate consent-

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

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

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

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

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

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

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

*Fingerprints and samples : supplementary provisions*

63A.- (1) Where a person has been arrested on suspicion of being involved in a recordable offence or has been charged with such an offence or has been informed that he will be reported for such an offence, fingerprints, impressions of footwear or samples or the information derived from samples taken under any power conferred by this Part from the person may be checked against -

- (a) other fingerprints, impressions of footwear or samples to which the person seeking to check has access and which are held by or on behalf of any one or more relevant law-enforcement authorities or which are held in connection with or as a result of an investigation of an offence;
- (b) information derived from other samples if the information is contained in records to which the

person seeking to check has access and which are held as mentioned in sub-paragraph (a).

(1ZA) Fingerprints taken by virtue of Article 61(6A) may be checked against other fingerprints to which the person seeking to check has access and which are held by or on behalf of any one or more relevant law-enforcement authorities or which are held in connection with or as a result of an investigation of an offence.

(1A) In paragraphs (1) and (1ZA) “relevant law-enforcement authority” means -

- (a) a police force;
- (b) the [National Crime Agency];
- (c) a public authority (not falling within sub-paragraph (a) or (b)) with functions in any part of the British Islands which consist of or include the investigation of crimes or the charging of offenders;
- (d) any person with functions in any country or territory outside the United Kingdom which -
  - (i) correspond to those of a police force; or
  - (ii) otherwise consist of or include the investigation of conduct contrary to the law of that country or territory, or the apprehension of persons guilty of such conduct;
- (e) any person with functions under any international agreement which consist of or include the investigation of conduct which is -
  - (i) unlawful under the law of one or more places;
  - (ii) prohibited by such an agreement; or
  - (iii) contrary to international law;

or the apprehension of persons guilty of such conduct.

(1B) The reference in paragraph (1A) to a police force is a reference to any of the following –

- (a) the Police Service of Northern Ireland or the Police Service of Northern Ireland Reserve;
- (b) any police force maintained under section 2 of the Police Act 1996;
- (c) the metropolitan police force;
- (d) the City of London police force;
- (e) the Police Service of Scotland;
- (f) the Ministry of Defence Police;
- (g) the Royal Navy Regulating Branch;
- (h) the Royal Military Police;
- (i) the Royal Air Force Police;
- (j) the Royal Marines Police;
- (k) the British Transport Police;
- (l) the States of Jersey Police Force
- (m) the salaried police force of the Island of Guernsey;
- (n) the Isle of Man Constabulary.

(1C) Where –

- (a) fingerprints, impressions of footwear or samples have been taken from any person in connection with the investigation of an offence but otherwise than in circumstances to which paragraph (1) applies, and
- (b) that person has given his consent in writing to the use in a speculative search of the fingerprints, of

the impressions of footwear or of the samples and of information derived from them,

the fingerprints or impressions of footwear or, as the case may be, those samples and that information may be checked against any of the fingerprints, impressions of footwear, samples or information mentioned in sub-paragraph (a) or (b) of that paragraph.

(1D) A consent given for the purposes of paragraph (1C) shall not be capable of being withdrawn.

(2) Where a sample of hair other than pubic hair is to be taken the sample may be taken either by cutting hairs or by plucking hairs with their roots so long as no more are plucked than the person taking the sample reasonably considers to be necessary for a sufficient sample.

(3) *Where any power to take a sample is exercisable in relation to a person the sample may be taken in a custodial establishment.*

(4) *Any constable may, within the allowed period, require a person who is neither in police detention nor held in custody by the police on the authority of a court to attend a police station in order to have a sample taken where -*

(a) *the person has been charged with a recordable offence or informed that he will be reported for such an offence and either he has not had a sample taken from him in the course of the investigation of the offence by the police or he has had a sample so taken from him but either it was not suitable for the same means of analysis or, though so suitable, the sample proved insufficient, or*

(b) *the person has been convicted of a recordable offence and either he has not has a sample taken from him since the conviction or he has had a sample taken from him (before or after his conviction) but either it was not suitable for the same means of analysis or, though so suitable, the sample proved insufficient.*

(5) *The period allowed for requiring a person to attend a police station for the purpose specified in paragraph (4) is -*



- (a) *in the case of a person falling within sub-paragraph (a), one month beginning with the date of the charge or one month beginning with the date on which the appropriate officer is informed of the fact that the sample is not suitable for the same means of analysis or has proved insufficient, as the case may be;*
- (b) *in the case of a person falling within sub-paragraph (b), one month beginning with the date of the conviction or one month beginning with the date on which the appropriate officer is informed of the fact that the sample is not suitable for the same means of analysis or has proved insufficient, as the case may be.*
- (6) *A requirement under paragraph (4) –*
  - (a) *shall give the person at least 7 days within which he must so attend; and*
  - (b) *may direct him to attend at a specified time of day or between specified times of day.*
- (7) *Any constable may arrest without a warrant a person who has failed to comply with a requirement under paragraph (4).*
- (8) *In this Article “the appropriate officer” is –*
  - (a) *in the case of a person falling within paragraph (4)(a), the officer investigating the offence with which that person has been charged or as to which he was informed that he would be reported;*
  - (b) *in the case of a person falling within paragraph (4)(b), the officer in charge of the police station from which the investigation of the offence of which he was convicted was conducted.”*

[6] Thus there are four circumstances in which a non-intimate sample may be obtained from a person without the appropriate consent.

- (i) The person is in police detention (and no sufficient non-intimate sample has been taken in the course of the investigation) (article 63(2A)).

(ii) The person is being held in custody by the police on the authority of a court (and the taking of the sample is authorised by a police inspector who has reasonable grounds for suspecting involvement in a recordable offence and for believing that the sample will tend to confirm or disprove involvement) (article 63(3)).

(iii) A person has been charged with a recordable offence or informed that he will be reported for a recordable offence (and no or no sufficient sample has been taken during the investigation). This category applies whether or not the person is in police detention or held in custody by the police on the authority of a court (article 63(3A)).

(iv) The person has been convicted of a recordable offence (article 63(3B)).

[7] The present case is concerned with the third category above, namely an applicant charged with a recordable offence, who was not in police detention and not held in custody by the police on the authority of a court and from whom no sample had been taken.

[8] The supplementary provisions as to the taking of samples set out in article 63A include provisions as to the power to check samples against the databases and power to require a person to attend a police station in order to have a sample taken. Article 63A(4)(a) deals with the power to require a person to attend a police station in the circumstances falling within the third category above and provides a time limit of one month within which a constable may require the person to attend a police station in order to have a sample taken.

[9] A constable may arrest without a warrant a person who has failed to comply with the requirement under paragraph (4) to attend a police station in order to have a sample taken (article 63A(7)). The arrested person may then, while not a person in police detention, as defined in article 2 of the 1989 Order, have a non-intimate sample taken without consent under article 63(3A)(a) as a person not in police detention and being a person charged with a recordable offence, provided no or no sufficient sample has already been obtained.

[10] Article 63(3A) and article 63A were brought into effect together by the Police (Amendment) (NI) Order 1995.

[11] The operation of article 63(3A) was the subject of judicial review in McBride's Application [1997] NI 269. The Chief Constable introduced a policy that non intimate samples should be taken in certain categories of recordable offences. The applicant contended that by introducing a force policy the Chief Constable had fettered the discretion of police officers to consider each case on its merits. The Divisional Court upheld the operation of the force policy. Carswell LCJ stated the purpose of article 63(3A) as being to establish DNA profiles and store them in a database, with the

object of using them in the future for comparison purposes in order to assist in the detection of crime.

[12] While the respondent initially sought to distinguish between the taking of non-intimate samples for evidential purposes and for speculative searches in the interpretation of articles 63(3A) and 63A(4), the supposed effect of the distinction was not maintained.

[13] The present application concerns the operation of article 63(3A), namely the circumstances in which a non-intimate sample may be taken without consent from a person charged with a recordable offence where a non-intimate sample was not taken in the course of the investigation and that person is not being detained by police or held in custody by police by the authority of the court. The applicant contends that the power to take a non-intimate sample in such circumstances is subject to the provisions of article 63A(4) and must be exercised by a constable requiring, within a period of one month, that the applicant attend a police station in order to have a sample taken. The respondent contends that the power to take a sample under article 63(3A) is not limited by article 63A(4) and may be taken at any time and place while the person remains charged with or informed that he will be reported for a recordable offence.

[14] In the present case the police did not issue a requirement for the applicant to attend a police station in exercise of the power under article 63A(4). Nor was there an attempt to exercise the power under article 63(3A) to take a non intimate sample without the appropriate consent. The constable requested the applicant to provide a non intimate sample and the applicant refused, as he was entitled to do. The decision in issue is therefore the decision of the constable that a non intimate sample will be taken at some as yet unspecified time in some as yet unspecified place. In effect the applicant seeks a declaration that the constable has no power to take a non intimate sample without consent under article 63(3A) now that the period of one month has elapsed since the applicant was charged with the recordable offence.

[15] The respondent contends that there exists the power to take such a non-intimate sample in any place after any period of time while the person remains charged with a recordable offence. This includes the exercise of the power in any place, including a public place. By article 88 a constable may use reasonable force, if necessary, in the exercise of the power. The respondent's contention extends to the exercise of the power to take a non intimate sample without consent, in a public place, with the use of reasonable force, if necessary.

[16] The respondent refers to what is not contained in the terms of articles 63(3A) and 63A. Article 63(3A) does not state that any power in relation to the taking of non-intimate samples is subject to article 63A. Nor is it stated in article 63A that the article governs the exercise of the powers contained in article 63(3A). Nor is it stated in article 63(3A) that the power to take a non-intimate sample from a person charged or informed that he would be reported for a recordable offence is subject to any time

limit. Nor is it stated in article 63(3A) that the power is subject to any restriction as to the place at which the non-intimate sample may be taken. The respondent contends that articles 63(3A) and 63A, while there may be some common ground, contain separate powers.

[17] Article 63(3A) contains the power to take a non intimate sample from a person charged with a recordable offence. Article 63A(4) contains the power, in circumstances arising under article 63(3A), to require attendance at a police station in order to have the sample taken, when the person is not in police detention nor held in custody of the police on the authority of the court. These are indeed separate powers as the respondent contends. The first is the power to take the sample. The second is the power to require attendance at a police station. The purpose of the exercise of the second power is stated to be in order to have the sample taken. The powers in article 63A in relation to samples are stated to be 'supplementary'. The powers in articles 63(3A) and 63A(4) are clearly interconnected. In default of compliance with the requirement to attend the police station for the stated purpose, a constable has a power of arrest. The object must be to secure the person's presence at the police station for the sample to be taken without the person's consent. The exercise of the power to require attendance at the police station must be within one month.

[18] The respondent contends that the power to take the non-intimate sample may be exercised outside the police station and the time limit would not apply. Reference is made to article 63(8B) relating to persons at a police station and article 63(9) relating to persons detained at a police station, where, in each instance, the person must be informed of the reason for taking the sample and that the sample may be subject to a speculative search. The implication is, says the respondent, that there are places other than a police station where the sample may be taken. Article 63(8B) and (9) set out some of the notice requirements when a sample is to be taken. They do not assist the respondent's argument as to the places where the sample may be taken.

[19] The respondent's further point on the power to take samples outside the police station is article 63A(3) which provides that a sample may be taken in a custodial establishment. That may arise only where there is otherwise a power to take the sample. That may arise in the third and fourth categories set out above where non intimate samples may be taken without consent where the person would not be in police detention or in police custody on the authority of the court.

[20] The applicant refers to section 16 of the Prison (NI) Act 1953 in relation to the taking of non-intimate samples without consent from a person in a custodial establishment. The prison authorities may authorise a person detained in prison to be taken to any place if it is desirable in the interests of justice. Thus the applicant contends for the exercise of the power to take a non intimate sample from a prisoner under article 63(3A) by requiring his attendance at a police station under article 63A(4) and seeking authorisation from the prison authorities under section 16 of the

1953 Act for his removal to the police station. This appears to be an unnecessary process where there is express provision for the taking of a sample in the prison, if the power to do so otherwise arises.

[21] Article 63A has been amended by the Crime and Security Act 2010 but the amendments are not yet in force in Northern Ireland. Similar amendments have already been commenced in the Police and Criminal Evidence Act 1984 in England and Wales. The amendments in Northern Ireland will provide, in respect of persons charged with or informed that they will be reported for a recordable offence, that a constable may require a person to attend a police station for the purpose of taking a non-intimate sample under article 63(3A) and that power may not be exercised after the end of the period of six months beginning with the day on which the person was charged (Schedule 2A substituted for article 63A(4) to (8)).

[22] In R (R) v A Chief Constable [2013] EWHC 2864 (Admin) a Divisional Court dealt with an application for judicial review of a police decision to require a convicted person to attend a police station for a non intimate sample to be taken under the PACE powers applicable in England and Wales as amended by the Crime and Security Act 2010 (the Northern Ireland version of which is not yet in force). As the first requirement by police that the applicant attend the police station was not authorised by a police inspector it was unlawful. A second requirement by police was duly authorised and was found to be compatible with the right to private life under article 8 of the European Convention as an interference which was justified by the legitimate aim of solving crime undertaken by proportionate means. The issue was the applicant's right to make representations as to why he should not be required to provide the sample. The applicant had already made submissions about the exercise of the power and the action was found to be proportionate.

[23] In the context of the taking of non-intimate samples from convicted persons for speculative searches of the database it was stated by Pitchford LJ-

“Parliament has already set the qualifying criteria. The first stage was a request to provide a sample with consent. Had the claimant wished to provide reasons why it would be, in his particular case, unreasonable or disproportionate to make the request (such as exceptional personal circumstances) the inspector would have been under a duty to consider them before making his decision whether to authorise the requirement to attend the police station for the purpose of taking a sample. I do consider that the better course is to provide the person to whom the request is made with the opportunity to respond.”

This appears to be some way from the situation envisaged by the respondent in the taking of non-intimate samples.

[24] The Court is unable to accept the respondent's approach to the interpretation of article 63 and 63A. The police do not have power to take a non-intimate sample without the appropriate consent from a person charged with a recordable offence at any time in any place, as the respondent contends.

[25] The legislation provides for the taking of non-intimate samples without consent to be completed in a controlled environment. In the first two categories that controlled environment will occur in police detention or in the custody of the police under an order of the court. In the third category relating to a person charged or to be reported and the fourth category of persons convicted, in each instance where the person is not in police detention or custody or in a custodial establishment, that controlled environment will occur by being required to attend a police station or on being arrested for failing to attend. Articles 63(3A) and 63(4) to (8) involve interference with the right to liberty and the right to privacy and must be strictly interpreted.

[26] Further, interference with qualified rights must be in accordance with law, a requirement of the European Convention that demands legal certainty, one aspect of which is the absence of arbitrariness. The power granted by article 63(3A) that involves interference with privacy must not be granted in terms that allow its exercise by public officials in an arbitrary manner. The exercise of the power to take non-intimate samples without consent, in a manner unrestrained by place and time, as advocated by the respondent, contains the very arbitrariness that is prohibited by the requirement for legal certainty. The arbitrariness is addressed by article 63A which controls the exercise of the power under article 63(3A).

[27] The power to take a non-intimate sample under article 63(3A) from a person who is not in police detention, not held in custody by the police on the authority of a court, not in a police station and not in a custodial establishment, is to be exercised by requiring that person to attend a police station for the sample to be taken, as provided by article 63A(4). The power to require attendance at a police station for the sample to be taken must be exercised within one month of the person being charged or one month from notice to the police officer that any prior sample was unsuitable or insufficient. In the present case the time limit for the requirement to attend the police station had expired when the applicant was requested to provide a non-intimate sample.