
THE DNA DATABASE

ADVICE (Fv)

1. INTRODUCTION

- 1.1 I am asked to advise the Equality and Human Rights Commission ("the Commission") whether the Government's proposals for a National DNA database set out in a consultation document "Keeping the Right People on the DNA Database" ("the Home Office paper") comply with the European Convention on Human Rights ("the Convention").
- 1.2 In my view, for the reasons set out below, if the proposals were enacted into law they are likely to breach the Convention and lead to findings of violations by the European Court of Human Rights ("the Court").

2. S AND MARPER v UK

- 2.1 In the case of *S and Marper v The United Kingdom* (Judgment 4th December 2008 EctHR) the Court had to consider applications made by two persons, [one of whom had been acquitted of a charge of attempted robbery, and another whose case in respect of charge of harassment of his partner was discontinued], complaining that

their fingerprints and DNA samples were not destroyed by police despite their request.

2.2 The key findings of the Court were as follows:

- (1) The retention of both cellular samples and DNA profiles disclosed an interference with the applicants right to respect for their private lives within the meaning of Article 8(1) of the European Convention on Human Rights (“the Convention”) (para 77).
- (2) The general approach taken by the Convention organs in respect of photographs and voice samples should be followed in respect of fingerprints (para 84).
- (3) (Accordingly) the retention of fingerprints also constituted an interference with respect for private life (para 86).
- (4) The retention of the applicants’ fingerprints and DNA records had a clear basis in domestic law (para 97).
- (5) It was not necessary to decide whether the wording of section 64 of PACE (the source of the power deployed) met the “quality of law” requirements within the meaning of Article 8(2) of the Convention (para 99).
- (6) The retention of fingerprint and DNA information was used as a legitimate aim of detection and therefore prevention of crime (para 100).

- (7) The question before the Court was not whether the retention of fingerprints, cellular samples and DNA profiles may in general be regarded as justified under the Convention but rather

“whether the retention of fingerprints and DNA data of the applicants as person who had been suspected but not convicted of certain criminal offences was justified under Article 8 paragraph 2 of the Convention” (para 106).

- (8) England, Wales and Northern Ireland (“the domestic jurisdictions”) appeared to be the only jurisdictions within the Council of Europe to allow the indefinite retention of fingerprints and DNA material of any person at any age suspected of any recordable offence (para 110).

- (9) The power of retention in these domestic jurisdictions was

“blanket and indiscriminate”.. “the material may be retained in irrespective of the nature or gravity of offence from which the individual was original 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 prisonable offences. The retention is not time limited; the material is retained indefinitely whatever the nature or seriousness of the offence of which a person is suspected. Moreover there exist only limited possibilities for an acquitted individual to have the data removed from the nationwide database or have it destroyed; in particular there is no provision for the independent review of the justification for the retention according to defined criteria including such factors as the seriousness of the offence, previous arrest, the strength if the suspicion against the person any other special circumstances (para 119).

- (10)

“The blanket and indiscriminate nature of the powers and retention of fingerprints, cellular samples, and DNA profiles of persons suspected but not convicted of offences, supplied in the case of a present applicants, fails to strike a fair balance between the competing public and private interest and that the respondent state has overstepped any acceptable margin of appreciation in this regard. Accordingly the retention of issue constitutes a disproportionate interference of the applicant’s right for respect for private life and cannot regard as necessary in a democratic society”. (para 125)

2.3 The Court added

“This conclusion obviates the need for the Court to consider the applicants’ criticism regarding the adequacy of certain particular safeguards such as too broad an access to personal data concerned and insufficient protection against the misuse or abuse of such data”. (ditto)

2.4 In rejecting the claim for pecuniary damage the Court noted that

*“it has found the retention of the applicants fingerprint and DNA data violates their right under Article 8. In accordance of Article 46 of the Convention **it will be for the respondent state to implement under the supervision of a committee of ministers, appropriate general and/or individual measures to fulfil its obligations to secure the right of the applicants and other persons in their position to respect for their private life”.*** (para 134)

2.5 The Court’s judgment expressly refrained from pronouncing on what would be a convention compatible system. Obviously as noted, it was the blanket nature of the present system in the domestic jurisdictions which it found non-compliant.

2.6 The Court, however, made it clear that:

- (i) clear detailed rules were required governing the scope and application of measures as well as minimum safeguards concerning, *inter alia*, storage, usage, access of third parties, procedures for preserving the integrity and confidentiality of data and procedures for its destruction (Judgment para 99).
- (ii) different measures should be in place in respect of the three different categories of data (Judgment para 120).
- (iii) the position of the innocent and guilty should be distinguished (para 122).

(iv) the principles of Committee of Ministers' recommendation 92(1) were useful¹ (para 110).

(v) the discrete cases of children and adults demanded different treatment (para 124).

3. THE HOME OFFICE PAPER

3.1 The Home Office paper sets out the Government's proposals to remove the current blanket retention policy (which the Court had found objectionable) and replace it with a retention framework which, in the words of the Judgment, "*will discriminate between different kinds of case which for the application of strictly defined storage periods for data*"² (Judgment para 110). It is presumably intended to reflect the State's obligations articulated in the Judgment para 134.

3.2 The paper (naturally) states that the Government is committed to comply with the ruling of the Court in the *S and Marper case* (Executive Summary ("ES") (para 2.2).

3.3 The paper recognised what it called

"the important distinction made in the judgment between cellular samples, which contain an individual's actual DNA, the DNA profiles on the database which simply

¹ The Data Protection Convention Article 6(c) says that data should be "*preserved in a form which permits identification of the data subject for no longer than is required for the purpose of which those data are stored.*"

Recommendation No. R (92) 1 on the use of DNA where the framework of the criminal justice system replicates the same philosophy and adds

"The results of DNA analysis and the information so derived may, however, be retained where the individual concerned has been convicted of serious offences against the life integrity or security of persons. In such cases strict storage periods should be defined by domestic law".

The same recommendation is made in respect of the retention of samples where the security of the state is involved.

² a reference to the position in Scotland which was found by the Court to be notably consistent with the Committee of ministers recommendation (R 92(1) Judgment para 110

describe for identification purposes certain non coding parts of the individual's DNA, and finally fingerprints". [ES para 2.3]

3.4 The paper notes that the existing threshold in PACE for taking DNA and fingerprints on arrest from a person detained at a police station for a recordable offence is appropriate and observes that this was not called into question by the Court. [ES para 2.4] (It was not actually addressed by the Court).

3.5 The paper notes that:

- (i) there is no evidence underlying retention regimes in other jurisdictions.
- (ii) in several cases it is relying on new work which has not yet been fully peer reviewed in the time available.
- (iii) however there is a "strong" (sic) evidence base to support its proposed new retention framework. [ES para 2.5]

3.7 The core judgment is around a six year retention period for the vast majority of profiles for persons arrested but not convicted. [ES para 2.6 and Section 6 esp. para 6.13]

3.8 The key from the Governments perspective is how long it takes after an arrest for a person to have no higher risk of re-arrest than a member of the general public. Some work on this is said to suggest a figure of more than 5 years, other work points to between 13-18 years.

A provisional model the Government have developed suggests a figure of 4-15 years, which forms the framework for the retention periods it is recommending. [ES para 2.7]

The retention periods of 6 years and 12 years is based on the likelihood of people who have been arrested and not convicted but who may go on to commit an offence. [ES para 2.8]

Part of that analysis has included data of those who have been arrested and convicted based on independent research carried out by the Jill Dando Institute (JDI)³ which found that offending rates of those arrested but not convicted were not significantly lower than for those convicted and not given a custodial sentence. [ES para 2.8]

The impact assessment research⁴ shows that it takes 15 years before the risk of offending is at the same level as that for the general population. [ES para 2.8]

The JDI research shows that 52% of re-offending happens within 6 years. The Government has taken a value judgment on the associated level of risk that retention for six years provides and combined within the Court judgment, concluded that this provides a proportionate retention period.

³ Annex C

⁴ The impact assessment for the Home Office paper out the underlying assumptions for its proposal in more detail at Annex D.

Two-thirds of re-offending happens within 12 years. The Government believe this a suitable period of retention for those arrested but not convicted for violent, sexual or terrorism-related offences in view of the potential level of harm associated with such offences and the issues of public confidence. With its proposal to re-start the clock of 6 years or 12 years after any subsequent arrest, it believes that a significantly greater proportion of all offending will remain detectable. [ES para 2.8]

3.9 The Government states destruction of all existing or legacy samples would be significant and lengthy process and could realistically take up to two years to complete that work. The destruction of individual samples taken following the introduction of new regulations should be done within a maximum period of six months after they were taken. In practice, this may be a matter of weeks following the profile being successfully loaded onto the National DNA Database. [ES para 2.10] [para 5.6]

3.10 In terms of destroying existing or legacy profiles, the Government anticipate, that a similar period of up to two years would be required even though there would be much smaller numbers involved i.e. profiles relating to those acquitted or not prosecuted between 1995 and 2003. That is because of the need to track progress on each case. [ES para 2.10] [para 5.7]

4. OBSERVATIONS ON THE HOME OFFICE PAPER

4.1 There is no doubt that the Government finds the Court ruling is unduly restrictive (see ES para 2.9 above) [see also para 4.15]. It stresses that any change to the existing policy is (in its view) likely to reduce the number of detections that DNA delivers, and will have some adverse impact on public protection. The Government's policy is said to be designed to minimise this risk while complying with the Court ruling. ES para 2.9 (see also para 4.16).

4.2 It is therefore unsurprising that the Government should seek to interpret the Court's ruling as narrowly as possible. It is also clear that it purports to take comfort from it in a way that the Court did not intend. For example the paper states "*At the same time, the Court recognised the domestic jurisdiction needed to take risk into account, and praised systems like that in Scotland where profiles are retained even in the case of individuals not ultimately convicted in certain circumstances*". [E.S. para 2.7]

4.3 As to this:

- (i) The Court does not say expressly that risk should be taken into account (ditto), (although in the area of crime prevention risk of occurrence or reoccurrence is intrinsic to the exercise). By contrast the Court's concerns as to risk are rather as to "*abuse and arbitrariness*" if no minimum safeguards are spelt out in detail for duration, storage, usage, third party access, preservation of integrity and confidentiality of data and procedures for its destruction (Judgment para 99) and of the stigmatisation of the innocent (Judgment para 122). This, the paper does **not** emphasise.

(ii) When the Court “praised” Scotland, it did so because of the **limits** on retention, not as the Paper implies [ES para 2.7] their **extent**.

4.4 In terms of solving crimes, the Paper refers to statistics which show that out of 200,000 DNA profiles retained of persons acquitted or against whom charges were dropped, circa 8,500 profiles from some 6,290 individuals have been linked with crime scene profiles involving circa 14,000 offences, some very serious (para 4.14). Otherwise there is no direct evidence that the more DNA is retained the more crimes are solved. In terms of preventing crime there is also no evidence about the database’s deterrent value. [See Annex C, p.28 point 3]

4.5 The Government consider that research into probabilities of persons in certain categories offending or reoffending legitimises their proposals: but this focus tends to underplay the privacy right against which the diminution or elimination of such risk is to be balanced.

4.6 The Court observed that

“the protection afforded by Article 8 of the Convention would be unacceptably weakened if the use of modern scientific techniques in the criminal justice system were allowed at any cost and without carefully balancing the potential benefits of the extensive use of such techniques against important private life interests”.
(Judgment para 112)

4.7 It is not within my area of expertise as a lawyer to comment on the robustness of the evidence: but I detect degrees of uncertainty in the Paper itself (e.g. ES para 2.5 and para 6.11), but obviously to the extent that the evidence established that the Home Office proposals would assist in the prevention or detection of crime, to that extent

the balance would shift in favour of public protection and against private interest:
and vice versa: (see the discussion in Annex C p.26-27).

4.8 The Paper recognises a concern that there be faster action on deleting samples and profiles, but suggests that the aim of the Court judgment is not to create chaos in the criminal justice system nor to divert operational policing resources away from the key functions of tackling crime and upholding the law. It considers that the proposed timelines will enable a suitable and realistic operational response to the judgment. [ES para 2.12]

5 **THE PROPOSALS**

5.1 The Home Office paper sets out the future framework for retention, destruction and governance of DNA and fingerprints. It has not been oblivious to the thrust of the Court's decision: to differentiate between the cases of the convicted and the acquitted (or not charged): between adults and children: between more or less serious offences: between different categories of data. The issue is whether it goes far enough i.e. strikes the "*fair balance ... inherent in the whole of the Convention*", *James v UK* 1986 EHRR 123 at para 50.

5.2 Against this background I note key recommendations set out in ES para 2.4 and consider below issues as to their legality and compliance with the Convention with my own comments in italics.

- **DNA Profiles**

- (i) Adults convicted of a recordable offence⁵ will have their profiles retained indefinitely (see para 6.2.3)

The indefinite retention of Recordable offences is inconsistent with the R92(1) recommendation on which is restricted to serious offences and requires strict storage periods [cited Judgment para 8] endorsed Judgment para 110. A proportionate response requires consideration of nature/seriousness of offence and the utility of DNA for crime solution to be balanced against privacy rights (Judgment para 112). The Judgment gives no scope for indefinite retention at all: (ditto). In my view if this proposal was enacted it would breach Article 8 of the Convention and be unlawful. Achieving a proportionate system of retention would involve taking into account such matters as: 1) the nature of the offence 2) its seriousness (or otherwise) 3) the likely and seriousness of risk to the public by not retaining the profiles and 4) what period of retention could be reasonably justified by balancing the rights of privacy of the individual with the right of the general public to be protected from the crime that might be committed.

- (ii) Adults arrested for a recordable offence which is not a serious violent or sexual or terrorism-related offence, but not convicted will have their profiles automatically deleted after six years (see para 6.13).

⁵ Recordable offences range from begging via theft to murder.

The Government rely here on their own work and the U.S. evidence (see paras 6.7 – 6.8). Against this in Scotland there is no power to retain DNA material at all when a person is arrested but not convicted unless the offence is a serious one (See Judgment para 109) . The Paper does not refer to any evidence that this has caused any detriment to the fight against any serious crime in Scotland.

The issue here (as elsewhere) is essentially one of proportionality: but again the Judgment para 109 endorsing the Scottish position seems at odds with the proposal. Without some recognition of this inconsistency the Government is unlikely to satisfy any requirement of proportionality nor address the Courts criticism of the absence of provision “for independent review of the justification for the retention according to defined criteria” (Judgment para 119). In my view if this proposal was enacted it is likely to breach Article 8 of the Convention and be unlawful.

- (iii) Adults arrested for a serious violent or sexual offence or terrorism-related offence but not convicted will have their profiles automatically deleted after twelve years (see para 6.13).

As to this it is first much longer than the three-year period (and a possible two-year extension if a sheriff consents) that is authorised in Scotland and approved by the Court (Judgment para 109).

Second the Government concede that the evidence for "reoffending in a more serious and violent case is unclear" and rely "on commonsense approach" (para 6.13).

Third within this category are a spectrum of offences including the lower end of the scale. The Court's warning against "indiscriminate" retention (Judgment para 125) has resonance here.

In my view if this proposal was enacted is likely to breach Article 8 of the Convention and be unlawful.

- **Fingerprints**

Retention of all fingerprints and deletion

- (i) after 6 years for those arrested but not convicted.
- (ii) after 12 years for those arrested and not convicted of violent sexual or terrorist related offences [see para 8.3].

In fidelity to the Court's judgment fingerprints & DNA samples should be treated differently. (See Judgment para 120). There should also be different treatment of children and adults. (Judgment para 124) It therefore follows inexorably that whatever the retention period may be for DNA profiles, it should be less than that for fingerprints, which the proposal does not properly recognise, thereby engaging the possibility of a further breach of Article 8.

Removal of right of individual's right to request to be witness of the destruction of fingerprints (see para 8.6)

No reason for this proposal is supplied. I presume it is animated by considerations of cost and convenience. In principle a person should be able (if s/he wishes) to verify the destruction of personal data – see the Judgment para 99 which contemplates detailed rules for procedures for data destruction providing sufficient guarantees against abuse.

- Exceptional grounds for earlier destruction of profiles

Possible grounds for earlier destruction of profiles. These could be requested by application to the Chief Constable.

Grounds might includes cases of:

- (i) wrongful/unlawful arrest
- (ii) mistaken identity
- (iii) where it emerges no crime has been committed.

The criteria which need to inform the Chief Constable's decision could then be codified or set out in regulations.

I see benefit in there being a mechanism for appeal to a judicial body against a refusal of destruction: indeed it may be required by Article 6 (right to a fair trial for determination of civil rights). As the paper notes (para 6.21 Judicial review would in any event be available, but it would be of limited practical utility in this context given that it does not complete a merits appeal: (Daly 2001 UKHL 26 paras 29-30).

- **Children**

(i) Those under 18 years old who are convicted of serious violent or sexual or terrorism-related offences will have their profiles retained indefinitely, in the same way as adults thereof (see para 6.19).

(a) *The reason for rejecting indefinite retention for all such offences in the case of adults is equally pertinent here. Further and in any event the proposal fails to recognise the need for different treatment of the case of adults and children (Judgment para 124).*

(b) *It is not clear to me what cogent evidence there is from the crime detention/prevention perspective to justify treatment of the profiles of 10 year old and 18 year old the same: obviously from the privacy perspective the fact that it is the younger whose private life is interfered with for the longer period seems counterintuitive. Again the proposal may be vulnerable for its insufficiently discriminating content. (However, as in so many areas of the law there will be hard cases which fall only just on the wrong side of whatever line is drawn).*

(c) *In my view if this proposal was enacted is likely to breach Article 8 of the Convention and be unlawful.*

- (ii) Those under eighteen who are convicted on only one occasion of a lesser offence will have the profile removed from the database when they turn eighteen. (See para 6.18) which, however, makes no reference to the duration of the retention).

I repeat what I said under (i)(b) above. The proposal does not sit entirely happily with the then Home Secretary's recognitive that "for many young people's involvement in crimes at that age (i.e. early teens) is often an isolated incident. (para 6.17) In my view if this was enacted it is likely to breach Article 8 of the Convention and be unlawful.

- (iii) Those under eighteen who are arrested but not convicted of a serious violent or sexual or terrorism-related offence will have the profile retained for twelve years, in the same way as those of adults (see para 6.19).

I refer again to the need, in fidelity to the judgment, to differentiate between adults and children and otherwise make the same points as under (i) above.

Those under eighteen who are arrested but not convicted of a lesser offence on one occasion will have the profile deleted after six years or on their eighteenth birthday, whichever is sooner (see para 6.19).

I refer again to the points made under (ii)(6) above.

The Paper also proposes that:

- those who are convicted of a violent and sexual or terrorism-related offence and whose DNA or fingerprints were not taken during the criminal justice process would be subject to a requirement to provide DNA and fingerprints at any point subsequently with retrospective effect (see Section 7).

See my comments above in relation to DNA profiles at (i), which would limit the period within which it would be proportionate to exercise this proposed power.

Therefore, in my view if this proposal was enacted it is likely to breach Article 8 of the Convention and be unlawful.

- UK citizens and residents who are convicted overseas of violent and sexual or terrorism-related offences should be required to provide DNA and fingerprints on return to this country (see Section 7).

Retention of data from someone who had been unfairly convicted (and also someone who had been unfairly arrested, although subsequently released or acquitted) would, even on the Home Office approach, be a step too far. The Judgment for obvious reasons does not deal with this. However the English courts have set their face and against the use of evidence obtained by torture (A v Home Department 2005 UKHL

71) *against the removal of persons who might be subject to a flagrant denial of justice in their country of origin (R(Othman) v Home Office Department 2009 UKHL 10).*

6. **DISCRIMINATION**

6.1 The Commission considers that Article 14 (taken with Article 8) may be engaged on several fronts in that:

- (i) * Black men are 4 times more likely to be on the database than white men (32% as against 8%). The database holds about a third of all black men and about three quarters of all young black men (aged 16 to 34) resident in the UK (i.e. in particular Appendix (“Appendix”) from Commission to chair of NDNAD Ethic Group 29th October 2008 (“the letter”).
- * There is some evidence to suggest that Black (and also Asian) defendants are less likely to be convicted than White defendants, and therefore that if profiles were retained only of those convicted the proportion that relate to Black people would lower. (Commission on the National Database and Race Equality September 2008) (“The September Paper”).
- * The Home Office’s own research indicates that black people have lower lifetime offending rates than their white counterparts (‘Minority ethnic groups and crime: Findings from the 2003 Offending, Crime and Justice Survey).

- (ii) * Vulnerable people such as children (as young as 10) or people with mental illnesses are over-represented on the database. DNA samples can be taken if one is sectioned under the Mental Health Act 1983 and (materially) black people are also 44% more likely to be sectioned under the Mental Health Act than their white counterparts (Black Mental Health UK).
- (iii) * The proportion of Asian people on the database is increasing beyond their proportion to the general population. (Appendix)
 - * There is speculation that Muslims are over-represented in arrests for terrorism related offences.

6.2 Article 14 guarantees, *inter alia*, the rights and freedoms specified in the Convention without discrimination on, *inter alia*, race, colour or national origin. The rights and freedoms include the right to respect for private life (Article 8).

6.3 The jurisprudence on the Article 14 has been well developed. The leading Court case concerning indirect discrimination is *DH v Czech Republic* (2008) 47 EHRR 3 which states, *inter alia*, that discrimination means treating persons in relevantly similar situations differently, without an objective and reasonable justification (para 175) and that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminating notwithstanding that it is not specifically aimed at that group (ditto).

6.4 In short (there being no basis for asserting that the proposals, if implemented, would be directly discriminatory i.e. targeted at minority ethnic groups), the issues which arise under this heading:

- (i) whether the proposals (or any of them) have a disproportionately adverse impact on any particular group, whether defined by race, colour or national origin "impact".
- (ii) if so, whether there is reasonable and objective justification for such treatment ("justification").

These issues are essentially ones of fact, not law.

6.5 As to impact the statistical material aggregated in paragraph 4.1 above (if valid) is *prima facie* proof that this element is satisfied.

6.6 It is indeed suggested that the Home Office proposals may increase such adverse impact, the removal from the database of volunteer profiles and a significant number of profiles from those who have not been convicted, which will change the nature of the database from one based on the simple contact with the criminal justice system to one based more on criminality. I shall assume this to be correct.

6.7 As to justification the September Paper states

"The stigma of such extreme over representation for one racial group has unknown but possibly serious social consequences making justification a crucial issue."

My instructions note that the continued retention of profiles of those acquitted or discharged of crimes, casts further suspicion on these groups and implies that they are not wholly innocent.

This would, I interpolate, be said to a complaint capable of being made by persons of any racial group whose data is retained, albeit they are innocent: the judgment does not outlaw entirely the retention of the data of the innocent, but requires rather that the cases of the innocent and convicted be differentiated (Judgment para 122). The same passage, however, while noting that “*the retention of the applicant’s private data cannot be equated with the voicing of suspicion*” (ditto) recognises the role that perception has to play: and it would be unrealistic not to recognise the consequences of particular racial groups entertaining particular perceptions.

6.8 The Home Office paper does not deal with these issues, and there does not appear to have been any attempts to assess the equality impact of the proposals on the BME groups, which are represented on the DNA Database out of proportion to their numbers in the population at large or how any EIA work to date has informed the proposals. Only in Appendix C p.28 in discussion of the (USA) Innocence Project is there a reference to the “*ethnic subtext of the debate with GB concerned that DNA testing exacerbates ethnic disproportionately, while the Innocence Project experience clearly sees it as a weapon against racism in criminal justice*”.

6.10 The Home Office has obligations under the race equality duty under section 71(1) of the Race Relations Act 1976 (RRA), which imposes on the Home Office a duty to have due regard to the need to eliminate unlawful racial discrimination; promote equality of opportunity; and promote good relations between people of different racial groups (the general duty) (as to its dimensions see *R (Baker) v Secretary of State for Communities and Local Government*: 2008 EWCA Civ 342 para 31).

- 6.9 The Home Office is also subject to specific duties made under Order by the Secretary of State under RRA section 71(2) including in relation to assessing and consulting on the likely impact of its proposed policies on the promotion of race equality (Race Relations Act 1976 (Statutory Duties) Order 2001).
- 6.11 I am specifically not asked to comment on whether in putting forward the proposals the Home Office has met its obligations under the above instruments, though I note the helpful background in my instructions suggestive of a certain reluctance in the past to fulfil it.
- 6.12 The disproportionality set out above raises questions over compliance with Articles 8 and 14 of the Convention and requires justification by the Home Office.

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