The retention of fingerprints and samples following acquittal or when proceedings are discontinued

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THE RETENTION OF FINGERPRINTS AND SAMPLES FOLLOWING ACQUITTAL OR WHEN PROCEEDINGS ARE DISCONTINUED

R v (1) Chief Constable of South Yorkshire (2) Secretary of State for the Home Department, ex p. S: R v (1) Chief Constable of South Yorkshire (2) Secretary of State for the Home Department, ex p. Marper [2002] EWCA Civ 1275, LTL 12/9/2002

Introduction and Background

The advent of DNA profiling and its development into an incredibly powerful forensic technique continues to raise both legal and moral issues. The Royal Commission on Criminal Justice[1] (RCCJ) recommended amending the law in order to facilitate the creation of a national DNA database. These recommendations were reflected in the provisions of the Criminal Justice and Public Order Act 1994,[2] which came into force in April 1995. These provisions amended the Police and Criminal Evidence Act 1984 (PACE) in order to enable samples suitable for DNA profiling to be taken without consent[3] and to increase significantly the offences for which such samples could be taken.[4] In addition to amending the law in relation to the classification and taking of samples the 1994 Act also amended s.64 PACE relating to

[1] The Royal Commission on Criminal Justice (July 1993) Cm 2263, HMSO.

[2] Sections 54-58

[3] This was achieved by reclassifying saliva and mouth swabs as non-intimate samples.

[4] This was achieved in two ways: firstly, by amending the offences for which non-intimate samples could be taken without consent from serious arrestable to recordable offences (going further than the recommendations of the RCCJ); and secondly, by extending the circumstances in which such samples could be taken to include persons charged with or informed they will be reported for a recordable offence and from persons convicted of a recordable offence.

the destruction of samples. These amendments did not significantly alter the provisions in relation to the destruction of samples but did clarify the law in relation to the retention of information derived from a sample. Both before and after the amendments, s.64 contained a requirement that samples be destroyed as soon as practical after an individual was acquitted of the offence,[5] or after a decision was taken not to prosecute.[6] However, following the amendments, there was a requirement that where samples were required to be destroyed information derived from the sample of any person entitled to its destruction should not be used in evidence against the person or for the purposes of any investigation of an offence[7].

These provisions could be interpreted as an attempt to restore the position of the person charged, but later acquitted or against whom proceedings were dropped, to the same position as that of an individual who had not been charged in the first place. The sample would be destroyed and the information derived from it could not be used against that person in the future. This position is attractive in that if we truly believe in the principle that an individual is innocent until proven guilty why should they not be in the same position that they would have been had they not come into contact with the criminal justice system in the first place.

However, two high profile cases, *R v B; Attorney General's Reference No 3 of 1999*[8] and *R v Weir,*[9] indicated a problem with this approach. In both cases the individuals

[5] Section 64(1)

[6] Section 64(2)

[7] Section 64(3B)

[8] [2001] 1 All ER 577

[9] [2001] Crim LR 656

concerned were implicated in serious offences (rape and murder respectively) by information (DNA profiles) derived from samples that should have been destroyed following an acquittal and the dropping of proceedings for more minor offences. In *R v B* the defendant was identified as a suspect for an offence of rape following a match between a DNA profile obtained from a sample taken in respect of a burglary, of which the defendant had been acquitted, and a DNA profile obtained from a sample recovered from the rape victim. Following this initial identification of the suspect a new sample was taken and the DNA profile compared with that from the rape victim. It was this match that was presented at court but the sample from the burglary, of which the defendant had been acquitted, had been used in the investigation contrary to s.64(3B)(b) of PACE. The trial judge ruled the DNA evidence inadmissible on the ground that s.64(3B)(b) provided that samples required to be destroyed under s.64 (1) 'shall not be used …for the purposes of any investigation of an offence' and directed an acquittal. On a subsequent reference by the Attorney General the Court of Appeal upheld the judge's ruling on admissibility, holding that s.64(3B) was mandatory. The House of Lords, reversing the decision of the Court of Appeal, held that a breach of s.64(3B) would not automatically render evidence inadmissible as a matter of law but would be a matter for the judge's discretion under s.78 PACE[10]. This decision was in line with the approach taken towards improperly obtained evidence; it is not normally inadmissible as a matter of law but may be excluded as the judge's discretion. However, the fact remained that, despite very cogent forensic evidence, in *R v B* the

[10] s78 (1) 'In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse affect on the fairness of the proceedings that the court ought not to admit it.'

defendant was acquitted of rape and in *Weir* a defendant initially convicted of murder had his conviction quashed on appeal.

The Attorney General's reference was heard by the House of Lords in December 2000 and in January 2001 the Home Secretary introduced amendments to the relevant sections of PACE in the House of Commons. These amendments became law in May 2001 when the Criminal Justice and Police Act 2001 gained Royal Assent. Section 82 of this Act amends s.64 PACE to permit the retention of fingerprints and samples from those subsequently acquitted or against whom proceedings are dropped. It provides that fingerprints or samples retained in these circumstances or the information derived from such samples may be used for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution. This is clearly a significant change in the law permitting, for example, a DNA profile from a sample taken in relation to an offence of which the defendant has been acquitted to be used in the investigation of subsequent offences. In addition, these changes have retrospective effect in that subsection (6) permits the retention and use of fingerprints and samples the destruction of which should have taken place before the commencement of s.82 and use of information from such samples[11].

Due to the far-reaching, and to some extent controversial, nature of these amendments it is perhaps not surprising that the issue has come before the courts.

[11] This could relate to a significant number of samples. *The Guardian*, September 1, 2000 reported that 50,000 samples that should have been destroyed were still in existence.

The Facts

S v Chief Constable of South Yorkshire

In January 2001 S, a boy 12 years of age, had his fingerprints and samples for DNA profiling taken following his arrest and charge with attempted robbery. He had no previous convictions, cautions or warnings. On June 14 2001, he was acquitted of the offence. On July18 2001, South Yorkshire Police wrote a letter to the solicitors acting on behalf of S, explaining that in accordance with s.64 PACE (as amended by the Criminal Justice and Police Act 2001) the fingerprints and samples would be retained. The letter specifically acknowledged that the fingerprints and samples taken would have been due for destruction but that the Criminal Justice and Police Act 2001 had amended the law. At the time S's fingerprints and samples were taken, in January 2001, s.64 PACE required the destruction of such evidence as soon as practicable after acquittal. By the time S had been acquitted the Criminal Justice and Police Act 2001 had come into force permitting their retention. On 24 July 2001, S's solicitors wrote requesting that his fingerprints and samples be destroyed. This was followed by a second letter, from S's solicitors to the Chief Constable of South Yorkshire, claiming that the retention constituted a breach of article 8 of the European Convention on Human Rights and that if the fingerprints and samples were not destroyed proceedings would be commenced for judicial review seeking a mandatory order for destruction and a declaration of incompatibility. A further letter was sent, by the solicitors, arguing that, even if the legislation were compatible with article 8, the Chief Constable should consider the exercise of his discretion in each case and not adopt a blanket policy.

Marper v Chief Constable of South Yorkshire

On March 13 2001 Marper was arrested and charged with harassment of his partner and his fingerprints and DNA samples were taken. By the time of the pre-trial review, on May 3 2001, his partner had decided not to press the charge. On June 11 2001, the Crown Prosecution Service wrote to his solicitors enclosing a notice of discontinuance. On June 29 2001, Marper's solicitors wrote requesting destruction of the fingerprints and DNA samples. Having received the general letter from the Chief Constable of South Yorkshire indicating the change in s.64 and that fingerprints and samples would be retained, Marper's solicitors wrote again requesting that the Chief Constable exercise his discretion not to retain either the fingerprints or the samples. The Chief Constable replied confirming that, save in exceptional circumstances, it was policy to retain fingerprints and samples in all cases.

The Decision of the Divisional Court

The Divisional Court dismissed the claims by S and Marper for judicial review of the decision by the Chief Constable of South Yorkshire to retain their fingerprints and samples lawfully taken during the course of criminal investigations. Three principal issues arose before the Divisional Court; firstly, is the revised s64 compatible with article 8; secondly, is it compatible with article 14; and thirdly, did the Chief Constable fetter his discretion.

Compatibility with Article 8

Counsel for the claimants submitted that the retention of fingerprints and samples constitutes an interference with a person's private life contrary to article 8(1) of the Convention.[12] The Divisional Court accepted that the taking of fingerprints and samples for DNA profiling, both of which are capable of identifying individuals, could constitute an interference with an individual's privacy capable of engaging article 8. However, it was less convinced that the retention of fingerprints and samples, lawfully taken, could infringe such a right citing *McVeigh, O'Neill and Evans v United Kingdom*.[13] The claimants relied on *Salonen v Finland,*[14] in which the European Commission of Human Rights recognised that the choice of forenames fell within the sphere of private life as this constituted a means of identifying individuals, arguing that fingerprints and DNA samples identified individuals and represented a physical aspect of their persona. The Divisional Court was not convinced by this analogy and was reinforced in its view by the fact that in *Kinnunnen v Finland*[15] the Commission did not consider retention of photographs and fingerprints for some years after acquittal, of the applicant, to be a breach of article 8(1).

Though not certain that retention breached article 8(1) the Divisional Court went on to consider, assuming that there had been a breach of article 8(1), whether such an interference was 'in accordance with the law' and 'necessary in a democratic society

[12] 'Everyone has the right to respect for his private and family life, his home and his correspondence.'

[13] (1981) 25 DR 15 in which the European Commission of Human Rights expressly distinguished between the taking of fingerprints, photographs and samples and their retention, stating that it was open to question whether such retention was an interference with article 8(1).

[14] Application No 27868/95.

[15] Application 24950/94.

for the prevention of disorder or crime and for the protection of others' as provided for by article 8(2). Counsel for the claimants argued that the retention was neither in accordance with the law nor necessary in a democratic society. The Court dismissed the first argument holding that the revised s.64 was neither uncertain nor lacking in clarity. With regard to whether the retention is necessary in a democratic society for the prevention of disorder or crime there were three issues: firstly, whether there is a need for restriction; secondly, whether the restriction corresponds to a pressing social need; and finally, whether the restriction is 'proportionate'. The real issue in dispute was whether the restriction is proportionate. The claimant's case was that a fair balance had not been struck between protecting their right to respect for their private life and the interests of society in preventing, investigating and prosecuting criminal offences. It had not been demonstrated that the retention of fingerprints and samples from those, with no previous convictions, acquitted or against whom proceedings were dropped was necessary. There was no evidence to suggest that it was necessary in respect of the two claimants. Counsel for the claimants submitted that they are presumed innocent of the charge and yet the retention creates the suspicion that they are not innocent. It was argued that there is a difference between retaining fingerprints and samples where the police have grounds for investigation of a specific individual for a specific offence and retaining such information because it may potentially prove useful in future investigations.

The Divisional Court rejected this argument believing the claimants to be concentrating on the wrong issue. The court drew the distinction between compelling members of the public to provide fingerprints or samples, merely because the police would find them useful, and retaining fingerprints and samples lawfully obtained. The

court felt that the protection for the individual lies in the legislative provisions detailing the circumstances in which the fingerprints and samples can be taken rather than their destruction. It highlighted the fact that the police are not required to destroy other evidence and intelligence gathered during an investigation, it is available for use in the future. The court concluded that the legislation relating to retention of fingerprints and samples is proportionate: the increase in serious crime is a pressing problem for society; fingerprints and DNA samples can provide powerful evidence against an individual; and, interference is slight. The court thus rejected that the revised s.64 was incompatible with article 8.

Compatibility with Article 14

The claimants argued that s.64 was incompatible with article 14,[16] submitting that the fact that an individual 'may' commit an offence in the future, in the same way that any person without previous convictions might, cannot be ground for allowing the police to retain personal information. Acquitted persons should be in the same position as those who have neither been convicted nor are under suspicion of having committed a crime. The court rejected this argument and found s.64 compatible with article 14. The court held that all those who have lawfully been obliged to provide fingerprints and samples for the police are treated equally whereas those who have never been required to provide fingerprints or samples are not in the same position. Should the court be incorrect in holding this view then it was satisfied that the

[16] 'The enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, birth or other status'.

retention of fingerprints and samples has a 'legitimate aim and objective and reasonable justification'.[17]

Had the Chief Constable Fettered his Discretion?

The court accepted that the Chief Constable clearly had a discretion whether or not to retain fingerprints and samples.[18] It was informed that the policy of the Chief Constable of South Yorkshire had been to retain fingerprints and samples unless there was a convincing distinguishing feature to the case. The court was provided with examples of such features eg a case where, prior to the amendments coming into force, a specific term of an agreement to be bound over was that the fingerprints and samples would be destroyed. The claimants argued that the governing principle in the exercise of the discretion should be features related to the individual such as age or the type of offence for which he was arrested. The court felt that this argument was flawed as the fingerprints and samples are not being retained specifically because the person from whom they were obtained is suspected of committing an offence, hence personal characteristics are not relevant. The court held that it was appropriate to place the burden on the person seeking an exception to the general policy and that the Chief Constable, through examples given to the court, had demonstrated a willingness to consider any request not to retain data on its merit. The Chief Constable had not adopted a blanket policy and had not fettered his discretion. The court could see no grounds for challenging the approach taken by the Chief Constable to the exercise of

[17] *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471.

[18] Section 64 1(A)'… the fingerprints or samples *may* be retained after they have fulfilled the purposes for which they were taken…'

his discretion, and no reason to conclude he erred in the exercise of his discretion in the two cases before the court.

The court recognised that the retention of fingerprints and samples by the police could arouse strong feelings and concerns. However, it felt that as a consequence of the Human Rights Act 1998 any extension of police powers could be challenged and tested against the provisions of the Convention. The court dismissed the applications holding s.64(1A) to be compatible with the Convention and that there was no ground for striking down the discretion exercised by the Chief Constable in relation to retention of fingerprints and samples either generally or specifically in the cases before the court.

The Decision of the Court of Appeal

The Court of Appeal dismissed the application for judicial review being of the view that retention of the fingerprints and DNA samples of individuals who had not been convicted of criminal offences did not contravene either the individuals right to privacy under article 8 or his right not to be discriminated against under article 14.

Compatibility with Article 8

The Court of Appeal was satisfied that retention of samples was an interference with an individual's privacy under article 8(1); a point that the Division Court felt was arguable. Holding that retention did infringe article 8(1) the Court of Appeal, agreeing with the Divisional Court, held that the interference with article 8(1) is justified by article 8(2), the adverse consequence to the individual being proportionate to the benefit to the public.

Compatibility with Article 14

The majority (Lord Woolf CJ and Waller LJ) held s.64 to be compatible with article 14. Lord Woolf CJ, accepting that both those who have not been investigated and those who have been investigated but are no longer subject to proceedings are entitled to be regarded as innocent, stated that once fingerprints or samples have been lawfully taken there is a clear, objective distinction between individuals from whom fingerprints or samples have been taken and those individuals from whom they have not been taken. It was therefore not an improper discrimination to treat those who have already given fingerprints or samples differently from those who have not when it comes to retention of fingerprints and samples. In addition he did not consider the discrimination relied on in this case to be within the categories of discrimination referred to in article 14. He acknowledged that an undesirable consequence of holding s.64 to contravene article 14 could be an expansion of the circumstances in which fingerprints and samples could be taken and retained in order to avoid discrimination. Waller LJ took a slightly different approach. He agreed that there was no discrimination but based this on the fact that, in his opinion, the relevant pool of individuals was those from whom samples had been taken and all these individuals were treated in the same manner.

Sedley LJ, dissenting in part on the question of discrimination, was of the opinion that the relevant pool of individuals is the unconvicted population, hence, there must be a justification for retaining the fingerprints and samples of those who have had fingerprints and samples taken but have been acquitted or are no longer subject to proceedings. He felt that this discrimination could fall within article 14 as to be charged or investigated but not convicted is both as involuntary and as stigmatic as

other examples within article 14. He was of the view that the discrimination was justified as individuals accused but acquitted or who are no longer subject to proceedings are not necessarily on a par with those never accused. He accepted that amongst those charged and acquitted there would be individuals who should never have been charged and would not go on to offend but that there would also be a significant number of individuals who would go on to offend; the proportion of such individuals being greater than the proportion of such individuals within the pool of individuals who have never been charged. He stated that not all unconvicted individuals are equal from a policing point of view and that the discrimination is therefore justified.

The Chief Constable Discretion

Lord Woolf CJ and Waller LJ were is agreement that the discretion conferred on the Chief Constable should be exercised in a manner consistent with the purpose for which it was bestowed ie prevention and detection of crime. As a consequence of this fingerprints and samples will normally be retained unless there are specific circumstances justifying an exception. In this case the Chief Constable had a policy permitting exceptions in exceptional circumstances. The approach of Sedley LJ was that the Chief Constable should consider whether the individual was free from 'any taint of suspicion' and where this was the case the fingerprints and samples should not be retained. This approach was not supported by Lord Woolf CJ and Waller LJ who felt it inappropriate that the Chief Constable should be assessing whether the individual was free from suspicion following acquittal in order to make a decision relating to retention of fingerprints and samples.

Commentary

The amendments to s.64 constitute a significant change in the law. Without doubt the larger the fingerprint and DNA databases the greater the chance that a fingerprint or sample from an unsolved crime will match an entry on the database and thus the greater the value of these databases in criminal investigations. However, this must be balanced by recognition of the great concern members of the public may have in having their fingerprints and samples retained on databases. Prior to the amendments the dividing line fell between those convicted of a recordable offence and those with no convictions; with the exception of individuals being investigated for criminal offences or awaiting trial. However, on acquittal or if proceedings were dropped, the fingerprints and samples of these individuals would be destroyed and if not destroyed could not be used for the investigation of offences or in evidence against them. The amendments have moved the dividing line, which now falls between those who have been investigated for an offence and those who have not. It is perhaps not surprising that those acquitted or against whom proceedings are dropped may feel aggrieved that they have not been returned to the position they were in before coming into contact with the criminal justice system. The amended provisions themselves show recognition of the unease members of the public may feel concerning the retention of fingerprints and samples in that they provide for fingerprints and samples taken from persons not suspected of having committed the offence to be destroyed. This provision is designed to encourage members of the public to assist in the investigation of offences; for example where the police wish to undertake a mass screen and ask all

the inhabitants of a particular geographical area to submit to the taking of samples for elimination purposes s.64(3)[19] provides for their fingerprints and samples to be destroyed. Although the majority of the Court of Appeal felt there was no basis for arguing that the amended provisions gave rise to improper discrimination and interference with article 14, Sedley LJ accepted that there was a basis for arguing that there was discrimination. As stated above those individuals acquitted or against whom proceedings are dropped are not returned to the position they were in prior to the investigation and the taking of fingerprints and samples and acknowledgement of this potential discrimination should be welcomed. However, Sedley LJ felt the discrimination was justified on the basis that a greater proportion of individuals who have been charged and acquitted or against whom proceedings are dropped are likely to subsequently commit an offence. Hence it is in the public interest that the fingerprints and samples be retained. This is likely to be little comfort to those individuals wrongly charged and who are unlikely to come into contact with the criminal justice system in the future. It would appear that in an attempt to redress this problem Sedley LJ states that the Chief Constable could exercise his discretion not to retain samples where the individual is beyond suspicion. This approach was rejected by the majority of the Court of Appeal. It would not be appropriate for the Chief Constable to make a judgement on, what is in effect, the degree of innocence of the individual. It is perhaps not surprising that Sedley LJ stated that he found the

[19] Section 64(3) of the act provides that if

> a) fingerprints 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 section, be destroyed as soon as they have fulfilled the purpose for which they were taken.

discrimination the most difficult issue in the case. Accepting the issue of discrimination an alternative solution would be to expand the taking and retention of fingerprints and samples in order avoid discrimination, possibly leading to pressure to create a comprehensive database of all persons. Lord Woolf CJ highlighted the fact that article 14 is designed to protect human rights and yet, in these circumstances, to accept that the current provisions are potentially in conflict with article 14 could result in a wider database being established which arguably would reduce the rights of a greater number of individuals. Accepting the argument that the discrimination is justifiable on the basis of slight interference with an individuals rights balanced against the significant benefits for society also leads us closer to a comprehensive database for all persons. There is no doubt that such a database would have huge benefits in respect of crime detection and protection of society but, as Sedley LJ indicates, there would be a price to pay in respect of the invasion of privacy and the intrusion and surveillance involved in setting up and maintaining such a database.

Having recognised there is concern amongst the public at such retention, it is necessary to consider whether the concern is reasonable and whether despite that concern the government should have expanded the law. The Court of Appeal addressed a number of concerns raised by Liberty. Liberty's primary concern was not the retention of DNA profiles, which reveal limited information, but the retention of samples. As science progresses we are able to obtain more and more information from samples and it is impossible to predict precisely what personal details could, in the future, be extracted and used. The amended s.64 provides that fingerprints, samples and information derived from such samples may be used for purposes related to the prevention or detection of crime. This gives an extremely wide discretion particularly

as we are not able to predict what information might be available in the future. Waller LJ addressed Liberty's concerns indicating that the benefits of retaining samples, primarily relating to reanalysis to check for errors and to upgrade profiles as techniques develop, outweigh the potential risks. He also felt that the potential risks were not significant as any change in law or practice would need to be Convention compliant so providing a safeguard. To maintain a functional database that can develop as techniques develop it is undoubtedly necessary to retain samples as well as the DNA profiles. It is impossible to legislate for future scientific developments and to some extent we have to accept that the need to remain Convention compliant will help to ensure the wide discretion afforded by the amended s.64 will be exercised in an appropriate manner.

Moving the dividing line, for retention of fingerprints and samples, from between those individuals convicted and those not convicted to between those who have had samples taken and those who have not may have significant ramifications. Accepting that there is discrimination could result in an expansion of the database in order to avoid discrimination; likewise justification of discrimination on the basis of slight interference with the individuals rights and significant benefit to the public could result in an expanded database. Risk of crime is part of a free society, greater monitoring of individuals can reduce the potential for crime and enhance detection, the difficulty is deciding where to draw the line.