13 May 2015

PRESS SUMMARY

Gaughran (Appellant) v Chief Constable of the Police Service of Northern Ireland (Respondent) (Northern Ireland) [2015] UKSC 29
On appeal from [2012] NIQB 88

JUSTICES: Lord Neuberger (President), Lade Hale (Deputy President), Lord Kerr, Lord Clarke and Lord Sumption

BACKGROUND TO THE APPEAL

The Appellant was arrested for driving with excess alcohol on 14 October 2008 and pleaded guilty to that offence on 5 November 2008. He was fined £50 and disqualified from driving for 12 months. A conviction for driving with excess alcohol is spent after five years. He has been an adult throughout.

When the Appellant was arrested, the Police Service of Northern Ireland ("PSNI") lawfully obtained from him: (i) fingerprints; (ii) a photograph; and (iii) a non-intimate DNA sample by buccal swab. The fingerprints are held on a UK-wide database and the photograph is held on a PSNI database to which only authorised PSNI personnel have access. A DNA profile was taken from the DNA sample. A DNA profile is digitised information in the form of a numerical sequence representing a very small part of the person's DNA. It indicates a person's gender and provides a means of identification. The profile is held on a Forensic Science Northern Ireland database.

At present, the statutory position in Northern Ireland is that the PSNI may retain fingerprints, photographs, DNA samples and DNA profiles for an indefinite period after they have fulfilled the purpose for which they were taken, but they may only be used for specified policing purposes. The Criminal Justice Act (Northern Ireland) 2013, when it comes into force, will require the PSNI to destroy all DNA samples as soon as a DNA profile has been taken or within six months of the taking of the DNA sample, and will otherwise bring the position broadly into line with the current legislation applicable in England and Wales. The PSNI intends to destroy the Appellant's DNA sample when that Act comes into force. This appeal therefore does not concern the retention of the DNA sample.

The PSNI changed its practice following the decision in *S and Marper v United Kingdom* (2009) 48 EHHR 50 ("*S and Marper*"). The European Court of Human Rights ("ECtHR") held that the UK's policy of indefinite retention of individuals' fingerprints, cellular samples and DNA profiles after proceedings against them had led to acquittal or discontinuance was a disproportionate interference with their right to respect for private life under article 8 of the European Convention on Human Rights ("ECHR"). The PSNI now retains indefinitely biometric data only of those convicted of crimes.

The Appellant says that the PSNI's retention of his data breaches article 8 ECHR. The Respondent accepts that there is an interference with the Appellant's right to respect for his private life under article 8(1) and the Appellant accepts that the interference is in accordance with law and pursues a legitimate aim under article 8(2). The sole question is therefore whether the interference was proportionate. The Divisional Court held that it was. The Appellant appeals to the Supreme Court.

JUDGMENTS

The Supreme Court dismisses the appeal by a majority of 4:1. Lord Clarke, with whom Lord Neuberger, Lady Hale and Lord Sumption agree, gives the leading judgment. Lord Kerr dissents.

REASONS FOR THE JUDGMENTS

The majority considers that in *S and Marper* the ECtHR was concerned only with the position of suspected but non-convicted persons, not convicted persons; its criticism of the UK's "blanket and indiscriminate" data retention policy should be read with this focus in mind **[30-32]**. He recognises that it does not follow that the practice of Northern Ireland (and the UK) in relation to convicted persons is automatically compliant with article 8 and that the policy as it applies to convicted persons could be described as a blanket policy **[33]**. However, the policy is in fact proportionate:

- The ECtHR did recognise in *S and Marper* the importance of the use of DNA material in the solving of crime and that the interference in question is low **[33]**. It is also important to note that the present scheme is concerned only with the retention of the DNA profile and applies only to adults, whereas the scheme criticised by the ECtHR in *S and Marper* provided for the retention of the full sample and did not distinguish between children and adults **[35]**.
- Factors such as the threshold of offence, whether retention is permitted once a conviction has been spent and whether retention is permitted indefinitely or is subject to a time limit are potentially relevant but not decisive in the proportionality analysis **[34, 36-39]**.
- The potential benefit to the public of retaining the DNA profiles of those who are convicted is considerable and outweighs the interference with the right of the individual **[40]**. The retention may even benefit the individual by establishing that they did not commit an offence **[41]**.
- In *S and Marper* the ECtHR placed some reliance on the fact that the UK was almost alone among ECHR member states in indefinitely retaining biometric data of non-convicted persons. In the case of convicted persons there is a much broader range of approaches, which broadens the margin of appreciation accorded to individual states **[42-44]**.
- Adopting a blanket measure is legitimate in some circumstances and it was legitimate here **[45]**.
- The retention policy is therefore within the UK's margin of appreciation, and the court has to decide for itself whether the policy is proportionate. Essentially on the basis of the factors already discussed and for the reasons given by the Divisional Court, the majority concludes that it is and dismisses the appeal **[46-49]**.

Lord Kerr would have allowed the appeal. He explains that the critical questions on proportionality in this case are: (i) whether there is a rational connection between the legislative objective and the policy; and (ii) whether the policy goes no further than is necessary to fulfil the objective **[61]**.

- As to (i), it is important to recognise that the objective is not the creation of as large a DNA database as possible, but the actual detection of crime and identification of future offenders. There is a striking lack of hard evidence in this case to support the assumption that all persons who commit any recordable offence are potential suspects in any future crime **[62-68]**.
- As to (ii), it is clear in Strasbourg, CJEU and domestic case-law that the question is whether a less intrusive measure could have been used without unacceptably compromising the attainment of the objective **[73-77]**. A far more nuanced and more sensibly targeted policy could easily be devised. In those circumstances it is impossible to say that the policy in its present form is the least intrusive means of achieving its stated aim **[83-85]**.
- As to whether a fair balance has been struck, the stigmatising application of the indefinite retention policy even to those whose convictions are spent frustrates the purpose of rehabilitation: this is an issue of first importance. It should not be relegated to the status of a single factor of no especial significance **[90-96]**.
- A domestic court should not be slow to condemn an ill-thought-out policy which does not address the essential issues of proportionality simply because a broad measure of discretion is available to an individual state **[99-101]**.

References in square brackets are to paragraphs in the judgment