

**ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT**

B E T W E E N

**"S"
MICHAEL RAYMOND MARPER**

Appellants

-v-

THE CHIEF CONSTABLE OF SOUTH YORKSHIRE

Respondent

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Interested Party

THIRD PARTY INVERVENTION ON BEHALF OF *LIBERTY*

1. INTRODUCTION AND OVERVIEW

1.1 Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research. It is the largest organisation of its kind in Europe and is democratically run.

1.2 Liberty takes a particular interest in the amendments made to the Police and Criminal Evidence Act 1984 ("PACE"), by the Criminal Justice and Police Act 2001 ("CJPA"), with which this case is concerned. Liberty's views were provided through the consultation process during the reading of the Bill, and were placed before the Joint Committee on Human Rights [S171]¹ when they considered the CJP Bill. Furthermore during the introduction of the Bill, on 29th January 2001, Liberty's views were specifically referred to by the Home

¹ S1= S's bundle at page 1 etc

Secretary in response to the very criticisms of the Bill's provisions with which this case is concerned [S133].

1.3 In this intervention Liberty wishes to focus on two particular issues;

- (1) The retention and use of the fingerprints and DNA samples of innocent persons, which the PACE now allows, is a significant interference with the rights of such individuals under Article 8(1) of the European Convention on Human Rights ("the Convention"). Such interference is far broader and more substantial than that found by the court, below, and expressed in the Respondent's skeleton arguments before this Court. This is because, *inter alia*, the range of genetic information that may be derived from DNA *samples* is of a highly private nature.
- (2) That interference is not justified under Article 8(2) of the Convention because it is disproportionate to the legitimate aims being pursued. Accordingly, the amended provisions of PACE are incompatible with Article 8. At the very least, it is disproportionate because the keeping of samples is unnecessary in order to match DNA profiles.
- (3) The Act cannot be "read down" under section 3(1) of the Human Rights Act 1998 ("HRA") to overcome the incompatibility. Accordingly, it is appropriate for this Court to make a declaration of incompatibility under HRA section 4.

1.4 Liberty's submissions fall under the following headings:

- (1) The extension of powers under the CJPA
- (2) The nature and extent of the interference with Article 8(1).
- (3) Reassessment of the extent of justification required.
- (4) Proportionality
- (5) Less restrictive methods of achieving the legitimate aim
- (6) Incompatibility

2. THE EXTENSION OF POWERS CAUSED BY THE AMENDMENTS TO PACE UNDER THE CJPA

2.1 The submissions of all parties to this claim set out the relevant statutory provisions and Liberty does not repeat them here. However, in Liberty's submission, the following points are not immediately obvious, but are important:

- (1) PACE makes no distinction in this context between fingerprints, samples, or the information derived from samples², notwithstanding that the information that may be obtained from each (and therefore the "private" nature of each) may be very different.
- (2) The uses that may be made of such fingerprints and samples are now not limited to checks made under section 63A (i.e. the "checking against other fingerprints and samples"³). They now merely "include" such checks⁴.
- (3) Such other uses of retained fingerprints and samples are unspecified. The only limitation is that the use that may be made of samples must fall under one of the following three heads⁵:
 - (a) use for "*purposes related to the prevention or detection of crime*";
 - (b) "*use for the investigation of an offence*";
 - (c) "*the conduct of a prosecution*".

The use under (b) appears to be the only category that has been referred to in this case thus far. However, Liberty is equally concerned with the potentially wider and more general scope of uses for the purposes "*related to the prevention or detection of crime*". On the face of it, this would include intelligence gathering and other forms of collation of detailed personal information, outside the immediate context of the investigation of a particular offence.

² See, for example, 63A(1), or 64(1A)

³ Section 63A(1)

⁴ See section 64(1B)(a)-(c)

⁵ See section 64(1A)

3. THE NATURE AND EXTENT OF THE INTERFERENCE WITH ARTICLE 8(1)

3.2 Liberty agrees with the Appellants' analysis of the various authorities on the retention of personal material that are cited by them, and asks the Court to prefer the Appellants interpretation of those authorities to that of the Respondents.

3.2.1 Mr Justice Leveson rejected the Appellant's approach and was "*far from convinced*"⁶ that Article 8 was even engaged. The Respondents support that view. Liberty believes Leveson J's finding may have been as a result of two errors:

(1) Approaching the question of to what extent certain information is to be regarded as private from a Strasbourg-centred, rather than an English-centred viewpoint.

(2) More importantly, attempting to draw close analogies with other types of personal information considered in Strasbourg jurisprudence, without understanding the unique and quintessentially personal and private qualities of genetic information and how it differs from other types of information.

3.3 How 'private' is the information in question, in the English context?

3.3.1 To what extent information is of a 'private' nature (and thereby engages Article 8(1)) falls, to some extent, to be considered and measured in the context of the cultural and social mores within a given jurisdiction. For example, the use of identity cards may be considered to be of no personal infringement in some states, while the history and perception of privacy in other states may result in the opposite view.

3.3.2 To that extent, decisions in the European Court of Human Rights, on the nature and extent of infringements of Article 8(1), (which were considered in detail by Leveson J, below), must be set against the context of that Court

⁶ Paragraph 22 of his judgment

being one of international jurisdiction. The principle of subsidiarity which governs the European Court of Human Rights, and the margin of appreciation afforded by that Court to each state when the engagement of rights is assessed, requires accommodation and respect for the various differences between states. That is not a principle that governs this Court. This Court can, and should, examine the right at stake against a domestic context, albeit informed by Strasbourg jurisprudence. A broad approach, in order to take account of the wide differences of culture and history between states, is not necessary.

3.3.3 In that light, and in accordance with the role of English Courts to develop **domestic** standards in order to protect fundamental rights⁷, in a way that builds on, or clarifies, the decisions from Strasbourg, as the Appellants seek to do in this case. This approach was identified in the Canadian charter cases that emphasised the need to develop an indigenous human rights jurisprudence; which is both cognisant of international standards, but also in keeping with a country's common law protection of fundamental rights. In this respect the Human Rights Act is not being applied 'in a vacuum', but in the 'historical and philosophical context' in which the parameters of private life have been respected in this country and can now be enforced by the Courts.⁸

3.3.4 In some, but not all cases, the Home Secretary may be in a better position than the Court to make such an assessment. For that reason he is to be afforded an appropriate margin of discretion, upon which the Respondents rely. However, the Court must still apply the appropriate degree of scrutiny of his decision, contended for by the Appellants. Furthermore, in Liberty's view he can, and should, take into account the following:

- (a) The well-established principles in English law, previously enshrined in statute, that fingerprints and other samples would be destroyed on acquittal.

⁷ See Laws LJ in *R(Middleton) v Secretary of State for the Home Department* (2002) *The Times* 18th April, at paragraph 61:

⁸ See the approach of the Canadian Supreme Court to the interpretation of the Charter of Rights and Freedoms: *Queen v Big M Mart Ltd* [1986] LRC (Const) 332, 364

- (b) The public concern over the breadth of powers given to the police by these amendments raised by Members of Parliament during the passage of the Bill⁹.
- (c) The views expressed by official regulatory bodies such as the Human Genetic Commission, part of whose formal terms of reference¹⁰ include analysing current and potential developments in human genetics and advising Ministers on:
- (i) their likely impact on human health and healthcare;
 - (ii) their social, ethical, legal and economic implications.
- (For their views on this specific issue, and the privacy implications see paragraph 3.7, below)

3.3.5 In Liberty's submission, if those factors are approached in the correct way the Court will find that Article 8(1) is clearly engaged in relation to the retention and use of fingerprints, DNA profiles and samples.

3.4 The unique and quintessentially personal and private qualities of genetic information and how it differs from other types of information.

3.4.1 It appears to Liberty that both Leveson J and the Respondents appear to make very little distinction between fingerprints, DNA profiles and DNA samples, and this too is an error.

3.4.2 It is Liberty's submission that fingerprints are private and personal information. However, Liberty recognises that it may be said that fingerprints, almost like photographs, reveal only limited personal information about an individual. DNA *profiles*, which are close to the minimum digital information taken from a sample for the purposes of making a match with another sample, reveal more, but that information is also of a limited nature.

3.4.3 In contrast, to fingerprints and DNA profiles, the physical *samples* which are retained and used under PACE (swabs etc.) and from which DNA is taken, potentially contain very much greater, more personal and detailed information

⁹ The Joint Human Right's Committee's Report, indicates that they too were concerned over the breadth of the powers. Those concerns were only resolved when they were shown a Home Office Memorandum on the way the powers were intended to be used in practice, which perhaps confused two separate issues [S266-7 paras 84-85].

about an individual. This may include highly private matters such information about a latent genetic illness, or the birth gender of a transsexual person. It may even reveal behavioural tendencies, or important information about the individual that he does not even know about himself such as the true nature of his familial relationships. The 'knowledge' in relation to an individual's life that can be gleaned from DNA samples has no parallel in the history of science and raises profound questions about the protection of privacy in the 21st Century. A key principle of Strasbourg jurisprudence is that the convention is a "living instrument"¹¹ It follows that the Human Rights Act cannot be applied solely in accordance with the intentions of the authors of the Convention as expressed more than 40 years ago.

3.4.4 Liberty submits that the question of how society responsibly and proportionately uses the science of DNA is a critical question for a 'living instrument' interpretation of the Convention. In this respect the Strasbourg Court has held that measures that interfere with privacy rights "should...be kept under review having regard particularly to scientific and societal developments".¹²

3.4.5 Once retained, the potential use of samples and investigation that may be done on them is almost limitless since they remain reliable sources for testing and research on genetic information about the donor individual for many years¹³.

3.4.6 For those reasons, the private nature of genetic information is not something that may be easily equated with photographs, personal documentation or even fingerprints. On one view it is more personal than all of those.

3.4.7 The Court's understanding may benefit from the views and research of the Human Genetics Commission on this precise point. The Commission performs a regulatory function in the UK in relation to research and policy on

¹⁰ See the Commission's web site at http://www.hgc.gov.uk/about_terms.htm

¹¹ *Loizidou v Turkey* 20 EHRR 99, paragraphs 71; *Tyler v UK* 2 EHRR 1

¹² *Rees v UK* (1987) 9 EHRR 56 para 47

¹³ See Human Genetics Commission report "Inside Information – Balancing Interests in the use of personal genetic data dated May 2002" at para 1.18(7).

genetic material. It was established following a comprehensive review in May 1999 by the UK Government of the regulatory and advisory framework for biotechnology. Its recent report "*Inside Information – Balancing Interests in the use of personal genetic data dated May 2002*", stated the following at paragraph 9.7 (which considers the forensic use of genetic information derived from samples):

"The [specimen] sample...contains the full genetic information of the individual and it would be possible to derive information about that person and about others. It therefore has the potential to be used to generate personal genetic information. It should also be subject to normal considerations of respect for persons, such as privacy and confidentiality, subject to the over-riding State-interest exclusions that we refer in Chapter 2"

At paragraph 9.40

"We heard during our visit [to the Forensic Science Services] that DNA-related research comprises a large part of the R&D programme of the FSS. This includes ways of improving the sensitivity and other aspects of the DNA profiling process. But it goes some way further in attempting to find ways of identifying commonplace characteristics so that in the future a "genetic photo-fit" could be built up. The aim of this work is to provide intelligence information on unknown offenders from sciences of crime to narrow down mass screens. Examples of commonplace characteristics would be sex (already identified), race, skin/hair/eye colour, stature, weight, age and facial characteristics. More controversially, this might be extended to behavioural traits (e.g. propensity to alcohol or nicotine addiction) and even medical information."

At paragraph 9.46

"We foresee a danger that the current DNA profiles will be supplemented on the National DNA Database (and linked databases such as the Police National Computer) by additional personal genetic information that might be said to be of a private and sensitive nature."

And at paragraph 9.37:

"In the case of CJ¹⁴ samples, these are identified via data on the National Database, and we understand increasingly by linkage to the Police National Computer. According to the principles we outline in this report, these samples, and the personal genetic information that they contain, should be entitled to a degree of respect for autonomy and privacy. However, in the case of samples from a convicted individual, individuals could have been said to have his or her right to autonomy in this respect over-ridden in the wider

¹⁴ Those taken from a suspect during the course of an investigation

interests of society. But this should not be taken to unnecessary extremes, especially if the conviction relates to a minor offence, or one committed a long time ago and perhaps as a youth. In other cases, the individuals are innocent in the eyes of the law and there appears to be no compelling reason why they should be subject to erosion of their individual rights."

3.4.8 Liberty appreciates, of course, that it is for the Court, not a regulatory body, to determine if and when private rights are being eroded. However, the views of a body such as the Commission, informed by an extensive public consultation carried out by them in 2001, are highly relevant in determining, within the context of English society, whether the retention of and access to genetic information is considered to be highly personal or not.

3.4.9 Similarly the views expressed in the strongest terms by Simon Hughes MP¹⁵ at public concern over a government approach to retaining genetic information which appears to be based on a "once we have it, we might as well keep it" philosophy, should not be dismissed as merely the views of one individual, as the Chief Constable of South Yorkshire's submissions appear to seek to do.

3.4.10 Perhaps ironically, Simon Hughes's disquiet may not be unfamiliar to the Chief Constable of South Yorkshire. This is because the representative body of his ranking officers, the Police Federation, has resisted the giving of mandatory samples by police officers and has endorsed the giving of voluntary samples, but only on certain conditions including that such samples must be destroyed on retirement. This more limited interference on persons who volunteer to enter the crime prevention profession itself is illustrative of the aversion to DNA retention that most members of English society, even those distinguished by their commitment to combating crime and upholding the highest levels of responsibility and integrity, such as the police officers.

3.4.11 Liberty submits that on a fuller understanding of the true nature of DNA samples, and the views that the prospect of their retention provokes amongst reasonable members of English society, the Court will take a different approach to that of Leveson J, below.

¹⁵ See S135-147]

3.5 What is the limit of the use of the samples?

3.5.1 The potential use to extract highly personal information, as indicated above, is substantial. Accordingly, the Respondents seek to reassure the Court of the minimal level of interference if these provisions by relying on the limitation on the uses that may be made of the samples, as set out in the amended provisions of PACE themselves. That limited use may be broadly stated as the prevention and investigation of crime. Liberty submits that, for reasons set out above, the room for broad interpretation of that category makes such reassurance somewhat illusory. On examination, it is a heading that may cover a very wide range of highly intrusive information gathering. The prevention and detection of crime goes much further than merely performing a check for the investigation of a single offence, which was the narrow area of consideration by Leveson J below.

3.5.2 Furthermore, a wide interpretation seems already to be being applied in some circumstances. For example, the current intelligence gathering research being carried out at the moment by the Forensic Science Service, and referred to by the Human Genetics Commission, appears to illustrate this point.

4. REASSESSMENT OF THE EXTENT OF JUSTIFICATION REQUIRED

4.1 For all those reasons, it is Liberty's submission that the Administrative Court fell into a fundamental error by concluding that the new powers given by the Act provide no greater intrusion than something akin to performing a fingerprint check, if that. The nature of information from genetic samples, and the potential use to which it can be put (even under the heading of crime prevention) indicates that the retention, access and use of such information is a substantial interference with Article 8(1), that requires a high level of justification.

4.2 As a result, it is of particular importance that the Respondents seek to justify such infringement that while simultaneously accepting that the donor of the fingerprint or samples may have given no indication that he presents any risk of offending behaviour: the Respondent has given the police the power to retain and use the samples and fingerprints from people who may be wholly

innocent of any crime, and may themselves have done nothing at all to warrant having been the suspects of the investigation during which such samples were taken (e.g. a person misidentified by an eye witness).

4.3 At paragraph 4.5.28, the Home Secretary's skeleton argument effectively admits this position, and that under the new provisions, fingerprints and samples are retained purely because of the possibility, however small, that such a sample might prove useful in implicating, or eliminating that person in relation to a future criminal offence, or identifying him as a possible source of information, in relation to a future criminal investigation¹⁶.

4.4 The Court should therefore not begin the assessment of proportionality from the perspective of balancing a negligible interference to persons who may have placed themselves under suspicion against the need to apprehend suspects of serious crime. The starting point should be the retention and use of deeply private material, in circumstances where the person himself may not have acted in any way to warrant the taking of such material being balanced against the possibility, however small, that he may be implicated in crime where genetic material is found at some stage during the rest of his life.

5. PROPORTIONALITY

5.1 Once sufficient weight has been given to the nature of the interference under Article 8(1), in accordance with paragraph 4, above, the proportionality assessment changes. As a result, the importance given to the existence of less restrictive methods of achieving the same aim should also change.

6. LESS RESTRICTIVE METHODS OF ACHIEVING THE SAME AIM

6.1 Liberty agrees with the various alternative methods proposed by the Appellants in their skeleton submissions at paragraphs 54-56, and the approaches to the same issue in other Commonwealth jurisdictions, referred to in the Appellants' skeleton submissions at paragraphs 67-76.

¹⁶ In that context it should be noted that where DNA does not provide an exact match, checks can be made for a close, but not exact, match in an effort to identify a relative of a suspected person. The Forensic Science Service have recently reported of assisting a police investigation in this way (See FSS Press release 6th June 2002).

6.2 Liberty submits that, notwithstanding the margin of discretion to be given to the Home Secretary in determining how to effect his aim of identifying suspects of serious crime, it remains very difficult to see how this may not be achieved in a less restrictive manner:

- (1) If other jurisdictions fulfil the same aim with appropriate safeguards to guard the infringement of privacy, such as automatic judicial scrutiny of decisions to retain samples in some circumstances or a consideration of the seriousness of the offence; or a determination of guilt on the part of the individual; why are such sweeping provisions without any such safeguards necessary to fulfil that aim in the UK?
- (2) Even if the Court accepted the Respondents' submissions that such provisions are necessary to identify easily the perpetrators of serious crime, why do *samples* need to be retained? Why can the same aim not be achieved by the retention of DNA profiles only, which allow matches to be made, but without potential access to the full range of genetic data?

6.3 The Respondents may seek to overcome the imbalance between the breadth of powers given to them under the Act, and the precise aim being pursued (the identification of suspects of crime), by suggesting that the actual practice presently being carried out by the police does not utilise the full range of those powers, and is no more than is necessary to achieve the legitimate aim (e.g. only DNA profiles are being used at present).

6.4 In Liberty's view, such a submission does not defeat the essential flaw in the breadth of power given by the primary legislation. At the very least, the nature of the extent of the power would be vague and not in accordance with law.¹⁷

7 INCOMPATIBILITY

¹⁷ See *Herczegfalvy v Austria* (1992) 15 EHRR 437, *Malone v UK* (1985) 7 EHRR 14; *Khan v UK* (2000) 8 BHRC 310

- 7.1 If this Court concludes that the powers given to the police by the Act represent an infringement on the Appellant's rights under Article 8(1) which are too broad, and that the aims being pursued may have been achieved in a much less restrictive manner, the Act is incompatible with the Convention.
- 7.2 Under HRA the Court must try to read the Act in such a way that it is compatible. In Liberty's view the Act would have to, remove, clarify and alter various provisions in such a way that would constitute a re-writing, rather than a re-reading of the Act.
- 7.3 If this cannot be done, a HRA section 4 declaration must be made.

28th June 2002

MATTHEW RYDER

Matrix Chambers

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DIVISION)**

C/2002/0880 & C/2002/0881

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