



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

SUBMISSION TO THE COMMITTEE OF MINISTERS IN RELATION TO THE UK GOVERNMENT'S REVISED PROPOSALS ON RETENTION OF DATA ON THE NATIONAL DNA DATABASE

Summary

This is the Commission's second submission in relation to UK government proposals on retention of data on the national DNA database produced in light of the *S and Marper v UK* judgment in the European Court of Human Rights (December 2008). The judgment found that the "blanket and indiscriminate nature of the power of retention" in the Government's policy regarding the DNA data of innocent persons (for those arrested for offences but subsequently acquitted or those who have had charges dropped) breached Article 8 (right to private life) of the European Convention on Human Rights (ECHR). The Council of Europe Committee of Ministers who oversee the implementation of measures in compliance with the judgment did not regard proposals put forward by the UK in May 2009, on which the Commission submitted comments to both government and the Committee of Ministers, as meeting the requirements of the judgment. The UK government produced revised proposals in November 2009. This present submission the Committee of Ministers comments on these revised proposals.

1. The Northern Ireland Human Rights Commission (the Commission) is the National Human Rights Institution for Northern Ireland, accredited with 'A' status by the International Co-ordinating Committee of NHRIs. The Commission is a statutory body created in 1999 by the United

Kingdom Parliament, through the Northern Ireland Act 1998 pursuant to the Belfast (Good Friday) Agreement.

2. Further to the *S and Marper v the UK* judgment in the European Court of Human Rights (ECtHR)¹ the Commission provided a submission to the Committee of Ministers in August 2009. This submission responded to proposals on retention of data on the national DNA database which had been put forward by the UK Government regarding fulfilment with the general measures required to comply with the judgement.²
3. Following the Committee's last assessment of 15 September the UK Government has issued revised proposals set out in the Home Secretary's Written Ministerial Statement of 11 November 2009.³ The present submission reflects the Commission's views in relation to these revised proposals, and is being submitted to the Committee of Ministers as a communication under rule 9(2) of the rules for the supervision of execution of judgments, in accordance with Article 46(2) of the European Convention on Human Rights (ECHR). The Commission remains concerned regarding the compatibility of the UK Government's new proposals with the ECtHR judgment, and with relevant international standards. This submission will focus directly on the issue of compatibility and does not engage more broadly with the range of arguments in relation to DNA retention and human rights compliance.

Background

4. The judgment in *S and Marper* found that the policy of retaining DNA samples and profiles from persons suspected but not convicted of offences violated Article 8 of the ECHR (right to private life). While this judgment referred to England and Wales, it noted that similar legislative provision applies in Northern Ireland. The policy change now proposed by the UK government is likewise intended to apply in Northern Ireland. Separate policy applies in Scotland.
5. The judgment found that the "blanket and indiscriminate nature of the power of retention" of the DNA data of persons

¹ App. nos 30562/04 and 30566/04, judgment of 4 December 2008.

² 'Keeping the right people on the DNA database', UK Home Office, May 2009 referenced in Ministers' Deputies 1059th meeting in June 2009 (CM/Del/OJ/DH (2009) 1059 Section 4.2, 19 June 2009.)

³ Written Ministerial Statement, Secretary of State for the Home Department [Alan Johnson] 11 Nov 2009 <http://www.homeoffice.gov.uk/documents/cons-2009-dna-database/> [accessed 18 November 2009]

suspected but not convicted of offences did not strike a fair balance between private and public interests. It drew attention to the indefinite nature of the retention, irrespective of the gravity of the alleged offence. Attention was also drawn to the limited possibilities of challenging the retention, and the absence of provision for independent review. The Court also considered that “the retention of the unconvicted persons’ data may be especially harmful in the case of minors”.⁴

UK proposals of May 2009

6. The proposals set out in May 2009 did not provide for persons who had been arrested but acquitted in court, or who had had charges dropped, being automatically removed from the DNA database, nor did it more broadly move to discontinuing the practice of retaining innocent persons DNA profiles on the national DNA database. The proposals set out in the government’s consultation document envisaged the retention of data of innocent persons for a time period that varied in relation to the offence for which the accused was not prosecuted, or was found not to have committed.
7. The Commission was not convinced that it was necessary in a democratic society and proportionate to continue to retain data of innocent persons in this way, and did not regard the proposals as being compatible with the judgment nor with standards to which the UK is party. The Commission also raised questions regarding the age of 10 being the minimum age of retention, and raised concerns regarding the proposed legislative vehicle which was to be used to bring in the proposals to Northern Ireland, namely by regulations subject to the negative resolution procedure, which in effect precludes Parliamentary debate.⁵

UK proposals of November 2009

8. The ministerial statement sets out that the new proposals will be ‘introduced through primary legislation’.⁶ If this means

⁴ As above, paras 119 and 124.

⁵ The ‘negative resolution procedure’ involves a draft instrument being laid before Parliament; the draft is not open to amendment and is not ordinarily debated, becoming law within 40 days unless either House requests that it be annulled – a situation that has occurred only twice in the past 30 years, although several thousand such instruments are made each year. The power was being sought through amendment to existing Police and Criminal Evidence legislation, through a Policing and Crime Bill.

⁶ Paragraph 1.

that the full detail of the proposals will be set out on the face of primary legislation this would be welcome, however clarity on this matter is therefore important.

9. In summary the new proposals in relation to the retention of DNA profiles are to:
 - **Convicted persons aged over 10:** to have their profiles retained indefinitely, this is unchanged from previous proposals (one exception: 10-18 year olds on first conviction will have profiles removed after 5 years – previous proposals were to remove at 18th birthday);
 - **Adults acquitted/not charged:** retained for six years (previous proposals were 12 years if accused of serious crimes and 6 if accused of minor crimes);
 - **Children over 10 acquitted/not charged:** retained for three years, or six years if 16-17 and were accused of serious crime (previously 12 years if accused of serious crimes and 6 years or 18th birthday for accusations of minor crimes).⁷
10. Whilst the position is 'yet to be finalised'⁸ the UK is also proposing a separate category for persons accused of national security/terrorism related offences. The ministerial statement indicates that material taken under any regime (including the Terrorism Act 2000) could be retained for over six years on the basis of a case-by-case review on 'national security' grounds; this itself would be subject to review every two years by a senior police officer.⁹
11. The Court, in issuing its judgment, drew on international standards including Committee of Ministers Recommendation R(92)1, which was adopted without reservation by the UK. This Recommendation sets out that the results of DNA analysis should be routinely deleted when it is no longer necessary to keep them for the purposes for which they were collected, and that retention should only take place "where the individual concerned has been convicted of serious offences against the life, integrity or security of persons", subject to "strict storage periods defined by domestic law". The only exceptions set out for retaining the results of DNA analysis of a person who has not been convicted of, or charged with, an offence is at the express request of the

⁷ 'Keeping the Right People on the DNA Database: Summary of Responses Public Consultation 7 May - 7 August 2009' Home Office, November 2009, page 14

⁸ As above, page 15.

⁹ Ministerial Statement, Paragraph 17.

individual or whereby the security of the state is involved: in the latter case strict storage periods are required in domestic law.¹⁰

12. The Committee of Ministers in assessing the UK's May 2009 proposals concluded that they did not conform to the requirement of proportionality. This included highlighting as disproportionate the stipulation, retained in the new proposals, for retaining profiles for six years for persons who had been accused of minor offences. The Committee also noted that the European Court had observed that there was a narrow margin of appreciation in this sphere due to a strong consensus among European states.¹¹
13. In light of the above standards and the narrow margin of appreciation, the new proposals put forward by the UK still do not appear to be compatible either with the judgment or with standards to which the UK is party. The Commission would therefore ask the Committee of Ministers to consider whether such an approach should be deemed compatible with the execution of the judgment.
14. In relation to the new proposed national security category, further detail is required from the UK to assess if the measure is proportionate, meets the stipulation of strict storage periods set out in Recommendation R(92)1, and provides sufficient safeguards and legal certainty to prevent its application for purposes beyond state security. The Committee of Ministers may wish to seek further clarification from the UK to this regard.

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¹⁰ Recommendation no R(92)1 of the Committee of Ministers on the use of analysis of deoxyribonucleic acid (DNA) within the framework of the criminal justice system (adopted by the Committee of Ministers on 10 February 1992 at the 470th meeting of Ministers' Deputies (para 8)).

¹¹ Minutes of the Committee of Ministers 1065th Human Rights Meeting, September 2009.