Court/Tribunal: European Court of Human Rights
Case: S. and Marper v. United Kingdom

The case involved Mr. S. and Michael Marper ("applicants"), both who were British nationals arrested in 2001. Mr. S. was arrested on January 19, 2001 at the age of eleven for armed robbery. When he was arrested his fingerprints and DNA samples were taken. He was acquitted on June 14, 2001. Mr. Marper was arrested on March 13, 2001 and was charged with the harassment of his partner. At the time of his arrest, his DNA and fingerprints were taken. Before the pre-trial review, Mr. Marper and his partner reconciled and charges were not pressed. On June 14, 2001 the case was formally discontinued.

In both cases the applicants asked that their fingerprints and DNA samples be destroyed, but in both cases the police refused. The applicants asked for a judicial review in the United Kingdom of the police decision not to destroy the samples. On March 22, 2002, the Administrative Court rejected the application. On September 12, 2002 the Court of Appeals upheld the decision of the Administrative Court.

In upholding the Administrative Court's decision, the Court of Appeals stated that the retention of the DNA and fingerprints revealed only limited personal information. The Court stated that the interference with private life was modest because (1) the samples were kept for the limited purpose of detection, investigation, and prosecution of crime, (2) the samples were not used without a sample from a crime scene, (3) the fingerprints would not be made public, (4) a person would not be identifiable to the untrained eye, and (5) the expansion of the database would be an advantage in the fight against serious crime. Furthermore, the Court cited a 1999 case where DNA samples obtained from a crime scene matched DNA in a national database. The Court also cited statistics where 6,000 DNA profiles were linked to samples taken from crime scenes. The crimes that were linked included 53 murders, 33 attempted murders, 94 rapes, 38 sexual offences, 63 aggravated burglaries, and 56 drug offenses.

The relevant statute at issue in this case is the Police and Criminal Evidence Act 1984 which allows for the taking of fingerprints and DNA samples. The retention of the fingerprints and samples are governed by section 82 of the Criminal Justice and Police Act 2001. Section 82 states, in part:

> (1A) Where—
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> > (a) fingerprints or samples are taken from a person in connection with the investigation of an offence, and
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> > (b) subsection (3) below does not require them to be destroyed, the fingerprints or samples may be retained after they have fulfilled the purposes for which they were taken but shall not be used by any person except for purposes related to the

prevention or detection of crime, the investigation of an offence or the conduct of a prosecution.

(3AA) Samples and fingerprints are not required to be destroyed under subsection (3) above if—

(a) they were taken for the purposes of the investigation of an offence of which a person has been convicted; and

(b) a sample or, as the case may be, fingerprint was also taken from the convicted person for the purposes of that investigation.

Appealing to the European Court of Human Rights, the applicants alleged that the retention of the samples violated their right to private life enshrined in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("Convention"). Article 8 states:

1. Everyone has the right to respect for his private … life …

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law is necessary in a democratic society … for the prevention of disorder or crime …

The applicants argued that the retention of their fingerprints, cellular samples, and DNA profiles interfered with their right for private life under Article 8 of the Convention. They contended that the continued retention attached a social stigma along with psychological implication, particularly for a minor such as Mr. S. In addition to the interference with their private lives, the applicants also argued that the retention of DNA profiles and cellular samples interfered with the right for private life of their families because the samples contained genetic information that could point to relatives of the applicants.

The government argued that use of fingerprints and samples was used for a limited purpose and did not interfere with Article 8 rights. Such samples were used only for the identification of person and contained no intrusive information about an individual or his person.

The Grand Chamber overruled the Court of Appeals and found that the retention policies violated an individual's right to a private life. The Grand Chamber gave a non-exclusive list of issues and elements that fell into the concept of private life including, physical and psychological integrity of a person, aspects of a person's physical and social identity, personal identification and links to family, information about a person's health, and information that identifies an individual's ethnic identity.

The Grand Chamber stated that the mere storage of DNA or cellular samples relating to the private life of an individual amounts to an interference with the rights in Article 8. How the

information is used is irrelevant. An individual's concern about possible future uses of stored data is sufficient based on the sensitive nature of the information, particularly the potential information on the health of a person. The retention of samples is a per se interference with the right of private lives.

Next the Grand Chamber considered the retention of fingerprints. It applied the same standards it uses for the retention of photographs and voice samples. In both instances, the Grand Chamber considers whether authorities have used the photographs and voice samples to identify the person. Likewise, fingerprints contain unique information about a person insofar as they can identify a person.

After establishing that the retention of the samples and fingerprints constituted an interference with the right to respect for a private life, the Grand Chamber considered whether the interference was justified.

The applicants argued that retention was not justified by Article 8 since the authorities were given large leeway to use the retained information for "purposes related to the prevention or detection of crime." They argued that the purpose was vague and open to abuse while lacking sufficient safeguards. The applicants also argued that indefinite retention of information of persons not convicted of any crimes could not be considered necessary in a democratic society for the prevention of crime. Furthermore, the applicants argued that retention was disproportionate since there was no distinction between offenses involved, failure to take the applicant's circumstances, lack of independent decision making process when considering whether or not to order retention, and unlimited period of retention. Lastly, the applicants argued that retention of the information casts suspicion on people who have been acquitted or discharged of crimes.

The Grand Chamber agreed with the applicants that the section 64 is very general and gave authorities too much leeway. The Grand Chamber stated that it is important for a retention policy to have clear rules governing such things as duration, storage, access of third parties, procedures for preserving the integrity and confidentiality of data, and procedures for its destruction.

The Grand Chamber also agreed with the applicants that the interference was not necessary in a democratic society. Interference is considered necessary in a democratic society for a legitimate aim if it answers a pressing social need and it is proportionate to the legitimate aim. However, the protection of personal data is of fundamental importance to a person's enjoyment of his right to respect for private life.

The Grand Chamber narrowed its decision in this case to the retention of fingerprints and DNA data to persons who have been suspects, but not convicted of criminal offenses. The Grand Chamber noted that England and Wales were the only jurisdictions that allow for indefinite retention of information of suspected criminal offenders regardless of the type of criminal

offense or age of the offender. All other jurisdictions allowed for the retention of suspected criminal offender's personal information based on the severity of the crime and for a limited duration.

The Grand Chamber was concerned with people in the position of the applicants, people not convicted, and the high risk of stigmatization. It found that the retention policy interfered with a person's right to a presumption of innocence when that person has not been convicted of any crime. The Grand Chamber placed special emphasis on the effect the policy would have on minors such as Mr. S. The retention policy, it was reasoned, would be harmful to their development and integration into society.

The Grand Chamber found that the indiscriminate and indefinite retention of fingerprints, cellular sample, and DNA profiles of persons suspected, but not convicted of any crimes, did not strike a fair balance between competing public and private interests. Therefore, the Government had interfered with the applicants' right to private life under Article 8.

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