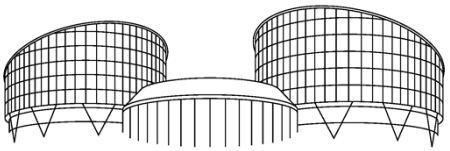

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF GAUGHRAN v. THE UNITED KINGDOM

(Application no. 45245/15)

JUDGMENT

Art 8 • Respect for private life • Disproportionate character of indefinite retention of DNA profile, fingerprints and photograph of person convicted of minor offence • Narrowed margin of appreciation when setting retention limits for biometric data of convicted persons • Indiscriminate nature of the powers of retention • Lack of reference to the seriousness of the offence or need for indefinite retention • Absence of possibility of review

STRASBOURG

13 February 2020

FINAL

13/06/2020

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Gaughran v. the United Kingdom,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Ksenija Turković, *President,*
Aleš Pejchal,
Armen Harutyunyan,
Pere Pastor Vilanova,
Tim Eicke,
Jovan Ilievski,
Raffaele Sabato, *judges,*

and Abel Campos, *Section Registrar,*

Having deliberated in private on 21 January 2020,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 45245/15) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a British national, Mr Fergus Gaughran ("the applicant"), on 20 October 2015.

2. The applicant, who had been granted legal aid, was represented by Mr Paul Fitzsimons of Fitzsimons Mallon Solicitors, a lawyer practising in Newry. The United Kingdom Government ("the Government") were represented by their Agents, Mr Chanaka Wickremasinghe and Ms Verity Robson, of the Foreign and Commonwealth Office.

3. The applicant alleged under Article 8 of the Convention that the indefinite retention of his DNA profile, fingerprints and photograph in accordance with the blanket policy of retention of personal data of any individual convicted of a recordable offence, amounted to a disproportionate interference with the right to respect for his private and family life and could not be justified.

4. On 13 July 2017 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1972 and lives in Newry.

A. The background facts

6. On 14 October 2008 at approximately 1.35 a.m. the applicant was stopped at a police checkpoint. He was arrested for the recordable offence (i.e. an offence punishable by imprisonment) of driving with excess alcohol contrary to the Road Traffic (Northern Ireland) Order 1995 and taken to a police station where he provided samples of breath. They were found to contain 65 milligrams of alcohol per 100 millilitres of breath: 30 milligrams in excess of the permitted limit. On the same day the following information or data relating to the applicant was taken from him: fingerprints; a photograph; and a non-intimate DNA sample by buccal swab. A DNA profile (a digital extraction of key data) was subsequently taken from the DNA sample.

7. On 5 November 2008 the applicant pleaded guilty to the offence of driving with excess alcohol at Newry Magistrates Court. He was thus a convicted person. He was fined 50 pounds sterling (GBP) and disqualified from driving for 12 months but no immediate or suspended custodial sentence was imposed on him. Under the relevant legislation, his conviction was spent after five years, i.e. by 5 November 2013. Other than his conviction for driving with excess alcohol, he had been convicted on 6 June 1990 (when he was seventeen years old) for 'disorderly behaviour', for which he was fined twenty five pounds.

8. On 15 January 2009, just over two months after the applicant pleaded guilty, his solicitor wrote to the Police Service of Northern Ireland (the "PSNI") claiming that the retention of the applicant's photograph, fingerprint and DNA sample was unlawful. He requested that they be destroyed or returned to the applicant. The PSNI replied on 27 February 2009 saying that the legal consequence of the decision of this Court in *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, ECHR 2008 was a matter for the United Kingdom Government and that any changes to the law of the United Kingdom would be fully complied with by the PSNI.

9. The applicant's DNA sample was destroyed in 2015. The PSNI continues to retain, and intends to retain indefinitely within its records the DNA profile, fingerprints and photograph relating to the applicant that were taken from him on 14 October 2008.

B. The domestic proceedings

1. The High Court of Justice of Northern Ireland

10. The applicant sought leave to bring an application for judicial review challenging the PSNI's continued retention of his biometric data that is, his fingerprints, photograph and DNA profile. In these proceedings the applicant sought:

"(a) a declaration that the indefinite retention of the data was unlawful and constituted an unjustifiable interference with his right to respect for private life under Article 8 of the convention; and

(b) an order of prohibition preventing the respondent from making any use of the relevant data."

11. The High Court gave its judgment on 13 November 2012. It found that the retention of the applicant's biometric data was an interference under Article 8 of the Convention but that interference was justified and not disproportionate for the following eleven reasons (see § 44):

"(i) The building up of a database of such data from those convicted of offences provides a very useful and proven resource in the battle against crime by reason of the assistance it provides in identifying individuals. It is clear that the larger the database the greater the assistance it will provide. While a universal database would be of immense help in combatting crime, weighing the private rights of individuals against the good which would be achieved by such a universal system requires the striking of a fair balance. Experience has shown that those who have committed offences may go on to commit other offences. A state decision to draw the line at those convicted of a substantial category of offences is entirely rational and furthers the legitimate aim of countering crime so as to protect the lives and rights of others.

(ii) The rights and expectations of convicted persons differ significantly from those of unconvicted persons. The striking of a balance between the public interest and the rights of a convicted or an unconvicted individual will inevitably be appreciably different. Strasbourg recognises that even in the case of some unconvicted persons retention for a period may be justifiable in the public interest.

(iii) A person can only be identified by fingerprints and DNA sample either by an expert or with the use of sophisticated equipment. The material stored says nothing about the physical make up, characteristics or life of the person concerned and it represents objective identifying material which can only be relevant or of use when compared with comparative material taken from a person lawfully subjected to a requirement to provide such material for comparison.

(iv) The use to which the material can be lawfully put is severely restricted by the legislation.

(v) As well as being potentially inculpatory the material may be exculpatory and thus in ease of a person such as the applicant. If it is inculpatory its use assists in the detection of someone likely to have been involved in crime which is a matter of deep interest to the public.

(vi) There is in place an exceptional case procedure which permits of a possibility of an application to have data removed.

(vii) Any differentiation within the system between categories of convicted persons calls for administrative action and has the potential for administrative complexity. Lord Steyn described how there was the potential for interminable and invidious disputes where differentiation is operated. While he was making that point in the context of differentiation between convicted and unconvicted persons (and thus was in error according to the Strasbourg court) the point retains its force in the context of differentiation between convicted persons. Carswell LCJ pointed out in *Re McBride* [1997] NI 269 at 274 that the legislature wished to have as wide a cover for the database as possible in order to give the police the best chance of detecting criminal

offenders. *Marper* requires protections for unconvicted persons and the current legislation and policy have limited the retention of data to those convicted of recordable offences. To allow further exceptions would in the view of the authorities undermine the effectiveness of the process which is designed to build up a database of those who have been involved in criminality to assist in the war against crime. Such a conclusion by the state authorities is legitimate and rational.

(viii) The current policy in fact does distinguish between (a) unconvicted persons and those convicted of offences which are not recordable and (b) those convicted of offences which are recordable. This represents a policy and legislative intent which is not blanket or indiscriminate as such but one which distinguishes between cases. The choice of that differentiation is one involving the exercise of judgment by the state authorities which seeks to balance, on the one hand, the very limited impact of retention and use of such material on a person's real private life and its minimal impact on the intimate side of his life and, on the other hand, the benefit to society flowing from the creation of as effective a database as legitimately possible to help in combatting crime. The choice to retain the data of those convicted of recordable offences represents the exercise of a balanced and rational judgment by the authorities.

(ix) In this case the offence committed by the applicant cannot, as the applicant asserts, be described as minor or trivial. It was an offence of a potentially dangerous anti-social nature. The criminal law has as one of its aims the protection of the lives of others and the consumption of alcohol by a driver endangers human life. Indeed the state under its operative duties under Article 2 must have in place laws which protect the lives of others. The offence was a recordable offence being one in respect of which a period of imprisonment could be ordered.

(x) Time limitations on the retention of data for particular categories of offences can be imposed as has occurred in some legal systems such as in the Netherlands (See *W.* and *Van der Velden*). Different countries operate different policies in this field and some other countries follow practices similar to those followed in the United Kingdom. Any time restriction is inevitably somewhat arbitrary and it is difficult to point to any particular reason why one particular period as opposed to another should be chosen. To introduce time limitations for some offences simply to avoid a possible charge of disproportionality smacks of defensive policy making in a field which requires a proper balancing of the interests of the public against the consequences of criminal activity. The introduction of different time periods for different offences or for different sentences would clearly add to the administrative burden and would require changes and deletion of recorded data. This complexity would be aggravated in the case of those found guilty periodically of repeat offending in respect of minor offences. The removal of such data would give the offender no benefit other than the knowledge that his data is no longer recorded. As already noted the retention of the data represents a very minor intrusion into his private life.

(xi) The retention of the data serves the added purpose of discouraging a convicted offender from reoffending for the offender has the knowledge that the police have available data which could lead to his detection. The permanent retention of that data thus serves a useful long term purpose in that regard.

These factors point to the conclusion that the policy of indefinite retention is not disproportionate and, accordingly, the applicant's application must be dismissed."

2. The Supreme Court

12. The applicant appealed to the Supreme Court which gave judgment on 13 May 2015. At the outset, the Supreme Court recalled the question certified by the lower court which formed the subject of the appeal as follows:

> "THE COURT CERTIFIES that the following point of law of general public importance is involved in the decision of the court.
>
> Is the policy of the Police Service of Northern Ireland to retain indefinitely the DNA profile, fingerprints and photographs of a person convicted of a recordable offence in breach of article 8 of the ECHR?"

13. The Supreme Court examined the applicant's claim and found that the indefinite retention of his data was proportionate. In arriving at its conclusion it noted that the applicant's photograph was retained on a standalone database which does not have the capability to match photographs, whether by way of facial recognition technology or otherwise.

14. Lord Clarke gave the leading judgment for the majority. He underlined that the Court's judgment in *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, ECHR 2008, only concerned "unconvicted" persons. That did not mean that system in Northern Ireland (and the United Kingdom) for convicted persons was necessarily proportionate. However, the level of interference in the applicant's Article 8 rights was low, and a fair balance must be struck between competing public and private interests when considering whether that interference is justified. The United Kingdom struck that balance by choosing recordable offences as the touchstone for retention, and this appeared proportionate and justified. He took into account the fact that the applicant was only fined and not imprisoned but highlighted that driving with excess alcohol is a serious offence. He also noted Principle 7 of the Committee of Ministers' Recommendation No. R(87)15 as giving some support for the proposition that the fact that a conviction may become spent is potentially relevant, but did not find this was decisive. He also noted that the scheme under scrutiny applied only to adults, whereas in *S. and Marper*, cited above, the Court was examining a scheme which also applied to minors.

15. He went on in the course of his analysis to consider the margin of appreciation available to the authorities. In this connection he reviewed the retention regimes in other Council of Europe States and commented as follows:

> "In *S. and Marper* the ECtHR, when considering the margin of appreciation in the case of those who were acquitted, placed some reliance upon the fact that the United Kingdom was alone or almost alone in retaining biometric data in such cases. There is a much broader range of approaches in the case of those who have been convicted. The Secretary of State produced an annex setting out a summary of inclusions and removal criteria in other jurisdictions. It is attached to this judgment as Annex B. It shows that in such cases many countries retain biometric data for very long periods. In

addition to England and Wales and Northern Ireland, Ireland and Scotland are I think the only jurisdictions which provide for indefinite retention. However, there are several states which provide for retention until death. They are Austria: five years after death or 80 years of age; Denmark: two years after death or at 80 years of age; Estonia: ten years after death; Finland: ten years after death; Lithuania: 100 years after inclusion or ten years after death; Luxembourg: ten years after death; The Netherlands: as stated above and 80 years after a conviction against minors; Romania five years after death or 60 years of age; and Slovakia: 100 years after date of birth. It seems to me that in the context of a person's rights under article 8 there is little, if any, difference between retention for an indefinite period and retention until death or effectively until death.

Annex B shows that there are other formulae. They include Belgium: 30 years after inclusion; France: 40 years after the end of the sentence or after the age of 80; Hungary: 20 years after the sentence has been served; Latvia: 75 years of age; Poland: 35 years after conviction; Germany: DNA profiles are reviewed after ten years and removal depends on a court decision; Italy: 20 years after the incident but no profile can be kept for more than 40 years; and Sweden: ten years after sentence. It can thus be seen that member states have chosen many different approaches but there is, in my opinion, no principled basis upon which the system in operation in Northern Ireland can be held to be disproportionate, especially when compared with the significant number of countries which retain DNA profiles until death or effectively until death. Very few states have a process of review."

16. He then recalled the eleven points set out by the High Court of Northern Ireland and concluded:

"I agree with that analysis and would dismiss the appeal. I would answer the certified question (quoted at para 8 above) in the negative."

17. Lord Kerr gave a dissenting judgment. He took a different approach to the question of whether the interference was justified, analysing the rational connection between the measure and its aim; whether the measure was no more than necessary to achieve the aim; and whether the measure was the least restrictive means to arrive at the stated aim. Answering those questions he concluded:

"One must return, therefore, to the question whether a more tailored approach than that of the current PSNI policy in relation to the retention of biometric materials, sufficient to satisfy the aim of detecting crime and assisting in the identification of future offenders, is possible. To that question only one answer can be given, in my opinion. Clearly, a far more nuanced, more sensibly targeted policy can be devised. At a minimum, the removal of some of the less serious offences from its ambit is warranted. But also, a system of review, whereby those affected by the policy could apply, for instance on grounds of exemplary behaviour since conviction, for removal of their data from the database would be entirely feasible. Similarly, gradation of periods of retention to reflect the seriousness of the offence involved would contribute to the goal of ensuring that the interference was no more intrusive than it required to be.

In this context, article 5(e) of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data should be noted. It provides that "personal data undergoing automatic processing shall be ... preserved in a form which permits identification of the data subjects for no longer than is required for the

purpose for which it is required". There is no evidence that consideration has been given to the question of whether it is necessary for the effective combatting of crime that the materials concerned in this case should be retained indefinitely.

For the intervener, the Secretary of State for the Home Department, Mr Eadie QC accepted that the decision as to how long and for what offences biometric and other data should be retained called for a nuanced decision. He argued that this had been achieved by the exclusion of non-recordable offences and offences committed by children and by the fact that such material from those not convicted was no longer retained. He was unable to point to evidence, however, that the question of whether it was necessary that there be retention of all data from all convicted of recordable offences for all time had been considered. Absent such consideration and in light of the fact that it is eminently possible to conceive of measures which are less intrusive but which would conduce to the avowed aim of the policy, it is simply impossible to say that the policy in its present form is the least intrusive means of achieving its stated aim."

18. He went on to consider whether a fair balance had been struck, and how the state's margin of appreciation should be viewed in the context of the case. Concerning the latter, he highlighted that.

"A margin of appreciation is accorded to a contracting state because Strasbourg acknowledges that the issue in question can be answered in a variety of Convention-compatible ways, tailored to local circumstances. But the margin of appreciation that is available to the state does not extend to its being permitted to act in a way which is not Convention compliant. If the state acts in such a way, it cannot insulate itself from challenge by recourse to the margin of appreciation principle. In *Wingrove v. UK* (1997) 24 EHRR 1, para 58, a 'broad margin' case, ECtHR emphasised that authorities within the state in question were in a better position than international judges to give an opinion "on the exact content of these requirements with regard to the rights of others as well as on the 'necessity' of the 'restriction'". Domestic courts therefore have the responsibility to examine closely the proportionality of the measure without being unduly influenced by the consideration that the Strasbourg court, if conducting the same exercise, might feel constrained to give the contracting state's decision a margin of appreciation.

For the reasons that I have given, I have concluded that the issues which must be considered under the proportionality exercise have not been properly addressed and that, if they had been, a more restricted policy would have been the inevitable product. The margin of appreciation cannot rescue the PSNI policy from its incompatibility with the appellant's article 8 right."

19. He concluded that:

"... the policy of retaining indefinitely DNA profiles, fingerprints and photographs of all those convicted of recordable offences in Northern Ireland is incompatible with article 8 of ECHR."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Retention of biometric data (DNA samples and profiles, fingerprints)

Retention of DNA samples and profiles, and fingerprints in England and Wales, and Northern Ireland

(a) Domestic law prior to *S. and Marper v. the United Kingdom*

20. Up until 11 May 2001, Section 64(1) of the Police and Criminal Evidence Act 1984 (referred to domestically as "PACE") included a requirement that DNA samples be destroyed "as soon as practicable after the conclusion of the proceedings". It did not require destruction of any DNA profile derived from a DNA sample.

21. From 11 May 2001, this Act allowed the indefinite retention of fingerprints, DNA material (including samples) and photographs of any person of any age suspected of any recordable offence in England, Wales and Northern Ireland. These provisions applied regardless of whether the person was ultimately convicted or not.

22. On 4 December 2008 this Court found that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences failed to strike a fair balance between the competing public and private interests. It concluded that the retention at issue constituted a disproportionate interference with the applicants' right to respect for private life which could not be regarded as necessary in a democratic society (*S. and Marper,* cited above, § 125).

23. The relevant domestic law and practice regarding the collection and retention of biometric data are set out in detail in the Court's judgment (see §§ 26-37).

(b) Domestic law after *S. and Marper* in England and Wales

24. The Protection of Freedoms Act 2012 ("POFA") came into force on 31 October 2013. It amended the DNA and fingerprints retention scheme set out in the Police and Criminal Evidence Act, in England and Wales. The amended provisions provided that DNA samples must be destroyed as soon as a DNA profile has been taken, or within six months of the taking of the DNA sample.

25. DNA profiles for minors and adults arrested for a minor crime are deleted at the time of the decision not to charge; to discontinue proceedings or on acquittal. The Act also introduced a time limit of three years for the retention of fingerprints and DNA profiles for individuals arrested but not convicted for a serious offence, with a possible, single extension of two years upon application of the police to the national courts.

26. DNA profiles and fingerprints taken from a person convicted of a recordable offence may be retained indefinitely. However, where (i) the person convicted is under the age of 18 years at the time of the offence, (ii) the offence is a "minor" recordable offence (meaning an offence which neither attracts a custodial sentence of more than five years nor is a "qualifying offence"), and (iii) the person has not previously been convicted of a recordable offence, the period of retention of such material may be shorter: the length of the sentence plus five years where the person concerned receives a custodial sentence of less than five years, or, if no custodial sentence was given, five years from the time when the fingerprints or DNA sample were taken, as the case may be. These provisions are subject to the person not re-offending during the relevant period: if the person is convicted of another recordable offence during the relevant period, the material may then be retained indefinitely. Where the custodial sentence is five years or more or where the offence is a "qualifying offence" (more serious offence) the material may again be held indefinitely.

27. A Biometrics Commissioner has been appointed, whose role is, *inter alia*, to keep the retention and use of biometric material under review.

(c) Domestic law after *S. and Marper* in Northern Ireland

28. The law in Northern Ireland was not changed following *S. and Marper*, cited above. At the time of the domestic proceedings, it was intended to enact the Criminal Justice Bill Northern Ireland which would have brought into force in Northern Ireland the changes made under POFA (see paragraphs 44-49 below on “the Committee of Ministers of the Council of Europe”).

29. The current practice of the PSNI is to take photographs, fingerprints, a DNA sample and profile from all persons who are arrested for a recordable offence. That biometric data is retained indefinitely.

30. The Association of Chief Police Officers ("ACPO") issued guidance entitled "Exceptional Case Procedure for the Removal of DNA fingerprints and PNC records" on 16 March 2006. The exceptional case procedure states that exceptional cases will be rare. The document states that while it is not recommended that any pro-active exercise be undertaken to determine potentially exceptional cases, the DNA and fingerprint retention project maintains a library of circumstances that have been viewed as giving rise to exceptional cases. Those guidelines no longer apply in England and Wales, in light of the changes in the law which were adopted after *S. and Marper*, cited above, and the appointment of the Biometrics Commissioner (see paragraph 27 above). However, they still apply in Northern Ireland.

31. Prior to the adoption of POFA and in the context of claims made by “unconvicted” persons challenging the retention of their biometric data, on 18 May 2011 the Supreme Court made a declaration that the ACPO guidelines prohibiting deletion of DNA and fingerprint data in the absence

of exceptional circumstances were unlawful (see *R (on the application of GC) v. The Commissioner of Police of the Metropolis* and *R (on the application of C v. The Commissioner of Police of the Metropolis* ([2011] UKSC 21) and *Goggins and Others v. the United Kingdom* (striking out), nos. 30089/04 and 7 others, § 48, and § 74, 19 July 2011).

B. Retention of photographs in England and Wales, and Northern Ireland

1. *Domestic law prior to RMC and FJ v Commissioner of Police for the Metropolis and Secretary of State for the Home Department [2012] EWHC 1681 (Admin)*

32. From 11 May 2001, PACE allowed the indefinite retention of photographs of any person of any age suspected of any recordable offence in England, Wales and Northern Ireland. This provision was unaffected by the amendments to execute *S. and Marper*, cited above, which did not concern retention of photographs.

33. In 2012, the High Court ruled, in the case of *RMC and FJ v. Commissioner of Police for the Metropolis and Secretary of State for the Home Department* [2012] EWHC 1681 (Admin) ('RMC'), that the retention of images from "unconvicted" individuals under the Police and Criminal Evidence Act and the Code of Practice on the Management of Police Information and accompanying guidance, was unlawful.

34. Lord Justice Richards gave the lead judgment and following an analysis of the relevant jurisprudence including the case law of this Court, concluded that the retention of the claimants' photographs by the defendant constituted an interference with the right to respect for their private life under Article 8, and therefore required justification.

35. He was not convinced that their retention was in accordance with the domestic law but considered it would be deeply unsatisfactory to stop there, since that deficiency is one that can easily be remedied whereas the claimants' concern was to prevent the continued retention of their photographs. He therefore went on to examine whether the retention was proportionate concluding:

> "I consider that the Code and guidance suffer from deficiencies of much the same kind as led to the adverse finding under art.8(2) in *S. [and Marper] v. the United Kingdom* and that those deficiencies are as significant in relation to the retention of photographs as in relation to the retention of fingerprints and DNA."

2. *Law and practice in England and Wales, and Northern Ireland after RMC*

36. After RMC, on 24 February 2017 the Government published a review of the current framework for the acquisition, retention and deletion

of custody images of both convicted and "unconvicted" persons (the Custody Image Review).

37. According to the Custody Image Review, the police's ability to make use of custody images is enhanced by their ability to upload them from forces' local custody IT systems onto the Police National Database ('PND'), which has been in place since 2010. All but nine forces upload custody images onto the PND. As of July 2016, there were over 19 million custody images on the PND, over 16 million of which had been enrolled in the facial recognition gallery making them searchable using facial recognition software. Many of these images are multiple images of the same individual. Recent advances in technology mean that it is now possible to search custody images on the PND.

38. Following publication of the Custody Image Review, police forces must analyse the custody images they hold and update their policy on retention of custody images in accordance with the guidelines set out in the Review.

39. The guidelines indicate that an individual convicted of a non-serious recordable offence should be able to apply for their photograph to be deleted six years after conviction and in such cases there should be a presumption in favour of deletion. The same applies for those who are under 18 and convicted of recordable offences. Persons over 18 convicted of recordable offences which raise public protection issues, or convicted of violent or sexual offences may also apply for the deletion of their photographs, but no presumption of deletion is applied.

40. The guidelines also specify time periods within which the retention of a custody photograph should be reviewed by the police of their own motion, and whether a presumption of deletion should be applied.

41. According to the Custody Image Review, this approach was taken because it is similar to the approach of some other European jurisdictions such as Belgium and the Netherlands.

C. The domestic law relating to the rehabilitation of offenders

42. The rehabilitation of offenders in Northern Ireland is governed by the Rehabilitation of Offences (Northern Ireland) Order 1978 (SI 1978 No. 1908 (NI 27). The purpose of the rehabilitation regime is to enable persons with spent convictions to decline to disclose their spent convictions in particular circumstances and enables such persons to treat a question about his criminal record as not relating to spent convictions.

43. Under article 3(1) of the Rehabilitation Order, where a person has been convicted of an offence and he was not at the time or subsequently subject to a sentence that is excluded from rehabilitation under the Order, after the end of the applicable rehabilitation period for the purposes of the Order he or she shall be treated as rehabilitated and the conviction shall be

treated as spent. In general terms, the consequences of a person being treated as rehabilitated and a conviction being treated as spent are that evidence may not be admitted in any proceedings to prove that the person was charged with prosecuted for, convicted of**,** or sentence**d** for the relevant offence.

D. The supervision of the execution of the *S. and Marper* judgment by the Committee of Ministers of the Council of Europe

44. In its role under Article 46 of the Convention to supervise the execution of judgments of the Court, the Committee of Ministers has examined the measures proposed and taken by the United Kingdom to execute *S. and Marper*, cited above, on a number of occasions.

45. After examining the case at its 1150th (Human Rights) meeting in September 2012, the Committee adopted a decision recalling that the Committee of Ministers had welcomed the authorities' legislative proposals for England and Wales in response to the European Court's judgment and noted with satisfaction that these proposals were adopted in POFA. The resulting amendments included the requirement to destroy a DNA sample within six months or as soon as a DNA profile had been obtained in all cases whether the individual concerned had been convicted or not (see paragraphs 24-27 above).

46. Concerning Northern Ireland, it noted with interest that legislative proposals which replicate POFA were under consideration in Northern Ireland and strongly encouraged the authorities to progress those proposals as quickly as possible.

47. According to the Action plan provided by the United Kingdom to the Committee of Ministers on 14 January 2015, the authorities intended to update the Committee on the progress in executing the Court's judgment, but there have been delays in bringing the relevant legislation into force in Northern Ireland for a number of reasons (see DH-DD(2015)49).

48. Initially there were delays before the Northern Ireland Assembly in adopting the piece of legislation designed to allow implementation of POFA in Northern Ireland which meant that additional powers had to be given to implement the POFA provisions. These were set out in a further piece of legislation, the Northern Ireland (Miscellaneous Provisions) Act 2014. However, following adoption of that Act, it came to light that a drafting error in POFA had been copied into the legislation for Northern Ireland. This error had the effect that a very significant volume of biometric data would inadvertently fall to be destroyed under the new legislative regime upon commencement. Therefore, the 2014 Act was not brought into force and an amendment was adopted to address the problem in a further piece of legislation. The United Kingdom informed the Committee of Ministers that this latest legislation would receive Royal Assent by summer 2015.

However, on 13 April 2016 the United Kingdom informed the Committee of Ministers that due to unforeseen circumstances the legislative provisions were not commenced on the date expected (see DH-DD(2016)489).

49. The United Kingdom wrote again to the Committee of Ministers on 5 September 2016 and said that the Secretary of State for Northern Ireland was working intensively with the Northern Ireland executive and that it was hoped to introduce a bill to Parliament shortly after autumn 2016. Since then, the Committee was informed that bilateral consultations are ongoing between the Committee's Secretariat and the United Kingdom authorities, as the relevant sections of the legislation have not yet come into force due to broader outstanding issues relating to the legacy of the Troubles in Northern Ireland and the absence of a devolved government. Further information was expected from the authorities in early 2019. The United Kingdom have informed the Committee that all relevant practical arrangements relating to the destruction of relevant DNA and fingerprint samples and data are underway.

III. RELEVANT INTERNATIONAL LAW AND PRACTICE

50. For a summary of relevant Council of Europe and European Union legal instruments and an overview of relevant national legislation in a selection of Council of Europe member states, reference is made to the Court's judgment in *S. and Marper v. the United Kingdom* (cited above), §§ 41-53, ECHR 2008.

51. Recommendation No. R (87) 15 of the Committee of Ministers regulating the use of personal data in the police sector (adopted on 17 September 1987) states, *inter alia*:

> "Principle 2 – Collection of data
>
> 2.1. The collection of personal data for police purposes should be limited to such as is necessary for the prevention of a real danger or the suppression of a specific criminal offence. Any exception to this provision should be the subject of specific national legislation.
>
> ...
>
> Principle 3 – Storage of data
>
> 3.1. As far as possible, the storage of personal data for police purposes should be limited to accurate data and to such data as are necessary to allow police bodies to perform their lawful tasks within the framework of national law and their obligations arising from international law.
>
> ...
>
> Principle 7 – Length of storage and updating of data
>
> 7.1. Measures should be taken so that personal data kept for police purposes are deleted if they are no longer necessary for the purposes for which they were stored.

For this purpose, consideration shall in particular be given to the following criteria: the need to retain data in the light of the conclusion of an inquiry into a particular case; a final judicial decision, in particular an acquittal; rehabilitation; spent convictions; amnesties; the age of the data subject, particular categories of data."

52. 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 on 10 February 1992) states, *inter alia*:

"...

8. Storage of samples and data

Samples or other body tissue taken from individuals for DNA analysis should not be kept after the rendering of the final decision in the case for which they were used, unless it is necessary for purposes directly linked to those for which they were collected.

Measures should be taken to ensure that the results of DNA analysis are deleted when it is no longer necessary to keep it for the purposes for which it was used. The results of DNA analysis and the information so derived may, however, be retained where the individual concerned has been convicted of serious offences against the life, integrity or security of persons. In such cases strict storage periods should be defined by domestic law.

Samples and other body tissues, or the information derived from them, may be stored for longer periods:

- when the person concerned so requests; or

- when the sample cannot be attributed to an individual, for example when it is found at the scene of an offence.

...."

IV. COMPARATIVE LAW

53. Concerning the retention of DNA profiles following a conviction for a minor criminal offence four out of thirty one Council of Europe member States surveyed (Cyprus, Ireland, North Macedonia and Montenegro) have indefinite retention periods. Twenty States have retention periods limited in time (Albania, Austria, Belgium, Bosnia and Herzegovina, Croatia, Denmark, Estonia, Finland, France, Hungary, Latvia, Lithuania, the Republic of Moldova, the Netherlands, Norway, Poland, Portugal, Spain, Sweden and Switzerland). It may also be noted that some of those states for example Belgium and Latvia do not provide for retention of data for 'administrative' offences, but only for criminal offences. Of those twenty, seven have a defined retention period (either general, or for more serious offences) linked to the date of death of the convicted person (Bosnia and Herzegovina, Denmark, Finland, the Republic of Moldova, the Netherlands, Norway and Switzerland). Of those seven, the legislation of the Netherlands specifies the longest retention period of twenty years from the date of death for serious offences, with decreasing periods for less serious offences. Three

member States (the Czech Republic, Germany and Malta) do not have specific retention periods but have various substantive limitations on the data retention and require periodic assessments to determine whether the substantive requirements for a prolonged retention are met. Four are without relevant regulation (San Marino, Georgia, Lichtenstein and Romania).

54. With regard to fingerprints, in two member States (Ireland and North Macedonia) fingerprints are kept indefinitely. Twenty-one have retention periods limited in time (Austria, Belgium, Bosnia and Herzegovina, Croatia, Denmark, Estonia, Finland, France, Georgia, Hungary, Latvia, Lichtenstein, Lithuania, the Republic of Moldova, Montenegro, the Netherlands, Norway, Poland, Portugal, Sweden and Switzerland). Of those twenty-one, seven have defined retention period linked to the date of death (Bosnia and Herzegovina, Finland, Latvia, the Republic of Moldova, the Netherlands, Poland, and Switzerland). In four States (the Czech Republic, Germany, Malta and Spain) there are no specific retention periods but there are various substantive limitations and the duty of a periodic assessment of the need of further retention. In four (Albania, Cyprus, San Marino and Romania) the issue of retention of fingerprints is not specifically regulated.

55. As regards the retention of photographs, in two of the member States surveyed (Ireland and North Macedonia) photographs are kept indefinitely. In eighteen States there are periods of retention limited in time (Austria, Belgium, Bosnia and Herzegovina, Croatia, Denmark, Estonia, Finland, France, Georgia, Hungary, Latvia, Lichtenstein, Lithuania, Montenegro, the Netherlands, Norway, Sweden and Switzerland) although it may be noted that Estonia permits indefinite retention of photographs for the most serious offences including crimes of aggression, genocide, crimes against humanity, war crimes and criminal offences for which life imprisonment is prescribed. In five States (the Czech Republic, Germany, Malta, Poland and Spain) there are no specific retention periods but there are various substantive limitations and the duty of a periodic assessment of the need of further retention. In six (Albania, Cyprus, San Marino, the Republic of Moldova, Portugal and Romania) there are no specific regulations for the retention of photographs.

56. In general, the reasons for retention of the relevant personal data (DNA profiles, fingerprints, photographs) of convicted offenders relate to the necessity of crime prevention and effective investigation and prosecution of crime. The legislation in Austria also refers to the need to protect public security and in Ireland the need to retain data for intelligence purposes. The legislation in Sweden also refers to the fulfilment of obligations which follow from international commitments.

57. As to the existence of review mechanisms, in six of the member States surveyed (Albania, Bosnia and Herzegovina, the Czech Republic, the Republic of Moldova, Norway and Poland) there is a possibility of an administrative or other similar specialised review of the necessity of the

data retention. In nineteen (Austria, Belgium, Croatia, Cyprus, Finland, France, Georgia, Germany, Hungary, Ireland, Lithuania, the North Macedonia, Malta, Montenegro, Portugal, Romania, Spain, Sweden and Switzerland) there is a possibility of a judicial review, often coupled with a prior administrative review. In five States (Denmark, Estonia, Latvia, the Netherlands, Lichtenstein) there is no possibility of a review of the necessity of data retention. In San Marino, it would appear that there is no specific regulation on the matter.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

58. The applicant complained that the indefinite retention of his DNA profile, fingerprints and photograph in accordance with the policy of indefinite retention of personal data of any individual convicted of a recordable offence, amounted to a disproportionate and unjustified interference with the right to respect for his private and family life as provided in Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

59. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

60. Relying on *S. and Marper,* cited above, the applicant submitted that the retention of his DNA profile, fingerprints and photograph interfered with his rights under Article 8 of the Convention. He also argued that the policy providing for indefinite retention of his biometric data and photograph was disproportionate and could not be justified because only in

exceptional cases will retention not occur and that restriction is to be applied narrowly. Moreover, the policy had no regard to the issues of rehabilitation or the fact that convictions may become spent as set out in Recommendation R(87) 15 (see paragraph 51 above). According to *S. and Marper,* cited above, the principles in that Recommendation are fundamental to the assessment of proportionality.

61. The Government accepted that the indefinite retention of the applicant's DNA profile, fingerprints and photograph amounted to an interference with his rights under Article 8 but submitted that this interference was "at a very low level". They argued that the retention of his biometric data was in accordance with the law and that the law and relevant policies were accessible and foreseeable as to their effect. They also submitted that the retention of the applicant's biometric data and photograph pursued the legitimate aim of the prevention and detection of crime provided for in Article 8, and underlined that the applicant did not allege the contrary.

62. The Government contended that the retention of the applicant's biometric data and photograph was proportionate because there is a wide margin of appreciation for three reasons. First, there is no consensus between States as to how to approach the retention of the biometric data of person convicted of an offence. Second, the scheme of retention in Northern Ireland is not unusually intrusive, several other European jurisdictions retain biometric data in some cases including DNA samples of convicted persons, indefinitely or for very long periods of time such as the lifetime of the person concerned. Third, the scheme in Northern Ireland means samples will only be taken from people convicted of recordable offences, namely an offence which is punishable by a term of imprisonment. Accordingly, the retention regime has regard to a minimum degree of seriousness in relation to offending. They also submitted that retaining biometric data and photographs is of value in fighting crime, in particular statistics for Northern Ireland show that a significant percentage of convicted adults are re-convicted of a further offence within one or two years. Also awareness that such data is being retained can deter offenders.

2. The Court's assessment

(a) Existence of an interference

63. The Court notes that it is not disputed by the Government that DNA material is personal data and that in the present cases there was an interference with the applicant's right to respect for his private life. The Court, having regard to its case-law, according to which DNA profiles clearly constitute data pertaining to one's "private life" and their retention amounts to an interference with the right to respect for one's private life within the meaning of Article 8 § 1 of the Convention (see *S. and Marper*,

cited above, §§ 67-77), finds no reason to hold otherwise. The Court has also previously found that the retention of fingerprints amounts to an interference with the right to respect for private life, within the meaning of Article 8 § 1 of the Convention (see *S. and Marper*, cited above, §§ 77 and 86). The retention of the applicant's DNA Profile and fingerprints therefore amounted to an interference with his private life.

64. The Government also accepted that retention of the applicant's photograph amounted to an interference with his private life. In so doing, it relied partly on the conclusions of the High Court in *RMC* (see paragraph 33 above). The Court notes that at no stage in the domestic proceedings was there any real doubt expressed about the conclusion that the retention of the applicant's photograph amounted to an interference.

65. Whilst that issue appears to have been settled in the domestic case-law and between the parties, it remains somewhat novel from the perspective of the Court's case-law. The Court recalls that the Commission previously found that the retention and use of photographs taken on arrest by law enforcement authorities did not constitute an interference with the right to respect for private life within the meaning of Article 8 § 1 (see *X v. the United Kingdom*, no. 5877/72, Commission decision of 12 October 1973, Decisions and Reports (DR) 45, pp. 94-94; *Lupker v. the Netherlands*, no. 18395/92, Commission decision of 7 December 1992, unreported, *Kinnunen v. Finland*, no. 24950/94, Commission decision of 15 May 1996, unreported; and *Friedl v. Austria*, no. 15225/89, Commission decision of 16 May 1996, unreported).

66. The case of *S. and Marper*, cited above, did not concern the retention of photographs but in its judgment the Grand Chamber reviewed the case-law set out above (see § 66) and observed that the concept of private life included elements relating to a person's right to their image. In the following paragraph it found that in determining whether the personal information retained by the authorities involves any of the private-life aspects mentioned above, the Court will have due regard to the specific context in which the information at issue has been recorded and retained, the nature of the records, the way in which these records are used and processed and the results that may be obtained (see *S. and Marper,* cited above, § 67).

67. In that connection, the Court notes that the photograph of the applicant was taken on his arrest to be stored indefinitely on the local police database. At the time of its judgment in 2014 the Supreme Court found that the applicant's custody photograph was held on a standalone database, limited to authorised police personnel and which did not have the capability to match photographs whether by way of facial recognition or otherwise (see paragraph 13 above).

68. However, following the High Court's judgment in *RMC*, the Home Office produced a report for England and Wales (the Home Office Review

of the Use and Retention of Custody Images, (see paragraphs 36-37 above) which outlined in some detail the functioning of the relevant databases and the use of facial recognition technology on the content of those databases. This report indicated that the technology had developed since the Supreme Court decision. It explained that the PND is designed to facilitate the sharing of intelligence (see section 5, paragraph 6.11). The PND facial searching facility allows an authorised user (usually a police officer) to search through saved custody images on the PND against an image that they have temporarily uploaded from their local database. According to the Review, police forces in Northern Ireland also run such searches through the PND (see section 5, paragraph 6.15 of the Review).

69. In response to the Court's question on communicating the case about the functionality of the database in Northern Ireland the Government confirmed the conclusion in the Home Office report. It indicated that the applicant's photograph was held on a local database which did not have facial recognition or facial mapping software but that photographs on that database may be uploaded to the Police National Database, which does have such software.

70. The Court recalls that, in considering whether there has been an interference, it will have due regard to the specific context in which the information at issue has been recorded and retained, the nature of the records, the way in which these records are used and processed and the results that may be obtained (see paragraph 66 above). In the present case, given that the applicant's custody photograph was taken on his arrest and will be held indefinitely on a local database for use by the police and that the police may also apply facial recognition and facial mapping techniques to the photograph, the Court has no doubt that the taking and retention of the applicant's photograph amounts to an interference with his right to private life within the meaning of Article 8 § 1.

(b) Whether the interference was justified

71. In order to be justified under Article 8 § 2 of the Convention, any interference must be in accordance with the law, pursue one of the listed legitimate aims and be necessary in a democratic society (see *M.M. v. the United Kingdom*, no. 24029/07, § 191, 13 November 2012).

(i) Whether the interference was "in accordance with the law"

72. The Government contended that the interference was in accordance with the law.

73. The legislative basis for the taking and retention of the applicant's biometric data was the Police and Criminal Evidence (Northern Ireland) Order 1989 (see paragraph 28 above). The power of retention is set out in Article 64 (1A) and is in the same terms as the former s.64 (1A) in the Police and Criminal Evidence Act which applied in England and Wales

until 31 October 2013 (see paragraph 24 above). In respect of s.64 (1A) of the Police and Criminal Evidence Act the Court found in *S. and Marper* (cited above, § 97) that the retention of the applicants' fingerprint and DNA records had a clear basis in the domestic law. However, it went on to observe that section 64 was far less precise in respect of the conditions attached to it and arrangements for the storing and use of this personal information (see *S. and Marper,* cited above, § 98). Overall, on this point the Court concluded that these questions were closely related to the broader issue of whether the interference was necessary in a democratic society. Accordingly it found it was not necessary to decide whether the wording of Section 64 met the "quality of law" requirements within the meaning of Article 8 § 2 of the Convention (see *S. and Marper* (cited above § 99). As the legislative provisions are materially the same in the present case as the provisions in England and Wales examined in *S. and Marper*, cited above, the Court finds no reason to take a different approach in the present case.

74. In coming to that conclusion, the Court also notes that the High Court in *RMC* adopted a similar approach when examining section 64A in relation to the retention of photographs. The High Court found that the provisions of section 64A were too broad and imprecise and when read in conjunction with the relevant guidance then in force for England and Wales. However, it too concluded that it would be appropriate to examine the issues in the case from the perspective of proportionality rather than lawfulness (see *RMC,* §§ 45-46).

(ii) Legitimate aim

75. As to whether there was a legitimate aim, the Court also considers it appropriate to adopt the same approach as that taken in *S. and Marper* (cited above, § 100). Accordingly, it considers that retention of biometric data and photographs pursues the legitimate purpose of the detection and, therefore, prevention of crime. While the original taking of this information pursues the aim of linking a particular person to the particular crime of which he or she is suspected, its retention pursues the broader purpose of assisting in the identification of persons who may offend in the future.

(iii) Necessary in a democratic society

76. The relevant Convention principles are summarised in the Court's judgment in the case of *S. and Marper* (cited above, §§ 101-104). Unlike that case, which concerned the retention of personal data of persons not convicted of criminal offences, the question in the present case is whether the retention of the biometric data and photograph of the applicant, someone convicted of driving with excess alcohol, was justified under Article 8 § 2 of the Convention (see *a contrario S. and Marper*, cited above, § 122 and see *Peruzzo and Martens v. Germany* (dec.), no. 7841/08, 57900/12, 4 June 2013).

(α) Margin of appreciation

77. A margin of appreciation must be left to the competent national authorities in this assessment. The breadth of this margin varies and depends on a number of factors, including the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference. The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted. Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider (see *S. and Marper* cited above § 102).

Degree of consensus amongst contracting States

78. The Government have advanced three reasons in relation both to the retention of biometric data and of photographs, as to why the margin of appreciation available to the State is wide in the present case based on the degree of consensus amongst contracting States (see paragraph 62 above). First, that there is no consensus between States as to how to approach the retention of the biometric data of person convicted of an offence. Second, that the scheme of retention in Northern Ireland is not unusually intrusive, as several other European jurisdictions retain biometric data, in some cases including DNA samples of convicted persons, indefinitely or for very long periods of time such as the lifetime of the person concerned. Third, that the scheme in Northern Ireland means samples will only be taken from people convicted of recordable offences, namely offences that are punishable by a term of imprisonment. Accordingly, the retention regime has regard to a minimum degree of seriousness in relation to offending.

79. The Government's submission that there is no consensus between contracting States as to how to approach the retention of the biometric data of person convicted of an offence, is based on an assumption that a regime which provides for retention for biological life, or biological life plus a certain number of years is comparable to a regime of indefinite retention. However, the Court considers that in concluding whether those two types of regime can be equated, consideration should be given to the nature of the data and the impact of retaining a person's data after their death.

80. In relation to fingerprints, the Court has previously found that they do not contain as much information as DNA profiles (see *S. and Marper*, cited above § 78). Moreover, it has not been suggested that it is possible to identify relationships between individuals from fingerprint or photograph data. The Court therefore accepts that in relation to fingerprints and photographs, periods of retention which end on or shortly after death could be considered comparable to indefinite retention; although, it is aware of the

possibility of rapid technological advances in this domain in particular concerning technology for facial recognition and facial mapping (see the developments outlined in paragraphs 67-70 above). That said, for both fingerprints and photographs the majority of States surveyed have put in place regimes with defined retention periods.

81. However, the Court considers that the situation is different concerning DNA profiles and that there is a distinction between retaining DNA profiles indefinitely and setting a defined limit on the retention period linked to the biological life of the person concerned, even if the period of retention foreseen is long. That is because retaining genetic data after the death of the data subject continues to impact on individuals biologically related to the data subject. The Court recalls that when considering the nature of the interference with privacy occasioned by the retention of DNA profiles, it has observed that the use of DNA profiles for familial searching with a view to identifying a possible genetic relationship between individuals is of a highly sensitive nature and there is a need for very strict controls in this respect. In the Court's view, the DNA profiles' capacity to provide a means of identifying genetic relationships between individuals is in itself sufficient to conclude that their retention interferes with the right to the private life of the individuals concerned. The frequency of familial searches, the safeguards attached thereto and the likelihood of detriment in a particular case are immaterial in this respect (see *S. and Marper*, cited above, § 75). As familial searching can be carried out on DNA profiles after the death of the data subject, the Court cannot accept the submission that it is possible to equate the retention of biometric data up to a fixed point in time linked to the death of the person from whom it was taken, with its indefinite retention.

82. It is true that in *S. and Marper*, cited above, the Court found the United Kingdom was alone in retaining indefinitely the DNA of unconvicted persons and concluded that the strong consensus existing among the Contracting States was of considerable importance and narrowed the margin of appreciation left to the respondent State in the assessment of the permissible limits of the interference with private life in this sphere (see *S. and Marper*, cited above, § 112). The situation is not exactly the same in the present case where even taking account of the distinction identified between retention linked to the death of the data subject and indefinite retention in relation to DNA profiles, there are a small number of states amongst those surveyed who operate indefinite retention regimes (see paragraph 53 above). Nonetheless, the Court considers that those states are in a distinct minority. The majority of States have regimes in which there is a defined limit on the period for which data can be retained. It also takes account of the fact that the Government in their submissions**,** referred to schemes permitting indefinite retention of biometric data of convicted persons in Austria and Lithuania. However, those regimes have

subsequently been amended to provide for definite periods of detention (see paragraph 53 above).

83. The Government advanced a separate submission relating to the margin of appreciation, which was that the scheme in Northern Ireland means that DNA samples will only be taken (and so DNA profiles only retained) from people convicted of recordable offences, namely an offence which is punishable by a term of imprisonment. Accordingly, the retention regime has regard to a minimum degree of seriousness in relation to offending. The Court notes that the Grand Chamber previously rejected a similar submission in *S. and Marper*, cited above, where the fact that data was only taken and so retained in relation to recordable offences under the scheme examined, still left such a wide variety of offences falling within the retention regime that the regime could be characterised as applying whatever the nature or seriousness of the offence (see *S. and Marper,* cited above, §§ 26, 110 and 119). The Court sees no reason to take a different approach from the Grand Chamber.

84. In light of the above, the Court cannot conclude that the State's margin of appreciation is widened in the present case to the extent claimed by the Government. The United Kingdom is one of the few Council of Europe jurisdictions to permit indefinite retention of DNA profiles, fingerprints and photographs of convicted persons. The degree of consensus existing amongst Contracting States has narrowed the margin of appreciation available to the respondent State in particular in respect of the retention of DNA profiles for the reasons set out above (see paragraphs 81-82 above).

Judicial scrutiny

85. With reference to the extensive amount of judicial scrutiny at the domestic level, the Government have contended that the question whether it was necessary to retain the applicant's data falls within the state's margin of appreciation and it was therefore not for this Court to decide. In this respect, the Court recalls that in Article 8 cases it has generally understood the margin of appreciation to mean that, where the independent and impartial domestic courts have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and its case-law, and adequately balanced the applicant's personal interests against the more general public interest in the case, it is not for it to substitute its own assessment of the merits (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities, unless there are shown to be compelling reasons for doing so (see *McDonald v. the United Kingdom*, no. 4241/12, §§ 56-57, 20 May 2014).

86. However, the Court considers in the present case there are reasons for doing so. In this connection, it notes that the proportionality of the

measure was scrutinised by the domestic courts up to and including the Supreme Court. However, the courts' made their assessment in particular relating to the retention of the applicant's photograph on the basis that it was held on a local database and could not be searched against other photographs, a conclusion which appears to have been superseded by technological developments (see paragraph 69 above). In that respect the Court recalls the importance of examining compliance with the principles of Article 8 where the powers vested in the state are obscure, creating a risk of arbitrariness especially where the technology available is continually becoming more sophisticated (see *Catt v. the United Kingdom*, no. 43514/15, § 114, 24 January 2019). The Supreme Court also proceeded in its analysis on the basis that very few states have a process of review, whereas it would appear that of the States surveyed by the Court most have a form of administrative and/or judicial review available (see paragraphs 15 and 57 above). Finally, concerning DNA profiles, the Supreme Court considered that there was no distinction to be identified between retention linked to the death of the data subject, and indefinite retention (see paragraph 15 above). However, the Court has rejected the Government's submission made on the same basis (see paragraph 81 above).

(β) Conclusions

87. The Court recalls that it found the application of *Peruzzo and Martens*, cited above, to be inadmissible on the basis that it was manifestly ill-founded. In that case, the applicants had been repeatedly convicted of serious offences and sentenced to prison. The law provided for the indefinite retention of their biometric data. That data was retained for those convicted of serious and/or repeat offences, and the Federal Criminal Office was obliged to review at regular intervals whether the continued storage of the data was still necessary for the performance of its task or otherwise to be deleted at the latest every ten years. However, the Court has also found a regime with a definite retention period of forty years in law but which amounted to an indefinite period in practice, to be in violation of the Convention (see *Aycaguer v. France*, no. 8806/12, § 42, 22 June 2017). In that case, the applicant was convicted of a minor offence and subject to fine. His biometric data was retained under provisions which did not differentiate according to the nature and/or seriousness of the offence committed, and he had no possibility to request the deletion of the data (see *Aycaguer,* cited above, §§ 43-47). It also notes that the Court was satisfied in *Peruzzo and Martens*, cited above, that there was nothing to establish that the domestic courts or authorities in the proceedings at issue had not observed the relevant guarantees (see § 48). Whereas in *Aycaguer,* cited above, the authorities' failure to implement a decree had created a degree of ambiguity in the legal provisions governing the retention of data, and they had not

given any follow up to the decision of the Constitutional Council of 16 September 2010 criticising the regime then in force (see §§ 42-43).

88. There is a narrowed margin of appreciation available to States when setting retention limits for the biometric data of convicted persons (see paragraph 84 above). However, in light of the considerations set out above (see paragraph 87) the Court considers that in respect of retention regimes for the biometric data of convicted persons, the duration of the retention period is not necessarily conclusive in assessing whether a State has overstepped the acceptable margin of appreciation in establishing the relevant regime. In that connection, it underlines that there is not the same risk of stigmatisation in retaining the data as in *S. and Marper* (cited above, § 122). Also of importance is whether the regime takes into account the seriousness of the offending and the need to retain the data, and the safeguards available to the individual. Where a State has put itself at the limit of the margin of appreciation in allocating to itself the most extensive power of indefinite retention, the existence and functioning of certain safeguards becomes decisive (see *Catt,* cited above, § 119).

89. As to whether the reasons adduced by the national authorities to justify the measure of indefinite retention were "relevant and sufficient", the Court notes that the Government submitted that the more data is retained, the more crime is prevented, providing a variety of different case studies to support that general contention. In this connection, the Court considers that accepting such an argument in the context of a scheme of indefinite retention would in practice be tantamount to justifying the storage of information on the whole population and their deceased relatives, which would most definitely be excessive and irrelevant (see *M.K. v. France*, no. 19522/09, cited above § 40, 18 April 2013 and *Aycagauer,* cited above, § 34). The Court also observes in that connection that the Government highlighted that those who had been convicted were in fact most likely to be convicted again after a relatively short period of two years (see paragraph 62 above).

90. The Government has also highlighted a particular need to retain DNA in Northern Ireland, where the investigation of historic cases forms part of the United Kingdom's obligations under Article 46 in the execution of the so-called "*McKerr* group of cases" (see paragraph 49 above).

91. As to the relevance of the United Kingdom's obligations under Article 46 § 2 of the Convention, the Court recalls that the question of compliance by the High Contracting Parties with its judgments falls outside the Court's jurisdiction if it is not raised in the context of the "infringement procedure" provided for in Article 46 §§ 4 and 5 of the Convention (see *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, § 102, 11 July 2017). The Government have explained in their submissions that the management of the Northern Ireland DNA database is a practical consideration selected by them in order to enable them to discharge their

obligations under Article 46 § 2. The United Kingdom's choice of means in that context falls outside the Court's jurisdiction and cannot affect the examination of Convention principles that the Court is called upon to undertake in the present case. In the exercise of its competence under Article 46 § 2 of the Convention, the Committee of Ministers is better placed than the Court to assess the specific measures to be taken (see *Rutkowski and Others v. Poland*, nos. 72287/10 and 2 others, § 207, 7 July 2015).

92. Insofar as the Government's submission could concern the substance of the proportionality test under Article 8, the Court considers that the necessity to preserve parts of the DNA database for the purposes of historic investigations is not significantly different to the general arguments advanced that retaining biometric data is helpful for investigating other types of 'cold cases', examples of which were included as case studies illustrating the Government's general argument set out above (see paragraph 89).

93. The Court recalls in general terms that it has found in the context of the positive obligation arising under Article 2 that the public interest in investigating and possibly obtaining the prosecution and conviction of perpetrators of unlawful killings many years after the events is firmly recognised (see *Jelić v. Croatia*, no. 57856/11, § 52, 12 June 2014). Investigating 'cold cases', is also in the public interest, in the general sense of combating crime (see paragraph 75 above). However, also in the context of unlawful killings the Court has underlined that the police must discharge their duties in a manner which is compatible with the rights and freedoms of other individuals (see *Osman v. the United Kingdom*, 28 October 1998, § 121, *Reports of Judgments and Decisions* 1998-VIII). Indeed, without respect for the requisite proportionality vis-à-vis the legitimate aims assigned to such mechanisms, their advantages would be outweighed by the serious breaches which they would cause to the rights and freedoms which States must guarantee under the Convention to persons under their jurisdiction (see *Aycaguer*, cited above, § 34).

94. Having chosen to put in place a regime of indefinite retention, there was a need for the State to ensure that certain safeguards were present and effective for the applicant (see paragraph 88 above), someone convicted of an offence (now spent, see paragraph 7 above). However, the applicant's biometric data and photographs were retained without reference to the seriousness of his offence and without regard to any continuing need to retain that data indefinitely. Moreover, the police are vested with the power to delete biometric data and photographs only in exceptional circumstances (see paragraph 30 above). There is no provision allowing the applicant to apply to have the data concerning him deleted if conserving the data no longer appeared necessary in view of the nature of the offence, the age of the person concerned, the length of time that has elapsed and the person's

current personality (see *Gardel v. France*, no. 16428/05, § 68, ECHR 2009). Accordingly, the review available to the individual would appear to be so narrow as to be almost hypothetical (see paragraph 31 above, and also *M.K. v. France*, no. 19522/09, § 25, 18 April 2013).

95. In that connection, in respect of photographs, the Court considers it of interest that the regime in England and Wales was changed after *RMC* to permit persons convicted of less serious recordable offences, to request deletion of their photographs after six years, with a presumption of deletion (see paragraph 39 above). It underlines however that the test of proportionality is not that another less restrictive regime could be imposed. The core issue is whether, in adopting the measure and striking the balance it did, the legislature acted within the margin of appreciation afforded to it (see *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 110, ECHR 2013 (extracts).

96. For the reasons set out above, the Court finds that the indiscriminate nature of the powers of retention of the DNA profile, fingerprints and photograph of the applicant as person convicted of an offence, even if spent, without reference to the seriousness of the offence or the need for indefinite retention and in the absence of any real possibility of review, failed to strike a fair balance between the competing public and private interests. The Court recalls its finding that the State retained a slightly wider margin of appreciation in respect of the retention of fingerprints and photographs (see paragraphs 84 above). However, that widened margin is not sufficient for it to conclude that the retention of such data could be proportionate in the circumstances, which include the lack of any relevant safeguards including the absence of any real review.

97. Accordingly, the respondent State has overstepped the acceptable margin of appreciation in this regard and the retention at issue constitutes a disproportionate interference with the applicant's right to respect for private life and cannot be regarded as necessary in a democratic society.

98. There has accordingly been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

99. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

100. The applicant claimed non-pecuniary damages without specifying an amount.

101. The Government contested that claim.

102. The Court considers that, for the reasons given in the *S. and Marper* case (cited above, § 134), the finding of a violation may be regarded as constituting sufficient just satisfaction in this respect. The Court accordingly rejects the applicants' claim for non-pecuniary damage.

B. Costs and expenses

103. The applicant made no claim for costs and expenses; accordingly the Court makes no award on this account.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 8 of the Convention;

3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 13 February 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos Registrar	Ksenija Turković President