C1/2008/1466

IN THE COURT OF APPEAL
ON APPEAL FROM
THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MCCOMBE J

B E T W E E N:

THE QUEEN

On the application of

ANDREW WOOD

Appellant/Claimant

And

THE COMMISSIONER OF POLICE FOR THE METROPOLIS

Respondent/Defendant

APPELLANT'S SUPPLEMENTAL SKELETON ARGUMENT

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1) This skeleton argument is lodged further to the decision of the Grand Chamber in *S and Marper v United Kingdom* Appns No 30562 and 30566/04. It is limited to considering the impact of that case. It deals in turn with:
   a) The decision of the Grand Chamber.
   b) The relationship between the decision of the Grand Chamber and that of the House of Lords.

c) The impact of the decision on the decision of McCombe J in relation to Article 8.

The decision of the Grand Chamber

2) The ECtHR was concerned (as was the House of Lords) with the retention of DNA samples, DNA profiles and fingerprints taken from individuals who had been arrested but not convicted. Such material was retained indefinitely but was available only to the police. The Court considered the uses to which DNA material could be put at paragraphs 38-40. There was a power to destroy the material but this was only possible in exceptional cases and was not subject to any independent review (Para 35 and 119). The Court was concerned only with retention of the data and not its taking.

3) On the question whether there was an interference with Article 8(1) the Court set out general principles at paragraphs 66-7. At Para 67 it said:

"The mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8 (see *Leander v. Sweden,* 26 March 1987, § 48, Series A no. 116). The subsequent use of the stored information has no bearing on that finding (*Amann v. Switzerland* [GC], no. 27798/95, § 69, ECHR 2000-II). However, 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, *mutatis mutandis*, *Friedl*, cited above, §§49-51, and *Peck v. the United Kingdom*, cited above, § 59)".

4) The Respondent (skeleton Para 60-1) relies on this passage. It is suggested that it requires the court to consider, among other things whether information is kept permanently or on a national database (Respondent's skeleton Para 64), and whether it has been held as part of a file concerning details of his activities over a significant period of time (Para 49(d)).

5) However, this threatens to make paragraph 67 internally incoherent. If the "mere storage" of data relating to the private life of an individual involves an interference within the meaning of Art 8 then the fact and manner of storage is not in itself an

element in deciding whether information does relate to the private life aspects mentioned. The apparent difficulty can be resolved by recognizing that the matters identified in paragraph 67 are directed to the quality of the information concerned and how it relates to an individual's private life rather than the extent, quantity and duration of storage[1]. Thus it focuses on matters such as whether the information identifies or can identify the individual or reveal private details about them. What matters here is potential rather than the actual use to which the material has been or is intended to be put. Moreover, some data contains sufficient private information that its storage will inevitably involve an interference for Article 8 purposes.

6) The specific discussion of the samples with which the court is concerned is consistent with this. So, in relation to celluar samples the court noted the level of personal detail that they contained or might be extracted from them [Para 71-2] and concluded:

> "Given the nature and the amount of personal information contained in cellular samples, their retention *per se* must be regarded as interfering with the right to respect for the private lives of the individuals concerned. That only a limited part of this information is actually extracted or used by the authorities through DNA profiling and that no immediate detriment is caused in a particular case does not change this conclusion"

7) Similarly, DNA profiles were noted to contain substantial amounts of unique personal data. At paragraph 75 the court found "the DNA profiles' capacity to provide a means of identifying genetic relationships between individuals (see paragraph 39 above) is in itself sufficient to conclude that their retention interferes with the right to the private life of the individuals concerned". This was so even though this information could be revealed only to specialists using computer technology.

8) The Court also held that "the retention of fingerprints constitutes an interference with the right to respect for private life" [86]. Its discussion of this issue is at paragraphs 78-86. Having considered *Mcveigh* (Appn No 8022/77) and *Kinnunen v Finland*

[1] Except to the extent that the term "storage" implies a level of systematic retention.

(Appn 24950/94 - see further below) the Court went on at paragraph 81 (added emphasis):

> "Having regard to these findings and the questions raised in the present case, the Court considers it appropriate to review this issue. It notes at the outset that the applicants' fingerprint records constitute their personal data (see paragraph 68 above) which contain **certain external identification features much in the same way as, for example, personal photographs or voice samples**".

9) And, having considered *Friedl v Austria* (1996) 21 EHRR 83) - see below*)* and *P.G. and J.H. v. the United Kingdom*, no. 44787/98, at paragraphs 84-5 (added emphasis):

> "84. **The Court is of the view that the general approach taken by the Convention organs in respect of photographs and voice samples should also be followed in respect of fingerprints.** The Government distinguished the latter by arguing that they constituted neutral, objective and irrefutable material and, unlike photographs, were unintelligible to the untutored eye and without a comparator fingerprint. While true, this consideration cannot alter the fact that fingerprints objectively contain unique information about the individual concerned allowing his or her identification with precision in a wide range of circumstances. They are thus capable of affecting his or her private life and retention of this information without the consent of the individual concerned cannot be regarded as neutral or insignificant.
>
> "85. The Court accordingly considers that the retention of fingerprints on the authorities' records in connection with an identified or identifiable individual may in itself give rise, notwithstanding their objective and irrefutable character, to important private-life concerns".

10) The Respondent states (skeleton paragraph 64) that what led to the finding of an interference was the further observation at paragraph 86 that the fingerprints were "subsequently recorded on a nationwide database with the aim of being permanently kept and regularly processed by automated means for criminal-identification purposes". This is not the case. The finding at paragraph 85 that retention may give rise to important private life concerns was a response to the government's submission that they merely contained objective information and "unlike photographs" were unintelligible to the untutored eye. The use of the word "may" in that paragraph is not intended to suggest that such retention will only be an interference where it is combined with other features. It is an explanation of the conclusion, which is

generally expressed, that "the retention of fingerprints constitutes an interference with the right to respect for private life". It has to be read together with paragraph 67, which makes clear that it is the potential use of the data that matters rather than its actual use. Retention of fingerprints is an interference because they have the potential to affect private life.

11) The passage relied on by the Respondent is not the basis for the decision. It is introduced by the words "in the instant case, the Court notes furthermore". It prefaces an observation that "in this regard" (i.e. in the operation of the database) fingerprints had a less important impact than other samples. But that did not affect the conclusion. If the ECtHR had intended this to be a critical element then its findings would have included a phrase such as "in the circumstances of this case" the retention of fingerprints is an interference.

12) The effect of the decision of the ECtHR in *Marper* is that the type and quality of information contained in DNA samples, profiles and fingerprints is such that their mere storage by the state in relation to an identified or identifiable individual is an interference with the right to respect for private life within Article 8(1).

13) The ECtHR did not have to make a decision about photographs but it is clear that it would have reached the same decision. Indeed it would have regarded a photograph of an identified individual as inherently more private than fingerprints.

Justification

14) In relation to justification the Court did not find it necessary to consider whether the interference was in accordance with law although it observed at paragraph 99 that the term "purposes related to the prevention or detection of crime" was "worded in rather general terms and may give rise to extensive interpretation".

15) The Court dealt with the general principles in relation to justification at paragraphs 101-4, noting that:

> "the intrinsically private character of this information calls for the Court to exercise careful scrutiny of any State measure authorising its retention and use by the authorities without the consent of the person concerned" (Para 104)[2].

16) The court concluded at paragraph 125 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, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard".

17) The Court found the following factors relevant:

a) The consensus among other contracting states was for more limited retention (Para 112).

b) The regime for retention was not time limited and allowed for indefinite retention whatever the offence for which the person had been arrested (Para 119).

c) There was no provision for independent review of the justification for retention. (Para 119).

d) There was a risk that the retention of the data stigmatized the Applicants and gave rise to a perception that they were not being treated as innocent in that their data was retained indefinitely as with convicted persons (Para 122). Similar data gathered from other unconvicted people was destroyed.

18) The Court did not examine the Appellant's complaint under Article 14 separately.

[2] See also para 120 where the Court said: such an indiscriminate and open-ended retention regime as the one in issue calls for careful scrutiny regardless of [the differences between the categories of data retained]".

The relationship between the decision of the Grand chamber and the House of Lords

19) In *Kay v Lambeth LBC* [2006] 2 AC 465 the House of Lords held that the domestic principles of *stare decisis* applied so that in the event of a conflict between a decision of the House of Lords and a later decision of the ECtHR, lower courts should follow and apply the decision of the House of Lords (paras 40-5 per Lord Bingham). This has since been applied and affirmed in *R (RJM) v SSWP* [2008] 3 WLR 1023 at Para 64 and in *R (Purdy) v DPP* [2008] EWHC 2565. This rule does not apply in wholly exceptional circumstances of which an example is the decision of the Court of Appeal in *D v East Berkshire Community NHS Trus*t [2004] QB 558.

20) It is unnecessary to consider what other circumstances may be exceptional for these purposes because both parties to this appeal accept that *Marper* in the House of Lords did not compel the judge to reach the result that he did as a matter of precedent. Both argue that *Marper* is distinguishable although they seek to identify different distinguishing features. Despite this the Respondent argues that to the extent that guidance differs in any relevant way between the House of Lords and Strasbourg the Court of Appeal should follow the guidance of the House of Lords (Skeleton Para 58).

21) This goes further than required by *Kay v Lambeth* and is contrary to principle. When he referred to adherence to precedent (para 42) and to the "domestic rule" (para 43) Lord Bingham was referring to the established rule that an authority is binding as to its ratio but not otherwise (see e.g. Halsbury's Laws Vol 37 para 1237-8). Since the ratio of *Marper* does not compel the outcome argued for by the Respondent the court is faced with two persuasive authorities. It should follow the ECtHR as being the more authoritative.

22) In any event, and should it become relevant, the circumstances of *Marper* are capable of being exceptional circumstances within the framework set in *Kay* in that:

a) The decision of the ECtHR was in respect of the same litigation as had been considered by the House of Lords.

b) At least in relation to Article 8(1) the House of Lords expressly rejected an argument based on different domestic attitudes to the retention of data. It noted that the meaning of Art 8(1) must receive a uniform meaning throughout the contracting states and its decision expressly followed its understanding as to the current state of convention case law (Para 27 per Lord Steyn and Para 66 per Lord Rodger).

c) The decision of the ECtHR expressly revisited the Commission decisions on which the House of Lords relied in coming to this conclusion (although recognizing that they were not decisive see House of Lords paragraph 25) - *McVeigh, O'Neill and Evans v United Kingdom* (1981) 5 EHRR 71 and *Kinnunen v Finland* (Application No 24950/94) (unreported) 15 May 1996.

d) The decision of the EctHR was a unanimous decision of the Grand Chamber. It reached an unequivocal decision that there was a prima facie interference contrary to the doubts expressed by the House of Lords.

e) That decision was not, on the approach advanced above, factually dependent but was to the effect that the storage of individually identified fingerprints or DNA samples or profiles was an interference within the meaning of Article 8(1).

23) The Respondent asserts (skeleton Para 57) that *Purdy* establishes in every case that strict precedent applies even where the conflicting decisions arise in the same litigation. This proposition does not follow from the decision in that case. It involved the earlier decision of the ECtHR in *Pretty v United Kingdom* 35 EHRR 1, which had followed from the decision of the House of Lords in *R (Pretty) v DPP* [2002] 1 AC 800. The Court considered at paragraph 45 that there had been "no more than a difference of opinion as to the ambit of art 8(1) between the House of Lords and the ECtHR" and that this did not fall within the exceptional circumstances contemplated by Lord Bingham. Indeed the Court had considerable doubt about the extent of the disagreement. Nothing in *Purdy* leads to the conclusion that the combination of factors identified above cannot be exceptional circumstances.

The impact of the ECtHR decision in Marper in this case

Whether there is a prima facie interference

24) For the reasons discussed above the effect of *Marper* is that where the police store a photograph of an identified individual then that is a prima facie interference with Article 8(1). This is because the information contained in the photograph is, in itself, such that it relates to the private life of the individual (Para 67). The discussion in *Marper* at 78 – 86 makes clear that this applies to all such photographs. It is therefore unnecessary to consider the other factors in Para 67 in further detail. If this is the correct approach then McCombe J ought to have held that the retention of images of the Claimant was a prima facie interference under Article 8(1).

25) Alternatively, the ECtHR decision significantly undermines the basis for the decision below (discussed in the Appellant's original skeleton at paras 35-6) and the application of the factors in the ECtHR decision at para 67 leads to the conclusion that there is a prima facie interference.

26) Paragraphs 52-4 of the decision of McCombe J rely on *X v UK* (Appn 5877/72), *Friedl* ((1996) 21 EHRR 83)*, Lupker v Netherlands* (Appn No 18395/91) and *Doorson v Netherlands* (Appn 202524/92) in support of the propositions that there was:

a) no interference by retention of the photographs (in respect of which he also relied on *Kinnunen v Finland* Appn 24950/94) and that;

b) the use of lawfully obtained photographs by the police for the purpose of investigations will not normally entail interference in the absence of publication elsewhere.

27) All of these decisions need to be reconsidered in the light of the ECtHR in *Marper*. In particular:

a) *Kinnunen*, in which photographs and fingerprints had been taken following the Applicant's arrest, was expressly revisited by the ECtHR and the opposite conclusion reached. *X v UK* was not expressly reconsidered but it shared the same relevant features (photographs were taken and retained following the Applicant's arrest) and, so far as it relates to retention, cannot survive the revision of *Kinnunen.* It also follows that the exception identified in paragraph 30 of the Appellant's original skeleton no longer applies, at least in relation to photographs[3].

b) The same applies to *Lupker* and *Doorson* to the extent that they are said to support the proposition that the retention of photographs taken in connection with an Applicant's arrest do not constitute an intrusion on his privacy (*Doorson* was cited as supporting this proposition in *Kinnunen* at Para 2(ii)).

c) *Marper* does not expressly deal with the use of data although it emphasises that mere retention is an interference irrespective of use. If the retention of information which is capable of being used against the interests of the Applicant is an interference then the actual use of such data must be an interference as well. *Lupker* and *Doorson* did not support the proposition for which they were cited (see Appellant's original skeleton at paragraph 36(a)) but if they did then that cannot survive the approach in *Marper* in relation to retention.

d) The decision in *Friedl* is explained by the ECtHR in *Marper* at para 82 as follows:

[3] This suggested that there was an exception to the rule that the storing of information relating to a persons private life involves an interference does not apply where "the information that is held merely records the fact of a publicly known event such as an arrest and where there is no additional surveillance or similar information in respect of the Applicant or any subjective appreciations which he might have wished to refute".

"the Commission considered that the retention of anonymous photographs that have been taken at a public demonstration did not interfere with the right to respect for private life. In so deciding, it attached special weight to the fact that the photographs concerned had not been entered in a data-processing system and that the authorities had taken no steps to identify the persons photographed by means of data processing"

e) The key feature in *Friedl* is that the photograph was anonymous and that the Applicant was not identified. The Respondent notes (skeleton Para 29) that this is difficult to reconcile with the facts of that case (as recorded at Para 45 of the Commission decision) but the case has consistently been explained as turning on this point (see e.g. *Perry v United Kingdom* (2004) 39 EHRR 3). This interpretation has been authoritatively confirmed by *Marper*. In the light of it the judge's reliance on it for the proposition at (26(a)) above is unsustainable. It would only be correct if the Appellant was not identified or identifiable.

28) At paragraphs 55 and 59 McCombe J relied on the fact there was no systematic collection and retention of secret police files over many years and there was no "compilation of a general dossier". The ECtHR decision provides no support for the notion that interference depends on the quantum of information accumulated or the length of time over which it is gathered. Storage itself is a sufficient interference although its extent is relevant to justification. *Marper* itself concerned data collected on a single occasion as did *PG & JH* referred to at paragraph 83. The Respondent now seeks to identify as crucial the fact that the fingerprints in *Marper* were "subsequently recorded on a nationwide database with the aim of being permanently kept and regularly processed by automated means for criminal identification purposes". This was not part of the reasoning of the ECtHR (see above) and these features have been absent from the other cases where a violation has been found. Equally *Marper* makes clear that <u>permanent</u> retention, as opposed to storage, is not necessary at the Art 8(1) stage.

29) At paragraph 56-7 McCombe J reasoned that if DNA samples were at most only a very modest interference then *a fortiori* photographs involved no interference at all.

The ECtHR decision makes clear that photographs of identified individuals do contain information of a private character. This is clear guidance on the subject matter of this decision.

30) At paragraph 59 McCombe J observed that the Appellant could have little expectation of privacy. *Marper* confirms (following *PG &* JH) that the permanent recording of data may involve an interference even if the information concerned was available in the public domain.

31) Applying the factors in paragraphs 66 and 67 of the decision in *Marper* the data held by the Defendant clearly did relate to the Appellant's private life. The photograph itself contained information about the Appellant's image, his approximate age and ethnic identity (expressly noted as significant in *Marper* at Para 66). The Appellant also relies on the factors identified in paragraphs 31-4 of his original skeleton.

Justification

In accordance with law

32) The ECtHR did not address this issue separately, considering that it was closely related to justification [Para 99]. However, its decision does have a bearing on the Appellant's appeal on this issue. McCombe J accepted an argument to the effect that the Data Protection Act 1998 provided safeguards that rendered any interference certain and so in accordance with law. The ECtHR considered the DPA at length and the Data Protection Directive. Despite this there was no suggestion that the DPA was a solution to any concerns about whether "the quality of law" requirements were met or that it provided appropriate safeguards to prevent abuse (Para 103) or remedied the "indiscriminate and open ended retention regime" in issue in that case. This supports the Appellant's contention that there must be a specific and clear legal foundation for the interference in this case.

Proportionality

33) The judge approached this case on the basis that if there was an interference then it was slight and required correspondingly little in the way of justification [Para 57 and 74]. The ECtHR in *Marper* makes clear that the appropriate starting point is different. The protection of personal data is of fundamental importance [Para 103] and "the intrinsically private character of this information calls for the Court to exercise careful scrutiny of any State measure authorising its retention and use by the authorities without the consent of the person concerned" [Para 104].

34) The regime for retention in this case shares many of the open ended and indiscriminate features that were present in *Marper* and led to the finding of a violation in that case. In particular:

a) Photographs might be kept indefinitely on the CO11 database so long as they retained intelligence value. This is not automatic retention but the criteria provide only the vaguest guidance and could, in this case be satisfied simply by his attending a peaceful protest. The effect is to stigmatise the Appellant (and to discourage him from participating in further lawful activity) when he has done nothing unlawful and is not suspected of having done so. This places him in the same position addressed by the ECtHR at paragraphs 122-3 and creates a perception that he is not being treated as innocent in comparison with other unconvicted persons.

b) It seems that photographs will be kept indefinitely at SCD4 whatever the Appellant does in the future. According to the Respondent's summary of the present rules access to these images is restricted to cases where there is a specific crime where the photograph is believed to be of evidential value (Respondent's skeleton Para 23). This is very similar to the basis on which the samples in *Marper* were said to be retained although the process of linking the data to a crime would necessarily be different. There is no provision for independent scrutiny of whether retention is necessary indeed there seems to be no provision for the destruction of image in any circumstances. Images could be retained long

after they cease to be of any possible evidential worth even if an offence does come to light. Given the unstructured nature of the power to retain there are no sufficient safeguards on the use of information. Indeed, on the Respondent's case the current checks on access to information could be changed at any time.

MARTIN WESTGATE

January 21, 2009