S. v. United Kingdom: The European Court of Human Rights Overturns the United Kingdom's Procedure for the Indefinite Retention of Unconvicted Persons' Personal Data

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I. OVERVIEW

When the Parliament of the United Kingdom amended the Police and Criminal Evidence Act of 1984 (PACE) in 2001, the United Kingdom became the only Member State of the Council of Europe to allow the indefinite and systematic retention of DNA profiles and cell samples taken from persons arrested for, but not convicted of, a crime.[1] As a result, the police denied the applications of S.[2] and Michael Marper to have their fingerprints and DNA samples destroyed after the proceedings against them had ended in an acquittal and a discontinuance, respectively.[3] S., born in 1989, was arrested on January 19, 2001, for attempted robbery.[4] Pursuant to sections 61 and 63 of PACE, the police took samples of S.'s DNA and fingerprints.[5] He was subsequently

1. S. v. United Kingdom, App. Nos. 30562/04 & 30566/04, para. 47 (Eur. Ct. H.R. Dec. 4, 2008), http://www.echr.coe.int/echr/en/hudoc (follow "HUDOC Database" hyperlink; search Application Number for "30562/04"). The Criminal Justice and Police Act 2001, section 82, of which Parliament substituted for section 64(1A) of PACE, created the indefinite retention policy in England and Wales. *Id.* para. 27. The Police and Criminal Evidence Order of Northern Ireland 1989 was similarly amended in 2001 to create an identical procedure in Northern Ireland. *Id.* para. 37. It is important to note that PACE is not applicable in Scotland. *Id.* para. 36. However, Scotland does allow biological samples and profiles to be retained for three years (with a possible two-year extension), and then only if the arrestee is suspected of certain violent or sexual offenses. *Id.* para. 36.

2. S. is referred to as such because the president of the Grand Chamber of the European Court of Human Rights agreed to his request to withhold his name pursuant to Rule 47, § 3, of the Rules of Court. *Id.* para. 1. Although the Court does not specifically state the reason that the nondisclosure is allowed, it is likely due to the fact that Mr. S. was only eleven years old, and therefore a minor, at the time of his arrest and acquittal. *See id.* para. 10.

3. *Id.* para. 12.

4. *Id.* paras. 9-10.

5. *Id.* para. 10. Section 61 of PACE regulates when the police may take fingerprints from a person charged with a recordable offense. *Id.* para. 26 n.4. Section 63 outlines similar procedures for the taking of genetic samples. *Id.* para. 26 n.5.

acquitted on June 14, 2001.[6] Marper, born in 1963, was arrested on March 13, 2001, for "harassment of his partner."[7] Similarly, pursuant to sections 61 and 63 of PACE, the police took samples of his DNA and fingerprints.[8] The Crown Prosecution Service officially discontinued the case on June 14 of the same year after he and his partner reconciled.[9]

Both of the applicants applied for judicial review of the police's refusal to destroy their fingerprints and DNA samples,[10] arguing, in part, that the decision violated their right to private life under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention).[11] The administrative court rejected the application on March 22, 2002.[12] The court of appeal upheld the administrative court's decision on September 12, 2002.[13] The applicants appealed to the House of Lords, which dismissed the appeal.[14] Lord Steyn, writing the lead judgment, noted that the retention of fingerprints and samples had proven to be a valuable tool for the police.[15] In his analysis of article 8 of the Convention, Lord Steyn stated that he did not believe that simply retaining the information constituted an interference with the right to respect for private life, but that if there were an interference, it would be modest and justified by the overall purpose of the retention.[16] Subsequently, and pursuant to article 34 of the

6. *Id.* para. 10.
7. *Id.* paras. 9, 11.
8. *Id.* para. 11.
9. *Id.*
10. *Id.* para. 12.
11. *See id.* para. 3.
12. *Id.* para. 12.
13. *Id.* para. 13. The Court of Appeals affirmed the Administrative Court's decision by a vote of two to one. *Id.* (citing R. v. Chief Constable of S. Yorkshire [2002] EWHC (Admin) 478). Lord Justice Waller, part of the majority, recognized the inherent privacy concerns related to the retention of fingerprints and DNA profiles. *Id.* (quoting R. v. Chief Constable of S. Yorkshire [2003] EWCA (Civ) 1275). However, he found that the benefits that could be achieved by retaining the information with the aim of prosecuting and preventing crime outweighed the risks. *Id.*
14. *Id.* para. 15.
15. *Id.* para. 16. Lord Steyn further relied on statistical evidence that tended to show that, postamendment, approximately 6000 DNA profiles, which would have been required to be destroyed under the preamendment rule, had been linked to genetic material found at other crime scenes, including "53 murders, 33 attempted murders, 94 rapes, 38 sexual offences, 63 aggravated burglaries[,] and 56 cases involving the supply of controlled drugs." *Id.* para. 17.
16. *Id.* paras. 19, 21. Specifically, Lord Steyn relied on five factors that indicated that the interference was proportionate to the aim:

> (i) the fingerprints and samples were kept only for the limited purpose of the detection, investigation and prosecution of crime; (ii) the fingerprints and samples were not of any use without a comparator fingerprint or sample from the crime scene; (iii) the fingerprints would not be made public; (iv) a person was not identifiable from the

Convention, S. and Marper applied to the European Court of Human Rights (ECHR), raising complaints under articles 8 and 14 of the Convention.[17] On December 4, 2008, the European Court of Human Rights *held* that the systematic and indefinite retention of fingerprints, DNA profiles, and cell samples authorized by PACE constituted a violation of article 8 of the European Convention of Human Rights. *S. v. United Kingdom*, App. Nos. 30562/04 & 30566/04, 48 Eur. H.R. Rep. 50 (2009).

II. BACKGROUND

In the wake of World War II, the governments of Western Europe established the Council of Europe to create and protect a regional set of human rights norms.[18] To accomplish this goal, the Member States approved the Convention, which entered into force in 1953.[19] Thereafter, the ECHR was established to implement the rights enumerated in the Convention.[20] Article 34 of the Convention allows the Court to accept "applications from any person, non-governmental organization[,] or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights sets forth in the Convention or the protocols thereto."[21] Although the Court rules on such alleged violations, it lacks the power to force the offending Member State to revise its national laws.[22] However, many Member States have expressed a willingness to comply with the judgments of the Court,[23] especially those

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> retained material to the untutored eye; and (v) the resultant expansion of the database by the retention conferred enormous advantages in the fight against serious crime.

Id. para. 21. Baroness Hale disagreed with the majority, taking the position that almost nothing is more personal than the information relating to a person's genetic make-up, and because of that the interference was not modest. *Id.* para. 25.

17. *Id.* paras. 1-3. The Court determined that the applications were admissible on January 16, 2007. *Id.* para. 4.

18. DAVID WEISSBRODT & CONNIE DE LA VEGA, INTERNATIONAL HUMAN RIGHTS LAW: AN INTRODUCTION 312 (Bert B. Lockwood, Jr. ed., 2007).

19. *Id.* As of 2007 there were forty-six Member States: the United Kingdom, the Ukraine, Turkey, Macedonia, Switzerland, Sweden, Spain, Slovenia, Slovakia, Serbia and Montenegro, San Marino, Russia, Romania, Portugal, Poland, Norway, the Netherlands, Monaco, Moldova, Malta, Luxembourg, Lithuania, Lichtenstein, Latvia, Italy, Ireland, Iceland, Hungary, Greece, Germany, Georgia, France, Finland, Estonia, Denmark, the Czech Republic, Cyprus, Croatia, Bulgaria, Bosnia and Herzegovina, Belgium, Azerbaijan, Austria, Armenia, Andorra, and Albania. *Id.* at 312-13.

20. *Id.* at 313.

21. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 34, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights].

22. WEISSBRODT & DE LA VEGA, *supra* note 18, at 315.

23. *Id.*

Member States, like the United Kingdom, that have incorporated some or all of the Convention as domestic law.[24]

The Convention outlines an array of rights and freedoms, including the right to respect for private and family life.[25] Article 8 of the Convention states:

> 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.[26]

When an applicant claims that a law of a Member State violates article 8 of the Convention, the Court first asks whether the impugned government measure in fact interferes with the applicant's right to respect for private life.[27]

The Court has traditionally taken a broad view of what is encompassed by the concept of "private life" in article 8(1).[28] For example, in *Peck v. United Kingdom*, the Court stated that elements such as personal development, sexual orientation, name, gender identification, sexual life, identity, and the "right to establish and develop relationships with other human beings and the outside world" are all protected.[29] The Court has also held that the retention of data relating to these elements constitutes an interference with the right in and of itself,[30] regardless of whether the data was subsequently used.[31] However, the Court noted that

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24. In the United Kingdom, the Human Rights Act 1998 entered into force in 2000. HUMAN RIGHTS ACT 1998, at 2 (Alastair N. Brown annotator, 2003). Its purpose was to integrate many of the Convention rights, including those contained in article 8, into domestic law, so that citizens could pursue remedies for the breach of those rights in national courts. *Id.* at 4.

25. European Convention on Human Rights, *supra* note 21, art. 8.

26. *Id.*

27. Peck v. United Kingdom, 2003-I Eur. Ct. H.R. 123, paras. 53-63.

28. *See, e.g.*, *id.* para. 57 ("Private life is a broad term not susceptible to exhaustive definition.").

29. *Id.*; *see also* Burghartz v. Switzerland, 280 Eur. Ct. H.R. (Ser. A), 1 para. 47 (1994) ("The Commission considers that the right to respect for private life as enshrined in Article 8(1) of the Convention ensures a sphere within which everyone can freely pursue the development and fulfillment of the personality."). Prior to 1999, the European Commission on Human Rights would determine whether private cases were suitable to be heard by the Court. MICHAEL D. GOLDHABER, A PEOPLE'S HISTORY OF THE EUROPEAN COURT OF HUMAN RIGHTS 4 (2007). After this initial hearing, the Commission would issue a nonbinding report. *Id.* Although such reports are nonbinding, they are treated by the Court as persuasive precedent. *See, e.g.*, *id.* paras. 45-46.

30. Leander v. Sweden, 116 Eur. Ct. H.R. (Ser. A) 1, para. 48 (1987).

31. Amann v. Switzerland, 2000-II Eur. Ct. H.R. para., 69 (Marxer, dissenting).

it is vital to view the data in context to determine whether its storage constitutes an interference. This requirement is shown by comparing the outcomes of two cases: *Kinnunen v. Finland* and *PG v. United Kingdom*. In *Kinnunen*, the Commission found that the retention of fingerprints and photographs connected to the applicant's arrest did not unduly interfere with his private life, even after the applicant's acquittal.[32] Specifically, the Commission stated: "[T]he material and information retained by the police was not of such a character that it could have adversely affected the applicant any more significantly than the publicly known fact that he had been charged with, but acquitted of, certain charges."[33] Despite the holding, the data was eventually destroyed.[34] In *PG*, however, the Court held that the systematic retention of a sample of the individual's voice raised sufficient private life concerns.[35] The Court found that, regardless of the fact that the individual had been speaking in a public place, "A permanent record [had] nonetheless been made of the person's voice and [was] subject to a process of analysis directly relevant to identifying that person in the context of other personal data."[36] Therefore, its retention constituted an interference.[37]

If the applicant can make a showing of interference, the Court will then determine whether the interference was justified under article 8(2), by determining if it (1) is "in accordance with the law"; (2) is necessary in a democratic society; and (3) pursues a legitimate health, safety, security, or welfare interest.[38] The Court has held that an interfering measure will be found to be "in accordance with the law" if it has a basis in domestic law and that law comports with the rule of law.[39] A domestic law will be seen as comporting with the rule of law if it includes protections against arbitrary interferences by the public authority.[40]

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32. Kinnunen v. Finland, App. No. 24950/94 (Eur. Ct. H.R., May 15, 1006), http://echr.coe.int/echr/en/hudoc (follow "HUDOC database" hyperlink; search for "Application Number 29450/94").

33. *Id.*

34. *Id.*

35. PG v. United Kingdom, 2001-IX Eur. Ct. H.R. 195, para. 60 (2008).

36. *Id.* para. 59.

37. *Id.* paras. 59-60.

38. Funke v. France, 256 Eur. Ct. H.R. 1, para. 80 (1993).

39. *See* Malone v. United Kingdom, 95 Eur. H.R. 1, para. 67 (1985).

40. *Id.*; *see* Kruslin v. France, 176 Eur. Ct. H.R. (Ser. A.) 1, paras. 33-34 (1990) ("Tapping and other forms of interception of telephone conversations represent a serious interference with private life . . . and must accordingly be based on a 'law' that is particularly precise. It is essential to have clear, detailed rules on the subject, especially as the technology available for use is continually becoming more sophisticated.").

The measure will be found to pursue a legitimate aim as long as it strives for one of the objectives listed in article 8(2) of the Convention.[41] For example, in *Funke v. France*, the Commission found that although the search for and seizure of financial documents from the applicant's home interfered with his right to respect for private life, the interference pursued the legitimate aim of "the economic well-being of the country" because the applicant had been involved in unlawful transfers abroad that could weaken the currency.[42]

Finally, the Court has found that a measure is "necessary in a democratic society" if it responds to a "pressing social need" and "is proportionate to the legitimate aim pursued."[43] In considering these factors, the Court gives a relatively generous "margin of appreciation" to the national authorities, which are in a comparatively better position to weigh the specific needs of their country.[44] However, the scope of this margin of appreciation depends on the nature of the aim of the interference and the nature of the activities involved.[45] For example, the Court found that a narrower margin of appreciation should be granted to Northern Ireland concerning a law against homosexuality because the law affected "a most intimate aspect of private life."[46] Additionally, if there is no consensus among the Member States, then the scope of the margin will be wider.[47]

In 2005, the Court applied these principles to the taking and retention of DNA evidence, such as profiles and cellular samples, in *Van der Velden v. Netherlands*.[48] The applicant was convicted of stealing four

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41. *See, e.g.*, Leander v. Sweden, 116 Eur. Ct. H.R. 1, para. 49 (1987) (holding that information held in a secret police register had the legitimate aim of protecting national security); Friedl v. Austria, 21 Eur. H.R. Rep. 83, paras. 51, 61 (1996) (holding, by the Commission, that photographs of the applicant kept on a national register had the legitimate aim of preventing disorder and crime).

42. *Funke*, 256 Eur. Ct. H.R. 1, paras. 81, 93.

43. Coster v. United Kingdom, App. No. 24876/94, para. 104 (Eur. Ct. H.R. Jan. 18, 2001), http://www.echr.int/echr/en/hudoc (follow "HUDOC Database" hyperlink; search Application Number for "24876/94").

44. *Id.* para. 105.

45. Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (Ser. A) 1, para. 52 (1982).

46. *Id.*; *cf.* Connors v. United Kingdom, App. No. 66746/01, para. 82 (Eur. Ct. H.R. Aug. 27, 2004), http://www.echr.int/echr/en/hudoc (follow "HUDOC Database" search Application Number for "66746/01") ("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. On the other hand, in spheres involving the application of social or economic policies, there is authority that the margin of appreciation is wide . . . .").

47. Dickson v. United Kingdom, 2007-XIII Eur. Ct. H.R. 930, para. 78.

48. Van der Velden v. Netherlands, App. No. 29514/05 (Eur. Ct. H.R. Dec. 7, 2006), http://www.echr.coe.int/echr/en/hudoc (follow "HUDOC database" hyperlink; search for "Application No. for "29514/05").

cars and robbing five banks.[49] Pursuant to national law, the police took the applicant's cellular material in order to create a DNA profile to be entered into the national database.[50] The applicant alleged a violation of his rights as guaranteed by article 8 of the Convention.[51] The Court determined that both the taking and the retention of cellular material, and subsequently created DNA profiles, interfered with the applicant's rights.[52] The Court distinguished such personal information from the fingerprints in *Kinnunen*, stating: "[G]iven the use to which cellular material in particular could conceivably be put in the future, the systematic retention of that material goes beyond the scope of neutral identifying features such as fingerprints, and is sufficiently intrusive to constitute an interference . . . ."[53]

However, the Court found that such interference was justified under article 8(2) of the Convention.[54] It determined that the interference was "in accordance with the law" and pursued the "legitimate aims of the prevention of crime and the protection of the rights and freedoms of others."[55] Furthermore, it held that the law was "necessary in a democratic society" for two reasons.[56] First, the DNA register had made a "substantial contribution . . . to law enforcement."[57] Second, the interference was only slight and could even possibly benefit the applicant by facilitating his rapid elimination as a suspect for crimes he did not commit.[58] Therefore, the ECHR found the applicant's complaint "manifestly ill-founded" and rejected it pursuant to article 35 of the Convention.[59]

III. THE COURT'S DECISION

In the noted case, the European Court of Human Rights upheld its earlier ruling in *Van der Velden* concerning the private nature of cellular

49. *Id.* paras. 1-2.
50. *Id.* para. 2.
51. *Id.*
52. *Id.* paras. 8-9.
53. *Id.* para. 9.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* Article 35 of the Convention outlines when it is appropriate for the Court to reject an individual's application. European Convention on Human Rights, *supra* note 21, art. 35. Specifically, section 3 states: "The Court shall declare inadmissible any individual application submitted under Article 34 which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly ill-founded, or an abuse of the right of application." *Id.* art. 35(3).

samples and DNA profiles and disagreed with the Commission's opinion in *Kinnunen* concerning fingerprints.[60] It held that the retention of cellular samples and subsequently created DNA profiles constituted a per se interference under article 8(1) of the Convention.[61] Furthermore, by analogizing fingerprints to photographs and voice samples, the Court held that fingerprints retained by the authorities in connection with an identified or identifiable person establishes an interference.[62] Finally, although the Court found that the interferences pursued the legitimate aim of the detection and prevention of crime,[63] it held that due to 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, [the measure] fails to strike a fair balance between the competing public and private interests" and thus could not be upheld as necessary in a democratic society.[64]

First, the Court decided that it was appropriate to determine separately the related issues of whether the retention of the cell samples and the DNA profiles and the retention of the fingerprints, respectively, constituted interferences under article 8(1).[65] Explicitly relying on *Van der Velden*, it held that the retention of both cell samples and DNA profiles amounted to an interference of the right to respect for private life.[66] Affirming the prior holding of *Van der Velden*, the Court emphasized that it is proper for a court to consider hypothetical future uses of the samples or profiles in deciding whether their retention constitutes an interference.[67] Hence, it found that because cellular samples allow the authorities access to a person's unique genetic code, "their retention *per se* must be regarded as interfering with the right to respect for the private lives of the individuals concerned."[68]

Similarly, the Court held that the retention of DNA profiles constituted an interference with an individual's right to respect for his or

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60. *See* S. v. United Kingdom, App. Nos. 30562/04 & 30566/04, paras. 77, 85 (Eur. Ct. H.R. Dec. 4, 2008), http://www.echr.coe.int/echr/en/hudoc (follow "HUDOC database" hyperlink; search Application Number for "30562/04").

61. *Id.* paras. 73, 75-77.

62. *Id.* paras. 84-85.

63. *Id.* para. 100.

64. *Id.* paras. 100, 125. The plenary Court deemed it unnecessary to determine whether the interferences were "in accordance with the law," relying instead on its determination of whether they were "necessary in a democratic society." *Id.* para. 99.

65. *Id.* para. 69.

66. *Id.* paras. 71, 77.

67. *Id.* para. 71.

68. *Id.* para. 73.

her private life.[69] Although the Court recognized that a profile contains considerably less personal information than a cell sample, it held that they are sufficiently informative for two primary reasons.[70] First, they allow the retaining authority to determine the familial relationships between the subject and others through so-called "familial searches."[71] Second, DNA profiles allow the retaining authority to establish the ethnic origin of the subject.[72] The fact that the DNA profiles are informative enough to supply the authorities with these two techniques qualifies them as an interference under article 8(1) of the Convention.[73]

Second, the Court next addressed whether the retention of fingerprints constituted an interference.[74] The Court recognized that in *Kinnunen* the Commission had found that fingerprints "did not contain any subjective appreciations which called for refutation," and thus their retention did not amount to an interference.[75] However, the Court found it significant that the data at issue in that case was destroyed nine years later, when the applicant so requested.[76] Further, the Court held that the more appropriate approach was that used in respect to personal photographs and voice samples, as in *PG*.[77] The Court preferred this approach because both fingerprints and voice samples "contain certain external identification features" that can be used by authorities to identify precisely the donating individual.[78] This analysis is especially relevant in the noted case because the respondent state intended to keep the applicants' fingerprints permanently in a nationwide database for the purpose of future criminal identification.[79]

In the United Kingdom's written submission on the merits, it contended that if the Court found any interference, such interference was justified under article 8(2) of the Convention because the retention was specifically and narrowly provided for in PACE and because it was for the legitimate purpose of preventing crime.[80] It based its argument on the premise that it is "of vital importance that law enforcement agencies [take] full advantage of available techniques of modern technology and

69. *Id.* para. 77.
70. *Id.* para. 75.
71. *Id.*
72. *Id.* para. 76.
73. *Id.* para. 77.
74. *See id.* para. 78.
75. *Id.* para. 80.
76. *Id.*
77. *Id.* para. 84.
78. *Id.* paras. 81, 84.
79. *Id.* para. 86.
80. *Id.* paras. 90-91.

forensic science in the prevention, investigation[,] and detection of crime for the interest of society generally."[81] Furthermore, it focused on the benefits to the criminal justice system provided by PACE, benefits that were already being realized through the use of retained data in the national DNA database.[82] Finally, the United Kingdom argued that the measures authorized by PACE were proportionate to the act's aim because while retention caused no stigma to the individual, it greatly benefited society overall.[83]

The Court conceded that the PACE retention procedure pursued the legitimate aim of detecting and preventing crime by creating a comprehensive database to assist in the identification of future offenders.[84] However, the Court could not find that the measure, as it related to individuals who were suspected, but not convicted, was proportionate or necessary in a democratic society, stating: "The core principles of data protection require the retention of data to be proportionate in relation to the purpose of collection and insist on limited periods of storage . . . ."[85]

The Court placed paramount significance on the fact that the other Member States had consistently applied these principles.[86] Although twenty Member States allow the compulsory collection of personal information to be stored in national databases, most of these states only allow DNA data to be collected in circumstances where a serious crime has been implicated, and even then such collection is limited, not systematic.[87] Furthermore, in Belgium, Hungary, Ireland, Italy, and Sweden, the government is explicitly required to automatically destroy such information if the criminal proceedings are discontinued or the individual is acquitted.[88] Significantly, ten more Member States have the same rule, subject to very limited exceptions.[89] In light of this, the Court recognized a consensus among the Member States that although personal

81. *Id.* para. 91.
82. *See id.* paras. 91-92.
83. *Id.* para. 94.
84. *Id.* para. 100.
85. *Id.* para. 107.
86. *Id.*
87. *Id.* paras. 45-46. Switzerland, Sweden, Spain, Poland, Norway, the Netherlands, Luxembourg, Latvia, Italy, Ireland, Hungary, Greece, Germany, France, Finland, Estonia, Denmark, the Czech Republic, Belgium, and Austria, allow for the collection of DNA material to be kept in a national database. *Id.* para. 45. However, in Sweden, Spain, Poland, Norway, the Netherlands, Luxembourg, Italy, Ireland, Hungary, Germany, France, Finland, Belgium, and Austria, DNA can only be taken if the crime is sufficiently serious, such as a crime punishable by a certain term in prison. *Id.* para. 46.
88. *Id.* para. 47.
89. *Id.*

data may be collected upon suspicion, it should not be retained once the suspicion has been lifted.[90]

The Court found the differing policy in Scotland to be of particular significance, because while Scotland is part of the United Kingdom, its procedure is in line with the other Member States.[91] Under Scottish law, the government may retain the DNA of an unconvicted adult for three years, with a possible two-year extension, only if the adult was charged with a sexual or violent offense.[92] Hence the procedures outlined in PACE make England, Wales, and Northern Ireland "the only jurisdictions within the Council of Europe to allow the indefinite retention of fingerprint and DNA material of any person of any age suspected of any recordable offence."[93]

Although the United Kingdom argued that such a comparative analysis was inappropriate because it "is in the vanguard of the development of the use of DNA samples in the detection of crime and [because] other states have not yet achieved the same maturity in terms of the size and resources of DNA databases," the Court rejected this contention.[94] While it recognized the advantages that could be attained through such databases, it could not ignore the fact that other Member States had decided to limit them.[95] Hence, because there was a strong consensus among the other States, the margin of appreciation that the Court could give the respondent state was narrow.[96] In fact, the Court found that "any state claiming a pioneer role in the development of new technologies bears special responsibility for striking the right balance" between interfering with private life and benefiting the public.[97]

Although the Court admitted that allowing the retention of the personal information of those suspected, but not convicted, of a crime contributed to preventing and detecting crime by enlarging the database, it held that the systematic and indefinite retention of such information "fails to strike a fair balance between the competing public and private interests."[98] In coming to this decision, the Court found that there was a significant risk of stigma, despite the United Kingdom's protestations to the contrary, because those individuals whose information was stored in

90. *Id.* para. 108.
91. *Id.* para. 109.
92. *Id.*
93. *Id.* para. 110.
94. *Id.* para. 111.
95. *Id.* para. 112.
96. *Id.*
97. *Id.*
98. *Id.* paras. 117, 125.

the database, although they were not treated as being under suspicion, were also not treated as innocent.[99] Finally, the Court determined that the blanket nature of the power of indefinite retention "led to [an] over-representation in the database of young persons and ethnic minorities[] who have not been convicted of any crime" due to the fact that there was no system of independent review guided by defined criteria through which an acquitted person could argue for the destruction of his or her identifying information.[100]

Because of this, the Court held that the retention of DNA profiles, cellular samples, and fingerprints constituted an interference with a person's "right to respect for private life."[101] Further, the Court held that the interference caused by indefinite retention is not justified under article 8(2) of the Convention because the measure is disproportionate and unnecessary in a democratic society.[102] Thus, the Court found that the impugned measure, section 61(a) of PACE, violated article 8 of the Convention as it relates to personal information of persons suspected, but not convicted, of a crime.[103]

IV. ANALYSIS

By the time the European Court of Human Rights announced its judgment in the noted case, the United Kingdom had profiled approximately 6.5% of its population,[104] with approximately 4.5 million individuals in the database.[105] It has been further reported that one in five of those profiled, or 850,000 people, had never been convicted of a crime.[106] Therefore, after the Court's unanimous, and strongly worded,

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99. *Id.* para. 122.

100. *Id.* paras. 119, 124.

101. *Id.* paras. 77, 86.

102. *Id.* para. 125.

103. *See id.* para. 126. The Court also held that, due to its findings of a violation under article 8, it was not necessary to examine the applicants' complaints under article 14 of the Convention. *Id.* para. 129. The Court further held that the United Kingdom did not owe the applicants any damages, but ordered it to pay the applicants' reasonable costs and expenses. *Id.* paras. 134, 140. Finally, the Court dismissed the rest of the applicants' claims for "just satisfaction." *Id.* para. 141.

104. Duncan Carling, Comment, *Less Privacy Please, We're British: Investigating Crime with DNA in the U.K. and the U.S.*, 31 HASTING INT'L & COMP. L. REV. 487, 493 (2008).

105. *A Victory for Civil Liberties—But the Larger War Still Rages*, INDEPENDENT (London), Dec. 5, 2008, at 42, *available at* http://www.independent.co.uk/opinion/leading-articles/leading-article-a-victory-for-civil-liberties-ndash-but-the-larger-war-still-rages-1052547.html.

106. *Id.*; *see also* Ian Drury, *One Million Innocent People Could Have Their Profiles Wiped from Britain's 'Orwellian' DNA Database After Court Ruling*, MAIL ONLINE (U.K.), Dec. 5, 2008, http://www.dailymail.co.uk/news/article-1091880/One-million-innocent-people-profiles-wiped-Britains-DNA-database-court-ruling.html; David Mery, *Don't Delay: Delete Your DNA*

opinion was published, the question resounding through the United Kingdom was: How will the government react?[107]

Article 46 of the Convention states: "The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties."[108] Therefore, although the Court generally lacks the capacity to impose its will on the United Kingdom, the United Kingdom, as a party to the complaint, is bound by this judgment.[109] The U.K. Home Secretary, Jacqui Smith, recognized this reality in a speech to the Intellect Trade Association soon after the ruling, in which she stated:

> I've found there are few areas where the balance between rights and protections comes into such stark relief as on DNA. The recent European Court judgment in the S and Marper case has put the issue back in the spotlight. . . . We will consult on bringing greater flexibility and fairness into the system by stepping down some individuals over time—a differentiated approach, possibly based on age, or on risk, or on the nature of the offences involved. . . . These changes will see some people coming off the system. But as I said, we need to strengthen the dividing lines between innocence and guilt—and so I want to do more to ensure that we get the right people onto the system as well.[110]

However, the Home Office's first attempt at reworking the policy was met with public outcry.[111] The plan would have kept the profiles of those suspected, but not convicted, for six to twelve years, depending on the severity of the offense and the age of the individual.[112] As for the existing 850,000 profiles of those suspected, but not convicted, the government stated that it would re-examine the profiles to see if the individuals had since been linked to a criminal activity.[113] If so, the police would keep the individual profiles on the database for six to twelve

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Today, REGISTER (U.K.), Dec. 17, 2008, http://www.theregister.co.uk/2008/12/17/david_mery_reclaim_your_dna/page2.html.

107. *See* Danny Shaw, *Europe DNA Ruling Resonates in UK*, BBC NEWS, Dec. 4, 2008, http://news.bbc.co.uk/2/hi/uk_news/7765484.stm.

108. European Convention on Human Rights, *supra* note 21, art. 46.

109. *See* WEISSBRODT & DE LA VEGA, *supra* note 18, at 315.

110. Jacqui Smith, Home Sec'y, U.K. Home Office, Home Secretary's Speech: Protecting Rights, Protecting Society (Dec. 16, 2008), *available at* http://press.homeoffice.gov.uk/Speeches/home-sec-protecting-rights.

111. James Sturcke & Afua Hirsch, *DNA Pioneer Condemns Plan To Keep Details for 12 Years*, GUARDIAN (London), May 7, 2009, at 11, *available at* http://www.guardian.co.uk/politics/2009/may/07/dna-database-reforms-human-rights.

112. Alan Travis, *Innocent Will Be Sentenced to 12 Years on the Database*, GUARDIAN (London), May 7, 2009, at 6, *available at* http://www.guardian.co.uk/politics/2009/may/07/dna-database-innocent-people-records.

113. *Id.*

years.[114] However, the government stated that it "can't estimate how many will be deleted."[115] The government has since abandoned the plan,[116] instead proposing in the 2009 Crime and Security Bill that the retention period for unconvicted persons' personal information be reduced to six years.[117] Nevertheless, there is still concern that the proposal is insufficient to protect the individual's right to be free from interference as found by the Court.[118]

Although the retention of DNA profiles and cellular samples has received the most press, the Court's decision in the noted case also affects the retention of fingerprints in a national database. Traditionally, such retention has been less controversial than the retention of DNA material. For example, in the United States, where privacy has gained the status of an essential right,[119] it is, nonetheless, the established procedure that the police keep fingerprint records of not only those who are convicted but also those who are arrested.[120] However, if the United Kingdom were to comply fully with the dictates of the holding in the noted case, it would have to limit not only its retention of DNA material, but fingerprints also.[121]

In so ruling, the Court chose to disregard the Commission's holding in *Kinnunen* and instead likened the retention of fingerprints to retention of photographs and voice samples.[122] The United Kingdom argued that fingerprints "constitute[] neutral, objective[,] and irrefutable material and [are] unintelligible to the untutored eye and without a comparator

114. *Id.*

115. *Id.*

116. Alan Travis, *Home Office Climbs Down over Keeping DNA Records on Innocent*, GUARDIAN (London), Oct. 19, 2009, http://www.guardian.co.uk/politics/2009/oct/19/innocent-dna-database.

117. Memorandum Submitted by the Information Commissioner on his Views of the Home Office Proposals for the Retention of DNA Profiles Contained in the Crime and Security Bill, Feb. 2010, *available at* http://www.publications.parliament.uk/pa/cm200910/cmpublic/crimeandsecurity/memos/uccr0502.htm.

118. *Id.*

119. Carling, *supra* note 104, at 502 ("Privacy has become an integral part of American constitutional rights, despite the absence of the word 'privacy' anywhere in the text of the Constitution.").

120. Jason Tarricone, Note, *"An Ordinary Citizen Just Like Everyone Else": The Indefinite Retention of Former Offenders' DNA*, 2 STAN. J. C.R. & C.L. 209, 233 (2005) ("[L]aw enforcement officials routinely retain fingerprints of ex-offenders . . . even [of] those individuals who were arrested but never convicted of the crime for which they were arrested . . . ." (quoting Johnson v. Quander, 370 F. Supp. 2d 79, 103 (D.D.C. 2005)) (alterations in original)).

121. S. v. United Kingdom, App. Nos. 30562/04 & 30566/04, paras. 125-126 (Eur. Ct. H.R. Dec. 4, 2008), http://www.echr.coe.int/echr/en/hudoc (follow "HUDOC Database"; search Application Number for "30562/04").

122. *Id.* para. 84.

fingerprint."[123] While recognizing that these arguments were true, the Court found that the retention of fingerprints nonetheless constituted an interference under article 8(1) of the Convention because "fingerprints objectively contain unique information about the individual concerned allowing his or her identification with precision in a wide range of circumstances."[124] It is with this holding that the Court seems to broaden the scope of protected private life.

Although the Court chose to determine separately whether the indefinite retention of DNA profiles and cellular materials, on the one hand, and fingerprints, on the other, constituted an interference, it made such determinations using the same analysis.[125] While it recognized that the level of interference varied depending on the type of personal information at issue, it determined that the "blanket and indiscriminate" nature of the retention trumped those differences.[126] In determining that the retention in question was not justified, the Court placed a great deal of weight behind the "strong consensus existing among the contracting states," using it to narrow the margin of appreciation that it gave the respondent state.[127] However, this "strong consensus" related only to the controversial issue of the retention of DNA material.[128] Therefore, it appears that the Court chose to widen the scope of what it considers an interference with private life to include the retention of fingerprints. It did not, however, properly address whether such an interference could be justified.

V. CONCLUSION

In recent years, there has been speculation that the British culture may view privacy differently than other cultures.[129] This viewpoint found strength through such policy decisions as the use of indefinitely retained suspect profiles to increase the size of the DNA database and the

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123. *Id.*

124. *Id.*

125. *Id.* paras. 69, 106.

126. *Id.* paras. 119-120.

127. *Id.* para. 112.

128. *Id.* ("[N]otwithstanding the advantages provided by comprehensive extension of the DNA database, other Contracting States have chosen to set limits on the retention and use of such data with a view to achieving a proper balance [between] the competing interests of preserving respect for private life.").

129. Carling, *supra* note 104, at 505 ("It may be that the British are more aggressive with their DNA programs, and the Americans more restrained, because aside from our legal understandings of privacy, our cultures fundamentally value privacy differently.").

widespread use of closed-circuit television (CCTV) to fight crime.[130] However, the overwhelming response to the judgment in the noted case seems to challenge such conclusions and indicates that although the right to respect for private life is a newly recognized right in the United Kingdom, it is a jealously guarded one.[131] However, it is yet to be seen how the United Kingdom will choose to embrace the Court's judgment and limit its power of retention as the Court instructed it to do, especially in regard to fingerprints.

Anna Peterson*

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130. *Id.* As of 2008, there were over 2.5 million CCTV cameras placed in public places in the United Kingdom. *Id.* The police compare the images captured by these cameras with stored pictures of wanted persons. *Id.* at 505-06. Therefore, it has been hypothesized that "[t]here appears to be a general willingness among British subjects to sacrifice personal privacy in the interest of state security." *Id.* at 506.

131. *Id.* at 502.

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