

A policy of indefinite retention of convicts' biometric data found to be unlawful (*Gaughran v United Kingdom*)

19/02/2020

Public Law analysis: The Police Service of Northern Ireland had a policy of taking photographs, fingerprints and a DNA sample and profile (biometric data) from all persons arrested for a recordable offence and retaining that data indefinitely for those convicted (the policy). The European Court of Human Rights (ECtHR), applying principles established in its decision in *Marper v UK*, held that the policy amounted to a disproportionate interference with Mr Gaughran's right to respect for his private and family life under Article 8 of the European Convention on Human Rights (ECHR). It held that the indiscriminate nature of the powers of retention 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. Written by Jonathan Lewis, barrister, at Henderson Chambers.

Gaughran v United Kingdom (App No 45245/15) [2020] ECHR 45245/15

What are the practical implications of this case?

In a vindication of Lord Kerr's dissent in the Supreme Court (*Gaughran v Chief Constable of the Police Service of Northern Ireland* [2015] UKSC 29), [2015] 2 WLR 1303, the ECtHR found the policy to be an unjustified breach of Mr Gaughran's rights under Article 8 of the ECHR. However, the ECtHR did not seek to set out any new universal principles in respect of such policies. It is quite clear that the assessment of such policies remains fact sensitive, the more nuanced and targeted the policy, the better its chances of withstanding scrutiny.

The ECtHR departed from the Supreme Court's assessment largely because its decision was premised on slightly different facts. It is notable that the ECtHR, in determining whether an interference with rights under Article 8 of the ECHR was proportionate, placed particular store in the fact that there were no adequate procedural safeguards by which a person could seek to have his or her data deleted from the police database.

The ECtHR drew an important distinction between fingerprints and photographs on the one hand, and DNA profiles on the other, given that the latter contains genetic information that continues to impact individuals related to the data subject even after his or her death, recognising that the use of DNA profiles for familial searching with a view to identifying a possible genetic relationships is of a highly sensitive nature.

What was the background?

In 2008, Mr Gaughran was stopped at a police checkpoint and arrested for drunk driving. This was a 'recordable offence' in that it was punishable by imprisonment. The following data was taken from him: fingerprints; a photograph; and a non-intimate DNA sample. A DNA profile (a digital extraction of key data) was subsequently taken from the DNA sample. He pleaded guilty, was fined and disqualified from driving for a year. This conviction would be spent in five years. His solicitors wrote to the Police Service of Northern Ireland claiming that the retention of his data was unlawful and asked that it be destroyed or returned to him. When this request was refused, he sought judicial review of the refusal.

The High Court found that retention of his biometric data was justified for eleven reasons (which were endorsed by the Supreme Court), including that building up of a database of such data from those convicted provides a useful resource in the battle against crime; the rights and expectations of convicted persons differ significantly from those of unconvicted persons—person can only be identified by fingerprints and DNA sample either by an expert or with the use of sophisticated equipment and so on. The Supreme Court found that indefinite retention of this data was proportionate and lawful.

In *Marper v UK* (App Nos. 30562/04 and 30566/04) [2008] ECHR 30562/04, the ECtHR had found that the blanket and indiscriminate nature of the powers of retention of the biometric data of persons suspected but not convicted of offences was an unjustified breach of Article 8 of the ECHR.

What did the court decide?

The government accepted that the indefinite retention of Mr Gaughran's biometric data amounted to an interference with Article 8 of the ECHR but submitted that this interference was 'at a very low level'. It argued that it was in accordance with the law and pursued the legitimate aim of the prevention and detection of crime (at para [61]).

The ECtHR preferred not directly to consider whether the interference was in accordance with the law (that is whether quality of law requirements in Article 8(2) were met), preferring to examine the issues from the perspective of proportionality (at para [74]). It had little difficulty in finding that the retention was for a legitimate aim (the prevention of crime) (at para [75]).

The government had contended that it was proportionate given that 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 convicts. Second, the scheme in question was not unusually intrusive. Third, the scheme only applied to people convicted of recordable offences.

The ECtHR considered in some detail the various practices of 31 Council of Europe Member States in respect of retention of biometric data (at paras [53]–[57]). It concluded that as the UK is one of the few states to permit indefinite retention, the margin of appreciation is narrowed (at para [84]). In deciding to substitute its own views as to the proportionality of the measure, the ECtHR noted certain factual developments since the Supreme Court had decided the matter.

The Supreme Court proceeded on the basis that the photograph was only to be stored on a local, standalone police database (at para [67]) when it later transpired that it may be uploaded onto a Police National Database which would use facial recognition (at para [86]). The Supreme Court had also proceeded on the basis that very few states had a process whereby retention of biometric data could be reviewed when in fact most do have such mechanisms.

The ECtHR held that 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 (at para [88]). It is of importance whether the regime takes into account the seriousness of the offending, the continuing need to retain the data, and the safeguards available to the individual (this had not been done in this case).

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. The safeguards here were inadequate as the police could only delete biometric data and photographs in exceptional circumstances, not where there simply was no longer a need to conserve the data.

Case details

- Court: European Court of Human Rights (Section I)
- Judge: Ksenija Turković, Aleš Pejchal, Armen Harutyunyan, Pere Pastor Vilanova, Tim Eicke, Jovan Ilievski, Raffaele Sabato
- Date of judgment: 13 February 2020

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