

# Retaining DNA

**Kristiina Reed** on the recent decision in *Gaughran* and retention of sensitive data

The Supreme Court of England and Wales has dismissed an appeal that the indefinite retention of the DNA profile of a convicted adult offender is unlawful and in breach of an individual's right to privacy under art.8 of the European Convention of Human Rights. This article considers the reasoning of the Supreme Court in *Gaughran (Appellant) v. Chief Constable of the Police Service of Northern Ireland (Respondent) (Northern Ireland)* [2015] UKSC 29 and raises the question whether there remains a debate that the same principles can be fairly applied to convicted youth offenders.

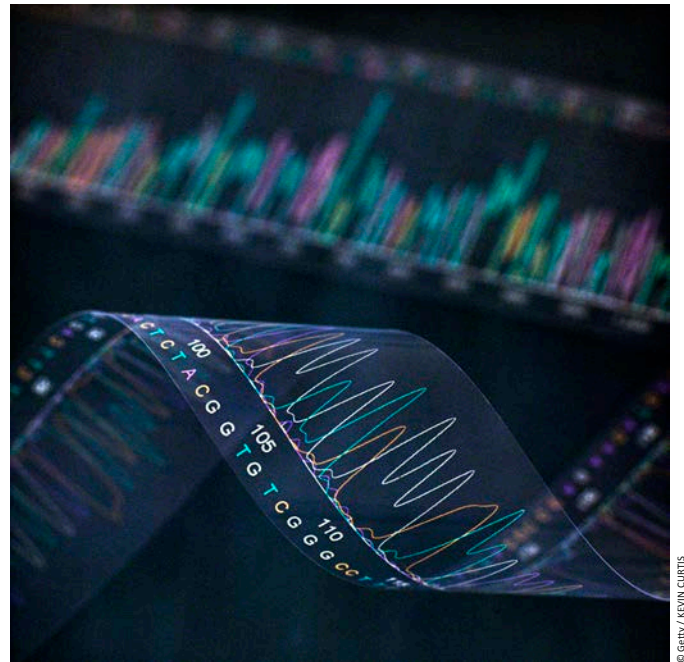
Fergus Gaughran, the appellant, was convicted of drink driving in Northern Ireland in 2008. Upon arrest, a DNA sample was taken, his profile was then loaded on to the Northern Ireland National DNA database and retained indefinitely in accordance with the statutory provisions in Northern Ireland. Mr Gaughran lodged an appeal at the Supreme Court in London after the High Court in Belfast dismissed Mr Gaughran's application for judicial review of the right to retain his DNA profile.

The statutory provisions relating to DNA profile retention in Northern Ireland, England and Wales are broadly similar. Article 64(1A) of the Police and Criminal Evidence (Northern Ireland) Order 1989 allows for the indefinite retention of DNA samples and profiles taken from convicted adult offenders for the prevention or detection of crime, the investigation of an offence, the conduct of a prosecution or the identification of a deceased person. In England and Wales, s.63I and s.63T of the Police and Criminal Evidence Act 1984 provide that a DNA profile taken from an adult person convicted of a recordable offence may be retained indefinitely for the provision of intelligence and evidence to support the investigation, detection and prosecution of crime.

In the agreed statement of facts and issues before the Supreme Court, the two questions for determination in the appeal were:

1. Does the retention of a DNA profile disclose an interference with the Appellant's right to respect for his private life within the meaning of art.8(1) of the European Convention on Human Rights?
2. If so, is the interference justified under art.8(2)?

With regard to the first question, the jurisprudence of ECtHR has long emphasized that the protection of personal data is fundamental to a person's enjoyment of his or her right to



respect for a private and family life. In *S and Marper v. United Kingdom* [2008] ECHR 1169 it was stressed that this is especially valid with regards to protection of sensitive data. In particular, the intrinsically private character of DNA information which holds the individual's genetic makeup and also that of his or her family is recognized as requiring careful scrutiny by the ECtHR of any state measure which authorizes use by the authorities without the consent of the individual concerned.

In *Gaughran*, it was conceded by the respondent that the policy of retaining DNA profiles of convicted adult offenders is an interference with the appellant's art.8 right, albeit a low level of interference. The focus of the appeal was the issue of whether the interference can be justified under art.8(2). Justification of interference with a qualified Convention right rests upon three central pillars:

- i. The interference must be in accordance with the law.
- ii. It must pursue a legitimate aim.
- iii. It must be necessary and proportionate.

It was agreed that the retention policy is in accordance with the law and that it pursues a legitimate aim, namely, the detection and prevention of crime. The narrow focus of the

appeal was therefore whether the retention policy is necessary and proportionate.

The court held that amongst the factors relevant to the proportionality analysis were the nature of the offence, whether the conviction has been spent, and whether retention is permitted subject to a time limit or indefinitely. In addition, the Supreme Court endorsed the factors cited by the Divisional Court namely that; the indefinite retention policy furthers the legitimate aim of countering crime so as to protect the lives and rights of others; there is an appreciable difference between the rights of an unconvicted individual and a convicted individual; that a digitized DNA profile is only capable of revealing a limited amount of personal data and does not reveal any physical characteristics of the individual; there are clearly defined boundaries within which the DNA profile may lawfully be used; the potentially exculpatory benefits to an individual of retaining the DNA profile; the existence of an exceptional case procedure which permits the possibility of data being removed; the decision to indefinitely retain profiles of those convicted of recordable offences represents a balanced and rational judgment by the authorities; time limitations as opposed to indefinite retention were not only arbitrary but would also increase the administrative burden and require deletion of recorded data, and, finally, that the retention of DNA profiles serves the added long term purpose of discouraging an offender from re-offending in the knowledge that the police have available data that could lead to detection.

It was on the above analysis that the appeal was dismissed by a majority of 4:1. Lord Clarke gave the leading judgement, which was agreed with by Lord Neuberger, Lady Hale and Lord Sumption. Lord Kerr dissented.

Interestingly, in his dissenting judgment, Lord Kerr said that in his view the two critical questions in the proportionality analysis were first, whether a rational connection between the policy in question and the legislative objective could be established, and secondly whether the policy goes no further than is necessary to fulfil the objective.

In answer to the first question, Lord Kerr found a striking absence of hard evidence to support the view that a policy of indefinite retention of DNA profiles of convicted offenders is indispensable to the legislative objective of the detection of crime and assisting in the identification of future offenders. The requisite connection between the policy and its professed aim had not, in Lord Kerr's judgment, been established.

With regard to the second question, Lord Kerr said that, absent consideration of whether a more tailored and nuanced policy could be devised, which might include greater differentiation between offences and a gradation of periods of retention, it was simply impossible to conclude that the least restrictive measure test was satisfied.

He added that it is a critical component of proportionality analysis to consider whether a fair balance had been struck between the competing private rights of the individual and public interests. Lord Kerr's judgment was that a fair balance has not been struck and that of particular concern was the stigmatisation of individuals posed by indefinite retention of DNA data and its incompatibility with the provisions and intended effect of the Rehabilitation of Offenders Act 1974/ Rehabilitation of Offenders (Northern Ireland) Order 1978.

Lord Kerr made the point with force saying, "If the principle

of rehabilitation is to have any meaning, ex-offenders such as he [the appellant] cannot be defined by the fact of their former offending. The philosophy underlying the rehabilitation provisions is the restoration of the ex-offender to his or her position as a citizen without the stigma of having been a criminal. He once more shares with his fellow citizens, entitlement to be treated as if he was of good character ... Rehabilitation is our criminal justice system's way of acknowledging and encouraging the potential for growth and change. If we continue to define ex-offenders throughout their lives on the basis of their offending we deprive them of re-integration into society on equal terms with their fellow citizens ... Allowing biometric details to be retained indefinitely is in flat contradiction of that fundamental principle."

The position now with regards to the retention of DNA profiles of unconvicted adult offenders and convicted adult offenders is largely settled by reason of *S and Marper*, the Protection of Freedoms Act 2012 and the instant case of *Gaughran*. What however of the position with regards to the retention of DNA profiles of convicted youth offenders?

The legislative provisions for retention of DNA profiles for youths are to be found in s.63K PACE which provides that 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" as defined in s.65A), and (iii) the person has not previously been convicted of a recordable offence, the period of retention of such material is either the length of the sentence plus five years where the person concerned receives a custodial sentence of less than five years (s.63K(2)), 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 (s.63K(4)). 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 (s.63K(5)). Where the custodial sentence is five years or more or where the offence is a "qualifying offence" the material may again be held indefinitely.

The provisions may be summarized as :-

First Conviction for a Recordable Offence	DNA Profile Retention Periods
First conviction for a Recordable offence	If custodial sentence is 5 years or less, retention for five years plus the length of any custodial sentence,
	If the custodial sentence is five years or more, indefinite retention.
Second conviction for a Recordable Offence	Indefinite retention
Conviction for a Qualifying offence	Indefinite retention
Qualifying offences are specified serious violent or sexual offences, burglary offences and terrorism	

So, the statutory provisions for the retention of DNA profiles of convicted youth offenders do, it can be seen, provide a more tailored and nuanced approach than the policy for convicted adult offenders. There is indeed a greater differentiation of offences and a gradation in periods of retention. On closer consideration however, it is arguable that the retention net is cast perhaps rather wider than is necessary. A recordable offence is any offence punishable by imprisonment, together with a limited number of non-imprisonable offences. The threshold is thus a low one. A “conviction” for these purposes also includes a youth reprimand or warning. Lawyers familiar with the youth courts will be only too aware that foolish and immature behaviour can attract a criminal charge such as robbery or burglary, a “qualifying offence”, which on the facts belies the criminality or culpability of the behaviour in question.

Approaches to youth offenders differ significantly from that of adult offenders. The overarching principles of the youth justice system, together with obligations under a range of international conventions emphasize the importance of avoiding the “criminalization” of children. It is enshrined in

statute that the principle aim of the youth justice system is the prevention of re-offending – a strategy which rests in large part upon rehabilitation of the young person and reintegration within society.

The view expressed by Lord Kerr with regard to the compatibility or otherwise of indefinite retention of DNA data with principles of rehabilitation assumes greater force in the context of convicted youth offenders. The position of adult offenders and youth offenders is appreciably different. Yet in real terms at least there is not a corresponding appreciable difference in the DNA retention policies for adult and youth offenders. Whilst the law concerning retention of adult DNA data now seems settled, it may remain open to debate whether the law concerning convicted youth offenders is too wide and may thus be considered disproportionate.

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