

European Court of Human Rights Limits DNA and Fingerprint Databases

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In this article, the author discusses the unanimous decision a Grand Chamber of the European Court of Human Rights made in the case of S. and Harper v. United Kingdom. The court held that the provision of the United Kingdom's Police and Criminal Evidence Act authorizing indefinite retention of genetic material, genetic profiles, and fingerprints of persons once targeted as criminal suspects but not convicted, violated Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, providing for the right to respect for private and family life.

At a December 4 hearing in Strasbourg, France, the European Court of Human Rights announced a potentially-far-reaching decision restricting the authority of European governments to retain the genetic material, genetic profiles, and fingerprints of persons once targeted as criminal suspects but not convicted. A Grand Chamber of the court, consisting of 17 judges, unanimously held in the case of *S. and Harper v. United Kingdom*¹ that the provision of the United Kingdom's Police and Criminal Evidence Act authorizing indefinite retention of such personal information violated Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, providing for the right to respect for private and family life.

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LITIGATION BACKGROUND

In 2001, the United Kingdom's Police and Criminal Evidence Act had been amended to authorize the indefinite retention of fingerprints and genetic samples of suspects "after they have fulfilled the purposes for which they were taken" but only for use "for purposes related to the prevention or detection of crime, the investigation of an offence, or the conduct of a prosecution." Previously, suspects' information generally had to be destroyed "as soon as practicable after the proceedings," and even after the amendment, genetic samples and fingerprints of persons "not suspected of having committed the offence" were to "be destroyed as soon as they have fulfilled the purpose for which they were taken." The information of convicted persons could be retained. Thus, the 2001 amendments were intended to produce expansion of the databases available to law enforcement by adding the genetic samples and fingerprints of suspects who had not been convicted.

Complainant Mr. S was arrested on January 19, 2001, at age 11 and charged with armed robbery. His fingerprints and DNA samples were taken. He was acquitted in June 2001. Michal Marper was arrested on March 13, 2001, and charged with "harassment of his partner." However, after his fingerprints and DNA were taken, and before trial, "he and his partner had become reconciled, and the charges were not pressed."

Subsequently, both S and Marper requested that the police destroy their samples and fingerprints, but the police refused. Both sought review of their denials in the British Administrative Court, which rejected their requests on March 22, 2002. Then the Court of Appeal, on September 12, 2002, upheld the decision of the Administrative Court by a 2-to-1 vote.

Next S and Marper appealed to the House of Lords, Britain's highest court. The Lords noted that fingerprints and samples retained under the disputed 2001 amendments had resulted in 6,000 DNA profiles being linked with crime scene stain profiles, offenses that included 53 murders, 33 attempted murders, 94 rapes, 38 sexual offenses, 63 aggravated burglaries, and 56 cases involving the supply of controlled drugs. Thus, in three years, the expanded database had played a major role in the detection

and prosecution of serious crime. The House of Lords dismissed their appeal on July 22, 2004.

Thus, when S and Marper applied to the multinational European Court of Human Rights, their requests had been exhaustively reviewed by the U.K. judicial system, with all levels upholding the personal information retentions authorized by the 2001 amendments to the Police and Criminal Evidence Act, including against challenges raised in terms of the Convention for the Protection of Human Rights and Fundamental Freedoms.

EUROPEAN COURT OF HUMAN RIGHTS

Both the European Court of Human Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms have been around for a number of years. However, their clout was increased by 1998 protocols that made all members of the Council of Europe subject to the court and the Convention. That recent expansion history also means that the Human Rights Court faces many issues of first impression, including those raised here. The court's case load has increased dramatically, with its Web site reporting that 42,376 applications in proper form were received in 2008 (compared with only 8,408 in 1999). The Court of Human Rights is structured to include a judge from each country subject to its jurisdiction, a total now approaching 50.

S and Marper's applications were received on August 16, 2004. Nearly three years later, on July 10, 2007, a seven-judge Chamber declared the applications "admissible," at which point the Chamber relinquished the matter to a Grand Chamber, without objection from the participants. Under the court's rules, proceedings before 17-judge Grand Chambers deal with "cases that raise a serious question of interpretation or application of the Convention, or a serious issue of general importance."

Selection of the Grand Chamber (which included the British judge) was followed by written submissions and responses. A hearing was held on February 27, 2008. The judges deliberated that day and again on November 12, leading to issuance of the December 4 judgment.

ANALYSIS UNDER THE CONVENTION

The Grand Chamber's unanimous judgment presented a phased analysis of whether the challenged provision of the Police and Criminal Evidence Act, as applied to S and Marper, violated Article 8 of the Convention. Article 8 declares that, "Everyone has the right to respect of his private...life..." and provides that, "There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society...for the prevention of disorder or crime..."

In that context, the Grand Chamber's judgment first examined whether retention by the authorities of the applicants' fingerprints, DNA profiles and cellular samples "constitutes an interference in their private life." First, relying largely on a prior decision, the court found that due to "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."

Next, the court found that DNA profiles have been used "for familial searching with a view to identifying a possible genetic relationship between individuals," which in itself the court deemed "sufficient to conclude that their retention interferes." The court also found interference in that the "processing of DNA profiles allows the authorities to assess the likely ethnic origin of the donor." Third, it ruled that fingerprints, while containing less information, and therefore being less sensitive than cellular samples or DNA profiles, nonetheless are capable of affecting private life because they allow "identification with precision in a wide range of circumstances." Thus, the court ruled that retention by the police of either of the three categories interfered with private life.

Having found interference, the question then became whether the interference was justified in terms of the Article 8 standards. The court easily concluded that the use was "in accordance with the law," in that the Police and Criminal Evidence Act clearly authorized it, and pursued a "legitimate aim" in the detection and prevention of crime.

The issue thus turned on whether the interference is "necessary in a democratic society," which depends on whether it is "proportionate to the

legitimate aim pursued and if reasons adduced by the national authorities to justify it are ‘relevant and sufficient.’”

The court was concerned because “core principles of data protection” reflected in the Data Protection Act of 1998 include “limited periods of storage.” It noted that the laws of “the great majority of the Contracting States with DNA databases” do not authorize authorities to retain samples indefinitely after the subject’s acquittal or discharge. In response to the United Kingdom’s argument that it was in the “vanguard of the development and use of DNA samples,” the court declared that “any State claiming a pioneer role in the development of new technologies bears special responsibility for striking the right balance.”

The court also was concerned by “the risk of stigmatization” stemming from the applicants being “treated in the same way as convicted persons.” The government’s “sole reason” for the retention, “to increase the size and, therefore, the use of the database in the identification of offenders in the future,” was found inconsistent with the Act’s requirement to destroy the data of volunteers “despite the similar value of the material in increasing the size and utility of the database.” The court also observed that “retention of unconvicted persons’ data may be especially harmful in the case of minors,” given the “importance of their development and integration into society.”

Based on such considerations, the court concluded 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 offenses, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests.” The court’s judgment held expressly that “there has been a violation of Article 8.” It denied the applicants’ requests for damages (which it had authority to award) but awarded 42,000 in costs and attorneys’ fees.

IMPLICATIONS

The finding that the existing United Kingdom Act violated Article 8 raises many questions about how European governments may craft laws that will authorize databases for investigating crime that are consistent

with the Convention. The judgment gives little guidance other than to suggest generally that such statutes must be narrowly tailored, and to note expressly that “the level of interference with the applicants’ right to private life may be different for each of the three different categories of personal data retained.”

Also lurking in the wings are issues about who can have access to such databases and for what purposes. Here the targeted database in varying degrees was available to “56 non-police bodies, including government agencies and departments, private groups such as British Telecom and the Association of British Insurers, and even certain employers.” The applicants here challenged such access and uses, but in light of its finding that retention for crime solving had not been justified, the court declined to address these other issues, but clearly signaled their relevance.

Although none of this has direct applicability to government databases in the United States, it would be unrealistic to assume that the court’s holding and reasoning may be safely ignored in this time of globalization.

NOTE

¹ *S. and Harper v. United Kingdom* (Applications Nos. 30562/04 and 30566/04).