Neutral Citation Number: [2015] EWCA Civ 34

Case No: B4/2014/2034 AND B4/2014/2037

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
The Rt. Hon. Sir James Munby, President
[2014] EWHC 1999 (Fam)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/02/2015

Before :

LORD DYSON, MASTER OF THE ROLLS
LORD JUSTICE McFARLANE
and
LORD JUSTICE BEATSON

- -

Between :

X	**1st Appellant**
The Commissioner of Police of the Metropolis	**2nd Appellant**
Secretary of State	**Intervener**
- and -	
Z (Children)	**1st Respondent**
A Local Authority	**2nd Respondent**

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Ms Sarah Morgan QC and Ms Rebecca Mitchell (instructed by **Sternberg Reed** Solicitors) for the **1st Appellant**
Ms Anya Proops and Mr Sean Aughey (instructed by **The Metropolitan Police Services**) for the **2nd Appellant**
Ms Samantha Broadfoot (instructed by **The Treasury Solicitor**) for the **Intervener**
Mr Roger McCarthy QC and Mr Neil Shah (instructed by **TV Edwards Solicitors**) for the **1st Respondent**
Mr Matthew Stott (instructed by **A Local Authority**) for the **2nd Respondent**

Hearing dates: 9th-10th December, 2014

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Judgment

Master of the Rolls:

1. This appeal concerns the question of the circumstances in which DNA profiles obtained by the police in exercise of their criminal law enforcement functions can, without the consent of the data subject, be put to uses which are remote from the field of criminal law enforcement. It is not in dispute that, where such profiles are obtained directly by the police under the questioning and treatment of persons provisions contained in Part V of the Police and Criminal Evidence Act 1985 (as amended) ("PACE"), they may not be used other than for the purposes specified in section 63T of PACE. I shall refer to these purposes as "criminal law enforcement purposes", although as will become apparent they are somewhat wider than what is conventionally considered to be criminal law enforcement. The question that we have to decide is whether a similar prohibition applies in relation to DNA profiles obtained by the police in exercise of their search and seizure powers under Part II of PACE.

2. In a judgment given on 18 June 2014 in care proceedings, Sir James Munby, the President of the Family Division, held that there was no such prohibition in respect of Part II DNA profiles. He decided that the court had a discretion to order the disclosure of DNA profiles obtained under Part II of PACE in order to assist the court in resolving a paternity issue which had arisen in those proceedings. He concluded that, in the exercise of the court's discretion, the Commissioner of the Police for the Metropolis ("The Commissioner") should be ordered to disclose the profiles.

The background

3. The respondents to this appeal are young children. In 2013 the appellant X, who is their "psychological" father, murdered their mother. Swabs were taken from the scene of the crime by the Metropolitan Police Service ("MPS"). These swabs were taken in the exercise of the MPS's powers under Part II of PACE. A blood sample was also taken from the mother post mortem. Thereafter, the MPS commissioned the profiling of all the crime scene blood swabs and their comparison with a DNA profile derived from a mouth sample provided by X under Part V of PACE following his arrest. The comparison indicated to a very high standard of probability that the blood at the scene of the crime was X's blood. X was subsequently convicted of murdering the mother.

4. The children are now the subject of care proceedings. In these proceedings, X has asserted that he is not only the psychological father, but also the biological father of the children. He has apparently done so because he wishes the court to permit him to have a role in the children's lives. Surprisingly, X refuses to undergo DNA testing to corroborate his assertion. In the face of this refusal, the children's guardian ("the Guardian") applied to the court for disclosure of various materials containing DNA information held by the Commissioner. In its final form, the application was for disclosure of two sets of DNA profiles ("the Disputed Profiles"), namely (i) a set of profiles derived from the blood stains found at the scene of the crime; and (ii) a DNA sample derived from a mouth sample taken from the mother post mortem. It has always been accepted by the Guardian that an application for disclosure of the DNA profile derived from the mouth sample provided by X under Part V is prohibited by section 63T. The thinking behind the application is that, if the DNA sample derived from the mother does not match the profile derived from the blood found at the scene

of the crime, then, since this is a "closed scene of crime", it can be inferred that the blood must have been that of X and not the mother.

5. The application for disclosure of the Disputed Profiles was supported by the local authority ("LA"), in its capacity as the local authority responsible for the children. It was resisted by the Commissioner (supported by the Secretary of State for the Home Department who is an intervener in these proceedings). The Secretary of State has ultimate responsibility for the National DNA Database ("the database") and the policy relating to the retention and disclosure of samples and DNA profiles derived from them.

6. By an order dated 23 June 2014, following a judgment given on 18 June, the President ordered the Commissioner to make disclosure to the local authority.

7. X and the Commissioner now appeal against the order with the permission of McFarlane LJ. It is not in dispute that, if the Commissioner has no power to disclose the Disputed Profiles except for criminal law enforcement purposes, then the court has no power to order the Commissioner to disclose them for use in care proceedings. The court cannot exercise its inherent jurisdiction to require a person to do something which is prohibited by statute.

The issues

8. There are three main issues. These are (i) whether on its true construction Part II of PACE prohibits the use of DNA profiles obtained under Part II other than for criminal law enforcement purposes ("the construction issue"); (ii) if not, whether section 6 of the Human Rights Act 1998 ("the HRA") operates to exclude any judicial discretion to order disclosure of Part II DNA profiles except for criminal law enforcement purposes ("the discretion issue"); and (iii) if not, whether the President reached a perverse conclusion in the present case when he concluded that the Disputed Profiles should be disclosed. As I shall explain, the issues were formulated rather differently before the President.

The statutory framework

9. The law relating to the collection and retention of biometric data, such as DNA samples, DNA profiles and fingerprints, has evolved significantly over the years, in order to take account of developments in technology as well as an increasing appreciation by the State, the public and the courts, of the sensitivity of the collection and retention of such data. Section 64(1) of PACE as originally enacted provided that samples from any person cleared of an offence were to be destroyed as soon as reasonably practicable after the conclusion of the proceedings. The Criminal Justice and Public Order Act 1994 established the database. It also made a number of changes to the rules which regulate the collection of tissue samples and gave the police powers to search the database for matches between DNA profiles. Data and samples could only be kept if the person was found guilty; if the person was not charged or was acquitted, the data and the sample had to be destroyed.

10. The powers to collect, retain and cross refer samples were further extended as a result of provisions contained in the Criminal Procedure and Investigations Act 1996, the Criminal Evidence (Amendment) Act 1997 and the Criminal Justice and Police Act

2001. The latter Act introduced section 64(1A) into PACE and provided the basis for the indefinite retention of samples taken from suspects, so that they remained available to the police on the database. This was the central provision that was held by the ECtHR in *S and Marper v UK* (2009) 48 EHRR 50 to be lacking in the safeguards required by article 8 of the European Convention on Human Rights ("the Convention"). I consider the *Marper* decision in detail at paras 39 to 43 below. The main response of the UK Government to the decision was contained in a White Paper, *Keeping the Right People on the DNA Database,* which was published on 7 May 2009. This led to the enactment of the Protection of Freedoms Act 2012 ("POFA").

11. The effect of POFA was to repeal section 64(1A) of PACE and to replace Part V of PACE in its entirety. Part V makes provision for the questioning and treatment of *persons* by the police. Part II (which was unaffected by *Marper* and untouched by POFA) makes provision for powers of entry and search of *premises* and seizure of anything which is on the premises. The amendments to Part V were introduced in order to meet the criticisms expressed by the ECtHR in *Marper* of the blanket and indiscriminate retention of DNA material from unconvicted individuals. These criticisms were met by setting out, in far more detail than had previously been the case, the circumstances in which fingerprints and DNA materials could be retained and for how long.

12. At this stage, I should refer to the relevant provisions of Part V in their current version. That is the version which is relevant for the purposes of this appeal and the determination of the construction of section 22.

13. Section 63D makes provision for the destruction of the material to which it applies, namely:

> "(1)
>
> (a) fingerprints –
>
> (i) taken from a person under any power conferred by this Part of this Act, or
>
> (ii) taken by the police, with the consent of the person from whom they were taken, in connection with the investigation of an offence by the police, and
>
> (b) a DNA profile derived from a DNA sample taken as mentioned in paragraph (a)(i) or (ii)."

14. Section 63R makes provision for the destruction of the material to which it applies, namely:

> "(1) ….samples--
>
> (a) taken from a person under any power conferred by this Part of this Act, or

> (b) taken by the police, with the consent of the person from whom they were taken, in connection with the investigation of an offence by the police."

15. Section 63S makes provision for the destruction of impressions of footwear.

16. So far as material, section 63T provides as follows:

> "(1) Any material to which section 63D, 63R or 63S applies must not be used other than –
>
> (a) in the interests of national security,
>
> (b) for the purposes of a terrorist investigation,
>
> (c) for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution, or
>
> (d) for purposes related to the identification of a deceased person or of the person to whom the material relates.
>
> (2) Material which is required by section 63D, 63R or 63S to be destroyed must not at any time after it is required to be destroyed be used –
>
> (a) in evidence against the person to whom the material relates, or
>
> (b) for the purposes of the investigation of any offence.
>
> (3) In this section –
>
> (a) the reference to using material includes a reference to allowing any check to be made against it and to disclosing it to any person,
>
> (b) the reference to crime includes a reference to any conduct which –
>
> (i) constitutes one or more criminal offences (whether under the law of England and Wales or of any country or territory outside England and Wales), or
>
> (ii) is, or corresponds to, any conduct which, if it all took place in England and Wales, would constitute one or more criminal offences, and
>
> (c) the references to an investigation and to a prosecution include references, respectively, to any investigation outside England and Wales of any crime or suspected crime and to a

> prosecution brought in respect of any crime in a country or territory outside England and Wales."

17. Section 65(1) defines "DNA profile" as meaning "any information derived from a DNA sample" and "DNA sample" as meaning "any material that has come from a human body and consists of or includes human cells".

18. As regards Part II of PACE, sections 19, 21 and 22 are material.

19. Section 19 provides:

> "(1) The powers conferred by subsections (2), (3) and (4) below are exercisable by a constable who is lawfully on any premises.
>
> (2) The constable may seize anything which is on the premises if he has reasonable grounds for believing—
>
> (a) that it has been obtained in consequence of the commission of an offence; and
>
> (b) that it is necessary to seize it in order to prevent it being concealed, lost, damaged, altered or destroyed.
>
> (3) The constable may seize anything which is on the premises if he has reasonable grounds for believing—
>
> (a) that it is evidence in relation to an offence which he is investigating or any other offence; and
>
> (b) that it is necessary to seize it in order to prevent the evidence being concealed, lost, altered or destroyed."

20. Section 21 provides:

> "(1) A constable who seizes anything in the exercise of a power conferred by any enactment, including an enactment contained in an Act passed after this Act, shall, if so requested by a person showing himself—
>
> (a) to be the occupier of premises on which it was seized; or
>
> (b) to have had custody or control of it immediately before the seizure,
>
> provide that person with a record of what he seized.
>
> (2) The officer shall provide the record within a reasonable time from the making of the request for it.
>
> (3) Subject to subsection (8) below, if a request for permission to be granted access to anything which—

> (a) has been seized by a constable; and
>
> (b) is retained by the police for the purpose of investigating an offence,
>
> is made to the officer in charge of the investigation by a person who had custody or control of the thing immediately before it was so seized or by someone acting on behalf of such a person, the officer shall allow the person who made the request access to it under the supervision of a constable."

21. Section 22 provides:

> "(1) Subject to subsection (4) below, anything which has been seized by a constable or taken away by a constable following a requirement made by virtue of section 19 or 20 above may be retained so long as is necessary in all the circumstances. "
>
> (2)Without prejudice to the generality of subsection (1) above—
>
> (a) anything seized for the purposes of a criminal investigation may be retained, except as provided by subsection (4) below—
>
> (i) for use as evidence at a trial for an offence; or
>
> (ii) for forensic examination or for investigation in connection with an offence; and
>
> (b) anything may be retained in order to establish its lawful owner, where there are reasonable grounds for believing that it has been obtained in consequence of the commission of an offence."

The judgment

22. The President said at para 29 of his judgment that it was important to be clear as to what was *not* being sought. He said:

> "I emphasise the fact that I am *not* being asked to direct the production of any exhibit or the original of any profile. The Metropolitan Police is, understandably and appropriately, concerned that there should be no risk by contamination or otherwise to the integrity of any of the exhibits from the criminal proceedings or any of the original profiles. To understand the importance of preserving the integrity of such materials, against some future day when they may need to be put to some at present unforeseen and even unforeseeable use, one has to look no further than the eventual resolution in 2002, by the DNA testing of the original trial exhibits, of the question of whether or not the man who had been executed in 1962 for

> having committed the A6 murder was in act guilty: *R v Hanratty* [2002] EWCA Crim 1141, [2002] 3 All ER 534. ”

23. At para 35, he identified the three issues that were before him, namely (i) does what is proposed offend section 45 of the Human Tissue Act 2004? (ii) is what is proposed prohibited by Part V, specifically section 63T of PACE? and (iii) if not, what order should be made? It will be seen at once that these issues are different from those that have been the subject of the submissions before us. We have heard almost no argument about the Human Tissue Act 2004; and the real focus of the submissions before us has been on the proper construction of section 22, although there has also been a subsidiary argument about whether the order sought by the Guardian would indirectly require something which is prohibited by section 63T.

24. The nub of the President’s reasoning on the issue relating to section 63T is contained in the following paragraphs:

> “42. Ms Broadfoot submits that a DNA sample or profile derived from a crime scene sample seized under Part II of PACE which has been matched to a DNA sample or profile taken under Part V of PACE may not be ordered to be disclosed for paternity purposes because the disclosure of the Part II sample would, as she puts it, involve the collateral (and prohibited) use of the Part V sample, in breach of section 63T. I agree with the proposition and the conclusion but it rests on an unspoken assumption which is at odds with what is sought in this case. ”
>
> 43. Ms Broadfoot says that crime scene samples and the profiles derived from them are of limited use on their own as they cannot identify any particular person. DNA, she says, only becomes significant for identification purposes once compared with that of a known person. She amplifies the point by postulating a case where samples at a crime scene produce 15 different DNA profiles. After 14 persons have been eliminated from the inquiry, the remaining man is convicted. A paternity issue arises and the guardian seeks *the DNA profile from the crime scene relating to the convicted man*. The only way, she says, the police can identify his DNA profile from the other 14 is by matching it to the Part V sample. This involves a use of the Part V sample (see section 63A(1)), which is not permitted for paternity purposes.
>
> 44. The short answer to all this, as Mr McCarthy points out, is that, whatever might be needed in another case, there is no need in this case to compare anything with a Part V sample, and that is not what he is proposing.
>
> 45. Evidence, entirely independent of any samples or DNA profiles, demonstrates that the blood at the crime scene in all probability includes both the mother's blood and X's blood. The unidentified DNA profiles obtained from those samples can,

> without reference to any other samples (whether obtained under Part V of PACE or, post mortem, from the mother's body), be compared with the DNA samples obtained, pursuant to the order already made by Hogg J, from the children. If those unidentified DNA profiles identify two persons as being parents of the children, then that will, without more, establish X's paternity. If those unidentified DNA profiles identify one person as being a parent of the children, then it will be necessary to compare the relevant profile with that obtained from the mother's post mortem sample to establish whether it is hers or, by elimination, X's.
>
> 46. Mr McCarthy submits that Ms Broadfoot's submissions entirely miss the point of *this* application, which makes no reference to and is not in any way dependent upon any Part V sample. As he says, none of the examples given by Ms Broadfoot have anything to do with the factual basis upon which the guardian's application is mounted. With brutal simplicity, he summarises his case as follows: The guardian's case is simple. No reference is made to any Part V samples; no reference is made to any comparison with any Part V sample; no disclosure is sought of any Part V sample (or, I might add, anything derived from a Part V sample). Section 63T, he submits, does not apply."

25. The President accepted Mr McCarthy's submissions.

26. Having concluded that there was nothing in Part II or Part V of PACE to prevent him from ordering the Commissioner to provide a copy of the DNA profiles taken from blood found at the crime scene, the President said at para 51 of his judgment that he had a discretion whether or not to make the order. The exercise of this discretion was the familiar one of balancing the various competing public and private interests. At para 52, he said that the information derived from the DNA demanded a "high degree of protection" and that any use of it without the subject's consent required "the imposition of robust and effective safeguards". He then conducted a careful balancing exercise and concluded at para 56:

> "In these circumstances, the balance, in my judgment, comes down in favour of the children. The criminal justice policy arguments are weighty, though in the circumstances of this case significantly less weighty than Ms Broadfoot would have me accept. The interests of the children are compelling. There are likely to be few other cases in which an order can sensibly be sought without having recourse—prohibited—to Part V material or material the use of which is prohibited by the Human Tissue Act 2004. The order I propose to make will be subject to stringent limitations and safeguards."

27. At para 57 he said:

> "I emphasise that my decision is confined to the forensically unusual circumstances of this particular case. Every case where an application is made for access to DNA samples or profiles requires the most anxious scrutiny and an intense focus on the specific facts and circumstances of the particular case. Even if there is no statutory prohibition of what is sought, an order is never to be had just for the asking. There will be cases where the policy arguments put forward by Ms Broadfoot will be found to weigh heavier in the balance than I have found in this case—a case which is not merely forensically unusual as requiring no recourse to Part V material but one where the children's claims are unusually compelling"

The first issue: the construction of Part 11 of PACE

28. It is common ground between the parties that the police have no power to use any material taken and retained under Part V (ie material obtained from a person as opposed to material taken from a place) for any other purpose than criminal law enforcement. I use the phrase "criminal law enforcement" as shorthand for the four matters set out in section 63T(1)(a) to (d). It is a somewhat loose use of the phrase, at any rate as regards the retention of material for use in the interests of national security or for a terrorist investigation. But all four uses come within the broad genus of the protection of the public, which is the paradigm function of the police. It follows that it is also common ground that the police cannot be required by the court to disclose material taken and retained under Part V for any purpose other than criminal law enforcement: the court cannot in the exercise of its inherent powers require the police to do something which the police are prohibited by statute from doing.

29. Part II is concerned with anything seized by the police on "premises". "Premises" are defined by section 23 as including "any place". An example is the scene of a crime from where DNA samples or other biometric material is taken. There is no provision in Part II which *expressly* prohibits the use of material seized under section 19. The central question in this case is whether section 22, on its true construction, has the same effect as section 63T, at least in so far as it relates to DNA or other biometric material. Ms Proops (whose submissions are adopted by Ms Broadfoot and Ms Morgan QC) submits that section 22 does have this effect (i) if it is construed in accordance with conventional domestic law principles of statutory interpretation; alternatively (ii) if it is interpreted compatibly with article 8 of the European Convention of Human Rights ("the Convention"). Before I consider this question in detail, I need to refer to the *Marper* decision.

Marper

30. The case concerned two individuals who had been arrested and whose fingerprints and DNA samples had been taken by the police under Part V (in its pre-POFA version). Both individuals applied for the fingerprints and samples to be destroyed. The police refused relying on the indefinite retention provisions in section 64(1A) of PACE.

31. At para 67, the court held that the mere storing of data relating to the private life of an individual amounts to an interference within the meaning of article 8. I interpolate

that, if mere retention of data interferes with an individual's article 8 rights, then the use or disclosure of the data must equally do so. At paras 74 to 75, the court considered whether there was a material difference between DNA samples and DNA profiles. It said:

> "75. The Court observes, nonetheless, that the profiles contain substantial amounts of unique personal data. While the information contained in the profiles may be considered objective and irrefutable in the sense submitted by the Government, their processing through automated means allows the authorities to go well beyond neutral identification. The Court notes in this regard that the Government accepted that DNA profiles could be, and indeed had in some cases been, used for familial searching with a view to identifying a possible genetic relationship between individuals. They also accepted the highly sensitive nature of such searching and the need for very strict controls in this respect. In the Court's view, 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. The frequency of familial searches, the safeguards attached thereto and the likelihood of detriment in a particular case are immaterial in this respect (see *Amann* cited above, § 69). This conclusion is similarly not affected by the fact that, since the information is in coded form, it is intelligible only with the use of computer technology and capable of being interpreted only by a limited number of persons."

32. The court concluded at para 77 that the retention of cellular samples and DNA profiles disclosed an interference with the applicants' right to respect for their private lives. It then considered whether the interference was justified in accordance with article 8(2). It first addressed the question whether the interference was "in accordance with the law". The law had to be "adequately accessible and foreseeable"; and it had to afford "adequate legal protection against arbitrariness and accordingly indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise" (para 95). The level of precision required depends on the context of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed. The court did not express a final decision on whether the retention provisions were "in accordance with the law". Section 64(1A) of PACE provided that retained samples must not be used by any person except for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution or the identification of a deceased person or of the person from whom a body part came. At para 99 it noted that these purposes were "worded in rather general terms". It went on to say:

> "It reiterates that it is as essential, in this context, as in telephone tapping, secret surveillance and covert intelligence-gathering, to have clear, detailed rules governing the scope and application of measures, as well as minimum safeguards

> concerning, *inter alia*, duration, storage, usage, access of third parties, procedures for preserving the integrity and confidentiality of data and procedures for its destruction, thus providing sufficient guarantees against the risk of abuse and arbitrariness. The Court notes, however, that these questions are in this case closely related to the broader issue of whether the interference was necessary in a democratic society. In view of its analysis in paragraphs 105-126 below, the Court does not find it necessary to decide whether the wording of section 64 meets the "quality of law" requirements within the meaning of Article 8 § 2 of the Convention. "

33. The court then considered the issue of necessity in a democratic society. It held that retention of DNA profiles met the legitimate aim of the detention and prevention of crime. On the issue of proportionality, it said:

> "103. The protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life, as guaranteed by Article 8 of the Convention. The domestic law must afford appropriate safeguards to prevent any such use of personal data as may be inconsistent with the guarantees of this article. The need for such safeguards is all the greater where the protection of personal data undergoing automatic processing is concerned, not least when such data are used for police purposes. The domestic law should notably ensure that such data are relevant and not excessive in relation to the purposes for which they are stored; and preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored. The domestic law must also afford adequate guarantees that retained personal data was efficiently protected from misuse and abuse. The above considerations are especially valid as regards the protection of special categories of more sensitive data and more particularly of DNA information, which contains the person's genetic make-up of great importance to both the person concerned and his or her family.
>
> 104. The interests of the data subjects and the community as a whole in protecting the personal data, including fingerprint and DNA information, may be outweighed by the legitimate interest in the prevention of crime. However, 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."

34. The court then went on to hold that the blanket and indiscriminate retention of DNA data permitted under PACE was disproportionate.

Domestic law interpretation of section 22(1) and (2)

35. I shall start with the construction of section 22(1) and (2) without regard to the Convention. The only real distinction between Part V data and Part II *biometric* data is that (i) the former derives from samples taken directly from a person (which means that it will be certain to whom the data relates) and (ii) the latter derives from materials taken from a place (usually the scene of a crime). Whether it is possible to link Part II biometric data to a known individual will depend on whether (i) the data can be matched to relevant Part V data or (ii) there is circumstantial evidence linking the relevant data to a known individual. Where a Part II DNA profile can be linked to a known individual, it is for all practical purposes indistinguishable from any Part V profile obtained from the individual. In reality, a request for a Part II DNA profile will only be made where it has been or can be established that the profile is linked to a known individual. In my view, the mere fact that the Part II profile has been obtained indirectly from a crime scene, rather than directly from a person, cannot be a rational basis for treating Part II and Part V profile data differently. Parliament cannot, when replacing Part V of PACE in 2012, have intended that Part II DNA profiles could be used outside the sphere of criminal law enforcement but that Part V DNA data could not be so used. That would be arbitrary and would make no sense. The court should be very slow to impute to Parliament an intention to legislate so as to produce results which are arbitrary and irrational.

36. In order to avoid such absurdity and to reflect Parliament's clear intention in POFA to legislate to remove the incompatibility between English law and the requirements of the Convention, I consider that section 22 should be construed in a way which is consistent with the scheme of Part V. That is to say, section 22 should be construed as meaning that, if the police consider that it is necessary to retain Part II DNA material for criminal law enforcement purposes, they may not use it for any other purpose.

Construction of section 22(1) and (2) compatible with article 8 of the Convention

37. If there were any doubt as to the meaning of section 22, it is laid to rest if regard is had to the requirement of section 3 of the HRA that, so far as it is possible to do so, primary legislation should be "read and given effect in a way which is compatible with Convention rights". There can be no doubt that article 8 of the Convention is engaged in this case. Article 8 provides:

> "(1) Everyone has the right to respect for his private and family life….
>
> (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…."

38. The retention and use of an individual's DNA data is an obvious interference with his right to private life. As we have seen, it was held in *Marper* that the mere retention of DNA data by the police can be an interference with the data subject's right privacy rights.

39. Ms Proops submits that, unless section 22 is read and given effect as if it contained the restrictions set out in section 63T, it would not be "in accordance with the law" because it would not meet (i) the requirement that the law should not be arbitrary and

(ii) the requirements for legal certainty and precision. In the course of her impressive analysis, she submitted that accessibility to the law is important for two reasons. These are (i) that it enables those potentially affected to regulate their conduct; and (ii) that it sets out what is permissible and what is impermissible, thereby reducing if not eliminating the opportunities for arbitrary state conduct. These are two distinct aspects of "in accordance with the law". Ms Proops points out that, in the context of state surveillance, knowledge of the law will not assist the individual in regulating his conduct: mere knowledge of the law will not tell him whether he is subject to telephone interception. What matters in this context is having a law which is clear and certain so that it avoids arbitrary conduct on the part of the State and provides a yardstick by which an independent court or tribunal can measure the lawfulness of conduct. On the other hand, there are many contexts where knowledge of the precise scope of a law *will* enable individuals affected to regulate their behaviour. The two reasons are different facets of the same general principle, namely that the law must be as clear and certain as is practicable in all the circumstances. I accept this analysis.

40. In my view, if section 22 is construed as meaning that the police can retain DNA material (whether samples or profiles) for as long as they consider to be necessary and for purposes wider than those specified in section 63T, then it is not "in accordance with the law" for two reasons. First, it is arbitrary that the law should treat a Part II DNA profile as susceptible to disclosure for purposes other than criminal law enforcement, but not similarly treat an identical Part V profile. It is arbitrary to have in place a judicial discretion which allows for the disclosure of Part II profiles in circumstances where (as is common ground) such discretion is excluded in respect of an identical Part V profile. There is no rational basis for saying that a Part V DNA profile should only be permitted to be used for the purposes of criminal law enforcement, but that a Part II profile may also be used for purposes which are unconnected with criminal law enforcement. As Ms Proops points out, Part II biometric materials engage article 8 in the same way as Part V materials. It is true that Part II samples are not taken directly from individuals. But this is an immaterial distinction. It is clear from *Marper* that what matters when it comes to lawful governance of police-held DNA profiles is not how they were obtained by the police, but what they reveal about the individual and their capacity for familial linking and, in other contexts, for other linking purposes or identification. Part II biometric material has the potential to be linked to a known individual, whether by matching with Part V data or by means of circumstantial evidence (based on the assumption that the crime scene was a "closed scene of crime").

41. Secondly, as is made clear at para 99 of *Marper*, the field of state-based DNA data management is par excellence a field which requires a high degree of certainty and precision. Section 22 sets out no rules for the exercise of the discretion of retaining and using seized material other than that it may be so exercised for the purposes stated in subsection (2)(a) (ie criminal law enforcement purposes). The President carefully set out the factors that he took into account in deciding how to exercise the discretion in this particular case. As Mr McCarthy says at para 10 of his skeleton argument:

> "The President's judgment deals with the present dispute before the Court and does not attempt to set out authoritative guidelines for other cases where the facts and competing issues may be quite different….It would have been dangerous for him

> to do so because there would have had to have been a great deal of guesswork about other cases. The President's decision is not authority on points which were neither argued nor decided."

42. I accept that the degree of precision and certainty demanded by the "in accordance with the law" requirement depends on the relevant context and what is practicable. In *CG v Bulgaria* (2008) 47 EHRR 51, the ECtHR said at para 40:

> "The Court is naturally mindful of the fact that in the particular context of measures concerning national security, the requirement of foreseeability cannot be the same as in many other fields. In particular, the requirement of 'foreseeability' of the law does not go so far as to compel states to enact legal provisions listing in detail all conduct that may prompt a decision to expel an individual on national security grounds. By the nature of things, threats to national security may vary in character and may be unanticipated or difficult to define in advance. However, even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that deportation measures affecting fundamental human rights be subject to some form of adversarial proceedings before an independent authority or a court competent to effectively scrutinise the reasons for them and review the relevant evidence, if need be with appropriate procedural litigation on the use of classified information. "

43. It is true that the context of that case (national security) was very different from the context of the present case, but it illustrates the wider principle that there is no fixed standard of precision or certainty demanded by the "in accordance with the law" principle. Thus, nobody has suggested that section 22 is not "in accordance with the law" so far as concerns retention of biometric material *for purposes of criminal law enforcement*. But section 22 contains no express or implied rules in relation to the retention and use of such material for any other purpose. If (contrary to the view I have earlier expressed) section 22 were construed as authorising the retention and use of biometric material for such wider purposes, then in my view it would lack the clarity and precision required to make it "in accordance with the law". It would be unclear for what other purposes the material could be retained and used and for how long. On this hypothesis, section 22 would also suffer from the other shortcomings identified at para 99 of *Marper* which I have set out at para 32 above.

44. In summary, I accept the submissions of Ms Proops that, if section 22(1) and (2) were to be interpreted as meaning that the police have the power to retain and use DNA or other biometric material for purposes other than criminal law enforcement purposes, then it would violate article 8, since it would not be "in accordance with the law". It would entail the existence of an arbitrary and unjustified distinction between Part II biometric material and Part V biometric material to which sections 63D, section 63R and section 63S apply. It would also mean that the exercise of the discretion given by section 22 would be indeterminate and unclear.

45. It is, however, possible to read and give effect to these provisions in a way which is compatible with article 8(1) of the Convention. I accept the submission of Ms Proops

that this can be done in one of two ways: (i) either the court must approach Part II on the basis that it contains a general implied prohibition on the use of Part II biometric data other than for purposes of criminal law enforcement; or (ii) the court must read words into section 22(1) so that, in effect, it contains a general prohibition on the use of biometric material other than for purposes of criminal law enforcement. Reading words to this effect into section 22(1) does not go against the grain of the legislation. Rather, it "leaves the essential principles and scope of the legislation intact but allows it to be read in a way which is compatible with Convention rights": see per Lord Rodger at para 122 of *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557.

Conclusion on the construction issue

46. I conclude, therefore, that upon its true construction section 22 does not permit the police to retain and use biometric material seized under section 19 for any other purpose than criminal law enforcement. For the reasons I have given, I reach this conclusion on the construction issue by applying a purposive domestic law approach to statutory interpretation; alternatively, by interpreting the provisions in accordance with section 3 of the HRA in a way which is compatible with article 8 of the Convention.

47. It is, therefore, no answer to this appeal to say (as the President accepted) that the order for disclosure can be made because it is unnecessary for the Guardian's purposes to compare the Part II material with the Part V sample obtained from X. If, as I have held, the Commissioner has no statutory power to retain and use the Part II sample except for the purposes of criminal law enforcement, he cannot disclose it for another unconnected purpose and the court cannot require him to disclose it for such a purpose. Even if it were true that the Guardian did not intend to use the material (or a copy of it) for any such other purpose, that would be irrelevant.

48. In these circumstances, the second and third issues do not arise and I do not propose to say anything about them.

49. Accordingly, I would allow this appeal.

Lord Justice McFarlane:

50. On the basis of the arguments that have been presented to this court, which differ markedly from those made before The President, I agree that this appeal should be allowed for the reasons given by The Master of the Rolls in his judgment. I simply wish to add the following observation for the avoidance of doubt.

51. The issue in the present case is confined to *biometric* material seized from 'premises' under Part II of PACE. To that extent the construction that we have given to the interpretation of Part II, in order to align it with the provisions of Part V, represents an exception confined to biometric material as distinct from any other form of material that may be seized by Police from premises under Part II.

52. It is often the case that the circumstances which may lead to a police investigation also justify investigation by the child protection arm of a local authority and, if necessary, the Family Court. For forensic, professional and pragmatic reasons, it is the

norm for social services, and the Family Court, to stand back from conducting their own investigation of premises which are, or may be, a crime scene in order for the Police to undertake that work themselves. The result of any Police investigation may, however, be of singular value to the local authority and the family court for the purposes of any related family proceedings. This is particularly so where, as may be the case, the Police investigation either does not result in a prosecution or leads to an acquittal but it is nevertheless necessary for the Family Court to conduct its own investigation into the same circumstances.

53. The law and practice relating to cooperation between the Police, the CPS, local authorities and the Family Justice System is now well established and, in particular, is reflected in the *'2013 Protocol and Good Practice Model: Disclosure of information in cases of alleged child abuse and linked criminal and care directions hearings*' signed by the Senior Presiding Judge, The President of the Family Division and the Director of Public Prosecutions (on behalf of the Crown Prosecution Service) which came into force on 1st January 2014. Nothing that is said in the judgments in this appeal is intended to have any impact upon these established arrangements for the disclosure of Part II material other than biometric material.

Lord Justice Beatson:

54. I agree with both judgments.