Case No: IL13C00895

Neutral Citation Number: [2014] EWHC 1999 (Fam)
**IN THE HIGH COURT OF JUSTICE**
**FAMILY DIVISION**
**(In Open Court)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 June 2014

**Before** :

**SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION**

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**In the matter of Z (Children)**

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**Mr Roger McCarthy QC and Mr Neil Shah** (instructed by T V Edwards) for the children's guardian
**Mr Matthew Stott** (instructed by local authority solicitor) for the local authority
**Ms Rebecca Mitchell** (instructed by Sternberg Reed) for the children's alleged father
**Ms Tina Cook QC and Ms Martha Gray** (instructed by Directorate of Legal Services) for the Metropolitan Police Service
**Ms Samantha Broadfoot** (instructed by the Treasury Solicitor) for the Secretary of State for the Home Department

Hearing date: 20 May 2014

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Judgment

**Sir James Munby, President of the Family Division :**

1. I have before me an application which arises in the context of ongoing care proceedings relating to some young children. It concerns the question of whether or not X, as I shall refer to him, is, as he asserts, the father of the children. The question arises because X, despite his assertion, refuses to submit to DNA testing.

2. The question arises in the most appalling circumstances: X murdered the children's mother, in particularly horrible circumstances. He is serving a sentence of life imprisonment, with a long minimum term. Whatever role it might be thought that X should have in these children's lives – a matter with which I am *not* concerned – the issue of his paternity goes also to the question of what role his wider family should have.

3. I shall return in due course to examine the facts in a little more detail and to identify precisely what relief is being sought. First, however, it is convenient to consider the legal framework.

The legal framework

4. The issue I have to determine, which is important and thus far unresolved, lies at a number of intersections. First, there is the intersection between the conflicting rights and interests of X and of the children. Secondly, there is the intersection between the conflicting rights and interests of X and of the public authorities responsible for his arrest and prosecution. Thirdly, there is the consequential intersection between the family justice system and the criminal justice system. And, fourthly, there is, as we shall see, the intersection between Part II and Part V of the Police and Criminal Evidence Act 1984 as amended (PACE). If it is the last of these which is ultimately determinative of the question I have to decide it is necessary first to consider the others.

5. It is convenient to start with the rights and interests of the children. They have a right (I put the matter descriptively rather than definitively) to know who their father is. That has long been recognised in our domestic law. In *S v McC (Otherwise S) and M (DS Intervener), W v W* [1972] AC 24, 57, 59, Lord Hodson said that:

> "The interests of justice in the abstract are best served by the ascertainment of the truth and there must be few cases where the interests of children can be shown to be best served by the suppression of truth … it must surely be in the best interests of the child in most cases that paternity doubts should be resolved on the best evidence, and, as in adoption, the child should be told the truth as soon as possible."

In *In re H (A Minor) (Blood Tests: Parental Rights)* [1997] Fam 89, 106, Ward LJ said, apropos paternity:

> "every child has a right to know the truth unless his welfare clearly justifies the cover-up."

It is recognised in Strasbourg law as an ingredient of the rights protected by Article 8: *Gaskin v United Kingdom* (1990) 12 EHRR 36, [1990] 1 FLR 167, *Mikulic v Croatia* (2002) 11 BHRC 689, [2002] 1 FCR 720. It is also recognised in Articles 7 and 8 of the United Nations Convention on the Rights of the Child.

6. From the children's perspective their interests are best served by the ascertainment of the truth, whatever that truth may be. As I said in *Re Z (Children) (Disclosure: Criminal Proceedings)* [2003] EWHC 61 (Fam), [2003] 1 FLR 1194, para 13(vii):

> "the children … have a direct and important interest … in ensuring that the truth, whatever it may be, comes out. As they grow older they will need to know, if this is the case, and however painful it may be, that their father is a murderer … In this as in other respects, better for the children that the truth, whatever it may be, comes out."

7. X, on the other hand has the right (again I put the matter descriptively rather than definitively) to keep his medical and genetic data confidential. That has long been recognised in our domestic law. It is also recognised in Strasbourg law as an ingredient of the rights protected by Article 8, indeed, a "vital principle" of "fundamental importance": see *Z v Finland* (1998) 25 EHRR 371, para 95, and *MS v Sweden* (1999) 28 EHRR 313, para 41. Moreover, if there is to be disclosure of such data which entails an interference with the right to respect for private life, then that interference will be justified only if there are what in *Z v Finland*, para 103, the Court referred to as "effective and adequate safeguards against abuse". What those safeguards should be will, no doubt, depend upon the particular circumstances.

8. In the specific context of DNA samples and profiles the Strasbourg Court emphasised in *S and Marper v United Kingdom* (2008) 48 EHRR 50 paras 70-75, the highly personal nature of such material, the sensitivity of the substantial amounts of unique personal data contained in such material, and the possibility, bearing in mind the rapid pace of developments in the field of genetics and information technology, that genetic information might in future be deployed in novel ways or in a manner which cannot be anticipated with precision today. The Court described DNA material as being among the special categories of sensitive data attracting a heightened level of protection.

9. In domestic law the balance between these various interests is struck in different ways. Where paternity is in issue in a family court, the balance is defined by Part III of the Family Law Reform Act 1969, a statutory scheme which abrogates any power to direct the taking of a sample under the inherent jurisdiction: *In re O (A Minor) (Blood Tests: Constraint), In re J (A Minor)* [2000] Fam 139, 151. Unless he is himself a child, the father cannot be compelled to provide a DNA sample: see section 21(1). The only remedy for such a refusal is provided by section 23(1), which enables the court to "draw such inferences, if any, from that fact as appear proper in the circumstances." It is X's refusal to give his consent in accordance with section 21(1) that has given rise to the present application.

10. It is clear from the illuminating account of the history set out by Ward LJ in *In re H (A Minor) (Blood Tests: Parental Rights)* [1997] Fam 89, 98-101, that the policy underlying Part III of the 1969 Act had little if anything to do with the protection of

personal medical data (let alone with DNA, the unforeseen forensic use of which in 1969 still lay in an unimagined future). Rather the policy derived from the undoubted fact that, at common law, the process of taking a blood sample without consent involves an attack on the integrity of the individual's body – an assault – and the view of the Law Commission in its 1968 Report on *Blood Tests and the Proof of Paternity in Civil Proceedings* that it would not be acceptable to public opinion in general or to the medical profession in particular to exert physical compulsion in order to obtain blood samples.

11. In the context of the criminal justice system the balance is struck very differently. Part V of PACE enables DNA samples to be taken in certain circumstances without consent but provides stringent safeguards in relation to their use. Specifically, Part V prohibits use of such samples except as specifically permitted by Part V. I shall return to the relevant provisions of PACE below.

12. Where Part V of PACE prevents the use of a DNA sample in circumstances where the Family Court would wish to have access to that sample, or information derived from it, in a case where paternity is in issue, PACE trumps the needs of the Family Court. Neither the Family Court, nor the High Court in exercise of its inherent jurisdiction, can order the release or use of DNA material in circumstances prohibited by PACE: see *Lambeth London Borough v S, C, V and J (by his Guardian)* [2006] EWHC 326 (Fam), [2007] 1 FLR 152, and *Lewisham London Borough Council v D (Police Disclosure of DNA sample to local authority)* [2010] EWHC 1239 (Fam), [2011] 1 FLR 908.

13. In the first of these cases, Ryder J as he then was said (para 44):

> "the use of retained DNA samples for any purpose other than that related to the specified uses in the Act would be contrary to the clear wording of the Act and inconsistent with the public policy that underpins the Act. Furthermore … the prohibition on other uses is a proportionate interference having regard to that public policy."

In the other case, Mr Stephen Cobb QC as he then was said (para 43):

> "I cannot treat the children's welfare as paramount in reaching the decision in this case; it is not in fact even a factor which can affect my decision".

I respectfully agree. True it is that both those decisions related to a previous version of PACE which did not include various amendments which are now in force, and on the basis of which I must decide the present case, but the principle recognised and applied by both Ryder J and Mr Cobb is still as good now as it was then. All turns on the relevant provisions of PACE.

14. I note at this point that the use of DNA material is also regulated by the Human Tissue Act 2004, to which I will return in due course.

<u>The Police and Criminal Evidence Act 1984 (PACE)</u>

15. Part II of PACE relates to powers of entry, search and seizure. For present purposes the material provisions are to be found in sections 19 and 22. So far as material section 19 provides as follows:

> "(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."

The word "premises" is defined in section 23 as including "any place".

16. So far as material, section 22 provides as follows:

> "(1) Subject to subsection (4) below, anything which has been seized by a constable … 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;
>
> …
>
> (4) Nothing may be retained for either of the purposes mentioned in subsection (2)(a) above if a photograph or copy would be sufficient for that purpose."

17. I note that Part II of PACE contains no provisions explicitly related to samples of blood or DNA material. On the other hand, the word "anything" in sections 19 and 22 means precisely that: *any thing*. So, for example, the word "anything" section 19(3) plainly includes blood or DNA material recovered – seized – at a crime scene.

18. Part V of PACE relates to questioning and treatment of persons by police. For present purposes the material provisions are to be found in sections 63D, 63R, 63S and 63T. So far as material, section 63D provides as follows:

> "(1) This section applies to –
>
> (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).
>
> (2) Fingerprints and DNA profiles to which this section applies ("section 63D material") must be destroyed if it appears to the responsible chief officer of police that … [I need not set out the details]
>
> (3) In any other case, section 63D material must be destroyed unless … [I need not set out the details]"

19. So far as material, section 63R provides as follows:

> "(1) This section applies to 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.
>
> (2) Samples to which this section applies must be destroyed if it appears to the responsible chief officer of police that … [I need not set out the details]
>
> …
>
> (4) A DNA sample to which this section applies must be destroyed … [I need not set out the details]"

20. Section 63S relates to impressions of footwear.

21. 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."

22. 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".

23. It will be noted that in each case sections 63D and 63R are confined to two classes of material (ie, fingerprints, DNA profiles derived from DNA samples, or samples): first, those "taken from a person under any power conferred by this Part of this Act" and, second, those "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".

The Human Tissue Act 2004

24. So far as material, section 45 of the Human Tissue Act 2004, headed "Non-consensual analysis of DNA" provides as follows:

> "(1) A person commits an offence if –
>
> (a) he has any bodily material intending –
>
> (i) that any human DNA in the material be analysed without qualifying consent, and
>
> (ii) that the results of the analysis be used otherwise than for an excepted purpose,
>
> (b) the material is not of a kind excepted under subsection (2), and
>
> (c) he does not reasonably believe the material to be of a kind so excepted.
>
> (2) Bodily material is excepted if –
>
> (a) it is material which has come from the body of a person who died before the day on which this section comes into force and at least one hundred years have elapsed since the date of the person's death,
>
> (b) it is an existing holding and the person who has it is not in possession, and not likely to come into possession, of information from which the individual from whose body the material has come can be identified, or …
>
> (4) Schedule 4 (which makes provision for the interpretation of "qualifying consent" and "use for an excepted purpose" in subsection (1)(a)) has effect.
>
> (5) In this section (and Schedule 4) –
>
> "bodily material" means material which –
>
> (a) has come from a human body, and
>
> (b) consists of or includes human cells;

> "existing holding" means bodily material held immediately before the day on which this section comes into force."

25. Schedule 4, paragraph 2(1), provides that in the case of a living adult "qualifying consent" means his consent. Schedule 4, paragraph 5(1)(g), provides that:

> "Use of the results of an analysis of DNA for any of the following purposes is use for an excepted purpose … implementing an order or direction of a court or tribunal, including one outside the United Kingdom."

Schedule 4, paragraph 5(5), provides that:

> "Sub-paragraph (1)(g) shall not be taken to confer any power to make orders or give directions."

The facts

26. The facts that bear on the issues I have to decide are very shortly stated. X murdered the children's mother. In the course of his attack he wounded her. Evidence at X's criminal trial referred to the mother's wound as "bleeding". There was also evidence that X had cut his wrists, which were also bleeding, with a knife. Various samples of blood were taken from the crime scene and submitted for analysis. A sample of blood from the knife was also analysed. A sample of the mother's blood was obtained during the post mortem examination of her body and analysed. A comparison of the various samples showed that two of the samples taken from the crime scene matched the mother's DNA profile. The remaining samples from the crime scene did not match the mother's DNA profile and were therefore each from a person other than the mother.

The order sought

27. The application before me is by the children's guardian, whose stance is supported by the local authority but opposed by X. It is also opposed by the two interveners, the Metropolitan Police and the Secretary of State for the Home Department.

28. The relief sought by the guardian has been refined during the course of the hearing. In its final form, what is sought is an order that:

> "1 The Commissioner for the Metropolitan Police shall provide to the … Local Authority a photocopy/scanned copy of the DNA profiles for each and every individual whose blood was found at the crime scene of the murder of [the mother] and a photocopy/scanned copy of the DNA profile in respect of the blood taken at [her] post mortem … ("copies") provided that any copies in relation to an individual other than [the mother] shall remain anonymous.
>
> 2 The copies obtained by virtue of paragraph 1 above may be used for the purposes of (a) comparing the respective DNA profiles with one another and reaching any appropriate

> conclusions, (b) comparing the respective DNA profiles with the DNA profiles of each of the … children and reaching any appropriate conclusions and (c) reaching a conclusion as to whether any of the DNA profiles, and if so which, is of a person who is related to any of the … children and of demonstrating the nature of that relationship. Upon receipt by the Local Authority the copies shall only be used for these purposes and shall be returned to the Commissioner at the end of the appeal period from the substantive hearing, or if an appeal is instituted, at the date of determination of any appeal."

29. It is important to be clear as to what is *not* being sought. I am *not* being asked to direct the disclosure of any DNA sample (only DNA profiles); any exhibit or original DNA profile (only copies or scans); any DNA profile derived from a DNA sample which a person has provided on a voluntary basis; any DNA profile derived from a DNA sample taken from a person under some statutory provision or power; or, except in the case of the mother, the DNA profile of any identified person. Nor am I being asked to direct the disclosure of any DNA profile with a view to proving that a man who *denies* paternity is a father (for X asserts that he is the father). It is also important to note the proposed safeguards. I am *not* being asked to direct the disclosure, use or retention of any DNA profile for any purpose beyond that defined in the order.

30. 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.

X's position

31. X's position is hard to understand. He asserts that he is the children's father, yet he refuses to do the obvious thing which would establish that, namely agree to DNA testing. Being anxious to understand his stance, I asked his counsel, Ms Rebecca Mitchell to put it in writing. This she did:

> "[X] opposes the application made by the Guardian in its entirety. He does not agree to paternity testing for the children and he does not agree to provide a DNA sample in any form.
>
> [X] believes that he is the father of all the children and the children believe he is their father. He does not therefore believe that a paternity test is required."

He appears to be saying that he knows best.

32. The situation is an odd one. More usually a refusal accompanies a *denial* of paternity. In such a case the court may readily draw an adverse inference: see *Re A (A Minor) (Paternity: Refusal of Blood Test)* [1994] 2 FLR 463. But what is the court to do if, as here, the refusal accompanies an *assertion* of paternity? That is a matter which I do not have to decide and, not least because it could arise later in this litigation, it is better that I say nothing about it.

33. There are two points to be borne in mind, however. The first is what Thorpe LJ said in *Re H and A (Paternity: Blood Tests)* [2002] EWCA Civ 383, [2002] 1 FLR 1145, para 29, where he identified:

> "the points of principle to be drawn from the cases: first, that the interests of justice are best served by the ascertainment of the truth and secondly, that the court should be furnished with the best available science and not confined to such unsatisfactory alternatives as presumptions and inferences."

34. The other derives from the fact that in the present case the father is seeking relief from the family court: he is seeking, in accordance with the Children Act 1989, a role in the children's lives. As I observed during the course of argument, if he was seeking relief from a civil court in proceedings where the just and fair determination of the proceedings required him to submit to a medical examination, the court would have no power to compel him to do so. But it would have the power to stay his claim – to decline to hear his claim – until such time as he agreed to the examination: see *Edmeades v Thames Board Mills Ltd* [1969] 2 QB 67. Could a family court adopt the same approach? Could a family court, for example, say, 'it is accepted that you are the children's psychological father, and you can make your application on that basis – though if you wish to you will need first to obtain leave in accordance with section 10 – but if you wish to apply on the basis that you are the children's biological father you can do so only if you have first submitted to DNA testing'. I pose the question without answering it, while observing that the application of such indirect pressure might be thought to be in the interests of the children if, all other avenues having been exhausted, there appeared to be no other way of obtaining the necessary sample.

The issues

35. There are three issues. First, does what is proposed offend section 45 of the Human Tissue Act 2004? Second, is what is proposed prohibited by Part V, specifically section 63T, of PACE? Third, if not, what order should I make?

The issues: section 45 of the Human Tissue Act 2004

36. It is common ground, and in my judgment correctly so, that what is sought does not offend section 45, essentially because what is proposed to be done does not satisfy the criteria in section 45(1)(a). Ms Samantha Broadfoot, on behalf of the Secretary of State, suggests that section 45 is nonetheless relevant for two reasons.

37. First, because she says it demonstrates the clear intention of Parliament that a person should not be subject to having his or her DNA analysed except where either (i) the material held is "excepted material" under section 45(2) or (ii) it is to be used for an "excepted purpose" in accordance with section 45(1)(a)(ii). The establishment of

paternity, as she correctly observes, is not an "excepted purpose". To that, the short answer in my judgment is that what matters is what Parliament effected by the language it chose to use. Ms Broadfoot accepts, as she has to, that section 45 is not directly applicable to what is proposed in the present case.

38. Secondly, she says, but for the happenstance of the existence of DNA profiles deriving from crime scene samples, the only way to obtain the information sought by the guardian would be by obtaining and handing over X's DNA profiles without his consent, something not permitted either by PACE or by the Family Law Reform Act 1969. That no doubt is so, but, putting the point robustly, so what. Either section 45 applies or it does not, and here it does not.

39. I shall return to these points when considering, if it arises, the question of how I should exercise any discretionary power I may have.

The issues: section 63T of PACE

40. Mr Roger McCarthy QC on behalf of the guardian submits that the answer on this point is clear. Neither the samples taken from the crime scene nor the samples taken post mortem from the mother's body were "taken from a person under any power conferred by *this Part of* this Act". Nor were they "taken by the police, *with the consent* of the person from whom they were taken". So section 63T has no application, whether in relation to the samples themselves or in relation to the DNA profiles derived from them. The samples taken from the crime scene were seized in accordance with the powers conferred by section 19, which is in Part II of PACE, not Part V. Moreover, no consent was either required or given to the taking of the crime scene samples. So far as concerns the post mortem samples, they were not taken under any power conferred by Part V of PACE, they were not taken with the mother's consent – no such consent was required – and they were in fact not taken from a "person" within the meaning of that word as it is used in the relevant provisions in Part V, because, as Mr McCarthy points out, the normal and ordinary meaning of the word "person" is a living person: *R v Newham London Borough Council ex p Dada* [1996] QB 507.

41. I add, for the avoidance of doubt, that Mr McCarthy accepts, as in my judgment he has to, that if and to the extent that any of the materials he seeks are caught by Part V of PACE, this would be an absolute bar to the relief he seeks.

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.

47. I agree with Mr McCarthy.

48. Ms Tina Cook QC on behalf of the police seeks to avoid these difficulties by submitting that section 22(2) of PACE provides what she calls clear guidance as to what articles "seized" in accordance with section 19 can be retained for, and this, she says, does not include allowing others to use DNA samples or DNA profiles. It would, she suggests, be bizarre if such samples could be disclosed for a purpose not provided for by the retention provisions.

49. The short answer to this, in my judgment, is two-fold. In the first place, the relevant materials have in fact been retained and, moreover, in circumstances where it is impossible to suggest that such retention has been improper, let alone unlawful. Secondly, the particular purposes specified in section 22(2) are explicitly said to be "without prejudice to the generality" of section 22(1), which permits retention "so long as is necessary in all the circumstances".

50. In my judgment there is nothing in Part II of PACE or Part V of PACE to prevent my making the order Mr McCarthy seeks.

The issues: a balancing exercise

51. Having got thus far in the analysis, the starting point is clear. There is no insuperable statutory obstacle to the order the guardian seeks. Nor is there any public policy or other insuperable obstacle created by the mere fact that the material sought is in the hands of the police: *Marcel and others v Commissioner of Police of the Metropolis and others* [1992] Ch 225. There is, therefore, no absolute bar. The exercise is accordingly the familiar one of balancing the various competing interests, both public and private.

52. I start with the obvious and compelling point that DNA, and the information derived from it, demands a high degree of protection and that any use of it without the subject's consent requires the imposition of robust and effective safeguards. The decision of the Grand Chamber in *Marper* is eloquent on the point, and not just in the passages to which I have drawn specific attention. And I readily accept the point made by Ms Cook and Ms Broadfoot of how important it is that public confidence in the system for taking, storing and using DNA samples and profiles is maintained.

53. Ms Broadfoot identifies the following factors which, she submits, in the circumstances of the present case argue against my making the order Mr McCarthy seeks:

    i) First, she says that disclosure here would undermine the integrity of the national DNA database. There is, for the reasons I have already explained, no question of any damage to the integrity of the information on the database. Her concern is with the potential loss of confidence if the public came to believe that samples provided for one purpose could be used for wholly different purpose, thus seriously undermining the ability to detect crime. Individuals might no longer be prepared to come forward. Part of the response to public concerns about the database is to ensure that it is kept confidential and seen to operate in the least invasive manner possible. This entails, she says, that the data is retained securely and that there are strictly observed limits as to who may use the data and for what purposes.

    ii) Secondly, she submits that, as a matter of principle, information gathered and retained for one purpose (the detection and prevention of crime) should not be permitted to be used for a different purpose (proving paternity) *absent express statutory provision to that effect.* Any widening of those purposes should result only from the operation of the democratic processes.

    iii) Thirdly, she submits that it is "highly significant" that the exceptions to what she calls the "blanket ban" in section 45 of the Human Tissue Act 2004 do not include testing for paternity purposes.

    iv) Finally, she makes a 'floodgates' point, suggesting that success in this application would pave the way for "many" such further orders in a "range" of cases. She points to what she says is the "breadth" of the guardian's submissions and suggests that it is very difficult to articulate a coherent set of principles which would govern the circumstances in which discretion should be exercised so that it is confined to a very limited pool of cases.

54. I see the force of all this, but these concerns have to be seen in context. The fact is that nothing which is here proposed offends any statutory prohibition and in that situation the principle in *Marcel* is significant. The fact is that I am not being asked to do anything with material provided voluntarily by anyone. The fact is that the order which Mr McCarthy seeks is very narrowly drawn and includes very clear limitations and safeguards. The fact is that granting the order in this very unusual case – unusual not because of the horrific circumstances of the mother's murder but because no recourse of any kind is needed or sought to any Part V material – is not of itself going to open the floodgates. As Mr McCarthy says, it is almost impossible to see how anything more than a very small number of cases could result from an order of the kind sought in the circumstances of this case. The reality, as it seems to me, is that the floodgates argument here is an argument against ever making an order in any case, even where statute is not determinative.

55. Moreover, there are powerful countervailing arguments. In the first place there are the interests of the children, to which both the guardian and the local authority draw attention and which, they say, should be preferred in the circumstances. In addition to all the usual arguments based on a child's right to know their paternity, one cannot ignore the enormous implications for these children of what happened to their mother. Their futures will be indelibly marked by it. They need to know if the man who murdered their mother, the man who they believe to be their father, is in truth their father. As Mr Matthew Stott on behalf of the local authority points out, because X is not named on their birth certificates, the local authority has at present sole parental responsibility for the children. Moreover, as he also points out, Hogg J has already, in making orders under section 21 of the Family Law Reform Act 1969, determined that it is in the interests of the children that the truth, whatever it may be, should out. I agree with Mr Stott that the material being sought is vitally important for the ongoing care planning for the children. I agree with him that in light of the circumstances of their mother's death it is fundamentally important for the children to have the opportunity to understand their family history and ascertain their familial identity. It will, as he says, have an enormous impact on their emotional welfare, now and into the future. As Mr McCarthy asks rhetorically, how can the children's life story work start, how can therapy or counselling be arranged, how is the children's psychological integrity to be preserved, if the paternity issue is not resolved?

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.

57. 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.