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Case Nos: CO/12476/2010 and CO/5572/2011

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/06/2012

Before :

LORD JUSTICE RICHARDS
and
MR JUSTICE KENNETH PARKER

- -

Between :

The Queen, on the application of (1) RMC and (2) FJ	**Claimants**
- and -	
Commissioner of Police of the Metropolis	**Defendant**
- and -	
Secretary of State for the Home Department	**Interested Party**
- and -	
(1) Liberty and (2) Equality and Human Rights Commission	**Interveners**

- -
- -

Stephen Cragg and **Azeem Suterwalla** (instructed by **Bindmans LLP** for **RMC** and **Hickman and Rose** for **FJ**) for the **Claimants**
Jeremy Johnson QC (instructed by **the Directorate of Legal Services, Metropolitan Police Service**) for the **Defendant**
Jonathan Moffett (instructed by **The Treasury Solicitor**) for the **Secretary of State**
Grodon Nardell QC and **Rory Dunlop** (instructed by **the Legal Director of Liberty**) for **Liberty**
The Equality and Human Rights Commission made written submissions settled by **Alex Bailin QC** and **Elizabeth Prochaska**

Hearing dates: 15-16 March 2012

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Approved Judgment

Lord Justice Richards :

1. This is another in the line of cases dealing with the lawfulness of retention of data by the police after a person has been arrested on suspicion of an offence but has subsequently not been proceeded against or has been charged and acquitted.

2. In *R (GC) v Commissioner of Police of the Metropolis* [2011] UKSC 21, [2011] 1 WLR 1230 the claimants' complaints related to the indefinite retention of fingerprints and DNA samples pursuant to s.64 of the Police and Criminal Evidence Act 1984 ("PACE") and guidelines issued by the Association of Chief Police Officers ("ACPO"). The Supreme Court, applying the decision of the European Court of Human Rights in *S v United Kingdom* (2009) 48 EHRR 50 (at p.1169), held that the indefinite retention of the claimants' data was an unjustified interference with their rights under art.8 ECHR and granted a declaration that the ACPO guidelines were unlawful. The court left open the question whether the retention of photographs of arrested persons who were not subsequently convicted of the offence for which they were arrested violated their art.8 rights. It also left open a question concerning the retention of certain information on the Police National Computer ("the PNC"). The first of those questions is raised by both the present claims and is the main issue before us. The second question is raised as a secondary issue by one of the claims.

3. There are two claimants, referred to respectively as RMC and FJ: their identities are protected by a court order.

4. RMC is a middle-aged woman of good character who attended voluntarily at a police station on 20 April 2007 and was arrested on suspicion of an assault occasioning actual bodily harm to a police community support officer who had stopped her riding a pedal cycle on the footway. She was interviewed, fingerprinted and photographed, and DNA samples were taken from her. The matter was investigated and was referred to the CPS, which decided on 2 May 2007 not to prosecute. Through her solicitors she subsequently sought unsuccessfully to secure the destruction of her fingerprints, DNA samples and photographs. She then brought a judicial review claim challenging the retention of all such data. Permission to apply for judicial review was refused in respect of the retention of fingerprints and DNA samples, on the ground that that issue had been examined in *R (GC) v Commissioner of Police of the Metropolis* and no useful purpose would be served by further proceedings. Permission was granted, however, in respect of the retention of photographs.

5. FJ is a boy now aged 15 who attended voluntarily at a police station on 3 April 2009, at the age of 12, and was arrested on suspicion of rape of his second cousin. He was interviewed in the presence of a solicitor, was fingerprinted and photographed, and DNA samples were taken from him. He was bailed to return on 1 July 2009. On 23 June 2009, however, following further enquiries, the decision was taken to cancel bail and to take no further action. In his case, too, unsuccessful requests were made to have the relevant data destroyed and a judicial review claim was then brought. Again, permission was refused in respect of fingerprints and DNA samples, by reference to *R (GC) v Commissioner of Police of the Metropolis*, but it was granted in respect of photographs and the retention of certain information about FJ on the PNC.

Legislative and policy framework

6. The retention and destruction of fingerprints and DNA samples are governed by s.64 of PACE. It is unnecessary for present purposes to set out the detailed provisions of that section.

7. The photographing of suspects, and the use, disclosure and retention of such photographs, are governed by s.64A of PACE. The material subsections are these:

> "(1) A person who is detained at a police station may be photographed –
>
> (a) with the appropriate consent; or
>
> (b) if the appropriate consent is withheld or it is not practicable to obtain it, without it.
>
> …
>
> (4) A photograph taken under this section –
>
> (a) may be used by, or disclosed to, any person for any purpose related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution or to the enforcement of a sentence; and
>
> (b) after being so used or disclosed, may be retained but may not be used or disclosed except for a purpose so related."

8. On the wording of subs.(4)(b), the power to retain arises *after* the photograph has been used or disclosed for a purpose in subs.(4)(a). Mr Johnson QC submitted on behalf of the Commissioner that this authorises retention "even after" (not "only after") the photograph has been used or disclosed, and that it is implicit in the section that retention is also authorised pending use or disclosure of the photograph in the first place. Mr Cragg did not dispute the point, and he made it clear that the claimants do not contend that retention of their photographs fell outside the statutory power. Their case is that, once the decision had been taken not to proceed against them, the continued retention of their photographs was in breach of their rights under art.8.

9. Paragraphs 5.12 to 5.18 of Code D of the PACE Codes of Practice lay down various requirements concerning the photographing of detainees but I do not need to refer to them in detail.

10. In the exercise of powers under, *inter alia*, s.39A of the Police Act 1996, the Secretary of State has issued a Code of Practice on the Management of Police Information, dated July 2005 ("the MoPI Code of Practice"). By s.39A(7), chief officers are required to have regard to the Code in discharging any function to which the Code relates. Paragraph 2.2.1 of the Code defines "police information" as "all information, including intelligence and personal data obtained and recorded for police purposes". Paragraph 2.2.2 provides that for the purpose of the Code, "police purposes" are "(a) protecting life and property, (b) preserving order, (c) preventing the commission of offences, (d) bringing offenders to justice, and (e) any duty or

responsibility of the police arising from common or statute law". Further relevant provisions of the Code are as follows:

> "**3.1 National guidance on management of police information**
>
> 3.1.1 Guidance under this Code will: -
>
> …
>
> (b) direct the management of police information within police forces so as to ensure consistent procedures throughout the police service for obtaining, recording, storing, reviewing, deleting and sharing information …
>
> **3.2. An Information Management Strategy to be applied within each police force**
>
> 3.2.1 Chief officers will establish and maintain within their forces an Information Management Strategy, under the direction of an officer of ACPO rank or equivalent, complying with guidance and standards to be issued under this Code ….
>
> **3.3 National system requirements for the management of police information**
>
> 3.3.1 For the purpose of achieving throughout the police service the standards described at 3.1.1 above, guidance issued under this Code … may specify procedures to be adopted within police forces for the management of police information systems ….
>
> **4.1 Duty to obtain and manage information**
>
> …
>
> 4.1.2 Chief officers must ensure that arrangements within their forces for the management of police information comply with the principles set out in the following paragraphs, and with guidance issued under this Code to give effect to these principles.
>
> …
>
> **4.5 Review of police information**
>
> 4.5.1 Information originally recorded for police purposes must be reviewed at intervals to be prescribed in guidance under this Code ….
>
> **4.6 Retention and deletion of police information**

> 4.6.1 On each occasion when it is reviewed, information originally recorded for police purposes should be considered for retention and deletion in accordance with criteria set out in guidance under this Code …."

11. Guidance on the Management of Police Information ("the MoPI guidance"), which according to its preface "describes the processes that support the principles set out in the MoPI Code of Practice", has been produced by the National Policing Improvement Agency on behalf of ACPO. The first edition came into effect on 1 April 2006. The current, second edition is dated 2010. The MoPI guidance uses the same definitions of "police information" and "police (or policing) purposes" as in the MoPI Code of Practice. Section 7 of the guidance contains detailed provisions on the review, retention and disposal of police information. The introduction to that section refers to the need for chief officers to balance resources against local policing needs, and states that in this context they "should develop risk-based review, retention and disposal policies and procedures which have regard to this guidance document and the MoPI Code of Practice". The guidance is stated to relate to information held on all police systems other than the PNC. Attention is drawn to relevant statutory provisions, including the Human Rights Act 1998, in the context of which it is said in subsection 7.2.1 that the decision to retain personal records should be proportionate to the person's risk of offending and the risk of harm they pose to others and the community, and that a higher proportionality test should be met in order to retain records about relatively minor offending.

12. Subsection 7.4, headed "National Retention Assessment Criteria", reads as follows:

> "7.4 This subsection sets out the framework for decision making on the retention of police information. The key points relating to the National Retention Assessment Criteria are:
>
> - The infringement of an individual's privacy created by the retention of their personal information must satisfy the proportionality test;
>
> - Forces should be confident that any records they dispose of are no longer needed for policing purposes;
>
> - There should be a consistent approach to the retention of police information.
>
> All records which are accurate, adequate, up to date and necessary for policing purposes will be held for a minimum of six years from the date of creation. This six-year minimum helps to ensure that forces have sufficient information to identify offending patterns over time, and helps guard against individuals' efforts to avoid detection over lengthy periods.
>
> Beyond the six-year period, there is a requirement to review whether it is still necessary to keep the record for a policing purpose. The review process specifies that forces may retain records only for as long as they are necessary. The template in

> Appendix 4 provides guidance on establishing whether or not information is still needed for a policing purpose.
>
> The national retention criteria asks a series of questions, focused on known risk factors, in an effort to draw reasonable and informed conclusions about the risk of harm presented by individuals or offenders. These questions are: Is there evidence of a capacity to inflict serious harm? … Are there any concerns in relation to children or vulnerable adults? … Did the behaviour involve a breach of trust? … Is there evidence of established links or associations which might increase the risk of harm? … Are there concerns in relation to substance misuse? … Are there concerns that an individual's mental state might exacerbate risk? …
>
> Where the answer to any of the questions above is 'Yes' then information relating to the individual being assessed should be retained and reviewed again at intervals designated by the review schedule given in Appendix 4 ….
>
> …
>
> There may be other circumstances not covered by the criteria listed above, where forces consider that they have a genuine need to retain records. Wherever a record is assessed as being necessary and proportionate to the purpose it serves, it can be retained …."

13. Subsection 7.6 lists the key points to consider in relation to the review of police information and states *inter alia* that the review process is a full person record review focusing on an individual and any other records linked to them, and that forces will review person records regularly throughout their lifetime to ensure that they are necessary, adequate, accurate and up to date, not excessive, and compliant with the Data Protection Act 1998. All person records will be subject to an initial evaluation, any necessary triggered reviews, and scheduled reviews as specified in Appendix 4.

14. It is unnecessary to say anything further about initial evaluation. Triggered reviews are dealt with in subsection 7.6.2:

> "7.6.2 Wherever further police information is submitted on an individual which relates to certain public protection matters or other sexual, violent or serious offending (Groups 1 and 2 …), or the risk thereof, or relates to a person previously identified as presenting such a risk, a review should be conducted in relation to all police information held on that person.
>
> …
>
> The policy for triggered reviews in each force should be published and clearly communicated to all staff to ensure understanding and adherence across the organisation.

> …
>
> Triggered reviews should also be held in the following circumstances:
>
> …
>
> - Subject Access Requests – subject access requests should be used as a trigger for review. Forces must disclose the information available at the time of the request and only update or dispose of records once the request has been responded to."

Cases falling within "Groups 1 and 2" are described in the subsection dealing with scheduled reviews, as set out below.

15. Scheduled reviews are dealt with in subsection 7.6.3. It states that the review schedule in Appendix 4 of the guidance focuses on those offenders who present a risk of harm because of the seriousness of their offences; and that, under the review schedule, information held for policing purposes is divided into four groups. I need only set out what is said about Groups 1 to 3:

> "**Group 1: Certain Public Protection Matters**
>
> The MoPI Code of Practice acknowledges that there are 'certain public protection matters' which are of such importance that information relating to them should only be disposed of if it is found to be entirely inaccurate or no longer necessary for policing purposes.
>
> Certain public protection matters are defined fully in 2.3 Critical Information Areas. They are:
>
> - Information relating to all offenders who have ever been managed under MAPPA;
> - Information relating to individuals who have been convicted, acquitted, charged, arrested, questioned or implicated in relation to murder or a serious offence as specified in the Criminal Justice Act 2003 (CJA) or historical offences that would be charged as such if committed today;
> - Potentially dangerous people.
>
> Forces must retain all information relating to certain public protection matters until such time as a subject is deemed to have reached 100 years of age (this should be calculated using the subject's date of birth). There is still a requirement, however, to review this information regularly to ensure that it is adequate and up to date. …

There may be extreme cases where the retention of records relating to certain public protection matters would be disproportionately injurious to the individual they are recorded against. For example, an individual arrested on suspicion of murder for a death that is subsequently found to have been the result of natural causes, or an entirely malicious accusation that has been proved as such, would both generate records that can only be adequate and up to date if they reflect what actually happened. Particular care must be exercised in disclosing any such records to avoid any unnecessary damage to the person who is the subject of the record.

…

Group 2: Other Sexual, Violent or Serious Offences

… A violent offence is any of those specified as such in the current Home Office Counting Rules for recorded crime ….

Information relating to sexual, violent or serious offences that are not listed as serious specified offences in the CJA can only be retained for as long as the offender or suspected offender continues to be assessed as posing a risk of harm, using the NRAC in Appendix 4.

After every ten-year clear period, these records should be reviewed and a risk-based decision made as to whether they should be retained or disposed of. This group includes any information related to persons convicted, acquitted, charged, arrested, questioned or implicated with an offence within this group. If the individual in question continues to offend or is implicated in continued offending then records relating to them must be retained ….

Group 3: All Other Offences

Records relating to people who are convicted, acquitted, charged, arrested, questioned or implicated for offending behaviour which does not fall within Group 1 or Group 2 are dealt with in Group 3.

Records that fall within this group do not necessarily have to be reviewed. Forces may opt to use a system of time-based, automatic disposal for classes of information in this group if it is considered that the risk of disposing of these records is outweighed by the administrative burden of reviewing them or the cost of retaining them.

Forces who opt to use time-based disposal for all or a proportion of their Group 3 records must observe the following principles: …

> - All records subject to time-based disposal must still be retained for an initial six year period;
>
> - …
>
> - Any Group 3 records that forces wish to retain for longer than six years must be reviewed at five-yearly intervals and risk assessed using the NRAC in Appendix 4. …"

16. Appendix 4 contains a standard form for completion in individual cases, reflecting the National Retention Assessment Criteria set out in subsection 7.4. The form lists, under "retention criteria", factors relating to risk of harm. It then asks "Is the information under review proportionate and still necessary for a policing purpose?" and "Is the information under review adequate and up to date?". Finally it provides a box for the outcome of the review. The rest of the appendix contains the Review Schedule referred to in subsection 7.6.3, and it reflects the content of that subsection.

17. The MoPI Code of Practice and the MoPI guidance are published documents, available on the internet.

18. In a witness statement dated 8 March 2012, Commander Allan Gibson states that the defendant's current policy in relation to visual imagery, including custody photographs, is to apply the MoPI Code of Practice and the MoPI guidance, but that it is the defendant's intention to promulgate further policy following the enactment of the Protection of Freedoms Act 2012 (see below). Mr Johnson's submissions on behalf of the defendant likewise relied on the MoPI Code of Practice and the MoPI guidance as the only relevant policy documents. A number of points need to be made about this:

    (1) In a note submitted after the hearing, Mr Johnson drew the court's attention to the fact that work to revise the existing policy was already underway and that in some respects revisions had already been agreed internally. He referred to evidence on this subject that was filed in *T and R v Commissioner of Police of the Metropolis*, a case then before the Administrative Court but judgment in which has since been handed down (see [2012] EWHC 1115 (Admin)). He told us that the changes referred to in that evidence did not apply to custody photographs. In a written response, Mr Cragg drew attention to the detail of the evidence filed in *T and R* and relied on it as indicating that the defendant has in fact devised its own policy on the retention of information and that this policy takes precedence over the MoPI guidance. He submitted that it could not therefore now be said that the defendant applies the MoPI guidance to the retention of photographs. It seems to me, however, that we have to proceed by reference to the evidence filed in the cases before us. In any event the evidence filed in *T and R*, whilst suggesting a somewhat confused picture, does not contradict or directly undermine the defendant's evidence in the present cases about the application of the MoPI guidance to the retention of photographs.

    (2) As explained below, the retention decisions taken in the present cases make no reference to the MoPI guidance. Whilst this adds to the confused picture, it is

not inconsistent with the defendant's evidence that the current *policy* in relation to custody photographs is to apply the MoPI guidance.

(3) There is, however, no clear statement of that policy in published documents. Various of the defendant's policy documents were in evidence before us, including an Information Management Strategy, an Information Management Policy and a Visual Evidence Policy, all of which are said to be available on the internet. None of them contains a statement that the policy in relation to custody photographs is to apply the MoPI Code of Practice and the MoPI guidance; nor do the documents themselves add materially to the picture. The Visual Evidence Policy refers in turn to a number of Standard Operating Procedures, including the Visual Identification of Suspects Standard Operating Procedure, which were also in evidence before us. The Standard Operating Procedures do include statements that the retention and disposal of data must be in accordance with the MoPI guidance, but we were told that those documents are not available on the internet or otherwise published.

(4) In the circumstances it is not surprising that the claimants were in a state of some uncertainty at the outset of the hearing as to which policy documents were relevant. But looking at the evidence overall, I think it right to approach the case on the basis that it is the defendant's policy in relation to custody photographs to apply the MoPI Code of Practice and the MoPI guidance and that nothing turns on the various other policy documents to which I have referred above, whether published or unpublished. The lack of clarity on the subject will, however, be relevant to the issue of justification under art.8(2) to which I will come later in this judgment.

19. There is a separate body of policy material relating specifically to the retention of data on the PNC. The PNC Code of Practice, issued under s.39A of the Police Act 1996, describes the PNC as "the only full-time, operational national police computer system routinely supported by data from all police forces" (paragraph 27). Its appendices set out the reasons that can trigger the creation of a PNC record and the fields to be completed for an entry. ACPO has issued "Retention Guidelines for Nominal Records on the Police National computer", dated 16 March 2006. Paragraphs 4.32-4.33 of those guidelines state that chief officers are the data controllers of all PNC records created by their force and they have the discretion in exceptional circumstances to authorise the deletion of any conviction, penalty notice for disorder, acquittal or arrest histories "owned" by them. To assist in relation to the exercise of that discretion, ACPO has approved a procedure set out in Appendix 2 to the guidelines and headed "Exceptional Case Procedure for Removal of DNA, Fingerprints and PNC Records" ("the Exceptional Case Procedure"). The Exceptional Case Procedure was the set of guidelines considered and declared unlawful by the Supreme Court in *R (GC) v Commissioner of the Police of the Metropolis* (see para [2] above). The procedure was, however, applied to the requests made by the present claimants for destruction of data relating to them, and it continues to be operated in material respects pending the coming into force of the Protection of Freedoms Act 2012 and any revision of policies consequent upon that Act.

20. The Protection of Freedoms Act 2012 received Royal Assent on 1 May 2012. It contains detailed provisions concerning the destruction, retention and use of

fingerprints and DNA profiles. Those provisions distinguish, for example, between persons arrested for or charged with "qualifying offences" (as defined in s.65A(2) of PACE) and persons arrested for or charged with a "minor offence"; between persons who are convicted or have previously been convicted and persons who are not convicted; between adults and persons under 18; between material taken post-commencement and material taken before commencement. It sets, for example, a retention period of 3 years for material relating to a person who is arrested for or charged with a qualifying offence but who is not convicted of that offence; but provision is made for extension of that period on application to a court. The relevant provisions are not yet in force; and when they come into force, it will be for the Secretary of State to make an order under s.25 of the Act to regulate the position concerning material taken before commencement. The Act does not deal with photographs. It is, however, relevant to the justification under art.8(2) of the defendant's existing policy concerning photographs, to the defendant's stated intention to revise the existing policy in the light of the Act, and to the related question of what relief should be granted if the court finds that the retention of photographs in accordance with the existing policy violates the claimants' art.8 rights.

The retention decisions in these cases

21. The destruction of RMC's DNA samples, fingerprints and photographs was first sought on her behalf by solicitors' letter to the defendant dated 28 September 2009. It took a long time to get any substantive response, but even then the retention of the photographs was not dealt with. It was not covered until Commander Gibson's witness statement shortly before the hearing. In the case of FJ, solicitors' representations were first made on his behalf by letter dated 6 April 2010 to the Exceptional Cases Unit. The application was refused, and the refusal was maintained in subsequent correspondence. Again the matter is dealt with in Commander Gibson's witness statement.

22. The relevant part of Commander Gibson's statement reads as follows:

> "***Retention decision in FJ***
>
> 13. In line with the Exceptional Case Procedure I considered the representations made by Hickman and Rose on behalf of FJ and reviewed the circumstances of the case ….
>
> 14. My assessment of the application was as follows. Police had a video taped interview from an alleged victim saying that the offence had occurred. The CPS had been influenced in their decision-making by inconsistencies in the account given by the alleged victim. There was no forensic evidence. The report was made a good while later from the date of the alleged offence. The report from the alleged victim remains as an accepted and recorded incidence of rape. Accepted in this context means that there were no substantive reasons, under the National Crime Reporting Standards, for not believing a crime took place. In accordance with these Standards, there was no evidence to show or to conclude that the offence had not taken place and hence to classify the allegation as 'no crime'. I did

not agree that the arrest of FJ was unnecessary or that the taking of fingerprints, DNA and photograph was disproportionate. I was in possession of advice from the Association of Chief Police Officers Criminal Records Office that 'a substantive and undetected crime is still recorded, therefore under current guidelines provided the necessity for arrest was established and the whole process lawfully conducted, retention [of the records] is justified'.

15. Based on the information before me, I concluded that no exceptional criteria under the Exceptional Case Procedure were made out and my decision was that the fingerprints, DNA and PNC records would be retained.

16. Under the Exceptional Case Procedure the fingerprints, DNA and PNC record are treated as an integrated whole …. Accordingly, if the retention of the DNA and fingerprints continue to be retained then so too should be the PNC data.

17. Custody photographs, although they have a value as means of confirming identity, are not regarded in the same way as DNA and fingerprints and are not intrinsically linked when decisions are made under the Exceptional Case Procedure. As explained above, custody photographs are not uploaded onto the Police National Computer. My decision in the FJ case therefore did not touch upon the issue of his custody photograph. If I had considered this my decision would have been to retain the photograph using the same reasoning as for the DNA and fingerprints.

Retention decision in RMC

18. On 2nd March 2012 I considered an application under the Exceptional Case Procedure from RMC made through her solicitors, Bindmans LLP, in a letter dated 28th September 2009. Due to an oversight, this matter had not previously been referred to me for a decision ….

19. The circumstances of the case were that RMC was arrested for assault occasioning actual bodily harm to a police community safety officer after she had been stopped riding a pedal cycle on the footway. The allegation was denied and RMC made a counter allegation of assault. The officer's account was corroborated by a fellow police community safety officer. RMC's account was corroborated by a man who worked in the block where RMC lived. The matter was investigated and was referred to the Crown Prosecution Service for a decision. They decided not to prosecute RMC and the matter was taken no further by police. RMC subsequently lodged a complaint which was considered and the Independent

> Police Complaints Commission judged that RMC's arrest had been lawful and did not uphold the complaint.
>
> 20. I considered the circumstances of the case and the grounds argued by Bindmans for deletion of RMC's person information under the Exceptional Case Procedure. My judgment was that it was not an exceptional case and that the information should be retained. My reasoning was as follows. The arrest of RMC was lawful and proper process was followed. The allegation of assault remains classified as a substantive crime and RMC was the only suspect. The fact that RMC was not charged and no prosecution followed is not an exceptional criterion under the Exceptional Case Procedure. On this occasion I did specifically consider the custody photograph in my decision making. I do not accept the argument that no policing purpose is served by the retention of the information. For the reasons given above, my view is that the information continues to serve a policing purpose.
>
> 21. However, as I explain above, the Metropolitan Police's policy in this area is being reviewed (in part in the light of the Protection of Freedom Bill). It is therefore likely that new policy will soon be promulgated. This will affect whether the Claimants' photographs continue to be retained thereafter."

23. In the passage quoted, Commander Gibson refers (at the end of para 20) to what he had said earlier about the policing purposes served by the retention of photographs. In the earlier passage he had referred to a variety of investigative purposes for which they can be and are used. They can be of great use in establishing the identity of a person, for example when all that is required is a quick intelligence confirmation that the person one is dealing with is the same as a person arrested on a previous occasion. They can be used to alert officers to look for a particular person suspected of committing offences, as for example when they are included in briefings so that patrolling officers look out for a person who is suspected of being an active burglar but whom there is insufficient information to charge. They can be used in various ways connected with the identification of suspects, such as in the defendant's Facial Recognition System, Witness Albums Display System, and an electronic system called PROMAT. They are also frequently used to establish the condition of a detained person at a moment in time, which can be very helpful in dealing with allegations that a suspect was assaulted while in police detention. (In addition to those points made by Commander Gibson, I should mention that Note 5B to Code D of the PACE Codes of Practice gives various examples of uses to which photographs may be put within the statutory purposes in s.64A of PACE.)

24. When stating the reasons for his decisions on the retention of photographs in the cases of RMC and FJ, Commander Gibson does not refer to the MoPI guidance. That is a surprising omission, given his evidence that the defendant's policy is to apply the MoPI Code of Practice and the MoPI guidance. I have taken this into account above when considering whether that is indeed the defendant's current policy. But on the basis that it is the policy, it is difficult to see how express consideration of the Code and guidance could have affected the actual retention decisions in these cases:

(1) The MoPI guidance provides in subsection 7.4 (see para [12] above) that all records which are accurate, adequate, up to date and necessary for policing purposes (as Commander Gibson evidently considered the claimants' data still to be) will be held for a minimum of six years.

(2) Moreover, scheduled reviews under subsection 7.6.3 (see para [15] above) are not due even then. There was a degree of uncertainty at the hearing as to the group within which each of the claimants fell for the purposes of scheduled reviews, but it was confirmed after the hearing that RMC falls within Group 2 (because the offence of assault occasioning actual bodily harm for which she was arrested is specified as a violent offence in the Home Office Counting Rules), and that FJ falls within Group 1 (because the offence of rape for which he was arrested is a serious offence as specified in the Criminal Justice Act 2003). This means that in RMC's case the guidance provides for a scheduled review after a period of 10 years, whilst in FJ's case it provides for the information to be retained until FJ is aged 100, subject to review every 10 years to ensure that it is adequate and up to date.

(3) That leaves the question of triggered reviews under section 7.6.2 (see para [14] above). In the course of his submissions Mr Johnson relied on the provision that subject access requests should be used as a trigger for review. A subject access request is a formal application to the Public Access Office requesting a copy of all personal data held on the applicant by the defendant. There is late evidence from RMC's solicitor, to which I think it right to have regard notwithstanding an objection on behalf of the defendant, that RMC made such a request on 23 September 2008. There is nothing to show that it triggered a review under the MoPI guidance.

(4) But even if a review should have been triggered, I see no realistic possibility that it would have led to any outcome other than the continued retention of RMC's photographs, having regard to the six year minimum period and the other provisions of the MoPI guidance.

25. Thus the real matter of concern in this case, as it seems to me, is not the defendant's failure to apply the guidance but the terms of the guidance itself.

26. That brings me to the central issue in the case: whether the retention of the claimants' photographs pursuant to s.64A of PACE and a policy to apply the MoPI Code of Practice and the MoPI guidance constitutes an interference with the claimants' rights under art.8(1), and, if so, whether that interference is justified under art.8(2).

Whether the retention of the photographs is an interference with article 8(1) rights

27. Art.8 provides, so far as relevant:

> "(1) Everyone has the right to respect for his private … 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 … for the prevention of disorder or crime".

28. The claimants' case under art.8 depends first on establishing that the *retention* of their photographs in police records amounts to an interference with the right to respect for their private life. Although it was no part of the claimants' case that the *taking* of the photographs in the police station engaged art.8, Mr Nardell QC, for Liberty, invited us to rule that it did. He submitted that in considering whether retention of the photographs engages art.8 it must be material, at least if the case otherwise falls at or near the borderline, that the photographs were acquired in circumstances that engaged art.8. I would decline Liberty's invitation, since in my view it is unnecessary and inappropriate in this case to consider the taking of the photographs as a distinct and prior issue (though one cannot leave the taking of the photographs entirely on one side, since a number of the authorities look at the taking and retention of photographs in the round when considering the applicability of art.8).

29. Mr Johnson relied on what he submitted to be a clear and constant line of Strasbourg jurisprudence that the retention and use by the police of photographs taken on arrest does not amount to an interference with the right to respect for private life. It is true that there are several cases to that effect, including *X v UK* (Application No. 5877/72, admissibility decision by the European Commission of Human Rights dated 12 December 1973); *Lupker v Netherlands* (Application No. 18395/91, Commission admissibility decision dated 7 December 1992); and *Kinnunen v Finland* (Application No. 24950/94, Commission admissibility decision dated 15 May 1996). Similarly, in *Friedl v Austria* (1995) 21 EHRR 83 the Commission held that the taking of police photographs of the applicant at a public demonstration and the retention of those photographs did not amount to an interference with his art.8(1) rights. As appears below, however, the issue must now be examined in the light of the decision of the Grand Chamber of the ECtHR in *S v United Kingdom*.

30. The applicants in *S v United Kingdom* had their fingerprints and DNA samples taken from them on arrest. They were both charged but one was acquitted after trial and the case against the other was discontinued. They then challenged the continued retention of their fingerprints and DNA samples on the ground *inter alia* of breach of art.8. The House of Lords dismissed the claim: *R (S and Marper) v Chief Constable of the South Yorkshire Police* [2004] 1 WLR 2196. The Strasbourg court took a different view, holding that there had been a violation of art.8 (and, as already explained, the Supreme Court then gave effect to this decision in *R (GC) v Commissioner of Police of the Metropolis*).

31. The Strasbourg court's assessment under art.8 began with a statement of general principles:

> "66. The Court recalls that the concept of 'private life' is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can therefore embrace multiple aspects of the person's physical and social identity …. Beyond a person's name, his or her private and family life may include other means of personal identification or linking to a family …. The concept of private life moreover includes elements relating to a person's right to their image.

> 67. The mere storing of data relating to the private life of an individual amounts to an interference within the meaning of art.8. The subsequent use of the stored information has no bearing on that finding. However, in determining whether the personal information retained by the authorities involves any of the private-life aspects mentioned above, the Court will have due regard to the specific context in which the information at issue has been recorded and retained, the nature of the records, the way in which these records are used and processed and the results that may be obtained."

32. In relation to DNA samples and profiles, the court said at para [73] that "[g]iven 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", and at para [75] that "the DNA profiles' capacity to provide a means of identifying genetic relationships between individuals is in itself sufficient to conclude that their retention interferes with the right to the private life of the individuals concerned". It is, however, the court's reasoning in relation to the retention of fingerprints that is of particular importance, since it aligns fingerprints with photographs in finding that art.8 is engaged. I propose to set out the relevant part of the judgment in full because I regard it as central to the issue before us:

> "78. It is common ground that fingerprints do not contain as much information as either cellular samples or DNA profiles. The issue of alleged interference with the right to respect for private life caused by their retention by the authorities has already been considered by the Convention organs.
>
> 79. In *McVeigh*, the Commission first examined the issue of the taking and retention of fingerprints as part of a series of investigative measures. It accepted that at least some of the measures disclosed an interference with the applicants' private life, while leaving open the question of whether the retention of fingerprints alone would amount to such interference.
>
> 80. In *Kinnunen*, the Commission considered that fingerprints and photographs retained following the applicant's arrest did not constitute an interference with his private life as they did not contain any subjective appreciations which called for refutation. The Commission noted, however, that the data at issue had been destroyed nine years later at the applicants' request.
>
> 81. Having regard to these findings and the questions raised in the present case, the Court considers it appropriate to review this issue. It notes at the outset that the applicants' fingerprint records constitute their personal data which contain certain external identification features much in the same way as, for example, personal photographs or voice samples.

82. In *Friedl*, the Commission considered that the retention of anonymous photographs that have been taken at a public demonstration did not interfere with the right to respect for private life. In so deciding, it attached special weight to the fact that the photographs concerned had not been entered in a data-processing system and that the authorities had taken no steps to identify the person photographed by means of data processing.

83. In *PG*, the Court considered that the recording of data and the systematic or permanent nature of the record could give rise to private-life considerations even though the data in question may have been available in the public domain or otherwise. The Court noted that a permanent record of a person's voice for further analysis was of direct relevance to identifying that person when considered in conjunction with other personal data. It accordingly regarded the recording of the applicants' voices for such further analysis as amounting to interference with their right to respect for their private lives.

84. The Court is of the view that the general approach taken by the Convention organs in respect of photographs and voice samples should also be followed in respect of fingerprints. The Government distinguished the latter by arguing that they constituted neutral, objective and irrefutable material and, unlike photographs, were unintelligible to the untutored eye and without a comparator fingerprint. While true, this consideration cannot alter the fact that fingerprints objectively contain unique information about the individual concerned allowing his or her identification with precision in a wide range of circumstances. They are thus capable of affecting his or her private life and retention of this information without the consent of the individual concerned cannot be regarded as neutral or insignificant.

85. The Court accordingly considers that the retention of fingerprints on the authorities' records in connection with an identified or identifiable individual may in itself give rise, notwithstanding their objective and irrefutable character, to important private-life concerns.

86. In the instant case, the Court notes furthermore that the applicants' fingerprints were initially taken in criminal proceedings and subsequently recorded on a nationwide database with the aim of being permanently kept and regularly processed by automated means for criminal-identification purposes. It is accepted in this regard that, because of the information they contain, the retention of cellular samples and DNA profiles has a more important impact on private life than the retention of fingerprints. However, the Court … considers that, while it may be necessary to distinguish between the

> taking, use and storage of fingerprints, on the one hand, and samples and profiles, on the other, in determining the question of justification, the retention of fingerprints constitutes an interference with the right to respect for private life."

33. It is plain from that passage, read as a whole, that the court considers that the retention of photographs (as of voice samples) in police records engages art.8, whatever the earlier cases may say on the subject. Stress is laid on the similarity between fingerprints and photographs (and voice samples) in containing "external identification features". The attempted point of distinction between photographs (and voice samples) and fingerprints, on the basis that fingerprints have an "objective and irrefutable" character, is rejected. In the light of the court's conclusion that the retention of fingerprints constitutes an interference with the right to respect of private life, it is difficult to see how any different conclusion could apply to the retention of photographs. Mr Johnson submitted that what led to the finding of interference was the specific additional factor in para [86] that the fingerprints were "recorded on a *nationwide database* with the aim of being *permanently* kept and *regularly processed by automated means* for criminal-identification purposes" (emphasis added), and he contrasted that with the present case, including the point that the defendant does not seek to justify permanent retention but contends that retention for a minimum period of six years in accordance with the MoPI guidance does not engage art.8. I do not accept that submission. The matters referred to were certainly taken into account as an additional factor, but that factor does not seem to me to have been an essential part of the court's reasoning.

34. The subsequent decision of the ECtHR in *Reklos v Greece* [2009] EMLR 16 supports the view I take of *S v United Kingdom*. The factual context in *Reklos* was the taking of photographs, without the parents' consent, of a newborn baby in a private clinic. In holding that the taking and retention of the photographs was a violation of art.8, the court stated at para [40] that "[a] person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers" and that the right to the protection of one's image is thus one of the essential components of personal development and presupposes the right to control the use of that image. The court also stated at para [42] that the key issue was the fact that the photographer kept the photographs without the parents' consent: "The baby's image was thus retained in the hands of the photographer in an identifiable form with the possibility of subsequent use against the wishes of the person concerned and/or his parents (see, mutatis mutandis, *PG v United Kingdom* (2008) 46 EHRR 51)". The reference to *PG v United Kingdom* picks up the court's citation of that case in para [83] of the judgment in *S v United Kingdom*, quoted above.

35. I have no doubt that the approach in those recent decisions of the Strasbourg court should be followed unless such a course is precluded by domestic authority. Mr Johnson submitted that domestic authority is inconsistent with the claimants' case. He relied in particular on observations of Laws LJ in *R (Wood) v Commissioner of Police of the Metropolis* [2009] EWCA Civ 414, [2010] 1 WLR 123, which concerned the actions of the police in taking photographs of the claimant in the street and retaining those photographs. The court held that in the particular circumstances

of the case art.8 was engaged, but Laws LJ contrasted the case with one where photographs were taken on arrest:

> "43. … The case is in my judgment quite different from the *X* case [*X v United Kingdom*, cited above], in which the photographs were taken on and after the applicant's arrest, when the police might well have been expected to do just that. It is possibly closer to the *Friedl* case [*Friedl v Austria*, cited above], but in that case there had been a demonstration – a sit-in – where again the taking of police photographs could readily have been expected. In *R (Gillan) v Comr of Police of the Metropolis* [2006] 2 AC 307, para 28, … Lord Bingham referred to: 'an ordinary superficial search of the person and an opening of bags, of the kind to which passengers uncomplainingly submit at airports'; another instance in which the putative violation of article 8 (if any violation were suggested) consists in something familiar and expected. In cases of that kind, where the police or other public authority are acting just as the public would expect them to act, it would ordinarily no doubt be artificial and unreal for the courts to find a prima facie breach of article 8 and call on the state to justify the action taken by reference to article 8(2)."

36. What Laws LJ said about the taking of photographs on arrest was obviously *obiter*. More importantly, it relied on Strasbourg decisions prior to *S v United Kingdom* which, as already explained, have to be re-assessed in the light of the judgment in that case; and it was based on a test of "reasonable expectation of privacy" which, as the recent Strasbourg cases show, is not the only or determinative factor. In *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, at para [21], Lord Nicholls of Birkenhead said, in relation to art.8(1), that "[e]ssentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy". But that was plainly not the specific test applied by the Strasbourg court in *S v United Kingdom*; and the judgment in *PG v United Kingdom* makes clear that it is not the only test and that other considerations come into play, in particular, in relation to the retention of personal data:

> "57. There are a number of elements relevant to a consideration of whether a person's private life is concerned by measures effected outside a person's home or private premises. Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person's reasonable expectation as to privacy may be a significant, although not necessarily conclusive, factor. A person who walks down the street will, inevitably, be visible to any member of the public who is also present. Monitoring by technological means of the same public scene (for example, a security guard viewing through closed-circuit television) is of a similar character. Private-life considerations may arise, however, once

> any systematic or permanent record comes into existence of such material from the public domain …."

37. Even on the "reasonable expectation of privacy" test, however, I would be inclined to the view that art.8 is engaged by the retention, for a substantial and potentially indefinite period, of photographs taken on arrest, especially where the arrest was of a young person such as FJ. For that purpose I would rely on the reasoning of the Northern Ireland High Court in *JR 27's Application* [2010] NIQB 143. In that case the court applied the "reasonable expectation of privacy" test in answering a question it formulated as follows: "does an interference with Article 8(1) ECHR arise in circumstances where this fourteen-year old boy, of previous good character, was arrested on suspicion of burglary, was photographed by police, was not prosecuted, has no prospect of his photographic images being destroyed until a minimum period of seven years has expired and is at risk of their indefinite retention on a Police Service database thereafter?" The statutory context was art. 64A of the Police and Criminal Evidence (Northern Ireland) Order 1989, which is in materially identical terms to s.64A of PACE, but the specific Police Service retention policy (as reflected in the terms of the question) was different. The court referred to the intensely fact-sensitive nature of the case. It held that the objectively reasonable expectation would be that it was appropriate for the police to photograph the applicant on arrest and to retain his photographic images for a certain period thereafter. The measurement of the permissible retention period was inextricably linked to the statutory purposes, which were to be placed on one side of the scales. The court continued:

> "54. On the other side of the scales, the lengthy, perhaps indefinite, retention by the police of the Applicant's photographic images seems incompatible with the broad and elastic formulations of the scope of Article 8(1) considered … above. As each person grows older, photographic images of their appearance at an earlier age will increasingly belong to their inner, private sanctum. The court is of the opinion that a person's physical appearance falls within the personal sphere protected by Article 8, as it is a means of identifying the individual and forging a link between the individual and exclusively private aspects of his life, including family membership and other matters and activities properly to be regarded as falling outwith the public gaze and belonging to a person's private sphere. The photographic images of the Applicant go further than simply displaying his physical appearance at a particular age: they disclose that he was in police custody when a young teenager. Thus they contain, and convey, both his physical appearance *and* the fact of police arrest and detention (Lord Nicholls' 'thousand words') [a reference to Lord Nicholls' observation in *Campbell v MGM Ltd* at para [31] that in general photographs of people contain more information than textual description; that is why they are more vivid; and that is why they are worth a thousand words]. A person's photographic image is, in the words of Baroness Hale, in *S and Marper* [*R (S and Marper) v Chief Constable of the South Yorkshire Police*, cited above], 'informational

> privacy'. Furthermore, it is no less unique than each person's genetic code. It is a fact of life that no two members of society truly share the same physical appearance: even genuinely identical twins are likely to develop differing physical appearances as they grow older."

38. The court went on to say that it was also necessary to consider aspects of the retention policy relating to review, duration, extension and destruction, and the limited uses to which the photographic images might be put. Although the ECtHR had given judgment in *S v United Kingdom*, the Supreme Court's decision in *R (GC) v Commissioner of the Police of the* Metropolis was not yet available and the court considered itself still bound by the previous decision of the House of Lords in *R (S and Marper) v Chief Constable of South Yorkshire Police* to hold that art.8 was not engaged. It made clear, however, that but for that decision it considered there to be "substantial force in the view that the retention of the Applicant's photographic images by the Police Service for a minimum period of seven years, which may be extended indefinitely, unconnected in any concrete or rational way with any of the statutory purposes, interferes with his right to respect for private life guaranteed by Article 8(1)".

39. I should mention for completeness that the "reasonable expectation of privacy" test was applied in the recent decision of the Divisional Court in *Catt v Commissioner of Police of the Metropolis* [2012] EWHC 1471 (Admin), in the materially different context of retention of data relating to the claimant's attendance at various political protests. Counsel in the present cases were agreed, however, that the decision in *Catt* does not impact directly on the present decision.

40. For the reasons given I would hold that the retention of the claimants' photographs by the defendant does constitute an interference with their art.8(1) right to respect for their private life and therefore requires justification under art.8(2).

Whether the interference is justified under article 8(2)

41. Mr Cragg submits that the retention of the claimants' photographs does not meet the conditions for justification under art.8(2) because (i) it is not in accordance with the law and (ii) it is disproportionate.

In accordance with the law

42. For a measure to be "in accordance with the law", the relevant law must be adequately accessible and foreseeable, i.e. formulated with sufficient precision to enable the individual, if need be with appropriate advice, to regulate his conduct; and to meet these requirements a law must indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise. In *S v United Kingdom*, having recited that test in somewhat fuller terms at para [95], the court went on to express doubts as to whether s.64 of PACE was sufficiently precise to meet the test, in providing that retained samples and fingerprints "shall not be used … except for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution". But it noted that the issue was closely related in that case to the broader issue of whether the interference was necessary in a

democratic society, and in view of its analysis of that broader issue it did not find it necessary to decide whether the "in accordance with the law" test was met.

43. Mr Cragg submitted first that s.64A of PACE has the same lack of precision as gave rise to concern in *S v United Kingdom*, in that it provides in similar terms that retained photographs may not be used or disclosed for any purpose except a purpose "related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution or to the enforcement of a sentence". In so far as the defendant relies on the MoPI guidance as providing a more precise basis on which the discretion to retain or destroy photographs is exercised, Mr Cragg submitted that the defendant had failed to discharge the burden on him of showing that the MoPI guidance is applied in practice.

44. Mr Nardell, for Liberty, similarly submitted that the language of s.64A itself is too broad to show with sufficient predictability how the discretion will be exercised in a particular case; and that if one "drills down" into the policy material for more detailed guidance, one becomes caught up in a paper trail which engaged the problem of accessibility and discloses no sufficiently coherent policy framework. Similar points were made in the written intervention of the Equality and Human Rights Commission, though by reference to the position as it appeared in advance of the hearing and without the benefit of seeing how the case concerning the defendant's policy developed immediately before and during the hearing.

45. If s.64A were taken in isolation, I am inclined to agree that it would be too broad and imprecise to meet the "in accordance with the law" test in relation to the retention of photographs. But it does not fall to be considered in isolation. I have found already that it is the defendant's policy to apply the MoPI Code of Practice and the MoPI guidance. Those documents, in particular the MoPI guidance, provide a clear and detailed framework governing the exercise of the discretion under s.64A to retain photographs for the statutory purposes. The purposes themselves are expressed in inevitably general terms but examples of their application are given in Note 5B to Code D of the PACE Codes of Practice (referred to at para [9] above) and the statutory purposes tie in adequately with the "policing purposes" defined in the MoPI Code of Practice and the MoPI guidance (see paras [10] and [11] above), so that on this aspect, too, I consider there to be sufficient clarity.

46. I accept, however, that there is a problem about accessibility and foreseeability, in that although the MoPI Code of Practice and the MoPI guidance are published documents available on the internet (and the Code is a document to which chief officers are required by statute to have regard), there does not appear to be any clear published statement that the defendant's policy with respect to custody photographs is simply to follow the Code and guidance: I refer to the confused picture discussed at para [18] above. This might well be a sufficient basis for finding against the defendant under art.8(2). It would, however, be deeply unsatisfactory to stop here, since the deficiency is one that can easily be remedied and which, so far as the claimants themselves are concerned, has in a sense been remedied by the evidence in these proceedings. The claimants' concern is to prevent the continued retention of their photographs; and in those circumstances the focus of attention should in my view be on whether the provisions of the MoPI Code of Practice and the MoPI guidance relied on to justify such continued retention satisfy the requirements of proportionality.

Proportionality

47. In relation to proportionality, the claimants again rely heavily on the reasoning of the Strasbourg court in *S v United Kingdom*, albeit it is acknowledged that the only relevant guidance considered in that case was the Exceptional Case Procedure, not the MoPI Code of Practice or the MoPI guidance. In relation to the question whether the retention of fingerprints and DNA records of all persons in the applicants' position was proportionate and struck a fair balance between the competing public and private interests, the court stated as follows:

> "119. In this respect, the Court is struck by the blanket and indiscriminate nature of the power of retention in England and Wales. The material may be retained irrespective of the gravity of the offence with which the individual was originally suspected or of the age of the suspected offender; fingerprints and samples may be taken – and retained – from a person of any age, arrested in connection with a recordable offence, which includes minor or non-imprisonable offences. The retention is not time limited; the material is retained indefinitely whatever the nature or seriousness of the offence of which the person was suspected. Moreover, there exist only limited possibilities for an acquitted individual to have the data removed from the nationwide database or the materials destroyed; in particular, there is no provision for independent review of the justification for the retention according to defined criteria, including such factors as the seriousness of the offence, previous arrests, the strength of the suspicion against the person and any other special circumstances.
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> …
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> 122. Of particular concern in the present context is the risk of stigmatisation, stemming from the fact that persons in the position of the applicants, who have not been convicted of any offence and are entitled to the presumption of innocence, are treated in the same way as convicted persons. In this respect, the Court must bear in mind that the right of every person under the Convention to be presumed innocent includes the general rule that no suspicion regarding an accused's innocence may be voiced after his acquittal. It is true that the retention of the applicants' private data cannot be equated with the voicing of suspicions. Nonetheless, their perception that they are not being treated as innocent is heightened by the fact that their data are detained indefinitely in the same way as the data of convicted persons, while the data of those who have never been suspected of an offence are required to be destroyed.
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> …
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> 124. The Court further considers that the retention of the unconvicted persons' data may be especially harmful in the

> case of minors such as the first applicant, given their special situation and the importance of their development and integration in society. The Court has already emphasised, drawing on the provisions of art. 40 of the UN Convention on the Rights of the Child of 1989, the special position of minors in the criminal justice sphere and has noted in particular the need for the protection of their privacy at criminal trials. In the same way, the Court considers that particular attention should be paid to the protection of juveniles from any detriment that may result from the retention by the authorities of their private data following acquittals of a criminal offence. The Court shares the view of the Nuffield Council as to the impact on young persons of the indefinite retention of their DNA material and notes the Council's concerns that the policies applied have led to the over-representation in the database of young persons and ethnic minorities, who have not been convicted of any crime.
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> 125. In conclusion, the Court finds that the blanket and indiscriminate nature of powers of retention of fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society …."

48. Mr Cragg also placed reliance on the view forcefully expressed by the Northern Ireland High Court in *JR 27's Application* (cited above) as to the application of the proportionality test (in fact taken from Lord Steyn's formulation of it in *R v Secretary of State for the Home Department, ex parte Daly* [2001] 2 AC 532) to the retention policy there under consideration:

> "58. … However, if Article 8(1) ECHR is engaged, we conclude that the indefinite retention by the Police Service of the Applicant's photographic images, for a minimum period of seven years and potentially for a period of many years, unconnected to any concrete measure or exercise linked to any of the statutory purposes, is plainly disproportionate. We consider that this manifestly fails Lord Steyn's three tests of statutory purpose justification, rational connection with the statutory purpose and minimal interference with the Applicant's right to respect for his private life. The image of using a sledgehammer to crack a barely visible nut springs readily to mind."

49. Mr Cragg submitted that the blanket policy, under the MoPI guidance, of retention for a minimum period of 6 years so long as it is necessary for a policing purpose does not

meet the requirement of proportionality and that the problem is exacerbated by the provision for scheduled review only after 10 years in the case of RMC and for retention up to the age of 100 in the case of FJ. The policy does not distinguish sufficiently between those who are convicted and those who are not charged or who are charged but acquitted. It does not take sufficient account of the age of the person arrested or of the nature of the offence for which the person was arrested. It does not make provision for input by the individual concerned when considering the question of retention. It does not make provision for independent review.

50. Mr Nardell made similar submissions about the blanket nature of the policy, as did the Equality and Human Rights Commission in its written intervention. Mr Nardell emphasised the failure of the policy to distinguish between the convicted and the unconvicted, and submitted that the fact of arrest is not a sufficient basis of retention of photographs for what is in every case a non-trivial period: there is no evidence before the court that people who have been arrested but have not been convicted are more likely to be involved in future crime than those who have not been arrested. The retention of photographs of all persons arrested may be useful for policing purposes but cannot be said to be necessary or the least intrusive means of achieving the relevant aims. Mr Nardell contrasted the policy with the provisions of the Protection of Freedoms Act 2012 which provide for destruction of fingerprints and DNA profiles after a defined period, with a series of carefully tailored exceptions and formal safeguards.

51. Mr Johnson, for the defendant, observed that the MoPI Code of Practice and the MoPI guidance provide for a much more tightly regulated regime than was under consideration in *S v United Kingdom*, and he submitted that the complaint about a blanket policy was misconceived. On its face, the MoPI guidance discriminates between different groups of offences. It requires an initial assessment as to the necessity of retention; there is also a discretion as to the taking of photographs in the first place, albeit that is the course adopted in the vast majority of cases. Thereafter the guidance adopts a series of brightline rules rather than contemplating individualised review at frequent intervals. In this context, he submitted, bright lines are permissible. In *R (S and Marper) v Chief Constable of the South Yorkshire Police*, in a passage at para [39] that has not subsequently been questioned, Lord Steyn pointed to the difficulties involved in having to exercise an individual judgment in every case. The Scottish system providing for a brightline rule (retention for 3 years with the possibility of a limited extension) was viewed with apparent approval by the Strasbourg court in *S v United Kingdom* (see paras [36] and [109]-[110] of that judgment). The Protection of Freedoms Act 2012 also adopts bright lines, albeit different lines from those in the MoPI guidance. Further, nothing in MoPI precludes the police from deciding exceptionally to review and to delete material within the prescribed periods. Mr Johnson referred to the fact that an individual decision had been taken in RMC's case, though this gives little assistance to his case since the decision in question was not taken by reference to MoPI and there is nothing to show that consideration was given to the proportionality of retention.

52. Mr Johnson submitted further that any interference with art.8 rights to which the retention of custody photographs gives rise is very slight and is right at the margins of the operation of art.8, whereas legitimate aims are engaged to a very significant degree. He underlined the value of retention of data for policing purposes and

referred *inter alia* to *Chief Constable of Humberside Police v Information Commissioner* [2010] 1 WLR 1136, a case under the Data Protection Act 1998 in which Waller LJ said at para [43], in the context of proportionality, that "[if] the police say rationally and reasonably that convictions, however old or minor, have a value in the work they do that should, in effect, be the end of the matter". Mr Johnson argued that the *current* retention of the claimants' photographs is necessary for and proportionate to the legitimate aims in question, but at the same time he stressed that the defendant does not seek to justify *indefinite* retention of the photographs and that the question of continued retention will fall to be reconsidered once further policy is promulgated in the light of the 2012 Act.

53. Mr Moffett, for the Secretary of State, adopted the submissions made by Mr Johnson and added a few brief points in support of them.

54. I can accept a number of the submissions made by Mr Johnson: that the MoPI Code of Practice and the MoPI guidance provide a much more structured system than was under consideration in *S v United Kingdom*, that they draw some distinction between different categories of offences (though the categorisations are very broad, as illustrated by the inclusion of RMC in Group 2) and that it is permissible in principle (and can indeed assist consistency and predictability) to have brightline rules in this area. Nevertheless I consider that the Code and guidance suffer from deficiencies of much the same kind as led to the adverse finding under art.8(2) in *S v United Kingdom* and that those deficiencies are as significant in relation to the retention of photographs as in relation to the retention of fingerprints and DNA. In particular:

(1) No adequate distinction is drawn between the convicted and those who are either not charged (the position of the two claimants) or are charged but acquitted. There is nothing to meet the concern expressed by the Strasbourg court about the risk of stigmatisation of those entitled to the presumption of innocence, or the perception that they are not being treated as innocent. The reasons given by Commander Gibson in support of the individual decisions to continue retention of the claimants' photographs (para [22] above) underline that concern: notwithstanding that no charges were brought (let alone proved) against either claimant, the reasons rely *inter alia* on the fact that the allegation against each claimant remains recorded as a substantive crime and the claimant was in each case the only suspect.

(2) Retention of the photographs is on any view for a long period (a minimum of 6 years), is likely in practice to be much longer (given that a scheduled review is due only after 10 years in RMC's case, and there is provision for retention until the age of 100 in FJ's case), and is potentially indefinite.

(3) The particular concern of the Strasbourg court that retention of unconvicted persons' data may be especially harmful in the case of minors applies here too, given FJ's age at the time of arrest. It is plain that the age of the applicant was also one of the factors that led the Northern Ireland High Court to express itself as strongly as it did in *JR 27's Application* about the application of the proportionality test to the (admittedly different) policy under consideration in that case.

55. In conclusion, I am not satisfied that the existing policy strikes a fair balance between the competing public and private interests and meets the requirements of proportionality. In my judgment, therefore, the retention of the claimants' photographs in application of the existing policy amounts to an unjustified interference with their right to respect for their private life and is in breach of art.8.

Retention of photographs: relief

56. I come to the issue of relief, in the light of my finding that the continued retention of RMC's and FJ's photographs in application of the existing policy is a breach of art.8. Mr Cragg submitted on behalf of the claimants that the court should quash the decision to retain the photographs and should declare that the decision was taken in the application of an unlawful policy. Mr Johnson submitted that the court should adopt an approach corresponding to that taken by the Supreme Court in *R (GC) v Commissioner of Police of the Metropolis*, declaring the relevant policy to be unlawful but stopping short of quashing the retention decision.

57. What happened in *R (GC) v Commissioner of Police of the Metropolis* is that the Supreme Court, having found that the retention of the claimants' fingerprints and DNA samples was an unjustified interference with their art.8(1) rights, decided that instead of making an order that would have required the immediate destruction of the relevant data, it should give Parliament the opportunity to rectify the position. At para [45] of his judgment Lord Dyson referred to the Protection of Freedoms Bill then before Parliament and said that in shaping the appropriate relief it was right to proceed on the basis that the legislation was likely to come into force later that year (2011). He continued:

> "46. In these circumstances, in my view it is appropriate to grant a declaration that the present ACPO guidelines (amended as they have been to exclude children under the age of 10) are unlawful because … they are incompatible with the ECHR. It is important that, in such an important and sensitive area as the retention of biometric data by the police, the court reflects its decision by making a formal order to declare what it considers to be the true legal position. But it is not necessary to go further. Section 8(1) of the HRA gives the court a wide discretion to grant such relief or remedy within its powers as it considers just and appropriate. Since Parliament is already seised of the matter, it is neither just nor appropriate to make an order requiring a change in the legislative scheme within a specific period.
>
> 47. … The legislature must be allowed a reasonable time in which to produce a lawful solution to a difficult problem.
>
> 48. Nor would it be just or appropriate to make an order for the destruction of data which it is possible (to put it no higher) it will be lawful to retain under the scheme which Parliament produces.

> 49. In these circumstances, the only order that should be made is to grant a declaration that the present ACPO guidelines (as amended) are unlawful. If Parliament does not produce revised guidelines within a reasonable time, then the claimants will be able to seek judicial review of the continuing retention of their data under the unlawful ACPO guidelines and their claims will be likely to succeed."

58. That reasoning cannot be applied across directly to the present cases, since there is no question here of waiting for the legislature to put in place a lawful solution. The Protection of Freedoms Act 2012 has received Royal Assent and any delay in exercising the powers to bring it into force and to make provision in respect of material taken pre-commencement is the responsibility of the Secretary of State, not of Parliament. Moreover the Act does not apply to photographs and, whilst the defendant intends to revise his policy concerning photographs in the light of the Act, it is open to him to do so without waiting for the Act to be brought into force. I am inclined nevertheless to allow the defendant a reasonable further period within which to revise the existing policy, rather than to grant relief that might have the effect of requiring the immediate destruction of the claimants' photographs without the possibility of re-assessment under a revised policy. In my view, the just and appropriate order is to declare that the defendant's existing policy concerning the retention of custody photographs (namely, to apply the MoPI Code of Practice and the MoPI guidance) is unlawful. It should be clear in the circumstances that a "reasonable further period" for revising the policy is to be measured in months, not years.

The issue concerning FJ's PNC records

59. I turn finally to consider the separate issue concerning FJ's PNC records. The issue is a very short one. The complaint relates to the fact that FJ's PNC record includes reference to the alleged rape for which he was arrested in April 2009 (para [5] above). It is listed as one of four matters under the heading "non-convictions". The other three matters relate to possession of a class B drug and two robberies. Basic details of each matter are given. The request to remove the information concerning the arrest on suspicion of rape was included in the application made on FJ's behalf under the Exceptional Case Procedure and refused by Commander Gibson (see para [22] above). The retention of the information is submitted to be a disproportionate interference with FJ's rights under art.8(1).

60. The complaint is limited to the PNC record and does not extend to the retention of the corresponding information in the defendant's own local records, which in fact include greater detail of the allegation and of the investigation than is contained in the PNC record. Thus the position contended for is an odd one, though it may fairly be said that retention of the information on a national database is of greater significance than retention on a local database.

61. It seems to me that a PNC record that did not include the basic history of FJ's involvement with the police would be an incomplete and potentially misleading record. Moreover, if a similar allegation were made against FJ in the future, it would be profoundly unsatisfactory if it fell to be considered without knowledge of the earlier allegation and the arrest and investigation to which it gave rise. I am satisfied

that retention of this kind of information in the PNC record is justified on any view. If it engages art.8 at all, the interference with FJ's right to respect for his private life is small and is plainly proportionate.

62. I would therefore dismiss this aspect of FJ's claim.

Conclusion

63. I would allow the claims in respect of the retention of RMC's and FJ's photographs and would grant the declaratory relief indicated at para [56] above, but would dismiss the claim in respect of FJ's PNC record.

Mr Justice Kenneth Parker :

64. I agree.