Neutral Citation Number: [2013] EWHC 2864 (Admin)

Case No: CO/3571/2013

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT SITTING IN BIRMINGHAM

Birmingham Civil Justice Centre
Priory Courts, 33 Bull Street, Birmingham

Date: 24/09/2013

Before :

LORD JUSTICE PITCHFORD AND MR JUSTICE HICKINBOTTOM

- -

Between :

R (on the application of R)	**Claimant**
- and -	
A CHIEF CONSTABLE	**Defendant**

- -
- -

Stephen Cragg QC (instructed by **Bhatia Best**) for the **Claimant**
Dijen Basu (instructed by **Jason Woodman, Solicitor**) for the **Defendant**

Hearing date: 16 July 2013

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Approved Judgment

Judgment Approved by the court for handing down.

Lord Justice Pitchford :

Introduction

1. It is common ground that by reason of his previous convictions the claimant was, from 7 March 2011, liable to have taken from him without his consent a non-intimate sample, pursuant to section 63(3B)(a) and (3BA)(a) of the Police and Criminal Evidence Act 1984 (as amended by section 2(7) of the Crime and Security Act 2010).

2. On 12 March 2013 the claimant was visited at his home by PC Woodcock and handed a letter dated 11 March 2013. The letter informed the claimant that he was requested to consent to the taking of a non-intimate sample. It concluded:

> *"You will be asked to consent to provide the sample. If you do not consent at this stage, we require you to attend a police station within 7 days. The time and date of your attendance can be discussed with the person delivering this letter.*
> *At the police station, the sample may be taken with the authority of a police officer of the appropriate rank. If you fail to attend the police station as required you may be liable to arrest."*

In his first witness statement the claimant says that he was told by PC Woodcock that he "had to make arrangements within 7 days to provide a non-intimate sample to be placed on the Police National DNA Database". He continued, "I was informed...that if I did not consent voluntarily to give a sample then I could be arrested and a sample could forcibly be taken". The claimant did not give his consent.

3. It is conceded on behalf of the defendant that the purpose of the request was to enable the defendant to compare the claimant's DNA profile with those held by the police in connection with unsolved crime (section 63A Police and Criminal Evidence Act 1984 - "PACE"). The effect, it is contended by the defendant, is to assist the detection of crime and to deter the commission of criminal offences by the claimant and others. There is an issue whether the terms of the letter amounted to a request only or to a requirement in the event that consent was not immediately forthcoming.

4. On 13 March 2013 the claimant's solicitors wrote a pre-action protocol letter challenging the 'decision'. The letter claimed that the claimant had handed to them a notice of a requirement to attend a police station under section 63A(3B) *[sic]* of the 1984 Act for the purpose that a non-intimate sample may be taken without his consent. In his reply the defendant confirmed that if the claimant did not consent to the taking of a sample he would be liable to arrest. On 19 March 2013 the claimant was notified that his appointment at the police station had been made for 26 March 2013. On 25 March 2013 the claimant filed his claim form. On 26 March 2013 Hickinbottom J granted an injunction restraining the defendant from exercising the power of arrest under paragraph 17, Schedule 2A of the 1984 Act. On 26 April 2013 Detective Inspector ("DI") Ashman gave his authorisation for the taking of the sample as *"necessary to assist in the prevention or detection of crime"* and made a requirement that the claimant should attend a police station for the purpose of taking a non-intimate sample, under section 63(3B) and paragraph 11 of schedule 2A Police and Criminal Evidence Act 1984, by 5 pm Friday 3 May 2013. On 3 May 2013 Kenneth Parker J

granted permission to proceed. This is the hearing of the claim for judicial review in which the claimant seeks an order quashing the decisions to make the requirement, a declaration that the decision to require the claimant to attend the police station and/or to take a sample was unlawful, and damages.

Grounds of claim

5. The claimant contends that on 12 March 2013 and/or on 26 April 2013 the defendant unlawfully required the claimant to attend a police station for the purpose that a non-intimate sample could be taken without his consent. Art 8(1) of the European Convention on Human Rights ("ECHR") required the defendant to accord respect for the claimant's private life. Art 8 was engaged by the decisions: to 'require' the claimant to provide a non-intimate sample; to 'require' the claimant to attend a police station; to issue a threat to arrest the claimant if he did not comply; and to take or threaten to take a non-intimate sample without consent for the purpose of speculative searching and retention.

6. It is conceded by the claimant that for the purpose of Art 8(2) the requirement was made for the legitimate purpose of the prevention of disorder or crime. However, his case is that for the interference to be lawful a fair balance must be struck between the right of the claimant to respect for his private life and the public interest in the legitimate aim identified. The claimant's case is that the decision to make the requirement in the circumstances was disproportionate and, therefore, unlawful. In his witness statement of 25 March 2013 the claimant says that he was convicted of manslaughter (on 14 November 1984) in consequence of picking up a male friend in his car. The claimant drove to a car park where they were disturbed, he thought, by a security vehicle. His companion fled the car and "jumped over what I assume he thought was a low wall". The deceased suffered injuries from which he died. The defendant has since recovered the statement under caution made by the claimant on 13 June 1984 at the time of the investigation. This statement was not available to the defendant at the time the decision was made to make the requirement to provide a non-intimate sample. It is, however, relevant to the credibility of the claimant's assertion that the requirement was disproportionate and I would, exceptionally, admit the statement in evidence. In that statement the claimant said that he engaged in consensual sexual activity with a male who then asked for money. An argument ensued. Both men left the claimant's car and they grappled with one another in the immediate vicinity of a wall about 4 feet 6 inches in height. In the course of the struggle the deceased went over the wall and fell some 25 feet to the ground below, suffering severe injuries from which he died. It was the prosecution case that the claimant had pushed the deceased over the wall. The claimant told the police in a subsequent interview that he could not remember whether he had pushed the deceased or not. He did not give evidence at his trial and he was convicted of unlawful act manslaughter. At paragraph 9 of his current witness statement the claimant says that before he surrendered himself to the police he "confessed everything" to his then partner (now his wife). His partner made a witness statement on 14 June 1984 in which she said that the claimant told her he had pushed the deceased over the wall. Two weeks later she retracted that statement.

7. The claimant acknowledges in his witness statement that following his release from prison and well into the 1990s he was a heavy drinker "and prioritised my own selfish wellbeing over that of my wife and my children". He said that he frequently went out

with friends and acquaintances drinking and getting involved in petty crime. It was during this period that the claimant admitted being involved in the kidnap of "a friend" by taking him "into the country". The claimant described this incident as "a stupid prank" for which, following conviction, he was sentenced to four months imprisonment.

8. The claimant said at paragraph 13 of his witness statement that he turned his life around some 13 years ago. He commenced his own business and gave up drinking. His wife was diagnosed with a life-threatening illness some five years ago and he is now her sole carer.

9. The claimant further contends that the manner in which the requirement to provide a non-intimate sample was made was, in any event, unlawful since it failed to comply with the statutory pre-condition that authorisation should be given by a police officer of the rank of inspector *before* the requirement was made. Although the authorisation may, other things being equal, justify a future requirement such as that made on 26 April 2013, the requirement made on 12 March was unlawful. However, it is said that other things are not equal. The claimant contends that the reasons given by DI Ashman for providing the authorisation failed to strike the balance required.

10. Finally, the claimant contends that before the requirement was made to provide a non-intimate sample the defendant was bound, in order to ensure fairness and/or to render the demand proportionate, to provide him with the opportunity to make representations and this the defendant failed to do.

S v United Kingdom

11. In *S v UK* [2009] 48 EHRR 50 the European Court of Human Rights ("ECtHR") considered the applications of two British nationals who had been required to provide samples of their fingerprints and cellular material for DNA analysis under sections 61 and 63 of the Police and Criminal Evidence Act 1984 following their arrests on suspicion of criminal offences. Subsequently, they were acquitted, or the proceedings were discontinued. Section 64(1A), as inserted by section 82 Criminal Justice and Police Act 2001, provided that the fingerprints and samples might be retained but should not be used except for "purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of the prosecution". The applicants challenged the refusal by the police to destroy the samples. The Court concluded that the taking and retention of the samples constituted an interference with the applicants' right to respect for their private lives under Art 8(1) [paras. 70-77; 78-86]. The Court was prepared to assume that the interference was authorised by law without considering whether the law was sufficiently accessible for the purpose of Art 8(2), but advised that the circumstances in which the power might be exercised and its scope should be the subject of detailed rules [99].

12. The Court found that the intrinsically private nature of the data which the Government sought to retain required careful scrutiny of the measure which authorised retention and use of the data without the consent of the person concerned [104]. The importance of the fight against crime was acknowledged [105]. Relevant to the current dispute is the observation of the Court at paragraph [106]:

> "106. However, while it recognises the importance of such information in the detection of crime, the Court must delimit *[sic]* the scope of its

> examination. The question is not whether the retention of fingerprints, cellular samples and DNA profiles may in general be regarded as justified under the Convention. The only issue to be considered by the Court is whether the retention of the fingerprint and DNA data of the applicants, as persons who had been suspected, but not convicted, of certain criminal offences, was justified under Article 8, para. 2 of the Convention."

The Court noted that the majority of European States which authorised the taking and retention of samples imposed a limit upon the period of storage in order to maintain proportionality with the purpose of collection [107-112]. The Court concluded that the power of retention given by section 64 was blanket and indiscriminate. The material could be retained irrespective of the nature or gravity of the offence of which the individual had been suspected. There was no provision for independent review of the decision against defined criteria, including factors such as the seriousness of the offence, previous arrests and the strength of suspicion [119]. Of particular concern to the Court was the stigmatisation of the individual stemming from the retention of samples from an unconvicted person. The presumption of innocence should be recognised [122]. The Court concluded:

> "125. In conclusion, the Court finds that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of 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. This conclusion obviates the need for the Court to consider the applicants' criticism regarding the adequacy of certain particular safeguards, such as too broad an access to the personal data concerned and insufficient protection against the misuse or abuse of such data."

13. It is to be noted that the ECtHR did not consider the question whether a power to demand the taking of a non-intimate sample without the individual's consent was a proportionate interference with the right of respect for his private life when that individual had in the past been convicted of serious offences. The present claimant challenges the proportionality of the requirement to submit to the taking of a sample by reference to the period of time since his last conviction, and relies upon the improbability, as he submits, that comparison with crime scene samples will disclose further offences committed by him.

The statutory power

14. Following the decision in *S v UK*, further amendments were made to section 63 PACE by the Crime and Security Act 2010. The purpose was to provide a scheme for the taking and retention of samples which complied with Art 8. Section 63(3B)-(3BC) applied to a person who had in the past been convicted of certain serious offences but from whom no sample had been taken or whose sample was insufficient or unsuitable for analysis. Further words were added by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, schedule 24. As from 8 April 2013 the relevant parts of section 63 for present purposes read as follows:

"**63.— Other samples.**

(1) Except as provided by this section, a non-intimate sample may not be taken from a person without the appropriate consent.

(2) Consent to the taking of a non-intimate sample must be given in writing.

.....

(3B) Subject to this section, a non-intimate sample may be taken from a person without the appropriate consent if (before or after the coming into force of this subsection)—

(a) he has been convicted of a recordable offence, or

(b) he has been given a caution in respect of a recordable offence which, at the time of the caution, he has admitted, and

either of the conditions mentioned in subsection (3BA) below is met.

(3BA) The conditions referred to in subsection (3B) above are—

(a) a non-intimate sample has not been taken from the person since he was convicted or cautioned;

(b) such a sample has been taken from him since then but—

(i) it was not suitable for the same means of analysis, or

(ii) it proved insufficient.

(3BB) A non-intimate sample may only be taken as specified in subsection (3B) above with the authorisation of an officer of at least the rank of inspector.

(3BC) An officer may only give an authorisation under subsection (3BB) above if the officer is satisfied that taking the sample is necessary to assist in the prevention or detection of crime.

.....

(6) Where a non-intimate sample is taken from a person without the appropriate consent by virtue of any power conferred by this section—

(a) before the sample is taken, an officer shall inform him of—

(i) the reason for taking the sample;

(ii) the power by virtue of which it is taken; and

(iii) in a case where the authorisation of an officer is required for the exercise of the power, the fact that the authorisation has been given; and

(b) those matters shall be recorded as soon as practicable after the sample is taken.

(7) The reason referred to in subsection (6)(a)(i) above must include, except in a case where the non-intimate sample is taken under subsection (3B) or (3E) above, a statement of the nature of the offence in which it is suspected that the person has been involved.

(8B) If a non-intimate sample is taken from a person at a police station, whether with or without the appropriate consent—

(a) before the sample is taken, an officer shall inform him that it may

be the subject of a speculative search; and

(b) the fact that the person has been informed of this possibility shall be recorded as soon as practicable after the sample has been taken.

(9) If a non-intimate sample is taken from a person detained at a police station, the matters required to be recorded by subsection (6) or (8B) above shall be recorded in his custody record.

(9ZA) The power to take a non-intimate sample from a person without the appropriate consent shall be exercisable by any constable.

(9A) Subsection (3B) above shall not apply to —

(a) any person convicted before 10th April 1995 unless he is a person to whom section 1 of the Criminal Evidence (Amendment) Act 1997 applies (persons imprisoned or detained by virtue of pre-existing conviction for sexual offence etc.); or

(b) a person given a caution before 10th April 1995.

....." [emphasis added]

15. Section 63A(1E) (inserted by the Crime and Security Act 2010, section 5) and section 63A(1)(a) and (b) (inserted by the Serious Organised Crime and Police Act 2005, section 117) provide authority to the police to check a non-intimate sample obtained under section 63(3B) with:

"(a) other...samples to which the person seeking to check has access and which are held by or on behalf of any one or more relevant law-enforcement authorities or which are held in connection with or as a result of an investigation of an offence;

(b) information derived from other samples if the information is contained in records to which the person seeking to check has access and which are held as mentioned in paragraph (a) above."

16. The supporting power to require a person to attend the police station is given by paragraph 11 of schedule 2A to the 1984 Act.

"**11 Persons convicted etc of an offence in England and Wales**

(1) A constable may require a person to attend a police station for the purpose of taking a non-intimate sample from him under section 63(3B).

(2) Where the condition in section 63(3BA)(a) is satisfied (sample not taken previously), the power under sub-paragraph (1) above may not be exercised after the end of the period of two years beginning with—

(a) the day on which the person was convicted or cautioned, or

(b) if later, the day on which this Schedule comes into force.

(3) Where the condition in section 63(3BA)(b) is satisfied (sample taken on a previous occasion not suitable etc), the power under sub-paragraph (1) above may not be exercised after the end of the period of two years beginning with—

(a) the day on which an appropriate officer was informed of the

matters specified in section 63(3BA)(b)(i) or (ii), or

(b) if later, the day on which this Schedule comes into force.

(4) In sub-paragraph (3)(a) above "appropriate officer" means an officer of the police force which investigated the offence in question.

(5) Sub-paragraphs (2) and (3) above do not apply where—

(a) the offence is a qualifying offence (whether or not it was such an offence at the time of the conviction or caution), or

(b) he was convicted before 10th April 1995 and is a person to whom section 1 of the Criminal Evidence (Amendment) Act 1997 applies. [emphasis added]

Schedule 2A, which was added by section 6(2) Crime and Security Act 2010, came into force on 7 March 2011. The alleged requirement of the claimant was made on 12 March 2013 or 26 April 2013. However, one of the claimant's previous convictions was for manslaughter, and another was for kidnapping, both of which are qualifying offences under section 65A(2)(b) and (d) of the 1984 Act. Accordingly, the time restriction imposed by paragraph 11(2) of schedule 2A did not apply to the claimant.

17. By paragraph 15 of schedule 2A the power may be exercised only when authorisation has been obtained:

"**15 Requirement to have power to take fingerprints or sample**

A power conferred by this Schedule to require a person to attend a police station for the purposes of taking fingerprints or **a sample under any provision of this Act may be exercised only in a case where the** fingerprints or **sample may be taken from the person under that provision (and, in particular, if any necessary authorisation for taking the fingerprints or sample under that provision has been obtained**)." [emphasis added]

18. Consequential duties and powers are provided by paragraphs 16 and 17:

"**16 Date and time of attendance**

(1) A requirement under this Schedule—

(a) shall give the person a period of at least seven days within which he must attend the police station; and

(b) may direct him so to attend at a specified time of day or between specified times of day.

(2) In specifying a period or time or times of day for the purposes of sub-paragraph (1) above, the constable shall consider whether the fingerprints or sample could reasonably be taken at a time when the person is for any other reason required to attend the police station.

(3) A requirement under this Schedule may specify a period shorter than seven days if—

(a) there is an urgent need for the fingerprints or sample for the

purposes of the investigation of an offence; and

(b) the shorter period is authorised by an officer of at least the rank of inspector.

(4) Where an authorisation is given under sub-paragraph (3)(b) above—

(a) the fact of the authorisation, and

(b) the reasons for giving it,

shall be recorded as soon as practicable after it has been given.

(5) If the constable giving a requirement under this Schedule and the person to whom it is given so agree, it may be varied so as to specify any period within which, or date or time at which, the person must attend; but a variation shall not have effect unless confirmed by the constable in writing.

17 Enforcement

A constable may arrest without warrant a person who has failed to comply with a requirement under this Schedule."

Operation Nutmeg

19. The request made to the claimant followed the formulation of Operation Nutmeg by the Home Office. Chief Officers were informed of the new powers given by the amendments to the 1984 Act by the Crime and Security Act 2010. Guidance was issued by the Association of Chief Police Officers ("ACPO") dated July 2012. Operation Nutmeg was aimed at those who had been convicted of homicide or sexual offences after 1995 or, having been convicted of such an offence before 1995, subsequently were convicted of 'recordable offences'. Those who were in prison and qualified by these criteria had been the subject of an earlier operation, Operation Sheen, which was completed in September 2011. At paragraph 3 of the Guidance the "Action to be taken" was described as follows:

> "The purpose of this operation is to ensure that those convicted of Homicides and/or Sexual Offences have a confirmed DNA profile held on the NDNAD and is correctly shown on their PNC record. To achieve this, Forces will be supplied [with] details of subjects whose last known location is within their Force area. Each subject will need a risk assessment carried out to identify the high risk nominals and ensure that they are located and sampled at the earliest opportunity. The data supplied to Forces will have as much detail as possible, including the subject's PNCID, last known address (as shown on PNC or from Phase 1 research) and an automated scoring matrix provided by PNC based on conviction history, arrest, imprisonment volumes and current age."

20. The defendant's force was notified of 764 'nominals' who appeared to fall within the criteria for collection of samples. However, of these, 137 were dead, were living outside the defendant's force area, or had already provided a sample which produced a DNA profile. A further 22 nominals were eliminated on the grounds that they were 'low risk'. A further 195 nominals were eliminated on the grounds of minimal risk (e.g. because their offences were no longer

unlawful). Nineteen nominals could not be traced before the statutory cut off point. Apart from the claimant, the remaining 389 nominals had provided DNA samples by consent (although one has since claimed that his 'consent' was not voluntarily given).

21. On 14 November 1984 the claimant was convicted of unlawful act manslaughter and sentenced to 3 years imprisonment. On 9 July 1993 he was convicted of kidnapping and sentenced to 4 months imprisonment. On 20 August 1997 he was convicted of driving with excess alcohol. On 26 July 1999 the claimant was convicted of an offence of using threatening words or behaviour, contrary to section 4 Public Order Act 1986. It is common ground that the claimant's convictions for manslaughter and kidnapping qualified under section 63(3B).

22. Appendix F to the Guidance contains a flow chart which purports to identify the sequence in which the power should be exercised. There is no requirement in the Guidance that the authorisation of a police inspector should be obtained *before* any step is taken. However, Appendix F also advises that when the person is located the relevant parts of the "non-intimate sample authority" should be read to him. This implies that the authorisation must already be in existence before any requirement under schedule 2A is made. However, Appendix L, which contains a form on which to record the result of the exercise, implies that authorisation would be obtained only after the requested person has arrived at the police station or been arrested. Consent and authority forms also imply that authorisation would be obtained after the person had arrived at the police station on request or under arrest.

23. The letter handed to the claimant on 12 March 2013 was based upon a pro forma contained in Appendix G to the Guidance.

The defendant's case

24. The defendant concedes that the effect of paragraph 15, schedule 2A to the 1984 Act is that no requirement under paragraph 11 may be made to a person who does not consent to provide a non-intimate sample that he should attend a police station for the purpose of providing such a sample unless an officer of the rank of inspector or above has first given authorisation for the taking of the sample under section 63(3BB). By paragraph 16 of schedule 2A, once that authorisation has been obtained the officer must give to the person at least 7 days within which to attend the police station unless an officer of the rank of inspector authorises the earlier taking of the sample on the ground that it is required urgently for the purpose of investigation of an offence when shorter notice may be provided. By paragraph 17, only if the person fails to attend the police station pursuant to a requirement made under paragraphs 11 and 16 may an officer arrest him for the purpose of enforcing the requirement.

25. The defendant further concedes that to the extent that the Guidance gives an impression of the statutory powers contrary to that described in paragraph 24 it is incorrect.

26. The defendant submits that on 12 March 2013 the claimant was requested to provide a sample but was not on refusal *required* to attend the police station. He was warned that the consequence of refusal may be a (later) requirement to attend the police

station and arrest in the event of failure. Further, and in any event, the requirement was properly authorised and made by DI Ashman on 26 April 2013.

27. It is submitted on behalf of the defendant that the collection of samples from those convicted of crime under the provisions above described is in accordance with the law and is necessary in a democratic society for the prevention of crime for the purpose of Art 8(2). In a review of the decision the issue for the Court is whether the collection of the claimant's sample for the purpose of speculative checking against other samples and the retention of his DNA profile once produced is a proportionate exercise of the statutory power. Appropriate weight should be given to the judgement of a person with responsibility for the subject matter with access to special sources of knowledge and advice, but the task of the Court is not to review the merits of the decision (see *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 at paragraphs 16 and 30). The test to be applied is not in dispute.

28. As to the proportionality of the authorisation the defendant relies on the terms of the authorisation of 26 April 2013 and the witness statement of DI Ashman. The claimant is one of 764 offenders liable to be notified by the defendant under Operation Nutmeg. The claimant's first conviction occurred when he was aged 17 years and his last when he was aged 41 years. He is now aged 54 years. He has been convicted of 25 offences following nine court appearances over a period of some 25 years. In his authorisation DI Ashman wrote:

> "I have been shown [the claimant's] witness statement in the judicial review claim...and I note that he says that, well into the 1990s, he would get involved in *"petty crime"* and that he *"continued to drink and be stupid throughout the 1990s"*. I suspect that he has committed further offences after DNA profiling became commonly used by the police and I believe that his DNA and DNA profile may be held by police in connection with an, as yet, undetected offence, whether as a result of his being responsible for the offence or present as a witness to it.
>
> In my experience and belief, a man who has previously been convicted of serious offences, is far more likely to offend in the future than is a man of good character.
>
> I am satisfied that the taking of the sample is necessary to assist in the detection of crimes that have been committed, whether by [the claimant] or where [the claimant] has been present and where identifying him will assist in identifying the perpetrator. I am satisfied that it is also necessary for the prevention of crime, both because [the claimant] is much more likely to re-offend, being a multiple offender, than a man of good character. The knowledge that his DNA is held by the police will provide a strong deterrence to him committing offences in the future, particularly serious ones where DNA profiling is likely to be of great value in any police investigation. If he does reoffend, the ability to match his DNA from the scene or victim of the crime will greatly assist in detection.
>
> I have considered [the claimant's] Article 8 right to respect for his private and family life human rights. The gravity of the previous convictions, particularly for manslaughter and kidnap, reinforce my view that the obtaining of this non-intimate sample without the appropriate consent is

> both necessary and proportionate, for the purposes and for the reasons set out above."

29. The notorious case of *Attorney General's Reference (No. 3 of 1999) (Baker)* [2001] 2 AC 91 (HL), in which an improperly retained DNA profile was subsequently matched with a sample recovered from a victim of rape, demonstrates the importance of the collection of samples in the detection of serious crime. As at 31 March 2012 there were 158,191 unmatched crime scene profiles on the National DNA Database ("NDNAD"). During the year to March 2012, 61% of DNA crime scene profiles checked against the NDNAD produced a match. It must follow that the remaining 39% belong to persons whose profiles are not yet contained within the database. It is submitted that the logical first step in improving the rate of detection was to recover, in the course of Operation Sheen, samples from those serving longer term sentences of imprisonment. Of 376 prisoners profiled only six profiles produced a match with undetected crime scene profiles. While the claimant contends that this is a disappointing result which demonstrates the disproportionality of the exercise, the defendant responds that on the contrary these results are what one would expect: the 376 prisoners from whom samples were taken would have spent considerable periods out of circulation and their opportunity to commit other offences was for that reason reduced.

30. The logical next step in the attempt to solve outstanding cases was to check crime scene profiles against those of individuals who have in the past been convicted of serious offences but who are no longer in custody. The claimant, along with 409 others in the defendant's police area, fell into this category of offenders who were made the target of Operation Nutmeg.

31. It is the defendant's case that the claimant's offending history is such that a requirement of him to provide a non-intimate sample would be a proportionate interference with his right of respect for his private life. That the claimant's profile is not already held on the NDNAD is an accident of timing. After 5 April 2004 any person convicted of any one of the offences committed by the claimant would expect his sample to be taken and his DNA profile to be retained indefinitely.

32. The defendant does not concede that there was an obligation upon the chief constable to afford the claimant an opportunity to make representations before issuing the requirement to attend the police station. The inspector was required to make a judgement whether the requirement would be proportionate but the underlying facts were not in dispute. The claimant's convictions were a matter of public record. There was no question that they would be re-published by the defendant. No stigma could attach to the taking of a sample on the ground on which the defendant relied. In the event that consent was given a sample could be taken in the privacy of the claimant's own home.

Discussion

Date requirement made

33. In my judgment the defendant's letter of 11 March 2013, by the plain meaning of the words used, constituted a demand that in the event the claimant did not then and there consent to the taking of a sample he **must** attend a police station for the purpose of providing a non-intimate sample at a time within 7 days of the delivery of the letter. The alternative requires an approach to language which fails to recognise the plain meaning of the words, "*If you do not consent at this stage, we require you to attend a police station within 7 days... [where]...the sample may be taken with the authority of a police officer of the appropriate rank*". In my judgment that demand was unlawful because it was made without prior authorisation by a police officer of the rank of inspector or above, contrary to paragraph 11(2) of schedule 2A to the 1984 Act.

34. It is unsurprising that the demand was made without prior authorisation because the Guidance notes published by ACPO in July 2012 were seriously inaccurate to the extent that they implied that the requirement to an individual could be issued before the authorisation was given. Paragraph 15 of schedule 2A makes clear that the authorisation must be obtained first.

Requirement of 26 April 2013

35. That, however, does not resolve the present claim. It is the defendant's alternative case that DI Ashman's authorisation of 26 April 2013 made its own requirement that the claimant provide a non-intimate sample. It is therefore necessary to decide whether the claimant has established that DI Ashman's requirement constituted an unlawful interference with the claimant's Art 8 right to respect for his private life.

Interference with private life: Art 8(1) ECHR

36. For the reasons given by the ECtHR in *S v UK* I accept that the requirement to provide a non-intimate sample for the purpose of producing a DNA profile for comparison with the 158,191 crime scene profiles held in the national DNA database constituted an interference with the claimant's Art 8(1) right to respect for his private life. This much is not in dispute.

Proportionality of interference: Art 8(2) ECHR

37. In *S v UK* the ECtHR recognised the importance of technological advances in the fight against crime. Its decision as to the proportionality of the retention of samples and DNA profiles was confined to the circumstances of that application. The applicants were to be treated as persons of good character. It was the indiscriminate reach of the statutory power (in particular, its tendency to stigmatise unconvicted persons who had come under suspicion) that rendered the retention objectionable. The amended powers are deliberately confined to particular categories of persons. We are concerned with those who were convicted of serious offences before it became commonplace to take samples for the production of DNA profiles for the investigation of crime. No stigma attaches to the claimant in the present case by reason only of the requirement to provide a non-intimate sample. His convictions for serious offences are matters of public record. The claimant is but one of 11,000 people who by virtue of their criminal antecedents were liable, depending upon their individual circumstances, to provide samples for the purpose of speculative checking against the crime scene

database of profiles. The process of collection may itself be carried out in the privacy of the person's own home when consent is given. When consent is withheld there is no public announcement of the fact that a requirement has been made.

38. The attack upon the authorisation given in the claimant's case is based largely upon the statistical improbability that the speculative check will reveal any information of value of the police. It is pointed out that of the checks so far made in the defendant's police area as a result of Operation Nutmeg only two have resulted in positive matches, and in both those cases no further action has been taken. It is argued that these matches do nothing to suggest that in this respect there will be any significant improvement on the results of Operation Sheen. Even under the risk matrix provided in the Guidance notes the claimant is assessed as a low risk. There is no evidential foundation for the assertion made by DI Ashman that those who have committed serious offences are more likely to reoffend. The claimant argues that the absence of suspicion, based upon evidence, that he has committed any other offence renders the present exercise purely speculative and, for that reason, a disproportionate interference with his private life.

39. It is argued on behalf of the chief constable that the claimant does have an offending profile which places him within a category of persons to whom the requirement could and should properly have been directed. On the claimant's argument he could justifiably have objected in 1993 that he had been out of serious trouble for nine years but he proceeded to commit the offence of kidnap. He is still a comparatively young man. It is pointed out that the purpose of the exercise is to ascertain whether the claimant continued to commit offences after the date of his last serious conviction in 1993. The statistical probability of a match should not, it is submitted, be determinative of the issue of proportionality. By way of example, no-one doubts that it is appropriate to seek samples from arrested persons. However, only 2.2% of arrested persons are found to have provided samples which match a profile in the crime scene database. This compares with a "hit rate" of 3% among Operation Nutmeg targets in the Metropolitan Police area. The underlying justification for the exercise is the importance of the task of detecting crime, particularly serious crime. Upon the information available to DI Ashman it was, it is submitted, a proportionate exercise of the statutory power to require the claimant to provide a sample.

40. I accept the defendant's submission that the statistical probability that any one of the samples gathered would produce a match with the crime scene database is not determinative of the issue of proportionality. As Mr Basu points out on behalf of the chief constable the statistical chance that a crime scene sample will be matched by any one member of the population at random is only 0.25% but it is a safe inference that almost all of the crime scene sample collected in the UK would be matched by a member of that population. The Secretary of State for the Home Department was, in issuing policy Guidance for Operation Sheen and Operation Nutmeg, applying priorities based upon experience, namely that those who were proved to have committed serious offences in the past were more likely to be responsible for unsolved crimes for which crime scene profiles are now available. This was the experience to which DI Ashman was referring in his authorisation. In my judgment, acceptance of propensity to commit offences as a measure (albeit an imprecise

measure) of probability in the detection and proof of further offences is now so widespread that the defendant was fully justified in placing weight upon it.

41. I accept that there was before DI Ashman no evidence that cast suspicion upon the claimant in respect of any particular offence. If there had been he could have been arrested and immediately he would have become liable under separate statutory provisions (section 63(2A) and (2B)) to provide a sample from which a DNA profile could have been taken. I do not consider that the absence of specific grounds for suspicion renders the requirement disproportionate. It seems to me that the essential question for this court is whether the information before DI Ashman, without more, justified the requirement made. As Hickinbottom J observed in the course of argument, had it not been for the accident of timing of the development of the DNA technique the claimant would have provided a sample as a matter of course at the time of his arrest for serious offences. While it is true that there was evidence before DI Ashman that there had been a change in the claimant's lifestyle at some stage after his last conviction for a serious offence, it seems to me that his conclusions (1) that the claimant may have committed other offences during the period of his admitted offending, and (2) that he may have committed offences after 1995 (in respect of both of which periods crime scene profiles may now be available) were justified. I consider that significant weight is to be attached to the legitimate interest in the detection of crime. I recognise that there is a theoretical deterrent effect in the knowledge by the claimant that the police are in possession of his DNA profile but, in my view, it is the objective of solving crime which provides the legitimate justification for the requirement in the present case. In my judgment, for the reasons I have given, DI Ashman's conclusion that his requirement of the claimant to provide a sample was proportionate in the circumstances was correct. DI Ashman was fully justified in concluding that the public interest in the detection of crime outweighed the limited interference with the claimant's private life.

Opportunity to make representations

42. In *R (L) v Commissioner of Police of the Metropolis* [2010] 1 AC 410, [2010] UKSC 3, the Supreme Court considered whether there was a requirement to seek representations from the person affected in a different context. The Commissioner resolved to disclose in an Enhanced Criminal Record Certificate available to prospective employers information about the claimant, pursuant to section 115(7) of the Police Act 1997. The Court found that the decision to disclose amounted to an interference with the claimant's Art 8(1) right of respect for her private life. However, the Court concluded that the need for disclosure in pursuit of the legitimate aim of the protection of children outweighed the prejudicial effects upon the claimant's private life. Accordingly, the Art 8(2) qualification was met. As to the question whether the claimant should have been consulted upon the issue of disclosure, Lord Hope said at paragraph 46:

> "46. In cases of doubt, especially where it is unclear whether the position for which the applicant is applying really does require the disclosure of sensitive information, where there is room for doubt as to whether an allegation of a sensitive kind could be substantiated or where the information may indicate a state of affairs that is out of date or no longer true, chief constables should offer the applicant an opportunity of making

> representations before the information is released. In *R (X) v Chief Constable of the West Midlands Police [2005] 1 WLR 65* , para 37 Lord Woolf CJ rejected Wall J's suggestion that this should be done on the ground that this would impose too heavy an obligation on the chief constable. Here too I think, with respect, that he got the balance wrong. But it will not be necessary for this procedure to be undertaken in every case. It should only be resorted to where there is room for doubt as to whether there should be disclosure of information that is considered to be relevant. The risks in such cases of causing disproportionate harm to the applicant outweigh the inconvenience to the chief constable."

At paragraph 82, Lord Neuberger added:

> "82 In a nutshell, as Lord Hope has said, the issue is essentially one of proportionality. In some, indeed possibly many, cases where the chief officer is minded to include material in an ECRC on the basis that he inclines to the view that it satisfies section 115(7)(b), he would, in my view, be obliged to contact the applicant to seek her views, and take what she says into account, before reaching a final conclusion. Otherwise, in such cases, the applicant's article 8 rights will not have been properly protected. Again, it is impossible to be prescriptive as to when that would be required. However, I would have thought that, where the chief officer is not satisfied that the applicant has had a fair opportunity to answer any allegation involved in the material concerned, where he is doubtful as to its potential relevance to the post for which the applicant has applied, or where the information is historical or vague, it would often, indeed perhaps normally, be wrong to include it in an ECRC without first giving the applicant an opportunity to say why it should not be included."

43. In the claimant's case, on 12 March 2013 there was no issue of disputed fact or any issue as to the reliability of an informant or any doubt about the interval of time since the claimant's last conviction. The sole question was whether the claimant's admitted convictions justified a requirement to provide a sample notwithstanding the interference with the claimant's private life. Parliament had already set the qualifying criteria. The first stage was a request to provide a sample with consent. Had the claimant wished to provide reasons why it would be, in his particular case, unreasonable or disproportionate to make the request (such as exceptional personal circumstances) the inspector would have been under a duty to consider them before making his decision whether to authorise the requirement to attend the police station for the purpose of taking a sample. I do consider that the better course is to provide the person to whom the request is made with the opportunity to respond. However, I have already indicated my view that the requirement made on 12 March 2013 was unlawful and therefore of no effect. Subject to my Lord's view, we are concerned with the position as it was on 26 April 2013 when DI Ashman issued his authority and requirement. By that stage the claimant had submitted his witness statement in support of his claim that the interference with his private life by means of a *requirement* to provide a sample was unlawful. The claimant's evidence was considered by DI Ashman before he made his decision. I do not accept the claimant's submission that he may have said more had he known of the underlying reasons for seeking a sample. The resolution of this dispute has depended upon the assessment of facts which were

largely undisputed and which the claimant had a full opportunity to address. In my view, it is not demonstrated that the claimant's Art 8 rights were not properly protected.

Conclusion

44. I have concluded that the requirement of 12 March 2013 was unlawful but that the requirement of 26 April 2013 was lawful. Upon the main issue of proportionality the claim has failed. I would therefore dismiss the claim.

Mr Justice Hickinbottom

45. I agree with my Lord, Pitchford LJ, that, whilst the 12 March 2013 requirement was unlawful, the focus of this claim is on the lawfulness of the 26 April 2013 requirement by the defendant that the claimant attend the police station to give a DNA sample; and that that issue turns on whether the requirement was appropriate and proportionate in the face of the claimant's article 8 rights.

46. The issue requires the court to consider (i) the extent of the interference with the claimant's article 8 rights caused by the requirement to give a DNA sample; (ii) the value of him giving a sample in achieving the legitimate aim of the statutory scheme, in this case of detection and reduction of crime (including the protection of the article 8 and other rights of actual and potential victims); and (iii) whether, in the light of that value and all other relevant circumstances, the interference is appropriate and proportionate. The question of whether it is appropriate and proportionate is one to be determined by the court, which accords an appropriate margin of appreciation to the chief constable, measured in the light of the fact that Parliament has entrusted the primary decision-making to him and those to whom he delegates the task.

47. Pitchford LJ has set out in clear terms the extent of the interference with the claimant's article 8 rights that the requirement imposes, and the value of the requirement in the context of the statutory scheme particularly so far as the detection of crime is concerned. For the reasons he has given, I too consider that the requirement of 26 April 2013 was appropriate and proportionate, and, speaking for myself, clearly so.

48. Consequently, I too would dismiss this application.