Police Powers to Take and Retain DNA Samples in the Qatari Law: A Comparative Study

Prof. Sami Hamdan Al-Rawashdeh
Professor of Criminal Law, College of Law – Qatar University, Doha – Qatar, P.O.Box 2713,
samirawashdeh@qu.edu.qa

Abstract:
Chapter 1 of Pt 1 of the Protection of Freedoms Act 2012 introduces a new regime governing the destruction, retention and use of fingerprints, footwear impressions, and samples and the DNA profiles derived from such samples. The purpose of the article is to explain and examine the new regime in all its complexity and, in particular, to assess whether it is compliant with the European Convention on Human Rights (ECHR). The research shows that the 2012 Act does not afford adequate privacy protection to innocent individuals, adding pains to an already coercive process without due justification. In Qatar, the DNA Profiling Act regulates the police powers to take and retain DNA samples. The Act should be amended to comply with human rights requirements as enshrined in the Qatar Constitution 2004, in particular the right to privacy.
Keywords: DNA, Privacy, Police Powers, The Protection of Freedoms Act 2012, The DNA Profiling Act 2013.

1. Introduction

There is wide range of policing actions that might invade the right to respect for private life guaranteed by Article 8 of the European Convention. There is no doubt that the recent application of DNA profiling technology has generated numerous legal issues related to the misuse of information obtained from DNA identification tests and the admissibility of these tests as legal evidence. The last two decades have witnessed a significant expansion of police powers both to take and to retain biometric materials and data in the context of criminal investigations and proceedings, and significant developments in the science relating to biometric data, and particularly DNA. There has been significant concern that these powers were incompatible with the right to respect for private life under Article 8 of the European Convention. This highlights the importance of implementing safeguards regarding the collection, storage and use of biological samples and genetic data.

The British National DNA Database has been described as the ‘piecemeal facilitation of the collection, storage and use of DNA and biological samples by successive amendments to legislation’, especially amendments to the Police and Criminal Evidence Act 1984. These amendments have proved to be controversial not least because they were implemented with little or no public consultation or debate. The Criminal Justice and Police Act 2001 allowed fingerprints and DNA samples to be retained indefinitely where they were taken from a person charged with an offence, including on acquittal or after a decision to take no further action was made. The Criminal Justice Act 2003 later allowed DNA to be taken on arrest, rather than on charge, and anyone arrested in England and Wales in connection with any recordable offence has his or her DNA sample taken and stored on the database. In the UK, Chapter 1 of Pt 1 of the Protection of Freedoms Act 2012 introduces a new regime governing the destruction, retention and use of fingerprints, footwear impressions, and samples and the DNA profiles derived from such samples. In Qatar, the DNA Profiling Act No. (9) of 2013 regulates taking and retention DNA samples.

This research addresses the question of whether the police power to take and retain DNA samples under the Protection of freedoms Act 2012 meets the requirements of Article 8 of the European Convention. It will examine whether the 2012 Act has struck the right balance between privacy rights and the public interest of fighting crime. Furthermore, it examines whether 2012Act has met the proportionality and necessity tests with respect to Article 8 under the European Convention. It is contended that the 2012 Act has failed to meet the proportionality and necessity tests. Furthermore, the 2012 Act needs to be properly scrutinised to ensure compatibility with the European Convention. The Qatari 2013 Act needs to be amended to meet constitutional rights as enshrined in the Qatari Constitution of 2004.

2. Police powers to take and retain DNA samples in the English Law

2.1 The Previous Legal Framework

The creation of the national DNA[1] database in England and Wales in April 1995 has raised a number of legal issues in respect of the criminal justice system relating in particular to civil liberties. Redmayne has identified these legal issues.[2] First, the impact of police power to take bodily samples on civil liberties, in particular the right to privacy. Secondly, the evidential problems related to database generated DNA matches.

2.1.1 The Police and Criminal Evidence Act 1984

Part V of the Police and Criminal Evidence Act 1984[3] regulates the taking and retention of DNA samples.[4] The Act distinguishes between two types of samples: intimate samples and non-intimate samples. According to Section 65, intimate samples include: a sample of blood, semen or any other tissue fluid, urine, saliva or pubic hair, and a swab taken from a person's body orifice other than the mouth. Non-intimate samples include: a sample of hair other than pubic hair, a sample taken from a nail or from under a nail, a swab taken from any part of a person's body including the mouth but not any other body orifice, a footprint or a similar impression of any part of a person's body other than a part of his hand. Section 62 provides that intimate samples can be taken provided that a number of conditions are met. First, the person must be in police detention and the appropriate consent[5] is given. Secondly, the authorisation must be granted by a superintendent. Thirdly, the superintendent can give such authorisation if he has reasonable grounds for suspecting the involvement of the person from whom the sample is to be taken in a serious arrestable offence, or for believing that the sample will tend to confirm or disprove his involvement. According to section 63 a non-intimate sample may be taken from a person without the appropriate consent provided that he is in police detention or is being held in custody by the police on the authority of a court, and an officer of at least the rank of superintendent authorises it to be taken without the appropriate consent.

The Criminal Justice and Public Order Act 1994[6] contains a number of amendments to the 1984 Act. The 1994 Act increased the number of situations in which samples can be taken by the police.[7] Section 54 empowers the police to take body samples from a person who is not in police detention but from whom, in the course of the investigation of an offence, two or more non-intimate samples suitable for the same means of analysis have been taken which have proved insufficient. However, two conditions must be met. First, the authorisation must be given by a police officer at of at least the rank of superintendent. Secondly, appropriate consent is given. Subsection 3(b) substitutes "serious arrestable offence"[8] with "recordable offence".[9] "A dental impression was reclassified as an intimate sample whilst saliva were recategorized as a non-intimate sample by section 58. Section 55 extends the situations and circumstances in which the police can take a non-intimate sample without appropriate consent. The police can take such samples if a person has been charged with a recordable offence or informed that he will be reported for such an offence, and either he has not had a non-intimate sample taken from him in the course of the investigation of the offence by the police or he has had a non-intimate sample taken from him but either it was not suitable for the same means of analysis or, though so suitable, the sample proved insufficient. Subsection 3(b) gives the police the power to take non-intimate samples from a person without the appropriate consent if he has been convicted of a recordable offence.

---

[1] DNA is the abbreviation of DeoxyriboNucleic Acid. See, Kelly, F. K., 'Methods and Applications of DNA Fingerprints' [1987] *Criminal Law Review* 105; Hibbs, M., 'Applications of DNA fingerprinting –truth will out' [1989] 139 *New Law Journal* 619, R. White, R. and Greenwood, J., 'DNA Fingerprinting and the Law' (1988) 51 *Modern Law Review* 145; Redmayne, M., 'Doubts and Burdens: DNA Evidence, Probability and the Courts' [1995] *Criminal Law Review* 464.

[2] Redmayne, M., 'The DNA Database: Civil Liberty and Evidentiary Issues' [1998] *Criminal Law Review* 437.

[3] Hereinafter the 1984 Act.

[4] For discussion see Walker, C., and Cram, I., 'DNA Profiling and Police Powers' [1990] *Criminal Law Review* 479; Gelowitz, M., 'Yet he opened not his mouth: A Critique of Schedule 14 to the Criminal Justice Act 1988' [1989] *Criminal Law Review* 198; Redmayne, M., 'The DNA Database: Civil Liberty and Evidentiary Issues' [1998] *Criminal Law Review* 437.

[5] According to section 65 "appropriate consent" means: (a) in relation to a person who has attained the age of 17 years, the consent of that person; (b) in relation to a person who has not attained that age but has attained the age of 14 years, the consent of that person and his parent or guardian; and (c) in relation to a person who has not attained the age of 14 years, the consent of his parent or guardian.

[6] Hereinafter the 1994 Act.

[7] See Steventon, B., 'Creating A DNA Database' (1995) 59 *Journal of Criminal Law* 411.

[8] See section 116 of the 1984 Act.

[9] See section 118 of the 1984 Act.

Furthermore, section 56 gives the police authority to conduct "speculative searches" of samples in relation to DNA and fingerprint analysis. Body samples or the information derived from samples taken by police from a person who has been arrested on suspicion of being involved in a recordable offence may be checked against other fingerprints or samples or the information derived from other samples contained in records held by or on behalf of the police or held in connection with or as a result of an investigation of an offence. It also gives the police the power to require a person who is neither in police detention nor held in custody to attend at a police station within one month for a sample to be taken if he has been charged with or reported for a recordable offence or has been convicted of such an offence. However, these powers do not apply if the conviction is recorded before 10 April, 1995. Many of these provisions implemented the recommendations of the Royal Commission on Criminal Justice though the Act went somewhat further than the Commission recommended.[1]

A further power has been introduced by the Criminal Evidence (Amendment) Act 1997. Section 1 of the Criminal Evidence (Amendment) Act 1997 extends the police power to take non-intimate body samples without consent from any person who has been convicted before 10 April, 1995 of a violent offence, sexual offence and other offences listed in Schedule 1 of this Act and at the relevant time he is serving a sentence of imprisonment in respect of that offence or he is detained under Part III of the Mental Health Act 1983. Section 2 empowers the police to take non-intimate body sample from persons under section 63 of the 1984 Act without the appropriate consent where they have been acquitted but detained by reason of insanity or unfitness to plead. It has been argued that a "power to take or obtain non-consensual samples from all those who have been convicted of serious offences before April 1995 would be difficult to justify, and the restrictions of the power to those who are imprisoned does not appear to make any difference to this".[2] Section 64 of the 1984 states that any body samples taken from a person in connection with the investigation of an offence must be destroyed as soon as is practicable after the conclusion of the proceedings if: (i) the person is cleared of the offence. (ii) no prosecution is brought and he is not cautioned, or (iii) the person has not been suspected of any involvement and the samples have fulfilled the purpose for which they were taken. Section 57 of the 1994 Act has amended section 64 of the 1984 Act. Subsection 3 provides that Samples and fingerprints *must not* be destroyed if they were taken for the purposes of the investigation of an offence of which a person has been convicted, and a sample or, as the case may be, fingerprint was also taken from the convicted person for the purposes of that investigation. Subsection 3B(a) and (b) prohibits the use "in evidence against the person so entitled" or "for the purposes of any investigation of an offence" the information derived from a sample that is required to be destroyed.
Section 64 of the 1984, as inserted by section 57 of the 1994 Act, has been considered by the House of Lords judgment in *Attorney General's Reference (No.3) of 1999* (*R v B*)[3] In January 1998 the defendant was arrested and charged with an offence of burglary, and a saliva sample lawfully taken from him and submitted for DNA profiling. The defendant was acquitted of burglary in August 1998, but the sample was not destroyed, in breach of section 64(1) of the Police and Criminal Evidence Act 1984. In 1997, a woman was assaulted and raped during a burglary of her home. Swabs were later taken from the victim in a medical examination, and a DNA profile obtained and placed on the national DNA database. A match was later made between the profile from the saliva sample taken from the defendant and the profile from the swabs taken from the victim. A hair sample was taken from the defendant confirmed the DNA match. Relying on the DNA match between the hair and swab samples, the defendant was arrested for the assault and rape.

The defendant argued that there had been a breach of Article 8 of the European Convention. It was contended that since section 64(1) required a DNA sample to be destroyed following an acquittal, the admission in evidence of the results of an investigation that was prohibited by virtue of section 64(3B)(b) could not satisfy that requirement. The trial judge had found that the sample had not been destroyed when it should have been, and had then been used in the investigation of an offence. Section 64(3B)(b) was mandatory with the result that the DNA evidence was inadmissible. The Crown offered no further evidence and the defendant was acquitted. The Court of Appeal subsequently upheld that decision. This matter came to the House of Lords at the request of the Attorney-General for reconsideration. The House of Lords allowed the reference and reversed the decision of the Court of Appeal. The House of Lords held that:

> [Section 64(3B)(b)] contains no language to the effect that evidence obtained as a result of the prohibited investigation shall be inadmissible. It does not make provision for the consequences of a breach of the prohibition on investigation. This does not mean that this particular prohibition is toothless. On the contrary,

[1] Royal Commission on Criminal Justice Report, *Royal Commission on Criminal Justice Report*, Cm.2263 (London: HMSO, 1993), para 25-38 at 14-16. For criticism of Creaton, J., 'DNA Profiling and the Law: A Critique of the Royal Commission's Recommendations' in McConville, M. and Bridges, L., (ed.), *Criminal Justice in Crisis* (Aldershot: Edward Elgar, 1994).
[2] Redmayne, M., 'The DNA Database: Civil Liberty and Evidentiary Issues' [1998] *Criminal Law Review* 437 at 445.
[3] [2001] 1 Cr. App. R. 34.

> it must be read with section 78(1) of PACE…. In other words, there is in the very same statute a discretionary power in the trial judge, in the face of a breach of part (b) of subsection (3B), to exclude the evidence if it would be unfair to admit it.[1]

Furthermore, a decision by a judge in the exercise of his discretion to admit such evidence would not amount to an unlawful interference with the defendant's right to private life under Article 8 of the Convention since the legislation was in accordance with the law, and any interference was necessary in a democratic society. There was no breach of Article 6 since the trial judge had adequate powers to ensure fairness, by staying proceedings as an abuse of process or excluding evidence section 78. There was no principle of Convention law that unlawfully obtained evidence is not admissible. Accordingly, the provision is fully compatible with the relevant Convention rights.

2.1.2 The Criminal Justice and Police Act 2001

The House of Lords Judgment in *Attorney General's Reference (No.3) of 1999* has "undoubtedly created an unsatisfactory anomaly in the law"[2] and undermined "any protection Parliament might have thought it was providing for acquitted suspects by enacting section 64(3B)".[3] This anomaly has been highlighted by the Joint Committee on Human Rights. It stated this "has the curious result that the police are under a legal duty to destroy material, but are able to use it as evidence if they breach their duty by keeping it".[4] The Criminal Justice and Police Act 2001 introduces a new statutory basis in relation to the police power to take and retain body samples.[5] It contains significant amendments of the 1984 Act.[6] The first significant change is contained in section 78. Section 78 gives the police the power to take compulsory fingerprints from a person who has been given a caution or reprimanded in respect of a recordable offence. Furthermore, subsection 4 gives the police authorities further power to take samples from persons answering bail if there are reasonable grounds for believing that he is not the same person or if he claims to be a different person. Subsection 8 gives a new definition to the term "fingerprint": a record of the skin pattern and other physical characteristics or features of any of that person's fingers or either of his palms.

The second significant change is contained in section 79 which substitutes an inspector for a superintendent as the officer who may give authorisation for the taking of all samples. The power to authorise a person with no medical qualifications to conduct an intimate search without the detainee's consent is a serious one and causes considerable concern. Such power constitutes interference with the right to respect for private life under Article 8 of the European Convention.[7] Furthermore, the Joint Committee expressed its worries about reducing the level of seniority of the officer who has to decide whether it is impractical for an intimate search to be conducted by a medically qualified person, before authorising a police officer who is medically unqualified to conduct a physical examination of a person's body orifices.[8] The Act failed to provide specific guidance which would be available to the officer when exercising his discretion in cases where medically qualified person is not available to conduct an intimate search.

The Government expressed its view that the change of the seniority of officer reflects modern management structure in the police service. The Joint Committee criticised such a view and stated that an inspector is more likely than a superintendent to be of the same rank as, or a lower rank than, the investigating officer, potentially compromising his or her independence. Furthermore, "management structures should enable a high level of protection to be offered, rather than being made a justification for reducing that level. If a detainee were more concerned about delay than about being subject to an intimate search, he or she could consent to the search, removing the need for special authorisation".[9] The Act amends the definition of "non-intimate sample" contained

---

[1] Ibid, at 482-483.
[2] Forster, S.,'The Taking and Subsequent Retention of DNA/Fingerprint Samples: Striking a Difficult Balance' (2001) 165 *Justice of the Peace* 556 at 559.
[3] Case Comment: [2001] Crim. LR 394 (HL) at 395.
[4] House of Parliament, Report of Joint Committee on Human Rights, First Report, 26 April, 2001, para 87, available at: http://www.publications.parliament.uk/pa/jt200001/jtselect/jtrights/69/6914.htm,[3/12/2002].
[5] Forster, S., 'The Taking and subsequent Retention of DNA/Fingerprint Samples: Striking a Difficult Balance' (2001) 165 *Justice of the Peace* 556; Wasik, M., 'Legislating in the Shadow of the Human Rights Act: The Criminal Justice and Police Act 2001' [2001] *Criminal Law Review* 931 at 945-947.
[6] See Home Office, *Proposals for Revising Legislative Measures on Fingerprints, Footprints and DNA Samples*, July 1999(London: Home Office, 1999), at http://www.homeoffice.gov.uk/docs/fingdna.pdf.
[7] House of Parliament, Report of Joint Committee on Human Rights, First Report, 26 April, 2001, para 78.
[8] House of Parliament, Report of Joint Committee on Human Rights, First Report, 26 April, 2001, para 76.
[9] House of Parliament, Report of Joint Committee on Human Rights, First Report, 26 April, 2001, para 79.

in section 65 of the 1984 Act. According Section 80(5)(b) "footprints" shall be substituted "a skin impression". Skin impression means any record (other than a fingerprint) which is a record, in any form and produced by any method, of the skin pattern and other physical characteristics or features of the whole or any part of his foot or of any other part of his body.[1] By virtue of section 80(4) where a non-intimate sample consisting of a skin impression is taken electronically from a person, it must be taken only in such a manner, and using such devices, as the Secretary of State has approved for the purpose of the electronic taking of such an impression.

The number of law enforcement agencies which have the ability to conduct speculative searches have been considerably increased by section 81. Section 63A of the 1984 Act gives police the power to check fingerprints or samples or the information derived from samples taken from the person where that person has been arrested on suspicion of being involved in a recordable offence or has been charged with such an offence or has been informed that he will be reported for such an offence. Section 81 of the 2001 Act expands this power to cover any fingerprints or samples or the information derived from samples which are held by or on behalf of any one or more relevant law enforcement authorities in the United Kingdom and abroad or which are held in connection with or as a result of an investigation of an offence.

Section 82 raises issues in relation to its capacity to satisfy the requirement of Article 8 of the European Convention. It is not clear that adequate controls are available to ensure that records were accurate and up to date. There are no clear controls over the circumstances in which searches of the records are permitted that would be adequate to meet the necessity tests under Article 8(2). Finally, it is not clear that the bodies given access to the records would themselves have adequate controls in place to satisfy the entitlements of data subjects under Article 8.[2] The Joint Committee expressed its reservations about this section. It stated that:

> We believe that there should be continuous monitoring of the use made of the extended power, to ensure that Article 8 rights to privacy are being respected in practice. Consideration should also be given to the possibility of providing in this legislation for adequate controls on the accuracy of records, the circumstances in which searches are permissible and proportionate, and of ensuring that the bodies given access to the records also have adequate controls in place.[3]

Furthermore, concern about such powers has been expressed by the Human Genetics Commission[4] which launched a consultation document on the appropriate use of genetic information.[5] The House of Lords Select Committee on Science and Technology recommended that the Government should establish an independent body, including lay membership, to oversee the workings of the National DNA Database, to put beyond doubt that individuals' data are being properly used and protected.[6] Section 82 of the 2001 has been enacted in response to the decision of the House of Lords in *Attorney-General's Reference* (No.3) of 1999 discussed above. It provides that fingerprints or samples may be retained after they have fulfilled the purposes for which they were taken but shall not be used by any person except for purposes related to the prevention or detection of crime, the investigation of offence or the conduct of a prosecution. Subsection 6 allows for the police, retrospectively, to retain and use of all fingerprints and samples which have been unlawfully held on the database.
The Joint Committee on Human Rights agreed that such retrospective effect of section 82 could be incompatible with Article 13 since it removes the right to take legal action to have body samples destroyed. However, the Committee stated that such argument an would be unlikely to succeed for the following reasons: (a) the case law of the European Court on Article 13 and the Scope for retrospective legislation is not settled, but it is likely that States would be permitted a degree of flexibility in matters such as this; (b) Section 82 would not extend powers to take fingerprints and samples, but only to retain those which had been lawfully taken; (c) the future operation of the new powers seems to be fully compatible with Convention rights; (d) the retained material is likely to provide valuable evidence mainly in relation to very serious offences against the person; and (e) the House of Lords has held that evidence based on material unlawfully retained in the past need not be excluded from evidence in such cases.[7]

---

[1] Section 80(5)(C).
[2] House of Parliament, Report of Joint Committee on Human Rights, First Report, 26 April, 2001, para 84.
[3] House of Parliament, Report of Joint Committee on Human Rights, First Report, 26 April, 2001, para 85.
[4] See, http://www.hgc.gov.uk/business_meetings_02march.htm#5d, 17/12/2002.
[5] Human Genetics Commission, *Consultation Document: Whose Hands on Your Genes*?: *a consultation on the storage, protection and use of personal genetic information* (London: Health Department of Health, 2000).
[6] House of Lords Select Committee on Science and Technology, *Human Genetic Databases: challenges and opportunities*, 4th Report (London: Stationary Office, 2001).
[7] House of Parliament, Report of Joint Committee on Human Rights, First Report, 26 April, 2001, para 91-92.

2.1.3 The Criminal Justice Act 2003

In 2004, the new Criminal Justice Act 2003 extended the pool of people who could have their profile retained on NDNAD to include all people who had been arrested for a recordable offence. Prior to this, it was only possible to retain DNA profiles from individuals who had been charged with, or reported for a recordable offence. The Act extends the powers of the police to enable them to take fingerprints and a DNA sample from a person whilst he is in police detention following his arrest for a recordable offence. Fingerprints can be taken electronically and the police will be able to confirm in a few minutes the identity of a suspect where that person's fingerprints are already held on the National Fingerprint Database. It will prevent persons who may be wanted for other matters avoiding detection by giving the police a false name and address. Fingerprints taken under this provision will be subject to a speculative search across the crime scene database to see if they are linked to any unsolved crime. The DNA profile of an arrested person shall be loaded onto the National DNA Database and shall be subject to a speculative search to see whether it matches a crime scene stain already held on the Database. This will assist the police in the detection and prevention of crime.

Section (9) of the Criminal Justice Act 2003, extends the circumstances in which the police may take a person's fingerprints without consent to include taking fingerprints from a person arrested for a recordable offence and detained in a police station. Section 61 of PACE currently provides powers for taking fingerprints from those in police detention without consent in the following circumstances:

1. following charge with a recordable offence or notification that a suspect will be reported for such an offence;
2. on the authority of an inspector, which can only be given where the officer has reasonable grounds for believing the suspect is involved in a criminal offence and the fingerprints will tend to confirm or disprove his involvement or facilitate the ascertainment of his identity;
3. an authorisation may only be given for the purpose of facilitating the ascertainment of the person's identity where the person has either refused to identify themselves or the authorising officer has reasonable grounds to suspect they are not who they claim to be.

Fingerprints may also be taken from a person convicted of a recordable offence or cautioned, warned or reprimanded in respect of such an offence. Subsection *(2)* replaces the existing provisions about the taking of fingerprints on the authority of an Inspector with a wider power to take fingerprints from any person detained in consequence of his arrest for a recordable offence. The existing requirement to give a person whose fingerprints are taken without consent reasons for doing so and for recording the reason as soon as practical applies to the new power. This amendment to section 61 of PACE will prevent persons who come into police custody and who may be wanted on a warrant or for questioning on other matters from avoiding detection by giving the police a false name and address. Using Livescan technology, which enables the police to take fingerprints electronically and which is linked to the national fingerprint database (NAFIS), the police will be able to confirm a person's identity whilst he is still in police detention if his fingerprints have been taken previously. It will also assist in enabling vulnerable or violent people to be identified more quickly and dealt with more effectively. A speculative search of the fingerprint crime scene database will also reveal if the person may have been involved in other crimes.

Section (10) of the Criminal Justice Act 2003 extends the circumstances in which the police may take without consent a non-intimate sample from a person in police detention to include taking such a sample from a person arrested for a recordable offence. Section 63 of PACE provides powers for taking a non-intimate sample without consent from a person in the following circumstances:

1. following charge with a recordable offence or notification that the person will be reported for such an offence;
2. if the person is in police detention (or is being held in custody by the police on the authority of a court), on the authority of an inspector which can only be given where the officer has reasonable grounds for believing the suspect is involved in a recordable offence and the sample will tend to confirm or disprove his involvement;
3. following conviction for a recordable offence.

In relation to a person in police detention, subsections (2) and (3) replace the existing provisions about the taking of a non-intimate sample on the authority of an inspector with a wider power to take a non-intimate sample from any person in police detention in consequence of his arrest for a recordable offence. This is conditional on him not having had a sample of the same type and from the same part of the body taken already in the course of the investigation or if one has that it proved insufficient for the analysis. The new power is available whether or not the sample is required for the investigation of an offence in which the person is suspected of being involved. But of course the police will be able to use the new power to obtain samples in cases where under the present law an

inspector's authorisation would be given (for example, in a rape investigation, to obtain a foot impression, a hair sample and a mouth swab). The existing requirement to give a person from whom a non-intimate sample is taken without consent the reason for doing so and for recording the reason as soon as practicable applies to the new power. The amendments do not affect the existing powers to take samples from persons held in custody by the police on the authority of a court. DNA profiles extracted from non-intimate samples taken from arrested persons will be added to the samples already held on the National DNA Database and checked for matches with DNA taken from crime scenes.

The wide powers to take and retain biometric data (especially DNA data) of persons not charged or not convicted of any offence, and the development of a DNA database which now covers almost 10 per cent of the population, gave rise to considerable debate and concern, and was challenged in 2002 by way of judicial review in the case of *R (on the application of Marper) v. Chief Constable of South Yorkshire.*[1] The applicants had been charged with offences, but later acquitted. On arrest, they had had DNA samples taken, and the details added to the national DNA database. Both applicants asked for their fingerprints and DNA samples to be destroyed, but in both cases the police refused. The applicants applied for judicial review of the police decisions not to destroy the fingerprints and samples. On 22 March 2002 the Administrative Court rejected the application. On 12 September 2002 the Court of Appeal upheld the decision of the Administrative Court.

On 22 July 2004, the House of Lords dismissed an appeal by the applicants. As to the Convention analysis, Lord Steyn inclined to the view that the mere retention of fingerprints and DNA samples did not constitute an interference with the right to respect for private life but stated that, if he were wrong in that view, he regarded any interference as very modest indeed. Questions of whether in the future retained samples could be misused were not relevant in respect of contemporary use of retained samples in connection with the detection and prosecution of crime. If future scientific developments required it, judicial decisions could be made, when the need occurred, to ensure compatibility with the Convention. The provision limiting the permissible use of retained material to "*purposes related to* the prevention or detection of crime ..." did not broaden the permitted use unduly, because it was limited by its context. If the need to justify the modest interference with private life arose, Lord Steyn agreed with Lord Justice Sedley in the Court of Appeal that the purposes of retention – the prevention of crime and the protection of the right of others to be free from crime – were "provided for by law", as required by Article 8.

As to the justification for any interference, the applicants had argued that the retention of fingerprints and DNA samples created suspicion in respect of persons who had been acquitted. Counsel for the Home Secretary had contended that the aim of the retention had nothing to do with the past, that is, with the offence of which a person was acquitted, but that it was to assist in the investigation of offences in the future. The applicants would only be affected by the retention of the DNA samples if their profiles matched those found at the scene of a future crime. Lord Steyn saw five factors which led to the conclusion that the interference was proportionate to the aim: (i) the fingerprints and samples were kept only for the limited purpose of the detection, investigation and prosecution of crime; (ii) the fingerprints and samples were not of any use without a comparator fingerprint or sample from the crime scene; (iii) the fingerprints would not be made public; (iv) a person was not identifiable from the retained material to the untutored eye, and (v) the resultant expansion of the database by the retention conferred enormous advantages in the fight against serious crime. In reply to the contention that the same legislative aim could be obtained by less intrusive means, namely by a case-by-case consideration of whether or not to retain fingerprints and samples, Lord Steyn referred to Lord Justice Waller's comments in the Court of Appeal that "[i]f justification for retention is in any degree to be by reference to the view of the police on the degree of innocence, then persons who have been acquitted and have their samples retained can justifiably say this stigmatises or discriminates against me – I am part of a pool of acquitted persons presumed to be innocent, but I am treated as though I was not. It is not in fact in any way stigmatising someone who has been acquitted to say simply that samples lawfully obtained are retained as the norm, and it is in the public interest in its fight against crime for the police to have as large a database as possible".

The House of Lords further rejected the applicants' complaint that the retention of their fingerprints and samples subjected them to discriminatory treatment in breach of Article 14 of the Convention when compared to the general body of persons who had not had their fingerprints and samples taken by the police in the course of a criminal investigation. Lord Steyn held that, even assuming that the retention of fingerprints and samples fell within the ambit of Article 8 so as to trigger the application of Article 14, the difference of treatment relied on by the applicants was not one based on "status" for the purposes of Article 14: the difference simply reflected the

[1] [2003] H.R.L.R. 1.

historical fact, unrelated to any personal characteristic, that the authorities already held the fingerprints and samples of the individuals concerned which had been lawfully taken. The applicants and their suggested comparators could not in any event be said to be in an analogous situation. Even if, contrary to his view, it was necessary to consider the justification for any difference in treatment, Lord Steyn held that such objective justification had been established: first, the element of legitimate aim was plainly present, as the increase in the database of fingerprints and samples promoted the public interest by the detection and prosecution of serious crime and by exculpating the innocent; secondly, the requirement of proportionality was satisfied, section 64 (1A) of the PACE objectively representing a measured and proportionate response to the legislative aim of dealing with serious crime.

Baroness Hale of Richmond disagreed with the majority considering that the retention of both fingerprint and DNA data constituted an interference by the State in a person's right to respect for his private life and thus required justification under the Convention. In her opinion, this was an aspect of what had been called informational privacy and there could be little, if anything, more private to the individual than the knowledge of his genetic make-up. She further considered that the difference between fingerprint and DNA data became more important when it came to justify their retention as the justifications for each of these might be very different. She agreed with the majority that such justifications had been readily established in the applicants' cases.[1]

In the case of *S. and Marper v. the United Kingdom*,[2] the European Court adopted a different opinion. The Court found 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. Accordingly, there has been a violation of Article 8 of the Convention in the present case.[3]

"That the judgment of the European Court in S and Marper required the law on retention of biometric data of persons unconvicted of an offence to be changed was commonly accepted. The issue was the degree of change that was necessary. In his commentary on the judgment, Andrew Ashworth argued there should be three dimensions to the reform, first, retention should be restricted to biometric data taken in respect of offences of a certain degree of seriousness. Possible categories, he suggested, would be violent and sexual offences, indictable offences, or recordable offences. Secondly, there should be special provision in respect of data relating to juveniles. Third, retention must be time limited: possibly three years, with a potential extension of two years on the authority of a judge, as in Scotland. Since the European Court accepted that retention of fingerprints amounted to less of an interference with the right to respect for private life than retention of cellular samples or DNA profiles, different regimes might be acceptable for different forms of sample. Finally, Ashworth argued that the judgment of the European Court implied that unconvicted persons who have had their data retained should have a right to independent review of the retention decision".[4]

2.1.4 The Crime and Security Act 2010

In response to this judgment, a more restrictive model was constructed by the Crime and Security Act 2010, but this Act was not implemented due to the change of administration in the United Kingdom. Sections 14 to 23 of the Crime and Security Act 2010 which, amongst other things, allowed for the retention of fingerprints and DNA profiles of persons arrested for, but not convicted of, any recordable offence for six years. Sections 14 to 18, 20 and 21 of the 2010 Act established a separate approach to the retention of DNA profiles and fingerprints by the police for national security purposes and made provisions for the extended retention of DNA and fingerprints on national security grounds. The Crime and Security Act 2010 contains provisions to give additional powers to the police to take fingerprints and DNA samples from people who have been arrested, charged or convicted in the UK, and from those convicted overseas of serious sexual and violent offences. In response to the European Court

---

[1] Allison Clare, "Retention of fingerprints and DNA samples: compatibility with the European Convention on Human Rights" 68(6) Journal of Criminal Law 481-483.
[2] (2009) 48 EHRR 50, [2008] ECHR 1581, (2009) 48 EHRR 50, 25 BHRC 557, [2009] Crim LR 355.
[3] Kate Beattie, "S and Marper v UK: privacy, DNA and crime prevention" (2009) European Human Rights Law Review 229-238.
[4] Ed Cape, "The Protection of Freedoms Act 2012: the retention and use of biometric data provisions" [2013] Criminal Law Review 23-37 at 28.

of Human Rights judgment in the case of *S and Marper v United Kingdom*, the Act also sets out a statutory framework for the retention and destruction of biometric material, including DNA samples, DNA profiles and fingerprints that has been taken from an individual as part of the investigation of a recordable offence.

These powers were consulted upon in the *Keeping the Right People on the DNA Database* paper published in May 2009.[1] Section 14 substitutes a new section 64 into PACE and inserts fourteen new sections immediately after it. Section 64 (destruction of fingerprints and samples) set out the purposes for which fingerprints, impressions of footwear and samples may be retained but permits them to be retained after they have fulfilled the purposes for which they were taken without reference to a retention period. The new provisions require the destruction of DNA samples once they have been profiled and loaded satisfactorily onto the national database. In any event, all samples (whether biological DNA material or other samples, such as dental or skin impressions) are required to be destroyed within six months of their being taken.

It has been argued that the "retention and destruction regime proposed in the consultation paper was complex".[2] The proposed automatic retention periods of 6 years and 12 years for more serious (suspected or alleged) offences proved to be controversial (especially in terms of whether they would be sufficient to comply with the *S and Marper v United Kingdom judgment)*. The Parliamentary Joint Committee on Human Rights considered it "unacceptable that the Government appears to have taken a very narrow approach to the [S and Marper] judgment by purposely 'pushing the boundaries' of the Court's decision".[38] The blanket retention period, said the Committee, remains "disproportionate and potentially arbitrary" and gives rise to a significant risk of further breach of the right to respect for private life under ECHR art.8.[3] These provisions of the 2010 Act have not been brought into force and Part 1 of Schedule 10 of the Protection of Freedoms Act 2012 repeals them.

3. The Developments of the Law Regulating DNA Retention

3.1 The English Law (The Protection of Freedoms Act 2012):

Chapter 1 of Part 1 of the Protection of Freedoms Act 2012 makes provision in respect of the retention and destruction of fingerprints, footwear impressions and DNA samples and profiles taken in the course of a criminal investigation. In particular, it replaces the existing framework, set out in Part 5 of the Police and Criminal Evidence Act 1984 ("PACE"), whereby fingerprints and DNA profiles taken from a person arrested for, charged with or convicted of a recordable offence may be retained indefinitely. Under the new scheme provided for in this Chapter, the fingerprints and DNA profiles taken from persons arrested for or charged with a minor offence will be destroyed following either a decision not to charge or following acquittal. In the case of persons charged with, but not convicted of, a serious offence, fingerprints and DNA profiles may be retained for three years, with a single two-year extension available on application by a chief officer of police to a District Judge (Magistrates' Courts). The police will also be able to seek permission from the new independent Commissioner for the Retention and Use of Biometric Material to retain material for the same period (three plus two years) in cases where a person has been arrested for a qualifying offence but not charged. In addition, provision is made for the retention of fingerprints and DNA profiles in the case of persons convicted of an offence or given a fixed penalty notice and for extended retention on national security grounds. Chapter 2 of Part 1 imposes a requirement on schools and further education colleges to obtain the consent of parents of children under 18 years of age attending the school or college, before the school or college can process a child's biometric information.

"Section 63D material" is defined as (a) fingerprints taken from a person under any power conferred by the PACE 1984 Pt V, or taken by the police with the consent of the person from whom they were taken, in connection with the investigation of an offence; and (b) a DNA profile derived from a DNA sample taken in the same circumstances as for fingerprints (PACE 1984 s.63D(1)).[4] Biometric samples are not included in the definition of s.63D materials. Moreover, the definition of s.63D materials does not include footwear impressions and photographs.[5]

---

[1] (London: Home Office, May 2009)

[2] Ed Cape, "The Protection of Freedoms Act 2012: the retention and use of biometric data provisions" [2013] Criminal Law Review 23-37 at 29.

[3] Joint Committee on Human Rights, Legislative Scrutiny: Crime and Security Bill; Personal Care at Home Bill; Children, Schools and Families Bill, Twelfth Report of Session 2009–10, HL Paper 67, HC 402, para.1.10, 1.16.

[4] As inserted by Section 1 of the Protection of Freedoms Act 2012.

[5] Ed Cape, "The Protection of Freedoms Act 2012: the retention and use of biometric data provisions" [2013] Criminal Law Review 23-37 at 30.

Section 1of the Protection of Freedoms Act 2012 inserts new section 63D into the Police and Criminal Evidence Act 1984 ("PACE") which sets out the basic rules governing the destruction of fingerprints and DNA profiles (collectively referred to as 'section 63D material') taken from a person under the powers in Part 5 of PACE or given voluntarily in connection with the investigation of an offence. New section 63D(2) requires the destruction of section 63D material if it appears to the responsible chief officer of police that the material was taken unlawfully, or that the material was taken from a person following an unlawful arrest or where the arrest was as a result of mistaken identity. Any other section 63D material must be destroyed as soon as reasonably practicable, subject to the operation of the provisions in new sections 63E to 63O and 63U of PACE. It is a general feature of new sections 63D to 63O that material must be destroyed unless one or more of those sections applies to that material, in which case the section which delivers the longest retention period will determine the period of retention. New section 63D(5) of PACE enables a person's section 63D material, which would otherwise fall to be destroyed, to be retained for a short period until a speculative search of the relevant databases has been carried out. The fingerprints and DNA profile of an arrested person will be searched against the national fingerprint and DNA databases respectively to ascertain whether they match any other fingerprints or DNA profile on those databases. Where such a match occurs, it may serve to confirm the person's identity, indicate that he or she had previously been arrested under a different name, or indicate that the person may be linked to a crime scene from which fingerprints or a DNA sample had been taken. New section 63U(3), as inserted by section 17, provides that section 63D material need not be destroyed where it may be fall to be disclosed under the Criminal Procedure and Investigations Act 1996 or its attendant Code of Practice.

Section 2 inserts new section 63E into PACE, which enables material taken from a person in connection with the investigation of an offence to be retained until the conclusion of the investigation by the police or, where legal proceedings are instituted against the person, until the conclusion of those proceedings. The Minister explained in the Public Bill Committee on the Bill that "legal proceedings are concluded when the charges are dropped, when the person is acquitted of the offence or, if they are found guilty, when they are acquitted on appeal"[1]

Section 3 inserts new section 63F into PACE which provides for the further retention of material taken from persons (both adults and juveniles) arrested for or charged with a qualifying offence, but not subsequently convicted. The concept of a qualifying offence is used to distinguish between serious and less serious offences for the purposes of the retention regime. A list of qualifying offences is contained in section 65A(2) of PACE (as inserted by section 7 of the Crime and Security Act 2010 ("the 2010 Act")); the list broadly covers serious violent, sexual and terrorist offences. Where a person who is arrested for, but not convicted of, a qualifying offence has previously been convicted of a recordable offence, that is not an 'excluded offence', his or her section 63D material may be retained indefinitely (new section 63F(2)). A recordable offence is defined in section 118 of PACE. In practice, all offences which are punishable with imprisonment are recordable offences, as are around 60 other non-imprisonable offences which are specified in regulations made under section 27 of PACE. An excluded offence for these purposes is defined in new section 63F(11) of PACE (inserted by the section) as a conviction for a minor (that is, non-qualifying) offence, committed when the person was under the age of 18, for which a sentence of less than five years imprisonment (or equivalent) was imposed.

Where a person who is charged with, but not convicted of, a qualifying offence has no previous convictions, his or her section 63D material may be retained for three years (new sections 63F(3), (4) and (6)). Where a person with no previous convictions is arrested for a qualifying offence, but is not subsequently charged or convicted, his or her section 63D material may be retained for three years only if a successful application is made under new section 63G to the independent Commissioner for the Retention and Use of Biometric Material appointed under section 20(1) of the Act (new section 63F(5)). The standard three-year retention period (whether following being charged with a qualifying offence, or arrested for such an offence and a successful application to the Commissioner) may be extended on a case by case basis with the approval of a District Judge (Magistrates' Courts). In any particular case, the police may apply during the last three months of the three-year period to a District Judge (Magistrates' Court) for an order extending the retention period by an additional two years (new section 63F(7), (8) and (9)). The retention period cannot be extended beyond five years in total under this process. The police may appeal to the Crown Court against a refusal by a District Judge (Magistrates' Court) to grant such an order and the person from whom the material was taken may similarly appeal to the Crown Court against the making of such an order (new section 63F(10)).

Separate arrangements (see new section 63M, inserted by section 9) apply in cases where the retention period is to be extended on national security grounds. New section 63G sets out the procedure for the police to apply to

[1] Hansard, HC Public Bill Committee, 5th Sitting, col.197 (March 29, 2011.

Journal of Law, Policy and Globalization www.iiste.org
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.78, 2018

the independent Commissioner for the Retention and Use of Biometric Material to retain section 63D material from a person with no previous convictions who has been arrested for a qualifying offence, but not subsequently charged or convicted. Applications may be made on the basis that either the victim of the alleged offence is vulnerable (which is defined as being under the age of 18, a vulnerable adult or in a close personal relationship with the arrested person) or, in other cases, where the police consider that retention is necessary for the prevention or detection of crime (new section 63G(2) and (3)). Notice of such an application must be given to the person to whom the section 63D material relates (new section 63G(6) to (8)) and that person may make representations to the Commissioner in respect of an application (new section 63G(5)).

Section 5 inserts new section 63I into PACE, which governs the retention period applicable where a person has been convicted of a recordable offence. Where an adult is convicted of a recordable offence, his or her section 63D material may be retained indefinitely. A person is treated as "convicted" if they are given a caution, warning or reprimand, are found not guilty by reason of insanity, or are found to be under a disability and to have done the act charged (s.65B). A penalty notice imposed under the Criminal Justice and Police Act 2001 s.2, is not defined as a conviction, but where a penalty notice is imposed, section 63D material may be retained for two years (s.63L). There is also provision for indefinite retention of materials akin to s.63D materials where the person was convicted of an offence under the law of any country or territory outside of England and Wales (s.63J). Section 7, which inserts new section 63K into PACE, makes provision for the retention of section 63D material taken from persons convicted of a first minor offence, committed when they were under the age of 18. In such cases, the retention period is to be determined by the length and nature of the sentence for that minor offence. Where a custodial sentence of five or more years is imposed, the person's section 63D material may be retained indefinitely (new section 63K(3)). Where a custodial sentence of less than five years is imposed, the person's section 63D material may be retained for the duration of the sentence (both the period spent in custody and the period of the sentence served in the community) plus a further five years (new section 63K(2)). Where a young person is given a non-custodial sentence on conviction for his or her first minor offence, his or her section 63D material may be retained for five years from the date the material was taken (new section 63K(4)). Any subsequent conviction for the recordable offence, whether before or after they turn 18, will enable the section 63D material to be retained indefinitely (new section 63J(5)).

Section 9 inserts new section 63M of PACE which makes provision for the retention of material for the purposes of national security. Where a person's section 63D material would otherwise fall to be destroyed, it may be retained for up to two years where the responsible chief officer of police determines that it is necessary to retain it for the purposes of national security (a 'national security determination'). A responsible chief officer may renew a national security determination in respect of the same material, thus further extending the retention period by up to two years at a time. See section 20 (paragraphs 129 to 133) which set out the functions of the Commissioner for the Retention and Use of Biometric Material in respect of national security determinations.
Section 17 section inserts new section 63U into PACE, which excludes from the PACE retention regime set out above those persons whose biometric data is held under the Terrorism Act 2000 Act ("the 2000 Act"), the International Criminal Court Act 2001 and the Terrorism Prevention and Investigation Measures Act 2011, as well as those whose fingerprints are held under immigration powers. A broadly equivalent retention regime for terrorist suspects is provided for in Schedule 8 to the 2000 Act, as amended by Part 1 of Schedule 1 to this Act.
Section 11 inserts new section 63O into PACE. New section 63O provides that a person's section 63D material, which would otherwise fall to be destroyed, may be retained for as long as that person consents in writing to its retention. This provision applies both to material taken in accordance with the powers in Part 5 of PACE and to material given voluntarily. A person may withdraw his or her consent at any time (new section 63O(3)).

Section 14 inserts new section 63R into PACE, which provides for the immediate destruction of samples if it appears to the responsible chief officer of police that the material was taken unlawfully, or where the material was taken from a person following an unlawful arrest or where the arrest was as a result of mistaken identity (that is, in the same circumstances as section 63D material (see new section 63D(2), as inserted by section 1). In addition, DNA samples must be destroyed as soon as a DNA profile has been satisfactorily derived from the sample (including the carrying out of the necessary quality and integrity checks) and, in any event, within six months of the taking of the sample. Any other sample, such as a blood or urine sample taken to test for alcohol or drugs, must similarly be destroyed within six months of it having been taken (new section 63R(5)). New sections 63R(6) to (12) of PACE provide that samples may be retained for a longer period than six months in certain limited circumstances. Those circumstances are where it appears to the responsible chief officer of police that, in relation to a serious offence, it is necessary to ensure that key evidence (in the form of DNA samples) remains available for disclosure to the defendant or to respond to an evidential challenge by the defendant. In such cases, the decision to extend the permissible retention period would fall to a District Judge (Magistrates'

Court) following an *ex parte* application made by the chief officer. If the application was approved, the district judge would authorise retention of the material for 12 months, which may be extended (on one or more occasions) following a further (*inter partes*) application by the responsible chief officer. Any material retained in this way would only be available for use in that case and the police would be under a duty to notify the person whose sample was to be retained, including any application for a subsequent order to retain and the outcome.

New section 63R(13) of PACE enables a person's DNA or other sample, which would otherwise fall to be destroyed, to be retained until a DNA profile has been derived from the sample and a speculative search of the relevant database has been carried out (that is, in the same circumstances as section 63D material (see new section 63D(5)). Section 16 inserts new section 63T into PACE which restricts the use to which fingerprints, DNA and other samples, DNA profiles and footwear impressions may be put. Such material may only be used for the purposes set out in new section 63T(1). New section 63T(2) provides that material which should otherwise have been destroyed in accordance with new sections 63D, 63R and 63S of PACE must not be used against the person to whom the material relates or for the purposes of the investigation of any offence; any evidence arising from the impermissible use of such material would therefore be likely to be ruled inadmissible in criminal proceedings.

The office of Commissioner for the Retention and Use of Biometric Material is established by the PoF Act 2012 s.20. Subsection (1) places a duty on the Secretary of State to appoint a Commissioner for the Retention and Use of Biometric Material (the Commissioner). Subsection (10) makes provision for the terms of the Commissioner's appointment and for the payment of allowances to the Commissioner and of his or her expenses. Subsection (11) enables the Secretary of State to provide staff, accommodation, equipment and other facilities to support the work of the Commissioner. Subsection (2) confers on the Commissioner the function of keeping under review determinations made by chief officers of police and others that the fingerprints and DNA profiles of a person are required to be retained for national security purposes, and the use to which fingerprints and DNA profiles so retained are being put. To enable the Commissioner to discharge this function, subsection (3) requires persons making national security determinations to notify the Commissioner in writing of the making of a determination, including a statement of the reasons why it was made, and to provide such other documents or information as the Commissioner may require in the exercise of his or her functions. Subsections (4) and (5) enable the Commissioner, having reviewed a national security determination, to order the destruction of the fingerprints and DNA profile held pursuant to it where he or she is satisfied that a determination should not have been made. There is no appeal against such a ruling by the Commissioner save by way of judicial review. The Commissioner may not order the destruction of material that could otherwise be retained pursuant to any other statutory provision, for example under the provisions in new section 63F(5) and (9) of PACE (as inserted by section 3).Subsections (6) to (8) confer on the Commissioner a general function of keeping under review the retention and use, by the police and others, of fingerprints and DNA profiles not subject to a national security determination, whether taken under PACE, the 2000 Act, the 2008 Act or the TPIM Act 2011. Subsection (9) provides that the Commissioner also has the function of determining (in response to applications by the police) whether the fingerprints and DNA profiles of persons arrested for, but not charged with, a qualifying offence may be retained pursuant to the provisions in new section 63G of PACE (as inserted by section 3 of this Act).

Section 21 requires that the Commissioner make an annual report to the Secretary of State and enables the Commissioner to make such other reports on any matter relating to the Commissioner's functions. The Secretary of State may also, at any time, commission a report from the Commissioner on any matter relating to the retention and use of biometric material by law enforcement authorities for national security purposes (subsection (3)). The Secretary of State is required to lay any report from the Commissioner before Parliament, but before doing so he or she may exclude from publication any part of the report which would, in his or her opinion, be contrary to the public interest or prejudicial to national security (subsections (4) and (5)).

It has been argued "having regard to the principles expounded in S and Marper, the retention and use regime of the PoF Act 2012 represents a considerable improvement compared to the provisions in the PACE 1984 s.64, and to the regime that would have been introduced by the Crime and Security Act 2010. Retention of samples is normally limited to six months, and the regime governing retention of fingerprints and DNA data taken from persons who are not convicted of an offence reflect, in broad terms, Ashworth's three dimensions: powers of retention do take account of the seriousness of the offence in respect of which they were taken; juveniles are treated differently than adults; and retention beyond the end of an investigation or proceedings is not generally permitted except where taken in respect of a serious offence or the person has a previous conviction".[1] "With regard to material taken from a person who is convicted of an offence, the regime sets the threshold for indefinite

[1] Ed Cape, "The Protection of Freedoms Act 2012: the retention and use of biometric data provisions" [2013] Criminal Law Review 23-37 at 35.

retention at the level of a "recordable offence". "Whilst retention of data of convicted persons was not explicitly addressed by the ECtHR, it is arguable that this sets a threshold that is too low and, to an extent, arbitrary. Many non-imprisonable offences are included in the definition of "recordable offence". Furthermore, a caution, reprimand or warning is treated as a conviction, and whilst an adult must be informed of the consequences of a caution before accepting it, a reprimand or warning can be imposed on a juvenile without consent (although in this case the retention period is five years). The different treatment of material taken where a caution is imposed (which may involve no actual "penalty"), compared to where a penalty notice for disorder is imposed (which involves the payment of a financial penalty) is anomalous since in the former case the retention period is indefinite whereas in the latter case it is two years even though they may be imposed in respect of the same offence".[1] whilst District Judges and the Commissioner for Retention and Use of Biometric Data have a limited role regarding retention where data is taken in, in connection with a qualifying offence in respect of which a person is not convicted, neither convicted nor unconvicted persons who are subject to provisions enabling their data to be retained have a statutory right to seek review of the retention of their data. This was a lacunae identified by the ECtHR in S and Marper and which is not filled by the new retention regime. Finally, as the Joint Human Rights Committee noted, the provisions enabling retention of data for national security purposes can override any of the limitations on retention. Whilst the Commissioner has a duty to review national security determinations, the person from whom the data was taken has no effective right of challenge.[2]

A research study on the implementation of the Protection of Freedoms Act 2012 has examined ten post-implementation reports of the NDNAD Strategy Board (3), the NDNAD Ethics Group (3) and the Office of the Biometrics Commissioner (OBC) (4).[3] The purpose of the review was to identify the benefits, challenges, risks and emerging issues associated with the implementation of the new DNA retention regime introduced by the Protection of Freedoms Act 2012. The review indicates that the system may have improved the match output of the database, with a current match rate of 63.3%. Compared to previous regimes, it appears the composition of the database under the PoFA regime may be more representative of the active criminal population and the regime may improve the crime-solving capacity of the database. Additionally, the new system has strengthened the genetic privacy protection of UK citizens, particularly the genetic privacy of the innocent. This benefit may improve public confidence in the operation of the database. The implementation challenges identified ranges from the Police National Computer configuration, legal and procedural issues to sufficient understanding of the requirements of PoFA by police forces. The review shows that some "retainable" profiles have been deleted and this may potentially diminish crime detection or reduction and raise public security concerns. Also, some DNA data have been unlawfully retained and the current police practice permits the use of unlawful matches for intelligence purposes. This policy may lead to privacy issues and challenges in court. Although limited in scope, this review advances the literature on the global evolution of forensic DNA database policy. The review shows that the current law in UK could potentially improve the effectiveness of forensic DNA databases whilst complying with human rights law. The challenges identified, however, suggest that there may be a significant gap between the law and implementation. Overall, the review emphasises the need for comparative empirical research to adequately demonstrate the efficacy of forensic DNA databases.

Joe Purshouse considers the current approach to the retention of DNA and fingerprint data taken from non-convicted persons in England and Wales under the Protection of Freedoms Act 2012. He argued that concerns are raised about the precautionary rather than proportionate approach of domestic legislators in the 2012 Act provisions, and the continued unjustifiable interference this causes to the rights of such persons under art.8 of the European Convention on Human Rights. He concluded that the "PoFA provisions have undoubtedly increased the level of privacy protection afforded to those subject to the criminal process. The question of whether DNA and fingerprint retention engages art.8(1) has been resoundingly answered in the affirmative in English law. Moreover, these provisions restrict the extent to which such data can be retained from young persons and those arrested or charged with minor offences. However, blanket retention in cases where an individual is arrested or charged but *not* convicted is neither rational, minimally intrusive, nor fair. The Statutory Disclosure Guidance regulating ECRC disclosure offers a potential template for how decisions to retain personal information from arrestees or charged persons should be made, not only having regard to the age of the individual subject to the criminal process and the seriousness of the alleged offence, but also to the certainty with which we can say that the circumstances surrounding a particular case indicate that retention may make a significant contribution to the

[1] Ed Cape, "The Protection of Freedoms Act 2012: the retention and use of biometric data provisions" [2013] Criminal Law Review 23-37 at 36.
[2] Ed Cape, "The Protection of Freedoms Act 2012: the retention and use of biometric data provisions" [2013] Criminal Law Review 23-37
[3] Aaron Opoku Amankwaa; McCartney, Carole, "The UK National DNA Database: Implementation of the Protection of Freedoms Act 2012" 2018 (284) Forensic Science International 117-128.

prevention or detection of crime. This article has attempted to show that the PoFA tariffs are incompatible with English law on its own terms. The current risk-averse approach of domestic legislators does not afford adequate privacy protection to innocent individuals, adding pains to an already coercive process without due justification".[1]

3.2 The Protection of Freedoms Act Issues:

Following the commencement of Part 1 Chapter 1 of the Protection of Freedoms Act, it was realized that there were five issues which arose from the drafting. These were as follows[2]:

First: The power to take DNA and fingerprints if an investigation is restarted. Previously, PACE stated that once a DNA sample had been taken from an arrested individual, a sample of the same type could not be taken again during the course of the same investigation unless the first sample proved insufficient. Therefore, if an investigation was stopped, the DNA sample was destroyed as required by the Act, and the investigation was later restarted, another sample could not be taken unless the individual consented to it. The problem was rectified by section 144 of the Anti-Social Behaviour Crime and Policing Act 2014 ("ASBCPA") which amended sections 61 & 63 of PACE to provide the police with the power to resample under these circumstances without consent.

Second: The power to retain fingerprints or DNA in connection with a different offence. Parliament's intention, when enacting the Protection of Freedoms Act, was that if a conviction in an individual's criminal history allows retention, then their DNA profile should be retained, regardless of whether the arrest for which the profile was obtained was itself followed by a conviction. However, the language in the Protection of Freedoms Act did not achieve this because it placed a requirement for a causal relationship between the sampling arrest and any conviction before a person's DNA profile could be held. This would have required some convicted offenders to have their DNA deleted from the National DNA Database where there was no relationship between the sampling arrest and the conviction. Section 145 of ASBCPA removed the requirement for the material taken on the sampling arrest to 'lead to' a later arrest, charge or conviction.

Third: The power to retain samples which are, or may become, disclosable under the Criminal Procedure and Investigations Act 1996 ("CPIA") Section 14 of the Protection of Freedoms Act required DNA samples taken from individuals to be destroyed within six months of being taken. The great majority of samples taken for DNA analysis can safely be destroyed once a profile has been derived from them but some samples are needed as evidence and this destruction would prevent this. Section 146 of ASBCPA extended the regime set out under CPIA so that samples are treated in the same way as other forensic evidence needed for court purposes. Samples retained under the CPIA can only be used in relation to that particular offence and must be destroyed once their potential need for use as evidence has ended.

Fourth: Retention of DNA and fingerprints on the basis of convictions outside England and Wales. Before April 2017, fingerprints and DNA profiles could only be retained indefinitely, in certain circumstances, if an individual with a previous conviction outside England and Wales (or outside the UK for fingerprints or DNA taken under the Terrorism Act 2000) was arrested under PACE for a recordable offence and no further action was taken in relation to the arrest offence, or if they were arrested under section 41 or detained under Schedule 7 to the Terrorism Act 2000. Under these circumstances, the law required that the individual be re- arrested and re-sampled, rather than the DNA profile and fingerprints already taken being retained. Furthermore, the power to retain applied only if the conviction was for an offence equivalent to a qualifying offence rather than for the equivalent of any recordable offence as would be the case for a conviction in England and Wales. Before the passage of the Protection of Freedoms Act this had little practical effect as the DNA profile and fingerprints could (in broad terms) be retained because of the arrest, regardless of whether the person had any convictions. However, once Part 1 Chapter 1 of the Protection of Freedoms Act came into force this was no longer the case. Section 70 of the Policing and Crime Act 2017 amended the law to avoid the need for resampling and to allow retention of DNA profiles and

---

[1] Joe Purshouse, "Article 8 and the retention of non-conviction DNA and fingerprint data in England and Wales" [2017] Criminal Law Review 253 at 269.

[2] Memorandum to the Home Affairs Committee: Post-Legislative Scrutiny of the Protection of Freedoms Act 2012, Cm 9579, March 2018 at 14-15, available at (Accessed on 10/10/2018).
https://www.parliament.uk/documents/commons-committees/home-affairs/Correspondence-17-19/Memorandum-Post-Legislative-Scrutiny-of-the-Protection-of-Freedoms-Act-2012.pdf

fingerprints taken in England and Wales (or anywhere in the UK if taken under the Terrorism Act 2000) on the basis of the equivalent of recordable convictions elsewhere.

Fifth: Whether national security determinations should be made in relation to individuals or material. Following the conclusion of the police review of legacy national security material in October 2016 (see below), a potential drafting issue has been identified in relation to 'new material' (taken since 31st October 2013) in national security cases. Section 9 and Schedule 1 provide that a national security determination may be made by a police force in relation to 'material'. However in practice multiple sets of biometric material might be held in relation to the same one individual, if for example they he been arrested on more than one occasion. The Protection of Freedoms Act is currently being interpreted under these circumstances as requiring a separate national security determination to be made in relation to each set of material (and potentially by different police forces if the arrests occurred in different force areas), risking unnecessary complexity and duplication of effort, even though the necessity and proportionality case for each determination in relation to the same individual is likely to be identical. We are working with the police to consider this issue and whether any procedural changes or amendments to the Protection of Freedoms Act may be required.

3.3 The Qatari Law (The DNA Profiling Act 2013):

The foundation legislation for the collection and retention of samples by the police is the Qatari DNA Profiling Act No. (9) of 2013. Article (1) of the 2013 Act defines DNA profiling: the biological characteristics or genotype of unencrypted, highly heterogeneous sites in the chromosomal DNA derived from DNA analysis of biological samples. It is fixed and unique from one person to another. It might be identical only in the cases of identical twins. Biological sample is defined as the "part taken from the human body or its biological secretions for the purpose of comparison to determine personal traits.[1] Biological trace evidence is every biological material collected from the secretions of the human organism or part of its vital organs. It can be used as biological proof to determine a person's identity.[2]

The legislation has expanded police powers and the classes of people from whom samples and profiles can be collected and retained. According to Section (2) of the 2013 Act, the DNA database is established at the Qatari Ministry of the Interior, attached to the forensic Laboratory and is dedicated to preserving genetic fingerprint resulting from the following:

1. The biological trace evidence that is found in a crime scene or elsewhere.
2. The biological sample collected from persons suspected of having committed any of the crimes stipulated in Article (5) herein.
3. The Biological sample extracted from unknown bodies.
4. The biological sample taken from the missing persons' relatives or the missing persons themselves, after they appeared or they are found, with the aim to prove their identity.
5. The biological sample taken from the criminals, who are subject to international search, after the approval of the Attorney General.
6. The biological sample taken from persons, following a decision of the competent court.

Section (3) of the 2103 Act gives judicial commissioners, public prosecutions and competent courts the powers to use the DNA database in the following cases:

1. Identification of the person and his relationship to the crime committed.
2. Determination of paternity.
3. Identification of missing persons and their parents.
4. Identification of unknown bodies.
5. Any other cases requested by the competent courts.

The biological samples stipulated in Article (2) herein shall be collected, and DNA testing shall be carried out by the competent authorities, then the outcome shall be registered, following a decision made by the minster, the competent court or the Attorney General. The accused refusal to provide the necessary sample shall be considered a presumption of in committing the offense with which he is charged, unless proven otherwise. The person in charge of conducting DNA profiling test shall record the DNA imprints with all the technical means available in the DNA database. [3] The DNA collection from an individual before a criminal trial affects the rights

[1] Article (1) of the 2013 Act.
[2] Article (1) of the 2013 Act.
[3] Section (4) of the 2013 Act.

to bodily integrity, to personal privacy, to the privilege against self-incrimination, and the presumption of innocence. Article (39) of the Qatari Constitution of 2004 states that: “An accused person is presumed innocent until his conviction is proved before a court of law, wherein the necessary guarantees of the right of self-defense are secured”. The presumption of innocence imposes on the prosecution the burden of proving the charge and guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt. It contains provisions regarding proof of criminal responsibility. It provides that the prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged. A legal burden means the burden of proving the existence of a particular matter. The presumption of innocence provides that a legal burden of proof on the prosecution must be discharged beyond reasonable doubt. In essence, the presumption of innocence means that a person charged with a criminal offence must be treated and considered as not having committed an offence until found guilty with a definitive verdict by an independent and impartial tribunal.

A defendant's right to be presumed innocent is one of the cornerstones of the right to a fair trial. The presumption of innocence is today enshrined in Article 6(2) of the European Convention of Human Rights (ECHR), which provides that "everyone charged with a criminal offence shall be presumed innocent until proven guilty according to the law." The same principle is also incorporated in Article 14, Paragraph 2 of the International Covenant on Civil and Political Rights (ICCPR), which reads: "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."

There is a vast literature on the importance and theoretical underpinnings of the presumption. This includes judicial assertions that the public interest in ensuring that innocent people are not convicted greatly outweighs the public interest in ensuring that a particular criminal is brought to justice, in order to ensure public confidence in the judicial system. It includes claims that an onus on the defendant to disprove an accusation is ‘repugnant to ordinary notions of fairness’. [1] Ashworth, a leading criminal law academic, defends the presumption on several bases. These include that (a) given the possible sanction of removing someone’s liberty, it is right that a high threshold is needed for that to happen; (b) there is always a risk of error in fact-finding in trials, and it is better that the Crown bear this risk; (c) police have far-reaching powers to conduct investigations and that these powers must be exercised in a way that properly respects human rights and freedoms; (d) typically the state’s resources far exceed that of any individual; and (e) the presumption of innocence is logically coherent with the principle of proof of a criminal charge beyond reasonable doubt.[2]

The use of so-called reverse onus provisions, which places the burden of proof on a person who is accused of wrongdoing, rather than on the prosecution, are not consistent with the presumption of innocence. These provisions are incompatible with the requirements of Article (39) of the Qatar Constitution of 2004 on the basis that they require a court to act in a non-judicial manner, undermining public confidence in the judiciary and protection of fundamental human rights.

Subject to the provisions of Article (2) herein, the DNA profiling shall be kept in the database, pertaining to the following crimes:
1. Crimes stipulated in the Criminal Code referred to below:
  a. crimes against the external and internal security of the State;
  b. crimes related to public trust;
  c. the social crimes provided for in chapters IV, V and VI of Chapter VII of the Second Book;
  d. crimes against persons and properties.
2. Crimes stipulated in the Law against the Control of Narcotic Drugs, Dangerous Psychotropic Substances and the Regulation of their Use and Trafficking.
3. Crimes stipulated in the Anti-Money Laundering and Terrorism Financing Law.
4. Crimes stipulated in the Combating Terrorism law.
5. Any other crimes, as per a decision of the Attorney General.
The recording of data for persons, whose genetic fingerprints are required to be stored in the DNA database, shall be carried out at the request of the evidence-gathering, investigation and trial authorities.
The collection of DNA (deoxyribonucleic acid) from crime scenes and from individuals is regarded increasingly in political, policing and popular discourse as a critical aspect of effective modern criminal investigation and prosecution. However, DNA collection from an individual affects the rights to bodily integrity, to personal

[1] Gray, Anthony, "Constitutionally Protecting the Presumption of Innocence" (2012) 31(1) University of Tasmania Law Review 132
[2] Andrew Ashworth, ‘Four Threats to the Presumption of Innocence’ (2006) 10 International Journal of Evidence and Proof 241, 246-250.

privacy and the privilege against self-incrimination. The European Court on Human Rights in the case of *S and Marper v UK*, mentioned above, concluded that the retention of both cellular samples and DNA profiles discloses an interference with the applicants' right to respect for their private lives, within the meaning of Article 8/1 of the Convention.[1] The Court held that:

> The Court observes, nonetheless, that the profiles contain substantial amounts of unique personal data. While the information contained in the profiles may be considered objective and irrefutable in the sense submitted by the Government, their processing through automated means allows the authorities to go well beyond neutral identification. The Court notes in this regard that the Government accepted that DNA profiles could be, and indeed had in some cases been, used for familial searching with a view to identifying a possible genetic relationship between individuals. They also accepted the highly sensitive nature of such searching and the need for very strict controls in this respect. In the Court's view, the DNA profiles' capacity to provide a means of identifying genetic relationships between individuals (see paragraph 39 above) is in itself sufficient to conclude that their retention interferes with the right to the private life of the individuals concerned. The frequency of familial searches, the safeguards attached thereto and the likelihood of detriment in a particular case are immaterial in this respect. This conclusion is similarly not affected by the fact that, since the information is in coded form, it is intelligible only with the use of computer technology and capable of being interpreted only by a limited number of persons. The Court further notes that it is not disputed by the Government that the processing of DNA profiles allows the authorities to assess the likely ethnic origin of the donor and that such techniques are in fact used in police investigations (see paragraph 40 above). The possibility the DNA profiles create for inferences to be drawn as to ethnic origin makes their retention all the more sensitive and susceptible of affecting the right to private life. This conclusion is consistent with the principle laid down in the Data Protection Convention and reflected in the Data Protection Act that both list personal data revealing ethnic origin among the special categories of sensitive data attracting a heightened level of protection.[2]

DNA samples contain biological matter taken from the individual, often in the form of a mouth swab. The coding regions of the sample contain all of the individual's genetic information including information about racial indicators, medical predispositions, and physical attributes. DNA profiles are derived from the non-coding regions of the DNA sample. The profile is essentially a number identifying the sample from which it is derived. This can be uploaded to the NDNAD and subsequently matched to other samples from the individual, such as samples recovered from a crime scene. It is generally accepted that these contain less personally identifiable information than DNA samples.[3] It seems that the 2013 Act gives the police powers to take DNA samples without warrant despite the fact that such procedure constitutes searching of persons. Section 47/1 of the Qatari Criminal Procedure Act No. 23 of 2004 provides that: **"**The Judicial Commissioner may, in cases where arrest is legally permitted, search the suspect's body, clothes, or the luggage or items he is carrying in relation to the investigated crime". According to the 2004 Act the police can search persons in the following cases: upon suspect consent,[4] warrant issued by public prosecution and act flagrante delicto.[5]

Data recorded in the DNA database shall be confidential and may not be accessed without the permission of the Minister, the Public Prosecution or the competent court. The use of biological samples taken for purposes other than those provided for in this law is prohibited.[6] Data stored in the DNA database shall be deemed to be authoritative in the evidence, unless proven otherwise.[7]

---

[1] (2009) 48 EHRR 50, para. 77.
[2] (2009) 48 EHRR 50, paras. 75 and 76.
[3] Joe Purshouse, "Article 8 and the retention of non-conviction DNA and fingerprint data in England and Wales" [2017] Criminal Law Review 253 at 260.
[4] Section 52 0f the Qatari Criminal Procedure Act states that: "The suspect may be searched with his consent, and the dwelling may be searched with the consent of its owner. The consent shall be made in writing prior to the search, provided that charges against occupants are known, and the search shall be deemed illegal without their consent".
[5] Section 37 of the Qatari Criminal Procedure Act 2004 states that: "The crime shall be regarded as flagrante delicto at the actual time of committing the crime, or a short time after committing it. The crime shall be regarded flagrante delicto if the victim followed his perpetrator, the perpetrator was followed by a shouting crowd after the crime was committed, or the perpetrator was found soon after its commission carrying tools, weapons, baggage, papers or other things which infer that he is the perpetrator, or accomplice, or if at that time indications or signs were found on him showing the same".
[6] Section (6) of the 2013 Act.
[7] Section (7) of the 2013 Act.

The biological sample and biological trace evidence provided for in this law shall be destroyed, following a decision of the Attorney General. The Minister or the competent court may authorize to destroy the samples and biological trace evidences, if the collection request was issued by either of them. In all cases, the sample or the biological trace evidence referred to shall be destroyed according to the scientific or laboratory methods used in this field, depending on the type and nature of the sample or the trace evidence to be destroyed. If the sample is related to any of the crimes set herein, then it shall be destroyed only after a final action has been taken on the case by a final order or a final judgment, as per the situation.[1] Without prejudice to the provisions of international conventions to which the State is a party, DNA data and information shall be exchanged with foreign judicial authorities and international organizations, in accordance with the provisions of the laws in force in the State, and subject to the condition of reciprocity.[2] Without prejudice to any more severe penalty stipulated by another law, a person who contravenes the provision of Article 6 of this Law shall be punished with imprisonment for a period not exceeding one year and a fine not exceeding thirty thousand riyals or with one of these two penalties.[3]

4. Conclusion

Future developments might allow for searches of incriminating details about individuals. The "danger of intrusive future uses is increased because the Police and Criminal Justice Act allows for a sample itself to be retained rather than merely the "profile" derived from the sample".[4] The need for more safeguards to protect the basic human rights against abuse is inevitable. The police powers to retain fingerprints and body samples after they have fulfilled the purposes for which they were taken might undermine any protection provided for acquitted suspects. Furthermore, this has raised concerns about the way in which the records were maintained and used. There should be a statutory framework to provide for adequate controls to ensure that records were accurate in order to satisfy the requirement of Article 8 of the European Convention. The statutory framework also should specify the bodies which have the right to get access to the records, and the circumstances in which access to the records should be authorised. In sum, these powers require careful consideration to establish the safeguards which are needed to maintain proportionality in relation to these powers.

The Government response represents only a marginal movement towards safeguarding the rights of non-convicted persons. Principled concerns about non-conviction DNA and fingerprint data retention will be raised, and the tariffs for such retention set forth in the Protection of Freedoms Act 2012 will be evaluated. These provisions restrict the extent to which such data can be retained from young persons and those arrested or charged with minor offences. However, blanket retention in cases where an individual is arrested or charged but *not* convicted is neither rational, minimally intrusive, nor fair. In sum, the lack of statutory criteria and procedural safeguards has raised significant privacy concerns under Article 8 of the European Convention and show a lack of respect for privacy rights. The Act has failed to meet necessity and proportionality tests which must be followed when deciding whether the personal information should be disclosed or retained.

With regard to Qatari law, the DNA Profiling Act 2013 should be amended. It should clearly state that taking DNA samples in cases specified by the law by the officers of the judicial authority must be approved by the Public Prosecution or the competent criminal court because this procedure is an inspection in the legal sense of the inspection as regulated by the Criminal Procedure Act of 2004. In addition, the law should specify the legal periods required to retain DNA information on DNA database in order to respect of the rights and freedoms enshrined in Qatari Constitution of 2004, in particular the right to respect the privacy of individuals.

---

[1] Section (8) of the 2013 Act.
[2] Section (9) of the 2013 Act.
[3] Section (10) of the 2013 Act.
[4] Barsby, C. and Ormerod, D., 'Evidence: Retention by Police of Finger Print and DNA Samples' [2003] *Criminal Law Review* 39 at 40.