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Meeting: 1514th meeting (December 2024) (DH)

Item reference: Action Plan (28/11/2024)

Communication from the United Kingdom concerning the group of cases of Gaughran v. the United Kingdom (Application No. 45245/15) - *The appendices are available upon request to the Secretariat.*

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Réunion : 1514^e réunion (décembre 2024) (DH)

Référence du point : Plan d'action (28/11/2024)

Communication du Royaume-Uni concernant le groupe d'affaires Gaughran c. Royaume-Uni (requête n° 45245/15) (**anglais uniquement**) - *Les annexes sont disponibles sur demande au Secrétariat.*

Execution of Judgments of the European Court of Human Rights
ACTION PLAN

The Gaughran group of cases

S AND MARPER V THE UNITED KINGDOM
Application numbers 30562/04 and 30566/04
Judgment final on 4 December 2008

GAUGHRAN V THE UNITED KINGDOM
Application number 45245/15
Judgment final on 13 June 2020

Information submitted by the United Kingdom Government on 28 November 2024

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1. S and Marper v the United Kingdom

CASE SUMMARY

The applicants are two British nationals who were arrested separately on unconnected charges at different times in 2001 and both had fingerprints and DNA samples taken by the police. Both applicants were acquitted. Once their proceedings had been terminated, they made separate requests to the respective Police Chief Constable that their fingerprints, DNA samples and profiles be destroyed. In both cases these requests were refused. They unsuccessfully challenged this through the domestic courts.

The European Court of Human Rights, sitting as a Grand Chamber, found that the blanket policy of retaining the applicants' fingerprints, cellular samples and DNA profiles was in violation of Article 8. The Court held that the blanket and indiscriminate nature of the retention power in England, Wales and Northern Ireland did not have any regard to the nature of gravity of the offence nor the age of the suspected offender, which rendered it disproportionate to the legitimate aim being pursued. Furthermore, the retention was not time-limited and there were limited possibilities for an acquitted individual to have the data removed, nor was there any provision for independent review of the justification of retention.

INDIVIDUAL MEASURES

Just satisfaction:

The Court considered that the finding of a violation, with the implementation measures that would ensue as a consequence, was sufficient just satisfaction for the non-pecuniary damage sustained by the applicants.

The Court awarded the applicants EUR 42,000 in respect of costs and expenses, inclusive of any tax, less EUR 2,613.07 already paid by the Council of Europe in respect of legal aid. This amount was paid by the Government of the United Kingdom in January 2009, evidence of which has been previously supplied.

Other measures:

The relevant DNA samples, DNA profiles and fingerprints taken from both applicants were destroyed in December 2008. In light of this, the Committee of Ministers has concluded that no further negative consequences of the violations persist.¹

GENERAL MEASURES

England and Wales

The Government of the United Kingdom brought forward legislative proposals to address the issue in England and Wales, and across the United Kingdom in respect of material collected under counter-terrorism powers, in the Protection of Freedoms Act 2012 (PoFA) which received Royal Assent on 1 May 2012. The provisions of PoFA relating to biometrics were brought into effect on 31 October 2013, 31 January 2014 and 13 May 2014.

¹ CM/Del/Dec(2022)1451/H46-44

The legislation adopted the protections of the Scottish model for the retention of DNA and fingerprints, which was noted by the Court to be consistent with Recommendation No. R (92) 1 of the Committee of Ministers, which stresses the need for an approach which discriminates between different kinds of cases and for the application of strictly defined storage periods for data, even in more serious cases.

In England and Wales, DNA profiles and fingerprints which can no longer be retained under the provisions of PoFA have been removed from the national databases. This was completed by 31 October 2013.

A Biometrics Commissioner was appointed on 4 March 2013 and their legal powers came into effect on 31 October 2013. The Commissioner's role is to keep the retention and use of biometric material retained subject to PoFA's provisions under review and, in particular, to adjudicate on those cases where the police apply to retain material of someone arrested for, but not charged with, a serious offence for a limited period or where a national security determination is made.

PoFA requires that all DNA samples (i.e. the biological material containing the person's genetic information) taken from arrested persons be destroyed as soon as a DNA profile for use on the National DNA Database has been created and in any event within six months of being taken. Destruction of existing DNA samples was completed by the end of May 2013. In total, 7,753,465 samples have been destroyed. This destruction removes the possibility of producing genetic information on individuals in future and goes further in protecting privacy than the judgment required. It also goes further than the Scottish model, in which profiles and samples are kept for the same length of time.

Under the PoFA regime, material will only be retained for those individuals without a conviction (and only for a limited period of time) who fall into one of the following categories:

- (i) those who have a Penalty Notice for Disorder – retention is for two years
- (ii) those arrested but not charged with 'qualifying' (specified violent, sexual or burglary) offences – retention is for three years but only if the Biometric Commissioner agrees
- (iii) those charged with qualifying offences, where retention is for three years automatically, without any need for the approval of the Biometric Commissioner
- (iv) those who are subject to a National Security Determination (NSD). If a Chief Officer makes an NSD, the material of the person concerned can be retained for up to five years. However, all NSDs are subject to review by the Biometrics Commissioner and if he considers that it is not necessary and proportionate to retain the material, it must be destroyed.

In cases (ii) and (iii), at the end of the three-year period, the police may apply for a court order extending retention for a further two years.

The Government considers that all necessary general measures have been taken in respect of England and Wales.

Scotland

As set out above, the Court recognised that Scotland had a different system to the rest of the United Kingdom and noted that it is consistent with Recommendation No. R (92) 1 of the Committee of Ministers, which stresses the need for an approach which discriminates between different kinds of cases and for the application of strictly defined storage periods for data, even in more serious cases. For this reason, the Government considers that no general measures are required in respect of Scotland.

Northern Ireland

In December 2022, the Committee of Ministers decided to join the examination of this case with that of *Gaughran v the United Kingdom*.² General measures being taken in respect of Northern Ireland are set out below in the action plan for the latter case.

Publication and dissemination:

The judgment has been published on the British and Irish Legal Information Institute website at: <http://www.bailii.org/eu/cases/ECHR/2008/1581.html>

It has also been reported by general media and specialist websites, for example:

- *The Times* newspaper, Law Report, 8 December 2008
<https://www.thetimes.co.uk/article/storing-innocents-samples-is-disproportionate-3rh808nsdv7>
- *The Economist* magazine
<https://www.economist.com/britain/2008/12/04/throw-it-out>

State of execution of judgment:

The Government considers that all necessary individual measures have been taken, all necessary general measures have been taken in respect of England and Wales, and no general measures are required in respect of Scotland. General measures are ongoing in respect of Northern Ireland.

² CM/Del/Dec(2022)1451/H46-44

2. Gaughran v the United Kingdom

CASE SUMMARY

The applicant pleaded guilty in November 2008 to the offence of driving with excess alcohol at Newry Magistrates' Court, meaning he was a convicted person. His DNA profile, fingerprints and photograph ('biometrics') were taken. The regime in Northern Ireland relating to police powers allows these biometrics to be retained indefinitely. The applicant argued that the Police Service of Northern Ireland's indefinite retention of his biometrics contravened his rights under Article 8 of the Convention. In 2015, the Supreme Court of the United Kingdom rejected his argument. He subsequently applied to the European Court of Human Rights.

The Court unanimously found that the scheme allowing for the indefinite retention of the biometrics of a person convicted of an offence was disproportionate and in violation of Article 8. In reaching this conclusion, the Court pointed to the lack of reference within the scheme to the seriousness of the offence or sufficient safeguards, including the absence of any real possibility of review of the retention.

INDIVIDUAL MEASURES

Just satisfaction:

The Court held, for the reasons given in *S and Marper*, that the finding of a violation constituted sufficient just satisfaction for the non-pecuniary damage sustained by the applicant. The applicant made no claim for costs and expenses and so the Court made no award on that account.

Other measures:

The DNA profile, fingerprints and custody image of the applicant have been deleted from local and national databases. In light of this, the Committee of Ministers has concluded that no further negative consequences of the violation persist.³

GENERAL MEASURES

General legal framework

The United Kingdom has a clear and robust legal framework for police use, retention and deletion of biometrics. The key relevant statutory change since the application was made is the coming into force of the **Data Protection Act 2018 (DPA)**, with its requirement for periodic review of the retention of data.

The DPA applies to all parts of the United Kingdom. It sets out the requirement for periodic review of the retention of personal data, including biometrics. It does not specify how those reviews should operate in practice, as data controllers are best placed to consider how this should work, having regard to the specific data and circumstances, while ensuring compliance with the DPA.

Part 3 of the DPA sets out the rules for the processing of personal data for law enforcement purposes, including data protection principles, legal grounds of processing (lawfulness), rights of

³ CM/Del/Dec(2022)1451/H46-44

the data subjects and obligations on the competent authorities as controllers. At the same time, applicable rules on the oversight, enforcement and redress applicable to law enforcement bodies are provided in Parts 5 and 6.

As well as the statutory requirement for periodic review, the DPA provides for independent oversight by the **Information Commissioner's Office (ICO)**, which has enforcement powers to ensure compliance.

As the ICO is responsible for auditing law enforcement agencies' processing under Part 3 for all parts of the United Kingdom, it can determine whether the principle is being complied with in practice. Police forces have additional internal mechanisms, such as data protection officers whose role is to support compliance with the DPA and to ensure that the data subjects' rights are upheld. They also have senior information risk owners and information asset owners whose duties involve protecting the personal information held. Police forces also provide training and guidance to their officers on their duties in relation to data protection.

Under section 47 in Part 3 of the DPA, individuals can request the deletion or restriction of the processing of their personal data. If they are not satisfied with the response received from the data controller, they can lodge a complaint with the ICO.

Many European Union Member States have adopted the same approach as the United Kingdom to implementing the requirement for periodic review, and it is significant that as part of its data adequacy decision the European Commission has agreed that the United Kingdom data protection regime is broadly equivalent to its own.

Localised rules

As policing is a devolved matter, there is separate but broadly equivalent legislation on police use and retention of biometrics in England, Wales and Scotland, but with some differences in Northern Ireland, related to the legacy of the Troubles.

England and Wales

The rules specific to the retention of DNA and fingerprints in England and Wales are set out in Part V of the **Police and Criminal Evidence Act 1984 (PACE)** as amended by the **Protection of Freedoms Act 2012 (PoFA)**. Broadly, the rules are that:

- any DNA sample taken in connection with the investigation of an offence must be destroyed as soon as a DNA profile has been derived from it and in any event within six months of the date it was taken
- if an individual is convicted of a recordable offence their biometrics (DNA profile and/or fingerprints) may be kept ‘indefinitely’
- except in certain circumstances, a DNA profile and fingerprints will be deleted after a period of 3 years if there is no conviction.

The retained biometric information is held on national police systems (NDNAD, IDENT1) which are linked to the PNC⁴. This, along with all police information, is managed in accordance with the general legal framework set out above.

The ACRO Criminal Records Office, operating under the National Police Chiefs’ Council, is a national unit that manages criminal record information on behalf of the police service. Under the ACRO record deletion procedure⁵ individuals may, in certain circumstances, apply to have their lawfully retained biometric information deleted from national police systems earlier than the periods specified under PACE (as amended by PoFA).

The rights associated with requesting the deletion of DNA and fingerprints are clearly signposted by local police forces⁶, the ICO⁷ and government⁸, via communication platforms.

Additionally, the Government and the police have produced, through the Forensic Information Databases Strategy (FINDS) Board, a leaflet which is available in custody suites throughout England and Wales (**Annex A**). It describes the process of taking, processing, and retaining DNA, as well as information on how to apply for deletion of the material.

The Government acknowledges the Committee of Ministers’ assessment that the provisions detailed above do not go far enough in addressing the requirement to have a process whereby individuals convicted by a court can apply to have the continued retention of their biometrics by the police reviewed.

The Government raised the Committee’s concerns with the FINDS Board. This has led to an agreement to implement a solution which we believe addresses the issues raised by the *Gaughran* judgment. The solution is likely to be an initial step whilst the new government (following the 2024 General Election) considers retention and oversight of biometrics in the round. This will consider the views of stakeholders, including the police who themselves are conducting two

⁴ NDNAD is the national DNA database, IDENT1 the national fingerprints database, and PNC the police national computer where all police forces store information about convictions and cautions.

⁵ <https://www.acro.police.uk/s/acro-services/record-deletion>

⁶ Example: <https://www.met.police.uk/rqo/request/r-dna-fp/data-removed-police-records/>

⁷ <https://ico.org.uk/for-the-public/your-right-to-get-your-data-deleted>

⁸ <https://www.gov.uk/government/publications/dna-early-deletion-guidance-and-application-form/guidance-record-deletion-accessible>

separate reviews into the use and retention of facial images and the wider retention of criminal records.

The FINDS Board maintains the integrity of the national DNA and fingerprints databases, by ensuring the data is fairly and lawfully retained. Attendees include the National Police Chiefs' Council lead (bearing in mind that there are 43 operationally independent (of government) police forces in England and Wales), the Scottish Biometrics Commissioner, and representatives from the police service and the devolved administrations of Scotland and Northern Ireland and the ICO. This is therefore the most appropriate body to consider these issues.

Proposed solution

The FINDS Board has agreed to an exceptional case process whereby individuals, including adults convicted of recordable offences, will have the right to request a review, which could lead to the deletion of their indefinitely held biometric data. The police will conduct the review against a set of criteria which will be informed by the *Gaughran* judgment and the assessment by the Committee.

The application process will be administered by ACRO Criminal Records Office, who already oversee the more limited process mentioned above, where individuals can request the deletion of their police record, including biometrics.

Next steps

We are working to define a clear set of criteria which will enable the police to carry out their review of the continued retention of biometric material. The criteria will include:

- a) type of offences qualifying for deletion
- b) length of time since the conviction
- c) police risk assessment of the individual's conduct.

Our assessment will balance the rights of the individual to have their biometrics reviewed, against the need to retain them in the interests of public safety. We aim to finalise this by December 2024 and implement the process in mid-2025.

Once completed, we will publicise the new review process and amend existing guidance on the ACRO and the GOV.UK pages⁹ (official UK government web pages).

Finally, the Committee requested '*examples of practice to demonstrate the effectiveness and accessibility of the safeguards under the Data Protection Act 2018*'. Whilst we acknowledge that this is limited with regards to indefinitely held material, we are nevertheless including examples of the application form used to request deletion and the letter of response currently used when replying to such requests (**Annex B-D**). Both are in scope to be amended by our agreement with the FINDS Board and the police.

⁹ See footnote 8.

Scotland

The law relating to retention periods for biometric data is largely contained in the **Criminal Procedure (Scotland) Act 1995**. This legislation sets out specific periods and circumstances under which data may be retained for persons who have not been convicted of a crime. With regard to the data of persons who have been convicted of a crime, the legalisation is silent as to what the relevant retention period should be. It should also be noted that Police Scotland and the Scottish Police Authority (SPA) already have retention policies in place for fingerprints and DNA, and for images on the Scottish Criminal History System which do not allow for indefinite retention without review. For example, the Criminal History System weeding policy is that the 20/40 and 30/70 rules apply in relation to fingerprints and custody images:

- Non-custodial sentences: the 20/40 rule applies (data is weeded when 20 years have passed since the sentencing and the subject is now at least 40 years of age); and
- Custodial sentences: the 30/70 rule applies (data is weeded when at least 30 years have passed since sentencing and the person is now aged at least 70 years).

Therefore, regardless of the 1995 Act provisions being silent on retention periods for the data of convicted persons, in practice, the Police Scotland weeding policy provides a check on indefinite retention.

Further provision for retention periods is contained in the **Scottish Biometrics Commissioner Act 2020**¹⁰, which requires the Scottish Biometrics Commissioner (SBC) to prepare a Code of Practice¹¹ (the Code) on the acquisition, retention, use and destruction of biometric data for criminal justice and police purposes in Scotland, specifically requiring the Commissioner to set retention periods where none currently exist in law. The Code was brought into effect on 16 November 2022 following regulations laid by Scottish Ministers and approved by the Scottish Parliament.

The Code applies to Police Scotland, the SPA and the Police Investigations and Review Commissioner (PIRC). Under the Code, Police Scotland, the SPA and PIRC must, in relation to the acquisition, retention, use and destruction of biometric data, comply with the provisions of the DPA, the United Kingdom General Data Protection Regulations and the Law Enforcement Provisions of the DPA (Part 3). The Code also requires that pending the outcome of a review of the laws of retention, policing bodies' data retention policy should reflect the ruling in *Gaughran* regarding the need to consider the proportionality of interference with Article 8 rights where there is indefinite retention of biometric material without periodic review. In light of these various requirements, the Code further noted that an 'appropriate policy document' was to be in place, as described in either section 35(4)(b) or section 35(5)(c) as well as section 42 of the DPA. The policy document should contain an explanation of how the processing complies with the relevant data protection principles, and an explanation of the controller's policies in relation to retention and erasure, including an indication of how long data is likely to be retained. The Code also establishes a presumption in favour of deletion following the expiry of any minimum retention period as prescribed in law, in recognition of Article 8 of the Convention.

¹⁰ <https://www.legislation.gov.uk/asp/2020/8/contents>

¹¹ <https://www.biometricscommissioner.scot/media/035latyc/code-of-practice.pdf>

The SBC is also required to keep the Code under review and to prepare and publish a report on its findings. The inaugural report must be laid by the SBC in the Scottish Parliament no later than 16 November 2025.

With regard to complaints about the retention of biometric data, it remains open in the first instance for any person to contact Police Scotland, the SPA and PIRC about how their biometric data is being retained including a request for such data to be deleted. It is also open for a person to complain to the ICO if they believe their data is being retained by such bodies in contravention of the DPA. The SBC has also established a complaints procedure¹² specifically about failures by such bodies to comply with the Code. A person can make a complaint¹³ about such a failure to the SBC who has the power to serve a compliance notice on such bodies, should the SBC consider that data is being unlawfully retained by such bodies. The SBC also has the power to seek enforcement of such a notice in Court should it be considered by the SBC that such bodies have failed, without reasonable excuse, to comply.

The SBC published a revised four-year strategic plan¹⁴ in February 2023, one output from which was for the SBC to undertake a review of the laws of retention.

A report¹⁵ relating to the review was published on 31 October 2024. The review conducted by the Scottish Government and the SBC found that the combination of existing law and Police Scotland practice has for a number of years ensured an approach to retention which is lawful, effective and proportionate. However, recent human rights developments may now require some changes which must be evidence-led. The review concluded that while existing legal provisions are compliant with human rights, the DPA and the *Gaughran* judgment, further evidence was required to assess whether and how current practices needed to evolve to take account of policing needs, and the expectations of communities. It recommended that Police Scotland establish a working group to ingather sufficient evidence and to develop an options appraisal which must be delivered by October 2025. Thereafter, a decision will be made as to whether any legislative change is required to underpin any changes to practice.

The current retention policy for biometrics¹⁶ is set out under Police Scotland's standard operating procedure on record retention which is published on the Police Scotland website.

The implementation of the statutory Code of Practice prepared by the SBC continues with the SBC determining that the Code is currently being complied with (as at January 2024)¹⁷. The SBC's Business Plan for 2024/25 indicates that the next assessments to determine compliance

¹² <https://www.biometricscommissioner.scot/media/k0znsqhe/complaints-procedure.pdf>

¹³ <https://www.biometricscommissioner.scot/contact/complaints/>

¹⁴ <https://www.biometricscommissioner.scot/media/dy2pj42s/strategic-plan-28-february-2023-document.pdf>

¹⁵ <https://www.gov.scot/publications/report-review-retention-biometric-data-provided-under-sections-18-19c-criminal-procedure-scotland-act-1995-scottish-government-scottish-biometrics-commissioner/>

¹⁶ Police Scotland – Record Retention – Standard Operating Procedure (pages 24-31)

<https://www.scotland.police.uk/spa-media/nhobty5i/record-retention-sop.docx>

¹⁷ <https://www.biometricscommissioner.scot/news/police-scotland-compliant-with-scottish-biometrics-commissioner-s-code-of-practice/>

<https://www.biometricscommissioner.scot/news/scottish-police-authority-spa-compliant-with-scottish-biometrics-commissioner-s-code-of-practice/>

<https://www.biometricscommissioner.scot/news/police-investigations-and-review-commissioner-pirc-compliant-with-scottish-biometrics-commissioner-s-code-of-practice/>

with the Code are due to be reported in the first quarter of 2025¹⁸. There have been no complaints received by the SBC in respect of alleged breaches of the Code during the latest reporting period 1 April 2023 to 31 March 2024¹⁹.

In addition, assurance activity undertaken by the SBC for the Scottish Parliament has continued with an assurance report on police use of images and photographs published in March 2024²⁰ and an annual report²¹ published in September 2024.

As an example of practice which has changed as a result of the scrutiny provided by the SBC, a new Biometric Data custody leaflet²² is now available to all custody centres in Scotland. The leaflet provides information to data subjects on why their biometric data is taken following arrest, the purposes for which it will be used and how a data subject can exercise their rights – including how to make a complaint. With around 88,000²³ police custody episodes in Scotland each year, this leaflet will ensure that important information rights are respected and that anyone who has their biometric data taken is aware of the SBC's Code of Practice and the accompanying complaint mechanism.

A report containing statistical information²⁴ on biometrics taken in custody has also been published on a quarterly basis since April 2024.

The SBC plans to report in 2025 on the outcome of collective improvements made in response to the recommendations arising from assurance reviews undertaken to date²⁵.

¹⁸ Scottish Biometrics Commissioner – Business Plan 2024/25 (page 13)

<https://www.biometricscommissioner.scot/media/0yzn25oa/business-plan-2024-25-september-2024-v1.pdf>

¹⁹ Scottish Biometrics Commissioner Annual Report and Accounts 2023/24 (page 3)

<https://www.biometricscommissioner.scot/media/sz2cs1cn/annual-report-accounts-202324-25-september-2024-web-version.pdf>

²⁰ Scottish Biometrics Commissioner Assurance Review of the acquisition, use and retention of images and photographs for criminal justice and police purposes.

<https://www.biometricscommissioner.scot/media/vcfnimt0/sbc-assurance-review-on-images.pdf>

²¹ See footnote 19

²² Police Scotland Biometrics Unit – Your photograph, fingerprints and DNA: what we do with them

<https://www.biometricscommissioner.scot/media/pmunhtpr/police-scotland-biometrics-leaflet.pdf>

Police Scotland – What we do with your photograph, fingerprints and DNA (Easy Read)

<https://www.scotland.police.uk/spa-media/g5hlbjji/pdf-20240722-police-scotland-biometrics-leaflet-easy-read.pdf>

²³ Scottish Biometrics Commissioner - New Police Scotland Biometrics Information Leaflet

<https://www.biometricscommissioner.scot/news/new-police-scotland-biometrics-information-leaflet/>

²⁴ Police Scotland Website – Biometrics – Management Information Reports

<https://www.scotland.police.uk/access-to-information/biometrics/>

²⁵ See footnote 19

Northern Ireland

Background

Article 64 of the **Police and Criminal Evidence (Northern Ireland) Order 1989 (PACE (NI))** remains the current law on the retention of DNA and fingerprints in Northern Ireland. It states that police may retain the DNA (samples and profiles) and fingerprints taken by police (after they have fulfilled the purposes for which they were taken) in connection with a recordable offence irrespective of whether it results in a conviction. Individuals have the right to request that the Police Service of Northern Ireland (PSNI) delete their material in specific circumstances, with recourse to the Information Commissioner or through the courts if necessary (see further detail below).

Schedule 2 of the Criminal Justice Act (Northern Ireland) 2013 (CJA) made provision for a new statutory framework for the retention and destruction of DNA and fingerprints. The legislation was in response to the case of *S and Marper*. The framework was broadly similar to PoFA and was intended to put in place a set of retention rules based on the seriousness of the offence, age, criminal history, and whether the person is convicted or not convicted.

Schedule 2 of the CJA was not commenced, as it would have required the destruction of a large volume of PACE (NI) material. In 2015, the Department of Justice in Northern Ireland (DoJ) was alerted to the potential loss of investigative leads to the proposed Historical Investigations Unit (HIU), which was to have been set up to investigate Troubles-related deaths, should Schedule 2 of CJA be brought into operation. The then Justice Minister took the decision to suspend commencement until a lawful solution could be identified to preserve legacy material.

The United Kingdom Government has commenced the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 and made the Independent Commission for Reconciliation and Information Recovery (Biometric Material) Regulations 2024 that came into force on 1 May 2024. These Regulations provide for the retention of biometric material, which would otherwise be destroyed, for use by the Independent Commission for Reconciliation and Information Recovery (ICRIR). The retained material will be subject to regular periodic reviews.

The United Kingdom Government had previously made provision through a transitional order to enable authorities in Northern Ireland to retain biometric data collected under counter-terrorism powers in Northern Ireland before 31 October 2013 on a temporary basis. The last transitional order expired on 31 October 2024.

The DoJ launched a consultation²⁶ on 3 July 2020 setting out proposals aimed at amending Schedule 2 of CJA to ensure it was fit for purpose. The DoJ published its response to the consultation in October 2020.

The DoJ introduced legislation for the consideration of the Northern Ireland Assembly on 17 September 2024 in relation to DNA and fingerprints, which will repeal Schedule 2 of the CJA and amend PACE (NI) to enable the commencement of a retention framework in Northern Ireland that will comply with both the *S and Marper* and *Gaughran* judgments.

²⁶ <https://www.justice-ni.gov.uk/consultations/proposals-amend-legislation-governing-retention-dna-and-fingerprints-ni>

The new legislation will remove references to the indefinite retention of DNA profiles and fingerprints and instead set out 75/50/25-year maximum retention periods, based on the nature / seriousness of the offence, the age of the person concerned, criminal history, and whether the person is convicted or not convicted. It was also important to create a model that is not overly complex to administer. The legislation will also support the DPA by setting out in regulations a requirement to review long-term retention of DNA profiles and fingerprints material. The proposed retention periods will be maximum retention periods and the review mechanism will provide an appropriate safeguard ensuring that long-term material is subject to a scheduled review to assess the continuing need to retain DNA profiles and fingerprints in each individual case. Furthermore, the legislation will also provide further safeguards, by including the right for individuals to ask for a review of any decision by the PSNI to retain their material. The DoJ believes that the 75/50/25 model, coupled with the review mechanism, strikes a fair balance between competing public and private interests i.e. the right to private life under Article 8 and the need to retain DNA profiles and fingerprints for the legitimate aim of preventing and detecting crime.

In addition, the proposals contain provision for the appointment and functions of the Northern Ireland Commissioner for the Retention of Biometric Material, which will provide important independent oversight of the operation of the new retention system. The review process may also include an independent complaint role for the Commissioner on requests to review decisions made by the PSNI to continue to retain long-term retained material.

Northern Ireland Human Rights Commission

In preparation for the introduction of the legislation to the Northern Ireland Assembly, and noting the Rule 9 submission to the Committee of Ministers from the Northern Ireland Human Rights Commission in November 2023, Departmental officials met with the Commission in May 2024 to discuss both the DNA and fingerprints retention legislative proposals and the review mechanism proposals. Assurance was provided to the Commission that the 75/50/25 proposals are maximum retention periods, with the review mechanism ensuring that material is subject to a review after a certain period of time, meaning that if there is no policing reason (i.e. on grounds of public safety, the prevention of crime or the investigation of crime) to retain the material, it will be deleted. The Department will continue to engage with the Commission, taking on board their feedback, as work on the review mechanism progresses.

The Commission also raised concerns in the submission that the proposals were silent on whether DNA profiles and fingerprints will be retained after the death of an individual. The Department's view is that where an individual has died, the review mechanism will provide an appropriate safeguard in that it will identify that there has been no recent offending and if there is no other legal reason to retain the material, it will be deleted. In addition, if the PSNI are notified of the death of an individual, it is anticipated that the review mechanism will require the PSNI to review continued retention of that material every 2 years from the date they were notified of the individual's death. The deceased's next of kin can also make an application to the PSNI for the continued retention of DNA profiles and fingerprints to be reviewed.

Timeline

The Northern Ireland Executive approved the introduction of the draft legislation for consideration and scrutiny by the Northern Ireland Assembly. The legislation was introduced to the Northern Ireland Assembly on 17 September 2024 and completed Second Stage on 1 October 2024.

The Assembly scrutiny process will involve detailed consideration of the Bill by the Committee for Justice who will issue a Call for Evidence and call expert witnesses to seek the views of interested bodies, such as the Northern Ireland Human Rights Commission (who provided oral evidence on 21 November 2024), regarding the DNA and fingerprints provisions contained in the Bill. The time limit for completion of the scrutiny process by the Committee for Justice has been extended to March 2026. However, the scrutiny process may be completed sooner. It is therefore not possible at this stage to estimate when Royal Assent may be achieved. Once Royal Assent is achieved, officials estimate that it will then take approximately 18-24 months before the legislation can be commenced, as there will be a range of subordinate legislation required to support the primary legislation. The PSNI will also need sufficient time to develop and test their systems to ensure that they are ready for commencement.

Custody images

The DoJ's draft legislative framework will cover fingerprints and DNA, in line with the rest of the United Kingdom. The draft legislation does not cover the retention of custody images. However, the PSNI has advised that it will operate the same retention and deletion policy in relation to custody images as the planned legislation will provide for DNA and fingerprints.

Once the DNA and fingerprint legislation is commenced, the result will be the same; an individual's custody image will be deleted at the same time as their DNA profile and fingerprints.

Current system to request a review of material held by the PSNI

The PSNI updated their policy on considering requests for early deletion of biometric material (including custody photographs) in November 2023. The policy updates the previous limited early deletion procedure by broadening the grounds permitting deletion. To ensure an applicant's right to private life under Article 8 is maintained, the updated policy provides an opportunity for an applicant to request a review of the decision for the continued retention of their biometric material.

The individual has the right to request a review of the decision by a senior officer designated by the Chief Constable. Each application will be considered individually and based on the particular set of circumstances including if an individual has been convicted or if there is perceived public safety risk (depending on nature and level of previous offending).

Anonymised examples demonstrating where the PSNI have considered applications for deletion are provided below.

Example 1

- Individual arrested for indecent exposure offence
- Individual reported by the PSNI to the Public Prosecution Service for Northern Ireland
- Public Prosecution Service for Northern Ireland make a decision not to prosecute
- Individual applies to the PSNI for deletion of their biometric material. The PSNI decide to delete the material on the basis of no policing need for ongoing retention having considered all the circumstances of the incident.

Example 2

- Individual arrested for offences of assault and domestic abuse
- Individual released unconditionally
- Individual applies to the PSNI for deletion of their biometric material. The PSNI decide to delete the material on the basis of no retention period being applicable if the proposed new biometrics legislation was in operation.

Example 3

- Individual arrested for offence of harassment
- Individual subsequently convicted for offence of harassment
- Individual applies to the PSNI for deletion of their biometric material. The PSNI decide to retain the material for 50 years (from the date they were taken) on the basis of the conviction for the offence of harassment.

Statistics obtained from the PSNI in October 2024 show that 21 applications for deletion have been made since the new process (broadening the grounds permitting for deletion) was launched in November 2023. Of the applications submitted for deletion, 9 have resulted in the deletion of DNA and fingerprints from all databases including any hard copies held, 1 application resulted in material being deleted from PSNI databases, but material was retained for the sole use of the ICRIR under the Independent Commission for Reconciliation and Information Recovery (Biometric Material) Regulations 2024, 8 applications have been refused and 3 requests are still being considered.

If a decision is made by the PSNI to retain material and the individual remains dissatisfied, they can make a complaint to the ICO or seek remedy through the courts.

We are aware of at least one case that an individual had exhausted the PSNI system and lodged a complaint with the ICO. The ICO upheld the PSNI decision to retain the biometric data for that individual.

Publication and dissemination:

The judgment has been published on the *British and Irish Legal Information Institute* database:

<https://www.bailii.org/eu/cases/ECHR/2020/144.html>

It has also been reported by general media and specialist websites, for example:

- *The Times* newspaper, Law Report, 22 April 2020
<https://www.thetimes.co.uk/article/proper-safeguards-lacking-for-retention-of-dna-profiles-q0k927zs0>
- Landmark Chambers (Barristers Chambers)
<https://www.landmarkchambers.co.uk/dna-fingerprint-and-photograph-retention-new-ecthr-ruling-on-13-feb-2020/>

A summary of the judgment has been disseminated to the Forensic Information Databases Strategy Board, which oversees the operation of the national DNA and fingerprint databases, is chaired by the National Police Chiefs' Council and includes representatives of other stakeholders.

State of execution of judgment:

Measures are ongoing to ensure full execution of the judgment. The Government will submit an updated action plan by June 2025.