

SECRETARIAT GENERAL

SECRETARIAT OF THE COMMITTEE OF MINISTERS
SECRETARIAT DU COMITE DES MINISTRES



Contact: Abel de Campos
Tel: 03 88 41 26 48

Date: 11/10/2013

DH-DD(2013)1076

Documents distributed at the request of a Representative shall be under the sole responsibility of the said Representative, without prejudice to the legal or political position of the Committee of Ministers.

Meeting: 1186 meeting (3-5 December 2013) (DH)

Item reference: Communication from the authorities (06/09/2013)

Communication from the United Kingdom concerning the case of S. and Marper against United Kingdom (Application No. 30562/04).

Information made available under Rule 8.2.a of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

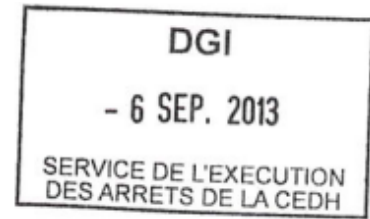
Les documents distribués à la demande d'un/e Représentant/e le sont sous la seule responsabilité dudit/de ladite Représentant/e, sans préjuger de la position juridique ou politique du Comité des Ministres.

Réunion : 1186 réunion (3-5 décembre 2013) (DH)

Référence du point : Communication des autorités

Communication du Royaume-Uni relative à l'affaire S. et Marper contre Royaume-Uni (Requête n° 30562/04) (**anglais uniquement**).

Informations mises à disposition en vertu de la Règle 8.2.a des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.



Progress on implementing the S and Marper Judgement

1. The Protection of Freedoms Act (PoFA) received Royal Assent on 1 May 2012. Sections 1 to 25 of this Act create a new regime for the retention of biometric (DNA and fingerprint) samples and data which implements the S and Marper judgement.

2. The reason for the lapse of time between the judgement, given in December 2008, and the passage of PoFA is the change of government in May 2010. The previous government formulated and passed the Crime and Security Act to change the biometric retention regime. This received Royal Assent on 8 April 2010. However, the retention regime laid out in this Act was not brought into effect, as the new government took the view that it did not provide sufficient protection for privacy. They therefore brought forward new legislation (PoFA) which received Royal Assent on 1 May 2012. The PoFA regime is based on the Scottish model, which was praised in the judgement as more proportionate than the regime in England and Wales.

Deletion of Data

3. In relation to DNA samples (i.e. the biological material containing all the person's genetic information), PoFA requires that all DNA samples taken from arrested persons will be destroyed as soon as a DNA profile for use on the database has been obtained from them, and in any event within six months of being taken. Destruction of existing DNA samples was completed by the end of May 2013. 7,753,465 samples were destroyed.

4. The destruction of samples removes the possibility of producing genetic information on individuals in future. This provision goes further in protecting privacy than the judgement requires, and further than under the Scottish model, in which profiles and samples are kept for the same length of time.

5. DNA profiles, consisting of a string of 20 numbers and two letters to indicate gender, are stored on the National DNA Database (NDNAD). They allow a person to be identified if they leave their DNA at a crime scene but contain none of the person's genetic characteristics.

6. PoFA requires the destruction of the DNA profiles and fingerprints of the vast majority of those who have not been convicted. The only unconvicted individuals whose material will be retained are those with a Penalty Notice for Disorder (PND), those charged with 'qualifying' (specified violent, sexual or burglary) offences, those arrested but not charged for such offences where the agreement of the new Biometrics Commissioner is obtained, or those whose data is retained under relevant counter-terrorism legislation.

7. In all these cases, retention is for a limited period – for those with a PND, two years; for those arrested but not charged with or convicted for qualifying offences, three years if the Biometric Commissioner agrees; and for those charged with but not convicted for qualifying offences, three years automatically (without any need for the approval of the Biometric Commissioner). (In either of the latter cases, PoFA provides that the police may apply for a court order extending the three year period for a further two years).

8. Implementation of the Act is not a simple matter. A large amount of work is needed to prepare police forces, forensic laboratories and national databases. Complex reprogramming of databases is required to ensure that each person's DNA and fingerprints are removed or retained correctly and at the right time. This work will be carried out thoroughly so that biometric material is not held unlawfully, and material needed to solve crime is not unnecessarily deleted.

9. In particular three computer systems, the Police National Computer (PNC), the National DNA Database (NDNAD) and the national fingerprint database (IDENT1) must all be reprogrammed to allow information which may not be retained under PoFA to be correctly identified and deleted, as retention or deletion depends on information on a person's conviction history which is held on PNC, but not on the other two systems. Deletion from the NDNAD and IDENT1 of information which does not meet requirements for retention began in January 2013 and is planned to be completed by October 2013. Following deletion of each IDENT1 fingerprint set, police forces will destroy any corresponding hard copies they hold.

10. The PoFA rules on whether a person's NDNAD records need to be deleted can vary considerably in complexity depending on the person's arrest, charge and conviction history. For example, if a person has been arrested once, no further action has been taken, and they have had no other contact with the police, then it is straightforward to conclude that their records need to be deleted; and similarly if a person has been convicted of a recordable offence as an adult then their records will be retained. However, PoFA rules also require that a person given a Penalty Notice for Disorder will have their records retained for 2 years; that a person charged with but not convicted of a qualifying offence will have their records retained for 3 years; a person convicted when under 18 of a first minor offence will have their records retained for 5 years; and so on.

11. The PNC software to drive the deletion is being developed in phases, so that those persons with straightforward circumstances are being dealt with first and those with a more complex history (which requires more complex software to analyse) later. The software to delete NDNAD records of those with one arrest followed by no further action who have no convictions has been developed and run, and so such records no longer exist. At the time of writing, 1,339,906 profiles have been deleted from the NDNAD. There is no exact figure for the number of profiles that remain to be deleted, as this can only be calculated once the software to do this has been completed, but it is estimated that the majority of profiles which are required to be deleted under PoFA have been already. As stated above, the remaining profiles that are required to be deleted under PoFA will be deleted by October.

Appointment of a Biometrics Commissioner

12. The Biometrics Commissioner, Alastair MacGregor QC, was appointed on 4 March 2013. His role is to keep under review the retention and use of biometric material retained subject to the Act's provisions, 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.

Amendment to PoFA

13. An amendment to PoFA is being made in relation to the destruction of samples which may be needed as evidence in court proceedings.

14. Section 63R of the Police and Criminal Evidence Act 1984 ("PACE"), as prospectively inserted by section 14 of PoFA currently requires both DNA and 'any other' samples taken from arrested persons or volunteers (but not crime scene samples) to be destroyed within six months of being taken. This covers all biological material – not just that processed to produce DNA profiles, but also blood, semen, urine, saliva, hair and skin swabs. These are taken for purposes such as testing for drug and alcohol use, violent and sexual contact between suspects and victims, and exposure to chemicals such as those associated with explosives, firearms, or drug production.

15. Work on implementation has revealed significant problems. If samples are destroyed within six months they will not be available for use in court proceedings – which is the very purpose of taking and analysing the ‘non-DNA’ samples. It is difficult to meet defence arguments about samples if they are made after the sample has been destroyed. For example, a defendant might argue that his state of mind had been affected because he had taken a prescription drug. With no sample taken at the time of the offence remaining, it would be difficult to rebut this argument.

16. Also, as PACE currently stands, whether the person consents to the supply of the sample is irrelevant – it must still be destroyed; though samples taken from one person to get material from another person can be retained. The result of this is that samples taken from victims (e.g. of rape or other sexual assault) which relate to the victim themselves must be destroyed, whereas samples taken from the victim which relate to the offender do not.

17. The Criminal Procedure and Investigations Act 1996 (CPIA) and its associated Code of Practice state that evidence which may be needed as evidence in court or for disclosure must be preserved for specified periods. However PACE states that though this applies to DNA profiles and fingerprints it does not apply to DNA and other samples.

18. An amendment to PACE is being made which remedies this situation by making samples subject to the protection of CPIA if they may be needed as evidence in court. This is being taken forward by clause 125 of the Anti-Social Behaviour, Crime and Policing Bill which is currently going through Parliament and is published at:

<http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0093/14093.pdf>

19. This contains safeguards by stating that once CPIA no longer applies the sample must be destroyed, and a sample retained under CPIA may not be used other than for the purposes of any proceedings for the offence in connection with which it was taken. Therefore it is not permissible to derive a DNA profile taken from a sample retained under this provision and add it to the national database.

Commencement

20. The Protection of Freedoms Act 2012 (Commencement No. 7) Order 2013 was made on 18 July 2013. It is published at: <http://www.legislation.gov.uk/uksi/2013/1814/made>

21. This brings the provisions of PoFA relating to biometrics into effect from 31 October 2013, with two exceptions.

22. The first relates to the destruction of copies of fingerprints. Section 13 of PoFA adds section 63Q to the Police and Criminal Evidence Act which requires copies of material to be destroyed. The provision relating to destruction of copies of fingerprints does not come into effect until 31 January 2014. This is because, while destruction of DNA profiles and fingerprints on the national computer systems is driven by software as described above, destruction of printed copies of fingerprints held locally requires manual searching of filing cabinets, and therefore takes longer.

23. The second relates to the amendment described above relating to samples needed as evidence in court. This will come into effect when the Anti-Social Behaviour, Crime and Policing Bill becomes law, which is expected to be in spring 2014.

Northern Ireland

24. Separate but broadly similar provision is in the process of being legislated for by the Northern Ireland Assembly in The Criminal Justice (Northern Ireland) Act 2013. The changes for England and Wales are expected to be commenced as set out above. The NI Assembly however could not make changes in the excepted/ reserved field (in particular to permit the biometric data obtained under the policy and Criminal Evidence (Northern Ireland) Order 1989 (PACE) to be used for national security purposes and terrorist investigations).

25. The UK Government is making the excepted/reserved provision in respect of Northern Ireland through Westminster legislation now that the NI Assembly's Criminal Justice Bill has received Royal Assent (The Criminal Justice (Northern Ireland) Act 2013). The expected/reserved provision will have to come into force at the same time as the Criminal Justice (Northern Ireland) Act 2013 to avoid any gap in the ability of the Police Service of Northern Ireland to use retained PACE material for national security purposes. The UK Government currently has a power to make expected/ reserved provision regarding biometric data in Northern Ireland by order in Part 7 of Schedule 1 to POFA but that power only allows the expected/ reserved changes to be made if a Bill of the NI Assembly was passed by the end of 2012. As the Criminal Justice Bill was not passed until April 2013 primary legislation is required to amend the order making power so the order can be made in consequence of the Criminal Justice (Northern Ireland) Act 2013.

26. The UK Government is taking forward such an amendment in the Northern Ireland (Miscellaneous Provisions) Bill which is currently before the Westminster Parliament but this will mean that commencement of the biometric retention framework in Northern Ireland i.e. the provisions contained within the Criminal Justice (Northern Ireland) Act 2013, will be delayed until the Westminster changes are in place and can be commenced. It is envisaged that this should take place sometime in early 2014.