

# Marper and After

## – Marper and the ‘global trajectory’ of forensic bioinformation: a lesson from history



- A testament to the crime solving power of DNA technology is the fact that *no government, having established a forensic DNA Database, has ever reversed course and reduced the scope of inclusion for that database.* Expansion of criteria for database inclusion has been the only direction taken by jurisdictions in amending or updating their forensic DNA laws. (Asplen 2005)



- The prospect of ‘rolling back’ the NDNAD and the removal of large numbers of profiles from it seems highly unlikely. This is in part explained by the way in which the database has become represented as an essential, seemingly indispensable, technology in the contemporary armoury of crime management’ (Williams & Johnson 2008)
- Both claims now in need of revision!



# Marper: A Reminder

- In conclusion, the Court finds that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly the retention at issue constitutes a disproportionate interference with the applicants' rights to respect for private life and cannot be regarded as necessary in a democratic society. (EctHR Grand Chamber, S& Marper v the United Kingdom)



# Marper: A Reminder

– A few Points to note:

- No criticism of threshold for taking
- No criticism of speculative searching
- Some distinction between DNA profiles, samples and fingerprints but not pursued
- Evaluated empirical evidence for public protection provided by UK Government but dismissed it



# The Pivot of Proportionality

- UK response in a set of proposals in Home Office (2009) Keeping the Right People on the DNA Database: Science and Public Protection. Currently subject to public consultation from 7<sup>th</sup> May 2009 to 7<sup>th</sup> August 2009

- Proposals are to amend Section 64 of Police and Criminal Evidence Act (PACE) 1984 and ‘make more detailed provisions on the retention, use and destruction of DNA data & fingerprints.



# The Pivot of Proportionality

- The proposals together:
  - add weight to the public interest justification by providing evidence for the benefit of retention
  - reduce the weight of the privacy breach by proposing to delete all cellular samples
  - promise a revised retention regime which continue to provide (reduced?) public protection through early detection and which complies with the Court ruling
  - intend to establish a ‘governance structure which is open, transparent and accountable.



# A New Retention Regime for DNA Profiles and Fingerprints (i)

- DNA Profiles of all convicted adults indefinitely retained
- DNA Profiles of adults arrested but not convicted for a recordable offence other than serious violence, sexual or terrorist-related offences will be retained for 6 years
- DNA Profiles of adults arrested but not convicted for serious violence, sexual or terrorist-related offences will be retained for 12 years
- DNA Profiles from volunteers not to be speculatively searched or retained
- Fingerprint record retention will mirror that for DNA.



# A New Retention Regime for DNA Profiles and Fingerprints (ii)



- DNA Profiles of all children under 10 will be removed
- DNA profiles of under 18s convicted of serious violence, sexual or terrorist-related offences to be retained indefinitely



- DNA profiles of under 18s convicted **once** of less serious offences to be removed at 18



- DNA profiles of under 18s arrested but not convicted of serious violence, sexual or terrorist-related offences will have profiles retained for 12 years

- DNA profiles of under 18s arrested but not convicted of less serious offences to be deleted after six years or on 18<sup>th</sup> Birthday, whichever is sooner.

- No mention of fingerprint retention regime for these categories of persons

# The Proposals

## – Other elements:

- All CJ samples to be destroyed within six months of processing
- Removal of individuals' entitlement to witness destruction of fingerprints taken in the course of an investigation
- Powers to be given to sample and fingerprint convicted offenders not already profiled and fingerprinted
- Powers to be given to sample and fingerprint UK nationals and UK residents convicted of violent or sexual offences overseas
- NDNAD Governance
  - NDNAD Strategy Board to have greater mix of operational and independent members
  - 'Strategic and Independent Advisory Panel' to 'monitor the application of the new approach and provide advice and guidance to Ministers through an annual report'. May be an existing body but will have to be able to 'adopt an entirely independent and constructively critical approach'





# Characterisations of the Draft Proposals



- ‘A proportionate response’ (Coaker)
- ‘No respect for the presumption of innocence’ (Chakrabarti)



- ‘An insult to the ECrtHR ruling’
- ‘An erosion of justice’
- ‘An undignified rearguard action’ (Huhne)



- ‘Striking the right balance between public protection and personal privacy’ (Payne)



- Mixed discursive repertoire including elements of : pragmatic actuarial risk analysis; bioethics-lite; moral solidarity;

# Questions and Comments on the Proposals (i)

– Retention proposals rest on actuarial risk assessment rather than judicial or other individualised assessment of ‘dangerousness’

- How good (relevant, reliable) is the preliminary evidence base provided thus far?
- How might this kind of reasoning collide with other ‘due process’ methods used elsewhere?
- Does the proposal’s deployment of two categories of crime align with criminological evidence about criminal careers? Or does it serve a different – public confidence/support function?



# Questions and Comments on the Proposals (ii)

- Can the measures be characterised as favouring ‘rational credibility’ over ‘strict scrutiny’?
- Will wholesale sample destruction have negative effects on current uses and future developments?
- Is the balance between public protection and personal privacy necessarily a zero-sum game?
- Others?

