

Article 8 and the Retention of Non-Conviction DNA and Fingerprint Data in England and Wales

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Summary

This article considers the current approach to the retention of DNA and fingerprint data taken from non-convicted persons in England and Wales. Concerns are raised about the precautionary rather than proportionate approach of domestic legislators in the Protection of Freedoms Act 2012 provisions, and the continued unjustifiable interference this causes to the rights of such persons under article 8 of the European Convention on Human Rights (ECHR).

Introduction

Successive Governments from the early 1990s to the late 2000s sought to continuously expand police powers to retain DNA and fingerprint data from those arrested or charged in connection with, but not convicted of, a criminal offence.¹ The expansion of the National DNA Database (NDNAD), which holds DNA and fingerprint data taken from crime scenes, convicted, and (in some circumstances) non-convicted persons subject to a criminal process, was driven by an over-estimation of DNA evidence as the all-encompassing crime prevention tool of the future,²

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¹ Henceforth, this will be referred to as 'non-conviction' data.

² See C. McCartney, "The DNA Expansion Programme and Criminal Investigation" (2006) 46 Brit. J. Criminol. 175; R. Williams and P. Johnson, *Genetic Policing: The Use of DNA in Criminal Investigations* (Cullompton: Willan Publishing, 2008); R. Williams, "DNA Databases and the Forensic Imaginary" in *Genetic Suspects: Global Governance of Forensic DNA Profiling and Databasing* (Cambridge: Cambridge University Press, 2010) pp.131-152.

and the political climate from the early 1990s-late 2000s where recorded crime was falling but fear of crime was increasing.³ The cumulative effect of this expansion led to a situation where, under s.82 Criminal Justice and Police Act 2001, the police could lawfully retain DNA samples, profiles and fingerprints taken from anyone arrested for a recordable offence⁴ “after they have fulfilled the purposes for which they were taken” for an indefinite period of time.⁵ This provision amended s.64 Police and Criminal Evidence Act 1984 (PACE), which, when originally enacted, required that such data be destroyed at the conclusion of an investigation.

Much has been written on the unfairness of this expansionist approach for those subject to the criminal process.⁶ However, what was an emergent body of academic literature seems to have died down in recent years following the landmark judgment of the ECtHR in *S and Marper v United Kingdom*.⁷ Here, it was held that the indefinite retention of DNA and fingerprint data violated the applicants’ (two non-convicted arrestees) rights under art.8 of the ECHR. Art.8 provides: (1) Everyone has the right to respect for his private and family life, his home and his correspondence; (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.⁸

³ D. Skinner, ““The NDNAD Has No Ability in Itself to be Discriminatory””: Ethnicity and the Governance of the UK National DNA Database” (2013) 47 *Sociology* 976, 978.

⁴ Generally, recordable offences are imprisonable offences; they could attract a sentence of imprisonment. However, many non-imprisonable offences are also classified as recordable offences. See National Police Records (Recordable Offences) Regulations 2000 (SI 2000/1139).

⁵ Criminal Justice and Police Act 2001 s. 82.

⁶ See L. Campbell, “A Rights-based Analysis of DNA Retention: “non-conviction” databases and the liberal state” [2010] 12 *Crim. L.R.* 889, 890-891; A. Roberts and N. Taylor, “Privacy and the DNA Database” (2005) 4 *E.H.R.L.R.* 373-392; R. Williams and P. Johnson, *Genetic Policing: The Use of DNA in Criminal Investigations* (Cullompton: Willan Publishing, 2008).

⁷ *S and Marper v United Kingdom* (2009) 48 *EHRR* 50; [2009] *Crim. L.R.* 355.

⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI. 1950.

The response of the UK Government was to end its practice of indefinitely retaining the DNA and fingerprint data of anyone arrested or charged but not subsequently convicted of an offence.⁹ The Government has moderated its position, and legal scholars concerned with the balance between privacy and security in the criminal justice context seem to have moved on to more contemporary examples of perceived injustice arising from legal attempts to strike that balance. This is unsurprising. The ECtHR unequivocally rejected the Government's notion that the indefinite retention of all non-conviction DNA and fingerprint data could be justified in the name of crime prevention under art.8 ECHR. The practice was brought to an end and the normative war seemed to have been won by those favouring less expansive non-conviction retention policies.

This article suggests that, on the contrary, 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 (PoFA) will be evaluated. In view of this evaluation, proposals for reform in this area are suggested drawing on the statutory guidance regulating the dissemination of non-conviction information in criminal records vetting.

The development of the law regulating non-conviction retention

Throughout the early 1990s-late 2000s, domestic legislators and the judiciary had no difficulty in determining that the retention of non-conviction DNA and fingerprint data constituted a proportionate interference with the art.8 ECHR rights of those subject to the criminal process.

⁹ There are, of course, exceptions to this generality: E. Cape, "The Protection of Freedoms Act 2012: the retention and use of biometric data provisions" (2013) 1 Crim. L.R. 23.

In fact, the only difficulty seemed to be in recognising that the mere retention of DNA and fingerprint data (as opposed to the collection of such information using swabs and other means) engaged the individual's right to respect for private life at all. In the domestic court rulings in *S and Marper*, with the exception of the Court of Appeal, judges generally approached with scepticism the question of whether art.8(1) was engaged when people arrested or charged but not convicted had their DNA and fingerprint data indefinitely retained. In the Divisional Court Leveson J held that the indefinite retention "did not constitute an intrusion in [the applicants'] privacy."¹⁰ The House of Lords, with Baroness Hale dissenting on this point, also did not view the retention of DNA and fingerprint data as particularly problematic in this context. As Lord Brown stated:

"Given the carefully defined and limited use to which the DNA database is permitted to be put—essentially the detection and prosecution of crime—I find it difficult to understand why anyone should object to the retention of their profile (and sample) on the database once it has lawfully been placed there."¹¹

All of the domestic judges ruling on *S and Marper* observed that any interference with the applicants' art.8(1) rights, however modest, was plainly justified, meeting the criteria set forth in art.8(2) ECHR. The ECtHR took a different view. It unanimously ruled not only that the indefinite retention of the applicants' DNA and fingerprint data constituted an interference with the applicants' art.8(1) rights, but also that such an interference was disproportionate and, therefore, constituted a violation of art.8. The Strasbourg Court ruled that the "blanket and indiscriminate" nature of the retention policies under the Police and Criminal Evidence Act 1984 (PACE) regime, as amended by the Criminal Justice and Police Act 2001, could not be

¹⁰ *R. (S and Marper) v Chief Constable of South Yorkshire Police* [2002] EWHC 478 (Admin); [2002] Po. L.R. 273 at [19].

¹¹ *R. (S and Marper) v Chief Constable of South Yorkshire Police* [2004] UKHL 39; [2004] 1 W.L.R. 2196; [2004] H.R.L.R. 35, [2005] Crim. L.R. 136, 221.

considered “necessary in a democratic society” and accordingly violated the applicants’ art.8 rights.¹² The position of the ECtHR, that DNA and fingerprint retention engages art.8(1) has since been confirmed in domestic courts.¹³

Following the judgment from the Strasbourg Court, the New Labour Government issued a consultation paper, *Keeping the Right People on the DNA Database*.¹⁴ In it, the then Home Secretary, Jacqui Smith expressed her commitment to comply with the ECtHR ruling in *S and Marper*, whilst maintaining a commitment to maximising the potential of the public protection benefits of the NDNAD.¹⁵ The consultation paper proposed the destruction of all DNA samples taken from a suspect arrested for a criminal offence after a DNA profile had been made or after a maximum of six months, depending on which came first.¹⁶ The Government also suggested that, for all but serious violent, sexual or terrorism-related offences, those arrested but not subsequently convicted of a recordable offence would have their profiles automatically deleted after six years.¹⁷ Furthermore, the paper addressed the concerns of the Strasbourg Court relating to the retention of DNA samples, profiles, and fingerprint data of children, outlining a six-year tariff for the retention of such non-conviction data where it is taken from children.¹⁸ In all cases, the same rules would apply to the retention of fingerprint data as the retention of DNA profiles.

¹² *S and Marper v United Kingdom* (2009) 48 EHHR 50 at [125].

¹³ See *R. (GC) v Commissioner of Police for the Metropolis* [2011] UKSC 21; [2011] 1 W.L.R. 1230; [2011] 2 Cr. App. R. 18; *Re Gaughran’s Application for Judicial Review* [2015] UKSC 29; [2016] A.C. 345; [2015] 2 W.L.R. 1303; [2015] Crim. L.R. 809.

¹⁴ Home Office, *Keeping the Right People on the DNA Database: Science and Public Protection* (The Stationary Office, 2009).

¹⁵ Home Office, *Keeping the Right People on the DNA Database: Science and Public Protection* at [2.2].

¹⁶ Home Office, *Keeping the Right People on the DNA Database: Science and Public Protection* at [2.4].

¹⁷ Those who are arrested but not convicted of the more serious offences detailed would have their DNA profiles automatically deleted after twelve years and those providing DNA samples voluntarily would not have their profiles stored on the National DNA Database. See Home Office, *Keeping the Right People on the DNA Database: Science and Public Protection* at [2.4].

¹⁸ Home Office, *Keeping the Right People on the DNA Database: Science and Public Protection* at [6.18]-[6.19].

These proposals were amended as part of the Crime and Security Bill so that no distinction would be made between the retention periods based on the offence for which an individual was arrested. In the case of children convicted of criminal offences, the retention period was reduced to three years.¹⁹ Despite these amendments, the proposals were met with intense criticism when put before the House of Commons on the grounds that the retention powers were still too broad to respect the art.8 rights of those subject to the criminal justice process.²⁰ In a report scrutinising the Bill, the Parliamentary Joint Committee on Human Rights expressed concerns that the Government's approach stretched the ECtHR's decision in *S and Marper* to its limit.²¹ Among other things, the Committee criticised the Government's proposals on the grounds that the six-year retention period for those not convicted or charged with an offence was disproportionate and potentially arbitrary, and the proposals were said to discount the stigmatising effect of the inclusion of the samples of innocent people on the National DNA Database.²²

Despite the shortcomings identified by the Committee, the Crime and Security Bill was enacted, with some minor amendments, as the Crime and Security Act 2010. However, the new DNA and fingerprint retention provisions were not brought into effect following a change in Government in the 2010 General Election.²³ Instead, the Conservative-led Coalition Government introduced the Protection of Freedoms Bill, which sought to address the ECtHR decision in *S and Marper*. In another report, the Joint Committee on Human Rights welcomed

¹⁹ Crime and Security Bill (Bill No. 3 of 2009-2010).

²⁰ MPs called into question the lack of external review for retention, the periods of retention for DNA profiles taken from those not subsequently convicted of any offence, and the strength of the evidence base upon which the new proposals were based. See generally *Hansard*, HC Vol.504, col. 32-36 (18 January 2010).

²¹ Joint Committee on Human Rights, *Legislative Scrutiny: Crime and Security Bill; Children, Schools and Families Bill* (HMSO 2010) HL Paper No.67 (Session 2009-10); *House of Commons Public Bill Committee*, January 26, 2010, col.71.

²² Joint Committee on Human Rights, *Legislative Scrutiny: Crime and Security Bill; Children, Schools and Families Bill*, p.3.

²³ GeneWatch, "Crime and Security Act 2010", <http://www.genewatch.org/sub-565677> [Accessed September 15, 2016].

the new Bill for its enhancement of the legal protection of human rights and civil liberties.²⁴ In particular, the Committee endorsed the Government's view that the proposals in the Protection of Freedoms Bill were more in line with the Scottish model of DNA and fingerprint data retention (which is much more restrictive in its non-conviction retention policies) and, consequently, were more likely to be ECHR compatible than the proposals in the Crime and Security Act 2010.²⁵ However, the Committee did suggest that without fuller statistical information on the operation of the National DNA Database it would not be possible for it to confirm the proportionality of the proposed measures.²⁶

The PoFA received Royal Assent in May 2012. This Act made extensive changes to the retention regime set forth in PACE. PoFA ss.3-5 inserted amendments to PACE at ss.63F to 63H. The effect of the (somewhat complicated) new provisions is that, where an arrestee does not go on to be convicted of an offence, any fingerprints, or any DNA profiles taken from that individual (henceforth, s.63D material)²⁷ must be destroyed no later than the conclusion of the investigation or, if the individual is charged, at the conclusion of any criminal proceedings.²⁸ The s.63D material can be speculatively searched against national databases upon its collection. This does engage privacy interests, but is not the focus of this article. However, there are several complex provisions that effectively make it possible for the police to retain such data at the conclusion of criminal proceedings in certain circumstances. These circumstances will be explained below.

²⁴ Joint Committee on Human Rights, *Legislative Scrutiny: Crime and Security Bill; Children, Schools and Families Bill*, p.3.

²⁵ Joint Committee on Human Rights, *Legislative Scrutiny: Protection of Freedoms Bill*, (HMSO 2011) HL Paper No.195 (Session 2010-12) p.10.

²⁶ Joint Committee on Human Rights, *Legislative Scrutiny: Crime and Security Bill; Children, Schools and Families Bill*, p.3.

²⁷ The relevant material under PACE s.63D (as amended) includes fingerprints taken under any power conferred by PACE Pt V, and any DNA profile derived from a sample taken in the same circumstances as for fingerprints. Notably, DNA samples are not included in the s.63D definition.

²⁸ See PACE ss.63F-63H (as amended).

Individuals arrested for or charged with “qualifying offences”, but not subsequently convicted

If the s.63D material is taken from an individual in connection with a “qualifying offence,”²⁹ but the individual is not subsequently convicted, then the material can be retained indefinitely only if the individual has a previous conviction for a recordable offence.³⁰ If the individual does not have a previous conviction, then the retention period will differ according to whether the individual was charged with the qualifying offence or only arrested. In the case of the former, the police can retain the s.63D material for three years. However, if the individual is arrested but not subsequently charged, then the police can still retain the material for three years but only with the consent of the Commissioner for the Retention and Use of Biometric Material (a role created under PoFA s.20).³¹

Individuals arrested for or charged with minor offences, but not subsequently convicted

PoFA s.4 inserts s.63H into PACE. This sets forth the provision that where an individual is arrested or charged with, but not convicted of, a minor offence,³² any collected s.63D material must be destroyed, unless the individual has been previously convicted of a recordable offence

²⁹ Such offences include murder, manslaughter, false imprisonment, and certain other serious offences detailed in PACE s.65. Some amendments to the current retention regime are contained in clauses 71 and 72 of the Policing and Crime Bill. The effect of these amendments is to expand the definitions of ‘recordable offence’ and ‘qualifying offence’ to include offences under the law of a country or territory outside of England and Wales where the act constituting the offence would be a recordable or qualifying offence if committed in England and Wales. These amendments aim to address the issue of having to relocate and re-take samples from a person following an arrest in this country, where it subsequently emerges that the person has previous convictions for serious offences committed in other countries. See: Policing and Crime Bill (Bill No. 118 of 2016-17).

³⁰ PACE s.63F (as amended).

³¹ The effect of these provisions is described in a House of Commons Research Briefing as follows: “The police may apply to the Commissioner to retain such data if the victim of the alleged offence was (at the time of the offence) under the age of 18, a vulnerable adult or in a close personal relationship with the arrested person. The police may also apply where they consider that retention is necessary for the prevention or detection of crime. Notice of any application to the Commissioner must also be given to the person from whom the data was taken, and that person may make representations to the Commissioner in respect of the application. If the Commissioner does not give his consent then the data cannot be retained.” See: *House of Commons Library Research Paper 4049*, November, 25, 2015, p.3.

³² Minor offences are recordable offences that are not ‘qualifying offences’. See Protection of Freedoms Act 2012, Explanatory Note para.90.

that is not an “excluded offence”.³³ In such cases, where the individual has a previous conviction for a non-excluded offence, s.63D material may be retained indefinitely.³⁴ There are further provisions for those who are subject to the criminal process. If, for instance, an individual receives a Penalty Notice for Disorder, the police are empowered to retain any section 63D material for two years.³⁵ Furthermore, such materials can be retained for two years (with the possibility of renewal), where they would otherwise be destroyed, if a responsible chief officer of police deems that such retention is necessary in the interests of national security.³⁶ The retention of DNA samples, which are not included in s.63D of PACE, is subject to separate retention provisions. PoFA s.14 inserts s.63R into PACE, which governs the retention, use, and destruction of DNA samples. Like s.63D material, DNA samples must be destroyed where it appears to a chief police officer that they have been taken unlawfully or as a result of mistaken identity. In addition, DNA samples must be destroyed once a DNA profile has been derived from the sample, or six months after it has been collected (if this date comes before a profile is created).³⁷ This period can be extended if a chief police officer applies to a district judge to retain the sample for a longer period on the grounds that the sample may be needed for use in a subsequent trial.³⁸ Any DNA sample retained under these provisions may only be used for purposes related to the proceedings for which the sample was taken, though a speculative search of the National DNA Database is permitted.³⁹

³³ “Excluded offence” means a recordable offence which: (i) is not a “qualifying offence”; (ii) is the only recordable offence of which a person has been convicted, and (iii) was committed when the person was under 18, and for which the person convicted of the offence was not given a custodial sentence of 5 years or more. See PACE s.63H (as amended).

³⁴ PoFA s.4.

³⁵ PoFA s.8.

³⁶ PoFA s.9.

³⁷ PoFA, Explanatory Note para.100.

³⁸ PACE s.63R (as amended).

³⁹ PACE s.63R (as amended).

Justifying non-conviction retention under the new provisions

When addressing the question of whether the interference with art.8(1) was justified in *S and Marper*, the domestic courts found that the interference was “in accordance with the law” and “in pursuit of a legitimate aim” for the purposes of art.8(2). To an extent, the ECtHR concurred with this view in finding that the retention of the applicants’ fingerprint and DNA records had a clear basis in domestic law, and that the law was not “insufficiently certain” to comply with art.8 ECHR.⁴⁰ If anything, the new provisions only increase this certainty, outlining the length of tariff dependent on the offence and disposal. The provisions also outline the scope of the discretion conferred upon the Biometrics Commissioner to determine the length of retention in certain specified circumstances. That retention pursues the legitimate aims of preventing disorder or crime and/or ensuring public safety is also an uncontroversial point. The greatest area of divergence between the analyses of the domestic courts and that of the ECtHR was on the final criteria in art.8(2): whether the interference was “necessary in a democratic society”. This requires that the interfering measures respond to a “pressing social need” and are “proportionate” to the legitimate aim pursued.⁴¹ The remaining sections highlight the differences between the domestic courts and the ECtHR in this area, before assessing the extent to which the PoFA provisions can clear the final hurdle of art.8(2).

As a starting point in assessing the proportionality and necessity of the measures, it is instructive to have a clear view on how, and to what degree, such retention sets back privacy interests generally. From here, the current retention regime can be assessed drawing on the structured proportionality test developed in the domestic cases of *Quila*⁴² and *Bank Mellat*.⁴³

⁴⁰ *S and Marper v United Kingdom* (2009) 48 EHRR 50 at [97].

⁴¹ *Olsson v Sweden* (1988) 11 EHRR 259 at [67].

⁴² *R. (Quila) v Secretary of State for the Home Department* [2011] UKSC 45 at [45]; [2012] 1 A.C. 621; [2011] 3 W.L.R. 836; [2012] H.R.L.R. 2; [2011] I.N.L.R. 698.

⁴³ *Bank Mellat v HM Treasury (No. 2)* [2013] UKSC 39; [2014] A.C. 700; [2013] 3 W.L.R. 179; [2013] H.R.L.R. 30.

The test consists of four limbs, which are broadly followed in the jurisprudence of the ECtHR and a range of other domestic jurisdictions as a method of adjudicating competing rights.⁴⁴ The limbs are: (i) whether the objective of the measure is sufficiently important to justify the limitation of the protected right; (ii) whether the measure is rationally connected to the objective; (iii) whether less intrusive measures could have been used to achieve the same objective (the necessity test); and (iv) whether the importance of the objective outweighs the severity of the measure's effects on the rights of the persons to whom it applies.⁴⁵

To what extent does non-conviction retention set back privacy related interests?

When assessing the extent to which individual privacy interests are set back by the retention of personal information much depends upon the nature of the personal information that is retained. In the Divisional Court in *S and Marper*, Leveson J observed that, in the context of the case, the retained material did not reveal anything related to the private lives of the individuals from which they originated.⁴⁶ However, this point conflates details regarding the nature of the information and details concerning the context in which such information is used. The samples retained contain information that is personally identifiable to applicants (to varying degrees) notwithstanding the context in which they are stored or used, or how they might be used in the future.

⁴⁴ For further discussion of how human rights are adjudicated, and the globalisation of the four-limbed proportionality analysis, see: T.A. Aleinkoff, "Constitutional Law in the Age of Balancing" (1987) 96 Yale Law J. 943; M. Kumm, "Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice" (2004) 2 Int'l. J. Const. L. 574, 579-581; A. Sweet and J. Matthews, "Proportionality, Balancing and Global Constitutionalism" (2008) 47 Colum. J. Transnat'l. L. 72, 72; R. Alexy (J. Rivers trans.), *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2002) pp.396-406; M. Klatt and M. Meister, *The Constitutional Structure of Proportionality* (Oxford: Oxford University Press, 2012) p.8.

⁴⁵ See *R (Quila) v Secretary of State for the Home Department* [2011] UKSC 45 at [45]; *Bank Mellat v HM Treasury (No. 2)* [2013] UKSC 39.

⁴⁶ *R. (S and Marper) v Chief Constable of South Yorkshire Police* [2002] EWHC 478 (Admin) at [19].

The differences between DNA sample, profile, and fingerprint data are relevant when considering the implications the retention of each has for privacy interests. These differences can be summarised as follows:

- 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;
- Fingerprints are usually scanned electronically from an arrestee. These are said to contain the least identifiable information out of the three types of data considered. Fingerprints reveal no information about the individual beyond the unique pattern of her skin on the body part (usually a finger or palm) from which the "print" is derived.⁴⁷

Even fingerprints, which contain less identifiable information than DNA samples and profiles, are undoubtedly personal information. The data taken from the individual can subsequently be linked back to her in a wide range of circumstances, albeit with the assistance of sophisticated biometric reading technology. The ECtHR held that the retention of DNA samples *per se* was sufficient to engage art.8(1). However, the Court did not go this far when it came to fingerprints and DNA profiles. These were held to engage art.8(1) only where retained in the context of criminal proceedings. Unlike the domestic judges, with the exception

⁴⁷ See D. Wilson, *Genetics, Crime and Justice* (Cheltenham: Edwin Elgar, 2015) pp.24-27.

of Baroness Hale, the ECtHR recognised that the retention in *S and Marper* set back the informational privacy interests of the applicants. Informational privacy interests broadly protect the individual from the use, misuse, and fear of use and misuse of any personally identifiable information.⁴⁸ These are the interests the individual holds in limiting the access others (persons, private, or public bodies) have to information about her. Such interests are diverse and may also arise through security breaches and the loss of personal information.⁴⁹ Where the individual's informational privacy interests are respected, she can expect a degree of control over how such personal information will be used by others.⁵⁰ By maintaining a system of mandatory retention of such personal information, the Government discounted the applicants' interests in retaining this control and accordingly failed to respect the privacy related interests of the applicants.⁵¹ Such informational privacy interests can be set back notwithstanding what the Government subsequently does with the information. As Hughes argues:

“As privacy plays a fundamental role in facilitating social interaction, any invasion of privacy is inherently harmful and X does not need to establish that he or she has suffered any particular harm for Y's act to constitute an invasion of privacy.”⁵²

This amounts to an exercise of control over the individual on behalf of the state. The individual's preferences for whether the state can store her personal information are disregarded. Thus, in principle, the storing of X's personally identifiable information by Y sets

⁴⁸ C. Fried, “Privacy” (1968) 77 Yale Law J. 475, 482; J.W. DeCew, *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology* (Ithaca: Cornell University Press, 1997) p.75.

⁴⁹ See generally D. Wilson, *Genetics, Crime and Justice* (Cheltenham: Edwin Elgar, 2015); D. Solove, *Understanding Privacy* (Massachusetts: Harvard University Press, 2008) pp.117-136.

⁵⁰ See also, D. Solove, *Understanding Privacy* (Massachusetts: Harvard University Press, 2008) p.29.

⁵¹ This much has since been determined by the ECtHR in the case of *Bouchacourt v France*, where it was held that: ‘the mere storing by a public authority of data relating to the private life of an individual’ constituted an interference with Art. 8(1). See *Bouchacourt v France*, December 17, 2009, no. 5335/06 at [57].

⁵² K. Hughes, “A Behavioural Understanding of Privacy and its Implications for Privacy Law” (2012) 75 M.L.R. 806, 821.

back X's privacy related interests. If this principle is accepted, as it has been by the ECtHR, the next step is to consider the degree to which the storing of DNA and fingerprint information, in the context of a criminal process, sets back privacy related interests. One further objection to non-conviction information retention relates to the potential ways such information might be used against the individual in the future. As technology has advanced, it has increased the extent to which personal information about genetic traits and familial history can be gleaned from such biometric information.⁵³ In the House of Lords, Lord Steyn observed that any concerns about this potential for future processing were not relevant as judicial decisions about future scientific developments and uses of DNA samples can be made when the need arises.⁵⁴ However, the ECtHR took a different position on the matter:

“In the Court's view, the DNA profiles' capacity to provide a means of identifying genetic relationships between individuals ... 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.”⁵⁵

The Court is referring to the potential for the information to be processed in future as relevant in determining the applicability of art.8(1), irrespective of the safeguards that are currently in place to prevent such abuses.⁵⁶ This approach focuses on the effect that the retention of an individual's personal information has on the individual regarding her concerns and fears about how this information can be used and might be used in the future, rather than

⁵³ D. Wilson, *Genetics, Crime and Justice* (Cheltenham: Edwin Elgar, 2015) pp.24-70.

⁵⁴ *R. (S and Marper) v Chief Constable of South Yorkshire Police* [2004] UKHL 39 at [29].

⁵⁵ *S and Marper v United Kingdom* (2009) 48 EHRR 50 at [75].

⁵⁶ There have been a number of cases brought before domestic courts regarding the use of profiles on the National DNA Database for purposes other than the prevention and detection of crime. In a recent case before the Court of Appeal, the applicant successfully argued that his art.8 rights had been violated when his DNA information, which was stored on the NDNAD, was used for a paternity test as part of a local authority's child care proceedings. Police took the DNA sample from the crime scene of his wife's murder; a crime for which the applicant was tried and convicted. See: *In re Z (Children)* [2015] 1 WLR 2501; [2015] 1 Cr. App. R. 28.

solely focusing on the actual risk that such information may be used to offset the individual's privacy related interests. Such retention is a form of permanent surveillance, which puts power over intimate information about the individual into the hands of the police, irrespective of how that individual wishes such information to be used. The issue with Lord Steyn's "we can cross that bridge when we come to it" fig leaf is that it overlooks the extent to which the mere existence of such a potential from the retention of DNA samples can produce an inhibiting effect in the individual, even if such fears of information misuse are misplaced, as is argued by Roberts and Taylor:

"It is the *effect* on the individual of the *risk* arising from the action taken by the state that constitutes the interference with his private life ... If widespread storing of DNA samples can engender such anxiety in the population at large, presumably that anxiety is heightened in those whose DNA samples are stored."⁵⁷

These supposed anxieties echo what Lyon describes as the setbacks to privacy related interests brought about through the "function creep" of an individual's personal information, where "subsequent novel uses are devised for existing technical systems, which are added to the original panoply of functions."⁵⁸ The potential for other uses of the personal information collected is significant, especially in the case of DNA samples and profiles. Hypothetically speaking, information stored on the NDNAD, which can already identify behavioural genetic predispositions in an individual, could potentially be used by a future fascist Government to subject individual's to oppressive crime-control or eugenic orientated measures. This potential alone can cause feelings of anxiety, powerlessness, and vulnerability in the individual.

⁵⁷ A. Roberts and N. Taylor, 'Privacy and the DNA Database' (2005) 4 E.H.R.L.R. 373, 384 (emphasis in original).

⁵⁸ D. Lyon, "The Border is Everywhere: ID Cards, Surveillance, and the Other" in *Global Surveillance and Policing: Borders, Security, Identity* (Cullompton: Willan Publishing, 2005) pp.66-82, 67.

Campbell proposes that the sharpest challenge to the State retention of DNA lies in the avoidance of stigmatisation.⁵⁹ According to Campbell, the most pernicious effect of non-conviction DNA and fingerprint retention is that it amounts to an expression of a lingering suspicion on behalf of the state, through the differential treatment of those subject to the criminal process.⁶⁰ Campbell goes on to suggest that, notwithstanding the fact that such information is not published by the State, the individual internalises the stigmatisation by virtue of the state treating her differently on the basis of potential guilt or risk of offending.⁶¹ Indeed, there exists a body of criminological literature which suggests that such “labelling” of the individual by the state can be detrimental to her functioning and flourishing in society by narrowing available life opportunities and adversely affecting her reputation and self-esteem.⁶² One resolution to this particular problem might be to create a population-wide database, which holds DNA and fingerprint data for everybody and, thus, does not have any discriminatory or stigmatising effects.⁶³ However, this amounts to nothing more than levelling down. Whilst such a measure may address the stigmatisation point, it would also entail a grossly disproportionate interference with the privacy interests of citizens at large, and represent a seismic shift away from the political principles of limited state intervention and respect for personal autonomy, which are prevalent in the criminal justice system and the ECHR. As Campbell highlights,

⁵⁹ L. Campbell, “A Rights-based Analysis of DNA Retention: “non-conviction” databases and the liberal state” [2010] 12 *Crim. L.R.* 889, 905.

⁶⁰ L. Campbell, “A Rights-based Analysis of DNA Retention: “non-conviction” databases and the liberal state” [2010] 12 *Crim. L.R.* 889, 905.

⁶¹ L. Campbell, “A Rights-based Analysis of DNA Retention: “non-conviction” databases and the liberal state” [2010] 12 *Crim. L.R.* 889, 903.

⁶² See E. Lemert, *Human Deviance, Social Problems and Social Control* (Englewood, NJ: Prentice-Hall, 1967); D. Downes, P. Rock, and E. McLaughlin, *Understanding Deviance*, 7th edn (Oxford: Oxford University Press, 2016) pp.160-184.

⁶³ See D.H. Kaye and M. Smith, “DNA Databases for Law Enforcement: The Coverage Question and the Case for a Population-Wide Database” in D. Lazer (ed.) *DNA and the Criminal Justice System: The Technology of Justice* (Cambridge, MA: MIT. Press, 2004) pp.247-284, 283.

concerns about stigmatisation are more appropriately dealt with by “limiting rather than expanding the scope of the database.”⁶⁴

Taken together, the potentially stigmatising effect of retention, the inhibiting effect it may have on the individual, and the setbacks such retention will inevitably cause to information-based privacy interests are certainly significant considerations. The extent of this significance will depend upon the circumstances of each particular case. For example, where an individual is a child, this may be particularly stigmatising, as the ECtHR ruled in *S and Marper*. The length of time such information is retained and the quality of this information (in terms of the extent of the information it reveals about the individual) are also relevant variables. This analysis indicates that where such DNA or fingerprint information is retained on the basis that the individual has been subject to a criminal process, but not convicted, this will set back the individual’s privacy interests to such a degree that it engages art.8(1) and, thus, must satisfy the criteria in art.8(2). The remaining sections of this analysis turn attention to the extent to which the PoFA provisions governing non-conviction retention are proportionate drawing on the four-limbed proportionality analysis.

Applying the proportionality analysis to the PoFA provisions

The objective and the interference

The first limb of the proportionality analysis is the easiest to clear. It requires the Government to show that the objective pursued through the interfering measure is sufficiently important to justify limiting the fundamental right in question. Given that the specific objectives pursued through the retention broadly pursue the stated legitimate aim of preventing disorder or crime,

⁶⁴ L. Campbell, “A Rights-based Analysis of DNA Retention: “non-conviction” databases and the liberal state” [2010] 12 Crim. L.R. 889, 905.

on any plausible account, these objectives are sufficiently important to form the basis for the interference. That the objective of the prevention of disorder or crime is sufficiently important to justify the retention of the DNA and fingerprint data of *some* of those arrested or charged in connection with a criminal offence for a *certain* amount of time was accepted in *S and Marper v United Kingdom*.⁶⁵ Whilst this limb is not a mere formality, the objective of preventing and detecting future crimes through increasing the expediency with which those who pose a threat to the public can be processed through the criminal justice system is clearly sufficiently important to provide the basis for an interference.

The existence of a rational connection between the objective and the means

In *Bank Mellat*, Lord Reed explained that the second limb of the proportionality test requires the Government to show that the legitimate and proportionate goals of the legislature are logically furthered by the means it has chosen to adopt.⁶⁶ According to Lord Reed:

“The words “furthered by” point towards a causal test: a measure is rationally connected to its objective if its implementation can reasonably be expected to contribute towards the achievement of that objective.”⁶⁷

Thus, to qualify as rational and avoid arbitrariness, the link between the measure and its aims should be evidence-based.⁶⁸ The crucial question in the immediate case then is: can the retention of DNA and fingerprint data from persons arrested or charged with, but not subsequently convicted of, a “qualifying offence” reasonably be expected to contribute to the

⁶⁵ *S and Marper v United Kingdom* (2009) 48 EHHR 50 at [105].

⁶⁶ *Bank Mellat v HM Treasury (No. 2)* [2013] UKSC 39 at [92]; [2014] A.C. 700; [2013] 3 W.L.R. 179; [2013] H.R.L.R. 30.

⁶⁷ *Bank Mellat v HM Treasury (No. 2)* [2013] UKSC 39 at [92]; [2014] A.C. 700; [2013] 3 W.L.R. 179; [2013] H.R.L.R. 30.

⁶⁸ See N. Taylor, “Case Note: *Re Gaughran’s Application for Judicial Review*” [2015] 10 Crim. L. R. 809, 811.

prevention and detection of crime? Whilst it is tempting to assume that the more biometric data the police hold, the greater will be their chances of identifying offenders in the future, there is a lack of evidence to support the claim that non-conviction retention will make such a contribution in any significant way. As Lord Kerr highlighted in his dissenting opinion in *Gaughran*, where the DNA retention of convicted persons was at issue:

“The usefulness of the assembly of a pool of personal data to assist with the detection of crime was rejected in *S and Marper* as justification for interference with the article 8 right and should also be in this case. Without proof as to the likelihood of reoffending, there is no obvious, or rational, connection between the current policy and reducing crime.”⁶⁹

The retention tariffs seem to operate on the assumption that those suspected, but not convicted, of committing more serious offences are more likely than other non-convicted persons to commit offences for which DNA and fingerprint data has probative value in the future. However, there is no evidence base to support this assumption. In its legislative scrutiny of the Protection of Freedoms Bill, the Joint Committee on Human Rights expressed its concern that “accurate statistical information about the operation of the National DNA Database does not appear to have been routinely gathered.”⁷⁰ Furthermore, the Committee recommended that the Government should be required to gather information about the proposals in the Protection of Freedoms Bill and regularly publish information and statistics on the different categories of biometric information retained.⁷¹ The PoFA requires the NDNAD Strategy Board to publish its governance rules, a statistical breakdown of the NDNAD, and guidance to police forces on

⁶⁹ *Re Gaughran’s Application for Judicial Review* [2015] UKSC 29 at [67]; [2016] A.C. 345; [2015] 2 W.L.R. 1303; [2015] Crim. L.R. 809.

⁷⁰ Joint Committee on Human Rights, *Legislative Scrutiny: Protection of Freedoms Bill*, (HMSO 2011) HL Paper No.195 (Session 2010-12) p.37.

⁷¹ Joint Committee on Human Rights, *Legislative Scrutiny: Protection of Freedoms Bill*, (HMSO 2011) HL Paper No.195 (Session 2010-12) p.37.

the early deletion of records from the NDNAD.⁷² However, so far, this statistical breakdown of the utility of the NDNAD tends to summarise the number of crimes solved using searches on the NDNAD as a whole, giving no information for a comparison between the proportion of those crimes that are linked to the profiles of arrestees who have not been convicted of a criminal offence and those who have been convicted.⁷³

Research has also cast doubt on the Government's approach in limiting the period of retention based on the seriousness of the offence for which the individual was first arrested. For example, Townsley, Smith, and Pease found that criminal careers are not homogenous, and that there is a lack of evidence to suggest that the offence an individual is first arrested or charged in connection with is in any way a useful measure of the offences she is likely to go on to commit.⁷⁴ Drawing on a longitudinal study of males from a working class area of London, research from Kazemian, Pease, and Farrington suggests that the deletion of DNA profiles of younger offenders may be particularly detrimental for subsequent serious crime detection rates.⁷⁵ This research supported the earlier findings of Townsley, Smith and Pease that criminal careers tend to be heterogeneous and, consequently, retention policies based on the seriousness of the offence for which an individual is first arrested are not supported.⁷⁶ In a comparison of the performance of DNA databases in European countries, research from Santos, Machado, and Silva suggested that the inclusiveness of a country's policies with regard to the retention of DNA from non-convicted arrestees does not necessarily translate into greater output in terms

⁷² Home Office, *National DNA Database Strategy Board Annual Report 2013-14* (London: HMSO, 2014).

⁷³ Home Office, *National DNA Database Strategy Board Annual Report 2013-14* (London: HMSO, 2014) pp.10-14.

⁷⁴ M. Townsley, C. Smith and K. Pease, *Using DNA to Catch Offenders Quicker: Serious Detections Arising from Criminal Justice Samples* (London: Jill Dando Institute of Crime Science, 2005) p.10.

⁷⁵ L. Kazemian, K. Pease, and D. Farrington, "DNA Retention Policies: The Potential Contribution of Criminal Career Research" (2011) 8 E. J. Criminol. 48, 60.

⁷⁶ L. Kazemian, K. Pease, and D. Farrington, "DNA Retention Policies: The Potential Contribution of Criminal Career Research" (2011) 8 E. J. Criminol. 48, 60.

of person-stain matches.⁷⁷ Whilst these studies give some indication of the potential shortcomings of the categories of retention periods for arrestees' DNA and fingerprint data that have been drawn in the PoFA, none claim to have provided a sufficiently robust empirical basis to support or oppose the proportionality of the Government's retention policies. Each of the studies discussed draws attention to the lack of a systematic empirical research base supporting the retention periods set out in the PoFA. Without such a basis providing a rational link between the measures and their objective, it is difficult to ascertain whether or not the DNA and fingerprint data taken from non-convicted persons subject to a criminal process has any more or less probative value than that of other non-convicted persons, or the population at large. Consequently, the Government has not established that the aim of preventing and detecting crime is logically furthered through the retention tariffs in the PoFA.

Minimally intrusive means

The new retention provisions are much less intrusive than both the provisions in s.64 of PACE, as amended by the Criminal Justice and Police Act 2001, and the proposed provisions under the Crime and Security Act 2010. However, this is not sufficient to pass the 'minimally intrusive means' limb of the proportionality analysis. To do so the measures must impair the right as little as is necessary to achieve the legislative objective. Though there are ongoing academic disputes over what is required of the public authority at this stage,⁷⁸ even on a conservative interpretation that "the claimant bears the evidential and persuasive burden of

⁷⁷ A person-stain match occurs where a person's stored DNA profile is matched with a subsequently created DNA profile. The subsequently created profile may be derived from a DNA sample collected from a crime-scene, an object, another individual, or any other source from which a DNA sample can be collected. See: F. Santos, H. Machado, and S. Silva, "Forensic DNA Databases in European Countries: Is Size Linked to Performance?" (2013) 9 Life Sci. Pol. 12.

⁷⁸ See C. Chan, "Proportionality and Invariable Baseline Intensity of Review" (2013) 33 L.S. 1; A. Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press) pp.449-451; J. Rivers, "The Presumption of Proportionality" (2014) 77 M.L.R. 409, 427.

showing that at least one alternative measure is at least equally effective and less intrusive”,⁷⁹ the PoFA provisions fail. A less intrusive but more effective retention policy would selectively retain such non-conviction information taking into consideration not only the offence which initiated proceedings against the individual, age, and previous arrests, but also the certainty with which we might say the individual is likely to have committed the offence for which the individual is processed. This can only be assessed on a case-by-case basis. Retention is not as stigmatising or harmful as a criminal conviction. Thus, the criminal burden of proof might be too high a threshold for public authorities to pass before retention can be justified. However, any minimally intrusive retention policy must place some burden on a public authority to filter out those who have been caught up in a criminal process and are not even likely to have committed any offence.

A policy based on this principle recognises that criminal investigations and prosecutions are inherently messy. They are human processes. Each case is different from the next. The fact that an individual has been charged indicates that, at a particular time, there existed sufficient evidence to provide a reasonable chance of prosecution (assuming the decision to charge was sound).⁸⁰ However, between the charging of an individual and a non-conviction disposal of the case, many things can happen. At one end of the spectrum, irrefutable evidence could come to light putting the individual’s innocence beyond question. On the other end, a charged person might be acquitted in the face of overwhelming evidence against her, due to some procedural impropriety. Whilst in circumstances such as the latter, the risk posed by the individual might be sufficient to justify biometric data retention for the periods than are

⁷⁹ J. Rivers, “The Presumption of Proportionality” (2014) 77 M.L.R. 409, 427.

⁸⁰ A recent report from HMIC/HMCPsi showed that in 91.9% of the cases examined, the decision to charge an individual was in compliance with the Code for Crown Prosecutors. The report also showed that in 34.3% of cases where the decision to charge was taken by the police, it should have been referred to the CPS. See: HMIC/HMCPsi, *Joint Inspection of the Provision of Charging Decisions* (2015), 27.

set out in the PoFA tariffs, in the case of the former, any retention would rightly feel like an opportunistic and arbitrary interference with the individual's art.8 rights. The current tariffs remain broad and indiscriminate, just less so. Thus, the tariffs set out cannot be considered minimally intrusive. They still retain data based on general categories of offence, without having sufficient regard to the credibility of the information surrounding the individual's arrest or charge, which forms the basis for retaining the biometric data. Without a strong evidence base, such assessments of the individual's risk can only be made with any modicum of accuracy on a case-by-case analysis.

An alternative regime, which could accommodate the certainty variable, might reflect the framework regulating the disclosure of non-conviction information as part of an Enhanced Criminal Record Certificate (ECRC). ECRCs are often sought by employers to vet prospective employees who will be tasked with working in contact with children or other vulnerable groups. As part of an ECRC a relevant chief police officer can disclose non-conviction information (allegations, failed prosecutions, known criminal associates etc.) about an applicant where it is "reasonably believed that the information is relevant" and the information "ought to be included" in the certificate.⁸¹ Before making such a disclosure, the chief police officer "must have regard" to the Statutory Disclosure Guidance, which outlines ten principles a relevant officer should adhere to on each case.⁸² Thus, in making a decision to disclose, relevant decision makers must consider the seriousness of the alleged offence, currency, and credibility of any information and balance these considerations against the risk to the public.⁸³ Moreover, the decision maker must consider giving the individual subject to the criminal process an opportunity to make representations where possible. Crucially, this guidance requires relevant

⁸¹ See PoFA s.82.

⁸² Home Office, *Statutory Disclosure Guidance*, 2nd edn (London: HMSO, 2015).

⁸³ Home Office, *Statutory Disclosure Guidance*, 2nd edn (London: HMSO, 2015) pp.3-4.

chief police officers to demonstrate that the disclosure satisfies art.8 ECHR on a case-by-case basis.⁸⁴ Such a system avoids the arbitrariness of the tariffs whilst still ensuring that biometric information can be retained from non-convicted persons where this retention corresponds to a pressing social need and is proportionate to protect the public.

One possible objection to this case-by-case approach is that it would be impractical and overburdensome on the resources of the police. Leaving aside arguments over whether such an objection constitutes an appropriate basis for upholding a retention system which unjustifiably interferes with the fundamental human rights of non-convicted persons, it is difficult to see such considerations representing a significant obstacle to the implementation of a framework which uses a case-by-case approach. Whilst an exhaustive costing of such an approach falls beyond the scope of this article, it is unlikely that it could be any more resource intensive to implement than the ECRC disclosure system. The total number of ECRC applications per year tends to be between 3-4 million, with approximately 1.1-1.2 million of these applications matching against local police records.⁸⁵ In comparison, the total number of people arrested from March 2015-April 2016 was 869,209.⁸⁶ Given that the latter figure includes arrests of those individuals who already have their personal information retained on the NDNAD, and those who go on to be convicted of the offence for which they have been arrested, the number of proportionality assessments the police would be required to undertake seems to compare favourably.

A fair balance between the objective and the interference

⁸⁴ Home Office, *Statutory Disclosure Guidance*, 2nd edn (London: HMSO, 2015).

⁸⁵ See: <https://www.gov.uk/government/statistics/dbs-dataset-1-disclosure-progress-information-disclosed-and-update-service-subscriptions> and <http://hub.unlock.org.uk/knowledgebase/local-police-information-2/>.

⁸⁶ Home Office, *Police Powers and Procedures, England and Wales: Statistical Bulletin 15/16* (London, HMSO, 2016) p.9.

The PoFA policies have an intuitive appeal. The retention periods adjust according to the seriousness of the offence for which an individual is arrested, the previous convictions of the arrestee, the age of the arrestee (i.e. whether the arrestee is a minor), and the type of biometric material in question (for e.g. DNA samples are retained for less time than DNA profiles and fingerprints). Taken at face value, these might seem proportionate and necessary. They give significantly more consideration to the privacy interests of those subject to the criminal process than the expansionist policies pursued prior to the *S and Marper v United Kingdom* judgment.⁸⁷ At the fourth limb of the proportionality analysis, the courts are required to consider the extent to which the measures strike a fair balance between the Government's objectives and the privacy interests of the individual. This involves a clear and full recognition of the rights of the individual; the recognition of the importance of pursuing the objective; and an assessment as to whether the pursuit of the objective can justify limiting the individual's rights.⁸⁸

In the abstract, the right to respect for private life, and the prevention and detection of crime are of equal constitutional importance. There is as little to be gained from living in a society where wanton disorder and criminality are the prevalent norm, as there is from living in a dystopian surveillance society, where the autonomy and dignity of the individual can be disrespected at will by state authorities. Thus, the two considerations must compete on equal terms.⁸⁹ In assessing the seriousness of an interference, it is necessary to consider the facts of the particular case. However, some general principles have emerged from the analysis so far. First, wherever the police retain the DNA or fingerprint data of an individual as part of a criminal process this will be sufficient to engage art.8(1). Though not to be mistaken for a

⁸⁷ C. McCartney, "The DNA Expansion Programme and Criminal Investigation" (2006) 46 *Brit. J. Criminol.* 175.

⁸⁸ M. Klatt and M. Meister, *The Constitutional Structure of Proportionality* (Oxford: Oxford University Press, 2012) p.157.

⁸⁹ In this respect see *Campbell v MGN Ltd* [2004] 2 AC 457; [2004] 2 W.L.R. 1232; [2004] E.M.L.R. 15; [2004] H.R.L.R. 24 at [113].

trivial matter, let us call this baseline measure a “light” interference with art.8(1). Other circumstantial factors may increase the seriousness of the interference. The length of the retention and the age of the arrested or charged person at the time the data is collected are obvious examples. Thus, whilst any non-conviction retention can be said to constitute at least a “light” interference with art.8(1), the extent of this interference may increase based on the circumstances of a particular case.

The second stage of the exercise requires the relevant court to determine the weight of the objective pursued through the use of the interfering measure. Any measure which pursues one of the legitimate aims stated in art.8(2) is at least serious enough to compete with the weight of an interference in the metaphorical balancing exercise. However, in ascertaining the weight that should properly be attached to a particular objective pursued through the interference, much turns on the facts of a particular case and a determination of the risk of future offending posed by the non-convicted person, which might be prevented or detected through DNA or fingerprint retention. Like with an assessment of the weight attached to an interference, two broad factors must be considered: the importance of the objective to achieving the aim, and the certainty with which the objective will be realised through the use of the measure. As the proposals in the PoFA do not provide for an assessment of the latter in each case where the police seek to retain such data, and as there are demonstrably cases where, absent such an assessment, non-convicted arrested or charged persons who pose no more risk than other non-convicted citizens will arbitrarily have their DNA or fingerprint data retained for long periods of time,⁹⁰ the measures cannot be said to strike a fair balance between the need to prevent crime and the art.8 rights of such non-convicted persons.

⁹⁰ It does not take a great imaginative leap to conceive of situations arising where the innocence of an individual charged with a qualifying serious offence is subsequently put beyond dispute. For example, where an individual’s alibi is confirmed post-charge, or where it is conclusively found that a false allegation has been made.

Conclusions

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 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.