

17 November 2009

**Equality and
Human Rights
Commission**

Secretary to the Committee of Ministers
Council of Europe
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Dear Secretary

Submission to the 1072nd Committee of Ministers Human Rights meeting from the Equality and Human Rights Commission regarding execution of *S and Marper v United Kingdom* - 30562/04

Further to the Equality and Human Rights Commission's submission to the Committee of Ministers' 1065th Human Rights meeting in relation to the execution of *S and Marper v United Kingdom*, the Commission would like to take this opportunity to update the Committee on the Commission's views on execution in light of the UK government's recent announcement in relation to further proposals to address the judgment.

As the Committee will be aware, on 11 November 2009 the UK government announced revised proposals for a new retention framework for DNA and fingerprints to address the judgment, to be introduced through primary legislation as soon as Parliamentary time allows. This letter sets out the Commission's ongoing concerns about the proposals in so far as they relate directly to execution of the judgment.¹

In short, the Commission is still concerned that the UK government's proposals are insufficient to comply with the judgment and that they are incompatible with the European Convention on Human Rights. In some

¹ Not all of the government's proposals regarding retention of DNA profiles and fingerprints are directly relevant to execution of *S and Marper v United Kingdom*, which related to the retention of DNA and fingerprints of individuals (children and adults) who had not been convicted of a crime. The Commission has further concerns about the extent to which the wider proposals comply with the European Convention on Human Rights and the general spirit of the judgment (i.e. the treatment of DNA profiles where there has been a conviction and new sampling powers), but these are not dealt with here.

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respects, the proposals are more proportionate, in others less. A few of the Commission's original concerns have been addressed or partially addressed, but many still apply.

Adults arrested but not convicted

The UK government proposes to retain DNA profiles and fingerprints of adults who are arrested and not convicted of any recordable offence for 6 years. This replaces the earlier proposal to retain profiles of adults convicted of serious, violent or terrorist related offences for 12 years and any other offence for 6 years.

This fails to address the Committee's decision² that 6 years for non-serious offences lacks the required level of proportionality. The Commission believes that treating adults in this category the same regardless of type of offence is too indiscriminate and lacks the required level of proportionality. It does not comply with Committee of Ministers Recommendation Rec(92)1. The Court stated that "weighty reasons would have to be put forward by the Government before the Court could regard as justified such a difference in treatment of the applicants' private data compared to that of other unconvicted people" (§123). The UK government does not appear to have met this threshold.

Children/juveniles arrested by not convicted

With the exception of children aged 16 or 17 arrested for a serious offence, the proposed provisions for children are different to those for adults. The UK government proposes that children aged 16 or 17 who are arrested for a serious offence will have their DNA profiles and fingerprints retained for 6 years (like adults) or 3 years for any other offence. All other children arrested but not convicted of any other offence will have their profiles and fingerprints retained for 3 years. This replaces the proposal to retain profiles of any child arrested for serious offence for 12 years, and any other offence for 6 years or once turned 18 (whichever is earlier).

Shorter retention periods for children and greater differentiation between children and adults are steps in the right direction. However, given that the Court found that the retention of profiles for children is especially harmful (§124) and stressed the provisions of Article 40 of the UN Convention on

² Minutes of the Committee of Ministers 1065th Human Rights Meeting, September 2009.

the Rights of the Child 1989 on the special treatment of minors in the criminal justice sphere, the Commission believes that the proposals still lack the necessary proportion.

The Commission also believes that failure to take account of offence types for under 16s lacks the necessary proportion. Treating 16 and 17 year olds the same as adults in relation to serious offences is still questionable in light of the Courts' specifications on the vulnerability of children compared with adults and the particular importance on the treatment of minors in the criminal justice system.

Evidence relied upon to support the existence of the retention periods

The UK government claims that further research *'lends support to the public protection case for retaining the DNA of those who have been arrested but not convicted of criminal offences. It suggests that we can go some way to reduce the retention periods originally proposed without compromising public protection, indicating that the chance of re-arrest, following an arrest with no further action, or individuals with no previous convictions remains higher than the chance of arrest in the general population for 6 years following the initial arrest.'*³

The UK government continues to focus on 'risk of re-arrest' as an indicator of guilt for a future offence despite the Committee's view that relying on such research is insufficient to justify retention periods that do not appear to be in conformity with the Court's judgment.

Focussing on 'risk of re-arrest' contrasts strongly with the Court's concern about "the risk of stigmatisation [and] ... the right of every person under the Convention to be presumed innocent includes the general rule that non suspicion regarding the innocence of an accused may be voiced after his acquittal." (§122).

Samples and profiles taken prior to the judgment

No further information has been published about the treatment of legacy profiles. The way in which an estimated 500,000 profiles, which cannot be linked to a police record, will be handled is unclear. The Commission

³ Written Ministerial Statement of the Secretary of State for the Home Department November 2009

agrees with the Committee that where the proposed retention periods are disproportionate, the retrospective application of those retention periods to legacy profiles would be equally inappropriate.

Retention of fingerprints

The proposals for retention of fingerprints are the same as those for the retention of DNA profiles on the grounds that the UK government is not aware of evidence which suggests a different retention period should apply. The Commission has fewer concerns about the retention of fingerprints as they contain far less personal information than DNA profiles and samples and the Court acknowledged that the level of interference for each may be different. It is for these reasons, however, that the Commission would question the justification for retaining profiles for as long a period of time as fingerprints.

Retention of DNA and fingerprints on national security grounds

The UK government proposes that 'material taken under any regime (including the Terrorism Act 2000), would be able to be retained beyond the 6-year point where there is a case for doing so on the basis of a case by case review on national security grounds. This would require a review by a senior police officer every two years.

The Commission is concerned regarding the proportionality of such proposals, particularly bearing in mind the wide ambit of offences under the Terrorism Acts, and particular concerns that have been expressed regarding the range of some offences, such as glorifying terrorism. In addition the Commission is concerned regarding the high numbers of persons who have been arrested under counter terrorism legislation, and the relatively few number of convictions that have resulted. Finally the Commission is concerned that the impact of counter terrorism legislation, and therefore these provisions may disproportionately affect Muslim communities.

It is unclear whether a decision to retain material obtained in this context would also be subject to appeal either to a Magistrates court as is now proposed in relation to retention of other profiles and fingerprints or to some other independent body. The Commission believes that this should be the case in light of the above.

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It is proposed that a similar policy apply to juveniles 'but would take account of the differential treatment proposed for juveniles more generally.' It is unclear what this would mean for children in practice and further information is therefore required.

Yours sincerely,



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