

Interview

DNA Retention, Human Rights, and the Landmark Decision That Underpinned the EU AI Act

An Exclusive Interview With Legal Aid Peter Mahy

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■ **HAVE YOU EVER** wondered what governments that collect deoxyribonucleic acid (DNA), do with the data? In 2009, I completed a Masters in the Faculty of Law at the University of Wollongong Australia, exploring the impact of DNA storage in all its forms (Figure 1). Encouraged by my thesis supervisor, Associate Professor Clive Harfield, formerly of the Center for Transnational Crime Prevention (CTCP) at UOW, I investigated the S and Marper case [1], [4].

S and MARPER v U.K. (2009) 48 EHRR 50

The European Court of Human Rights (ECtHR) ruling of S and Marper v U.K. has had major implications on the retention of DNA samples, profiles, and fingerprints of innocents stored in England, Wales, and Northern Ireland. In its attempt to develop a

comprehensive national DNA database (NDNAD) for the fight against crime, the U.K. Government came under fire for its blanket coverage of the DNA sampling of its populace. Figures indicate that the U.K. Government retains a highly disproportionate number of samples when compared to other nation-states in the Council of Europe (CoE), and indeed anywhere else in the world.

In 2001, Section 64(1A) of the Police and Criminal Evidence Act 1984 (the PACE) was substituted with Section 82 of the Criminal Justice and Police Act. The change to legislation meant that a suspect of a crime would have their fingerprints and samples permanently stored on the police national computer (PNC) even after having been acquitted or never charged with any crime, giving the police somewhat indiscriminate powers to collect DNA samples. Recordable offenses for which DNA could be obtained under U.K. laws in 2010 included crimes that carried a custodial sentence not excluding petty misdeeds such as begging, being under the influence of alcohol, or acting in a disorderly fashion.

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Figure 1. DNA as the fundamental element of a human being. Image by Gordon Johnson from Pixabay.

ECtHR ruling

The Grand Chamber of the ECtHR unanimously judged that the indefinite retention of DNA samples of innocent people was an interference with the right to respect for private life pursuant to Article 8(1) of the European Convention of Human Rights (ECHR).

The ECtHR's conclusion was that the English legislation failed to "strike a fair balance between the competing public and private interests" which ultimately narrowed the margin of appreciation left to the U.K. when compared to the strong consensus of other contracting states who set limits on the retention of DNA samples and profiles and fingerprints. The ECtHR emphasized that "any State claiming a pioneering role in the development of new technologies bears special responsibility for striking the right balance in this regard."

The ECtHR judgment placed the U.K. Government in the precarious position of needing to roll back police powers, considering what to do with existing DNA samples of innocents (and the convicted for that matter), the need to consult the public and nongovernment organizations (NGOs), and bringing laws and guidelines into step with proposed changes.

The complexity of what was needed at the time to adhere to the Strasbourg ruling, and the confusion related to what changes needed to be made

and how they would be instituted, should not be understated.

The U.K. media reported on the S and Marper case extensively since 2001 but has been particularly active since the ECtHR ruling on the 4th of December 2008, acting to place increased pressure on the U.K. Government. But more than that, some 15 years later, the outcome of the S and Marper case has been influential in underpinning aspects of the EU Artificial Intelligence Act 2024, particularly with respect to Art 29a(1) that describes the role of fundamental rights impact assessment (FRIA) with respect to high-risk artificial intelligence (AI) systems [1].

This exclusive interview with legal aid lawyer Peter Mahy of Howells LLC conducted via teleconference on 10th October 2009 provides a lawyer's journey representing S and Marper first through the Administrative Court ruling, then the Court of Appeal, and onward the House of Lords, all the way to the judgment of the European Court of Human Rights, presenting diverse insights that have not been previously documented.



Peter Mahy received the law degree from The Sheffield University, Sheffield, U.K., and an M.Phil. degree in criminology from the University of Cambridge, Cambridge, U.K. He was made a partner at Howells in 2002 and appointed Managing

Partner in 2011 with responsibility for strategic planning and operational running of the firm. He is an Experienced Specialist in administrative and public law, civil liberties, human rights, and police law. He has acted in many high-profile landmark cases and has conducted cases before all levels of courts. He has appeared on national television and radio and has been a keynote speaker at conferences. He has been the Times Lawyer of the Week and a Legal Aid Lawyer of the Year. As well as Managing Partner, he is the Head of the Civil Liberties Department who act for clients in a wide range of civil liberties issues.

THE DECISION TO release an excerpt of that 2009 interview conducted between Michael and Mahy [see the Appendix in the supplementary material] has been triggered by the widespread references to the S and Marper case in so many recent publications with respect to the new EU AI Act 2024 legislation (e.g., [3]). ■

References

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