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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **22/11/2007**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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AN APPLICATION BY JR14 (CRIMINAL CAUSE OR MATTER)

FOR JUDICIAL REVIEW

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WEATHERUP J

[1] This is an application for Judicial Review of a decision of the Police Service of Northern Ireland not to destroy fingerprints, photographs and DNA samples which have been obtained from the applicant after his arrest on 6 March 2007. A preliminary issue arises as to whether the application constitutes a "criminal cause or matter" for the purposes of Order 53 Rule 2. Mr Sayers appeared for the applicant and Mr McMillan appeared for the respondent.

[2] Order 53 Rule 2 provides for a Divisional Court of two or more Judges to hear a case involving a criminal cause or matter. If the matter is heard by a Divisional Court then an appeal from the decision goes directly to the House of Lords and not to the Court of Appeal in Northern Ireland.

[3] The applicant is 15 years old and he was arrested and detained on the 6 March 2007 and 13 April 2007. The arrest and detention have been found to be unlawful. Judicial Review proceedings were instituted and the result was an Order of certiorari made by a Divisional Court on the 22 May 2007quashing the decision to arrest the applicant.

[4] While in police detention the applicant's fingerprints, photographs and DNA samples were taken (for shorthand I refer to "the samples"). Following the quashing of the decision to arrest the applicant his solicitor sought confirmation from the police that all samples taken in relation to the applicant would be destroyed. By letter of 17 September 2007 the police replied to the effect that the policy, in line with the Criminal Justice and Police Act 2001, was to retain all fingerprints taken from those who are or have been suspected of involvement in a crime and the same general principle applies in relation to all the samples. Members of the public from

whom samples had been taken had to apply and establish that the general policy should be disapplied. The Chief Superintendent who decided the issue in relation to the applicant concluded that a case had not been made out that warranted destruction of the samples taken on the 6 March 2007 and therefore the samples would be retained.

[5] In Marper v The Chief Constable of South Yorkshire Police [2004] UKHL 39 the House of Lords rejected a challenge to the legislative provisions in relation to the detention of fingerprints and samples and therefore the general policy is lawful. The issue has been referred to the European Court of Human Rights. An admissibility hearing on the 16 January 2007 concluded that the matter was admissible and therefore the case is pending before the ECtHR.

[6] In this jurisdiction McCrory's Application was lodged on 28 February 2007 and raised a challenge to the decision of the Police Service refusing to destroy fingerprints and samples. McCrory's Application was adjourned pending the conclusion of Marper in the ECtHR.

[7] Now this application has been lodged. The applicant contends that this application differs from McCrory's Application in that the arrest that facilitated the taking of the fingerprints and the samples has been found to be unlawful.

[8] While the arrest of the applicant was found to be unlawful, the file in his case is with the Public Prosecution Service to determine whether criminal charges are to be preferred against the applicant. The samples may yet be relevant to the possible charges or to other matters.

[9] What is a criminal cause or matter? I define the test in these terms - Is the application before the Court ancillary or incidental to a substantive process which places the applicant at risk of a criminal charge or punishment before a Court?

[10] There are a number of steps to be taken in applying the test. First of all, it is necessary to distinguish between, on the one hand, the particular application that is before the Court and on the other hand the underlying substantive process in which the applicant has become involved. In the present case the application is for an Order for the destruction of the samples and the underlying substantive process is the police investigation which involved the arrest and detention of the applicant.

[11] Secondly, it is necessary to determine whether the underlying substantive process may lead directly to a charge or punishment before a Court. Thirdly, it is necessary to establish whether the particular application which has been made to the Court is ancillary or incidental to that substantive process.

[12] There are three cases to which I propose to refer. In Clifford and O'Sullivan [1921] 2 AC 570 the appellants, who were civilians, were tried by a military court held under the authority of the Commander in Chief in Ireland on the charge of

improperly carrying arms and were convicted and sentenced to death, subject to confirmation. The appellants applied to the Chancery Division for a Writ of Prohibition against the military court and the Commander in Chief to prohibit them from proceeding further with the trial of the appellants or carrying out the execution on the grounds that the court was illegal and had no jurisdiction to deal with the matter. This raised the issue as to whether it was a criminal cause or matter. It was held that it was not a criminal cause or matter because the proceedings before the military court could not be in any sense described as criminal proceedings as that expression was generally understood and therefore it was not a criminal matter. The Court laid down some general guidance in relation to criminal cause or matter (page 580) -

> "…. in order that a matter may be a criminal cause or matter it must, I think, fulfil two conditions where are connoted by and implied in the word 'criminal'. It must involve the consideration of some charge of crime, that is to say, of an offence against the public law …. and that charge must have been preferred or be about to be preferred before some Court or judicial tribunal having or claiming jurisdiction to impose punishment for the offence or alleged offence."

[13] Amand v Home Secretary [1943] AC 147 involved a Netherlands subject who was resident in England and who was arrested as an absentee without leave from the Netherlands' army. He was taken before a Magistrate with a view to being handed over to the Netherlands' military authorities. He applied to the Divisional Court for a Writ of Habeas Corpus. The matter was found to be a criminal cause or matter and the Court of Appeal had no jurisdiction to hear the appeal. At page 156 it is stated by Viscount Simon:

> "It is the nature and character of the proceedings in which habeas corpus is sought which provide the test. If the matter is one the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so, the matter is criminal. This is the true effect of the two conditions formulated by Viscount Cave in Clifford and O'Sullivan."

[14] Cuoghi v The Governor of Brixton Prison [1977] 1LR 1347 was an extradition case where proceedings were brought by the government of Switzerland. The applicant applied for a Writ of Habeas Corpus and obtained an order ex parte for the issue of a Letter of Request to the authorities in Switzerland for assistance in obtaining evidence in support of his application. The preliminary question was whether the order on the ex parte application for assistance to require evidence was made in a criminal cause or matter. The first question asked by the Court was "Do

the extradition proceedings fall within the statutory expression criminal cause or matter?" to which the Court stated that the answer was unquestionably, yes. The second question was "Does an application for Habeas Corpus made in extradition proceedings fall within the statutory expression?" and again the answer was yes. The third question was "Does an order relating to the obtaining evidence for the purposes of a Habeas Corpus application in extradition proceedings fall within the statutory expression?" and again the answer was yes for the following reasons -

> First, it is a clear principle to derive from the authorities I have already mentioned that if the main substantive proceedings in question are criminal, proceedings ancillary or incidental thereto are similarly to be treated as criminal: hence the clear rule that habeas corpus applications incidental or ancillary to extradition proceedings are regarded as criminal because extradition proceedings are so regarded. To avoid any possibility of confusion, I should emphasis that in using the words 'incidental or ancillary' I am not intending to propound any new or difference test, but to express the gist of what I understand the authoritative test or tests to be.

[15] Finally, another case much closer to home and much closer to the facts of this case is Moore and Pooles Application [2005] NIQB. On applications for Judicial Review of decisions of the Police Service of Northern Ireland not to destroy fingerprints and DNA samples Girvan J was faced with the issue as to whether or not it was a criminal cause or matter. At paragraph 18 it was stated -

> "I conclude that these applications do not constitute criminal causes or matters. The applicants seek to challenge decisions relating to the retention and destruction of samples that are no longer of relevance to any pending charges. The samples were taken in relation to investigations relating to offences, but once decisions were taken that resulted in the discontinuance of proceedings against Moore and the acquittal in the case Poole, the question of the applicant's rights, if any, would demand destruction of the samples and fingerprints raised matters of civil, not criminal law."

[16] I draw attention to two particular facts upon which Mr Justice Girvan relied in reaching that conclusion. First, that the samples were no longer relevant to any pending charges and secondly that decisions had been taken to discontinue proceedings against one defendant and to acquit the other defendant. Further, I draw attention to the facts of the present case where the papers are before the Public

Prosecution Service for direction on charges relating to matters for which the applicant was arrested. Secondly, there is the prospect that the samples that have been obtained may be relevant to the possible charges.

[17] I return to the test formulated above and the three stages to be considered. First of all, as noted above, the particular application before the Court is for the destruction of the samples and the underlying substantive process is the police investigation that involved the arrest and detention of the applicant.

[18] The second stage is to establish whether the underlying substantive process may lead directly to the conviction or punishment of the applicant by a Court. As that process involves the possibility that criminal charges will be preferred against the applicant on the direction of the Public Prosecution Service the answer is that the applicant remains at risk of conviction and punishment by a Court. Accordingly the underlying substantive process is a criminal cause or matter.

[19] The third stage is to establish whether the application which is before the Court is ancillary or incidental to that underlying substantive process. The application for an Order for the destruction of the samples is ancillary and incidental to the substantive process as the former arises out of the circumstances of the latter. As there remains the risk of conviction or punishment in the substantive process the application that is ancillary and incidental to that process is a criminal cause or matter.

[20] According, it is my conclusion that this application for judicial review involves a criminal cause or matter and should be dealt with by a Divisional Court.