Retention by police of samples and fingerprints – whether legitimate expectation that they would be destroyed – whether decision to retain unlawful – whether decisions to retain properly made – nature of expectation

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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY PAUL ALBERT MOORE FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY THE CRIMINAL INVESTIGATION DEPARTMENT OF THE POLICE SERVICE OF NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY JOSEPH RONALD POOLE FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE POLICE SERVICE FOR NORTHERN IRELAND

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GIRVAN J

Introduction

[1] These two judicial review applications raise similar issues, the central question being whether the decisions by the Police Service of Northern Ireland ("the PSNI") not to destroy fingerprints and DNA samples taken from the applicants were bad in law.

The decision relating to Paul Albert Moore

[2] The applicant Moore was arrested on 1 April 2001 in relation to a serious assault and attempted murder in respect of Trevor Thomas Lowry

who subsequently died. The alleged assault occurred on the night of 31 March/1 April 2001 and the applicant was detained in custody until 5 April 2001. During the course of the police investigations DNA samples, fingerprints and photographs were taken from the applicant with his consent.

[3] The form dated 1 April 2001 entitled "Appropriate Consent to Provide Sample" recorded that Moore was requested to provide a sample of head hair, nail clippings and buccal swabs in connection with attempted murder "to assist in proving – disproving involvement in a serious assault on Mr Lowry on 31 March 2001." The form went on to state:

> "I have been told that a sample may be the subject of a speculative search and also that it will form part of a computerised collection and as such may be used by police forces for identification and crime investigation purposes. (*Delete if inapplicable*).
>
> I have been told that, except as provided by Article 64 of the above legislation, if –
>
> (a) I am prosecuted for the offence and cleared; or
>
> (b) I am not prosecuted or cautioned;
>
> The sample will be destroyed and that I may be issued with a certificate confirming the destruction if I apply for it within five days of being cleared or informed that I will not be prosecuted or cautioned."

The form concluded with the signed consent of the applicant.

[4] Fingerprints were taken on 4 April 2001 and an appropriate consent from Moore was filled in on that date. He was likewise informed that the fingerprints would be destroyed if he was not prosecuted for the offence or cautioned or if was prosecuted for the offence and cleared.

[5] The applicant was charged with murder on 23 May, but subsequently on 14 September 2001 the charge of murder was withdrawn. On 14 September 2001 his solicitor wrote to the police and "in accordance with the provisions of PACE" asked for confirmation that his fingerprints, photos and DNA samples had been destroyed.

[6] By a letter dated 14 November 2001 Detective Inspector Templeton who had been the investigating officer stated that the applicant's fingerprints and DNA samples would not be destroyed and that they would be retained "as per section 82 (sic) of the Criminal Justice and Police Act 2001 which

amends section (sic) 64 of PACE". The reference to section 82 should have been to section 83 of the 2001 Act and the reference to section 64 of PACE should have been a reference to Article 64.

[7] According to the first affidavit of Detective Inspector Templeton in making the decision not to destroy the samples and fingerprints he was "aware of and took into account all of the circumstances of the applicant's case including the withdrawal of the charge against him, his past clear record and his refusal to consent to the retention of his fingerprints and samples". He also said that he had regard to and took into account his obligations under the Human Rights Act 1998 and the provisions of PACE as amended by section 83 of the 2001 Act. He asserted that the applicant and two others remained the subject of investigation into the murder of Mr Lowry and that low copy DNA testing was ongoing in England in relation to the case with the view to identifying further suspects including the applicant. In a second affidavit sworn in May 2001 Mr Templeton stated that he was aware that section 83 provided the police with a discretion (though he does not state how or when he was made aware of the legal meaning of section 83). He stated that he considered the exercise of his discretion in accordance with the circumstances of the applicant's case together with the Chief Constable's policy of building a data base of fingerprints and samples for use in future investigations and detection of crime. He said that he took into account the fact that the applicant remained a serious suspect in relation to participation in the murder. A third affidavit was filed on the part of Mr Templeton on 24 November 2004. This affidavit followed the decision in the House of Lords in R (S) v Chief Constable of South Yorkshire Police and R (Marper) v Chief Constable of South Yorkshire Police [2004] 1 WLR 2196, (sometimes compendiously called "the Marper case".) That decision upheld the provisions of section 82 of the 2001 Act (and by extension of section 83) as being compatible with Article 8 of the Convention and held that a policy of retaining fingerprints and samples of all those who had been required to provide them was lawful. In the third affidavit Mr Templeton said he reviewed his decisions. He said he re-considered the circumstances in which the applicant gave his consent for the taking of fingerprints and samples and had taken into account that it might reasonably be said that his consent may have been induced by the terms of the printed forms. He also took account of the public interest in the enlargement of the data bank available in respect of fingerprints and DNA samples. His conclusion was that the facts in favour of retention outweighed any expectation of the applicant that they would be destroyed. He asserted that he was leaving out of account the applicant's clear record and any suspicions of involvement in the murder.

[8] In an affidavit sworn by the District Commander of the Newtownabbey District Command, the area within which the murder occurred, was filed. This affidavit did not explain how it came about the Divisional Commander was now involved in a decision already made by Mr

Templeton. It emerged, however, in the course of argument at a somewhat late stage and as a result of some probing by the court that there was in place a Force Order issued apparently in February 2003. In the introduction to the Force Order it is recorded that the PSNI policy in line with section 83 of the 2001 Act would be to retain all fingerprints and samples taken from those suspected of involvement in crime. Paragraph 1(2) of the Order stated:

> "(2) The Police Service of Northern Ireland policy in line with the legislation will be to retain all fingerprints and samples taken from those suspected of involvement in a crime. This applies to both adults and juveniles. References to fingerprints include palm prints.
>
> (3) Members of the public, from whom fingerprints and/or samples have been taken may apply to have this policy overturned in their specific case. Each case should be considered in the light of the circumstances it discloses. The onus is on the person seeking destruction to justify why there should be an exception to the general policy of retention. This general order sets out the process to be followed."

Paragraph 2 of the Force Order in relation to fingerprints states that the District Commander will be the appropriate person to decide whether or not fingerprints should be retained or destroyed. Circumstances which could justify destruction might be where the fingerprints were taken in error or under a misapprehension as to who the donor was.

Paragraph 3 applied the same approach in relation to samples.

[9] The District Commander in his affidavit states in paragraph 3 and 4 of his affidavit:

> "3. In addressing again this request I have considered all the information I have available to me and have re-read the totality of the representations which the applicant through his solicitor has made. I have also considered the papers in this judicial review. I have, in particular, considered the circumstances in which the applicant gave his consent to the taking of fingerprints and samples and have taken into account that it may be reasonably said that his consent may have been induced by the terms of

> the printed forms which he signed by the references therein to the fingerprints and samples being destroyed in certain eventualities. I have also taken into account the public interest (affirmed by the House of Lords) enlargement of the databases available in respect of fingerprints and DNA samples.
>
> 4. The conclusion of my consideration is that the factors in favour of retention of fingerprints and samples outweigh in particular any expectation the applicant may have derived that the fingerprints and samples would be destroyed."

The decision relating to Joseph Ronald Poole

[10] The applicant Poole was involved on 17 August 1999 in an incident which led to charges of dangerous driving, assault and obstruction to the police in the execution of their duty and resisting arrest. During the police investigation he was asked to supply fingerprints and a DNA sample. He consented giving his consent in identically worded pro forma to the documents used in the case of Moore. He stated in his affidavit that he gave his consent "on the basis" that the sample and prints would be destroyed if he was cleared or if not prosecuted. Although convicted in the Magistrates' Court on appeal to the County Court he was acquitted on 11 September 2001.

[11] Following his acquittal on appeal the applicant requested the police to destroy the samples and fingerprints. His solicitors wrote to the police on 12 September 2001. On 20 September 2001 the police stated that the relevant forms had been completed and forwarded to the relevant department and that the applicant would be contacted once the samples had been received so that he could witness their destruction. Subsequently, however, the police wrote on 6 November 2001 stating that following the coming into force of the 2001 Act on 11 May 2001 there was no obligation to destroy the sample and fingerprints. The photographs would however be destroyed.

[12] The actual decision not to destroy the fingerprints appears to have been made by Geoffrey Logan the senior fingerprint officer, whose decision is recorded in the document apparently signed on 19 October 2001. This decision records the amendment of Article 64 by section 82 (sic) of the 2001 Act and stated that the obligation to destroy fingerprints and samples were replaced by a rule to the effect that any fingerprints or samples taken on suspicion of involvement in an offence could be retained. On 23 October 2001 Fiona Purdue of the Forensic Science Laboratory wrote to the police at Tandragee in similar terms in respect of the DNA sample stating that no action would be taken about the DNA samples.

[13] In an affidavit sworn 24 January 2005 Chief Inspector McClean stated that as deputy to the Sub-Divisional Commander he was asked to consider the papers to consider the decision taken by Geoffrey Logan and Fiona Purdue of the Forensic Science Laboratory not to destroy the applicant's fingerprints and DNA samples. The deponent reconsidered the decision on the light of the House of Lords decision in the Marper case. In paragraph 3 of his affidavit he stated that having considered all the information made available to him and that the totality of the representations which the applicant had made to his solicitor and having regard to the circumstances in the applicant gave his consent to the taking of the fingerprints and samples and having taken into account that it may reasonable be said that his consent may have been induced by the terms of printed form which he signed he concluded that the factors in favour of retention of the fingerprints and samples outweighed any expectation that the applicant might have had that its samples would in the circumstances which transpires be destroyed.

The relevant statutory provisions

[14] As originally enacted Article 64(1) and (2) of PACE provided so far as material:

> "64.-(1) If –
>
> (*a*) fingerprints or samples are taken from a person in connection with the investigation of an offence; and
>
> (*b*) he is cleared of that offence,
>
> they must be destroyed as soon as is practicable after the conclusion of the proceedings.
>
> (2) If –
>
> (*a*) fingerprints or samples are taken from a person in connection with such an investigation; and
>
> (*b*) it is decided that he shall not be prosecuted for the offence and he has not admitted it and been dealt with by way of being cautioned by a constable,
>
> they must be destroyed as soon as practicable after that decision is taken."

[15] Article 64(1) and (2) were amended by insertions effected by section 83 of the 2001 Act. For paragraphs 1 and 2 of Article 64 as originally enacted there are substituted new paragraphs 1A and 1B which provide as follows:

> "(1A) Where –
>
> (a) fingerprints or samples are taken from a person in connection with the investigation of an offence; and
>
> (b) paragraph (3) does not require them to be destroyed,
>
> full fingerprints or samples may be retained after they have fulfilled the purposes of which they were taken but shall not be used by any person except for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution.
>
> (1B) In paragraph (1A) –
>
> (a) the reference to using a fingerprint includes a reference to allowing any check to be made against it under Article 63A(1) and to disclosing it to any person;
>
> (b) the reference to using a sample includes a reference to allowing any check to be made under Article 63A(1) against it or against information derived from it and to disclosing it or any such information to any person;
>
> (c) the reference to crime includes a reference to any conduct which –
>
> (i) constitutes one or more criminal offences (whether under the law of a part of the United Kingdom or of a country or territory outside the United Kingdom); or
>
> (ii) is, or corresponds to, any conduct which, if it all took place in any

> one part of the United Kingdom, would constitute one or more criminal offences;
>
> and
>
> (d) the references to an investigation and to a prosecution include references, respectively, to any investigation outside the United Kingdom of any crime or suspected crime and to a prosecution brought in respect of any crime in a country or territory outside the United Kingdom."

Section 83(6) states that the fingerprints and samples, the retention and use of which in accordance with the amended provisions of Article 64 was authorised by the provision, included fingerprints and samples the destruction of which should have taken place before the commencement of the section but had not been and information deriving from any samples or from samples the destruction of which did take place in accordance with that article before the commencement of the section. The new legislation took effect on 11 May 2001.

The relevant samples in the present cases were taken before that date. The decision not to prosecute the applicant Moore was taken after 11 May 2001 and the applicant Poole's acquittal occurred after that date. The current applications raise questions as to the proper approach to be taken by the police in relation to the decisions whether to destroy or retain samples taken before 11 May at a time when suspects were told that their samples and fingerprints would be destroyed if they were cleared or a decision was made not to prosecute.

A criminal cause or matter?

[16] In the course of the hearing a question arose as to whether the application constituted a criminal cause or matter for the purposes of Order 53, rule 3(1). If the applications did then they should have been heard by a Divisional Court although both the respondent and the applicants' counsel in the cases agreed that a single judge could hear the matter if it was indeed a criminal cause or matter. The point as to whether or not the applications gave rise to a criminal cause or matter is not entirely academic given the different appeal routes which arise in the applications are criminal.

[17] It is sometimes a matter of some nicety as to whether a matter is a criminal cause or matter. In Clifford and Sullivan [1921] 2 AC 570 at 580

Viscount Cave gave his view of what was suggested by the words criminal cause or matter contained in the Supreme Court of Judicature (Ireland) Act 1877.

> "In order that a matter may be a criminal cause or matter it must, I think, fulfil two conditions which are connoted by and implied in the word 'criminal'. It must involve the consideration of some charge or 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. …."

In Amand v Home Secretary [1943] AC 147 Viscount Simon stated:

> "The decisions … involved the view that the matter in respect of which the accused is in custody may be criminal although he is not charged with a breach of our criminal law, and (in the case of the Fugitive Offenders Act), although the offence would not necessarily be a crime at all if committed here. It is the nature and character of the proceedings in which habeas corpus is sought which provides the test. If the matter is one the direct outcome of which may be a trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so, the matter is criminal."

In Cuoghi v Governor of Brixton Prison [1997] 1 WLR 1353 Lord Bingham CJ at 1354 stated:

> "It is a clear principle to be derived from the authorities … that if the main substantive proceedings and question are criminal, proceedings ancillary or incidental thereto are similarly to be treated as criminal …. To avoid any possibility of confusion I should emphasis that, using the words 'incidental or ancillary' I am not intending to propound any new and different test, but to express the gist of what I understand the authoritative test or tests to be."

It is noted that in Marper's case itself it appears to have been accepted by all parties that the judicial review which challenged the lawfulness of the retention of samples and fingerprints under the 2001 Act was a civil matter.

[18] 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 of Poole, the question of the applicants' rights, if any, to demand destruction of the samples and fingerprints raised matters of civil not criminal law. The current judicial review applications are not ancillary or incidental to any criminal proceedings.

The parties' contentions

[19] Mr Larkin QC on behalf of Moore and Mr Scoffield on behalf of Poole made essentially the same submissions. The central proposition was that the applicants had a clear substantive legitimate expectation that the samples and fingerprints would be destroyed. The assurance given was unambiguous and was relied on in each case. The respondents could identify no factors or combination of factors to "trump" the applicants' substantive legitimate expectation that the commitment to destroy the samples would be honoured. Mr Larkin QC contended that Detective Inspector Templeton was irredeemably biased by the time he reviewed his decision recorded in the third affidavit. The decision-makers had failed to give consideration to the applicants' legitimate expectations. Prior to the decisions made by the Divisional Commanders, the decision-makers, had failed to appreciate that there was no obligation on the police to retain fingerprints and consequently a discretion to destroy. The most recent decision-makers had applied the wrong tests starting from a presumption of destruction. They simply weighed various factors in the balance and decided what they considered to be preferable. It would be a clear abuse of power for the respondents to frustrate the applicants legitimate expectations.

[20] Mr Maguire on behalf of the Crown argued that the contents of the consent forms added nothing to what was already the effective entitlement to destruction of the samples provided for in Article 64 of PACE as originally enacted. The expectation was based on a standard form. All the applicants could derive from the consent form was the belief that provided if there was no change in the underlying legal position the samples would be destroyed if the applicants were cleared or not prosecuted. There was no legitimate expectation that if the law was changed to facilitate retention of samples in cases where the sample providers had been cleared nonetheless the samples would be destroyed. If there was a legitimate expectation in this case it was a case where a the public authorities only required to bear in mind its previous policy and other representations before deciding on a change of course. The representation was in a standard form not tailored to the applicant and did not possess a quasi-contractual quality. The test to be applied took by the

court was the Wednesbury test. Even if this were a case of a legitimate expectation the court would have to determine whether it was an abuse of power for the authority to decide to retain samples. There is no abuse of power as there was a sufficient overriding interest to justify departure from what had previously been indicated. The police had properly reviewed the matter after the Marper decision and the current decisions were consistent with the approach of the House of Lords.

The Marper decision

[21] In Marper the House of Lords held that insofar as the retention of fingerprints and DNA samples under the equivalent of Article 64(1A) of the PACE constituted an interference with the appellants' right to respect for their private lives under Article 8(1) of the Convention such interference was modest and objectively justified under Article 8(2) as being necessary for the prevention of crime and the protection of the rights of others. The new scheme did not infringe Article 14. It would be unrealistic and impractical to require the police to examine each case individually. In the case before the House of Lords the policy adopted by the Chief Constable of the South Yorkshire police was to retain save in exceptional circumstances all fingerprints and samples taken from those who had been acquitted of criminal offences. In that case counsel for the appellants contended that the policy was a fetter on the discretion of the Chief Constable and argued that the only fair solution was a case by case examination of the circumstances of each case. That would involve a case by case examination of the circumstances which led to the taking of the samples and prints in respect of the alleged offence of which the individual was cleared. Lord Steyn rejected this argument since such a system would probably not confer the benefits of a greatly extended database and would involve the police in interminable and invidious disputes with individual decisions being subject to judicial review. Moreover in such a decision-making process individuals who were not eliminated. Lord Brown in his speech paragraph 86 stated:

> "Given the carefully defined and limited use to which the DNA data base 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 samples) on the data base once it has lawfully been placed there. The only logical basis I can think of for such an objection is that it will serve to increase the risk of the person's detection in the event of his offending in future. But that could hardly be a legitimate objection, nor, indeed is it advanced as such. Such objections as were suggested, however, seem to be entirely

> chimerical. First, the fear of an Orwellian future in which retained samples will be re-analysed by a mischievous state in the light of scientific advances and the results improperly used against the person's interest. If, of course, this were an added objection it would apply no less to samples taken from the convicted as from the unconvicted and logically, therefore it would involve the destruction of everyone's samples. But no such abuse is presently threatened and if and when it comes to be then will be the time to address it."

The House of Lords proceeded on the basis that the benefit of the larger database brought about by the amendment were manifest. Lord Brown stated that "the cause of human rights generally (including the better protection of society against the scourge of crime) will inevitably be better served by the database's expansion than by its proposed contraction. The larger the database the less call there will be to round up the usual suspects."

The earlier decisions

[22] The decisions taken by Mr Templeton when they were taken were flawed but have been overtaken by the decision of the District Commander who made the current decision in the light of the Marper decision and pursuant to the terms of the Force Order. Mr Templeton's affidavit of 24 November 2004 indicated that an ineffective decision had been made since he was not the proper decision-maker under the police policy set out in the Force Order, of which apparently and inexplicably the Crown solicitor was unaware when Mr Templeton was asked to provide his affidavit. His original decision referred to in his earlier affidavit of February 2002 was flawed in that he took into account the question of the applicant's clear record and the decision referred to the fact that he remained a suspect. Marper makes clear that taking those matters into account would be inappropriate.

[23] In the case of Poole the decisions were apparently made by an officer in the forensic laboratory and by a fingerprint officer. At the time of those decisions the Force Order was not in place and there was apparently no clear or formulated policy in place as to how decisions would be made in relation the retention or destruction of samples. As in the Moore's case the relevant decision is that of the person who acted on behalf of the Divisional Commander.

The current decisions

[24] In Coughlin [2001] QB 213 at paragraphs 56 and 57 Lord Woolf MR stated:

> "The starting point has to be to ask what in the circumstances the member of the public could legitimately expect …. Where there is a dispute as to this, the dispute has to be determined by the court …. This can involve a detailed examination of the promise of representation made, the circumstances in which the promise is made and the nature of the statutory or other discretion. There are at least three possible outcomes – (a) The court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it weight it thinks right but no more before deciding whether to change course. Here the court is confined to reviewing the decision on Wednesbury grounds. This has been held to be the effect of changes and policy in cases involving the early release of prisoners: see in Re Findlay, R v Secretary of State for the Home Department Ex Parte Hargreaves. (b) On the other hand the court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken. Here it is uncontentious that the court itself will require the opportunity for consultation to be given unless there is an overriding reason to resile from it, in which case the court will itself judge the adequacy of the reason advance for the change of policy, taking into account what fairness requires. (c) Where the court considers that a lawful promise or practice has induced a legitimate expectation of a *benefit which is substantive*, not simply procedural, authority now establishes that here to the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied on for the change of policy."

It is clear from the words "at least three possible outcomes" that the Court of Appeal was not purporting to lay down a definitive statement. Moreover the Court of Appeal observed that in many cases the difficult task will be to decide into which category the decision should be allotted. In determining what was an individual's legitimate expectation the court pointed out that this can involve a detailed examination of the precise terms of the promise of

representation made, the circumstances in which the promise was made and the nature of the statutory or other discretion. Moreover as Laws LJ pointed out in Ex parte Begbie [2000] 1 WLR 1115 at 1130F categories (a) and (b) are not hermetically sealed.

> "The facts of the case viewed always in their statutory context will steer the court to a more or less intrusive quality of review. In some cases a change of tack by a public authority, though unfair from the applicant's stance, may involve questions of general policy affecting the public at large or a significant section of it (including interest not represented before the court); here the judges may well be in no better a position to adjudicate save at the most on a bare Wednesbury basis, without downing the garb of the policymaker, which they cannot wear ….
>
> In other cases the act or omission complained of may take place on a much smaller stage with far fewer players. Here with respect, lies the importance of the fact in the *Coughlin* case that few individuals were affected by the promise in question. The case's facts may be discreet and limited having no implications for an innominate class of persons. There may be no wide-ranging issues of general policy, or none with multi-layered effects, upon whose merits the court has asked to embark. The court may be able to envisage clearly and with sufficient certainty what the full consequences will be if any order it makes. In such a case the court's condemnation of what is done as an abuse of power, justifiable (or rather, failing to be relieved of its character as abusive) only if an overriding public interest is shown of which the court is the judge, offers no offence to the claims of democratic power."

[25] At the time the fingerprints and samples were taken from the applicants Article 64 in its original form stated clearly what would happen in the event of an acquittal or non-prosecution. The consent form signed by the applicants recorded that the applicants were informed what the legal consequences would be, namely, the destruction of the fingerprints and samples. If the form had not so stated and the police had left the applicant to obtain legal advice from the solicitors, the applicants would have been told what the law was in Article 64 as it then stood. In that latter hypothetical situation the applicants would have no basis for asserting that they had a

legitimate expectation that there would be no change in the statutory law as their rights would be governed by the law as it stood from time to time whenever the question of destruction or retention of the sample arose for determination. Having been informed by the police that the samples would be destroyed if there was an acquittal or no prosecution it is asserted and not disputed that the applicants consented to provide the samples "on that basis". The affidavits do not in terms state that they would have declined to provide the samples on consent if they had not understood that they would be destroyed. Even if they had refused to give their consent there were statutory provisions whereby the police could compulsorily obtain samples and there is every likelihood that in these cases the police would have exercised that power. It is against that legal and factual background that the question arises as to whether the applicants had a substantive legitimate expectation that the samples would be destroyed.

[26] In the present case the police did not form or formulate a policy relating to the destruction or retention of samples when the original Article 64 was in force. The police were required to obey the laws that then stood. Nor did they make a representation to the applicants, as such, save in the sense that the applicants may have concluded from the effect of Article 64 (the effect of which was explained to the applicants) that the samples would be destroyed. If an expectation arose it was from the policy of the legislation which, like all other statutes, would be subject to change dependent on the will of Parliament. I am not persuaded that in the present case the applicants could rely on a legitimate expectation as such. The law changed and the police were faced with a new policy imposed by Parliament. When the law was changed the police had to make a decision whether they should retain or destroy the applicants' samples. It was necessary to formulate a policy as to when samples might be destroyed having regard to their general entitlement to retain samples whenever taken. Eventually the Force Order set out the policy which provided for destruction in exceptional cases. Clearly persons such as the applicants were entitled to make representations as to why the samples should be destroyed. The case put forward by Moore was that they should be destroyed because he had been led to believe that they would be. This argument was taken into account by the decision-maker. The case made on behalf of Poole was similar with the added argument that he had been led to believe by a letter after the new provision had taken effect that his samples would be destroyed. The decision-maker in that case took the argument into account. Having analysed the reasons set out in the decision-makers affidavits there is nothing to indicate that the decision-maker erred in law or acted irrationally in coming to the conclusions reached.

[27] If contrary to the view expressed in paragraph 25 there was a representation by the police that they had a policy of destroying samples which they would apply to the applicants' samples and if that give rise to a legitimate expectation the question arises as to whether it was a category (a)

expectation or a category (c) expectation. If it was category (a) legitimate expectation then the decision could not be categorised as Wednesbury unreasonable. If one accepts the argument of the applicant that there was a legitimate expectation that the samples would be destroyed, the change of tack by the police impelled by the new legislation involved a question of general policy affecting the retention of samples taken by the police both before and after the change in the law. While the change in the law did not affect the public generally, it affected all persons whose samples had been taken before and after 11 May 2001, not an insignificant section of the public. The Coughlin (c) category of cases relates to a limited identifiable category of persons where giving effect to the substantive legitimate expectation had no implications for an innominate class of persons. To categorise as an abuse of power the decision by the police to retain the samples under the 2001 Act would be unjustifiable having regard to the clear statutory change of policy affected by the legislation, the express provision that the new law applied to samples whenever taken and the fact that all persons, where samples were taken under the old law had a statutory expectation of destruction whether they were informed of the right or not. The Marper decision indicated the difficulty in formulating a workable scheme in the absence of a general policy of retention. Clearly once the police power to retain is seen as permissive rather than obligatory destruction may be called for in some exceptional cases. However, the mere fact that the applicants were informed of the statutory position when the samples were taken does not make their cases exceptional since it would appear that where samples were taken on consent suspects were routinely asked to sign a pro forma containing the information in relation to Article 64. The policy to apply the new legislation to all samples whenever taken set in the context of the prevailing practice that had existed before the change in the law in relation to the pro forma consents makes an argument of exceptionality unsustainable in the present instance. Furthermore there is nothing in the policy that creates any actual injustice or unfairness to the applicants bearing in mind the points clearly made by Lord Brown in Marper. In the case of Poole the letter written to him indicating that his samples would be destroyed may have led Poole to believe that they would be destroyed but before they were destroyed there was a review of that decision in the light of the Marper case. There was no suggestion of any reliance by the applicant on the representation contained in the letter and nothing rendering it so unfair for the police to take a different course that that would amount to an abuse of power.

[28] In the result I dismiss the applications.