Application nos 30562/04 and 30566/04

IN THE EUROPEAN COURT OF HUMAN RIGHTS
GRAND CHAMBER

(1) S.
(2) MICHAEL MARPER

Applicants

v.

UNITED KINGDOM

Respondent Government

INTERVENTION BY LIBERTY

Introduction

1. Liberty is grateful for the opportunity to intervene in the proceedings before the Grand Chamber. Liberty is concerned about the current state of UK law, which permits indefinite retention of DNA samples and profiles obtained from individuals who have been arrested but not charged with an offence, or charged but not convicted. Liberty also has a wider concern about the restrictive approach to Article 14 adopted by the UK courts in the domestic proceedings in the present case, which has severely diminished the protection afforded by Article 14 in cases where discrimination is alleged to have taken place on grounds of "other status".

2. Liberty was granted permission to intervene to make written submissions in the domestic proceedings in the Court of Appeal. It presented detailed arguments on e.g. the personal nature of the genetic information, drawing attention to the views and research of the Human Genetics Commission as published in its report dated May 2002*, Inside Information--balancing interests in the use of personal genetic data*. In response to the intervention the Secretary of State served the affidavit of Dr Bramley. The Court of Appeal found Liberty's intervention beneficial, particularly Waller LJ who, based on these submissions, decided that there were interferences with rights under Article 8(1): see para. 58.

3. On the Applicants' appeal to the House of Lords, Liberty successfully petitioned to intervene. But on 8th June 2004 the Treasury Solicitor, on behalf of the Secretary of State, advised Liberty that they "reserved their position" in respect of the costs of dealing with the intervention. Liberty therefore had no alternative but to withdraw, because it could not take the financial risk of an order to meet the Government's costs. Liberty's withdrawal from the Lords was particularly unfortunate, because its intervention in the Court of Appeal was the subject of close analysis by the House of Lords: see Lord Steyn at paras 15, 17, 26, 28, and 41.

4. Liberty would like the opportunity to make further observations to the Grand Chamber, as fairness requires, if the parties submit any additional evidence or observations addressing matters raised by this intervention.

5. Liberty notes the questions posed by the Court at the time of the admissibility decision. This intervention is intended to assist the Court, in particular, on the following points.

a. Applicability of Article 8(1): As to the first question posed by the Court in relation to Article 8, Liberty submits that -- whatever the position as regards fingerprints -- DNA samples and profiles constitute information about an individual's genetic identity and as such form an intimate part of a person's private life. They are analogous to medical information, and also to various kinds of information about a person's identity held by the State and which the Strasbourg institutions have long recognised as protected by Article 8(1). The private nature of this material is further explained in the evidence of Professor Sir Alec Jeffreys (**Annex A** to this Intervention) and in the Report of the Nuffield Council on Bioethics (**Annex B**), on which this Intervention makes observations.

b. Interference: As to the Court's second Article 8 questions, retention of such material by the State, in particular its retention as part of a searchable national database, amounts to an interference which the State is obliged to justify under Article 8(2). That conclusion is reinforced by:

- the Court's case-law on other kinds of gathering and retention by the State of private information about the individual, eg. the fruits of clandestine surveillance;
- the status of genetic information in a form that can, or is intended to, identify individuals as "personal data" within the Data Protection Convention. Such data are "processed" by retention in searchable form, and the data protection principles apply to ensure that the retention of the data takes place only where to do so is proportionate to its purpose and subject to adequate safeguards.
- comparative legal material from other jurisdictions, notably Canada

c. Necessary in a democratic society: As to the Court's third to sixth Article 8 questions, Liberty submits that:

- Under the proportionality test, the Court will be concerned to inquire whether there is cogent evidence that the indiscriminate retention of DNA samples or profiles from such a wide range of unconvicted individuals improves detection or prevention rates in respect of serious crime. It appears to Liberty that there is no such evidence
- A fair balance requires the retention of DNA samples or profiles without consent to be confined to those convicted of offences of appropriate seriousness. At all events, the mere fact that a person has been charged, or even simply arrested but released without charge, is not a justifiable trigger for inclusion on the database. Such a practice is contrary to Convention principles, has (as the evidence demonstrates) discriminatory implications, and falls well outside the pan-European consensus reflected in Committee of Ministers Recommendation R(92)1.
- The position under the Data Protection Convention provides a further indication that UK law and practice fail to strike a fair balance.
- The only "safeguard" of any significance, ie. one that is capable of resulting in a decision to destroy a sample or delete a profile from the database, is the "deletion" element of the ACPO guidance. The Court will wish to consider whether that has the status of "law". In any event, it is wholly inadequate as a safeguard against the risks posed by a

policy of otherwise indiscriminate retention of DNA samples or profiles from unconvicted members of the public.

d. Article 14: Liberty submits that being arrested, being charged and being convicted each amount to a "status" of an individual for the purpose of considering whether a person is subjected to a difference in treatment in the context of retention of DNA samples or profiles. Those attributes flow from the State's own conduct towards individuals, and it would undermine the effectiveness of the Convention if the Court were not able to examine the State's justification for (i) treating persons in those categories differently, as regards retention of genetic information, from persons not in those categories, and (ii) failing to treat persons who have been merely arrested or charged differently from those convicted. The House of Lords, in attempting to counterpose the concepts of "personal characteristic" and "historical fact", misunderstood the Court's Article 14 case-law and failed to give proper effect to the object and purpose of Article 14. That mistaken approach has been followed in other domestic cases, restricting the effectiveness of Article 14 in UK law.

6. Liberty makes the following detailed submissions on those points.

Applicability of Article 8(1)

The private nature of genetic material and information

7. Whatever the correct position as regards fingerprints (and Liberty has concerns about the former Commission's decision in *Kinnunen v. Finland*, 24950/94, dec. 15.5.96), DNA samples, and profiles derived from them, plainly engage the concept of private life. DNA is biological material from human cells, representing an individual's unique biological identity. It is inescapably an inherently intimate aspect of human life. Liberty respectfully agrees with the Applicants that the Court correctly analysed the position in its admissibility decision in *Van der Velden v. Netherlands* 29514/05 dec. 7.12.06 (para. 21 of the Applicants' submissions of 15.3.07), and invites the Grand Chamber to follow that approach.

8. Data derived from such material which contains significant genetic information about an individual, and which is capable or (as here) intended to identify individuals, cannot sensibly be distinguished from the material itself. The fact that a DNA sample may be obtained by a method (such as a mouth swab) that domestic law does not treat as "intimate" in no sense detracts from the private, intimate character of the information it contains. Liberty draws the Court's attention to Professor Jeffrey's statement paras. 40-43 and the Nuffield report at paras 1.12-1.13; 2.15-2.21

Analogy with medical information

9. Information about the individual's health, and treatment for ill-health, is protected by Article 8 and very assiduously so: eg. *Z. v. Finland* judgment 25.2.97, (1997) 25 EHRR 371. The Court commented at para. 95:

> *"…the protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life… Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general.*"

10. Z had been married to X, who was accused in criminal proceedings of deliberately exposing a third party, M, to a risk of HIV infection (judgment, paras 9-18). As a result, information revealing Z's own HIV status entered the public domain. That information derived from

evidence about Z's health provided in the course of the criminal investigation into X's conduct. The Court was therefore concerned not only with the confidentiality attaching to professional medical treatment (which was the original source of the information about Z's HIV status), but also with the inherent privacy interest in material capable of revealing information about the individual's health.

11. Liberty submits that material capable of revealing such information raises an equally significant privacy interest whether it comes into the hands of the authorities in the form of records of medical treatment or in some other form such as a sample obtained by the police. In determining the applicability of Article 8(1), the question is not the *purpose* for which the individual provides the material, but the inherent *nature* of the material. The evidence before the Court shows that genetic material, and the profiles derived from it, are readily capable of providing information about health, including predisposition to disease.

12. Moreover, the very fact that genetic material contains details of the composition and functioning of the individual's body – as well as about his or her ethnic and familial heritage -- gives it a necessarily private quality. These are fundamental aspects of human identity. It is not necessary to show that genetic material relates to "health", in the narrow sense of a specific medical condition, before it raises an issue of "private life".

13. Liberty also draws attention to the types of information whose special significance is recognised by Article 6 of the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, ETS 108 ("DP Convention"). That provision, titled "Special categories of data", requires that "personal data revealing racial origin… as well as personal data concerning health… may not be processed automatically unless domestic law provides appropriate safeguards". The preamble to the DP Convention expressly links regulation of processing of personal data with the right to respect for privacy. Those Council of Europe Member States who are members of the EU have given further effect to the DP Convention by adopting Directive 95/46/EC of 24.10.95 on the protection of individuals with regard to the processing of personal data etc ("DP Directive"). Article 8 –"the processing of special categories of data" – imposes extended restrictions on "the processing of data revealing racial or ethnic origin… and the processing of data concerning health…".

Analogy with other forms of informational privacy recognised by the Court

14. The Court has held the concept of "private life" applicable to a wide range of information about an individual's background, activities and beliefs which may be gathered or retained by the State. It would be strange if information about the individual's unique genetic composition were any less strongly protected by Article 8 than these species of information, eg:

- *Hewitt and Harman* v. *UK (No. 2)*, 20317/92, dec. 1.9.93, *Rotaru v Romania* 28341/95, judgment 4.5.00 – records of observations etc. by the security services
- *Hilton* v. *UK* (1988) 57 D&R 108 -- vetting of public employee for personal associations, past conduct, etc.
- *Gaskin* v. *UK* (1989) Ser. A 160 – information about childhood care arrangements held by social services
- *Roche v. UK* judgment 19.10.05 (GC) -- service records of personnel subjected to chemical weapons testing in the 1960s
- *Adamson* v. *UK*, 42293/98, dec. 26.1.99 -- registration of sex offender.

Comparative material: Canada

15. Liberty draws attention to the consistent approach taken by the Supreme Court of Canada in stressing the informational privacy associated with DNA. In *R v RC* [2005] 3 SCR 61 (**Annex C**) the trial judge had held that taking DNA from a youth would have an impact on his privacy and security interests which would be grossly disproportionate to the public interest in the protection of society and the proper administration of justice. The Court of Appeal reversed that decision. The Supreme Court reversed the Court of Appeal and upheld the trial judge. Fish J observed:

> "*Of more concern, however, is the impact of an order on an individual's informational privacy interests. In* R v Plant *[1993] 3 S.C.R. 281, at p. 293, the Court found that s. 8 of the Charter protected the `biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state'. An individual's DNA contains the `highest level of personal and private information':* R v SAB *[2003] 2 SCR 678, at para. 48. Unlike a fingerprint, it is capable of revealing the most intimate details of a person's biological makeup*."

Interference

16. Liberty considers that the retention of material obtained by the authorities amounts to an interference with Article 8 rights *over and above* the original obtaining of the material for the following reasons.

17. First, the question of retention of such information – and conversely, the question in what circumstances and at what stage information so obtained should no longer be retained – has previously been regarded by the Court as an interference with Article 8(1) rights. In *Hewitt and Harman* v. *UK (No. 2)* and *Rotaru* (above), the Court and former Commission examined under Article 8(2) the justification offered by the State for its failure or refusal to remove from its files information which it had continued to hold long after it had originally been gathered. Liberty respectfully submits that that approach is correct and should be followed by the Grand Chamber.

18. Second, such an approach is strongly supported by the DP Convention, which expressly treats the storing and retention of personal data as a specific activity which must conform to certain requirements. Hence Article 5 requires data to be "*stored for specified and legitimate purposes*" (paragraph b.) and "*preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored*" (paragraph e.). Article 7 deals with security of "*personal data stored in automated data files*". Article 8 b. gives the data subject the right to know "*whether personal data relating to him are stored*" [emphasis added].

19. Third, DNA samples, and in particular the profiles derived from them, are not "retained" in the passive sense of simply being stored, but are retained by way of incorporation into and use as part of a national database. The information is held with a view to identifying individuals who, in the event of a match with crime scene material, may be suspected of involvement in criminal activity either directly or because of a "near match" (the familial DNA issue). It is important to bear in mind that each record is processed not only when a database search reveals a match, but every time the database is searched and non-matching records eliminated from the inquiry – at least once a day. The fact that the database entries are read by automated means using a search algorithm rather than by human examination of each record does not take the process outside the scope of an interference with Article 8 rights. Indeed the definition of "automatic processing" in DPA Convention Article 2 c. includes "*the carrying out of logical operations and/or arithmetical operations on those data*". DNA profiles undergo exactly this kind of processing so long as they remain on the database.

20. Fourth, the Court has long accepted that where the State undertakes a multi-stage process involving private information obtained from an individual, each stage of the process must be attended by an adequate legal framework of safeguards, precisely because each subsequent step involving searching, selection, consultation and use of data following original acquisition itself raises an Article 8 issue.

21. Liberty refers to the long-standing line of authority on interception of telecommunications content and data and the subsequent retention and other processing and use of intercept product: eg. *Kruslin and Huvig v. France* (1990) 12 EHRR 528 & 547; *Valenzuela Contreras v. Spain* (1998) 28 EHRR 483. The principles were affirmed and summarised in the Court's recent *Weber and Saravia v Germany* decision 54934/00, 29.6.06. Para. 95 recalls that the law must set out sufficient minimum safeguards in relation to a multiplicity of matters, including in particular:

- the procedure to be followed for examining, using and storing the data obtained;
- the precautions to be taken when communicating the data to other parties; and
- the circumstances in which recordings may or must be erased or the tapes destroyed.

22. The Court reiterated that these post-interception steps are equally significant interferences with Article 8(1) as the original acquisition by interception: see para. 79.

Necessary in a democratic society

No evidence that retention of samples or profiles from persons charged but not convicted, or arrested but not charged, helps serve the aim of preventing or detecting crime

23. There is no sound evidential basis to support the supposition that the retention of samples from those never convicted (or charged) with an offence aids crime detection. Indeed that has been conceded by the Respondent Government: in 2006 the Home Office Minister acknowledged that "*As far as we are aware, there is no definitive evidence on whether persons arrested but not proceeded with are more likely to offend than the population at large*" (see generally, Nuffield Report para 4.19-4.20, 4.47-4.52; Alec Jeffreys paras 36-38).

24. The statistics used (Nuffield report para 4.50) to defend the retention of subject sample from those arrested but not convicted give no indication of the significance of the DNA in the police investigation. They do not reveal:

a. whether the suspect whose DNA matched that found at a crime scene was already known to the police or whether the DNA match led to an unknown suspect; nor conversely
b. whether the "matches" led to any subsequent arrests or convictions or were used in an investigation or court proceedings.

The statistics also conflict with those given by the Government in recent Parliamentary answers: see generally, Nuffield Report para 4.20 (the conflicting statistics in the Parliamentary answers are set out in the Nuffield Report at paras 4.47 to 4.50). As a result, the Nuffield Report concluded that "*the evidence used to support the retention regime in England and Wales is seriously limited and confusing.*": see para 4.52. The Nuffield Report recommended that independent research should be commissioned by the Home Office to

assess the impact of retention so that an informed judgment could be made (para 4.53), and that the law in England should be brought in line with Scotland: see paras 4.54 and 4.55.

25. See also the evidence of Hellen Wallace, filed by the Applicants in this case, for a further explanation why the lifelong retention of profiles for the unconvicted does not materially assist in the prevention and detection of crime.

26. Hence the "evidence" relied on by the Government to support the change of policy in 2003 fails to provide any objective or rational connection between the measure employed – the change in the law to provide for compulsory indefinite retention of material obtained from acquitted and uncharged persons -- and the legitimate aim said to be pursued.

Fair balance requires the retention of DNA samples and profiles to be confined to those convicted of sufficiently serious offences. The pan-European consensus is for retention to be confined to convicted persons, even then subject to time limits

27. There is simply no objective information available to support any suggestion that persons who are arrested but not charged, or charged but acquitted, are more likely than the general population to be associated with future criminal activity. The singling out of those categories of individual for compulsory lifelong retention of DNA material is wholly arbitrary. It also has disturbing implications in relation to other well-established Convention principles:

a. The presumption of innocence. Retention of material obtained from a person charged but acquitted casts doubt on the acquittal. At the very least it amounts to a suggestion by the State that it harbours some lingering doubt about the acquitted person's involvement in crime. As regards persons arrested but not charged, the UK position effectively creates a "presumption of propensity" which has no place in a legal system operated in accordance with Convention principles.

b. The current system of retention disproportionately affects children (Nuffield Report paras 4.67-4.72), whom the Court has always recognised deserve particular protection in their contact with the criminal justice system (eg. *T. and V. v. UK*, 24724/94 and 24888/94, judgments 16.12.99);

c. The system also has a demonstrably disproportionate impact on black and ethnic minority males, who as a group face a high statistical incidence of arrest, and hence liability to have samples taken and profiles retained: see Nuffield Report paras 4.63-4.66.

d. Liberty is also concerned about the impact on other categories of individuals who face a heightened risk of arrest, as in the case of those who participate in public protest activity in exercise of rights under Articles 10 and 11. The fact that arrest now carries with it lifelong retention of DNA material risks a "chilling" effect on the exercise of such rights.

e. The practice of using "near match" data for familial searches is unduly intrusive and disproportionate: see statement of Alec Jeffreys, paras 47-50.

28. The clear European consensus is against the practice of lifelong retention of genetic information from persons not convicted of any offence. That militates against affording the UK Government any significant margin of appreciation in relation to its current practices. Indeed the Court should insist on particularly cogent and compelling justification for the UK position.

29. Liberty draws attention to Committee of Ministers Recommendation R(92)1, para. 8 (set out in the admissibility decision), which requires that samples should not be kept beyond the final decision in the case for which they were used, unless for purposes "*directly linked*" to those for which they were taken; and that measures be taken to ensure that the results of analysis (ie. the DNA profiles) are deleted when its retention is no longer necessary for the purpose for which it was used. The only exception to the latter requirement is where "*the individual concerned*" (ie. the data subject) "*has been convicted of serious offences against the life, integrity or security of persons*". Even then, "*strict storage periods should be defined by law*".

30. The DP Convention similarly requires personal data to be retained, in a form capable of identifying the subject, for no longer than necessary to fulfil the purposes for which they are stored. Since the purpose for which the data are obtained, and rendered into digital form for storage, will generally relate to the original investigation which led to the subject's arrested or charge, it is not legitimate to "store" the data for the *new* purpose of adding to the database for future use in relation to other potential criminal activity. The data protection principles laid down by the DP Convention, and followed in the DP Directive, are closely related to the principle of proportionality under Article 8(2): see the judgment of the ECJ of 20.5.03 in *Österreichischer Rundfunk* C-465/00 [2003] ECR I-4989, paras 76 to 83. The data protection principles have particular pertinence because (as the Court observed in *Z v Finland* at para 95 in relation to the right of respect for private life):

> *The domestic law must therefore afford appropriate safeguards to prevent any such communication or disclosure of personal health data as may be inconsistent with the guarantees in Article 8 of the Convention (art. 8) (see, mutatis mutandis, Articles 3 para. 2 (c), 5, 6 and 9 of the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, European Treaty Series no. 108, Strasbourg, 1981).*

<u>The only relevant safeguard is inadequate</u>

31. Since the nub of Liberty's objection to current UK law and practice lies in the routine lifelong retention of DNA material, a safeguard cannot be relevant unless its application is capable of leading to a decision to destroy the sample or delete the profile. The only "safeguard" relevant in that sense is the document issued on behalf of ACPO entitled "Exceptional Case Procedures for Removal DNA, Fingerprints and PNC Records" (**Annex D**). That is a statement of guidance or advice to individual police forces on the exercise of discretion under PACE s. 64(1A)-(3AA). This effectively converts the *power* in s. 64 to retain samples and profiles into an *invariable duty* to do so except in the most highly "exceptional" cases. It is incapable of providing a sufficient "safeguard" to enable the UK Government to justify the current practice under Article 8(2), in particular:

a. The document has no apparent legal basis, and it is doubtful whether it amounts to "law" at all. Hence the general practice of lifelong retention of DNA material from unconvicted persons (as opposed to the mere *power* conferred by s. 64) does not appear to be "in accordance with the law".

b. It is extremely difficult to understand the scope of the concept of "exceptional" circumstances, beyond the proposition that such circumstances will be "rare". The onus is placed on persons whose records are held to apply for removal, contrary to the burden placed on the data controller by the DP Convention and Directive to process data lawfully by positively ensuring, among other things, that data are not retained for longer than necessary. A person making such an application is asked to state why he considers his or her case is "exceptional" without any guidance as to the range of circumstances which might qualify.

c. The worked example of "exceptional circumstances" offered in the document – ie. a case where "it is established beyond doubt that no offence existed" – is objectionable in principle because it transfers to the suspect (or former suspect) the burden of proving, to the criminal standard, that no crime was committed by anyone.

d. There is no rational connection between the criteria of 'exceptional circumstances' and any pressing need to retain a former suspect's DNA and other information.

32. It is right to say that separate guidance has also been issued by ACPO in relation to retention of material generally on the Police National Computer (PNC), to which NDNAD entries are cross-referenced enabling their consultation by the various agencies entitled to search and inspect PNC entries. Those agencies are not confined to the police. That Guidance, entitled "Retention Guidelines for Nominal Records on the Police National Computer" (**Annex E**), incorporates a procedure known as "step down", which is designed to prevent "non-police" users of the PNC from accessing certain records once a specified event occurs (such as acquittal of the suspect) or a certain period of time has elapsed from disposal of the proceedings against the suspect.

33. The intention of this guidance is to limit access by non-police agencies to material, including NDNAD entries. However, the guidance has no statutory force and, crucially, contains no definition of "non-police" user. Moreover the systems necessary to give effect to the "step-down" procedure have yet to be introduced. The guidance has no effect at all on the availability of retained DNA material and profiles to the police.

Article 14

34. Liberty invites the Court to accept that persons in the Applicants' position are subjected to a difference in treatment on the ground of "other status" within Article 14. The domestic courts accepted there was a difference in treatment but held this was not on a ground engaging Article 14 because it related to a "historical fact" (ie. the fact that such persons had had DNA obtained from them by the police) rather than a "personal characteristic".

Difference in treatment

35. The House of Lords held that there had been a difference in treatment between the Applicants and the general body of persons who have not had DNA material taken from them in the course of a criminal investigation (the "comparators"). They were correct to do so.

36. Liberty additionally invites the Court to consider whether there is a difference of treatment between:
(i) children whose DNA is retained, who are then treated as being involved in a criminal investigation while not having been convicted of an offence, and
(ii) other children, who are not so treated: see Nuffield Report para 4.67-4.72.

37. For the same reason black and ethnic minority males: see Nuffield Report paras 4.63-4.66.

"Status" under Article 14

38. Lord Steyn concluded that the difference in treatment in question was not based upon a "relevant ground" for the purposes of Article 14. In his opinion, the retention of DNA material was the result of "historical fact" and was not based upon the "status" of the individuals concerned, "status" being defined as a "personal characteristic" which was "analogous" to the "expressly proscribed grounds such as sex, race, gender or religion" set out in Article 14: see para. 51. Liberty respectfully submits that the approach of the House of

Lords is based on a misunderstanding of Article 14 and of the way in which the Court has approached the question of ascertaining when a "difference in treatment" has occurred.

39. In paragraphs 48 and 49 of his speech, Lord Steyn relied upon *Kjeldsen v Denmark* (1976) 1 EHRR 711 for the proposition that a "personal characteristic" was required. However, it is respectfully submitted that Lord Steyn's approach adopts an excessively narrow view of the approach of the Court to the definition of "other status", which in the French text is phrased as "*toute autre distinction*". In the Strasbourg case-law "other status" is not confined to grounds that very closely resemble or which are closely analogous to the characteristics such as race, sex and religion set out expressly in Article 14.

40. This part of Liberty's intervention has been drafted in consultation with the Child Poverty Action Group ("CPAG"), a charitable NGO with considerable experience in representing social security claimants in the UK. CPAG is concerned that the observations of Lord Steyn in the present case have created very considerable difficulty for the English courts in applying the concept of "other status" in Article 14 cases. Lord Steyn's approach has been followed in *R (Hooper) v Secretary of State for Work and Pensions* [2005] 1 WLR 1681; *R (Reynolds) v Secretary of State* [2006] 1 AC 173; and *R (Clift) v Home Secretary* [2007] 1 AC 484, and will be examined next year by the House of Lords in the case of *R. (RJM) v Secretary of State for Work and Pensions*. Extracts from the decisions of the Lords in *Hooper*, *Reynolds and Clift*, and from the Court of Appeal decision in *RJM*, are at **Annexes F, G, H and I** to this Intervention.

41. In *RJM* the Court of Appeal [2007] EWCA Civ 614 (**Annex I**) held that RJM's position as a "rough sleeper" was not a personal characteristic. That court observed, in paragraph 45 of the judgment of Sir Anthony Clarke MR:

> *"As I see it, a chosen status is less likely to satisfy that test. This case appears to be to be an example of such a situation. It is not necessary to be without accommodation or homeless. A person who chooses such a lifestyle does not seem to me to be a person who naturally falls within the protection afforded by Article 14. The solution lies in the person's own hands, namely by seeking and obtaining accommodation."*

42. The UK case-law on Article 14 that has developed under the Human Rights Act 1998 has become complex and difficult to apply, based on an often inscrutable distinction between a 'historical fact' and 'personal characteristic.' In *Clift* (**Annex H**), Lord Bingham it "difficult to apply so elusive a test." In that case, his lordship was inclined (paragraph 28) to treat a life sentence as an acquired personal characteristic, but felt constrained by the Strasbourg case law not to extend this to a prisoner serving a determinate sentence of 15 years or more, such as Mr Clift in that case. Lord Hope (paragraph 48) was similarly inclined, notwithstanding his view that the function of Art 14 suggested that a generous meaning should be given to the words "or other status". Similarly Baroness Hale felt constrained by the 'personal characteristic' test (at paragraphs 61-3). See also the important concerns expressed by Lord Hope in the recent case of *R (Countryside Alliance) v Attorney-General* [2007] UKHL 52 at paras 61 and 62 (**Annex J** to this Intervention).

43. The difficulty that has emerged in the UK cases has arisen from an over-reliance on the term "personal characteristic," which originated in the Court's judgment in the case of *Kjledsen, Busk, Madsen and Pedersen v Denmark* (1976) 1 EHRR 711. In that case, a group of parents of children of school age complained that in the Danish state school system it was not possible for their children to be exempted from sex education. They complained that Art 14, in conjunction with Art 2 of Protocol 1, was violated because it was discriminatory to permit their children to be exempted from *religious* education and not from *sex* education.

44. The Court, rejecting the argument, held at paragraph 56 that:

> *"The applicants also claim to be victims, in the enjoyment of the rights protected by Article 2 of Protocol No. 1, of a discrimination on the ground of religion, contrary to Article 14 of the Convention. They stress that Danish legislation allows parents to have their children exempted from religious instruction classes held in State schools, whilst it offers no similar possibility for integrated sex education.*
>
> *The Court first points out that Article 14 prohibits, within the ambit of the rights and freedoms guaranteed, discriminatory treatment having as its basis or reason a personal characteristic ('status') by which persons or groups of persons are distinguishable from each other. However, there is nothing in the contested legislation which can suggest that it envisaged such treatment.*
>
> *Above all, the Court, like the Commission, finds that there is a difference in kind between religious instruction and the sex education concerned in this case. The former of necessity disseminates tenets and not mere knowledge; the Court has already concluded that the same does not apply to the latter. Accordingly the distinction objected to by the applicants is founded on dissimilar factual circumstances and is consistent with the requirements of Article 14."* [emphasis added].

45. It is plain on a consideration of the full text, which was not set out in by the House of Lords in either *S./Marper* or *Clift,* that in this passage of its judgment this Court was emphasising that discrimination had to be between groups or persons, not different classes of education experienced by the same pupil.

46. In Liberty's submission, it is not appropriate on the basis of the current state of the case-law of the Strasbourg Court for the Grand Chamber now to adopt such a restrictive and problematic approach based on the 'personal characteristic' test. It is accepted that the words "other status" or "*toute autre situation*" cannot be unlimited (as per Lord Steyn in *S.* at paragraph 48). However, if one considers the various circumstances to which "other status" has been found to apply by this Court, a rigid distinction of the kind made by Lord Steyn is clearly untenable: for example, professional status (*Van der Mussele v Belgium* (1983) 6 EHRR 133), employed or self-employed persons (*X v UK* (1984) 7 EHRR 135), military rank (*Engel v Netherlands* (1976) 1 EHRR 647), financial situation (*C v Netherlands* (1992) 15 EHRR CD26) and status based on previous employment with the KGB (*Sidabras v Lithuania* (2006) 42 EHRR 6).

47. In any case, the distinction between "status" and "historical fact" as made by Lord Steyn is, with respect, unsustainable: (i) The Strasbourg case-law plainly does not adopt this approach, as evidenced by the historical fact of KGB membership in *Sidabras* being treated as constituting "status". (ii) The inclusion of "national or social origin", "association with a national minority" and "property" within the express grounds set out in Article 14 is also incompatible with the making of a distinction between historical fact and personal status: all three express grounds are derived and based upon the existence of "historical facts". (iii) Status will inevitably be the result of historical factors: even grounds such as race, sex and religion will owe their particular salience as "personal characteristics" to historical facts. (iv) Disability, recognised as an "other status" ground in *Botta v Italy* (1998) 26 EHRR 241, is often the product of historical facts rather than the result of the possession by an individual of inherent "personal" characteristics.

48. Liberty submits that the correct approach is to consider whether the distinction in question was based upon the social categorisation of the individuals concerned in terms of their possession of a particular "status" or "personal characteristic", which has the effect of marking them out just as their possession of types of property, national or social origin, association with a national minority or any other type of status recognised in the case-law would. This would fit with *Sidabras*, *Engels* and the other relevant Court decisions, and

avoids the construction of an unstable and inherently contradictory distinction between current status and the historical events leading up to possession of that status.

49. Accordingly, those whose DNA material is retained following a police investigation are distinguished by the possession of a personal characteristic arising from a social categorisation: they are categorised as individuals who have been involved in a criminal investigation, and are subject to a special statutory regime as a consequence- like the former KGB employees in *Sidabras*: the individuals concerned in both scenarios are classed as possessing a certain status derived from historical circumstances.

50. Furthermore, given the negative social consequences that often stem from involvement with a police investigation, it makes sense for Article 14 to be capable of being applied to protect such a class from unjustified differences of treatment, just as it would make sense for Article 14 to extend similar protection to victims of crimes, which could also constitute an analogous status.

51. Even if, as a matter of principle, an attribute acquired by "choice" were excluded from the concept of "status" (*cf.* the *RJM* case), that cannot apply where the status in question results from an intervention by the State against the individual's will. No-one "chooses" to be arrested or charged with an offence. It would be wrong for the State to avoid an Article 14 examination of its differential treatment of persons by reference to an attribute that the State itself has imposed.

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on behalf of the Intervener
Date: 14 December 2007

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IN THE EUROPEAN COURT OF HUMAN RIGHTS

(1) S.
(2) MICHAEL MARPER

v.

UNITED KINGDOM

INTERVENTION BY LIBERTY

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