



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

**Rule 9 Submission to the Council of Europe  
Committee of Ministers in Relation to the  
Supervision of the Execution of Judgments and  
of Terms of Friendly Settlement**

**Gaughran v. the United Kingdom  
Application No. 45245/15**

**November 2023**

# Table of Contents

<b>1.0 Introduction .....</b>	<b>3</b>
<b>2.0 Background .....</b>	<b>4</b>
<b>3.0 UK Action Plan .....</b>	<b>7</b>

## 1.0 Introduction

- 1.1 The Northern Ireland Human Rights Commission ('NIHRC'), pursuant to Section 69(1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights in Northern Ireland ('NI'). The NIHRC is one of three national human rights institutions in the UK and has 'A' status accreditation from the United Nations (UN). It is an independent public body that operates in full accordance with the UN Paris Principles.<sup>1</sup>
- 1.2 The NIHRC was established to play a central role in supporting a society that, as it rebuilds following conflict, respects and upholds human rights standards and responsibilities. This includes holding the UK Government to its commitments under the European Convention of Human Rights and encouraging the full implementation of judgments from the European Court of Human Rights.
- 1.3 The NIHRC bases its advice on the full range of internationally accepted human rights standards, including the treaty obligations of the United Nations, Council of Europe (CoE), including the European Convention on Human Rights<sup>2</sup>, as incorporated by the Human Rights Act 1998.
- 1.4 In accordance with these functions the following Rule 9 submission is made to the CoE Committee of Ministers on Supervision of the Execution of Judgments in *Gaughran v. the United Kingdom*. The scope of this submission relates to Northern Ireland.

## 2.0 Background

- 2.1 In 2008, the European Court of Human Rights (ECtHR) found in *S. and Marper*<sup>3</sup> that the provisions relating to DNA retention in the Police and Criminal Evidence (NI) Order 1989 were in violation of the Article 8 ECHR.
- 2.2 In February 2020, the ECtHR gave a further judgment on this issue in the case of *Gaughran*. This case involved retention of biometrics from a convicted person. As a convicted person his DNA profile, fingerprints and photograph ("biometrics") were taken. The legal framework in Northern Ireland relating to police powers allows these biometrics to be retained indefinitely. The Applicant argued that the Police Service of Northern Ireland's indefinite retention of his biometrics contravened his rights under

---

<sup>1</sup> UN Principles relating to the Status of National Institutions, General Assembly res 48/134 of (20 December 1993).

<sup>2</sup> Ratified by the UK in 1951.

<sup>3</sup> *S and Marper v the United Kingdom* [2008] ECHR 1581.

Article 8 ECHR. In 2015, the UK Supreme Court rejected this argument. He subsequently applied to the ECtHR.

- 2.3 The ECtHR found that the policy of indefinite retention of biometrics was a disproportionate interference with the applicant's rights under Article 8 ECHR:

"the indiscriminate nature of the powers of retention of the DNA profile, fingerprints and photograph of the applicant as person convicted of an offence, even if spent, without reference to the seriousness of the offence or the need for indefinite retention and in the absence of any real possibility of review, failed to strike a fair balance between the competing public and private interests... Accordingly, the respondent State has overstepped the acceptable margin of appreciation."<sup>4</sup>

- 2.4 The ECtHR unanimously ruled that the indefinite retention of biometric data (digital DNA profile, fingerprints) and photographs of persons convicted of an offence punishable by imprisonment was a breach of a person's right to respect for their private life under Article 8 ECHR.<sup>5</sup> They found that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences failed to strike a fair balance between the competing public and private interests. The ECtHR pointed to the lack of reference within the scheme to the seriousness of the offence or sufficient safeguards, including the absence of any real possibility of review of the retention.<sup>6</sup>
- 2.5 The ECtHR held that the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant and dismissed the remainder of the applicant's claim for just satisfaction. The DNA profile, fingerprints and custody image of the applicant have been deleted from local and national databases.<sup>7</sup>

## **UK legal framework**

- 2.1 In UK wide law, the key relevant statute governing the handling and retention of personal data is the Data Protection Act 2018 ("DPA"), with its requirement for periodic review of the retention of data. The DPA sets out the requirement for periodic review of the retention of personal data, including biometrics. However, it does not specify how those reviews should operate in practice.

---

<sup>4</sup> *Gaughran v the United Kingdom* [2020] ECHR 144, at para 96.

<sup>5</sup> *Ibid*, at para 94.

<sup>6</sup> *Ibid*, at para 96.

<sup>7</sup> *Ibid*, at paras 100-102.

- 2.2 The DPA provides for independent oversight by the Information Commissioner's Office ("ICO"), which has enforcement powers to ensure compliance. As the ICO is responsible for auditing law enforcement agencies' processing under Part 3 for all parts of the UK, it can determine whether the principle is being complied with in practice.
- 2.3 As Justice and Policing are devolved matters for UK devolved institutions, there is separate but broadly equivalent legislation on police use and retention of biometrics in England, Wales and Scotland, but with significant divergence in NI.
- 2.4 The Police and Criminal Evidence (Northern Ireland) Order 1989 ("PACE Order") sets out the law in NI on the retention of DNA and fingerprints. Article 64 states that police may retain indefinitely the DNA and fingerprints taken by police in connection with a recordable offence regardless of whether it results in a conviction.
- 2.5 The Criminal Justice Act (NI) 2013 was enacted in order to rectify the ECHR violation in *S and Marper*; however, the sections in relation to DNA retention were not commenced pending political agreement on how these sections would affect evidence that may be used in legacy investigations relating to the conflict in NI.<sup>8</sup>

## Human rights legal framework

- 2.6 Article 8(1) ECHR states "everyone has the right to respect for his private and family life, his home and his correspondence". The ECtHR has confirmed that this right is engaged in the context of biometric material.<sup>9</sup> This is also reflected in a range of other international human rights treaties.<sup>10</sup>
- 2.7 The right to respect for private and family life is a qualified right, meaning that it can be interfered with in certain circumstances. The circumstances in which interference may be permitted is set out in Article 8(2) ECHR.
- 2.8 For an interference to be in accordance with law, the ECtHR has elaborated that the relevant measure should "have some basis in domestic law" and "to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention" and inherent in "the object and purpose of Article 8".<sup>11</sup> Thus, the:

"law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm

---

<sup>8</sup> 1451st meeting (December 2022) (DH) - Action plan (23/09/2022) - Communication from the United Kingdom concerning the case of *Gaughran v. the United Kingdom* (Application No. 45245/15).

<sup>9</sup> *S and Marper v UK* (2008) ECHR 1581.

<sup>10</sup> Article 17, UN International Covenant on Civil and Political Rights 1966; Article 16(1), UN Convention on the Rights of the Child 1989; Article 22, UN Convention on the Rights of Persons with Disabilities 2006.

<sup>11</sup> *Malone v UK* (1984) ECHR 10, at paras 66-68.

cannot be regarded as 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."<sup>12</sup>

## 2.9 Specific to retention of biometric material for suspects, the ECtHR states:

"the domestic law should notably ensure that such data are relevant and not excessive in relation to the purposes for which they are stored; and preserved in a form which permits identification of the data subjects for no longer than is required for the purpose which those data are stored. The domestic law must also afford adequate guarantees that retained personal data was efficiently protected from misuse and abuse."<sup>13</sup>

2.10 The ECtHR further states that consideration must be given to "whether the permanent retention of... all suspected but unconvicted people is based on relevant sufficient reasons".<sup>14</sup> Consideration should also be given as to "whether such retention is proportionate and strikes a fair balance between the competing public and private interests".<sup>15</sup> The ECtHR provides a 'margin of appreciation' to States in proceedings that concern qualified rights such as Article 8 ECHR.<sup>16</sup> The State does have a certain amount of discretion in how it chooses to limit such rights, through considering the pressing social need to do so. However, any interference must be necessary and proportionate in pursuit of a legitimate aim, as set out in Article 8(2) ECHR.

2.11 A number of factors must be taken into account when determining the breadth of a State's margin of appreciation. In previous cases where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted.<sup>17</sup> In the case *Brunet v France* (2014)<sup>18</sup>, the applicant complained of an interference with his private life as a result of being added to a French police database, which contained information from investigation reports and listed the individuals and victims implicated, after the discontinuance of criminal proceedings against him. The ECtHR held that there had been a violation of Article 8 ECHR, finding that the French Government had overstepped its discretion to decide the 'margin of appreciation' on such matters. The retention was regarded as a disproportionate breach of the applicant's right to respect for his private life and was not necessary in a democratic society. The ECtHR

---

<sup>12</sup> Ibid, at para 66; *Silver and Others v UK* (1983) ECHR 5, at paras 87-88.

<sup>13</sup> *S and Marper v UK* (2008) ECHR 1581, at para 103.

<sup>14</sup> Ibid, at para 114.

<sup>15</sup> Ibid, at para 118.

<sup>16</sup> *Dudgeon v UK* (1981) ECHR 5, at para 51-53.

<sup>17</sup> *X and Y v the Netherlands* (1985) ECHR 4; *Christine Goodwin v UK* (2002) ECHR 588; *Pretty v UK* (2002) ECHR 427.

<sup>18</sup> *Brunet v France* (2014) ECHR 263.

considered whether the applicant had a real possibility of seeking to delete his data from the French police’s database. Furthermore, the ability for the French police to retain his data for 20 years could be equated to indefinite retention.

- 2.12 The issues raised in *Gaughran* continue to be a live issue in NI and as of 5 November 2021 approximately 207,189 individuals’ fingerprints and 199,537 DNA profiles are held by the Police Service NI.<sup>19</sup> In December 2017, the NIHRC issued judicial review proceedings against the Police Service NI on behalf of an individual.<sup>20</sup> This was settled on the basis that it would produce a formal policy on biometric data retention, which would expressly consider Article 8 ECHR and provide clear guidance to the public as to how they can apply for their biometric data to be destroyed.<sup>21</sup>
- 2.13 In July 2021, the NIHRC wrote to the then Justice Minister for NI setting out continuing concerns that the ongoing lack of legislative reform will continue an ongoing breach in light of the *Gaughran v UK* judgment.<sup>22</sup> In August 2021 the NIHRC also wrote to the Police Service NI in respect of how it intends to reform how it retains biometric data, in light of the *Gaughran* judgment and pending any legislative reform.<sup>23</sup> The Police Service NI confirmed that, in light of biometric provision no longer being included in the Justice (Sexual Offences and Trafficking Victims) Bill, that it could only implement certain interim measures, including the reinstatement of the Biometric Ratification Committee to determine all applications for deletion in line with the Police and Criminal Evidence (NI) Order 1989.<sup>24</sup>

## 3.0 UK Action Plan

### Proposals in UK Action Plan

- 4.1 The Committee of Ministers discussed the UK compliance with *Gaughran* on 8 December 2022. In relation to the position of biometric retention in NI, the following points were made by the Committee:

“as concerns Northern Ireland, noted with profound concern that nearly 14 years after *S. and Marper* became final, a Convention compliant framework for retention of biometric

---

<sup>19</sup> Correspondence from the Chief Constable of the Police Service of NI to the Chief Commissioner of the NI Human Rights Commission, 5 November 2021.

<sup>20</sup> NI Human Rights Commission, ‘Press Release: Human Rights Commission secures settlement in DNA fingerprint retention case’, 9 January 2019.

<sup>21</sup> *Ibid.*

<sup>22</sup> NI Human Rights Commission, Correspondence from the NI Human Rights Commission to the Justice Minister, July 2021.

<sup>23</sup> NIHRC, Correspondence from the NI Human Rights Commission to the Chief Constable of the Police Service of NI, August 2021.

<sup>24</sup> Police Service of NI, ‘Service Instruction SI9999 on Biometric Retention’ (PSNI, 2022).

data with applicable safeguards is yet to come into force for those arrested but not convicted;”

“noted with interest nevertheless that a broader reform of the legislative framework governing the retention of biometric data and photographs for both convicted and non-convicted persons is being prepared in Northern Ireland with effective safeguards; urged the authorities to ensure swift progress and rapid adoption of the same in line with the considerations of the Court in *S and Marper* and *Gaughran* including in relation to retention of biometric data related to legacy investigations;”

“invited the authorities to submit a detailed action plan setting out developments on all of the above issues by 1 October 2023 and decided to resume consideration of these cases at their 1483<sup>rd</sup> meeting (December 2023) (DH).”

- 4.2 The UK’s most recent Action Plan notes that the NI Department of Justice intends to introduce new legislation to implement the wider destruction regime for NI to ensure compliance with *Gaughran*.<sup>25</sup> It was anticipated that this legislation would be introduced in October 2021; however, there has been no progress. Given the lack of a devolved NI Executive since the collapse of the NI Assembly in February 2022, legislation will only be introduced when the government has been restored. It is now estimated that any legislative reform will take an additional 18-24 months to commence due to the requirements for secondary legislation.<sup>26</sup>

## **NI legislative proposals**

- 4.3 The NIHRC is concerned that the failure to address the unlawful retention of biometric data will amount to an ongoing breach of Article 8 ECHR. The NIHRC has previously provided advice to the Department of Justice NI on the subject of biometric retention,<sup>27</sup> and amongst the NIHRC recommendations is that proposals to address the retention of DNA and fingerprints must fully address the specific issues raised by the *Gaughran* judgment.<sup>28</sup>
- 4.4 The NIHRC highlights the UK Government’s lack of progress in implementing the judgments of *S and Marper* and *Gaughran*. The timeline, proposed by the UK Government, of legislative and regulatory reform of biometric retention the UK is reliant upon a NI Executive being restored and a devolved

---

<sup>25</sup> DH-DD(2023)1161, 1483<sup>rd</sup> meeting (December 2023) (DH) - Action plan (28/09/2023) - Communication from the authorities concerning the case of *Gaughran v. the United Kingdom* (Application No. 45245/15).

<sup>26</sup> *Ibid.*

<sup>27</sup> NIHRC, ‘Submission to DoJ Consultation on Proposals to Amend the Legislation Governing the Retention of DNA and Fingerprints in NI’, September 2020.

<sup>28</sup> *Ibid.*, para 2.14.



Justice Minister being appointed. The proposals therefore have not progressed and compliance with *Gaughran* remains outstanding.

4.5 In 2020, the Department of Justice NI proposed to amend the Criminal Justice Act (NI) 2013 to replace the indefinite retention to that of a '75/50/25' year retention model to biometrics of convicted individuals.<sup>29</sup>

4.6 The '75/50/25' model consists of the following maximum periods of retention:

- 75 years' retention period for DNA and fingerprints for all convictions associated with serious violent, sexual and terrorism offences (otherwise known as a qualifying offence, as set out in section 53A of PACE NI);
- 50 years' retention period for adult convictions for recordable offences that do not fall within the serious category; and
- 25 years' retention for two or more juvenile non-serious convictions which do not involve a custodial sentence of more than 5 years (an under 18 conviction for a non-serious offence involving a custodial sentence of more than 5 years will attract a 50 years retention period).<sup>30</sup>

4.7 **The NIHRC believes that the maximum years of retention across the proposed '75/50/25' model is too broadly constituted, disproportionate and is incompatible with Article 8 ECHR.**<sup>31</sup>

4.8 This proposed model would also allow for the retention of biometrics for less serious offences for an overly excessive length of time. For example, under the proposed model, retention of biometrics for less serious offences can be retained for up to 50 years. For example, a drunk driving offence could result in that individual's biometrics being retained for up to 50 years. This would appear to be a disproportionate length of time for such an offence. As Lord Kerr, of the UK Supreme Court, outlined in his dissenting judgment in *Gaughran v Chief Constable of the Police Service NI* [2015]:

"one must return, to the question whether a more tailored approach than that of the current Police Service NI policy in relation to the retention of the biometric materials, sufficient to satisfy the aim of detecting crime and assisting in the identification of future offenders, is possible. To that question only one answer can be given, in my opinion. Clearly, a far more nuanced, more sensibly targeted policy can be devised. At a minimum, the removal of some of the less serious

---

<sup>29</sup> Department of Justice NI, 'A Consultation on Proposals to Amend the Legislation Governing the Retention of DNA and Fingerprints in NI' (DoJ, 2020), para 3.3.

<sup>30</sup> Ibid, para 3.4.

<sup>31</sup> NIHRC, 'Submission to DoJ Consultation on Proposals to Amend the Legislation Governing the Retention of DNA and Fingerprints in NI', September 2020, para 3.8.

offences from its ambit is warranted. But also, a system of review, whereby those affected by the policy could apply, for instance on the grounds of exemplary behaviour since conviction, for removal of their data from the database would be entirely feasible. Similarly, the gradation of periods of retention to reflect the seriousness of the offence involved would contribute to the goal of ensuring the interference was no more intrusive than it required to be."<sup>32</sup>

- 4.9 There may be reasonable justification for retaining biometric material for a prolonged and substantial period in the most serious circumstances, but that approach should be tightly focussed, carefully crafted and not unnecessarily broadly constructed. Moreover, the proposals are silent on whether biometric material will be retained after the death of an individual. There is also potential to utilise the retained biometric material for checking on other close family members who are not on the biometric database. This gives rise to further human rights considerations and any forthcoming legislation should set out whether such material is retained and in what circumstances it will be utilised.
- 4.10 **The NIHRC has recommended that the Department of Justice NI considers revising the model proposed so that the retention of biometric material for offences is more tailored and proportionate to the offence and the circumstances.**<sup>33</sup>
- 4.11 **The NIHRC has also recommended that the Department of Justice NI makes clear whether biometric material is retained after death and if so, when and in what circumstances it will be utilised including in respect of other family members and that human rights considerations are fully taken into account before any such approach is adopted.**<sup>34</sup>

### **Biometric retention in Legacy cases**

- 4.12 The UK's Action Plan notes that the proposed biometric retention framework to be introduced would require the destruction of a large volume of existing DNA and fingerprints, there is a risk that future investigations into Troubles-related deaths in NI would be undermined, should such material be destroyed. The UK Government proposed to mitigate this risk by introducing statutory provision to allow for the retention of a copy of material solely for the purposes of such investigations and that retention of this data will be strictly time-limited for the period any such investigations are taking place.<sup>35</sup>

---

<sup>32</sup> *Gaughran v Chief Constable of the Police Service NI* [2015] UKSC 29, at para 83.

<sup>33</sup> NIHRC, 'Submission to DoJ Consultation on Proposals to Amend the Legislation Governing the Retention of DNA and Fingerprints in NI', September 2020, para 3.18.

<sup>34</sup> *Ibid*, para 3.19.

<sup>35</sup> DH-DD(2023)1161, 1483<sup>rd</sup> meeting (December 2023) (DH) - Action plan (28/09/2023) - Communication from the authorities concerning the case of *Gaughran v. the United Kingdom* (Application No. 45245/15), at page 5.

- 4.13 The Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 (“Legacy Act 2023”) received Royal Assent on 18 September 2023. This legislation provides for secondary legislation, to be made by the Secretary of State for Northern Ireland, which will provide for the retention of legacy biometric data<sup>36</sup> to be used by the Independent Commission for Information Recovery and Reconciliation (ICRIR), also established under the legislation.
- 4.14 The UK Government noted, in their September 2022 Action Plan, that any data retention will be time-limited and will only continue until a reasonable period after the winding up of the body, and the ICRIR must carry out regular periodic reviews as to whether data it holds is still relevant.<sup>37</sup>
- 4.15 The NIHRC notes that neither the UK Action Plan or the Legacy Act 2023 itself provides for time-limits for retention under the Act, nor is this clear from the passage of the Bill through the UK Parliament. Lack of such detail, or assurances, means it is unclear if this would satisfy the requirements in *Gaughran*.<sup>38</sup>
- 4.16 Under the Legacy Act 2023, information that has been obtained by the ICRIR through the exercise of police powers may be used by the ICRIR for the purposes of, or in connection with, the exercise of any function of the ICRIR.<sup>39</sup> However, it is not stated that such information must be relevant to the ICRIR’s work. This ambiguity means that it is questionable whether this is a proportionate approach to data retention, as required by Article 8 ECHR.<sup>40</sup>
- 4.17 The Legacy Act 2023 has been subject to a number of legal challenges, which are ongoing before the NI High Court. The Irish Government is also reported to be considering taking a case against the UK to the ECtHR over the legislation and is obtaining legal advice on what the strength would be of taking such a case.<sup>41</sup>
- 4.18 **The NIHRC is concerned that the blanket retention of biometric data under the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, even if it is only for those whose biometric data was obtained prior to a certain date, is not proportionate, in line with Article 8 ECHR.**
- 4.19 Legislation to permit the retention of biometric data collected under counter-terrorism powers in Northern Ireland before 31 October 2013 on a

---

<sup>36</sup> Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, Sections 34-35.

<sup>37</sup> 1451st meeting (December 2022) (DH) - Action plan (23/09/2022) - Communication from the United Kingdom concerning the case of *Gaughran v. the United Kingdom* (Application No. 45245/15).

<sup>38</sup> NIHRC, ‘Submission to DoJ Consultation on Proposals to Amend the Legislation Governing the Retention of DNA and Fingerprints in NI’, September 2020.

<sup>39</sup> Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, Section 31(1)(b).

<sup>40</sup> *Mozer v Republic of Moldova and Russia* (2016) ECHR 213, at para 194.

<sup>41</sup> Christina Finn & Stephen McDermott, ‘Government considering legal action as Westminster votes to end historical prosecutions in NI’, *The Journal*, 6 September 2023.

temporary basis continues to be renewed, in the absence of agreement and a legislative framework in NI.<sup>42</sup> The UK Government has taken steps to renew this transitional order so that such material can continue to be held until October 2024.<sup>43</sup>

- 4.20 **The NIHRC is concerned that the absence of an express provision linking biometric retention with the purposes of the ICRIR's work, under the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, is not proportionate as required by Article 8 ECHR.**

---

<sup>42</sup> The Protection of Freedoms Act 2012 (Destruction, Retention and Use of Biometric Data) (Transitional, Transitory and Saving Provisions) Order 2013.

<sup>43</sup> The Protection of Freedoms Act 2012 (Destruction, Retention and Use of Biometric Data) (Transitional, Transitory and Saving Provisions) (Amendment) Order 2022.

## Contact us

[www.nihrc.org](http://www.nihrc.org) | [info@nihrc.org](mailto:info@nihrc.org) | +44 (0)28 9024 3987  
4<sup>th</sup> Floor, Alfred House, 19-21 Alfred Street, Belfast, BT2 8ED

