# I lost in the UK Supreme Court. What can Strasbourg still decide?

*Fergus Gaughran pleaded guilty to drink-driving. He paid his fine and served his driving ban. Years later, the police were still entitled to keep his DNA profile, fingerprints and photograph indefinitely. He challenged that policy all the way to the UK Supreme Court and lost. In Strasbourg, all seven judges found a violation of his right to privacy. What accounts for the difference?*

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For someone who has just lost in the Supreme Court, perhaps the most discouraging sentence in a lawyer's letter is this: "The European Court of Human Rights is not a fourth instance." The sentence is accurate. On its own, it is also an incomplete answer to a client whose case already raised a human rights issue. Fergus Gaughran's lawyers had put Article 8 before the UK courts. The Supreme Court understood the privacy objection and gave reasons for rejecting it. His subsequent application to Strasbourg therefore presents the harder question: what is left for the European Court to decide when the highest domestic court has already considered the right on which the applicant relies?

## A conviction with a continuing consequence

When Mr Gaughran was arrested in Northern Ireland in October 2008, the police took his fingerprints, photographed him and obtained a DNA sample by swabbing the inside of his cheek. He pleaded guilty. The immediate consequences of his offence were clear: a fine of £50 and a twelve-month driving ban. The consequence he later challenged had no equivalent end date. The police retained identifying information obtained when he was arrested. His physical DNA sample was eventually destroyed in 2015. The DNA profile derived from it remained on record, alongside his fingerprints and photograph[1].

That distinction matters. A person told that a sample has been destroyed might reasonably believe that the issue is over. What mattered in Mr Gaughran's case was what

[1] ECtHR, *Gaughran v. the United Kingdom*, no. 45245/15, 13 February 2020, §§ 6-9.

the authorities could still do with the information they retained. The conviction itself became spent in 2013. The police policy nevertheless allowed those records to be kept indefinitely. For an applicant deciding whether to pursue a Strasbourg case, identifying the continuing act of the State can be as important as identifying the original interference.

## Why he lost in the Supreme Court

On 13 May 2015, the UK Supreme Court dismissed his appeal by four votes to one[2]. The majority accepted that retaining the data interfered with his private life. It examined whether that interference was justified by the contribution such records could make to detecting crime. A distinction mattered to its reasoning: Mr Gaughran had been convicted. The Strasbourg authority at the centre of the argument, *S. and Marper v. the United Kingdom*, had concerned people who had not been convicted[3]. The majority considered the retention policy proportionate. Lord Kerr dissented.

It would be easy, and wrong, to describe what happened next as Strasbourg discovering a privacy issue the British judges had overlooked. Both courts addressed proportionality. Both had to take seriously the public interest in detecting crime. A database may help solve a future offence, including one with no connection to the event for which a particular record was originally taken. The difficult question was how far that general benefit justified keeping this individual's records indefinitely, given the safeguards available to him.

## What Strasbourg found missing

On 13 February 2020, the European Court unanimously found a violation of Article 8. Its reasoning is worth reading carefully. The Court considered the extent of the retention powers together with the safeguards governing their use. The system did not relate continued retention to the seriousness of the offence or to an assessment of the need to keep the particular person's records indefinitely. Nor did it offer Mr Gaughran a real opportunity to obtain a review of whether retention remained justified. Those features, taken together, meant that the system failed to strike a fair balance[4].

Put that reasoning in the language a client might use. "I understand why the police took my fingerprints when they arrested me. I understand how fingerprints can help solve crimes. Who has to decide whether there is still a sufficient reason to keep mine, and what can I do to have that question answered?" The first two points concede a great

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[2] *R (Gaughran) v Chief Constable of the Police Service of Northern Ireland* [2015] UKSC 29, 13 May 2015 (Lord Clarke giving the leading judgment; Lord Kerr dissenting).

[3] ECtHR [GC], *S. and Marper v. the United Kingdom*, nos. 30562/04 and 30566/04, 4 December 2008.

[4] *Gaughran*, cited above, §§ 94 and 96-97. The Court also noted that the photograph could be uploaded to a police database with facial recognition capability, and that the domestic assessment on this point appeared to have been superseded by technological developments (§§ 69-70 and 86).

deal to the State. The third identifies the difficulty that ultimately persuaded Strasbourg. The fact of conviction helped explain why the records entered the system. It did less to explain how the person could ever leave it.

## Where the gap actually lies

Mr Gaughran had no need to reopen the evidence about his driving. His conviction could stand exactly as it was and his privacy complaint could still succeed. Nor did the European Court need to find that the Supreme Court had misunderstood Northern Irish law. Strasbourg's task was to determine whether the United Kingdom had complied with its obligations under Article 8. The domestic judgment mattered greatly: it set out the case for retention and showed how the national court had weighed the interests at stake. Its conclusion did not bind the European Court on the Convention question.

That is a useful distinction for counsel reviewing a case after a final decision. Suppose the proposed application says only that a domestic judge should have believed one witness over another. What would Strasbourg be asked to do beyond assessing the evidence again? Now suppose the evidence is accepted, the conviction is accepted, and the applicant can identify an enduring interference for which the State provides no effective individual review. The second case gives the European judge a question that can be answered without retrying the first. Whether the answer favours the applicant will depend on the right, the facts and the safeguards actually available.

## What I would want to see in the file

After a Supreme Court defeat, I would ask for more than the judgment and the grounds of appeal. I would want the document that best captures the interference as the client experiences it. Here, one revealing exchange began when Mr Gaughran's solicitor wrote to the police in January 2009 to challenge retention. A letter of that kind establishes what the individual asked the authorities to do. The reply helps establish whether anyone considered his circumstances, whether the decision followed automatically from the policy and what prospect there was of securing a different answer later[5]. Read beside the judgments, that correspondence turns an abstract dispute about databases into a legal question about a person.

Mr Gaughran's case offers a precise answer to the person who says, "I lost in the Supreme Court." He had lost on a question the domestic court was fully entitled to decide. What remained was an identifiable interference with his privacy, a record of having challenged it and a serious question about the protection afforded to him. His driving ban had an end date. The retention of his identifying data had none. What ultimately mattered in Strasbourg was whether he had a meaningful way to ask why.

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[5] *Gaughran*, cited above, § 8: letter of 15 January 2009 asking for the data to be destroyed or returned; reply of 27 February 2009 stating that the legal consequences of *S. and Marper* were a matter for the Government.