disabilities and struggled to meet their basic needs; - too many prisoners were doubled up in small cells designed for one with inadequately screened toilets and some cells were damp; - prisoners from black and minority ethnic groups and Muslim prisoners reported less positively about relationships than the population; and - there were insufficient programmes to directly address prisoners' attitudes and behaviour. - provision and support for foreign national prisoners with little or no English should be improved, and detainees should not be held in prisons after the completion of their sentences. - Inspectors made 93 Recommendations

Nick Hardwick said: "HMP Manchester is one of the best large, inner city Victorian prisons and we have now found this to be so over two inspections. We still have some significant concerns and there is more the prison needs to do, but it has solid, longstanding strengths. It is better placed than most to continue to make progress and weather the pressures ahead.

Prisoner Refuses to Shite for 23 Days - New UK Record

Last week Maidstone Crown Court, Kent, heard how David Akande, 26, held out for 21 days after swallowing 24 wraps of cocaine. But his remarkable feat has now been overshadowed by Sy Allen, 30, now serving a 32-month sentence for possession with intent to supply Class A drugs. He refused to go to the toilet for 23 days after being arrested with 44 wraps of heroin and cocaine hidden inside his body. Police stopped a blue Mercedes he was driving in Colchester, Essex, on March 31. Officers suspected he was hiding something in his body, which he denied, after he was searched for drugs. At first Allen refused medical examinations and food and drink. Officers constantly watched him, and he was visited by a doctor every day, but he refused help. Magistrates at Colchester allowed police to keep Allen in custody for 192 hours until he went to the toilet, which was extended for a further 192 hours twice more. Allen refused food and drink for three days before resorting to fresh food and snacks. He was taken to hospital on April 22 when became unwell. Doctors found 24 wraps of heroin and 20 wraps of crack cocaine from his body, valued at about £980. Allen was charged with possession with intent to supply crack cocaine and possession with intent to supply heroin. He admitted both charges at Chelmsford Crown Court and was jailed for 32 months.

South Wales Police fined £160k for Sexual Abuse Case Data Breach

The fine has been imposed by the Information Commissioner's Office (ICO) after unencrypted DVDs of interviews were left in a desk drawer. Staff discovered the loss after moving office in 2011 but the security breach went unreported for nearly two years. The ICO said the force had "failed to take all appropriate measures" against the accidental loss of personal data. A second interview had to be abandoned due to the victim's distress and the DVDs have still not been recovered. The defendants in the case were eventually convicted in court.

Hostages: Jamie Green, Dan Payne, Zoran Dresic, Scott Birtwistle, Jon Beere, Chedwyn Evans, Darren Waterhouse, David Norris, Brendan McConville, John Paul Wooton, John Keelan, Mohammed Niaz Khan, Abid Ashiq Hussain, Sharaz Yaqub, David Ferguson, Anthony Parsons, James Cullinene, Stephen Marsh, Graham Coutts, Royston Moore, Duane King, Leon Chapman, Tony Marshall, Anthony Jackson, David Kent, Norman Grant, Ricardo Morrison, Alex Silva,Terry Smith, Hyrone Hart, Glen Cameron,Warren Slaney, Melvyn 'Adie' McLellan, Lyndon Coles, Robert Bradley, John Twomey, Thomas G. Bourke, David E. Ferguson, Lee Mockble, George Romero Coleman, Neil Hurley, Jaslyn Ricardo Smith, James Dowsett, Kevan Thakrar, Miran Thakrar, Jordan Towers, Patrick Docherty, Brendan Dixon, Paul Bush, Frank Wilkinson, Alex Black, Nicholas Rose, Kevin Nunn, Peter Carine, Paul Higginson, Thomas Petch, John Allen, Jeremy Bamber, Kevin Lane, Michael Brown, Robert Knapp, William Kenealy, Glyn Razzell, Willie Gage, Kate Keaveney, Michael Stone, Michael Attwooll, John Roden, Nick Tucker, Karl Watson, Terry Allen, Richard Southern, Jamil Chowdhary, Jake Mawhinney, Peter Hannigan, Ihsan Ulhaque, Richard Roy Allan, Carl Kenute Gowe, Eddie Hampton, Tony Hyland, Ray Gilbert, Ishtiaq Ahmed.

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MOJUK: Newsletter 'Inside Out' No 530 (21/05/2015) - Cost £1

'We Need Our Innocence Projects Now More Than Ever' *Mark Alexander: A8819AL*

The announcement that Innocence Network UK (INUK) had disbanded in September 2014 came as a real shock to those of us on the inside still fighting for justice. There had been no indication to those of us on their waiting list that the organisation was having any problems, so it all seemed rather disappointing and confusing when the news finally reached us. What had gone wrong, and why would they seemingly give up on us like that? INUK was essentially a casework referral service that assessed applications from prisoners who protested their unequivocal innocence in a crime for which they were wrongly convicted. Members of the network signed up to common operating protocols and investigative methodologies, and were allocated eligible cases by a centralised co-ordinator following assessment.

The Innocence Network helped to fulfill the desperate need for investigative assistance in criminal appeal cases which simply couldn't be met under legal aid. INUK helped to bridge the chasm between what a legal aid lawyer could achieve and what needed to be pursued in an investigative context. With INUK's disbandment – and the simultaneously crippling effects of legal aid reforms – that void has not only reopened, but become bigger than ever. My own firm of solicitors were forced to close their criminal appeals department at the beginning of 2015. Those of us struggling with exhausting and lengthy appeals know how easy it would be to just give up in the face of obstacle after relent-less obstacle.

Regulation and governance: The simultaneous curse and blessing of the INUK model is that it relies almost entirely upon student manpower. On one hand, the great advantage of this is that there is an almost endless source of talented young minds in our universities with the dedication and enthusiasm required to plough through the stacks of material in a case. As Dr Andrew Green pointed out on www.thejusticegap.com: 'No one working under the restrictions of legal aid funding or the budgetary constraints of institutions such as the CCRC is likely to do the detailed work that students are prepared to do.' However, given their lack of experience and the quick turnover of university students, much of the advantage is lost in the continuous cycle of training new recruits up.

For future innocence projects to run efficiently, they need to develop a vigorous and intensive training programme to get their students into shape. A formulaic approach is critical and the first thing they need to get to grips with is what constitutes a valid ground of appeal. Once you've familiarised yourself with the common errors that occur at trials or in police investigations, you'll have a good idea of what you should be looking out for: things like the wrongful admission or exclusion of evidence; non-disclosure; counsel incompetence or misconduct; poor summing-up, or misdirection, by the judge; police failure to pursue reasonable lines of enquiry, or secure evidence; abuses of process; and so on. Recognising the symptoms of a wrongful conviction will enable students to diagnose them.

The next big thing is understanding the various tests applied by the CCRC and the Court of Appeal: the 'safety' test (including the 'lurking doubt' test and, more recently, the 'risk of a miscarriage of justice' test); the 'real possibility' test; the 'jury impact' test; the cumulative effect of multiple grounds of appeal; and the court's discretion 'in the interests of justice'. In addition, an appreciation for historic cases and campaigns will help students to identify patterns of

failure and spot the tell-tale signs of a miscarriage of justice. Finally, an understanding of what 'fresh' evidence is and the issues surrounding admissibility should fully arm an innocence project member with the basic tools they need to pick apart a prosecution case and identify the threads that merit further investigation, or the commissioning of an expert, before submissions can be prepared. There wasn't an innocence project at my university when I was at law school in 2010. How I wish there had been, if only to structure my expectations. I walked into the Crown Court with the lofty principles and beliefs of the lecture hall. What I received in return came as a cold, sharp shock. Innocence projects serve a vital educational purpose, grounding future lawyers and barristers in the realities and practicalities of a fallible justice system.

Sponsorship: The most fundamental problem facing any innocence project is funding. Without it they lack the resources or the capacity to meet demand. A radical approach is needed if others are to improve the service they can provide. When I was at university I stood for our Law Society elections. Fundamental to our role was approaching law firms to sponsor our society events, open days, competitions, etc. Every student law party we hosted was funded partly by a firm keen to attract future applicants, and partly by our own membership fees. Law societies have a responsibility to reflect the ethical interests of their student members, and I believe that in this capacity they can play a much greater role in the innocence project movement.

If student law societies allocated part of their funding to their university's innocence project then they would be able to secure its longevity and increase its capacity. This would involve student representatives actively approaching law firms to fund their innocence projects. They may also choose to mark-up their membership fees on the basis that a percentage was going towards the initiative. Innocence projects have everything to gain from affiliations with law firms. Many will be willing to donate time rather than money, supporting projects through the provision of invaluable expertise and legal oversight.

Exciting collaborations like these have already started appearing in the past six months alone: at the University of Essex, for example, who have begun working in partnership with Inside Justice (itself funded by the Esmee Fairbairn Foundation, Inside Time, and the Roddick Foundation); or Sheffield Hallam University, who are now working in conjunction with Cartwright King (albeit on prison law); and of course, the all new Centre for Criminal Appeals, which – whilst an independent law practice in its own right – is funded on a similar basis by charities. Their vision of bringing an American model of miscarriage of justice investigation to Britain – with a focus on defence orientated 'boots on the ground' reinvestigation – is perhaps the most exciting ideological departure from INUK yet.

Corporate Social Responsibility: Above all, student law societies and innocence projects alike need to tap into the increasingly prevalent mind-set of Corporate Social Responsibility (CSR), through which corporate law firms pledge to channel a percentage of their time to pro bono work (free legal help) each year. CSR is founded upon the belief that corporations ultimately have a moral duty to give something back to society, and that the legal profession in particular is ethically bound to promote access to justice and equality of arms. Over recent years, this has seen a growing amount of private sector involvement in traditionally state-funded areas such as social welfare law. Indeed, the idea of setting an aspirational target of pro bono hours for all lawyers and firms to aim for is gaining increasing currency within the profession.

The Attorney General's pro bono envoy, Michael Napier – in expressing his own concerns about cuts to legal aid – commented that, "There is pressure in every direction to meet the gap in unmet legal needs". Pro bono should never replace legal aid – indeed it can't – but it

repair - many windows were broken and some cells were in a particularly poor state. Significant investment was needed to bring all the buildings up to a decent standard.

Time out of cell for most was reasonable and although too many prisoners were locked up during the core day, most had some activity. Leadership and management of learning and skills was good and some excellent work was taking place to improve the range and amount of activities available. There were now sufficient activity places for the population held and unemployment was low. The focus on vocational training was particularly strong, with some good opportunities offered, although some waiting lists were poorly managed. However, attendance and punctuality were poor and aspects of the education provision needed urgent attention, particularly the quality of some teaching and outcomes in functional English and maths. Given the age, profile and needs of the population this was surprising and was a key area for improvement.

Pre-release resettlement support was very strong and it was notable that in our survey more prisoners than the comparator said they had done something, or something had happened to them at the prison, that would make it less likely that they would offend in the future. Work to support prisoners in maintaining contact with family, friends and the outside world was particularly encouraging, and important for this age group. However, offender management arrangements were underdeveloped and many key assessments were overdue or had not even been started. While some work with higher risk prisoners was better, as was most public protection work, this was a key area for improvement to ensure everything possible was being done to reduce the risk of future reoffending.

Overall, while Deerbolt remained a decent and generally safe prison, some key challenges were evident. Action to address the supervision of force started as soon as we raised concerns with the prison management, and needed to be quickly resolved. Deficits in the key areas of functional skills teaching and achievements, and offender management, needed close management attention, but we were confident that this would happen and that in time progress would be made. The quality of the buildings' infrastructure is more difficult for local managers to address and support is needed from the National Offender Management Service (NOMS) to resource the improvements required. This is a challenging agenda but Deerbolt remains one of the better young adult prisons we have inspected.

Nick Hardwick, HM Chief Inspector of Prisons, May 2015

HMP Manchester - One of the Best Inner City Prisons!!!

Once known as Strangeways, HMP Manchester is a local prison which also holds a small number of high risk prisoners. The overcrowded Victorian prison held a complex and challenging population. The normal pressures of a local prison - a high churn in the population and a high incidence of mental health and substance abuse problems - had to be managed alongside the need to hold its small, high risk category A population safely and securely. Its last inspection in 2011 was very positive about the prison and the quality of its leadership, although there were some concerns. This recent inspection found that HMP Manchester had maintained many of its previous strengths and, despite signs of the pressures the prison system as a whole is under, had made progress in addressing those concerns.

Inspectors were concerned to find that: - the number of self-inflicted deaths remained high, but the prison was much better focused on preventing these and learning lessons from each incident and care for those at risk of self-harm was good; - more prisoners said they felt unsafe than at the last inspection and there were more violent incidents, although both of these were lower than at comparable prisons; - the prison held some men with profound

record relied upon when having to recall and account for all decisions made.

Some say the professionalism of a major crime investigation can be measured not only against the quality of the decisions made but also by the way in which they have been recorded. Decisions contained within KDLs that are properly recorded and therefore auditable are a sure means of ensuring there are adequate methods of accountability in complex investigations and operational policing. How decisions are judged when they come under scrutiny might largely depend on the meticulousness of entries made in policy files. It is not uncommon for an SIO to be called to account, eg at court, to explain a policy decision, at which time their policy file becomes a hugely important asset.

Long after an investigation has ended, a KDL can assist in the review of the quality of the management of an investigation by facilitating consideration and assessment of investigative decisions. Recording the rationale behind decisions at the time they were made can explain why they were made in the circumstances and on the basis of the information existing at the time, without the benefit of hindsight. This will be helpful in explaining to third parties how a logical decision-making process was followed, and why decisions were changed or the course of an investigation was changed in the light of developing information and events.

Decisions may be challenged long after they were made. Such challenges can be difficult to defend without accurate records of the reasons behind decisions. KDLs provide accountability and transparency in justifying decisions, including those about resourcing and competing demands.

Unannounced Inspection of HMYOI Deerbolt

HMP Deerbolt is a young adult establishment managing male prisoners aged 18 to 21. Located near Barnard Castle in County Durham it provides a place for up to 513 convicted young men who come from across the north of England. At our last inspection in 20 I I we considered it to be a safe and respectful prison that provided a fairly purposeful regime and some solid resettlement support. At this inspection, the evidence again suggests that the prison is performing reasonably well.

Most prisoners felt safe and early days support was particularly good. The population however, had changed and it now held mainly those convicted of violent or other serious offences. While most violent incidents were low level, some were more serious, and the emerging problem of prisoners using new psychoactive substances, such as Spice, meant that the prison had to be vigilant in responding to these challenges. It was however, commendable that the prison had not had any self¬inflicted deaths since opening, which was testament to some good work supporting those deemed vulnerable to self-harm. Substance misuse support provided on the recovery unit was excellent but needed to be extended to those requiring such assistance on other units. Use of segregation was not high and relationships on the unit were good, although the regime was somewhat limited. However, while use of force was not high, we were concerned about the management and application of some aspects offorce at the prison. We found examples where de-escalation had not been used effectively, and overall arrangements did not provide reassurance that all force used was proportionate.

Relationships between staff and prisoners were strong and staff had appropriately high expectations of the behaviour they expected from the young men held. While strategic elements of diversity work were in need of development, and despite negativity in our survey from black and minority ethnic and disabled prisoners, we found outcomes for the protected groups were reasonable. Health services were very good and valued by prisoners. The general environment and cleanliness was also good, but some residential areas were in a poor state of

already makes a huge contribution in supplementing its provision. As Rebecca Hilsenrath, chief executive of the charity LawWorks, notes: “It doesn’t help if, as a profession, we simply maintain the line that this is the government’s responsibility. Even if some of us can’t do much, it is beholden on us to do as much as we can”. Smarter marketing will enable innocence projects to garner both the support they need and the cases they need to work with.

Dennis Eady, of the Cardiff University Innocence Project, has suggested that the breaking up of INUK may ‘provide a timely opportunity for universities to close down their activities’, but I have to disagree. Rather, they should take this opportunity to consider a new approach. We need our innocence projects now more than ever. They play an invaluable role not only in expediting justice, but in shining the spotlight on the prevalence and scale of miscarriages of justice in Britain. From the ashes of INUK lingers a glistening phoenix. Exciting opportunities await. Now is the time to grasp those opportunities and foster the rebirth of an all new innocence movement in our country. There has never been greater potential for change in this field. Let us rise to the occasion and unite in our pursuit of justice.

Mark Alexander: A8819AL, HMP Gartree, Gallow Field Road, Market Harborough, LE16 7RP

Habib Ullah Death - Police Misconduct Hearing to be Held in Public

'The family are genuinely pleased that the misconduct hearing of the officer's involved in Habib’s death is taking place in public. Whilst we still have grave reservations about the role of the IPCC in the whole investigation it is nevertheless a significant step to have this hearing take place in front of us. Justice can not seen to be done if hearings like this continue to take place behind closed doors. We know there is still a great deal of public interest in what happened in 2008 and we hope that the officers who are looking at gross misconduct charges receive an appropriate decision about their futures with Thames Valley Police. With all the talk about restoring ‘confidence in the complaints' system it needs to be remembered that this is an employment process and we are still hugely concerned that we and many other families are still being failed by the Crown Prosecution Service and the legal system when it comes to getting justice’ Saqib Deshmukh, Justice4Paps

Thames Valley Police to Hold Misconduct Hearings in Public

The Independent Police Complaints Commission (IPCC) has directed Thames Valley Police to hold a misconduct hearing for five officers in public following the death of Habib Ullah in July 2008. In August 2014 the IPCC announced that its investigation found a case to answer for gross misconduct against five Thames Valley police officers. After the inquest concluded and following a mandatory consultation with interested parties, IPCC Associate Commissioner Guido Liguori has concluded that the high level of public interest; the gravity and seriousness of the case; and the need for transparency mean the full misconduct hearing should be held in public. Thames Valley Police were consulted and were also in favour of a public hearing.

Mr Liguori commented: "I have given careful consideration to all of the representations made, both those in favour, and those opposed to this course of action. The focus of this disciplinary hearing will be on the testimony of the five officers following Mr Ullah's death. The purpose of holding a disciplinary hearing in public is to maintain confidence in the police complaints system. The IPCC has set a high threshold for the gravity of cases to be heard in public and I am satisfied that the alleged circumstances of this case meet that test." It will be for Thames Valley Police to make arrangements for the hearings to be held in public and these details will be published in due course. The IPCC investigation report will be published at the conclusion of the hearings.

Background: Mr Ullah died on 3 July 2008 following a drugs search by police officers. The IPCC investigation into events surrounding Mr Ullah's death concluded in December 2009. However, the inquest into Mr. Ullah's death was abandoned in December 2010 when new evidence emerged publicly. This led to the re-opening of the IPCC investigation in order to assess the impact the new evidence had on the original investigation.

A file was sent to the Crown Prosecution Service (CPS) in February 2014 and in August 2014 the CPS decided that there was insufficient evidence to charge any individual in relation to Mr Ullah's death or in relation to allegations of perverting the course of justice. The full investigation report was provided to the Ullah family and Thames Valley Police. Thames Valley Police agreed there was a case to answer for the officers. The IPCC began its consultation on a public hearing in August 2014 but agreed to postpone until after the inquest. We restarted the consultation in March 2015. *IPCC, May 12, 2015*

Inquest Into Death Of Kingsley Burrell Jury Return Neglect Finding

Kingsley Burrell, a 29 year old Black man from Birmingham, died on 31 March 2011 following a prolonged and brutal restraint by police and a failure by medical staff to provide basic medical care. The six week inquest into his death has concluded with a finding of neglect, amidst a raft of other highly critical findings including that police officers lied about the circumstances in which Kingsley was left in seclusion, and that unreasonable force by police contributed to the death.

On 27 March 2011, four days before his death Kingsley, was detained by police under the Mental Health Act and forcibly restrained by means of rear cuffs, leg straps and threats of a taser for 4π hours. On 30 March police and a dog unit were called to the hospital, and Kingsley was once again restrained using rear cuffs, leg straps, and the threat of tasers. En route to another facility, an ambulance worker placed a blanket over Kingsley's head as he lay chest down on a hospital trolley, still restrained. During the time he was restrained Kingsley was subjected to baton blows, punches, and strikes by police.

Police then left Kingsley lying face down and motionless in a locked seclusion room for around 28 minutes, with his trousers about his knees and the blanket still around his head. Even though medical staff observing him had already seen that his respiration had dropped to a worrying rate, no one entered the room. When they finally did, they found that Kingsley had suffered a cardiac arrest. Further delays followed in locating a functioning defibrillator and in calling an ambulance. He never regained consciousness and died the next day. The jury found that these delays contributed to the death. The inquest jury found that all police and medical staff who dealt with Kingsley should have removed the blanket over his face, but that none did, and that this was one of the causes of death.

Four police officers were arrested on suspicion of gross negligence manslaughter and misconduct in a public office but were not charged. Three of them will now face gross misconduct proceedings for failing to give truthful accounts to the investigation into the death. Neither West Midlands Ambulance Service nor Birmingham & Solihull Mental Health Trust have responded to requests for information as to any disciplinary consequences for their staff.

Chantelle Graham, Kingsley's partner said: "Kingsley needed help and compassion but instead he was treated so brutally by police, ambulance staff and medical staff. It hurts to know that his last hours were filled with brutality and fear, and that no one had the courage to stop it. I never want to hear of this happening to another family. Kingsley will be badly missed by his children and his family"

Kadisha Brown- Burrell, Kingsley's sister said: "The family are not jumping for joy as yet

however, some consideration must have been given by that state to the issues at stake and a considered judgment must have been made on the options available. One cannot excuse a slack or i II-considered pol icy as survivable just because it can be said to be open to the member state to make a choice which is different from that of other member states. There needs to be some form of evaluation or judgment of the issues at stake. If the choice is the product of consideration and is designed to meet the particular circumstances or conditions encountered in the particular member state, that is one thing. But an ill-thought out policy which does not address the essential issues of proportionality cannot escape condemnation simply because a broad measure of discretion is available to an individual state.

101. A margin of appreciation is accorded to a contracting state because Strasbourg acknowledges that the issue in question can be answered in a variety of Convention-compatible ways, tailored to local circumstances. But the margin of appreciation that is avai lable to the state does not extend to its being permitted to act in a way which is not Convention compliant. If the state acts in such a way, it cannot insulate itself from challenge by recourse to the margin of appreciation principle. In Wingrove v UK (1996) 24 E H R R 1, para 58, a 'broad margin' case, ECtHR emphasised that authorities within the state in question were in a better position than international judges to give an opinion "on the exact content of these requirements with regard to the rights of others as well as on the 'necessity' of the 'restriction"'. Domestic courts therefore have the responsibi l ity to examine closely the proportionality of the measure without being unduly influenced by the consideration that the Strasbourg court, if conducting the same exercise, might feel constrained to give the contracting state's decision a margin of appreciation.

102. For the reasons that I have given, I have concluded that the issues which must be considered under the proportional ity exercise have not been properly addressed and that, if they had been, a more restricted pol icy would have been the inevitable product. The margin of appreciation cannot rescue the PSNI policy from its incompatibility with the appellant's article 8 right.

Conclusion 103. I would therefore allow the appellant's appeal and declare that the policy of retaining indefinitely DNA profiles, fingerprints and photographs of all those convicted of recordable offences in Northern Ireland is incompatible with article 8 of ECHR.

Senior Investigating Officer - Policy Files & Key Decision Logs

This extract From 'Blackstoness' SIO Book is aimed at demystifying the topic of policy files or key decision logs, the completion of which can be an art in itself and one that must be mastered. Policy files (or Key Decision Logs, 'KDLs' as they are sometimes known) are a crucial element of an Senior Investigating Officer's (SIO) decision-making process. They are how details about key decisions and the rationale as to why they were made, or in some cases not made, at a particular time in an investigation are recorded and articulated.

Decision logs have the potential to be an important decision support tool and can help externalise ideas during decision making. They are used in most if not all major incidents and serious crime investigations where decision making is deemed critical. In most forces there are standard formats and procedures for their completion outlined in internal standard operating procedures. Policy files and the decisions recorded within them can be scrutinised in many settings, such as in court cases, public enquiries, internal reviews and Independent Police Complaints Commission (IPCC) investigations. The logs can and should be the safety net for the decision maker and organisation. This is because they are the official and definitive

94. It is suggested that the fact that a conviction may become spent is no more than one of a number of factors to be taken into account in deciding whether a proper balance has been struck between the appellant's rights and the interests of the community. I consider that it ranks much higher than this. The single basis on which Mr Gaughran's biometric material is retained is that he has committed a crime. If the principle of rehabilitation is to have any meaning, ex-offenders such as he cannot be defined by the fact of their former offending. The philosophy underlying the rehabi l itation provisions is the restoration of the ex-offender to his or her position as a citizen without the stigma of having been a criminal. He once more shares with his fellow citizens, entitlement to be treated as if he was of good character. If the fact that his conviction is spent is relegated to the status of a single factor of no especial significance, the purpose of rehabi l itation is frustrated.

95. Rehabilitation is our criminal justice system's way of acknowledging and encouraging the potential for personal growth and change. If we continue to define ex-offenders throughout their lives on the basis of their offending we deprive them of reintegration into society on equal terms with their fellow citizens. The only reason proffered to justify the denial of that hope is the assertion that those convicted of offences may reoffend. The premise which must underlie this claim is that those convicted of recordable offences are more likely to reoffend than those who have not been. But no evidence has been presented to support that claim. Unsurprisingly, therefore, no attempt to quantify such a risk has been made. It is difficult to avoid the conclusion that the fact of conviction merely provides the pretext for the assembly and preservation of a database which the pol ice consider might be useful at some time in the future and that it has no direct causal connection to the actual detection of crime and the prevention of future offending.

96. In any event, for the principle of rehabilitation to have proper effect, it is necessary that, once a conviction is spent, any supposed or presumed risk be regarded as having dissipated. Offenders whose convictions are spent must be treated as any other citizen would be treated. Allowing their biometric details to be retained indefinitely is in flat contradiction of that fundamental principle.

97. It is, of course, true that Mr Gaughran's conviction was not spent when the case was decided in the Divisional Court but that is nothing to the point. In the first place, his conviction is now spent and, more importantly, the PSNI policy proceeds on the basis that the Rehabilitation Order provisions can effectively be ignored. I do not bel ieve that they can be and they constitute an unanswerable reason that the policy does not strike a fair balance between the rights of individuals who are entitled to the benefit of the Order's rehabilitation provisions and the interests of the community.

98. It might be said that, when the 2013 Act comes into force, there will be an express statutory power to retain indefinitely all biometric data of those convicted of a recordable offence. If that will indeed be its effect, serious questions will arise, in my opi nion, about its compati bi l ity with article 8 of ECtHR . But that is not a matter for decision in this case. The possibility of future legislation underpinning the present policy of PSN I should not deflect this court from recognising the current illegitimacy of that policy.

Margin of appreciation 99. It is, of course, the case that a margin of appreciation is available to national authorities in decid ing where to stri ke the balance between the rights of the individual under article 8 of ECtHR and the interests of the community. The use and advantage of that margin is exemplified by the consideration in Sand Marperof the different standards that have been adopted by various member states of the Council of Europe. It is also referred to in the judgment of Lord Clarke and in the annexes to his judgment.

100. For a margin of appreciation to be accorded to the choice of the member state,

due to the fact that today's damning narrative conclusion has not brought any custodial sentences to all the services involved, for example, 9 mental health staff, 4 West Midlands police officers and 2 Ambulance staff. The CPS needs to review its previous decision not to prosecute as only then will the family have some sort of closure in the death of kingsley".

Carolynn Gallwey of Bhatt Murphy's, solicitor for Kingsley's children and their mothers said: "The inquest has heard distressing evidence of the inhumane, degrading and avoidable death of a young father. A proper overhaul of how police and mental health services deal with vulnerable people, especially where forcible restraint is involved, is long overdue."

Deborah Coles of INQUEST said: "Kingsley Burrell was a vulnerable black man in need of help and yet he was failed by all those who should have been there to protect him. For a man so obviously unwell to be restrained in such a brutal and terrifying way in a healthcare setting raises serious concerns about the culture and practice in policing and mental health provision. This begs the question of whether racism informed the way he was treated. Time and again we're told that 'lessons will be learned' and yet we see the same shocking practice and system failures identified following previous deaths. The neglect and use of unreasonable restraint uncovered by this inquest must prompt the Government to reaffirm its commitment to ensure police and mental health providers work together to respond humanely to people in crisis. We have no confidence this callous, indifferent and cruel treatment would not be replicated today."

INQUEST has been working with the family of Kingsley Burrell since March 2011. The family is represented by INQUEST Lawyers Group members Carolynn Gallwey of Bhatt Murphy Solicitors and Richard Reynolds of Garden Court Chambers. Karon Monaghan QC of Matrix Chambers is instructed as Senior Counsel.

Government Rewrites Surveillance Law to Get Away With Hacking Allow Cyber Attacks

The British government quietly changed anti-hacking laws to exempt GCHQ and other law enforcement agencies from criminal prosecution, it has been claimed. Details of the change were revealed at the Investigatory Powers Tribunal which is hearing a challenge to the legality of computer hacking by UK law enforcement and intelligence agencies. The Government amended the Computer Misuse Act (CMA) two months ago. It used a little-noticed addition to the Serious Crime Bill going through parliament to provide protection for the intelligence services. The change was introduced just weeks after the Government faced a legal challenge that GCHQ's computer hacking to gather intelligence was unlawful under the CMA.

The challenge, by the charity Privacy International and seven internet service providers, claims GCHQ's actions were unlawful and called for the techniques to be stopped. It followed revelations by Edward Snowden, the US intelligence whistle-blower, that US and UK agencies were carrying out mass surveillance operations of internet traffic. He claimed that GCHQ and its US counterpart – the National Security Agency – had the ability to infect potentially millions of computer and mobile handsets with malware which enabled them to gather up immense amounts of digital content, switch on microphones or cameras on user's computers, listen to phone calls and track their locations. Government sources insisted the amendment did not change the law as the intelligence agencies had powers under the Intelligence Services Act. Parliamentary guidance notes explaining the amendment described its purpose was to "remove any ambiguity over the interaction between the lawful exercise of powers … and the offence provisions."

Eric King, the deputy director of Privacy International, said: "The underhand and undemocratic manner in which the Government is seeking to make lawful GCHQ's hacking oper-

ations is disgraceful. Hacking is one of the most intrusive surveillance capabilities available to any intelligence agency, and its use and safeguards surrounding it should be the subject of proper debate. Instead, the Government is continuing to neither confirm nor deny the existence of a capability it is clear they have, while changing the law under the radar." Privacy International insisted that the notes accompanying the changes to the Serious Crime Bill did not explain its full impact, and that no regulators, commissioners, industry or members of the public were consulted before it came into law. The legislation came into effect on 3 May.

The charity said it wasn't the first time the Government has changed the law. In February, a code of practice for GCHQ which gives "spy agencies sweeping powers to hack targets, including those who are not a threat to national security nor suspected of any crime", was released, a charity spokesman claimed. Privacy International launched its challenge asserting the use of malware was illegal in England and Wales under the 1990 CMA. It claimed that protection provided by warrants signed by a secretary of state under the Intelligence Services Act conflicted with individuals' right to privacy under the European Convention on Human Rights. The Home Office rejected the activists' claims. A spokesperson said: "There have been no changes made to the Computer Misuse Act 1990 by the Serious Crime Act 2015 that increase or expand the ability of the intelligence agencies to carry out lawful cyber crime investigation. "It would be inappropriate to comment further while proceedings are ongoing."

Piper v United Kingdom - 44547/10 Judgment 21.4.2015 Article 41 Just satisfaction

Absence of award in respect of non-pecuniary damage where delays in confiscation proceedings were mainly attributable to applicant: Facts – In June 2001 the applicant was found guilty of drug-trafficking offences and sentenced to fourteen years' imprisonment (he was released in 2006). By virtue of his conviction he became liable to confiscation of assets under the Drug Trafficking Act 1994. The compensation proceedings ended with a judgment of the Court of Appeal in March 2010 upholding a confiscation order at first instance in which the total amount of the applicant's benefit from criminal conduct was assessed at over 1,800,000 pounds sterling. In his application to the European Court, the applicant complained of the length of the confiscation proceedings (Article 6 § 1 of the Convention). Law – Article 6 § 1: The period to be taken into account commenced with the applicant's arrest in January 1999 and ended with the judgment of the Court of Appeal in March 2010 (approximately eleven years, two months). Although the applicant had pursued a series of fruitless appeals, there had also been delays in the case attributable to the State authorities totalling approximately three years. Given, in particular, what had been at stake for the applicant, and notwithstanding the fact that he was himself responsible for the majority of the overall delay, the Court found that the proceedings had not been completed within a reasonable time.

Conclusion: violation (unanimously). Article 41: As regards the applicant's claim for non-pecuniary damage, the Court accepted that, although not fully identified, some of the "strain" experienced by the applicant during the course of the confiscation proceedings had inextricably been linked to the issue of delay. However, that "very limited uncertainty" (in the words of the Court of Appeal) could not be taken to have caused the applicant substantial prejudice at all. Furthermore, it was far from the totality of the extraordinary length of the proceedings that had been found to be attributable to the respondent State. On the contrary, it was the applicant himself who, after being convicted of a serious offence of drug-trafficking involving potentially enormous rewards for himself but much damage to society, was largely responsible for preventing the proceedings aimed at confiscating his assets being brought to a timely

of this passage is clearly relevant to the issue under discussion here. No differentiation is made based on the gravity of the offence of which an individual was convicted; the retention is not time-limited, whatever the offence; and there is no provision for independent review of the justification for the retention of the data.

90. The court also addressed the question of stigmatisation of individuals by the retention of data. At para 122 it said: "Of particular concern in the present context is the risk of stigmatisation, stemming from the fact that persons in the position of the appl icants, who have not been convicted of any offence and are entitled to the presumption of innocence, are treated in the same way as convicted persons. In this respect, the court must bear in mind that the right of every person under the Convention to be presumed innocent includes the general rule that no suspicion regarding an accused's innocence may be voiced after his acquittal. It li true that the retention ofthe applicants' private data cannot be equated with the voicing of suspicions. Nonetheless, their perception that they are not being treated as innocent is heightened by the fact that their data are retained indefinitely in the same way as the data of convicted persons, whi le the data of those who have never been suspected of an offence are required to be destroyed."

91. Of course, it is true that the sense of stigmatisation may be more acutely felt by those who have been acquitted of crime but that does not mean that someone such as the appellant would be free from such sentiment knowing as he does that his biometric data and photograph wi II forever remain on pol ice databases. A lthough he has been convicted of a crime, and a serious crime at that, he is entitled to be presumed innocent of future crime notwithstand ing that conviction. H is sense of stigmatisation and the impact that the retention of his data on police databases must be taken into account, therefore, in an assessment of whether a fair balance has been struck between his rights and the interests of the community as a whole. As Lord Reed observed in para 71 of Bank Mellatthis involves what is essentially a value judgment. Making due allowance for what has been claimed will be the contribution made to fighting crime by the indefinite retention of data from those such as the appellant, when weighed against his personal interests, my judgment is that a fair balance has not been struck between the two.

92. I am reinforced in this view by consideration of the provisions and intended effect of the Rehabilitation of Offenders (Northern Ireland) Order 1978. By virtue of article 5 of that Order, a person who has become rehabilitated for the purposes of the Order is to be "treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence". Retaining the biometric data of someone who has become rehabilitated is plainly inconsistent with the requirement that he or she be treated as if they had never been convicted of the offence. Conviction of the offence is the very basis on which the data are retained. If Mr Gaughran had not been convicted, his data could not be retained. But he is being treated markedly differently from someone who has not been convicted.

93. The Secretary of State has submitted that the sole effect of the Order is to restrict the use that may be made of past convictions in legal proceedings, eg where the subject has suppressed a spent conviction. This cannot be right. The contexts in which a rehabi I itated offender is entitled to demand that he or she be treated in precisely the same way as someone who has not been convicted are not prescribed by the Order. If a rehabilitated offender is entitled, for instance, to refuse to disclose that he has not been convicted when applying for employment, why should he not be entitled to demand that his biometric data be destroyed, after the original purpose in obtaining them is no longer relevant, just as someone who has been arrested but not convicted of an offence is entitled to do?

of crime that the materials concerned in this case should be retained indefinitely.

85. For the intervener, the Secretary of State for the Home Department, Mr Eadie o C accepted that the decision as to how long and for what offences biometric and other data should be retained called for a nuanced decision. He argued that this had been achieved by the exclusion of non-recordable offences and offences committed by ch i ldren and by the fact that such material from those not convicted was no longer retained. He was unable to point to evidence, however, that the question of whether it was necessary that there be retention of all data from all convicted of recordable offences for all time had been considered. Absent such consideration and in light of the fact that it is eminently possible to conceive of measures which are less intrusive but which would conduce to the avowed aim of the policy, it is simply impossible to say that the policy in its present form is the least intrusive means of achieving its stated aim.

A fair balance? 86. The final element in the proportionality examination is whether a fair balance has been struck between the rights of the individual and the interests of the community. Although this may not be of quite the same importance as the rational connection and less intrusive means factors, it deserves consideration in its own right. The starting point must be a clear recognition of the importance of the rights of the individual. This was emphasised by ECtHR in Sand Marperat para 103: "The protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family l ife, as guaranteed by article 8 of the Convention. The domestic law must afford appropriate safeguards to prevent any such use of personal data as may be inconsistent with the guarantees of this article. The need for such safeguards is all the greater where the protection of personal data undergoing automatic processing is concerned, not least when such data are used for police purposes. 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 for which those data are stored. The domestic law must also afford adequate guarantees that retained personal data was efficiently protected from misuse and abuse. The above considerations are especially val id as regards the protection of special categories of more sensitive data and more particularly of DNA information, which contains the person's genetic make-up of great importance to both the person concerned and his or her family."

87. At para 104 the European court acknowledged that the interests of the data subjects and the community as a whole in protecting personal data could be outweighed by the legitimate interest in the prevention of crime but it emphasised that the intrinsically private character of the information called for careful scrutiny of any state measure authorising its retention and use by state authorities.

88. Addressing the blanket and indiscriminate nature of the power of retention, the court said this at para 119: "The material may be retained irrespective of the nature or gravity of the offence with which the individual was originally suspected or of the age of the suspected offender; fingerprints and samples may be taken - and retained - from a person of any age, arrested in connection with a recordable offence, which includes minor or non-imprisonable offences. The retention is not time limited; the material is retained indefinitely whatever the nature of seriousness of the offence of which the person was suspected. Moreover, there exist only limited possibilities for an acquitted individual to have the data removed from the nationwide database or the materials destroyed; in particular, there is no provision for independent review of the justification for the retention according to defined criteria, including such factors as the seriousness of the offence, previous arrests, the strength of the suspicion against the person and any other special circumstances."

89. While this was said in relation to those who had not been convicted of crime, much

close. As the national judges and the Court of Appeal in particular had pointed out, the applicant had "deployed every legal stratagem to delay the confiscation process" and succeeded in his endeavour. Faced with various objections and requirements from the applicant's legal team, the judge in the confiscation proceedings had sought to strike a balance between the need to prevent delay in the proceedings and the importance of allowing the applicant adequate time to prepare and mount his defence.

Having regard to these particular circumstances, the Court did not consider it "necessary", in the terms of Article 41 of the Convention, to afford the applicant any financial compensation and held that the finding of a violation of Article 6 § 1 by reason of the delay in the proceedings attributable to the respondent State in itself constituted adequate just satisfaction for the purposes of the Convention.

Simon Hall Prison Death Concerns Raised

Alleged failures by the prison service in a killer's case had an "impact" on him later being found dead in his jail cell, a pre-inquest hearing was told. Simon Hall, 36, was found hanged at Wayland Prison, Norfolk, in 2014. Hall was jailed in 2003 for killing Joan Albert, but claimed innocence for 12 years before confessing his guilt. The hearing was told that when he was transferred to Wayland, details of his suicidal tendencies were not passed on - although this has been disputed.

The hearing, held by Norfolk coroner Jacqueline Lake, was told Hall had attempted suicide following his confession to killing Mrs Albert, 79, at her home in Capel St Mary, near Ipswich. Tom Stoate, counsel to Hall's wife Stephanie, asked for the inquest to include an investigation into his medical care at Hollesley Bay open prison, near Woodbridge in Suffolk, from where he was transferred to Wayland. He alleged there was "evidence of systemic failures" in the passing of information to Wayland, near Thetford, about Hall's suicidal condition, which had a "clear impact on his death". But Cicely Heywood, counsel for HM Prisons, disputed key information on Hall was not sent to the jail at the time of his transfer.

Police to Investigate 'Suppressed Evidence' From Jeremy Thorpe Trial

Steven Morris, Indpendent: Thorpe, who died last year aged 85, was cleared in 1979 at the Old Bailey of conspiracy to murder model Norman Scott. The politician had been accused of hiring a hitman to murder Scott, who alleged that Thorpe wanted him silenced to cover up a sexual affair. Scott's great dane Rinka was shot at his home on Dartmoor in Devon, but the model escaped unharmed. After Thorpe's death, a Radio 4 documentary broadcast the claims of Dennis Meighan, an antique firearms dealer who said he was originally asked to kill Scott but refused to be involved. Meighan said he spoke to police about the approach but his original statement vanished to be replaced by one that removed incriminating references to Thorpe and the Liberal party. On Wednesday, Avon and Somerset police, which carried out the original inquiry, confirmed it had asked another force to look at the case and is currently drawing up terms of reference. It may reveal later which force is to carry out the fresh investigation. The Independent Police Complaints Commission has been informed of the move.

Thorpe won the North Devon seat for the Liberal party in 1959 and was renowned for his energetic campaigning and flamboyant style. He served as the party's treasurer before becoming leader in 1967. His political career was ended by the scandal. Thorpe, who married twice, was cleared along with three fellow defendants in 1979 in what was billed at the time as the "trial of the century". In the Radio 4 documentary, made by investigative reporter Tom Mangold, Meighan alleged that his original statement incriminated himself and Thorpe. He claimed he later received an anonymous phone call asking him to go to his nearest police station in west London. In the documentary, Meighan said:

"I just went in there on my own, read the statement, which did me no end of favours but it did

Jeremy Thorpe no end of favours too because it left him completely out of it. So I thought, I've got to sign this. So I signed it, gave it back to them, said nothing to them and that was the end of it. I just virtually left everything out that was incriminating. At the same time everything I said about Jeremy Thorpe, the Liberal party, etc, was left out as well." Speaking on Radio 4's Today programme, Mangold said that if Meighan was telling the truth – and he had no reason to think he was not – there must have been a "conspiracy at the very highest level".

Poland Pays $250,000 to Victims of CIA Rendition and Torture *Indpendent*

Poland is paying a quarter of a million dollars to two terror suspects tortured by the CIA in a secret facility in this country – prompting outrage among many here who feel they are being punished for American wrongdoing. Europe's top human rights court imposed the penalty against Poland, setting a Saturday deadline. It irks many in Poland that their country is facing legal repercussions for the secret rendition and detention programme which the CIA operated under then-President George W Bush in several countries across the world after the 9/11 attacks.

So far no US officials have been held accountable, but the European court of human rights has shown that it does not want to let European powers that helped the programme off the hook. The court also ordered Macedonia in 2012 to pay €60,000 ($68,000/£43,000) to a Lebanese-German man who was seized in Macedonia on erroneous suspicion of terrorist ties and subjected to abuse by the CIA. The Polish foreign ministry said on Friday that it was processing the payments. However, neither Polish officials nor the US embassy in Warsaw would say where the money is going or how it was being used.

For now, it remains unclear how a European government can make payments to two men who have been held for years at Guantánamo with almost no contact to the outside world. Even lawyers for the suspects were tight-lipped, though they said the money would not be used to fund terrorism. Witold Waszczykowski, an opposition lawmaker, says he considers the punishment unfair because the suspects were in the sole custody of American officials during their entire stay in Poland in 2002 and 2003 – and never under Polish authority. "I think we shouldn't pay, we shouldn't respect this judgment," Waszczykowski said. "This is a case not between us and them – it's between them and the United States government."

The European court of human rights ruled last July that Poland violated the rights of suspects Abu Zubaydah and Abd al-Rahim al-Nashiri by allowing the CIA to imprison them and by failing to stop the "torture and inhuman or degrading treatment" of the inmates. It ordered Warsaw to pay €130,000 to Zubaydah, a Palestinian, and €100,000 to Nashiri, a Saudi national charged with orchestrating the attack in 2000 on the USS Cole that killed 17 US sailors. Poland appealed against the ruling but lost in February. The foreign minister, Grzegorz Schetyna, said at the time that "we will abide by this ruling because we are a law-abiding country". The country apparently received millions of dollars from the United States when it allowed the site to operate in 2002 and 2003, last year's report on the renditions program by the US Senate intelligence committee said in a section that appears to refer to Poland though the country name was redacted.

The ruling by the European court of human rights also required Poland to seek diplomatic guarantees from the United States that the suspects not face the death penalty, a request that Poland sent several weeks ago. That move was largely symbolic given that a foreign government cannot dictate such a matter to the United States. But the court wanted Poland to make a "good faith effort" to pressure its US ally not to impose the death penalty, said Adam Bodnar, a human rights lawyer with the Helsinki Foundation for Human Rights, who has been a

whether the machinery employed in the present case by the UK constitutes a measure which is disproportionate in relation to the objective pursued, on the ground that the same result may be achieved by the means of less restrictive measures."

79. EU law and that of ECHR have become increasingly assimilated, not least because of the possible future accession of the E U to the Convention and the enactment of the European Charter on Human Rights. In this context, see also cases such as Baumbast v Secretary of State for the Home Department [2002] (Case No C-413/99) [2003] ICR 1347. The Court of Justice of the European Union has traditionally given the Convention "special significance" as a "guiding principle" in its case law (Anthony Arnull, The European Union and its Court of Justice (2006) pp 339-340) and therefore, whi le the E U approach to proportional ity is not necessarily to be imported wholesale into the Convention analysis, it is clear that the prominence given to this general principle in EU law is likely to be reflected in Strasbourg jurisprudence.

Canadian case-law 80. Lord Reed in Bank Mellat (/l/o 2), referred to the circumstance that Canadian law has long embraced the least restrictive measures principle - see, in particular, Ford v Quebec [1988] 2 SC R 712 and Black v Royal College of Dental Surgeons [1990] 2 SC R 232 and the classic exposition of the test in R v Oakes above.

81. I n Libman v A G of Quebec (1997) 151 D L R (4th ed) 385, paras 415-416 the court stated: "The government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be 'minimal', that is the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the court will not find it over broad because they can conceive of an alternative which may better tailor the objective to infringement."

82. This approach is largely mirrored in the current case-law of this country, particularly Bank Mellat (/l/o 2). There must be a proper inquiry into whether the measure affects the right of the individual no more than is necessary. That does not require the state to show that every conceivable alternative is unfeasible - a condition of unique practicability is not demanded. But if it is clear that the measure goes beyond what the stated objective requires, it will be deemed disproportionate.

Application of the principles to the present case 83. One must return, therefore, to the question whether a more tailored approach than that of the current PSNI policy in relation to the retention of 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 offences from its ambit is warranted. But also, a system of review, whereby those affected by the policy could apply, for instance on grounds of exemplary behaviour since conviction, for removal of their data from the database would be entirely feasible. Similarly, gradation of periods of retention to reflect the seriousness of the offence involved would contribute to the goal of ensuring that the interference was no more intrusive than it required to be.

84. I n this context, article 5(e) of the Convention for the Protection of Ind ividuals with regard to Automatic Processing of Personal Data should be noted. It provides that "personal data undergoing automatic processing shall be ... preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which it is required". There is no evidence that consideration has been given to the question of whether it is necessary for the effective combatting

who sought the applicants' advice or of the reasons that the advice was sought at para 73.

73. The question whether a measure interfering with a Convention right is no more than necessary to achieve the aim is sometimes expressed as an inquiry into whether the "least intrusive means" has been chosen. This has not always been the basis used by the Strasbourg court as a measure of the proportional ity of a particular species of interference and it has been suggested that it is "a factor to be weighed in the balance, but ... not insisted on in every case" - Arden LJ Human Rights and European Law (2015) 0 U P, P 60. In R (Wilson) v Wychavon District Council Richards LJ [2007] QB 801 suggested that the least restrictive means test was not an integral part of the proportional ity assessment.

74. Recent case-law from ECtHR suggests, however, that resort to the "least intrusive means" approach will be much more readily made in deciding whether interference with a Convention right is proportionate. In Mouvement Raelien Suisse v Switzerland (2012) 16354/06, para 75, the court observed at the conclusion of its proportionality reasoning: "the authorities are required, when they decide to restrict fundamental rights, to choose the means that cause the least possible prejudice to the rights in question". And in /I/ada v Switzerland (2013) 10593/08 , para 183, ECtHR made simi lar comments: "The court has previously found that, for a measure to be regarded as proportionate and as necessary in a democratic society, the possibility of recourse to an alternative measure that would cause less damage to the fundamental right at issue whi 1st fulfi II ing the same aim must be ruled out."

75. In Bank Mellat Lord Reed, in outlining the four-fold test of proportionality followed the approach of Dickson CJ in the Canad ian case of R v Oakes [1986] 1 SCR 103. It is worth recalling that Lord Reed, in articulating the third element of the test, specifically endorsed the approach that one should ask "whether a less intrusive measure could have been used without unacceptably compromising the achievement of the obj ective".

76. Of course it is true that this approach does not require the condemnation of an interference simply on the basis that it is possible to conceive of a less intrusive interference at a theoretical level. The mooted less intrusive measure must be capable of fulfilling, and must not unacceptably compromise, the objective. As Lord Reed pointed out, "a strict application of a 'least restrictive means' test would allow only one legislative response to an objective that involved limiting a protected right". But where it is clear that the legislative objective can be properly real ised by a less intrusive means than that chosen, or where it is not possible to demonstrate that the database that is created by the PSN I policy is in fact needed to achieve the objective, this is, at least, a strong indicator of its disproportionality.

77. I suggest, therefore, that the least restrictive measure test is now well establ ished as part of domestic law. A recent example of its appl ication is to be found in a case decided in October 2014, R (Gibraltar Betting and Gaming Association Ltd) v Secretary of State for Culture, Media and Sport[2014] EWH C 3236 (Admin) where the High Court went to considerable lengths in paras 182-190 to analyse this test as part of its proportionality analysis under the TFE U, ultimately explicitly accepting that "the least restrictive measure test is a proper part ofthe proportionality assessment." See also R (Sinclair Collis Ltd) v Secretary of State for Health [2012] OB 394.

European Union law on the least restrictive means test 78. It is beyond question that proportionality is a fundamental principle of EU law. In the Skimmed Milk Powder case Bergman v Grows-Farm [1977] ECR 1211 it was held that, in order to be lawful, an obligation had to be necessary in order to attain the objective in question. Similarly, in Commission v United Kingdom (Re U HT Milk) [1983] ECR 203, at para 236, the ECJ commented: "It must ... be ascertained

sharp critic of Poland's role in the detention programme. The ruling is also generating anger across the Atlantic. The father of one of the US sailors killed in the attack on the USS Cole, Jesse Nieto, says he finds it unjust that a man suspected in the killing of his son Marc and 16 others should receive money. "This is highly upsetting," Nieto said. "And I think Poland is crazy for paying this." But Nieto is even more disturbed by the European court pressing the United States not to execute him. "Why should they dictate what is going to be the ruling of a US court?" Nieto, a 71-year-old retired marine, said from his home in Newnan, Georgia.

Human rights lawyers for the two suspects take a different view, stressing that neither of the two men has ever been found guilty in a court of law. They say they were subjected to torture, and that their rights continue to be violated as they remain held at Guantánamo without trial. Nashiri is expected to be tried by a military commission, though it has not started yet, and he could face the death penalty. Abu Zubaydah was subjected repeatedly to waterboarding, death threats, ice baths, sleep deprivation and a vast array of other harsh techniques, according to the Senate intelligence committee report. He remains in custody since 2002 with no charges ever being brought against him.

It is a limbo that was predicted in 2002 by CIA terror experts, according to the Senate report. In a 2002 email to CIA headquarters, the CIA's interrogators said they wanted assurances that Zubaydah would never be allowed to publicly describe what they were doing to him, recommending that he should "remain incommunicado for the remainder of his life". "This secret rendition programme was generated by the CIA, but it could not have taken place without the active collaboration of states like Poland," said Amrit Singh, a lawyer with the Open Society Justice Initiative, who represented Nashiri before the European court. "Had states like Poland said no this, torture would not have happened."

Torture Still Routine in Chinese Jails *Human Rights Watch*

Torture is still routine in Chinese jails, with police flouting regulations and courts ignoring rules designed to exclude evidence and confessions obtained by mistreatment, a report by Human Rights Watch has warned. Detainees, their relatives and lawyers said abuse included prisoners being beaten and electrocuted with batons, deprived of sleep, shackled in painful positions and hung from their wrists. Some have been sprayed with chilli oil in sensitive areas, deprived of sleep and water, starved and frozen.

The study, Tiger Chairs and Cell Bosses: Police Torture of Criminal Suspects in China, is based on hundreds of newly published court verdicts from around the country, and interviews with nearly 50 people on all sides of the justice system – those jailed, their relatives and lawyers, prosecutors and other officials. Human Rights Watch also interviewed families of four people who died in detention. The police said all deaths were due to natural causes, despite evidence of neglect and mistreatment. Relatives were blocked in efforts to see full videos of their detention or commission independent autopsies.

"Torture to extract confession has become an unspoken rule, it is very common," one former police officer from northern Heilongjiang province told Human Rights Watch in February 2014. The report also included several accounts of mistreatment, including shackling to the 'tiger chairs' of the title, which are used to keep detainees immobile for days at a time. "I sat on an iron chair all day, morning and night, my hands and legs were buckled ," one woman held this way for weeks told the group. During the day I could nap on the chair, but when the cadres came, they scolded the police for letting me doze off… I sat until my buttocks bled."

After several high profile cases of police brutality in 2009 and 2010, China promised

reforms to reduce miscarriages of justice and torture. These include videotaping some interrogations, banning the use of brutal inmates as “cell bosses” to control other detainees through violence and a new rule banning evidence obtained through torture. The government claims the reforms led to a significant drop in the use of forced confessions in 2012.

Abuse in pre-trial detention centres did fall, Human Rights Watch said, but police appeared to have responded to new rules by shifting torture to other areas with less strict monitoring including police stations, hostels and drug rehabilitation centres they control. “The period between when suspects are apprehended and when they are taken to a detention centre is a period with high incidence of torture,” the report quoted procurator Wu Yanwu saying in article posted on a Beijing legal affairs website.

Police have also learned to administer beatings and other torture in ways that left few or no marks but still caused significant suffering, the report said, and there was little sign of courts excluding evidence obtained by torture or holding abusive officials to account. “Despite several years of reform, police are torturing criminal suspects to get them to confess to crimes and courts are convicting people who confessed under torture,” said Sophie Richardson, China director at Human Rights Watch. “Unless and until suspects have lawyers at interrogations and other basic protections and until police are held accountable for abuse, these new measures are unlikely to eliminate routine torture.”

In a national database which is not an exhaustive list of cases, or definitive record of torture allegations, Human Rights Watch found over 430 cases in which defendants said they had been mistreated. The judge threw out evidence in only 23 cases and none of the trials ended in acquittal. There was only one prosecution of police officers for using torture and none served prison time. Most of the torture cases uncovered by Human Rights Watch were of suspects charged with theft, robbery and drug sales, but several lawyers said abuse was particularly common and severe for people caught up in high-profile murder and corruption trial-linked cases.

“These crimes have been specifically targeted for crackdowns by the central government in recent years because they tend to attract widespread public condemnation and attention,” the report said. Lawyers we interviewed said that in these ‘major cases’, there is political pressure coming from the top to solve them, thus further weakening any procedural protections – however limited – that otherwise might exist in Chinese criminal law for the defendants.”

The UN will review China’s progress on eliminating torture later this year, and Human Rights Watch called on Beijing to make “fundamental reforms” to the Chinese system, including cutting the length of time suspects can be held before seeing a judge – currently over a month – and setting up an independent commission to investigate allegations of police abuse. It warned unless the government is willing to give more power to defence lawyers and independent monitors, “the elimination of routine torture and ill-treatment is unlikely”.

Indefinite Retention of DNA/prints/photos Incompatible with Article 8!

Gaughran (Appellant) v Chief Constable of the PSNI - The issue in this case is whether the indefinite retention of fingerprints, photographs, DNA samples and DNA profiles of an individual convicted in Northern Ireland of a recordable offence is (i) an interference with the rights protected by Article 8(1) ECHR and (ii) if so, justified in accordance with Article 8(2) ECHR. The Supreme Court dismissed the appeal by a majority of 4:1. Lord Neuberger (President), Lade Hale (Deputy President), Lord Clarke and Lord Sumption, concurring.

the retention of the data of persons who had not been convicted. But the need for a rational connection between the broad policy of indefinite retention of the DNA profiles, photographs and fingerprints of all who have been convicted of recordable offences is just as necessary in their case. The connection cannot be considered to be supplied simply by the fact of conviction. Many who have been convicted, especially of less serious recordable offences never re-offend. The rational connection between the retention of their biometric data and photographs still needs to be established. It is not to be inferred or presumed simply because they have been found guilty.

70. Nor can the connection be presumed to exist just because the importance of the use of DNA material in the solving of crime has been recognised by E CtH R. It requires a considerable leap of faith, or perhaps more realistically, a substantial measure of conjecture, to say that simply because DNA material is useful in combatti ng cri me in a general way the retention forever of DNA profi les of everyone convicted of a recordable offence establ ishes the rational connection between that particular policy and the aim the detection of crime and the identification of future offenders. In this connection, it should be remembered that recordable offences occupy a wide spectrum of criminal activity. Under the Northern Ireland Criminal Records (Recordable Offences) Regulations 1989 they include not only all offences punishable by imprisonment but also examples of what may fairly be described as minor, not to say trivial, offences such as tampering with motor vehicles (article 173 of the Road Traffic (Northern Ireland) Order 1981: improper use of the public telecommunications system (section 43 of the Telecommunications Act 1984). To take some even more extreme examples they include blowing a hom "or other noisy instrument" or ringing any bell for the purpose of announcing any show or entertainment or hawking, selling, distributing or collecting any article whatsoever, or obtaining money or alms; wilfully and wantonly disturbing any inhabitant by ringing any doorbell or knocking at any door without lawful excuse, all under section 167 of the Belfast Improvement Act 1845 and being drunk in any street under section 72 of the Town Improvement (Ireland) Act 1854. These might be considered to be frivolous examples of recordable crimes which would never, in practical reality, generate the taking of biometric samples but they serve to illustrate the extremely wide potential reach ofPSNl's current policy and the failure ofPSNI to confront the implications of the breadth of its possible application.

No more than necessary to achieve the aim? 71. If one accepts the premise that the retention of DNA profi les, fingerprints and photographs of those convicted of crime can help in the detection and identification of future offenders, the question arises whether a more tai lored approach than that of the current PSN I policy in relation to the retention of those materials, sufficient to satisfy the aim, is possible.

72. ECtHR has consistently condemned, or, at least, has been extremely wary of, measures which interfere with a Convention right on an indefinite or comprehensive basis. Thus in Campbell v United Kingdom (1992) 15 E H R R 137 the court rejected the justification for opening and reading all correspondence between prisoners and solicitors, pointing out that letters could be opened to check for illicit enclosures without having to be read at para 48. And in Open Door Counselling and Dublin Well Woman v Ireland(1992) 15 EHRR 244, the permanent nature of an injunction granted by the Supreme Court of Ireland restraining the applicants from counselling pregnant women in Ireland on the options for travelling abroad to obtain an abortion was found to be disproportionate. The Irish Supreme court had granted an injunction, restraining the applicants from counselling or assisting pregnant women to obtain further advice on abortion. ECtHR found the injunction to be disproportionate and in breach of article lt), because of its "perpetual" nature and because of its sweeping application. It applied regardless of the age or health of the women

the two admissibility decisions of Van der Velden v The /I/etherlands 29514/05 E Q-I Rand W v The /I/etherlands 20689-08 (2009) ECHR 277) does not diminish the need for the justification to be established positively. Slight interference may sound on the question of whether a measure can be regarded as no more intrusive than necessary. It does not supply the answer to the question whether it is rationally connected to its avowed aim.

65. Moreover, the rational connection here must be between the objective of the detection of future criminals and the indefinite retention of the profile, fingerprints and photograph. It is not enough that retaining these items on a permanent basis might, in some vague or unspecified way, help in the detection of crime in the future. It is necessary to show that in a real, tangible sense, keeping DNA profiles, fingerprints and photographs indefinitely will assist in counteracting or detecting future crime. That is not to say, of course, that it needs to be shown that retention of the appellant's particular details will assist in preventing or detecting crime in the future. But, as a minimum, it must be established that retaining forever such items from all who have been convicted of recordable crime is likely to make a positive and significant contribution to the detection of future criminal activity.

66. I accept, of course, that it is not required of the state to show that the achievement of the aim of the measure will be the only and inexorable consequence of its implementation. As Lord Reed said in Bank Mellat (/I/o 2), quoting Wilson J in the Canadian case of Lavigne v Ontario Public Service Employees Union [1991] 2 SCR 211,291 the inquiry into "rational connection" between objectives and means to attain them requires nothing more than showing that the legitimate goals of the legislature are logically furthered by the means government has chosen to adopt. As Lord Reed then put it: "The words 'furthered by' point towards a causal test: a measure is rationally connected to its objective if its implementation can reasonably be expected to contribute towards the achievement of that objective."

67. This is the critical question on this particular aspect of the proportional ity analysis. Can the indefinite retention of biometric data of all who are convicted of recordable offences be reasonably expected to contribute to the detection of crime and the identification of future offenders? It is, of course, tempting to make the assumption that the more DNA profi les etc. that the pol ice hold, the greater wi II be their chances of discovering the identity of those who commit crime in the future. But there is a striking lack of hard evidence to support the claim that a blanket policy of retaining such items indefinitely is indispensable to the need to counteract crime or even that it will make a significant contribution to the detection of future crime. The usefulness of the assembly of a pool of personal data to assist with the detection of crime was rejected in Sand Marper as justification for interference with the article 8 right and should also be in this case. Without proof as to the likelihood of reoffending, there is no obvious, or rational, connection between the current policy and reducing crime.

68. The current system operates on the assumption that all persons who, at any time, commit any offence are potential suspects in any future crime. No evidence to support this has been provided. Indeed, the only evidence proffered by the respondent on this issue was that which suggested that 90% of those who were given custodial sentences reoffended within two years, regardless of the nature of the original offence. But the true significance of this particular statistic must be recognised. It involves (a) the commission of more serious offences, which attract a custodial offence; (b) more serious offenders, where the custodial option has been chosen; and (c) time-limitation, rather than indefinite duration. In fact, the respondent accepted during the hearing that there was no robust evidence base for the current pol icy. It seems to me clear, therefore, that a rational connection between the policy and its professed aim has not been established.

69. Much was made in the Divisional Court of the fact that Sand Marper was concerned with

Lord Kerr giving a very strong dissenting opinion said: I have concluded that the issues which must be considered under the proportionality exercise have not been properly addressed and that, if they had been, a more restricted policy would have been the inevitable product. The margin of appreciation cannot rescue the PSNI policy from its incompatibility with the appellant's article 8 right. I would therefore allow the appellant's appeal and declare that the policy of retaining indefinitely DNA profiles, fingerprints and photographs of all those convicted of recordable offences in Northern Ireland is incompatible with article 8 of ECHR.

Lord Kerr's Dissenting Opinion in full: 50. On 14 October 2008 Fergus Gaughran was driving between Crossmaglen and Camlough, County Armagh when his vehicle was stopped at a police checkpoint. As a result of a breath test taken from Mr Gaughran at the scene, it was suspected that he had been driving after having consumed more than the permissible amount of alcohol. He was arrested and taken to a police station in Newry, County Down. There he provided more samples of breath which, when analysed, were found to contain 65 milligrams of alcohol per 100 millilitres of breath. This level of alcohol exceeded the permitted limit by 30 milligrams. Mr Gaughran was charged with the offence of driving with excess alcohol. He pleaded guilty to that offence at Newry Magistrates Court on 5 November 2008 and was fined £50 and ordered to be disqualified from driving for 12 months.

51. As well as supplying samples of breath, Mr Gaughran provided a DNA sample. His photograph and fingerprints were taken. It has been established that, despite initial claims by the appellant to the contrary, all of this was done with his consent and there is no issue as to the legal entitlement of the police to take these steps. The photographs, fingerprints and DNA sample are held on the database maintained by the Police Service of Northern Ireland (PSN I). Section 9 of and Schedule 2 to the Criminal Justice Act (Northern Ireland) 2013 make provision about the retention of samples. When they come into force a new article 63P wi II be inserted into the Police and Criminal Evidence (Northern Ireland) Order 1989. This will have the effect that Mr Gaughran's DNA sample wi II be destroyed.

52. But already a DNA profile compiled from his sample has been created by the Forensic Science Agency in Northern Ireland (FSN I). A DNA profile consists of digitised information in the form of a numerical sequence representing a small part of the person's DNA. The DNA profile extracted by FSNI comprises 17 pairs of numbers and a marker ("XX" or "XV") which indicates gender. DNA profiles do not include any information from which conclusions about personal characteristics of an individual, such as his or her age, height, hair colour or propensity to develop a particular disease might be drawn. The purpose of the profile is to provide a means of identification of the person in respect of whom it is held.

53. The European Court of Human Rights (ECtHR) made these observations in para 75 of Sand Marper(2009) 48 EHRR 50 about the use to which DNA profiles can be put: " ... the profiles contain substantial amounts of unique personal data. While the information contained in the profiles may be considered objective, and irrefutable in the sense submitted by the Government, their processing through automated means allows the authorities to go well beyond neutral identification. The court notes in this regard that the Government accepted that DNA profiles could be, and indeed had in some cases been, used for familial searching with a view to identifying a possible genetic relationship between individuals. It also accepted the highly sensitive nature of such searching and the need for very strict controls in this respect."

54. DNA profiles obtained by police in Northern Ireland, such as that of Mr Gaughran, are held (and, it is intended, will remain) on the Northern Ireland DNA database. A lthough a profi le thus created does not include information as to whether that person has been convicted

of or is under investigation for an offence, it contains sufficient material to allow the person concerned to be identified and, of course, it can be used to match a DNA sample subsequently obtained. The photograph and fingerprints of Mr Gaughran have also been retained and it is intended that these will also be kept indefinitely.

55. As of June 2012, the Northern Ireland DNA database included the DNA profiles of 123,044 known persons. DNA profiles uploaded onto the Northern Ireland system are also loaded onto the United Kingdom wide National DNA Database. The retention of Northern Irish DNA profiles on the National DNA Database is governed by the law and policy applicable in Northern Ireland.

56. Mr Gaughran claims that the policy of PSN I to retain for an indefinite period his DNA profile, his photograph and his fingerprints is an interference with his right to respect for a private life guaranteed by article 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) and that that interference has not been justified on any of the grounds advanced by the respondent (the Chief Constable of PSNI) or the intervener (the Secretary of State for the Home Department).

57. Article 8 of ECHR provides: "I. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

Justification of an interference with a Convention right 58. It is accepted by the respondent and the intervener that the appellant's article 8 right has been interfered with; the single and central issue in the appeal is whether that interference has been justified. Justification of interference with a qualified Convention right such as article 8 rests on three central pi liars. The interference must be in accordance with law; it must pursue a legitimate aim; and it must be "necessary in a democratic society". Proportionality is a sub-set of the last of these requirements. The appellant has not argued that the retention of samples, his photograph and his fingerprints is other than in accordance with law - see articles 64(1 A) and 64A(4) of the Northern Ireland PAC E 0 rder of 1989. Likewise, it is not disputed that the retention of these pursues a legitimate aim. That aim was identified by ECtHR in Sand Marper v United Kingdom at para 100 as "the detection, and therefore, the prevention, of crime". In particular the retention of samples etc. was said to be for the "broader purpose of assisting in the identification of future offenders" .

59. One can focus, therefore, on the question of whether the measure is necessary in a democratic society. In the context of this case, that means asking whether the pol icy is proportionate. As Lord Wi Ison in R (Aguilar Quila) v Secretary of State for the Home Department [2012] 1 A C 621, para 45 and Lord Reed in Bank Mellat v HM Treasury (/I/o 2) [2014] AC 700, 790, para 72ff explained, this normally requires that four questions be addressed:

(a) is the legislative objective sufficiently important to justify limiting a fundamental right?; (b) are the measures which have been designed to meet it rationally connected to it?; (c) are they no more than are necessary to accomplish it?; and (d) do they strike a fair balance between the rights of the individual and the interests of the community?

60. The circumstance that the measure pursues a legitimate aim does not necessarily equate to the objective of the policy being sufficiently important to justify the limitation of a fundamental right, although, in most cases, the pursuit of such an aim will provide an effective answer to the first of the mooted questions. It is, at least hypothetically, possible to conceive of a legitimate aim that a con-

templated policy or a legislative provision might seek to achieve but, because the right that would thereby be infringed is so fundamental, no limitation on it, on the basis of the avowed legitimacy of the aim to be pursued, would be defensible. One need not dwell on this, perhaps somewhat esoteric, question, however, because it has not been contended by the appellant that no limitation on his article 8 right could be justified. It is accepted that the need to counteract crime is of sufficient importance to warrant some restriction of the right to respect for private life. But the actual interference, as E CtH R observed in Sand Marperat para 101, must conform to the "general principle" of the Strasbourg jurisprudence that an interference wi II only be considered necessary in a democratic society if it answers "a pressing social need" and, in particular is proportionate to the aim pursued. Importantly, the court stated that the reasons which national authorities proffered to justify the interference must be "relevant and sufficient". This is of especial significance in addressing the question whether it has been shown that there is in fact a rational connection between the breadth of the policy as it is currently framed and the objective which it is said to be designed to achieve.

61. The two critical questions on the issue of the proportionality of the policy of indefinite retention of the appellant's DNA profile, his photograph and his fingerprints are, in my opinion, whether there is a rational connection between the legislative objective and the pol icy and whether it goes no further than is necessary to fulfi l the objective.

What is the objective of the policy? 62. It is, I believe, necessary to recognise the distinction between the legislative provisions which authorise the retention of samples etc. and the pol icy of using those provisions to retain them indefinitely. The justification of, on the one hand, the enactment of statutory provisions which permit retention and, on the other, the use of those provisions to devise a policy to retain without limit must be considered separately. But no distinction has been drawn between the legislation and the policy in terms of their objective. In the case of both, this has been assumed to be that which was articulated in Sand Marper v United Kingdom, namely, the detection of crime and assisting in the identification of future offenders.

63. It is of fundamental importance that it be recognised that the objective is not the creation of as large a database of the Northern Irish population as possible, in order that it should be available as a potential resource in the counteracting of crime. The objective is defined in terms of the actual detection of crime and identification of future offenders. This distinction is important because it is not difficult to hypothesise that if everyone's DNA profile was held by police this might have a significant impact on the detection of future criminals. The theory is, perhaps, less obvious but still tenable in relation to photographs and fingerprints. But hypothesis should not be confused with evidence. And the question of whether the retention of DNA profiles, photographs and fingerprints of a limited class of person vizthose convicted of recordable offences, as opposed to the population at large, would in factmake a substantial contribution to counteracting crime is, at best, imponderable. But before it can be said that a rational connection exists between the retention of biometric data of all convicted of recordable offences and the detection of crime and identification of future offenders one must go beyond assumption or supposition. To justify an interference, it is necessary that it be shown, at the very least, that the promoted objective will be advanced, in order to support the claim that there is a rational connection between the interference and the stated objective.

Rational connection? 64. A connection between the aim of a measure and its terms, in order to qualify as rational, must be evidence-based - see para 101 of Sand Marper. Mere assertion that there is such a connection wi II not suffice, much less wi II speculation or conjecture that the connection exists. The fact that the interference can be characterised as "relatively slight" (as ECtHR described the retention of DNA profiles and fingerprints of convicted persons in