



22 May 2013

## PRESS SUMMARY

**Public Prosecution Service of Northern Ireland (Respondent) v McKee (AP) (Appellant)**  
(Northern Ireland)

**Public Prosecution Service of Northern Ireland (Respondent) v Elliott (AP) (Appellant)**  
(Northern Ireland) [2013] UKSC 32

*On appeal from:* [2011] NICA 61

**JUSTICES:** Lord Neuberger (President), Lady Hale, Lord Mance, Lord Kerr, Lord Hughes

### BACKGROUND TO THE APPEALS

The issue in the appeal is: what are the statutory consequences if the fingerprints of a defendant have been taken in a police station in Northern Ireland by an electronic device for which the legislation required approval from the Secretary of State, when such approval has never been given? In particular, is any evidence which makes use of the fingerprints taken on such a device inadmissible at the defendant's trial?

The appellants were charged with theft in Northern Ireland. The offence was alleged to have taken place on 6 October 2007. A stack of building materials had been found removed from the owner's depot apparently ready for collection by thieves. The appellants were found nearby in a van but said they were waiting there innocently. They were arrested and their fingerprints were taken at the police station using an electronic fingerprint scanner called 'Livescan'. This machine has been commonly used by police in the UK, including in Northern Ireland, for a number of years. A fingerprint matching Elliott's left thumb was found on packaging of the building materials.

Article 61 of the Police and Criminal Evidence (Northern Ireland) Order sets out the powers of the police to take fingerprints without consent. Between 1 March 2007 and 12 January 2010 article 61(8B) provided that where a person's fingerprints are taken electronically, they may only be taken using "*such devices, as the Secretary of State has approved for the purpose of electronic fingerprinting*". Due to an oversight no approval was ever given to any device (including Livescan) until it was belatedly provided on 29 March 2009. Article 61(8B) was later repealed by the Policing and Crime Act 2009. Therefore at the time the fingerprints were taken from the appellants there was no approval for the Livescan machine in breach of article 61 (8B).

The appellants were convicted at trial and no issue over the fingerprints was taken. After the lack of approval for the Livescan device was noticed the appellants appealed to the County Court which, after a full re-hearing, declared the fingerprint evidence inadmissible and acquitted the appellants. The Public Prosecution Service appealed to the Court of Appeal who allowed the appeal and reinstated the appellants' convictions. The appellants' primary argument before the Supreme Court and the courts below was that the lack of approval for the Livescan device meant that the fingerprints obtained with it were automatically inadmissible at the appellants' trial.

## JUDGMENT

The Supreme Court dismisses the appeal. Lord Hughes gives the judgment of the court.

## REASONS FOR THE JUDGMENT

*References in square brackets are to paragraphs in the judgment*

The difficulty with the appellants' argument is that the statute says nothing about the potential consequences of failure to use an approved device. This is despite the fact that there are numerous examples of other statutes where such consequences are expressly spelled out, such as in relation to obtaining specimens of breath for road traffic offences [8].

There is a well understood common law rule that evidence which has been obtained unlawfully does not automatically become inadmissible. It is clear that this rule extends equally to evidence created by an unlawful process as it does to existing material uncovered by unlawful process. The common law background to the legislation (article 61 (8B)) shows that inadmissibility of the fingerprints here under consideration cannot possibly simply follow from the existence of the requirement for device approval [9].

It is not correct to say that article 61 (8B) would have no purpose unless fingerprints obtained from unapproved devices were inadmissible at trial. A defendant who was asked to give a fingerprint on an unapproved device could lawfully refuse to do so. While, if such devices were found to be routinely in use by police, there would be no defence to an application for judicial review in which their unlawfulness could be declared and further use prohibited [10].

The appellants relied on the rule that the product of a breathalyser test was inadmissible unless the testing device was an approved one. However, the requirement for approval of fingerprint devices is not analogous to that in cases of breath tests or speed guns. The latter are methods of measuring something that cannot be re-measured, they capture a snapshot of the suspects activity and are often the offence itself i.e. being found to be over the prescribed limit of alcohol at the time of driving. The fingerprints on the other hand could be reproduced at any time afterwards, and would be the same. If the Livescan readings were disputed they could readily be independently checked for accuracy and further fingerprints taken by a different method. The ease of which this could be done shows there was no need for Parliament to stipulate that the product of unapproved fingerprint readers should be inadmissible. Further, no challenge was ever made by the appellants to the accuracy of the fingerprints taken by the Livescan device [15].

The background material to the legislation shown to the Court further shows that the purpose of the requirement for device approval was not principally the protection of the individual against the risk of conviction on inaccurate evidence [16]. Relevant parts of the Protection for Freedoms Act 2012 and Criminal Justice (Northern Ireland) Act 2013 regarding fingerprints that have yet to come into force further support the construction of the legislation chosen by the Supreme Court in this case as, where required, express provision is made for evidence to be inadmissible [18].

## NOTE

**This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:**

[www.supremecourt.gov.uk/decided-cases/index.html](http://www.supremecourt.gov.uk/decided-cases/index.html)