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MINISTRY OF FOREIGN AFFAIRS
Directorate-General for European Affairs

Court of Justice
of the
European Union

Case No C-434/16

Nowak

OBSERVATIONS
OF THE
PORTUGUESE REPUBLIC

In the request for a preliminary ruling submitted by the Supreme Court (Ireland) on the interpretation of Directive 95/46/EC of the European Parliament and of the

* Language of the case: English.
Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, as regards the access to examination scripts, which have been marked and corrected by the examiner.
Lisbon, 14 October 2016

To the President and the Judges

of the Court of Justice of the European Union

The Portuguese Government, represented by Luís Inez Fernandes, Miguel Figueiredo and Inês Oliveira, acting as Agents, having been notified of the request for a preliminary ruling from the Supreme Court (Ireland) in Case C-343/16, has the honour of submitting its observations under Article 23 of the Statute of the Court of Justice of the European Union, which it does in the following terms and on the following basis:

Facts and Procedure

1. From the information transmitted in the present case, it is apparent that the present proceedings concern the interpretation of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (‘Directive 95/46/EC’ or ‘the Directive’). The main proceedings relate to the challenge by an individual (‘the applicant’) to a determination of the Irish Data Protection Commissioner (‘the defendant’), denying him access to his examination script which had been marked and corrected, on the ground that it did not constitute personal data within the meaning of the Irish Law transposing the Directive.

2. According to the defendant, examination scripts do not, as a general rule, constitute personal data, since they do not contain information of a personal nature. By contrast, the applicant understands that the examination script is personal data, since it contains biometric data, in that it is handwritten, and the answers reflect intellect, thought processes and judgment. In addition, the comments made by the examiner can allegedly constitute personal data.

3. The defendant, on the other hand, emphasised in conclusion that the material over which the applicant sought to exercise ‘a right of correction is not personal data to which ... the Data Protection Acts appl[y].’ However, the applicant argues that ‘if the result of an examination can [in law implicitly] be personal data, then the raw material, from which that result is derived, i.e. the script, .....must also be personal data.’

4. In those circumstances, faced with a dispute of this kind, a request must be made to the Court of Justice for an interpretation of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Reference should be made to the order for reference for the analysis of the national court’s remaining reasoning justifying the questions referred.
Questions referred by the national court

In order to decide the case before it, brought against the decision of the appeal court which had held that the action challenging the defendant’s decision was unfounded, the Supreme Court considers it relevant for the Court of Justice to give a preliminary ruling on the following questions:

1 – Is information recorded in/as answers given by a candidate during a professional examination capable of being personal data within the meaning of Directive 95/46/EC [of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data]?

2 – If the answer to Question 1 is that all or some of such information may be personal data within the meaning of the Directive, what factors are relevant in determining whether in any given case such script is personal data, and what weight should be given to such factors?

Legal assessment

First of all, it must be noted and emphasised that it is inevitable that an examination script contains a wide range of information, in particular technical information.

In fact, an examination does not reflect only objective knowledge, strictly scientific replies, opinions, ideas and judgments of the candidate and personal information. Examination scripts also contain, as a general rule, personal information, in so far as they enable a natural person to be identified.

When a name is present on the examination script itself, the candidate may be identified immediately, without further thought. However, if his own name is not on the examination script, the candidate may be able to be identified by considering other information.

Indeed, under the Directive, the concept of personal data is a broad one, since it is stated that ‘personal data’ is to mean any information relating to an identified or identifiable natural person.

Notwithstanding the fact that the scope of the rules on the protection of personal data must not be unduly extended, an inappropriate restriction of the interpretation of the concept of personal data must also be avoided.

By way of example, reference should be made to the analysis of the definition of personal data, under the Directive, established in Opinion 4/2007 on the concept of personal data, issued by the working party on data protection, provided for in Article 29 of the Directive.

Indeed, a person may be identified, directly or indirectly, by reference to the student number, name or other identifying factors accompanying the
examinations. And — it must be emphasised — this is irrespective of whether or not the examination has been corrected, with the due comments of the teacher.

Accordingly, the definition in Article 2(a) of Directive 95/46/EC seems to find expression in the present case, since the examination script may amount to a set of personal data.

Consequently, the question of whether an examination script may constitute personal data, within the meaning of Directive 95/46/EC, must be answered in the affirmative. Indeed, an examination script constitutes personal data, within the meaning of Directive 95/46/EC, since it contains information relating to the student, who may be identified through his name or be capable of being identified, in particular through other factors enabling the person in question to be identified.

It was already beyond doubt that examination marks were personal data. Consequently, it must also be understood that the basis of such marks, which is to be found in the examination scripts, also constitutes a set of personal data, which is especially identifiable, or even expressly identifies a person by name.

Conclusion

In the light of all of the foregoing, and for the reasons set out, the Portuguese Government proposes that the Court of Justice should answer the questions referred by the Supreme Court (Ireland) as follows:

*Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data must be interpreted as meaning that, in circumstances such as those of the main proceedings, examination scripts, such as those at issue in those proceedings, constitute personal data within the meaning of that directive, since they contain information relating the student examined, who may be identified, through the name entered on the examination script, or be readily identifiable, in particular through an individual number.*

The Agents for the Portuguese Republic

Luís Inez Fernandes  Miguel Figueiredo  Inês Oliveira

[signature]