

CHAPTER 16

CASE 3 – AN IRRATIONAL RECRUITMENT SYSTEM

A. Austria

Matthias Zußner

According to the facts of the case, a formal algorithmised decision has been taken by an administrative authority (in Austria, a formal decision on a legal matter is called a *Bescheid*).

In this respect, Caius would have the right to appeal against this algorithmised *Bescheid*. According to Article 130 paragraph 1 No 1 of the Austrian Federal Constitutional Law, *Bescheide* can be challenged for unlawfulness at the competent administrative court. In his claim, Caius would have to state which of his rights have been infringed by the decision (§§ 9, 11 of the Austrian Proceedings of Administrative Courts Act¹). Caius must plead the unlawfulness of the ‘decision’ and, specifically, that it has been treated unlawfully because the challenged decision is based on an algorithm that has generated an unlawful *Bescheid*. In particular, Caius may argue that the algorithmically generated *Bescheid* did not adequately explain the reasons for the decision (which may also be due to a lack of technical suitability of the algorithm) or that the decision produced an unlawful result in terms of content.

On the basis of the appeal against the decision, the administrative court would be obliged to decide on the matter itself after an independent examination of the facts. First of all, the administrative court must decide whether the use of the algorithm is based on a formal legal basis, since Article 1 § 1 DSG requires a formal legal basis for the processing of personal data and also Article 11 paragraph 2 of the Austrian Federal Constitutional Law requires a formal legal basis for derogating from the general requirement of authorisation and execution of the decision by an authorised person. In the presence of such a legal provision, the ground of complaint that a person should have taken the decision is not in itself a valid ground of illegality of the decision. But if this formal legal basis exists, it is at least doubtful whether there are any

¹ Bundesgesetz über das Verfahren der Verwaltungsgerichte (Verwaltungsgerichtsverfahrensgesetz – VwGVG), BGBl. I No. 33/2013.

constitutional objections to the law in question. In this case, the administrative court could challenge the legal basis for the algorithmic decision before the Austrian Constitutional Court in a so-called *Gesetzesprüfungsverfahren* (Article 140 of the Austrian Federal Constitutional Law) before taking its own decision, e.g. if there are doubts about the technical suitability to meet the legal requirements for justification. If the Constitutional Court overturns the legal basis for the use of the algorithm, e.g. because of a lack of system suitability, the administrative court would have to overturn the challenged decision on the grounds of unlawfulness in the subsequent proceedings. The algorithmised *Bescheid* may not be issued. The administrative authority will have to decide again.

If there is a lawful legal basis for the use of the algorithm in the formal recruitment decision, the administrative court must itself decide on the matter previously decided by the administrative authority and give adequate reasons for its own decision; it would therefore be unlawful for the administrative court simply to adopt the result of an algorithmic decision. Rather, the court must explain the facts on which its decision is based and provide its own evidence and legal assessment (cf. §§ 17 and 29 para 1 of the Austrian Proceedings of Administrative Courts Act and § 60 of the Austrian General Administrative Procedure Act)². If the court cannot explain why Casius, despite his higher ranking, was treated worse than his competitors, the administrative court must declare the administrative authority's decision unlawful and replace it with its own lawful decision. In its own reasoning, the administrative court must state the reasons for its legal assessment and thus make clear the parameters and criteria on which a decision has been taken; however, it is not necessary to explain to the individual the range of criteria and the range according to which cases like this case are generally decided³. It just has to be clear why in this case it has decided the way it has decided. The explanation and description of the source code of the algorithmic decision complained of by Caius is therefore not part of the legal justification⁴. Nor does the administrative court have the power to compel the authority to hand over the source code. In any case, disclosure of the source code cannot be demanded before the administrative court because there is no legal basis for it. The administrative court is only obliged to grant all parties access to the file,

² See Austrian Supreme Administrative Court (VwGH) 24.08.2023, Ra 2020/22/0128.

³ M. Mayrhofer, P. Parycek, *Digitalisierung des Rechts*, 4 Österreichischen Juristentages 67 (2022).

⁴ *Ibid.*, 93.

including access to the contents of the file that the administrative authority has submitted to the administrative court. But if the source code is exceptionally included in the file, access to the file may be denied if this would violate business and trade secrets according to Article 8 of the European Convention on Human Rights⁵ and Article 1 § 1 of the Austrian Data Protection Act. Both of these fundamental rights also protect business and trade secrets. Computer programs are also protected under § 40a of the Austrian Copyright Act⁶.

B. China

Xixin Wang

Caius requests access to the algorithm's source code, arguing that this transparency is necessary to ensure the fairness of the assignment process. This is generally recognised in Chinese law. In recent years, a series of statutes and regulations have been introduced to establish a legal requirement for transparency in algorithm-based decision-making. In September 2021, nine ministries, including the Cyberspace Administration of China, jointly promulgated the *Guiding Opinions on Strengthening the Comprehensive Governance of Internet Information Service Algorithms (Guiding Opinions)*⁷, which pledges to promote algorithm transparency and to regulate corporate algorithm application practices to protect the legitimate rights of internet users, uphold principles of fairness and impartiality, and advance algorithmic transparency. Specifically, it encourages companies to disclose essential information about algorithms—such as fundamental principles, optimisation objectives, and decision criteria—in a timely, reasonable, and effective manner to ensure clear explanations of algorithmic outcomes and to establish accessible complaint channels to address societal concerns. Less than two months later, the PIPL came into effect. Article 24 states, as already mentioned, that personal information processors who use personal information for automated decision-making must ensure the transparency of the decision-making process and the fairness and impartiality of the outcomes. They must not impose unreasonable

⁵ On the constitutional rank cf. of the European Convention of Human Rights in Austria, see VfSlg 4706/1964.

⁶ *Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte (Urheberrechtsgesetz)*, BGBl. No. 111/1936.

⁷ http://www.moe.gov.cn/jyb_xxgk/moe_1777/moe_1779/202109/t20210929_568182.html.

differential treatment on individuals in transaction conditions, such as pricing. More importantly, the same article stipulates that when decisions significantly impacting an individual's rights and interests are made through automated decision-making, the affected individual has the right to request an explanation from the personal information processor. It should be noted that the PIPL goes a step further than the Guiding Opinions in that the latter targets only private entities that use algorithms to provide internet services, while the former applies to both private and public entities. Article 33 of the PIPL explicitly states that public authorities are also subject to its provisions. This means that, at least at the level of principle, algorithm-based recruitment of school teachers – a form of automated administrative decision that involves the processing of personal information – is subject to transparency requirements under Chinese law.

Yet, that is hardly the end of the matter. Two further questions arise. On one hand, what does the transparency requirement actually entail? The relevant provision in the PIPL is far from self-evident. It remains unclear what kind of explanation those individuals seriously impacted by automated administrative decision-making can request from the decision-maker. It is still debated among Chinese legal scholars whether the transparency obligation entails the disclosure of source code to the affected parties. While some argue that disclosing source code should be regarded as a primary, if not the sole, means of fulfilling transparency obligations, others disagree, asserting that, due to the technical complexity of algorithms and the general public's limited digital literacy, access to source code does little to meaningfully enhance transparency. There have yet to be any authoritative statements in this regard from either the legislature or the judiciary in China. In the context of employment, for example, the Ministry of Human Resources and Social Security, along with seven other central agencies, issued the *Guiding Opinions on Protecting the Labour Security Rights and Interests of Workers in New Forms of Employment* in 2021⁸. These opinions urge that when establishing or revising platform rules and algorithms directly affecting workers' rights, such as those governing platform access and exit, order allocation, piece-rate pricing, commission rates, remuneration structure and payment, working hours, and rewards and penalties, companies should fully consider the opinions and suggestions of unions or worker representatives, publicly disclose the results, and inform the workers. But it leaves what will be disclosed to the workers open.

⁸ <https://www.mem.gov.cn/gk/zfxgkpt/fdzdgnr/202201/P020220119421220937140.pdf>.

On the other hand, even if open-source code is regarded as one way to make automated administrative decision-making explainable to the affected parties, the fact that the relevant algorithms may be developed by a private company and are thus proprietary raises questions concerning the protection of trade secrets when granting affected individuals access to the source code. Article 9 of the PRC Anti-Unfair Competition Law defines trade secrets as technical and operational information that is not known to the public, possesses commercial value, and is protected by appropriate confidentiality measures taken by the rights holder. In 2020, the Supreme People's Court of China issued the *Provisions on Several Issues Concerning the Application of Law in the Trial of Civil Cases Involving Infringement of Trade Secrets*⁹, suggesting that information related to technology, such as structures, raw materials, components, formulas, materials, samples, designs, propagating materials of new plant varieties, processes, methods or steps, algorithms, data, computer programs, and related documentation, may be recognised as "technical information", as referred to in Article 9(4) of the Anti-Unfair Competition Law.

If and when the Chinese court recognises the algorithm, presumably developed and owned by a private company, and used by the public authority to determine the allocation of employment opportunities as trade secrets of the company, it is obliged to conduct a balancing test between the transparency mandate and the protection of trade secrets. This is because the OGI Regulation establishes the presumption of transparency regarding government information, and the algorithm used by the government to recruit school teachers ought to be categorised as a type of government information. This is defined by Article 2 of the OGI Regulation as information created or obtained by an administrative agency in the course of performing its administrative functions. In principle, such algorithms must be disclosed to the public. But Article 15 of the OGI Regulation creates a partial exemption for trade secrets, suggesting that administrative agencies must not disclose government information involving trade secrets unless the rights holder agrees to the disclosure or the administrative agency deems that nondisclosure would significantly impact the public interest. The exemption is partial precisely because the government is authorised to balance public interests and trade secrets and to disclose trade secrets if it determines that public interests outweigh trade secrets, which apparently involves case-by-case deliberation. In this sense, if Caius files

⁹ <https://baijiahao.baidu.com/s?id=1677547621724893960&wfr=spider&for=pc>.

an OGI request with the responsible authority or goes to court to challenge the government's non-disclosure decision, the administrative agency or the court has to carry out a balancing exercise to determine whether the source code, as a trade secret of the private developer, should be disclosed or not.

So far, there is no publicly available government decision or court judgment on this point in China. That being said, the courts in China have been reviewing the government's non-disclosure decisions for years in the name of protecting trade secrets. For instance, in 2015, the Beijing No. 3 Intermediate People's Court decided that the disclosure of information in this case originated from a food complaint. If the test report of the product involved is simply classified as a trade secret and withheld from disclosure, it could undermine food safety regulations and consumers' right to health, especially if the test results indicate food safety issues with the product in question, then the economic interests that the third party seeks to protect may be considered illegal"¹⁰. It is, therefore, practically possible for Chinese courts to engage in substantial balancing to weigh the public interest and individual rights against corporate interests in safeguarding trade secrets. If Caius can demonstrate that the source code directly and significantly affected his rights, the court may side with him and ask the government to grant him access to the source code. Otherwise, the court is unlikely to grant Caius full access to the source code, although it can still ask the government to disclose information related to the decision-making that is not the source code itself, such as the instructions given by the government to the algorithm developer.

Caius also asserts that the algorithm's criteria and parameters should have been published for transparency. This is relatively easier to decide than the last issue because it is unlikely that the criteria and parameters would constitute trade secrets of the private developer. Given that the algorithm is supposed to assign each teacher a position that matches their ranking with their preferences, ensuring that the highestranked teachers have their preferences satisfied and so on down the list, the criteria used in the algorithm to determine ranking are of paramount importance. Whether merit-based, identity-based, or a mixture of both, the criteria shall not be set solely by the private developer, as this would constitute an unauthorised and unlawful transfer of public authority from the government to a private organisation under Chinese law. This is also true for parameters, as they

¹⁰ <https://bj3zy.bjcourt.gov.cn/article/detail/2017/12/id/3107549.shtml>.

presumably represent the weight of each criterion in the algorithm, which ultimately determines the ranking of each applicant. In this light, both the criteria and parameters applied in the algorithm shall be disclosed to Caius. Surely, there will be concerns about the potential risks of gaming once the exact criteria and weight of recruitment are publicised. Yet, it is important in individual disputable cases to inform the aggrieved. The Chinese court may, therefore, find merit in Caius' claim regarding the need for disclosure of the algorithm's criteria and parameters, especially if he can demonstrate that the lack of transparency led to an unjust outcome. If Caius can show that this information was crucial to understanding how his assignment was decided, the court may endorse his request for disclosure of the criteria and parameters.

Caius argues that a human review should have been part of the assignment process to verify the algorithm's decisions. This reflects a concern often echoed in Chinese laws and regulations regarding AI governance. Article 18 of the PRC E-Commerce Law, passed in 2018, stipulates: "When an e-commerce operator provides search results for goods or services to consumers based on characteristics such as their interests and consumption habits, they must also provide an option that is not tailored to the consumer's individual characteristics, in order to respect and equally protect consumers' legitimate rights and interests." Article 12 of the Provisions on the Governance of the Online Information Content Ecosystem, issued by the Cyberspace Administration of China in 2019, stipulates that when an online information content platform uses personalised algorithm recommendation technology to push information, it must set up recommendation models that comply with the relevant content requirements of these provisions and establish a robust system for human intervention and user choice. Article 24 of the PIPL grants users the right to refuse decisions made solely through automated decision-making if such decisions significantly affect their rights and interests. More importantly, the PRC Administrative Penalty Law, as revised in 2021, stipulates in Article 41 that "When administrative agencies collect and document illegal acts using electronic surveillance equipment in accordance with laws and administrative regulations... Administrative agencies must verify that the recorded content meets these standards; records that have not been reviewed or do not meet the requirements after review cannot be used as evidence for administrative penalties". This is so far the only explicit statutory requirement for public authorities to incorporate human intervention in administrative decision-making; however, it reflects a significant trend in Chinese law towards requiring human oversight in automated

administrative decision-making. Against this background, when Caius argues that his case demonstrates a significant impact, as it involves his employment placement and thus his livelihood and personal life, it is likely that the court will recognise the importance of human oversight in algorithmic decision-making, particularly in decisions with significant consequences. While this may not lead to an immediate annulment of the decision itself, the court may well support Caius' call for human intervention in cases where algorithms have substantial, direct effects on individuals.

In conclusion, the Chinese court is unlikely to grant full access to the source code but may request the organisation to disclose non-proprietary details about the algorithm's functionality. This request to disclose criteria and parameters is more likely to succeed, as Chinese law increasingly favours transparency in AI-based decision-making that affects individuals' rights. Furthermore, the court may support Caius' argument that human oversight is essential, particularly in cases with significant individual impact, and could recommend a revision to the recruitment process. Overall, Chinese courts tend to balance transparency and accountability with the need to protect proprietary information. Given Caius' high rank and the discrepancy in outcomes, the court may find sufficient grounds to question the fairness of the algorithmic assignment and could order disclosure of the criteria and parameters, along with recommending procedural changes to incorporate human oversight.

C. Estonia

Katrin Nyman-Metcalf

There is a court case in Estonia, from the Tallinn Administrative Court in July 2023, that is similar to this one, albeit about the placement of pupils to certain schools. The court was very clear about the fact that decisions need to be reviewable, taking into account all relevant factors, regardless of whether AI or other automated decisions are utilised. Although various tools, including AI, can be used, the relevant authority remains ultimately responsible for the correctness of the decision. Moreover, every IT solution has a 'customer' – the entity for which the IT solution is procured – and this entity is responsible for the correctness of the parameters provided to the algorithm based on which decisions are reached. If the task is set incorrectly – (alleged) school-centredness

instead of child-centredness in the case in question (where considerations of what was better from the school's point of view, like equal distribution of pupils between schools, appeared to determine the placement) – the result is also erroneous and must be rectified¹¹. The use of tools like AI does not absolve authorities from ensuring that legislative objectives are met. These decisions must be verifiable and open to challenge if someone feels that the aim is not correctly achieved.

As mentioned above, in Estonia the source code of public AI solutions is available online¹², and there is no need to ask courts or authorities for it, Caius can access it directly using his digital ID (that everyone in Estonia has). As for the decision of the court to annul the decision, this depends on how they evaluate the relevant factors, which would be done by humans. It appears that also the EU AI Act is relevant here, as it mentions recruitment as a high-risk use, but this point will not be elaborated upon as it would not be special for Estonia.

D. European Union

Leonardo Parona

Although this hypothetical case requires only minor adaptations from the perspective of the EU legal system, it shall be preliminarily underlined that, to date, there are no documented experiences with algorithms of the kind used by the State of Trantor in the EU recruiting system¹³. A situation of the kind presented by this hypothetical would nonetheless qualify as involving a high-risk AI system under Annex III, n. 4(a) of the AI Act, being therefore subject to the legal requirements established by Chapter III of the Act¹⁴.

¹¹ Tallinn Administrative Court, case 3-23-1142, 4 July 2023, see paragraph 10, page 6. Case law of all courts available at https://www.riigiteataja.ee/kohtulahendid/koik_menetlused.html

¹² https://koodivaramu.eesti.ee/users/sign_in, <https://www.kratid.ee/en>.

¹³ The European Ombudsman only refers to the fact that “the European Personnel Selection Office is looking into the possibility of using AI for recruitment activities” (see the Closing note on Strategic Initiative concerning the impact of artificial intelligence on the EU administration and public administrations in the EU (SI/3/2021/VS), para 20)

¹⁴ As is well known, Annex III, which specifies high-risk AI systems referred to in Article 6(2), mentions at n. 4(a) “AI systems intended to be used for the recruitment or selection of natural persons”. The exclusion of the qualification in terms of a high-risk

As it is well known, the largest portion of EU personnel is recruited through the Commission's European Personnel Selection Office (EPSO)¹⁵. It is also known that, after the abolishment of the Civil Service Tribunal (the only specialised court ever instituted at the EU level), since 2016 the controversies concerning EU personnel, including recruitment, are decided in the first instance by the Tribunal.

Besides adding to these premises the – obvious – remark that EU personnel does not include school teachers, it is now possible to address the issues presented by the hypothetical. The case of Caius requires attention to three different aspects: (i) access to the algorithm and its denial; (ii) the legitimacy of an automated decision when the criteria and parameters used by the system are neither published nor understandable; and (iii) the issue of full automation of administrative procedures, as occurs in this case, since “no human intervention is foreseen”.

Issues (i) and (iii) have already been addressed in the answers to the previous hypothetical cases¹⁶ and will therefore be dealt with only briefly. Issue (ii), instead, deserves a more thorough analysis.

On the issue of denied access, the Tribunal would probably deem it unjustified. In fact, even though the Tribunal would consider some of the exceptions established by Article 4 of Regulation (EC) No 1049/2001 applicable to the given case, it would probably conclude that a more balanced and proportionate solution was required, such as partial access to the algorithm or the provision of an explanation of its functioning logic (in compliance with Article 86 of the AI Act and Article 15(2)(f) of Regulation (EU) No 1725/2018).

On the issue of the full automation of the procedure, Caius is protected by Article 24(1) of Regulation (EU) No 1725/2018, which establishes the “right not to be subject to a decision based solely on automated processing”. Article 24(2) exceptionally establishes the legitimacy of automated processing when the latter “(b) is authorised by Union law, which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests; or (c) is based on

AI system under Article 6(3) does not apply in this case, given the decisive role of the algorithm in assuming the decision and the fully automated nature of the procedure.

¹⁵ On this topic, see K. Bradley, *European Union Civil Service Law*, in H.C.H. Hofmann (ed.), *Specialized Administrative Law of the European Union* (2018). There have recently been several complaints about EPSO's recruiting systems, mainly with regard to testing for new EU staff. The complaints have finally been addressed by the European Ombudsman, which has carried out an inquiry, the results of which are available online at: <https://www.ombudsman.europa.eu/en/news-document/en/180993>.

¹⁶ See answers to hypothetical cases 1 and 2, respectively.

the data subject's explicit consent". There is no mention of Caius' consent, so the exception under letter (c) is inapplicable and, although in our case it is specified that the extraordinary recruitment system was established by a statute, this does not establish suitable measures nor safeguards – instead required by letter (b). As a consequence, there seems to be no space for any exception to the right not to be subject to a fully automated decision-making procedure. Moreover, as already mentioned, the CJEU requires that any "result obtained following automated processing must be subject to an individual reexamination by non-automated means before an individual measure adversely affecting the persons concerned is adopted"¹⁷.

In more decisive terms, as far as the legitimacy of an automated decision issued by an EU administration through a recruitment algorithm as the one described here is concerned, several violations of most obligations established for the deployers of high-risk AI systems by Article 26 and ff. of the AI Act emerge.

Even before the entry into force of the AI Act, when addressing the minimum contents of an act authorising the use of AI within a decision-making procedure, the CJEU established that the former must ensure that review mechanisms are put in place in order to "verify that a situation justifying that measure [issued with the assistance of an AI system] exists and that the conditions and safeguards that must be laid down are observed"¹⁸. It could be argued that this principle has not been complied with in the present hypothetical.

In stronger terms, Article 26(1) and (2) of the AI Act provide, as mentioned in the answers to the general questions, that the proceeding authority must deploy the high-risk AI system in accordance with the instructions for use accompanying such system, which include assigning human oversight to a competent and experienced natural person – in accordance with Article 13, which concerns the providers' duty in this regard. Furthermore, the fundamental rights impact assessment required by Article 27 of the AI Act does not seem to have been conducted in the present case.

¹⁷ Case C- 511/18 *La Quadrature du Net* [2020] ECLI:EU:C:2020:791, para 182.

¹⁸ Case C-511/18 *La Quadrature du Net*, para 179. See also H.C.H. Hofmann, *Assessing Cyber delegation in European Union Public Law*, in H.C.H. Hofmann, F. Pflücke (eds.), *Governance of Automated Decision-Making and EU Law* (2024), 51., who observes that "The reason why a legal act, empowering ADM systems, needs to be more detailed also arises from the fact that ADM programming software is, under the current system of judicial review, not in itself a regulatory act subject to an action for annulment, nor can it be subject for that purpose to indirect review under Article 277 TFEU since computer code in and of itself is not an act of EU institutions, bodies, or agencies".

For the aforementioned reasons, the Tribunal would annul the contested decision due to lack of adequate reasons, besides requesting that – when acting again – the administration disclose at least the criteria and parameters used by the algorithm and explain its functioning logic, which is mandatory under Article 86 of the AI Act.

E. France

Maximilien Lanna

To organise the recruitment process for schoolteachers, the State of Trantor uses an algorithm to rank and assign selected teachers to their post. A teacher, who is very high in the ranking after the recruitment procedure, is assigned to a school different from the ones he selected and very far away from his home, while some teachers lower in the ranking are assigned to their first-choice position.

Can this teacher have access to the source code of the algorithm and challenge the result of the automated decision? Should there have been human intervention in the decision-making process?

As a matter of principle, it is forbidden to take a decision with legal effects solely based on automated processing, including profiling. Several exceptions apply, notably to individual administrative decisions. As in the previous case, there are various provisions to ensure the transparency of algorithm-based processing.

Article 47 of the French Data Protection Act states that the data controller ensures that the algorithmic processing and its evolution are under control, to be able to explain, in detail and in an intelligible form, to the data subject how the processing has been implemented in his or her case.

Article R311-3-1-2 of the French Code of relations between the public and the authorities requires that, upon request, an individual who is the subject of an individual decision based on algorithmic processing must be provided with the following information in an intelligible form, without infringing on legally-protected secrets: the extent and manner of contribution of the algorithmic processing to the decision-making process; the data processed and their sources; the processing parameters and, where applicable, their weighting applied to the data subject's situation; the operations carried out by the processing.

Since algorithm source codes are now considered administrative documents, Caius will be able to claim access to the algorithm code used

to make the decision, according to Article L.311-1 of the French Code of relations between the public and the administration.

GDPR and Convention 108+ allow individuals, in the case of a fully automated decision, to put forward their point of view and arguments, as well as to prove the inaccuracy of the data or the inadequacy of the profile established by the algorithm. Article 22(3) GDPR includes it among the minimum guarantees to be respected in the case of automated decisions which are either necessary for the conclusion or performance of a contract between the data subject and a controller or are based on the explicit consent of the data subject.

Regarding the possibility of human verification of the automated decision, the legal framework (notably Article 47 of the French Data Protection Act, as well as Article L. 311-3-1) sets out how a decision can be made without human intervention. In this case, the law provides, as already mentioned, several guarantees and safeguards (transparency, right to information, access to source code). Furthermore, Article 22 of the GDPR states that when an automated decision is necessary for the conclusion or performance of a contract between the data subject and a controller, or is based on the data subject's explicit consent, the data subject has the right to request human intervention on the part of the controller.

As far as Caius is concerned, the lack of human control over the decision does not seem to pose any problems, provided it can be shown that the automated decision that led to his classification met with certain conditions and obligations.

F. Germany

Cristina Fraenkel-Haeberle & Charlotte Langer

Decision of the court

Caius needs to file a so-called *Konkurrentenklage* (competitor suit)¹⁹. Importantly, Caius cannot have the entire assignment procedure overturned but is limited to his own assignment and that of the competitor who was assigned to his preferred position²⁰.

¹⁹ There are several versions of this type of claim, depending on the particulars of the case. For details, see R. Schmidt, *Verwaltungsprozessrecht* 72 et seq. (2024).

²⁰ See *ibid.* for details. Essentially, he lacks *Klagebefugnis* (standing to sue) to contest additional assignments, as they do not infringe upon his own rights.

As in the previous case, the use of a fully automated system is unlawful under § 35a, as it involves a margin of appreciation. Since the formal error is not evidently irrelevant to the outcome (§ 46 VwVfG), the court will annul the competitor’s assignment. However, for Caius to be assigned to the position, he also needs to prove that his competitor was less suited to the position than he is.

Following the investigative principle, the court will gather the relevant facts that determined the administration’s exercise of discretion. This includes the criteria factored into the ranking, their respective weights, professional performance data for Caius and his competitor, and possibly their (and other competitors’) given preferences for posts. Importantly, as the administration has a margin of appreciation in evaluating public servants’ suitability and assigning positions, the scope of the court’s review is limited²¹. It can only assess whether the administration made legally significant errors in the exercise of its discretion, but it may not substitute its own evaluation for that of the administration. In the present case, the administration could amend its decision by providing a more detailed explanation of why Caius’ competitor was considered more suitable. Under § 113(5) VwGO, the court will grant Caius’ motion only if, in the light of the relevant facts, the administration has no lawful alternative but to appoint Caius to his preferred position (i.e., if the administration’s room for discretion is “reduced to zero”)²². However, due to the broad discretion granted to the administration when evaluating applicants’ suitability, the court will most likely only direct the administration to make a new decision – without relying on the unlawful algorithm.

The court would therefore partially endorse Caius’ arguments. Publicising criteria in advance is not a legal requirement in the procedure for assigning public servants’ posts²³. Rather, they are assigned according to individual suitability²⁴ as determined by the administration, and those individual decisions are then subject to judicial review. However, the use of the algorithm without human involvement constitutes a clear breach of § 35a VwVfG. The court may recommend

²¹ Concerning judicial review of discretionary decisions, see R.P.Schenke, W.R.Schenke, § 113, in W.R.Schenke, F.Kopp (eds), *Verwaltungsgerichtsordnung Kommentar* 1516 (2022).

²² *Ibid.*

²³ The criteria merely need to be recorded and disclosed on request; for a detailed account see I.Burg, *Die Konkurrentenklage des Arbeitnehmers im öffentlichen Dienst*, *Recht der Arbeit* 142 (2023).

²⁴ *Ibid.*

that this could be rectified by limiting the algorithm's use to the steps in the assignment process that do not involve discretion. However, the court can only offer recommendations in this regard; it cannot dictate how the administration should exercise its discretion, except where only one course of action is legally permissible.

Access to the code

Caius would be entitled to access information about the automated processes involving his personal data under Art. 15(h) GDPR. He might also be granted information about the assignment process based on his federal state's *Informationsfreiheitsgesetz* (Freedom of Information Law). To date, thirteen out of the sixteen federal states of Germany and the Federation have enacted such laws granting citizens the right to access official information. Since the educational system is a matter for the federal states, any request would need to be based on the respective state's law, in accordance with its requirements.

G. Italy

Stefano D'Ancona

Concerning the request for access to source code and parameters, please refer to the answer to the previous question. Regarding the lawfulness of the decision made solely by the algorithm, the court could accept Caius' objections. In fact, Italian case law, in line with Article 22 GDPR, has affirmed that it is only possible for the decision of a public authority to be made by an algorithmic system if it is provided for by law or consent has been given.

If there is no rule, and the administration has not demonstrated that an official contributed to the automated decision, Caius could have the decision annulled. Italian case law permits the decision to be assigned to an algorithm, with one clarification.

The courts have stated that the recipient of the legal effects of an automated decision has "the right to have that decision not based solely on the automated process, entrusting the official responsible with the task of checking, and thus validating or, on the contrary, refuting the automated decision"²⁵. It follows that, as noted above, a decision adopted

²⁵ Council of State, section VI, 8 April 2019, no. 2270, TAR Campania, Naples, section III, 14 November 2022, no. 7003.

using an algorithm always requires the authority to perform an ex-ante selection and verification, also by means of constant testing, updating, and refinement of the algorithm. Above all, in such cases, it must be considered that a court is required to make evaluations and assessments at a ‘human’ level for the first time, based on those made directly by automatic means. Consequently, the automated decision necessitates that the court evaluate the correctness of the automated process in all its components. Otherwise, it is evident that the measure fails to uphold the principles of participation and motivation (TAR Campania, Naples, section III, 14 November 2022, no. 7003).

H. Netherlands

Louise Verboeket & Jacobine van den Brink

In this case, we are dealing with a single-case decision (*beschikking*) as defined by Article 1:2(3) of the Dutch General Administrative Law Act (GALA, *Algemene wet bestuursrecht*), specifically the decision (*besluit*) to assign Caius to a certain school²⁶. The fact that this decision was based on an algorithm without a human in the loop does not affect the regular administrative law procedure. This means that, after lodging an objection with the administrative authority (*bestuursorgaan*), Caius can appeal the decision on the objection (*beslissing op bezwaar*) to the administrative court (*bestuursrechter*)²⁷.

The first question is whether the administrative court would endorse the argument that Caius should have access to the source code of the algorithm. In the *AERIUS II* judgment, the administrative court considered that the obligation to disclose does not, at least not without further consideration, apply to standard input data (*standaardinvoergegevens*) unrelated to the specific decision, such as the complete dataset²⁸. If Caius, as the party concerned (*belanghebbende*), indicates that he requires access to the source code of the algorithm to substantiate his appeal, then the administrative authority must make the source code available to him at his request²⁹. Caius should submit his

²⁶ Given the administrative law approach, we assume that this is a legal act under public law (*publiekrechtelijke rechtshandeling*).

²⁷ Art. 7:1 and 8:1 GALA.

²⁸ ABRvS 18 July 2018, ECLI:NL:RVS:2018:2454 (*AERIUS II*), para. 23.5.

²⁹ Or upon a request by the administrative court. See Art. 8:42 in conjunction with 8:45(1) GALA.

request for access to the source code in a timely manner during the procedure. He should also, if possible, specify which particular data his request concerns, so that the administrative authority can provide access as clearly and specifically as possible³⁰. It is thus not necessarily the case that the administrative court would grant Caius access to the source code. He will need to request that information in a timely and specific manner, stating that he requires it to substantiate his appeal. In this regard, it could work in Caius's favour that the algorithm appears to have made an unreasonable decision, which implies that there may be an error in the source code.

The second question is whether the administrative court would endorse Caius's argument questioning the legitimacy of the automated assignment on the grounds that the criteria and parameters adopted by the software to elaborate the solutions have not been published. The fact that this information has not been published indeed points towards an algorithm that amounts to a 'black box'. According to the standard of review established in Dutch case law, as previously discussed³¹, this is not permitted. The decision to assign Caius to a certain school would therefore fail to meet the requirement for a proper statement of reasons (*deugdelijke motivering*) as established by Article 3:46 of the GALA³². Moreover, a lack of transparency regarding the workings of the algorithm, including the underlying criteria and parameters, could lead to a judicial ruling that the use of the algorithm is unlawful in and of itself³³. All in all, it is likely that the administrative court would endorse Caius's argument questioning the legitimacy of the automated assignment because the underlying criteria and parameters have not been published.

The third question is whether the administrative court would endorse Caius's argument that there should have been, at least at the end of the assignment, a human check on the automated decision. As already mentioned³⁴, the GALA does not rule out that a decision can be the direct result of an algorithmic process. As such, a human check is not legally

³⁰ In the *AERIUS II* judgment, the administrative authority submitted approximately 1,500 pages of input data.

³¹ See the answer to the fourth question in the Chapter on the Netherlands in Part II.

³² ABRvS 17 May 2017, ECLI:NL:RVS:2017:1259 (*AERIUS I*), para. 14.3.

³³ District Court of The Hague 5 February 2020, ECLI:NL:RBDHA:2020:1878 (*SyRI*), paras. 6.49, 6.65, 6.82 and 6.94.

³⁴ See the answer to the second question in the Chapter on the Netherlands in Part II.

enforceable, unless the law states otherwise³⁵. However, the mandatory objection procedure, as regulated by the GALA, assumes human intervention before the decision on the objection is made. Particular attention must be drawn to the obligation of the administrative authority to fully reconsider the decision during the objection process³⁶. Full reconsideration (*volledige heroverweging*) entails a reassessment of the previously made decision in terms of legality and efficiency. It may also involve considering whether there are individual, exceptional circumstances that justify making a decision that deviates from established policy³⁷. The basic premise is that this full reconsideration can only be conducted by real people³⁸.

As the algorithm appears to have made an unreasonable decision by assigning Caius to a certain school, the administrative court will probably annul the decision. Moreover, the lack of insight into the functioning of the algorithm and the underlying criteria and parameters results in the decision violating the principle of due care (*zorgvuldigheidsbeginsel*) and the duty to give reasons (*motiveringsbeginsel*)³⁹.

I. Spain

Agustí Cerrillo-i-Martínez

To answer this question, it may be useful to introduce the case of a secondary school teacher who each year saw his application to form part of the university admissions panel rejected, and requested access to the source code of the algorithm from the administration responsible for

³⁵ Cf. Art. 22 General Data Protection Regulation (GDPR or AVG, *Algemene verordening gegevensbescherming*) and Art. 40 GDPR Implementation Act (UAVG, *Uitvoeringswet Algemene verordening gegevensbescherming*).

³⁶ Art. 7:11 GALA.

³⁷ R.J.N. Schlössels, R.J.B. Schutgens, S.E. Zijlstra, *Bestuursrecht in de sociale rechtsstaat. 2. Rechtsbescherming, Overheidsaansprakelijkheid (Handboeken staats- en bestuursrecht)* (2019).

³⁸ Council of State (*Raad van State*), *Digitalisering. Wetgeving en bestuursrechtspraak* (2021), 79-80.

³⁹ Art. 3:2 and 3:46 GALA. See also C Adriaansz, 'De rechtmatigheid van algoritmische besluitvorming in het licht van het zorgvuldigheidsbeginsel en het motiveringsbeginsel' *NJB* 2020(100), Netherlands Institute for Human Rights (*College voor de Rechten van de Mens*), *An open and frank approach: transparent use of algorithms by the government. Call for a legal transparency requirement in the government's use of algorithms* (2023), 6.

the tests in order to assess whether its design and functions were appropriate.

The university administration denied his request. Faced with this denial, the teacher turned to the Catalan Commission for the Guarantee of the Right of Access to Public Information (GAIP), the independent body ensuring the right of access.

In 2017, the GAIP stated officially that the algorithms were public information. Its Resolution of 21 September 2016 stated that an algorithm “is essentially a type of information, usually expressed in mathematical or programming language (although algorithms can also be expressed in many ways, including flow charts, pseudocode, and natural language), which, insofar as it is owned by the authority, constitutes public information for the purposes of Article 2.b of the LTAIPBG.”

The GAIP reiterated this idea in its Resolution 200/2017 of 21 June, specifying that: “The source code of a computer programme used by the authority in the appointment of the members of assessment panels constitutes public information for the purposes of Article 2.b of Law 19/2014 of 29 December, on transparency, access to public information, and good governance (LTAIPBG).”

L. United Kingdom

Gordon Anthony

There is some degree of overlap between this question and that directly above, in particular as relates to the potential commercial sensitivity of an algorithm. For the purposes of this answer, it is assumed that the company that owns the rights in the algorithm waives any objection to disclosure. It is also assumed that no issue arises under Article 22(1) of the GDPR, which provides: “*The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her*”. Article 22(2)(b) contains an exception whereby “*Paragraph 1 shall not apply if the decision is required or authorised by domestic law which also lays down suitable measure to safeguard the data subject’s rights and freedoms and legitimate interests*”.

In terms of Caius’ first point – that of access to the source code of the algorithm – it could be expected that the reviewing court would order such access. While courts in the UK do not permit “fishing expeditions” in the context of discovery, the source code would appear to be

fundamental to the scheme in question, and an order for discovery might therefore be made. It should, however, be noted that expert knowledge may be required before the code might be understood, and the court may require that independent reports be prepared as part of the hearing. It is also possible that competing reports would be prepared in relation to the code – the court would, at that stage, have to decide which, if either, it would be more inclined to follow.

Caius' second point – that the failure to publish the criteria and parameters that would be used in the decision-making process made it unlawful – would raise familiar points about administrative law, albeit within the unusual setting of this case. The foremost principle would again be *Wednesbury* unreasonableness, as Caius would argue that the lack of transparency in the process meant that he was unable to focus his application as well as he might have done, notably given uncertainty about how factors were to be weighted, etc. While the authority might say that the algorithm approaches all applications processed under it in the same way, the fact that lower-ranked applicants received more favourable outcomes against the statutory criteria suggests that an error has occurred. Caius might here argue that there has been an apparent breach of the equality principle, which is one feature of *Wednesbury* irrationality: it appears that he has been treated less favourably than others, and the decision-maker ought to be required to explain the difference in treatment⁴⁰.

The third point – that there ought to have been a human check – might raise points under either unreasonableness and/or procedural fairness. In short, Caius might argue that the fact that he cannot ask for a human-led review is unreasonable in and of itself and that, in effect, it denies him an appeal right in the context of the overall process. Appeal rights are not, however, a set requirement under the common law, and the respondent authority may argue that his ability to challenge the matter in court amounts to a right to have a human-led review at that stage. Whether that argument would succeed would depend upon what the reviewing court could do. If the court were able to look closely at the decision and balance all the considerations for itself, that may “cure” the defects in the decision-making process (this point would be relevant at common law and under Article 6 ECHR, if engaged on the facts). Were the court not able to look closely at the decision, Caius might then want to argue that there are problems with the whole statutory scheme. In that

⁴⁰ On common law equality see *R (Gallaher) v Competition and Markets Authority* [2018] UKSC 25, [2019] AC 96.

instance, he may wish to challenge the lawfulness of the statute itself – something that would seemingly be possible, given that the legislation in this case appears to be regional rather than national and thereby secondary, or subordinate, in nature.

In sum: Caius might expect to be given access to the source code and the facts give rise to a presumption that there has been inequality of treatment. The court may be able to cure the defects in the decision-making process – though, if not, Caius may be required to challenge the legislative scheme in question.

M. United States

Catherine M. Sharkey & Caterina Barrera Hyneman

Background

In the U.S., decisions about education including employment decisions occur at the state and local level. However, general requirements or fair hiring practices are imposed at the federal level, creating an interconnected web of laws⁴¹. While there have not been similar cases in education yet in the U.S., other industries have begun to implement AI hiring technology and ranking algorithms, leading to case law at the local and federal levels.

Answer

Caius is unlikely to access the source code due to intellectual property and privacy concerns.

However, if Caius were in New York City, he could gain access to the company's annual AI audits. New York City Local Law 144 is groundbreaking; similar legislation has yet to be enacted in other jurisdictions in the U.S. Local Law 144 requires employers to conduct annual bias audits of their automated decision tools used at all points of an employee's lifecycle: hiring, internal promotion processes, and firing⁴². Companies must also disclose the results of the audits, which uses the company's data, to job candidates⁴³. However, a recent study

⁴¹ See the answer to the fourth question in the Chapter on the United States in Part II.

⁴² Local Law No. 144 (2021) of City of N.Y.; N.Y.C. Consumer and Worker Prot., *Automated Employment Decision Tools: Frequently Asked Questions* (2023), <https://www.nyc.gov/assets/dca/downloads/pdf/about/DCWP-AEDT-FAQ.pdf>.

⁴³ *Ibid.*

found extremely low compliance and therefore, “limited value for job seekers”⁴⁴.

Armed with this information from the AI audits about how the algorithm affects the general population, Caius may be able to question the legitimacy of the decision, if the algorithmic ranking error points to systemic bias or discrimination. In New York City, individuals who believe they are the subject of discrimination can bring forth proceedings with the NYC Commission on Human Rights⁴⁵.

To date, however, no cases have been brought in state or federal court on the basis of a Local Law 144 violation, and similar cases implicating employment ranking systems have failed⁴⁶. In one New Jersey federal district court case, the Plaintiff (Buj) alleged discrimination when she failed to get her desired medical residency program at Rutgers, which participated in a national algorithmic ranking program to match applicants to their desired hospitals across the country⁴⁷. The Plaintiff’s mentors at Rutgers made comments about her older age, and how that would negatively impact her chances of getting the position she wanted⁴⁸. Despite these comments, the court ruled that her case did not amount to discrimination. Buj failed to show that discriminatory intent motivated Rutgers to not place her in its program because Rutgers did not control the national ranking algorithm⁴⁹. The court explained that the evidence Buj brought forth which compared her qualifications to other candidates’ was insufficient to prove discrimination, especially because Rutgers is entitled to its hiring preferences⁵⁰.

The reasoning of this case does not bode well for Caius’ prospects. Caius would not be able to argue that because he is higher ranked than other candidates, he has made a showing of discrimination. Similarly, he could not bring a claim against the schools themselves because the State controls the algorithm.

⁴⁴ See L. Wright *et al.*, *Null Compliance: NYC Local Law 144 and the Challenges of Algorithm Accountability* (ACM Conf. on Fairness, Accountability, and Transparency, 2024); L. Weber, *New York City Passed an AI Hiring Law. So Far, Few Companies Are Following It.*, Wall St. J. (Jan. 22, 2024, 8:00 AM), <https://www.wsj.com/business/new-york-city-passed-an-ai-hiring-law-so-far-few-companies-are-following-it-7e31a5b7>.

⁴⁵ N.Y.C. Consumer and Worker Prot., *Automated Employment Decision Tools: Frequently Asked Questions*, cit., 6.

⁴⁶ See *Buj v. Psychiatry Residency Training*, No. 17-5012 (CCC), 2020 WL 5820608 (D.N.J. Sept. 30, 2020), *aff’d*, 860 F.App’x 241 (3d Cir. 2021).

⁴⁷ 860 F.App’x at 242-43.

⁴⁸ 2020 WL 5820608, at *1.

⁴⁹ *Ibid.* at *3, 5.

⁵⁰ *Ibid.* at *3.

Recent related cases cast further doubt on Caius' likelihood of success. In a 2024 Maryland federal district court case, the Plaintiff was working with a recruiter for a company that used an algorithm to pair applicants with hiring companies that were a good match⁵¹. The recruiter disclosed to the Plaintiff that the algorithm "did not work" and that "women with gaps in their resume were 'getting left behind' in the job market"⁵². The court dismissed the allegation of algorithmic bias because it was "entirely speculative"⁵³. In a 2024 California federal district court case, the Plaintiff – an African-American man over forty years old, with anxiety and depression – alleged that he applied to over 100 jobs with companies through Workday's platform and did not receive a single offer⁵⁴. The court granted Workday's motion to dismiss because it was not an employer subject to federal law, but an "employment agency"⁵⁵.

Caius may try to challenge the outcome on the grounds that there should have been a human check on the process, but this will be an uphill battle. The requirement in the U.S. that required agencies to allow people to appeal an adverse decision to a human review process has since been removed by the Trump administration⁵⁶

⁵¹ Saas v. Major, Lindsey & Afr., LLC, No. 1:23-cv-02102-JRR, 2024 WL 2113654, at *1 (D. Md. May 10, 2024).

⁵² *Ibid.*

⁵³ *Ibid.* at *5.

⁵⁴ Mobley v. Workday, Inc., No. 23-cv-00770-RFL, 2024 WL 208529, at *1 (N.D. Cal. Jan. 19, 2024).

⁵⁵ *Ibid.*

⁵⁶ Memorandum from Shalanda D. Young, Off. of Mgmt. & Budget for the Heads of Exec. Off. of the President, Advancing Governance Innovation and Risk Management for Agency Use of Artificial Intelligence 26-27 (Mar. 28, 2024), <https://www.whitehouse.gov/wp-content/uploads/2024/03/M-24-10-Advancing-Governance-Innovation-and-Risk-Management-for-Agency-Use-of-Artificial-Intelligence.pdf>, at 23.