

CHAPTER 19

CASE 6 – A BIASED FRAUD DETECTION ALGORITHM

A. Austria

Matthias Zußner

Insofar as the UPU represents Mr Capone in his appeal against the repayment decision and the penalty, the UPU can only exercise rights that Mr Capone actually has. Mr Capone has no right to access the source code because it does not have to be part of the reasoning. However, insofar as the outcome of the decision discriminates against Mr Capone, this can be raised in the administrative court appeal and can be reviewed by the administrative court. If necessary, the repayment decision and the penalty would have to be set aside by the administrative court on the grounds of discrimination.

Furthermore, the following is also conceivable: NGOs have a special significance as a ‘social watchdog’ according to the case law of the Austrian Supreme Administrative Court in the light of Article 10 (1) of the European Convention on Human Rights following the case law of the European Court of Human Rights¹. Under the Federal Information Disclosure Act and each of the Information Disclosure Acts of the federal states², also an NGO is entitled to make a general request for information on the actions of administrations. In this respect, the NGO can submit a general request for information. However, the source code cannot be accessed via a request for information if the disclosure of the source code is contrary to confidentiality interests, in particular data protection interests or business and trade secrets (see case 3 and all references made there). However, it would not be a conflict with confidentiality interests to use a general request for information to ask about the logic underlying the decisions of the automatically generated warnings relevant in a certain number of cases. In addition, the NGO could use a general information request also to inquire how many people with nationality and how many people without nationality the algorithm has associated with fraud and how many people with or without nationality have been automatically warned by using an algorithmic system. As long as

¹ Austrian Supreme Administrative Court (VwGH) 29.05.2018, Ra 2017/03/0083.

² For legal references, see Case 4 footnote 3.

confidentiality interests, in particular data protection, are not violated, there is a legal right to the access to information³. The request for information must be submitted to the authority; if the authority refuses the request for information, legal protection is available before the administrative courts. These can determine that a request for information has been wrongly denied, and the authority is obliged to comply with the ruling and provide the relevant information⁴.

B. China

Xixin Wang

Article 25(1) of the PRC *Administrative Litigation Law* grants standing to two types of parties. One is the subject or target of the administrative decision, while the other consists of those who are related to such decisions in terms of legal interests. It is apparent that the UPU is not the target of the repayment order and the penalty; the question of standing comes down to whether it is related to the decision. The answer is negative because Chinese law does not accept class litigation or representative standing for administrative litigation at all. UPU, as an NGO, does not have a direct legal interest in the administrative decision concerning Mr Capone's repayment order and penalty. Standing typically requires that the party intervening must be affected by the challenged decision themselves, rather than merely representing others who are affected. Moreover, Article 25(4) of the *Administrative Litigation Law* suggests that, in the course of performing their duties, the People's Procuratorate found that administrative agencies with supervisory and administrative responsibilities in the fields of ecological environment and resource protection, food and drug safety, State-owned property protection, and transfer of State-owned land use rights had illegally exercised their powers or failed to act, resulting in harm to national interests or social public interests. Those who have been violated should make procuratorial suggestions to the administrative agencies and urge them to fulfil their duties in accordance with the law. If an administrative agency fails to perform its duties in accordance with the law, the People's Procuratorate must file a lawsuit with the People's Court as required by law. This means that, currently under Chinese administrative law, public

³ Austrian Supreme Administrative Court (VwGH) 28.06.2021, Ro 2021/11/0005.

⁴ Austrian Supreme Administrative Court (VwGH) 25.05.2023, Ra 2023/05/0036.

interest litigation is limited to specific areas such as environmental protection, food and drug safety, and state property protection, and it does not extend to administrative discrimination or AI governance cases.

More importantly, NGOs are barred from filing public interest administrative litigation in China. The underlying reason is likely to avoid opening the door to collectivised legal petitions against the government. In this light, the UPU's case will fail at the initial stage, as the court would refuse to take it due to a lack of standing. That being said, if Mr Capone goes to court to challenge the decision by himself, it is likely that the court would give relevance to his argument on discrimination because Article 24 of the PIPL explicitly bans unreasonable and unfair treatment of data subjects by data processors. As the Chinese administrative litigation system places the burden of proof on the defending administration, Naboo's government must demonstrate in court that the FRDS does not unduly and unfairly discriminate against aliens in detecting potential fraudsters. In order to do so, the government needs to disclose the parameters used in the system to demonstrate that there is bias against non-citizens. If it fails to do so, the court could quash the decision.

C. Estonia

Katrin Nyman-Metcalf

The UPU would not have standing but can support the case through strategic court process. Discrimination is illegal but must be proven. The court must look at facts, even if AI is used. The Equal Treatment Act ⁵ may be relevant here, though it is unlikely to help Mr Capone as far as the repayment order is concerned, as he has to separately contest this and not just the discriminatory nature of the process. There have not yet been (in April 2025) any cases of discrimination by AI dealt with by the Gender Equality and Equal Treatment Commissioner, but the Commissioner has encouraged people to report any cases where they suspect discrimination ⁶. In Estonia, discrimination cases can be solved by the Commissioner or they can be taken to court. The Data Protection Inspectorate provides information on their website about the restrictions on the use of automated decision-

⁵<https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/507032022003/consolide>.

⁶<https://www.volinik.ee/artiklid/christian-veske-vordoiguslikkusest-tehisaru-kasutamisel.html>,

making in profiling, explaining in simple terms what follows from EU law⁷.

A potentially (and indirectly) interesting comparison here is a case from the Court concerning the legality of using freely available data (from the commercial register) to create new forms of information – a reputation or creditworthiness score – with the help of AI algorithms. The case concerned a dispute over what is termed ‘secondary disclosure’. The complainants used data from natural persons listed in the commercial register (including first and last names, personal identification codes, dates of birth, role within legal person, its beginning and end, business prohibitions and contact details). Through algorithmic analysis of data on entrepreneurship, created a reputation score for a specific natural person as an entrepreneur. The purpose of the reputation score was to demonstrate the reliability of a natural person as an entrepreneur. The case addressed the legality of orders by the Data Protection Inspectorate. While the outcome itself is not directly relevant here as it pertained to various formal aspects, it is notable that the algorithmic nature of the score did not alter the question of responsibility for it⁸.

D. European Union

Leonardo Parona

With some adaptations, it is possible to address the present hypothetical by referencing situations in the EU system similar to the Fraud & Risk Detection System (FRDS) used by the Naboo government in this case. Similar applications can be found, for instance, in the activities carried out by the European Anti-Fraud Office (OLAF), which has started using natural language processing to identify potential corruption or fraud in the expenditure of EU funds⁹. In addition, the newly established Authority for Anti-Money Laundering and

⁷ <https://www.aki.ee/isikuanamed/inimese-oigused/automatiseeritud-otsused-ja-profilianaluus#automatiseeritudotsus3>.

⁸ Tallinn District Court, case 3-21-1749, 28 May 2024.

<https://www.riigiteataja.ee/kohtulahendid/fail.html?fid=374527397>.

⁹ See on this aspect the reports available online at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/691722/IPOL_STU\(2021\)691722_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/691722/IPOL_STU(2021)691722_EN.pdf), and <https://digital-strategy.ec.europa.eu/en/funding/use-artificial-intelligence-fraud-detection>.

Countering the Financing of Terrorism is expected to use AI to enhance its analytics capabilities (in cooperation with national authorities)¹⁰.

A couple of features of the present hypothetical need to be highlighted before addressing the main legal issues it raises. First of all, the allegedly biased AI system only merely flagged a potential fraud to the administration, which remained responsible for exercising its function and issuing penalties, and which presumably conducted a review of the preliminary fraud assessment. Secondly, aside from the alleged bias in the functioning of the algorithm, it is not disputed that Mr Capone was actually unable to prove his unemployment status at the time of receiving the benefit, a situation which, in itself, would have rendered him ineligible for the unemployment benefit in the first place.

When framing the FRDS and the data mining algorithm it embodies within the framework of EU law, it should be noted that, although it might appear to qualify as a high-risk AI system, it invokes both the exceptions under Article 6(3)(c) and (d) of the AI Act and the exclusion under Annex III, Article 5, lett. d) of the AI Act. In fact, the FRDS might either be “intended to detect decision-making patterns or deviations from prior decision-making patterns [...] not meant to replace or influence the previously completed human assessment, without proper human review”, or it might be “intended to perform a preparatory task to an assessment [...]”. As already clarified in the answers to the general questions, should any of the exceptions established by the AI Act apply, none of the guarantees and requirements established by the Act for high-risk AI systems would come into play. If that were the case – as it seems reasonable to argue – then no violation of the AI Act could be attributed to the proceeding administration in the given case.

Moreover, and in more decisive terms, the algorithm at issue here involves the detection of fraud, clearly falling within the exclusion provided by Annex III, Article 5, lett. d) of the AI Act. It may therefore be concluded that the FRDS used by the administration in this case does not qualify as a high-risk AI system.

The issue that remains to be addressed, therefore, concerns the UPU’s standing and request. As far as this aspect is concerned, no specific consequences derive from the fact that the controversy between Mr Capone and the administration revolves around the use of an AI system. The UPU acts as a third party in the case brought by Mr Capone

¹⁰ Article 5(5)(i), Regulation (EU) No 1620/2024 of 31st May 2024 establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism.

and, more precisely, qualifies as a non-privileged intervener according to Article 40(2) of the CJEU Statute. As a consequence, the UPU must demonstrate an interest in the result of the case in the form of a direct, existing – and not merely hypothetical – interest in the judgment’s solution and possible remedy¹¹. Since the UPU collectively represents unemployed individuals in the same situation as Mr Capone, it is arguable that it would have standing; its intervention, however, could only take the form of an *ad adiuvandum*, meaning that it could support the arguments Mr Capone has already put forward.

As for the access request, the decision would not be influenced by the UPU’s argument regarding the alleged discrimination. This aspect would perhaps be relevant in the context of reviewing the lawfulness of the fraud assessment system and of the penalty (not addressed in the present hypothetical). Nonetheless, as already observed in the answers to the previous cases, mere access to the source code, without a meaningful explanation of its functioning logic under Article 86 of the AI Act, would be of little use. The latter provision, as already clarified, does not apply here, given the non-high-risk nature of the AI system used by Naboo’s Government.

E. France

Maximilien Lanna

Naboo’s Government develops an AI system called Fraud & Risk Detection System (FRDS), a data-mining algorithm specifically aimed at identifying patterns and trends to pinpoint frauds in the requests for unemployment benefits.

Mr Capone, a member of the non-governmental organisation Unemployed People United (UPU), receives a fraud alert notice and is asked to prove that he was unemployed at the time in which he received the benefit.

Does this organisation have the right to access the code underlying the FRDS?

Discrimination can be intentional. This is the case when a discriminatory criterion is directly integrated into a computer program.

¹¹ See on this aspect *Council v K. Chrysostomides & Co. and Others*, C-597/18, para 11; *Council v Front Polisario*, C-104/16, para 10 and *C. Amalfitano, Standing (Locus Standi): Court of Justice of the European Union (ad vocem)*, in *Max Planck Encyclopedias of International Law*, 2021, para 44 ff.

Such a practice can still be identified by examining the parameter settings. However, discrimination can also be the result of the developer's cognitive biases, whether conscious or unconscious, reproduced by the algorithm. In this way, software will carry the stereotypes and prejudices of its designers.

French law has several instruments for combating digital discrimination, with general texts that are gradually being supplemented by specific legislation to protect individuals.

While discrimination based on a person's origin is in principle prohibited by national and European law, there remains the possibility of discrimination being carried out indirectly by the characteristics of the algorithm. Therefore, identifying discrimination presupposes the formal establishment of a bias that is not known *a priori*: its existence and mechanics must be 'revealed' at the end of an algorithmic audit.

If the algorithm used is an administrative document within the meaning of Article L. 300-2 of the CRPA, it may be made available to anyone who requests it in accordance with Article L. 311-1 of the CRPA.

In principle, an individual decision taken based on algorithmic processing includes an explicit statement informing the person concerned. The rules defining this processing, as well as the main features of its implementation, are referred by the authority to the interested party on request. Furthermore, authorities must publish the rules defining the main algorithmic processes used in their functions if they form the basis of individual decisions.

Exceptions apply, particularly when the administrative documents in question are likely to prejudice the investigation and prevention, by the competent services, of offences of any kind (CRPA, Article L. 311-5, g.). This solution was adopted by the *Commission d'accès aux documents administratifs* (Commission for access to administrative documents) for documents relating to the prevention of fraud on which sanctions against an individual were based.

Under these provisions, in principle, only the person affected by the decision can have access to the rules defining the processing. This access will be limited, however, given that the purpose of the processing is to prevent and identify cases of fraud.

F. Germany

Cristina Fraenkel-Haeberle & Charlotte Langer

Standing to intervene

The UPU has no standing to intervene in Mr Capone's case.

A voluntary third-party intervention is not provided for in administrative court procedure. § 63 VwGO exhaustively lists the parties to a trial and does not include a third-party intervener.

A third party can be summoned to participate under the conditions listed in § 65 VwGO (*Beiladung Dritter*). However, the third party must have a legal interest vested in the case, meaning that the pending judgment stands to impact the third party's *own* legal position¹², which is not the case here. Representing a party's or public interests is sufficient grounds for intervention only in a few restricted cases, such as environmental law¹³.

The UPU cannot act as Mr Capone's legal representative. § 67 (2) VwGO (*Anwaltszwang, Prozessbevollmächtigte und Beistände*) lists the possible qualifications for legal representation exhaustively and does not include non-governmental organisations representing unemployed people's interests.

The UPU could try and make the case that they are an anti-discrimination organisation as established by § 23(1) *Allgemeines Gleichbehandlungsgesetz* (AGG; General Equal Treatment Act) in conjunction with § 1 AGG and thereby allowed to act as legal counsel in court under § 23(2) AGG. However, § 1 AGG severely limits the scope of this option. According to § 23(1) in conjunction with § 1 AGG, anti-discrimination organisations must – among other formal requirements – represent the interests of groups that are disadvantaged because of their race or ethnic origin, sex or sexual identity, religion, disability, or age. Discrimination because of employment status or social standing, which is the primary goal of the UPU, is not a characteristic protected under the

¹² W.R. Schenke, § 65, in W.R. Schenke, F. Kopp (eds), *Verwaltungsgerichtsordnung Kommentar* 829 (2022).

¹³ *Ibid.*

AGG¹⁴. Furthermore, nationality is not a criterion listed in § 1 AGG¹⁵. Thus, the UPU will not be recognised as legal counsel under § 23 AGG.

The UPU could also file a motion to be permitted to act as legal counsel under § 67(7) S. 3 VwGO. This is a subsidiary provision granting the court discretion to allow counsel when this is pertinent, given the circumstances of the case. Past case law points to a restrictive interpretation; the provision is seen as an exception to the rule of representation by a legal professional¹⁶. The few successful cases are limited to natural persons whose personal closeness to the claimant and expertise in the field justify supporting him or her¹⁷. It is unlikely that the UPU, being a non-governmental organisation with no exceptional personal ties to Mr Capone, will be permitted under § 67(7) S. 3 VwGO.

Decision of the court

As in the previous case, this one must be divided into two distinct parts: the demand to repay the granted benefits, and the allegation of fraud, including the penalty. This is relevant because the burden of proof is on Mr Capone in the first instance, and the administration or, if the case goes to trial, the prosecutor in the second.

Part 1: Demand for repayment

The court will not annul the notice demanding repayment. As mentioned above, administrative courts operate under the investigative principle, meaning that they are under obligation to investigate the facts and uncover the truth. Even so, there remains a “material burden of proof”¹⁸: this determines which party bears the consequences if a relevant fact cannot be established beyond reasonable doubt. If a claimant asserts a right to benefits, he or she must prove the factual basis for the claim¹⁹. Here, Mr Capone must prove that he was unemployed

¹⁴ This restrictive regime was criticised by the federal anti-discrimination office in their last report to the Bundestag: https://www.antidiskriminierungsstelle.de/SharedDocs/downloads/DE/publikationen/BT_Bericht/gemeinsamer_bericht_fuenfter_lang_2024.pdf?__blob=publicationFile&v=9. See pages 33 et seq. for further details.

¹⁵ *Ibid.*

¹⁶ VG Freiburg, 4 K 1219/07.

¹⁷ BVerfG, 1 BvR 105/94.

¹⁸ H. Müller, *Der Amtsermittlungsgrundsatz in der öffentlich-rechtlichen Gerichtsbarkeit*, Juristische Schulung 324 (2014); W.R. Schenke, § 86, in W.R. Schenke, F. Kopp (eds), *Verwaltungsgerichtsordnung Kommentar* 1159 et seq. (2022).

¹⁹ *Ibid.*

and therefore entitled to unemployment benefits. Since he cannot provide conclusive proof, the burden of this uncertainty falls on him.

The court would give no weight to the argument on discrimination. While the fact that non-nationals are more likely to be screened may be considered unequal treatment, the fact remains that Mr Capone cannot prove that he was eligible for unemployment benefits. Therefore, the decision to revoke his benefits is not only lawful but a legal requirement, as granting benefits to someone who does not fulfil the requirements would be unlawful. There is no right to “equal treatment in injustice” (*Gleichheit im Unrecht*)²⁰, meaning that a person cannot demand to be treated a certain way if such treatment is unlawful, based solely on the fact that other persons (i.e., nationals who commit benefits fraud but are not screened) are also being treated unlawfully. Furthermore, there is no “fruit of the poisonous tree” doctrine in German administrative law, meaning that even if the use of the algorithmic screening procedure is unlawful, its results (the identification of Mr Capone as an unlawful recipient of benefits) can still be used for further investigations.

Part 2: The benefit fraud charge

As in the previous case, the criminal allegation of benefit fraud follows a different path. After Mr Capone’s appeal, the case would be transferred to the public prosecution, which would need to decide whether there is sufficient evidence to bring the case to trial. Again, the assumption of innocence applies: the burden of proof lies with the prosecution²¹. They must prove that Mr Capone was ineligible for unemployment benefits. If the question of Mr Capone’s employment status remains unanswered, the prosecution will drop the case. In any case, the allegation of discrimination will not be considered relevant, as the focus is solely on Mr Capone’s guilt or innocence. Whether others are being screened (or not) has no bearing on the question.

Rectifying an unlawful practice

The question remains as to how the administration can be forced to review and abandon its potentially discriminatory practice. Forcing the administration to change internal practices is difficult if those

²⁰ BVerfGE 50, 142 (166); T. Kingreen, *Art. 3*, in W. Kahl *et al* (eds), *Bonner Kommentar zum Grundgesetz* 423 et seq. (2022); P. Reimer, “Keine Gleichheit im Unrecht”: *dogmatische Rekonstruktion eines Verfassungsspruchworts*, *Rechtswissenschaft* 1 (2017).

²¹ B. Schmitt, *Einleitung*, in B. Schmitt, L. Meyer-Goßner (eds), *Strafprozessordnung Kommentar* (2022).

practices show their unlawful effects only systemically, as judicial review of administrative acts is limited to the individual case. The possibility of class action or union suits, where systemic problems become more visible, is severely limited in German law²². With isolated exceptions, claimants must be able to assert that the contested decision infringes upon their individual rights, which usually excludes non-governmental organisations from suing in the interest of their members²³.

Thus, the UPU is limited to political means: a systemic issue could be brought to the attention of the anti-discrimination office, as well as to the Federal Ministry of Labour and Social Welfare, which oversees the unemployment benefits office. The former may include the issue in its reports to the Bundestag, while the latter may officially direct the unemployment benefits office to review the algorithm and its use.

G. Italy

Stefano D'Ancona

The first question asks whether an association may intervene in a legal case against a public authority. In Italian law, the right to intervene in the proceedings is governed by Article 28(2) CPA, which establishes that “Anyone who is not a party to the proceedings and is not disqualified from exercising the relevant actions, but has an interest therein, may intervene by accepting the state and degree in which the proceedings are pending”.

Jurisprudence has first established that the intervener’s interest must differ from that of the plaintiff. It has been affirmed that dependent adhesive intervention is secondary to the “objective otherness of the interest claimed by the intervener with respect to the interest that would legitimise the bringing of the main action”. The intervention may be carried out by a person who has a *de facto* position dependent on or connected to the situation invoked in the main appeal²⁴.

²² To date, it only exists in civil law for consumer claims against private companies, in environmental law for certified unions that represent the public interest in environmental protection, and for unions representing disabled people to address breaches of the right to accessibility. Some federal states also allow unions to bring an action under animal protection law. See Weber K, ‘Verbandsklage’ in K. Weber (ed) *Rechtswörterbuch* (2024).

²³ See R.P. Schenke, § 42, in W.R. Schenke, F. Kopp (eds), *Verwaltungsgerichtsordnung Kommentar* 233 et seq. (2022).

²⁴ Council of State, section III, 04/04/2023, no. 3442.

UPU's interest in intervening in the case is linked to a collective interest, and it must therefore be demonstrated, by reference to the provisions of the association's statute, that the association carries out activities for the protection and in the interest of the unemployed in order for it to take part in the proceedings.

If UPU has an interest independent of Mr Capone, it could also make an independent appeal to the court against the authority's decision. In this regard, it has been affirmed that for associations representing collective interests to have active legitimacy in the administrative process, the issue at hand must directly relate to the association's statutory purposes, meaning that the effects of the disputed measure must directly harm its institutional purpose rather than merely aggregating the interests of individual members²⁵.

UPU may also have a right to access records. In one case, the court held that "a trade union organisation may be the holder of a legally relevant interest in access to administrative acts and documents, in relation both to the position of individual members and to an interest of its own"²⁶. In another case, the court held that a consumer association has the right to access documents held by a Chamber of Commerce under Law 241/1990 on administrative transparency²⁷.

It is possible for an algorithmic decision to be discriminatory. In the case at hand, there is the possibility that the court will find in UPU's favour if it proves that the Fraud & Risk Detection System (FRDS) flags the potential fraudster on the basis of citizenship. In this case, it would be necessary for UPU to request access to the operating documents of the FRDS and prove that it is not functioning properly.

The UPU could, in any case, ask the administrative court to order an ex-officio technical advisory opinion or a verification to verify that the AI system does not give rise to discriminatory decisions. In fact, during the administrative process, the plaintiff can request findings regarding the functioning of the algorithms and the accuracy of the data and criteria provided by the programmer for the operation of the automatic decision-making or AI systems (see, for example, the ordinance of the Council of State 13.03.2024 no. 2432, regarding the suitability of the algorithmic decision related to calculating energy savings for issuing Green Certificates).

²⁵ TAR Lazio Rome, section II, 03/01/2024, no. 199.

²⁶ TAR Naples, Campania, section VI, 21/11/2012, no. 4690. That case, however, related to a position as a party to the collective conflict that exists institutionally between trade unions and employers.

²⁷ Council of State no. 311/2012.

In this specific case, the aspect that does not support UPU is that the fraud detection procedure allows the notified individual to prove the unfairness of the measure generated by the AI system. This would disadvantage the UPU, as the authority could demonstrate compliance with the principle of non-exclusivity. The judges have stated that the recipient of the legal effects of an automated decision possesses “the right to have that decision not based solely on the automated process, entrusting the responsible official with the task of checking, and thus validating or, on the contrary, refuting the automated decision”²⁸.

H. Netherlands

Louise Verboeket & Jacobine van den Brink

The contested decision (*besluit*) to impose the repayment of the benefit received, along with a penalty, constitutes a single-case decision (*beschikking*) as defined by Article 1:3(2) of the Dutch General Administrative Law Act (GALA, *Algemene wet bestuursrecht*). Mr Capone, as the addressee and thus a party concerned (*belanghebbende*) as defined by Article 1:2(1) of the GALA, must seek recourse against that decision in the administrative court (*bestuursrechter*). In this case, however, we focus on the non-governmental organisation Unemployed People United (UPU) of which Mr Capone is a member and which seeks to intervene in Mr Capone's case in order to highlight the discriminatory nature of the underlying Fraud & Risk Detection System (FRDS). As a sidenote, the UPU is free to (financially) support Mr Capone in his procedure before the administrative court. The first question is if the UPU has standing to intervene in Mr Capone's procedure before the administrative courts. In other words: can the UPU be qualified as a party concerned in the decision? Under Article 1:2(3) of the GALA, the interests of legal entities are deemed to include the general and collective interests that they specifically seek to promote according to their objectives and actual activities. Three cumulative criteria can be derived from case law in this context. First, the UPU must be an organisation with legal personality. Second, it must be able to derive its collective interest in Mr Capone's case from its statutory objectives. The general rule is that the UPU advocates a collective interest when acting on behalf of its members'

²⁸ TAR Campania, Naples, section III, 14 November 2022, no. 7003.

interests, unless proven otherwise²⁹. From the perspective of effective legal protection, it can also be argued that the UPU, more so than individual parties concerned like Mr Capone, is better positioned to demonstrate that the administrative authority (*bestuursorgaan*) is acting in a discriminatory manner through the use of the FRDS³⁰. After all, this is evident primarily from the overall proportion of flagged fraudsters with a different nationality. Third, the UPU must be able to derive its collective interest in Mr Capone's case from its actual activities, which must extend beyond merely litigating against decisions³¹. Based on the limited facts of the case in light of these three criteria, it seems likely that the UPU could join Mr Capone's case before the administrative court as a party concerned.

However, the administrative court primarily rules at the level of individual decisions and can therefore only indirectly assess the legality of the underlying legislation³². This type of judicial review is called 'incidental review' (*exceptieve toetsing*)³³. The case does not clarify whether the FRDS is enshrined in legislation. A challenge to the use of the FRDS itself must be brought before the civil courts (*civiele rechter*). This is because the administrative authority's decision to use an automated system, and the use of that system, do not constitute decisions as defined by Article 1:3(1) of the GALA. The question then becomes: does the UPU have access to the civil courts to challenge the use of the FRDS by the administrative authority, whether or not in a case brought by Mr Capone as a member of the UPU? To this end, the UPU could initiate a so-called collective action (*collectieve actie*) under Article 3:305a of the Dutch Civil Code (*BW, Burgerlijk Wetboek*)³⁴. The requirements for the UPU's admissibility under Article 3:305a(2) and (3) of the Civil Code

²⁹ ABRvS 23 August 2006, ECLI:NL:RVS:2006:AY6762.

³⁰ Cf. ABRvS 24 juni 2009, ECLI:NL:RVS:2009:BI9672.

³¹ ABRvS 1 October 2008, ECLI:NL:RVS:2008:BF3911 (*Stichting Openbare Ruimte*).

³² Apart from Acts of Parliament (*wetten in formele zin*). See the answer to the first question in the Chapter on the Netherlands in Part II.

³³ See, for example, ABRvS 4 March 2015, ECLI:NL:RVS:2015:622, which formally resulted in the annulment of the single-case decision in question but *de facto* entailed a declaration of the illegality of the underlying general binding regulation (*algemeen verbindend voorschrift*) through incidental review. The current standard of incidental review is set out in CRvB 1 July 2019, ECLI:NL:CRVB:2019:2016-2019.

³⁴ A central register of collective actions under Art. 3:305a of the Dutch Civil Law Code can be found here: <https://www.rechtspraak.nl/Registers/centraal-register-voor-collectieve-vorderingen> (accessed January 2026). See, as an example of a collective action against a potentially discriminatory algorithm used by the government, District Court of The Hague 5 February 2020, ECLI:NL:RBDHA:2020:1878 (*SyRI*), paras. 6.9-6.18 on the admissibility of claimants.

are similar to those under Article 1:2(3) of the GALA, although Article 3:305a(2) and (3) of the Civil Code sets additional conditions aimed at transparency, good governance, the absence of a profit motive, sufficient connection with the Dutch legal sphere, and the obligation to first seek to resolve the matter in consultation with the defendant (in this case, the administrative authority). Furthermore, under Article 217 of the Dutch Code of Civil Procedure (Rv, *Wetboek van Burgerlijke Rechtsvordering*), the UPU could intervene (*voegen*) in a civil action brought by Mr Capone against the use of the FRDS by the administrative authority without submitting a claim against the administrative authority on or of its own³⁵.

The second question is what the likelihood is that the UPU's requests for access to the code underlying the FRDS and to all warnings issued by the administrative authority will be accepted. It is unlikely that the court will grant these requests outright. The UPU will need to argue why the requested information is relevant to substantiating its claim against the use of the FRDS. In the *SyRI* judgment, which shares parallels with this case, the court did not grant the request to disclose the risk models and indicators used. The State refused to make this information public, citing the concern that individuals could then adjust their conduct accordingly ('gaming the system'). The court considered that, without access to this information, it could not assess the accuracy of the State's position on what the algorithmic system in question precisely entailed³⁶. This conclusion influenced the court's assessment of whether the system's interference with private life was permissible under Article 8(2) of the European Convention on Human Rights (ECHR)³⁷. This assessment led the court to the judgement that the fair balance required for justified interference under Article 8(2) of the ECHR was not met, and the underlying legislation was therefore declared invalid due to its conflict with that article³⁸. The UPU's request for access to all warnings issued by the administrative authority may also be refused on privacy grounds. However, the administrative authority could be required to

³⁵ Cf. District Court of The Hague 5 February 2020, ECLI:NL:RBDHA:2020:1878 (*SyRI*), para. 6.17 on the admissibility of FNV as an intervening claimant.

³⁶ District Court of The Hague 5 February 2020, ECLI:NL:RBDHA:2020:1878 (*SyRI*), para. 6.49.

³⁷ District Court of The Hague 5 February 2020, ECLI:NL:RBDHA:2020:1878 (*SyRI*), paras. 6.65, 6.82 and 6.90-6.91. See also CJ Wolswinkel, 'Normering van geautomatiseerde besluitvorming: tijd voor wetgeving?' in B Aarrass, CLGFH Albers, R Ortlep (eds), *Digitalisering in de rechtsverhouding tussen burger en overheid. Zoeken naar een balans tussen instrumentaliteit en waarborg* (Wolters Kluwer 2022) 67-68.

³⁸ District Court of The Hague 5 February 2020, ECLI:NL:RBDHA:2020:1878 (*SyRI*), para. 7.2.

provide 'bare' statistics on those warnings, such as the nationalities of the recipients³⁹. Regardless of the UPU's specific requests, it is clear that the fact that the parameters of the FRDS are unpublished and, more importantly, unknowable, affects the legality of the FRDS and the decisions based on it. This means the administrative authority is not fulfilling its transparency obligation, as previously described⁴⁰.

The third and final question is whether the court would consider the UPU's argument regarding the suspected discriminatory nature of the FRDS. The fact that an automated system appears to be discriminatory is certainly relevant to the court's assessment. If there is a *prima facie* suspicion of discrimination, the burden of proof shifts to the defendant. The defendant (in this case, the administrative authority) would then need to demonstrate that the data used and/or the algorithm do not result in any unlawful discrimination⁴¹. Moreover, the *SyRI* judgment shows that stricter requirements are imposed on the transparency obligation of the administrative authority when there is a risk that the use of the algorithm may lead to (unintended) discriminatory effects⁴². This makes it highly unlikely that the administrative authority can get away with the fact that the parameters of the FRDS are unpublished and unknowable. Regarding the contested decision to impose the repayment of the benefit received, along with a penalty, it cannot be ruled out that the court may conclude that the (automated) audit of Mr Capone was conducted in such a way that it so severely violates what can reasonably be expected of a properly functioning government, and that the use of the findings from that audit must be deemed inadmissible under all circumstances. In such an exceptional case, the administrative authority would not have the power to adjust the payment of the benefit to Mr Capone based on the issues uncovered during the audit. If Mr Capone and/or the UPU substantiate(s) that such an exceptional situation has occurred in his case,

³⁹ Cf. Court of Appeal of The Hague 4 November 2020, ECLI:NL:GHDHA:2020:2092, paras. 10-11.

⁴⁰ See the answer to the fourth question in the Chapter on the Netherlands in Part II. Please note that the EU AI Act is not covered in the latter. The FRDS could be classified as a high-risk algorithm under the AI Act. If it qualifies as a high-risk AI system, all requirements of Section 2 of the AI Act apply, including the requirement for human oversight, as established by Article 14 of the AI Act, to minimise the risk to fundamental rights.

⁴¹ Art. 10 Equal Treatment Act (AWGB, *Algemene wet gelijke behandeling*), *Kamerstukken I* 2021/22, 35447, H, 18.

⁴² District Court of The Hague 5 February 2020, ECLI:NL:RBDHA:2020:1878 (*SyRI*), paras. 6.91-6.95.

the administrative authority must also provide Mr Capone and/or the UPU and the court with any data that may be relevant to this assessment⁴³. It is likely that these data will include the parameters of the FRDS.

I. Spain

Agustí Cerrillo-i-Martínez

According to Spanish law, the UPU would have standing to intervene. However, the chances of its requests being accepted are slight, as the algorithms used to assess fraud by Spanish public authorities are not transparent

We can illustrate the point through two cases.

Some Spanish public authorities are using AI to find irregularities and to assess risk of fraud (i.e. Tax Agency, Social Security). One of these is the early alerts system of the Government of Valencia. It is based on analysis of the data generated by the activity of its public authorities to identify irregular situations which would otherwise go undetected, or which would be difficult to detect in a mass of government records. The aggregate and interconnected processing of the data generated by the activity of public administrations through complex algorithms can facilitate the detection and discovery of behaviour, conduct, and situations concealing conflicts of interest and cases of corruption.

This system is stated in Law 22/2018 of 6 November, on the general inspection of services and the alerts system for the prevention of malpractice in the Administration of the Valencian Government and its public bodies. Law 22/2018 seeks to identify government actions which may present a risk of irregularities or malpractice through the aggregate analysis of large volumes of data generated by the activity of the public authorities, and the evaluation of possible corruption. In the words of the law, “the alerts system will be organised through a set of tools whose interaction enables the detection of possible administrative irregularities and malpractice as a preventive measure, based on analysis of the information obtained and the assessment of risk factors which might lead to them” (Article 17).

Law 22/2018 of 6 November states that the digital system processing data to prevent irregularities must consist of, among other

⁴³ Supreme Court 10 December 2021, ECLI:NL:HR:2021:1748, para. 5.3.

elements, “data analysis mechanisms that use risk indicators, defined for each of the different administrative management areas to be analysed, to enable the detection of irregular situations which can be investigated” (Article 20). To this end, it stipulates the design of a system of indicators to detect the presence of possible irregularities or malpractice in each of the management areas, which will be regularly updated to ensure they are as specific as possible, through the application of the information and conclusions arising from the implementation of the system itself (Article 27). To verify compliance with the security policy, the established operating procedures, and the applicable personal data protection regulations to correct errors in the alerts and to identify and prevent new risks, the alerts system will be subject to regular review and evaluation (Articles 26 and 29).

However, Law 22/2018 does not provide any procedure to allow citizens access to the data use or to control that the algorithm is working well.

Another example where the lack of transparency of algorithms can have an impact in the prevention of bias and discrimination is the algorithm the pension calculation programme uses to set the percentages corresponding to full years of effective service. An individual asked the Ministry of Inclusion, Social Security and Migration for access to the algorithm. In its resolution, the Ministry provided details of the procedure followed to calculate retirement pensions, illustrating it with an example and alluding to the software at several points, but did not provide the requested algorithm.

The applicant then presented a claim to the Council of Transparency and Good Governance, which issued the resolution of 20 May 2021 (058/2021).

An initial matter of interest emerging from the resolution is that “this Council considers that, without any need for further semantic debate on the various meanings attributed to the term, an algorithm such as the one described in this claim – which the applicant describes as “the one the pension calculation programme uses to determine the percentages corresponding to full years of effective service...” – undoubtedly falls within the scope of the concept of public information established in the LTAIBG [Law 19/2013].”

The resolution also cautions that “in the current context of ongoing development and implementation of electronic government and the growing use of artificial intelligence, algorithms are becoming vitally important and increasingly complex. They may support government decision-making or directly serve as the source of automatic decisions,

with very significant consequences for individuals. This evolution is generating an increasing public demand for transparency in the algorithms used by public authorities as an essential condition to ensure accountability and the scrutiny of government decisions, and ultimately, as an effective safeguard against arbitrariness or discriminatory biases in fully or partially automated decision-making”. In view of the above, the resolution concludes by urging the Social Security Treasury General to provide access to the algorithm.

L. United Kingdom

Gordon Anthony

This question gives rise to two main issues in UK law: human rights law, notably in relation to Article 1 Protocol 1 ECHR; and procedural law, *viz* intervention rights. Neither issue is particularly complex from the perspective of UK law.

In relation to human rights law, Mr Capone would challenge the decision against him by means of judicial review proceedings under the Human Rights Act 1998. According to section 6 of that Act, a public authority must always act in a manner that is compatible with a person’s rights under the ECHR, as have effect under Schedule 1 to the Act; and, by section 7, only a “*victim*” within the meaning of Article 34 ECHR can bring proceedings in UK courts. Mr Capone is plainly a victim on the given facts, as there has arguably been an interference with his property rights under Article 1 Protocol 1. He would therefore bring proceedings to argue that the interference with his property rights is disproportionate and thereby unlawful. The Naboo government would argue that the interference was justified in the public interest. (In contrast to the above scenario, the alert notice and opportunity to provide evidence of unemployment would arguably meet the requirements of fairness, whether under Article 6 ECHR or under the common law, albeit Mr Capone would be advised to raise this as a ground for challenge, too.)

The matter of intervention rights would be one for the discretion of the court, which might be expected to refuse UPU’s request for standing. The reason is a simple one: courts in the UK do not typically allow cases under section 7 of the Human Rights Act 1998 to morph into *acciones populares*, and UPU’s proposed intervention may be perceived as taking Mr Capone’s case in that direction. In short, if Mr Capone’s own case could not provide a basis for the point about discrimination – and it

would appear from the given facts that it would not – it is unlikely that the court would allow his case to expand on the basis of UPU’s intervention. There would, in any event, be a question about whether any meaningful remedy could be given as: (a) section 8 of the Human Rights Act 1998 provides, in terms, that remedies may be granted only for a breach of section 6; and (b) proceedings under section 6 may be brought only by a “*victim*” for the purposes of section 7. UPU’s intervention, and the points that it would raise, would fall outside that framework. (UPU may also apply to intervene on the basis of the common law – it incorporates customary international law’s rule against discriminatory treatment – but the court may rule that any such point would have to be raised in different proceedings outside the Human Rights Act 1998⁴⁴).

To summarise: Mr Capone can bring proceedings under the Human Rights Act 1998, but it is unlikely that UPU would be able to intervene given the procedural rules that apply under that Act.

M. United States

Catherine M. Sharkey & Caterina Barrena Hyneman

Background

Unemployment benefits are determined at the state level within the U.S. with great levels of variation between states⁴⁵. More generally, a large number of federal agencies are deploying AI to detect fraud in benefits applications, like the SSA⁴⁶.

Answer

UPU would likely have associational standing to intervene on behalf of Mr. Capone and similarly situated individuals.

UPU could argue that this system violates Mr. Capone’s due process because none of the applicants have access to the “unpublished and unknowable” information that makes these life-altering decisions. The U.S. Supreme Court has recognized that organizations may pursue claims on behalf of their members whether or not the organization itself has been injured. UPU has standing to bring a case on behalf of Mr.

⁴⁴ On non-discrimination and customary international law see, eg, *Roma Rights Centre v Immigration Officer at Prague Airport* [2005] UKHL 55, [2005] 2 AC 1.

⁴⁵ Unemployment Benefits, <https://www.usa.gov/unemployment-benefits>.

⁴⁶ See the answer given to the third question in the Chapter on the United States in Part II.

Capone and its other members when: “(a) its members would otherwise have standing to sue in their own right; (b) the interests its seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation” of individual members in the lawsuit⁴⁷. In this case, UPU is likely to be able to demonstrate associational standing. Unlike Question 3.1, Mr. Capone would have a higher likelihood of proving injury in fact and standing because his benefits were terminated⁴⁸. This lawsuit is germane to UPU’s mission to help unemployed people. The third prong could be satisfied if UPU brought a claim demonstrating wide-spread algorithmic discrimination across all of its members, which could not be satisfied with only Mr. Capone’s evidence. But UPU could likely not bring a case for Mr. Capone if all he wanted to show was that the algorithm was wrong in his individualized case. However, nothing is stopping Mr. Capone from bringing this on his own.

Similar cases to Mr. Capone’s have been brought throughout the U.S. by beneficiaries challenging decisions made by algorithms which deny or reduce their benefits. Michigan created the Michigan Integrated Data Automated System, commonly known as MiDAS, to search for “discrepancies” in unemployment compensation beneficiary records⁴⁹. It automatically determined whether an applicant allegedly committed fraud and began collection proceedings, garnishing wages, and taking tax refunds without oversight⁵⁰. The algorithm detected fraud where none existed, did not allow administrative appeals, and had no human oversight⁵¹. A Michigan federal district court held that the Plaintiffs in this class action sufficiently demonstrated injury resulting from the “rigid logic trees coupled with inadequate notice procedures”⁵², but later the case was dismissed for lack of subject matter jurisdiction and proximate cause⁵³.

A similar case took place in Idaho, under a new program for developmentally disabled adults that assessed an applicant’s need for home and community-based services under Medicaid⁵⁴. To qualify, an applicant needed to go to a medical assessment center and fill out a form

⁴⁷ Hunt v. Wash. State Apple Advert. Com’n, 432 U.S. 333, 343 (1977).

⁴⁸ See the hypothetical case number one.

⁴⁹ Cahoo v. Fast Enters. LLC, 508 F. Supp. 3d 162, 166 (E.D. Mich. 2020).

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.* at 180.

⁵³ Cahoo v. Fast Enters. LLC, 528 F. Supp. 3d 719, 763 (E.D. Mich. 2021).

⁵⁴ S. Landau et al., *Challenging the Machine: Contestability in Government AI Systems* (2024), <https://arxiv.org/pdf/2406.10430>, at 36.

to quantify their needs⁵⁵. A human assessor then entered the data into a tool that calculated an applicant's Medicaid budget amount using formulas, which Idaho considers a trade secret⁵⁶. After the system was implemented, the state's legal office received complaints from many people who had their benefits slashed by an algorithm without explanation, and they came forward with a class action lawsuit⁵⁷. The Idaho federal district court held that Idaho's system violated constitutional due process because the applicants requesting Medicaid aid must have access to proprietary information about the assessment tool and required that the state ensure that everyone using the program have a suitable representative to help them challenge the results⁵⁸.

In Arkansas, beneficiaries of a state Medicaid program which provided home-based services to low-income residents with physical disabilities also brought forth a class action lawsuit⁵⁹. Arkansas Department of Human Services implemented a new system which determined the number of attendant-care hours, and Plaintiffs argued that the algorithm did not comply with the APA⁶⁰. While the appeal was pending, the agency promulgated a new rule that was "properly promulgated under the APA" so the case became moot⁶¹.

Unlike these prior cases, however, there was human oversight in the process that targeted Mr. Capone. In the Michigan case, once decisions were made by the AI, it began to garner wages immediately. In Mr. Capone's case, the algorithm only flags potential fraudsters; the administration then follows up with them to request more documentation. Mr. Capone is in a difficult position because he is unable to prove he was unemployed. Despite any potential biases the algorithm may have, this is still a difficult fact to overcome in court.

Still, UPU can argue that the algorithm was discriminatory. If Naboo was a place like New York City with a law similar to Local Law 144 (discussed above in Question 3.3) it could gain access to annual discrimination audits and see how the algorithm ranks people without Naboo nationality. Again, New York City's law is groundbreaking; and most cities and states throughout the U.S. do not have laws like this.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.* at 37.

⁵⁷ *Ibid.*; *K.W. v. Armstrong*, 180 F. Supp. 3d 1125 (D. Idaho 2023).

⁵⁸ *Armstrong*, 180 F. Supp. 3d at 1134-36.

⁵⁹ *Ark. Dep't of Hum. Servs. v. Ledgerwood (Legerwood II)*, 572 S.W.3d 1, 1 (Ark. 2019).

⁶⁰ *Ibid.*

⁶¹ *Ibid.*