CHAPTER 20
CASE 7 – A DISCRIMINATORY PREDICTIVE POLICING AI

A. Austria

Matthias Zußner

Whether Mr Acab can appeal against the warning itself depends on the form in which it is issued. If the warning is issued by way of a formal administrative decision, this *Bescheid* can be challenged before an administrative court with an appeal against an administrative decision under Article 130 para 1 no 1 of the Austrian Federal Constitutional Law. The administrative court must decide on the merits of the case and base its decision on its own findings of fact, its own consideration of evidence and its own legal assessment. It is not permissible for the administrative court to rely solely on the result of an algorithm, as this would violate the constitutional requirements for reasoning; however, it would be permissible to adopt algorithmically generated findings if the administrative court can explain their plausibility (see the answer to Case 3).

If the warning is not issued itself in the form of a *Bescheid*, it would be regarded as an informal act by an administrative body in preparation for a decision (a so-called '*schlicht-hoheitliche Verwaltung*[1]'). A formal legal basis for technical and even algorithmic support of a formal *Bescheid* is only needed if personal data is processed[2]. The algorithmic support for a decision is therefore not contestable per se, but it would also not be binding in subsequent proceedings, e.g. in proceedings before an administrative authority or an administrative court. As long as the law does not provide for this, it is not sufficient to rely solely on the AI result in administrative or subsequent administrative court proceedings (e.g. in proceedings concerning a hooligan ban). The relevant circumstances would have to be established and assessed by the authority itself; otherwise the relevant decision (e.g. a formal hooligan ban) would be unlawful due to a lack of reasoning and could be successfully challenged through an administrative complaint or appeal. In this respect, Mr Acab

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[1] M. Zußner, *Schlichte Hoheitsverwaltung* (2018).

[2] See VfSlg 8844/1980 (for the informal character of algorithmic support in the decision-making-process) and and Art 1 § 1 of the Austrian Data Protection Act (on the need for a legal basis).

has no direct legal right to know on what basis the AI issued a warning against him as a potential hooligan. Even though Mr Acab is appealing against the formal hooliganism decision, this only means that he is appealing against the formal hooliganism decision itself. In this decision, the authority itself must state the reasons for the hooliganism ban. If it fails to do so, there is a breach of the duty to state reasons, but there is still no right to disclosure of the source code or anything like that in relation to the discriminatory system that generates warnings.

However, Mr Acab can claim official liability if he can prove that he is discriminated against by a hooligan ban and that this results in a financial disadvantage for him[3]. For the sake of completeness, however, it should be noted that as long as the hooligan ban is not issued automatically, as in the present case, but formally by a person, the use of AI as an aid (e.g. to generate warnings) is not in itself causal for the discriminatory formal decision of the administration.

B. China

Xixin Wang

In the Chinese *Administrative Litigation Law* and the *Administrative Reconsideration Law*, administrative acts are subject to review. The concept of administrative acts has been transplanted from German law, but it is far from a direct translation of Verwaltungsakt. For instance, administrative contracts (Verwaltungsvertrag) are also considered a type of administrative act in China, which is categorised as a non-Verwaltungsakt under German law. The more pertinent question in this case is whether a warning would qualify as an administrative act in China. It depends on what kind of warning it is. Article 9 of the PRC Administrative Punishment Law includes a warning (警告) as a type of administrative punishment, which is recognised as a quintessential administrative act subject to hierarchical and judicial oversight. Nevertheless, the warning against Mr Acab would not qualify as a warning in the sense of administrative punishment under Chinese law because it is not based on any unlawful conduct by Mr Acab. The other possible categorisation of Mr Acab's warning would be as a factual act, a rough translation of Realakt in German law. It is most likely that the Chinese court would consider such factual acts as non-reviewable

[3] § 1 of the Liability of Public Bodies Act – AHG, BGBl. No. 20/1949.

because they do not have any direct and tangible effect on Mr Acab's legal rights and obligations. One can certainly argue that the warning effectively places Mr Acab at a heightened level of risk of facing a potential Hooligans Ban. But that is just a possibility that may or may not materialise. At most, the warning can be seen as a preparatory act leading towards the future Hooligans Ban (which would qualify as reviewable administrative punishment in Chinese law). Yet that means the warning is unripe to be judicially reviewed in and of itself. Mr Acab has to wait until the subsequent Hooligans Ban to challenge the ban and the preceding warning together on the grounds that the warning itself is unlawful and would, in turn, make the consequent ban unlawful as well. In a nutshell, under current Chinese law, Mr Acab would not be able to challenge the warning per se, but he can challenge it as part of the basis for a subsequent ban.

In this process, he may be able to discover the reason behind being identified as a potential hooligan, as this is essentially part of the factual basis on which the authority imposes the Hooligans Ban on him. If he can demonstrate that the PHS is biased against heavily tattooed people, that would be great. But even if he cannot, the burden of proof is on the administration to show that there is no discrimination embedded in the PHS. If the government fails to do so and the court is convinced that there is indeed unlawful discrimination, Mr Acab would, based on the PRC State Compensation Law, be compensated for his direct loss incurred due to the Hooligans Ban. On this point, things become a bit tricky. The State compensation system in China is far from generous. Given that the ban does not cause any physical damage (bodily harm or loss of personal freedom) or property damage (unless Mr Acab buys a non-transferable and non-refundable ticket to a game he would not be able to attend due to the ban), he will have to resort to psychological damages.

According to Article 4 of the 2021 *Interpretation of the Supreme People's Court on Several Issues Concerning the Applicable Law in Determining Liability for Compensation for Mental Damage in the Trial of State Compensation Cases* [4], if an infringement causes mental harm to a person, the administration must eliminate the impact, restore their reputation, or offer an apology. If an infringement causes mental harm and results in serious consequences, a consolation payment for mental damage shall be provided. This means that Mr Acab may receive an apology from the government, and in order to obtain pecuniary damages, he must prove

[4] *http://www.lawinfochina.com/display.aspx?id=35168&lib=law&EncodingName=big5.*

that he has suffered serious consequences from mental illness due to being unable to attend games or access sports facilities.

C. Estonia

Katrin Nyman-Metcalf

The EU AI Act should be relevant here. Article 5 prohibits certain AI practices, including "use of an AI system for making risk assessments of natural persons in order to assess or predict the risk of a natural person committing a criminal offence, based solely on the profiling of a natural person or on assessing their personality traits and characteristics". However, the same point states that the prohibition shall not apply to "AI systems used to support the human assessment of the involvement of a person in a criminal activity, which is already based on objective and verifiable facts directly linked to a criminal activity". Article 5 of the AI Act also prohibits "evaluation or classification of natural persons or groups of persons over a certain period of time based on their social behaviour or known, inferred or predicted personal or personality characteristics" when this leads to unfavourable treatment. It appears that the situation could fall under such prohibitions. From the short description, it is possible that the authorities use also other human assessment, but in any case, it appears as if the reliance on AI is likely to fall under Article 5. As for the whole of the EU, there is as yet no Estonian practice to rely on. It is not known that Estonian police would use predictive policing to any noticeable extent. It is unlikely that there would be any distinct Estonian approach to this issue, separate from the practice that will evolve in the EU.

Bias due to tattoos will be very difficult to show, just as such a bias among human police officers may be hard to demonstrate. It is unlikely that access to the code could help identify discrimination either. The Estonian Discrimination Ombudsman has focused on possible discrimination in the use of AI, and a new project has recently been launched. In a joint project with Lithuania, risks of discrimination due to the use of AI will be examined and, among other things, a toolbox for AI developers will be created [5]. The Ombudsman has stated that the use of AI should never lead to discrimination and has warned of such risks.

[5] *https://www.volinik.ee/artiklid/eesti-vordoigusvolinik-tehisaru-otsused-ei-tohi-kedagi-diskrimineerida.html*.

In Estonia, the Equal Treatment Act [6] does not include tattooed persons among the protected groups and does not directly cover a situation like this as it lists conditions under which equal treatment is mandatory, recognising however that there may also be additional situations covered. Law enforcement has some possibilities for exceptions, but this seems rather unlikely in the case at hand.

D. European Union

Leonardo Parona

As is well known, the EU lacks both normative and administrative competences in the field of public order and security; consequently, it cannot – and does not – exercise any direct (or indirect) policing function, the latter remaining within the competences of the Member States. The legal issues posed by the present case can therefore only be addressed in a purely hypothetical manner, relying on the general principles of EU law and the rules introduced by the AI Act.

The present hypothetical depicts a scenario which could be framed by recalling the one that AG Pitruzzella described as a "digital panopticon – where public authorities can be all-seeing without being seen" and exercise "an omniscient power able to oversee and predict the behaviour of each and every person and take the necessary measures"[7].

Despite its evocative nature, such an image does not assist in addressing the case in legal terms. To better contextualise the Project Hooligans Sentinel (PHS) used in this case for predictive policing functions, it would be more useful to refer to the provisions and categories of the AI Act. First of all, the proceeding administration should be classified as a "law enforcement authority" under Article 3, n. 45 of the AI Act. Secondly, and more importantly, the PHS is based on an AI system which is prohibited under Article 5(1)(d) of the AI Act, since it is used "for making risk assessments of natural persons in order to assess or predict the risk of a natural person committing a criminal offence, based solely on the profiling of a natural person or on assessing their personality traits and characteristics". As the hypothetical explains: "once a potential hooligan is identified, he receives a warning from the police"; the PHS's outcome therefore seems to lead automatically to an

[6] *https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/507032022003/consolide.*

[7] Opinion of AG Pitruzzella delivered on 27th January 2022 in the Case C-817/19 *Ligue des droits humains ASBL v Conseil des ministres*, para. 2.

individual warning, on the basis of which a subsequent ban (as a precautionary measure) is issued.

The system would not be prohibited, according to the second sentence of Article 5(1)(d), if it were "used to support the human assessment of the involvement of a person in a criminal activity, which is already based on objective and verifiable facts directly linked to a criminal activity". This exception does not apply to the circumstances of the given case.

A serious infringement of the AI Act seems therefore to have occurred in the case involving Mr Acab, calling for the supervision and intervention of the European Data Protection Supervisor (EDPS), the competent authority under Article 70(9) of the AI Act, as already clarified in the answers to the general questions.

Besides the supervisory powers of the EDPS – which have not yet been specified – given the infringement of his fundamental rights, Mr Acab could also have access to judicial protection. The precautionary measure specified in the hooligan ban could therefore be challenged through an action for annulment under Article 263 TFEU and quashed on the grounds of a violation of secondary law.

It should be noted that the warning itself could probably not be immediately and directly challenged through an action for annulment, as it does not produce any prejudicial legal effect. The impact on Mr Acab's legal position is instead determined by the subsequent precautionary measure (the hooligan ban), which is undeniably a contestable measure. Nevertheless, the AI system leading to the issuance of the warning would still represent a prohibited use of AI, for the reasons already mentioned in relation to Article 5(1)(d) of the AI Act.

Since the AI application in question is – as reiterated – a prohibited one, there is no scope for invoking guarantees such as the right to a meaningful explanation under Article 86 of the AI Act, which would only apply to high-risk systems. There seems, therefore, to be no possibility of demonstrating the PHS's alleged bias against tattooed persons as the system is prohibited outright – biased or not.

E. France

Maximilien Lanna

The Arcadia Police Department (APD) launches Project Hooligans Sentinel (PHS), a groundbreaking initiative that harnesses the power of

artificial intelligence (AI) for predictive policing. A potential hooligan, Mr Acab, after being warned by the local administration, receives a Hooligans Ban, a temporary measure prohibiting access to sporting events and to the area surrounding stadiums on the date of football matches.

In order to understand the avenues available to Mr Acab, it is necessary to distinguish between processing carried out using an algorithm and processing based on the use of an artificial intelligence system.

The rules applicable to the protection of personal data in the context of data processing taking place for the purposes of the prevention and detection of criminal offences, the investigation and prosecution, or the enforcement of criminal penalties are determined by Directive (EU) 2016/680 of April 27, 2016. With regard to automated decision-making, Article 11 the Directive enjoins States to provide for the prohibition of any decision based exclusively on automated processing which produces adverse legal effects for the data subject or significantly affects him or her, unless such decision-making is authorised by Union law or the law of a Member State which provides appropriate safeguards for the rights and freedoms of the data subject.

The provisions transposing this directive are set out in Title III of the French Data Protection Act of January 6, 1978, particularly in Article 95. However, these provisions (including the ones from the directive) must be disregarded here, as the data used does not fall into the category of personal data but should be regarded as contextual data.

Nevertheless, the Hooligan Ban must be regarded as an individual administrative decision. Therefore, it must include, under pain of nullity, the explicit mention provided for in Article L. 311-3-1 of the French Code of relations between the public and the administration, in order to inform the interested party. The rules defining this processing, as well as the main features of its implementation, are made available to the interested party on request.

However, there is a clear risk that the authority will refuse to disclose the documents (and the process used by the algorithm), as Article L.311-5 of the CRPA explicitly states that administrative documents whose consultation or communication would be prejudicial to public safety may not be disclosed. Mr Acab may submit a request for access to this information to the Commission for access to administrative documents (CADA), but given the nature of the processing involved, this prerogative will probably be denied.

Regarding algorithmic bias, this type of discrimination is currently excluded from the scope of discrimination regulations in the absence of intentionality.

If processing is carried out by an artificial intelligence system, Regulation (EU) 2024/1689, laying down harmonised rules on artificial intelligence, applies. Recital 42 of the AI Act states that "natural persons should never be judged on AI-predicted behaviour based solely on their profiling, personality traits or characteristics, such as nationality, place of birth, place of residence, number of children, level of debt or type of car, without a reasonable suspicion of that person being involved in a criminal activity based on objective verifiable facts and without human assessment thereof".

Article 5 of the text clearly states that "the placing on the market, the putting into service for this specific purpose, or the use of an AI system for making risk assessments of natural persons in order to assess or predict the risk of a natural person committing a criminal offence, based solely on the profiling of a natural person or on assessing their personality traits and characteristics" is prohibited.

F. Germany

Cristina Fraenkel-Haeberle & Charlotte Langer

Legal remedies

Mr Acab can successfully challenge both the warning and the subsequent ban. The use of the algorithmic predictive policing system is unlawful under Article 5(1)(d) of the EU AI Act, which prohibits "[…] the use of an AI system for making risk assessments of natural persons in order to assess or predict the risk of a natural person committing a criminal offence, based solely on the profiling of a natural person or on assessing their personality traits and characteristics"[8]. This is precisely what the program does in the present case. Even without taking the EU AI Act into account, however, both the warning and the ban would be considered unlawful under German national law.

The warning is not an administrative act as defined by § 35 S. 1 VwVfG. It is, however, a measure that infringes addressees' rights, as it has the potential to influence their freedom to make decisions. As such, it needs a legal basis authorising the police to act. As the police come

[8] *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0206.*

within the competence of federal states in Germany, the concrete legal basis depends on the federal state: some, like Baden-Württemberg, have included authorisation for so-called "Gefährderansprachen/Gefährderanschreiben" (address/letter to a person posing a potential public threat). Where such explicit authorisation is lacking, the legal basis is a general clause authorising the police to counter threats to public safety. In either case, this requires the existence of such a threat, meaning that objective facts justify the assumption that the person addressed will commit a crime with a sufficient degree of probability[9]. These facts must be presented to the court to justify the police's assessment of a potential threat; failing that, the court will overturn the warning. In the present case, it is not clear whether and to what extent the algorithmic system provides reasons for its assessments. However, it seems that its assessments are largely statistical and not based on facts concerning only the individual in question. If no facts can be presented, Mr Acab's identification as a potential threat would not be justified, regardless of the fact that he is heavily tattooed. This alone is insufficient to justify the warning. Since this warning is unlawful and infringes on Mr Acab's rights, the court will annul it.

The same basic reasoning applies to the subsequent ban. As a standard police measure, banning from premises is expressly regulated in federal states' police laws. It allows the police to ban a person from specific premises to prevent an imminent threat or terminate an ongoing danger to public safety. This is congruent with the standard explained above: there must be objective facts justifying the assessment of an imminent or ongoing threat. It seems highly unlikely that this threshold is met in the present case. The sole basis for the ban is the rival supporter's allegation of assault. The mere accusation is not sufficient evidence. The police are under obligation to investigate whether the accusation is true; only after establishing a sufficient degree of probability that Mr Acab committed the alleged crime can the police force him to leave the premises to prevent him from committing further offences. To this end, a credible accusation opens up a wider toolkit of investigative options[10]. However, taking a victim's statement at face value without further investigation and using this as the sole basis for a ban from specific premises does not satisfy the legal standard of an imminent or ongoing threat.

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[9] E. Krüger, *Der Gefahrbegriff im Polizei- und Ordnungsrecht*, in Juristische Schulung 985 (2013).

[10] *Ibid*.

However, the challenge to the ban must be based on the fact that Mr Acab does not constitute a threat to public safety. He cannot base his challenge on discrimination alone. This is because physical appearance, including tattoos, is not a protected characteristic under Art. 3 of the German Basic Law (right to equality); protected characteristics are limited to sex, ethnicity or race, language, geographical origin, religious, and political views.

Access to the code

As the use of the predictive policing program is unlawful in this case, its procedures are irrelevant to the case and will not be examined in court.

Damages

Damages for violations of public law are awarded solely to compensate for material losses[11]. Awards for personal suffering are available only in cases of bodily harm or imprisonment[12]. Therefore, Mr Acab is only entitled to claim financial compensation for the stadium tickets he was unable to use due to the ban.

G. Italy

Stefano D'Ancona

As in a previously discussed case, it is evident that Mr Acab has the right to access the IA system that generated the warning or cautionary measure. Case law has affirmed that, based on the general admissibility of such tools, two key aspects are of fundamental importance, especially considering the rules of supranational origin, as minimum guarantees for any use of algorithms in public decision-making: (a) the complete upstream knowability of the module used and the criteria applied; and (b) the accountability of the decision to the authority in question, which must be able to verify the logicality and legitimacy of both the choice and the outcomes assigned to the algorithm[13].

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[11] T. Spitzlei, C. Hautkappe, *Die Entschädigung für polizeiliches Einschreiten*, Die Öffentliche Verwaltung 134 (2018).
[12] *Ibid*.
[13] Council of State no. 8472/2019.

As mentioned in the previous hypothetical case Mr Acab should sue the public administration and request technical verification of the accuracy of the data entered and the criteria used by the PHS system to prove discrimination.
If Mr Acab can prove that the AI system's decision was discriminatory due to his tattoos, he may be entitled to compensation.
In order to obtain damages, Mr Acab must, pursuant to Article 2043 of the Civil Code, prove the existence of an unlawful decision, damage, and culpable or wilful conduct on the part of the administration.

Regarding damage, it is noted that the authority improperly used Mr Acab's personal data, as being tattooed is a physical characteristic of his. Therefore, Mr Acab would also be entitled to compensation for non-pecuniary damage under Article 2059 of the Civil Code.
The Lazio Regional Administrative Court has ruled on this, stating that the right to compensation for non-pecuniary damage is due not only to the victim of a crime but also to anyone who has been the victim of "unlawful processing of personal data or violation of the rules prohibiting racial discrimination"[14].

Regarding the authority's liability and fault, it is important to first determine whether the decision made using the PHS system can be attributed to the administration's liability.
The answer is affirmative because the use of the algorithm must be properly understood as an organisational module—a procedural and investigative tool—subject to the verifications typical of any administrative procedure. This aligns with the modus operandi of the authoritative choice, which should be executed in compliance with the law that grants the power and the purposes assigned to the public body, the holder of that power. Therefore, to apply the general and traditional rules regarding imputability and liability, it is essential to ensure that the final decision is attributable to the competent authority and body based on the law granting that power[15].

Instead, it would be more difficult for Mr Acab to prove the authority's fault or wilful misconduct regarding the unlawful decision; in this instance; he would need to prove that the officials had made a significant error in programming the PHS system or that the authority had seriously failed to conduct ex-post checks on the system's operational correctness. In this context, it is important to note that case law has confirmed that decisions made using the algorithm require an

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[14] TAR Lazio, Rome section II, 19 October 2023, no. 15494, cf. Joint Chambers of the Court of Cassation, no. 26972 of 11/11/2008.
[15] TAR Lazio Rome, section III excerpt, 21.06.2022 no. 8313.

authority to perform an ex-ante selection and verification, which includes ongoing testing, updates, and improvements to the algorithm[16]. To prove the authority's fault and support the claim for damages, Mr Acab would have to demonstrate that the authority, as a whole, failed to fulfil its obligations, including organisational duties, necessary for the control and monitoring of the IA system's functioning.
In this regard, we refer to the affirmation of the Council of State: "for the purposes of the existence of the administration's liability for damages caused by an illegitimate measure, the assessment cannot be made on the basis of the mere objective fact of the illegitimacy of the administrative action, since, on the contrary, the court must carry out a more penetrating investigation, extended also to the assessment of the subjective element (not of the acting official but) of the administration understood as an apparatus. In particular, proof must be provided that the public administration acted with at least negligence, in contrast with the canons of impartiality and good performance of administrative action, pursuant to Article 97 of the Italian Constitution"[17].

H. Netherlands

Louise Verboeket & Jacobine van den Brink

The contested decision (*besluit*) to impose a precautionary and temporary measure prohibiting access to sporting events and the area surrounding stadiums on the days of football games 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 Acab, 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*). According to established case law, it is not a requirement that the behaviours underlying the imposition of an area ban be the subject of an irrevocable conviction by a criminal court (*strafrechter*)[18]. However, under Article 172a(1)(a) of the Municipalities Act (*Gemeentewet*), the mayor, as the authorised administrative authority (*bestuursorgaan*), must demonstrate that the disruptive behaviours occurred and that there is a serious risk of

[16] Council of State, section VI, 8 April 2019, no. 2270, TAR Campania, Naples, section III, 14 November 2022, no. 7003.
[17] Council of State section V, 02/02/2024, no. 1087.
[18] ABRvS 27 June 2018, ECLI:NL:RVS:2018:2112 (*Beijum*).

further public order disturbances in the area. This means the mayor must specifically indicate what serious public order disruption Mr Acab caused, why there is a significant fear of recurrence in this case, and that the past actions are severe enough to justify such a stringent measure[19]. The latter is based on the principle of proportionality, as laid down in Article 3:4(2) of the GALA, Article 8 of the European Convention on Human Rights (ECHR), and Article 2 of Protocol 4 of the ECHR. The mayor must base his decision on a documented file[20]. Without proper file documentation, the mere accusation that Mr Acab assaulted someone outside a stadium after a football match is not sufficient to impose an area ban. Consequently, the area ban is unlikely to withstand judicial scrutiny. Mr Acab can request the administrative court in the interlocutory proceedings (*voorzieningenrechter*) to grant interim relief (*voorlopige voorziening*), more specifically to suspend the area ban.

In this case, however, we focus on the remedy against the prior warning generated by an AI system called Project Hooligans Sentinel (PHS). Under Dutch law, an administrative warning (*bestuurlijke waarschuwing*) is considered a decision within the meaning of Article 1:3(1) of the GALA if the existence of the warning, based on a legal provision (*wettelijk voorschrift*), serves as a precondition for the exercise of sanctioning powers. The warning is then intended to have a legal consequence under public law, which is a precondition for a decision as defined by Article 1:3(1) of the GALA[21]. Since the prior warning in this case directly leads to the imposition of a Hooligan Ban on Mr Acab, the warning, provided it is based on a legal provision[22], can be regarded as a decision, specifically a single-case decision as defined by Article 1:3(2) of the GALA. This means that an objection and appeal can be lodged against the warning with the administrative authority and the administrative court, respectively. As mentioned, Mr Acab can also request the administrative court in the interlocutory proceedings to suspend the area ban.

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[19] *Kamerstukken II* 2007/08, 31467, 3, p. 41, ABRvS 5 February 2014, ECLI:NL:RVS:2014:325, paras. 1 and 4.1.

[20] *Kamerstukken II* 2007/08, 31467, 3, p. 14-15.

[21] See also the answer to the first question in the Chapter on the Netherlands in Part II. Cf Dutch Data Protection Authority (DPA, *Autoriteit Persoonsgegevens*), *Advies artikel 22 AVG en geautomatiseerde selectie-instrumenten* (The Hague 2024) 7-8.

[22] Profiling in fully automated decision-making is only permitted if there is a specific legal basis for it. See C.J. Wolswinkel, *Normering van geautomatiseerde besluitvorming: tijd voor wetgeving?*, in B. Aarrass, C.L.G.F.H. Albers, R. Ortlep (eds), *Digitalisering in de rechtsverhouding tussen burger en overheid. Zoeken naar een balans tussen instrumentaliteit en waarborg* (2022).

The next question is whether Mr Acab can know on what basis the AI system identified him as a potential hooligan. Since this concerns a single-case decision, the general principles of good administration (*algemene beginselen van behoorlijk bestuur*) from Chapters 3 and 4 of the GALA are applicable[23]. In the answer to the fourth question in the Chapter on the Netherlands, in Part II, the meaning given to these general principles of good administration in leading case law – particularly the duty to give reasons[24] (*motiveringsbeginsel*), the principle of due care[25] (*zorgvuldigheidsbeginsel*), and the proportionality principle[26] (*evenredigheidsbeginsel*) – in the context of automated administrative decision-making was discussed[27]. From this case law, it follows that an AI system cannot operate as a 'black box'. Moreover, the mayor has the obligation to disclose, fully, promptly, and on his own initiative, the decisions made, and the data and assumptions used by the AI system, in an appropriate manner so that these decisions, data, and assumptions are accessible to Mr Acab[28]. This obligation to disclose applies particularly to customised input data (*maatwerkinvoergegevens*), meaning the data specific to the decision to be made (in this case, the warning that was issued). Not all customised input data need to be disclosed, as long as the warning clarifies which choices have been made regarding these data. In short, it is not just possible but actually obligatory for the mayor to let Mr Acab know on what basis the AI system identified him as a potential hooligan.

When it comes to the question of whether Mr Acab would ever be able to demonstrate that the AI system is biased against heavily tattooed persons and to challenge the Hooligan Ban on the basis of discrimination, there are at least two options. Firstly, Mr Acab could, in the appeal against the warning to the administrative court, use the data provided

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[23] *Kamerstukken II* 2007/08, 31467, 3, p. 15.
[24] Art. 3:46 GALA.
[25] Art. 3:2 GALA.
[26] Art. 3:4(2) and 4:84 GALA.
[27] Please note that the EU AI Act is not covered in the answer to the fourth question in the Chapter on the Netherlands. PHS 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.
[28] ABRvS 17 May 2017, ECLI:NL:RVS:2017:1259 (*AERIUS I*), paras. 14.3-14.4, Supreme Court 17 August 2018, ECLI:NL:HR:2018:1316, CRvB 15 May 2019 ECLI:NL:CRVB:2019:1737. Cf. CBb 8 October 2015, ECLI:NL:CBB:2015:318, para. 4.5.3. See also Art. 5(1)(a) and 22 General Data Protection Regulation (GDPR or AVG, *Algemene verordening gegevensbescherming*).

by the mayor in fulfilment of his transparency obligation to demonstrate that the AI system is biased against heavily tattooed persons. As was previously mentioned in the sixth hypothetical case, if there is a *prima facie* suspicion of discrimination, the burden of proof shifts to the defendant. The defendant (in this case, the mayor) would then need to demonstrate that the data used and/or the AI system do not result in any unlawful discrimination[29]. Moreover, the *SyRI* judgment shows that stricter requirements are imposed on the aforementioned transparency obligation when there is a risk that the use of the AI system may lead to (unintended) discriminatory effects[30]. This increases the likelihood that the administrative court would annul the warning and the subsequent area ban. Secondly, Mr Acab could challenge the use of the mayor's potentially discriminatory AI system in the civil court (*civiele rechter*)[31]. In this proceeding, Mr Acab could request access to the parameters used within the AI system. Additionally, Mr Acab could seek a declaratory judgment (*verklaring voor recht*) that the use of the AI system is unlawful due to its violation of the prohibition of discrimination and/or a prohibition on the continued use of the AI system. As was also mentioned in the sixth hypothetical case, a collective action based on Article 3:305a of the Dutch Civil Code (BW, *Burgerlijk Wetboek*) also provides a suitable route for such a claim. After all, the discriminatory nature of the AI system is evident primarily from the overall proportion of flagged potential hooligans who are heavily tattooed.

Finally, what conditions apply to the awarding of damages for the unlawful imposition of the area ban, assuming Mr Acab can demonstrate that there was discrimination? This concerns damages caused by an unlawful decision against which an appeal can be lodged with the administrative court. The administrative court has jurisdiction to rule on claims up to €25,000, pursuant to Article 8:89(2) of the GALA. Higher claims may be brought before the civil courts. Mr Acab could also choose to first approach the administrative court for damages up to €25,000 and then claim the remaining amount in civil court[32]. Additional procedural requirements for the request of damages before the administrative court are set out in Title 8.4 of the GALA. As for the material requirements for

[29] Art. 10 Equal Treatment Act (AWGB, *Algemene wet gelijke behandeling*), *Kamerstukken I* 2021/22, 35447, H, 18.
[30] District Court of The Hague 5 February 2020, ECLI:NL:RBDHA:2020:1878 (*SyRI*), paras. 6.91-6.95.
[31] See also the answer to the fourth question in the Chapter on the Netherlands in Part II.
[32] ABRvS 2 August 2017, ECLI:NL:RVS:2017:2081 (*Interbest*).

awarding damages, the same liability conditions apply as for a civil tort (*onrechtmatige daad*) under Article 6:162 of the Dutch Civil Code. First, there must be an unlawful act, which secondly must be attributable (*toerekenbaar*) to the defendant. Since the area ban will be annulled due to a violation of the prohibition on discrimination, in the liability procedure it will be assumed that the area ban was unlawful and also attributable to the mayor[33]. Mr Acab, as party concerned (*belanghebbende*) who has lodged an appeal against the area ban, can rely on the unlawfulness of the ban in the liability procedure. Third, the requirement of relativity (*relativiteitsvereiste*) must be met. This means that the violated rule must be intended to protect Mr Acab from the type of damages he claims to have suffered[34]. This also seems to be the case: the prohibition of discrimination is specifically designed to protect the interests of the person discriminated against (in this case, Mr Acab). Fourth, there must be actual damage. The administrative court assesses this in accordance with regular civil law, particularly Article 6:96 of the Dutch Civil Code for material damages and Article 6:106 of the Dutch Civil Code for other damages[35]. Fifth, there must be a causal link (*causaal verband*) between the unlawful decision and the damages suffered. Again, the administrative court assesses this in accordance with regular civil law, particularly Article 6:98 of the Dutch Civil Code. This means that the damages claimed by Mr Acab must be sufficiently related to the area ban such that, given the nature of the liability and the damage, the mayor can be held liable for it as a consequence of the area ban[36].

I. Spain

Agustí Cerrillo-i-Martínez

In addition to what has been previously said, in relation to algorithm bias and discrimination prevention, another significant case relates to the Comprehensive Gender Violence Monitoring System (VioGén).

VioGén is a web app forming part of the Network of Administration Systems and Applications (Red SARA) designed to coordinate the actions of Spanish public sector professionals responsible

[33] HR 31 May 1991, ECLI:NL:HR:1991:ZC0261 (*Van Gog/Nederweert*).
[34] Art. 6:163 Dutch Civil Code. Cf. Art. 8:69a GALA.
[35] ABRvS 13 December 2017, ECLI:NL:RVS:2017:3445, para. 6.1.
[36] ABRvS 15 December 2004, ECLI:NL:RVS:2004:AR7587, para. 2.8.

for the monitoring, assistance, and protection of women reporting gender violence, as well as their children.

In 2023, the Eticas Research and Innovation Association asked the Ministry of the Interior for access to the technical specification of the VioGén software and/or any other deliverable which would enable an understanding its functions, such as anonymised data from the system, or access to them, as well as the audit of the informed consent system, the impact assessment in accordance with the GDPR, and the mechanisms for consenting to or challenging the VioGén system.

The request was partially accepted by the Ministry of the Interior, leading the Association to file a claim with the Council of Transparency and Good Governance, which issued a resolution on 23 August 2023 (Proceedings 551-2023).

In the resolution, the Council of Transparency and Good Governance stated that "when, as in this case, the responsible body presents a written statement signed by a public official declaring that the requested information does not exist, the claim must be rejected, given the absence of the object to which the right would grant access". However, regarding the requested information on the technical specification of the software and/or any other deliverable which would clarify its functions, it concluded that "it is classed as public information and the body against which the claim is made has not provided evidence for any exemption from Article 18 of the LTAIBG, nor for the application of any of the limitations provided in its Articles 14 and 15, so the claim must be accepted on this specific point".

Particularly, there is no in case law concerning algorithms used by public authorities and security tasks. Furthermore, Cotino (2023) refers to difficulties in accessing information on AI systems in the sphere of the police because information is usually classed as 'reserved' or under the limit of public security stated in Article 14 of Law 19/2013.

For all the reasons mentioned above, and in accordance with the legislation and practices of Spanish public administrations, Mr Acab would face numerous difficulties in proving that the algorithm was biased. Indeed, Mr Acab would probably not be given access to the algorithm's code, and the data used by the algorithm would probably not be made available.

If he could prove that the discrimination had caused him harm, Mr Acab would be able to claim compensation. In this regard, Law 40/2015 states: "Individuals shall have the right to be compensated by the corresponding public authorities for any injury suffered to any of their property or rights, provided that the injury results from the normal

or abnormal functioning of public services, except in cases of *force majeure* or damages that the individual has the legal duty to bear in accordance with the law".

L. United Kingdom

Gordon Anthony

This question essentially gives rise to a problem of legality and proportionality in public safety measures, including as a matter of procedural and substantive law. It is primarily a human rights problem centred upon Article 8 ECHR, albeit there may also be issues under Article 6 ECHR and the common law rules of fairness, as well as Article 14 ECHR.

An initial query is whether it is legitimate for the police to use predictive policing technology where that can result in the imposition of civil bans (and, presumably, where breach of the civil ban could amount to a criminal offence). The law here would (of course) say that it is appropriate, though there are certain irreducible standards of protection for the individual. They may be summarised as follows:

i. The legal framework governing the use of AI must be sufficiently clear to be lawful. For instance, in *Bridges*[37] it was held that the use of automated facial recognition technology was unlawful when set against Article 8 ECHR, aspects of the data protection legislation, and the Equality Act 2010. As regards Article 8 ECHR, a key point was the lack of clarity in the law, which thereby placed the scheme in breach of the ECHR's quality of law requirement. A declaration to that effect was issued.

ii. Interferences with Article 8 ECHR must be proportionate. In some analogous case law on precautionary notification measures, the courts have emphasised that the person who is to be made subject to a notification requirement should have the chance to make submissions to the police before a notice is issued. Should the person not be able to do so, this may mean that the decision cannot be proportionate for procedural

[37] See, eg, *R (Bridges) v Chief Constable of South Wales Police* [2020] EWCA Civ 1058.

reasons[38]. It has also been suggested that a person should have a right to seek an administrative review of any proposed notice – that, too, is relevant to the requirement of proportionality.

iii. Automated decision-making processes ought not to be able to impose criminal sanctions in the absence of hearing rights. Such an outcome offends not only Article 6 ECHR but also the common law[39].

In terms of Mr Acab, the logic of the above points would suggest: (a) that he should be given access to information that the police hold about him so that he might make informed submissions on it (there might be a debate about whether he would need to be given access to all of the information or whether he might be given it in some reduced form for reasons of public interest); and (b) that he ought to have some means to request an administrative review of the decision that has been taken. Such procedural guarantees would mean that the decision to issue the notice would be more defensible in law, and it would ensure a higher degree of transparency for Mr Acab. Should either guarantee (or both) not be observed, he would have grounds for challenging the notification in court.

His proposed discrimination point is more difficult as it is not clear that "*tattooed*" would be a "*protected characteristic*" for the purposes of Article 14 ECHR. That said, if he were able to show that there was a statistically higher incidence of notification orders for those who are tattooed, that may give rise to an argument about the unreasonableness of the system that is being used. This point can be made in the light of the famous case of *Short v Poole Corporation*, where Warrington LJ gave, as an example of unreasonableness, the decision to dismiss a red-haired teacher simply because she had red hair [40].

To summarise: the law ought to protect Mr Acab to the extent of ensuring that he has access to the information about him, to comment upon that information, and to request an administrative review. Less clear are the prospects for his proposed discrimination claim, notably if he were to rely upon "*tattooed*" as a "*protected characteristic*" under Article 14 ECHR.

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[38] *R (R) v Chief Constable of Greater Manchester* [2018] UKSC 47, [2018] 1 WLR 4079.

[39] See, for instance, *Re McLarnon's Application* [2013] NIQB 40, [2014] NI 73, wherein a computer generated system of criminal enforcement steps for non-payment of fines without a hearing was unlawful.

[40] [1926] Ch 66, 91.

M. United States

Catherine M. Sharkey & Caterina Barrena Hyneman

Background

In the U.S., most criminal law is enacted at the state and local level. Decisions over what tools to use in policing are also enacted at these levels and decided in conjunction with state and local budgets[41]. Criminal laws implicate issues of due process. To revoke an individual's liberty or property a government must first give a person notice, the opportunity to be heard, and a neutral arbiter[42].

Answer

Mr. Acab can bring forth a case, arguing that the law did not comport with the Due Process Clause, which is required because his property and liberty were infringed upon.

In Michigan, there was a similar case where the government threatened to take or took food assistance benefits (SNAP) from people that had received at least one criminal justice disqualification notice[43]. The government implemented an automated system that automatically disqualified felons from receiving SNAP benefits, and Plaintiffs alleged that they were not given notice before the benefits were taken[44]. The federal district court granted summary judgment for the Plaintiffs, finding that the policy denied them due process, which was reaffirmed by the federal appellate court[45].

Mr. Acab was given notice, but not an opportunity to be heard or rebut the evidence in an appeals process. Through a presentation of evidence, he may be able to demonstrate that he was not the one that committed the assault. Because criminal law is enacted at the state and local level, Mr. Acab's rights with respect to a human appeals process will depend on the laws in the state in which this action is being taken. At the federal level, the Trump administration loosened the explicit right to a human appeals process which was required by the Biden

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[41] See A. Johnson *et al.*, *Police Tech: Exploring the Opportunities and Fact Checking the Criticisms*, Info. Tech. & Innovation Found. (Jan. 9, 2023), *https://itif.org/publications/2023/01/09/police-tech-exploring-the-opportunities-and-fact-checking-the-criticisms/.*

[42] See the answer given to the fourth question in the Chapter on the United States in Part II.

[43] Barry v. Lyon, 834 F.3d 706, 711 (6th Cir. 2016).

[44] *Ibid.*

[45] *Ibid.* at 710.

administration. Instead, it directs that, only when possible, individuals affected by "AI-enabled decisions" should have access to a timely human review and an opportunity to appeal any negative decisions[46]. However, it is unlikely that this loose expectation amounts to a requirement that Mr. Acab may bring a claim under at the federal level. Mr. Acab's best argument may be to challenge the lack of human appeals process at the state or local level.

Second, Mr. Acab may be entitled to receive information about the denial if an adverse decision is taken against him. It would depend on the state, but federal laws state that citizens are entitled to notice that an adverse action is being taken against them and on which grounds[47]. If the state adopts this measure, he would be entitled to know why the AI identified him and perhaps whether it was because of his tattoos or another discriminatory reason.

Finally, if the state he is in adopts laws like New York City's Local Law 144, he would be entitled to annual bias audits to further understand how the algorithm is working. That said, a bias against people with tattoos (rather than typical suspect categorizations based on race, gender or ethnicity) may be too fine-grained and may not be reflected in the data captured by a law like Local Law 144.

In civil cases across the U.S., damages are a remedy, usually monetary, that a party requests as a stand-in to make the injured party whole[48]. Typically, damages are awarded if a party breaches a duty under contract or violated a plaintiff's right[49]. Damages can be compensatory or punitive, either to compensate the plaintiff for something lost or to punish the defendant for egregious conduct[50]. Compensatory damages can be economic or non-economic, which can include things like pain and suffering, loss of enjoyment of life, grief, or distress.

Mr. Acab may have grounds to request both economic and noneconomic compensatory damages. He was denied the ticket he paid

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[46] See Memorandum from Russell T. Vought, Off. of Mgmt. & Budget for the Heads of Exec. Off. of the President, Accelerating Federal Use of AI through Innovation, Governance, and Public Trust 18 (Apr. 3, 2025), *https://www.whitehouse.gov/wp-content/uploads/2025/02/M-25-21-Accelerating-Federal-Use-of-AI-through-Innovation-Governance-and-Public-Trust.pdf*, at 17.

[47] J. Dempsey, S. Landau, *Challenging the Machine: Contestability in Government AI Systems*, Lawfare (Mar. 11, 2024), *https://www.lawfaremedia.org/article/challenging-the-machine-contestability-in-government-ai-systems*.

[48] R.A. Epstein, C. M. Sharkey, *Cases and Materials on Torts* (2024), at 645.

[49] *Ibid.*

[50] *Ibid.*

for and forfeited any future games he may have wanted to attend. His quality of life also deteriorated. Not only did he lose his favorite pastime, but he faced emotional distress and ostracization from society from carrying the stigma of being a Hooligan. He was discriminated against and had his name slandered without having any way to clear it.

Punitive damages are less common but may be adequate in a case like this—one in which society wants to send a strong message that discrimination is wrong. Punitive decisions have been mulled over in AI discrimination cases by courts, but many of the cases are too new (or have settled) to give a view based on precedent.