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U.K. Court of Appeal Revisits the Definition of 'Personal Data': This Time It *Is* Personal

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The U.K. Court of Appeal's decision in *Durant v Financial Services Authority* [2003] ("*Durant*") has commonly been seen to have restricted the definition of "personal data" to the benefit of data controllers, leading to criticism from EU data protection authorities (and some commentators) that, as a result, U.K. law does not properly comply with the EU Data Protection Directive (95/46/EC) ("Directive").

A recent case decided by the same court, *Edem v Information Commissioner and another* [2014] ("*Edem*"), suggests that *Durant* has been frequently misunderstood, and may have gone some way to assuaging the criticism.

Procedural Background

Edem was in fact a case brought under the U.K. Freedom of Information Act 2000 ("FOIA"), not data protection law. When presented with a FOIA request, a U.K. public authority does not have to disclose information if it is "personal data", the disclosure of which would put the public authority in contravention of the U.K. Data Protection Act 1998 ("DPA"). The interaction between these two statutes often results in decisions important to data protection issues being determined in cases under the FOIA.

Mr Edem had made a request for information from the Financial Services Authority ("FSA") under the FOIA. In responding, the FSA redacted the names of its junior employees ("Names") on the ground that they were "personal data" and that their disclosure would contravene the DPA.

In May 2011, the Information Commissioner's Office ("ICO"), the U.K. regulator for both FOIA and DPA matters, agreed and refused to order that the FSA disclose the Names. The first level of appeal (the First-Tier Tribunal) found the ICO to have got this wrong: The Names, the First-Tier Tribunal found, were not "personal data". After an intermediary appeal found in favour of the ICO and the FSA, Mr Edem appealed to the Court of Appeal.

In short, the issue to be decided by the Court of Appeal was whether the Names constituted "personal data". If they did, the FSA would have been correct to redact them, as disclosure would infringe the first principle of the DPA (the equivalent of Articles 6(a) and Article 7 of the Directive).

Statutory Definitions of 'Personal Data'

Common to the definition of "personal data" in both the DPA and the Directive is the requirement that the information must "relate to" an identifiable individual. However, the meaning of "relate to" has proved controversial.

The Durant Case

A brief reminder of the Durant case is needed to understand the latest decision.

As is well known, Mr Durant had filed a complaint with the FSA against Barclays Bank. Through a subject access request, Mr Durant sought information about the FSA's investigation into Barclays on the basis of that complaint. Mr Durant thought that such information might assist in litigation against the bank. The data in question clearly identified Mr Durant. However, the Court of Appeal outlined a narrow approach to whether the data "related to" an individual.

Auld LJ (who gave the leading judgment) stated that "not all information retrieved from a computer search against an individual's name or unique identifier is 'personal data' . . . . Mere mention of the data subject in a document held by a data controller does not necessarily amount to his 'personal data' ".

Auld LJ set out "two notions" to assist in deciding whether information was sufficiently relevant and proximate to an individual to "relate to" that individual. The first notion is that, to constitute "personal data", the information should be "biographical in a significant sense". Auld LJ set out that the recording of an individual's "involvement in a matter or an event that has no personal connotations" is not biographical in a significant sense; privacy must be compromised. The second notion is that the focus of the information should be the individual (rather than another person, transaction or event). For example, in *Durant,* the court held that the information in question did not relate to Mr Durant but rather related to his complaints. The information was therefore not "personal data" and, as such, the FSA had been entitled to withhold it.

In his judgment in *Durant,* Buxton LJ agreed with Auld LJ, but clarified that Auld LJ's guidance provided a clear guide in *borderline* cases. However, as *Edem* shows, the "two notions" have since been applied as a strict test even when the matter is really rather obvious.

ICO Guidance

Before going on to consider the judgment in *Edem,* it is also worth recalling the ICO's guidance on the issue. The ICO released guidance in August 2007 on the definition of "personal data" partly with a view to explaining *Durant*. The ICO's Guidance set out a number of points which should be taken into account when considering whether data relate to an individual. First and foremost, the ICO opined that often the data are "obviously about" a particular individual, and in such situations data will be "personal data" within the meaning of the DPA. The ICO set out other points that could be considered when the answer was not obvious, for example, whether the data could be used to "learn, record or decide something about an identifiable individual" or to "inform or influence actions or decisions affecting an individual".

Only when the data are not "obviously about" the individual does the ICO's guidance consider it relevant to turn to the Court of Appeal's two "notions" in *Durant*— biographical significance and focus. In the ICO's view, it is not a requirement that the data have "biographical significance" for the individual or have him as its "focus".

The Edem Judgment

Moses LJ's judgment in *Edem* criticises the First-Tier Tribunal for siding with Mr Edem and finding the Names were not "personal data" on the grounds that they did not "relate to" the relevant individual. This resulted, he said, from a slavish application of Auld LJ's "two notions" in *Durant* when, on the facts in *Edem*, they really had "no relevance whatever". The Names were clearly (he said) the "personal data" of the relevant individuals. He emphasised, as did Buxton LJ in *Durant* and the ICO in its guidance, that the notions should be considered only in borderline cases.

However, names are not always "personal data". They will not be if they are very common and taken in isolation. The name "John Smith", for example (arguably one of the most common names in the U.K.), would not on its own identify anyone. However, the name together with details of where he was employed might well.

The extent to which an individual is *identifiable* from his name was also discussed in *Edem*. Mr Edem had argued that the Names could not identify anyone. Rejecting this argument, Moses LJ cited the "ample" EU jurisprudence (in *Commission v Bavaria Lager* and *Criminal Proceedings against Lindqvist)*, which interpreted the definition of "personal data" in the Directive to include the combination of a person's name and his occupation. Moses LJ said that, although the Names in this case were not unique, the junior employees could be identified from the combination of their names and the information provided by the FSA which showed that they were working at the FSA and the capacity in which they were doing so.

The Names in *Edem* were therefore "personal data", and the FSA had been right not to disclose them.

Comment

Some commentary on this case suggests that it is the death knell for the *Durant* judgment, but this is likely premature.

Edem really is a case where it was obvious that the disputed information was "personal data", and (perhaps with the benefit of hindsight) it is hard to see how the First-Tier Tribunal could have found otherwise. So, rather than a death knell, when things settle down, it may well be seen as neutral.

Many subject access requests are made with a view of extraneous purposes, and the biographical significance or focus of material will likely continue to be cited in response to these types of requests.

Edem does not signal the end of *Durant*, but perhaps rather an end to the interpretation of *Durant*'s notions as strict, universal tests.

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The Court of Appeal's decision in Edem v Information Commissioner and another can be accessed at http://www.11kbw.com/app/files/Judgments/Edem_v_Info_Comm_and_FSA_Approved.pdf.

The Court of Appeal's decision in Durant v Financial Services Authority can be accessed at http://www.bailii.org/ew/cases/EWCA/Civ/2003/1746.html.

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