European Court of Justice, 16 December 2008, Huber v Germany

PERSONA

Processing of personal data relating to foreign nationals

- **Permissible if it contains only the data which are necessary for the application of legislation and it enables that legislation to be more effectively applied**

A system for processing personal data relating to Union citizens who are not nationals of the Member State concerned, such as that put in place by the AZRG and having as its object the provision of support to the national authorities responsible for the application of the legislation relating to the right of residence, does not satisfy the requirement of necessity laid down by Article 7(e) of Directive 95/46, interpreted in the light of the prohibition on any discrimination on grounds of nationality, unless:

– it contains only the data which are necessary for the application by those authorities of that legislation, and

– its centralised nature enables that legislation to be more effectively applied as regards the right of residence of Union citizens who are not nationals of that Member State.

It is for the national court to ascertain whether those conditions are satisfied in the main proceedings. The storage and processing of personal data containing individualised personal information in a register such as the AZR for statistical purposes cannot, on any basis, be considered to be necessary within the meaning of Article 7(e) of Directive 95/46.

- **Not permissible is a system for processing personal data specific to foreign nationals for the purpose of fighting crime**

Article 12(1) EC must be interpreted as meaning that it precludes the putting in place by a Member State, for the purpose of fighting crime, of a system for processing personal data specific to Union citizens who are not nationals of that Member State.

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European Court of Justice, 16 December 2008

(V. Skouris, P. Jann, C.W.A. Timmermans and K. Lenaerts, P. Kūris, G. Arestis, U. Lõhmus, E. Levits and L. Bay Larsen)

JUDGMENT OF THE COURT (Grand Chamber)

16 December 2008 (*)

(Protection of personal data – European citizenship – Principle of non-discrimination on grounds of nationality – Directive 95/46/EC – Concept of necessity – General processing of personal data relating to citizens of the Union who are nationals of another Member State – Central register of foreign nationals)

In Case C-524/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Germany), made by decision of 15 December 2006, received at the Court on 28 December 2006, in the proceedings

Heinz Huber

v

Bundesrepublik Deutschland,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans and K. Lenaerts, Presidents of Chambers, P. Kūris, G. Arestis, U. Lõhmus, E. Levits (Rapporteur) and L. Bay Larsen, Judges,

Advocate General: M. Poiares Maduro,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 8 January 2008,

after considering the observations submitted on behalf of:

– Mr Huber, by A. Widmann, Rechtsanwalt,

– the German Government, by M. Lumma and C. Schulze-Bahr, acting as Agents, and by Professor K. Hailbronner,

– the Belgian Government, by L. Van den Broeck, acting as Agent,

– the Danish Government, by B. Weis Fogh, acting as Agent,

– the Greek Government, by E.-M. Mamouna and K. Boskovits, acting as Agents,

– the Italian Government, by I.M. Braguglia, acting as Agent, and by W. Ferrante, avvocato dello Stato,

– the Netherlands Government, by H.G. Sevenster, C.M. Wissels and C. ten Dam, acting as Agents,

– the Finnish Government, by J. Heliskoski, acting as Agent,

– the United Kingdom Government, by E. O'Neill, acting as Agent, and J. Stratford, Barrister,

– the Commission of the European Communities, by C. Docksey and C. Ladenburger, acting as Agents,

after hearing the **Opinion of the Advocate General** at the sitting on 3 April 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns Article 12(1) EC, read in conjunction with Articles 17 EC and 18 EC, the first paragraph of Article 43 EC, as well as Article 7(e) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

2 The reference was made in proceedings between Mr Huber, an Austrian national who is resident in Germany, and the Bundesrepublik Deutschland, represented by the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees) ('the

Bundesamt'), regarding Mr Huber's request for the deletion of the data relating to him in the Central Register of Foreign Nationals (Ausländerzentralregister) ('the AZR').

Legal context

Community legislation

3 The eighth recital in the preamble to Directive 95/46 states:

'Whereas, in order to remove the obstacles to flows of personal data, the level of protection of the rights and freedoms of individuals with regard to the processing of such data must be equivalent in all Member States; …'.

4 The tenth recital in the preamble to that directive adds:

'… the approximation of [the national laws on the processing of personal data] must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the Community'.

5 Article 1 of Directive 95/46 is entitled 'Object of the Directive' and Article 1(1) provides:

'In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.'

6 Article 2 of that directive includes the following definitions:

'…

(a) "personal data" shall mean any information relating to an identified or identifiable natural person ("data subject"); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;

(b) "processing of personal data" ("processing") shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;

…'.

7 The scope of application of Directive 95/46 is laid down by Article 3, in the following terms:

'1. This Directive shall apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system.

2. This Directive shall not apply to the processing of personal data:

– in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and in any case to processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law,

– by a natural person in the course of a purely personal or household activity.'

8 Article 7(e) of Directive 95/46 states:

'Member States shall provide that personal data may be processed only if:

…

(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed;

…'.

9 Article 4 of Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ, English Special Edition 1968 (II), p. 485) provides:

'1. Member States shall grant the right of residence in their territory to the persons referred to in Article 1 who are able to produce the documents listed in paragraph 3.

2. As proof of the right of residence, a document entitled "Residence Permit for a National of a Member State of the EEC" shall be issued. …

3. For the issue of a Residence Permit for a National of a Member State of the EEC, Member States may require only the production of the following documents:

– by the worker:

(a) the document with which he entered their territory;

(b) a confirmation of engagement from the employer or a certificate of employment;

– by the members of the worker's family:

(c) the document with which they entered the territory;

(d) a document issued by the competent authority of the State of origin or the State whence they came, proving their relationship;

(e) in the cases referred to in Article 10(1) and (2) of [Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475)], a document issued by the competent authority of the State of origin or the State whence they came, testifying that they are dependent on the worker or that they live under his roof in such country.

…'

10 Article 10 of Directive 68/360 provides:

'Member States shall not derogate from the provisions of this Directive save on grounds of public policy, public security or public health.'

11 Article 4(1) of Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ 1973 L 172, p. 14) states:

'Each Member State shall grant the right of permanent residence to nationals of other Member States who establish themselves within its territory in order to pursue

activities as self-employed persons, when the restrictions on these activities have been abolished pursuant to the Treaty.
As proof of the right of residence, a document entitled "Residence Permit for a National of a Member State of the European Communities" shall be issued. This document shall be valid for not less than five years from the date of issue and shall be automatically renewable.
…'
12 Article 6 of Directive 73/148 states:
'An applicant for a residence permit or right of abode shall not be required by a Member State to produce anything other than the following, namely:
(a) the identity card or passport with which he or she entered its territory;
(b) proof that he or she comes within one of the classes of person referred to in Articles 1 and 4.'
13 Article 8 of that directive sets out the derogation provided for in Article 10 of Directive 68/360.
14 On 29 April 2004, the European Parliament and the Council of the European Union adopted Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, with Corrigendum, OJ 2004 L 229, p. 35), which required to be transposed by 30 April 2006. Article 5 of that directive provides:
'1. Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport.
…
5. The Member State may require the person concerned to report his/her presence within its territory within a reasonable and non-discriminatory period of time. Failure to comply with this requirement may make the person concerned liable to proportionate and non-discriminatory sanctions.'
15 Article 7(1) of that directive governs the right of residence for a period of more than three months of Union citizens in a Member State of which they are not nationals in the following terms:
'All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:
(a) are workers or self-employed persons in the host Member State; or
(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or
(c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and
– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or
…'.
16 Article 8 of Directive 2004/38 provides:
'1. Without prejudice to Article 5(5), for periods of residence longer than three months, the host Member State may require Union citizens to register with the relevant authorities.
2. The deadline for registration may not be less than three months from the date of arrival. A registration certificate shall be issued immediately, stating the name and address of the person registering and the date of the registration. Failure to comply with the registration requirement may render the person concerned liable to proportionate and non-discriminatory sanctions.
3. For the registration certificate to be issued, Member States may only require that:
– Union citizens to whom point (a) of Article 7(1) applies present a valid identity card or passport, a confirmation of engagement from the employer or a certificate of employment, or proof that they are self-employed persons;
– Union citizens to whom point (b) of Article 7(1) applies present a valid identity card or passport and provide proof that they satisfy the conditions laid down therein;
– Union citizens to whom point (c) of Article 7(1) applies present a valid identity card or passport, provide proof of enrolment at an accredited establishment and of comprehensive sickness insurance cover and the declaration or equivalent means referred to in point (c) of Article 7(1). …'
17 Article 27 of that directive, entitled 'General principles', states:
'1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.
2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.
The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

3. In order to ascertain whether the person concerned represents a danger for public policy or public security, when issuing the registration certificate or, in the absence of a registration system, not later than three months from the date of arrival of the person concerned on its territory or from the date of reporting his/her presence within the territory, as provided for in Article 5(5), or when issuing the residence card, the host Member State may, should it consider this essential, request the Member State of origin and, if need be, other Member States to provide information concerning any previous police record the person concerned may have. Such enquiries shall not be made as a matter of routine. …

…'

18 Lastly, Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers (OJ 2007 L 199, p. 23) lays down the framework in which the Member States are to supply statistics to the Commission of the European Communities relating to migratory flows in their territories.

National legislation

19 In accordance with Paragraph 1(1) of the Law on the central register of foreign nationals (Gesetz über das Ausländerzentralregister) of 2 September 1994 (BGBl. 1994 I, p. 2265), as amended by the Law of 21 June 2005 (BGBl. 1994 I, p. 1818) ('the AZRG'), the Bundesamt, which is attached to the Federal Ministry of the Interior, is responsible for the management of the AZR, a centralised register which contains certain personal data relating to foreign nationals who, inter alia, are resident in Germany on a basis which is not purely temporary. The foreign nationals concerned are those who reside in that territory for a period of more than three months, as is shown by the general administrative circular of the Federal Ministry of the Interior relating to the AZRG and to the regulation implementing that Law (Allgemeine Verwaltungsvorschrift des Bundesministeriums des Innern zum Gesetz über das AZR und zur AZRG-Durchführungsverordnung) of 4 June 1996. That information is collected in two databases which are managed separately. One contains personal data relating to foreign nationals who live or have lived in Germany and the other to those who have applied for a visa.

20 In accordance with Paragraph 3 of the AZRG, the first database contains, in particular, the following information:

– the name of the authority which provided the data;

– the reference number allocated by the Bundesamt;

– the grounds of registration;

– surname, surname at birth, given names, date and place of birth, sex and nationality;

– previous and other patronymics, marital status, particulars of identity documents, the last place of residence in the country of origin, and information supplied on a voluntary basis as to religion and the nationality of the spouse or partner;

– particulars of entries into and exits from the territory, residence status, decisions of the Federal Employment Agency relating to a work permit, refugee status granted by another State, date of death;

– decisions relating, inter alia, to any application for asylum, any previous application for a residence permit, and particulars of, inter alia, any expulsion proceedings, arrest warrants, suspected contraventions of the laws on drugs or immigration, and suspected participation in terrorist activities, or convictions in respect of such activities; and

– search warrants.

21 As the authority entrusted with the management of the AZR, the Bundesamt is responsible for the accuracy of the data registered in it.

22 According to Paragraph 1(2) of the AZRG, by registering and supplying personal data relating to foreign nationals, the Bundesamt assists the public authorities responsible for the application of the law on foreign nationals and the law on asylum, together with other public bodies.

23 Paragraph 10(1) of the AZRG provides that every application made by a public authority to consult the AZR or for the making available of personal data contained in it must satisfy certain conditions, compliance with which must be determined by the Bundesamt on a case-by-case basis. The Bundesamt must, in particular, examine whether the data requested by an authority are necessary for the performance of its tasks and must also examine the precise use to which those data are intended to be put. The Bundesamt may reject an application if it does not satisfy the prescribed conditions.

24 Paragraphs 14 to 21 and 25 to 27 of the Law specify the personal data which may be made available depending on the body which made the application in respect of them.

25 Thus, Paragraph 14(1) of the AZRG authorises the communication to all German public authorities of data relating to identity and domicile, as well as the date of death and particulars of the authority responsible for the file and of any decision not to make data available.

26 Paragraph 12 of the AZRG provides that applications, termed 'group applications', that is to say, which relate to a group of persons having one or more common characteristics, are to be subject to certain substantive and formal conditions. Such applications may be made only by a limited number of public bodies. In addition, every communication of personal data pursuant to such an application must be notified to the Federal and regional regulators responsible for the protection of personal data.

27 In addition, Paragraph 22 of the AZRG permits public bodies authorised for that purpose to consult the AZR directly through an automated procedure. However, the right to do so arises only in strictly defined circumstances and after a weighing up by the Bundesamt of the interests of the data subject and the public

interest. Moreover, such consultation is allowed only in the case of so-called group applications. The public bodies having rights under Paragraph 22 of the AZRG are, by virtue of Paragraph 7 of that Law, also authorised to enter data and information directly in the AZR.

28 Lastly, Paragraphs 25 to 27 of the AZRG specify the public bodies which may obtain certain data contained in the AZR.

29 The national court adds that, in Germany, every inhabitant, whether a German national or not, must have his particulars entered in the register kept by the authorities of the district in which he resides (Einwohnermelderegister). The Commission has stated in that regard that that type of register contains only some of the data comprised in the AZR, with those relating, in particular, to a person's status as regards his right of residence not appearing there. There are currently some 7 700 district registers.

The facts and the questions referred

30 Mr Huber, an Austrian national, moved to Germany in 1996 in order to carry on business there as a self-employed insurance agent.

31 The following data relating to him are stored in the AZR:

– his name, given name, date and place of birth, nationality, marital status, sex;

– a record of his entries into and exits from Germany, and his residence status;

– particulars of passports issued to him;

– a record of his previous statements as to domicile; and

– reference numbers issued by the Bundesamt, particulars of the authorities which supplied the data and the reference numbers used by those authorities.

32 Since he took the view that he was discriminated against by reason of the processing of the data concerning him contained in the AZR, in particular because such a database does not exist in respect of German nationals, Mr Huber requested the deletion of those data on 22 July 2000. That request was rejected on 29 September 2000 by the administrative authority which was responsible for maintaining the AZR at the time.

33 The challenge to that decision also having been unsuccessful, Mr Huber brought an action before the Verwaltungsgericht Köln (Administrative Court, Cologne) which upheld the action by judgment of 19 December 2002. The Verwaltungsgericht Köln held that the general processing, through the AZR, of data regarding a Union citizen who is not a German national constitutes a restriction of Articles 49 EC and 50 EC which cannot be justified by the objective of the swift treatment of cases relating to the right of residence of foreign nationals. In addition, that court took the view that the storage and processing of the data at issue were contrary to Articles 12 EC and 18 EC, as well as Articles 6(1)(b) and 7(e) of Directive 95/46.

34 The Bundesrepublik Deutschland, acting through the Bundesamt, brought an appeal against that judgment before the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Higher Administrative Court for the Land North-Rhine Westphalia), which considers that certain of the questions of law raised before it require an interpretation of Community law by the Court.

35 First, the national court notes that, according to the Court's case-law, a citizen of the European Union lawfully resident in the territory of a Member State of which he is not a national can rely on Article 12 EC in all situations which fall within the scope of Community law. It refers in that regard to Case C-85/96 Martínez Sala [1998] ECR I-2691, paragraph 63; Case C-184/99 Grzelczyk [2001] ECR I-6193, paragraph 32; and Case C-209/03 Bidar [2005] ECR I-2119, paragraph 32. Accordingly, having exercised the right to the freedom of movement conferred on him by Article 18(1) EC, Mr Huber was entitled to rely on the prohibition of discrimination laid down by Article 12 EC.

36 The national court states that the general processing of personal data relating to Mr Huber in the AZR differs from the processing of data relating to a German national in two respects: first, some of the data relating to Mr Huber are stored not only in the register of the district in which he resides but also in the AZR, and, secondly, the AZR contains additional data.

37 The national court doubts whether such a difference in treatment can be justified by the need to monitor the residence of foreign nationals in Germany. It also raises the question whether the general processing of personal data relating to Union citizens who are not German nationals and who reside or have resided in Germany is proportionate to the objective of protecting public security, inasmuch as the AZR covers all of those citizens and not only those who are subject to an expulsion order or a prohibition on residing in Germany.

38 Secondly, the national court is of the opinion that, in the circumstances of the main proceedings, Mr Huber falls within the scope of application of Article 43 EC. Since the freedom of establishment extends not only to the taking up of activities as a self-employed person but also the framework conditions for that activity, the national court raises the question whether the general processing of data relating to Mr Huber in the AZR is liable to affect those conditions to such an extent that it comprises a restriction on the exercise of that freedom.

39 Thirdly, the national court raises the question whether the criterion of necessity imposed by Article 7(e) of Directive 95/46 can be a criterion for assessing a system of general data processing such as the system put in place under the AZR. The national court does not, in fact, rule out the possibility that the directive may leave it open to the national legislature itself to define that requirement of necessity. However, should that not be the case, the question arises how that requirement is to be understood, and more particularly whether the objective of administrative simplification might justify data processing of the kind put in place by the AZRG.

40 In those circumstances, the Oberverwaltungsgericht für das Land Nordrhein-Westfalen decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is the general processing of personal data of foreign citizens of the Union in a central register of foreign nationals compatible with … the prohibition of discrimination on grounds of nationality against citizens of the Union who exercise their right to move and reside freely within the territory of the Member States (Article 12(1) EC, in conjunction with Articles 17 EC and 18(1) EC)[?]

(2) [Is such processing compatible with] the prohibition of restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State (first paragraph of Article 43 EC)[?]

(3) [Is such treatment compatible with] the requirement of necessity under Article 7(e) of Directive 95/46 …?'

The questions referred

Preliminary observations

41 By its questions, the national court asks the Court whether the processing of personal data which is undertaken in a register such as the AZR is compatible with Community law.

42 In that regard, it must be noted that Paragraph 1(2) of the AZRG provides that, through the storage of certain personal data relating to foreign nationals in the AZR and the making available of those data, the Bundesamt, which is responsible for maintaining that register, assists the public authorities responsible for the application of the legislation relating to the law on foreign nationals and the law on asylum, together with other public bodies. In particular, the German Government has stated in its written observations that the AZR is used for statistical purposes and on the exercise by the security and police services and by the judicial authorities of their powers in relation to the prosecution and investigation of activities which are criminal or threaten public security.

43 At the outset, it must be stated that data such as those which, according to the order for reference, the AZR contains in relation to Mr Huber constitute personal data within the meaning of Article 2(a) of Directive 95/46, because they represent 'information relating to an identified or identifiable natural person'. Their collection, storage and transmission by the body responsible for the management of the register in which they are kept thus represents the 'processing of personal data' within the meaning of Article 2(b) of that directive.

44 However, Article 3(2) of Directive 95/46 expressly excludes from its scope of application, inter alia, the processing of personal data concerning public security, defence, State security and the activities of the State in areas of criminal law.

45 It follows that, while the processing of personal data for the purposes of the application of the legislation relating to the right of residence and for statistical purposes falls within the scope of application of Directive 95/46, the position is otherwise where the objective of processing those data is connected with the fight against crime.

46 Consequently, the compatibility with Community law of the processing of personal data undertaken through a register such as the AZR should be examined, first, in the context of its function of providing support to the authorities responsible for the application of the legislation relating to the right of residence and to its use for statistical purposes, by having regard to Directive 95/46 and more particularly, in view of the third question, to the condition of necessity laid down by Article 7(e) of that directive, as interpreted in the light of the requirements of the Treaty including in particular the prohibition of any discrimination on grounds of nationality under Article 12(1) EC, and, secondly, in the context of its function in the fight against crime, by having regard to primary Community law.

The processing of personal data for the purpose of the application of the legislation relating to the right of residence and for statistical purposes

The concept of necessity

47 Article 1 of Directive 95/46 requires Member States to ensure the protection of the fundamental rights and freedoms of natural persons, and in particular their privacy, in relation to the handling of personal data.

48 Chapter II of Directive 95/46, entitled 'General rules on the lawfulness of the processing of personal data', provides that, subject to the exceptions permitted under Article 13, all processing of personal data must comply, first, with the principles relating to data quality set out in Article 6 of the directive and, secondly, with one of the criteria for making data processing legitimate listed in Article 7 (see, to that effect, **Joined Cases C-465/00, C-138/01 and C-139/01 Österreichischer Rundfunk and Others [2003] ECR I-4989, paragraph 65**).

49 In particular, Article 7(e) provides that personal data may lawfully be processed if 'it is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed'.

50 In that context, it must be noted that Directive 95/46 is intended, as appears from the eighth recital in the preamble thereto, to ensure that the level of protection of the rights and freedoms of individuals with regard to the processing of personal data is equivalent in all Member States. The tenth recital adds that the approximation of the national laws applicable in this area must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the Community.

51 Thus, it has been held that the harmonisation of those national laws is not limited to minimal harmonisation but amounts to harmonisation which is generally complete (see **Case C-101/01 Lindqvist [2003] ECR I-12971, paragraph 96**).

52 Consequently, having regard to the objective of ensuring an equivalent level of protection in all Member States, the concept of necessity laid down by Article 7(e) of Directive 95/46, the purpose of which is to delimit precisely one of the situations in which the processing of personal data is lawful, cannot have a meaning which varies between the Member States. It therefore follows that what is at issue is a concept

which has its own independent meaning in Community law and which must be interpreted in a manner which fully reflects the objective of that directive, as laid down in Article 1(1) thereof.

The necessity for the processing of personal data, such as the processing undertaken through the AZR, for the purpose of the application of the legislation relating to the right of residence and for statistical purposes

53 It is apparent from the order for reference that the AZR is a centralised register which contains certain personal data relating to Union citizens who are not German nationals and that it may be consulted by a number of public and private bodies.

54 As regards the use of a register such as the AZR for the purpose of the application of the legislation relating to the right of residence, it is important to bear in mind that, as Community law presently stands, the right of free movement of a Union citizen in the territory of a Member State of which he is not a national is not unconditional but may be subject to the limitations and conditions imposed by the Treaty and by the measures adopted to give it effect (see, to that effect, Case C-33/07 Jippa [2008] ECR I-0000, paragraph 21 and the case-law cited).

55 Thus, Article 4 of Directive 68/360, read in conjunction with Article 1 thereof, and Article 6 of Directive 73/148, read in conjunction with Article 1 thereof, provided that, in order for a national of a Member State to be entitled to reside for a period of more than three months in the territory of another Member State, that person had to belong to one of the categories laid down by those directives and provided for that entitlement to be subject to certain formalities linked to the presentation or the provision by the applicant of a residence permit together with various documents and particulars.

56 In addition, Article 10 of Directive 68/360 and Article 8 of Directive 73/148 permitted Member States to derogate from the provisions of those directives on grounds of public policy, public security or public health and to limit the right of entry and residence of a national of another Member State in their territory.

57 While Directive 2004/38, which fell to be transposed by 30 April 2006 and which accordingly did not apply at the time of the facts of the present case, repealed both of the abovementioned directives, it sets out, in Article 7, conditions which are generally equivalent to those laid down under its predecessors as regards the right of residence of nationals of other Member States and, in Article 27(1), restrictions relating to that right which are essentially identical to those laid down under its predecessors. It also provides, in Article 8(1), that the host Member State may require every Union citizen who is a national of another Member State and who wishes to reside in its territory for a period of more than three months to register with the relevant authorities. In that regard, the host Member State may, by virtue of Article 8(3), require certain documents and particulars to be provided in order to enable those authorities to determine that the conditions for entitlement to a right of residence are satisfied.

58 It must therefore be held that it is necessary for a Member State to have the relevant particulars and documents available to it in order to ascertain, within the framework laid down under the applicable Community legislation, whether a right of residence in its territory exists in relation to a national of another Member State and to establish that there are no grounds which would justify a restriction on that right. It follows that the use of a register such as the AZR for the purpose of providing support to the authorities responsible for the application of the legislation relating to the right of residence is, in principle, legitimate and, having regard to its nature, compatible with the prohibition of discrimination on grounds of nationality laid down by Article 12(1) EC.

59 However, such a register must not contain any information other than what is necessary for that purpose. In that regard, as Community law presently stands, the processing of personal data contained in the documents referred to in Articles 8(3) and 27(1) of Directive 2004/38 must be considered to be necessary, within the meaning of Article 7(e) of Directive 95/46, for the application of the legislation relating to the right of residence.

60 Moreover, while the collection of the data required for the application of the legislation relating to the right of residence would be of no practical benefit if those data were not to be stored, it must be emphasised that, since a change in the personal situation of a party entitled to a right of residence may have an impact on his status in relation to that right, it is incumbent on the authority responsible for a register such as the AZR to ensure that the data which are stored are, where appropriate, brought up to date so that, first, they reflect the actual situation of the data subjects and, secondly, irrelevant data are removed from that register.

61 As regards the detailed rules for the use of such a register for the purposes of the application of the legislation relating to the right of residence, only the grant of access to authorities having powers in that field could be considered to be necessary within the meaning of Article 7(e) of Directive 95/46.

62 Lastly, with respect to the necessity that a centralised register such as the AZR be available in order to meet the requirements of the authorities responsible for the application of the legislation relating to the right of residence, even if it were to be assumed that decentralised registers such as the district population registers contain all the data which are relevant for the purposes of allowing the authorities to undertake their duties, the centralisation of those data could be necessary, within the meaning of Article 7(e) of Directive 95/46, if it contributes to the more effective application of that legislation as regards the right of residence of Union citizens who wish to reside in a Member State of which they are not nationals.

63 As regards the statistical function of a register such as the AZR, it must be recalled that, by creating the principle of freedom of movement for persons and by conferring on any person falling within its ambit the right of access to the territory of the Member States for

the purposes intended by the Treaty, Community law has not excluded the power of Member States to adopt measures enabling the national authorities to have an exact knowledge of population movements affecting their territory (see Case 118/75 Watson and Belmann [1976] ECR 1185, paragraph 17).

64 Similarly, Regulation No 862/2007, which provides for the transmission of statistics relating to migratory flows in the territory of the Member States, presupposes that information will be collected by those States which allows those statistics to be determined.

65 However, the exercise of that power does not, of itself, mean that the collection and storage of individualised personal information in a register such as the AZR is necessary, within the meaning of Article 7(e) of Directive 95/46. As the Advocate General stated at point 23 of his Opinion, it is only anonymous information that requires to be processed in order for such an objective to be attained.

66 It follows from all of the above that a system for processing personal data relating to Union citizens who are not nationals of the Member State concerned, such as that put in place by the AZRG and having as its object the provision of support to the national authorities responsible for the application of the legislation relating to the right of residence, does not satisfy the requirement of necessity laid down by Article 7(e) of Directive 95/46, interpreted in the light of the prohibition on any discrimination on grounds of nationality, unless:

– it contains only the data which are necessary for the application by those authorities of that legislation, and

– its centralised nature enables that legislation to be more effectively applied as regards the right of residence of Union citizens who are not nationals of that Member State.

67 It is for the national court to ascertain whether those conditions are satisfied in the main proceedings.

68 The storage and processing of personal data containing individualised personal information in a register such as the AZR for statistical purposes cannot, on any basis, be considered to be necessary within the meaning of Article 7(e) of Directive 95/46.

The processing of personal data relating to Union citizens who are nationals of other Member States for the purposes of fighting crime

69 As a preliminary point, it should be noted that, according to settled case-law, citizenship of the Union is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to receive the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for (see, to that effect, Grzelczyk, paragraphs 30 and 31; Case C-148/02 Garcia Avello [2003] ECR I-11613, paragraphs 22 and 23; and Bidar, paragraph 31).

70 In that regard, a Union citizen lawfully resident in the territory of the host Member State can rely on Article 12 EC in all situations which fall within the scope ratione materiae of Community law (see Martínez Sala, paragraph 63; Grzelczyk, paragraph 32; and Bidar, paragraph 32).

71 Those situations include those involving the exercise of the fundamental freedoms guaranteed by the Treaty and those involving the exercise of the right to move and reside within the territory of the Member States, as conferred by Article 18 EC (see, to that effect, Bidar, paragraph 33 and the case-law cited).

72 It is apparent from Paragraph 1 of the AZRG, read in conjunction with the general administrative circular of the Federal Ministry of the Interior of 4 June 1996 relating to the AZRG and to the regulation implementing that Law, that the system of storage and processing of personal data put in place through the AZR concerns all Union citizens who are not nationals of the Federal Republic of Germany and who reside in Germany for a period of over three months, irrespective of the reasons which lead them to reside there.

73 That being the case, since Mr Huber exercised his freedom to move and reside within that territory as conferred by Article 18 EC, reference should, having regard to the circumstances of the main proceedings, be made to Article 12(1) EC in order to determine whether a system for the storage and processing of personal data such as that at issue in the main proceedings is compatible with the principle that any discrimination on grounds of nationality is prohibited, in so far as those data are stored and processed for the purposes of fighting crime.

74 In that context, it should be pointed out that the order for reference does not contain any detailed information which would allow it to be established whether the situation at issue in the main proceedings is covered by Article 43 EC. However, even if the national court were to consider that to be the case, the application of the principle of non-discrimination cannot vary depending on whether it finds its basis in that provision or on Article 12(1) EC, read in conjunction with Article 18(1) EC.

75 It is settled case-law that the principle of non-discrimination, which has its basis in Articles 12 EC and 43 EC, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way. Such treatment may be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the objective being legitimately pursued (see, to that effect, Case C-164/07 Wood [2008] ECR I-0000, paragraph 13 and the case-law cited).

76 It is therefore, in circumstances such as those at issue in the main proceedings, necessary to compare the situation of Union citizens who are not nationals of the Member State concerned and who are resident in the territory of that Member State with that of nationals of that Member State as regards the objective of fighting crime. In fact, the German Government relies only on that aspect of the protection of public order.

77 Although that objective is a legitimate one, it cannot be relied on in order to justify the systematic processing of personal data when that processing is re-

stricted to the data of Union citizens who are not nationals of the Member State concerned.

78 As the Advocate General noted at point 21 of his Opinion, the fight against crime, in the general sense in which that term is used by the German Government in its observations, necessarily involves the prosecution of crimes and offences committed, irrespective of the nationality of their perpetrators.

79 It follows that, as regards a Member State, the situation of its nationals cannot, as regards the objective of fighting crime, be different from that of Union citizens who are not nationals of that Member State and who are resident in its territory.

80 Therefore, the difference in treatment between those nationals and those Union citizens which arises by virtue of the systematic processing of personal data relating only to Union citizens who are not nationals of the Member State concerned for the purposes of fighting crime constitutes discrimination which is prohibited by Article 12(1) EC.

81 Consequently, Article 12(1) EC must be interpreted as meaning that it precludes the putting in place by a Member State, for the purpose of fighting crime, of a system for processing personal data specific to Union citizens who are not nationals of that Member State.

Costs

82 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds,

the Court (Grand Chamber) hereby rules:

1. A system for processing personal data relating to Union citizens who are not nationals of the Member State concerned, such as that put in place by the Law on the central register of foreign nationals (Gesetz über das Ausländerzentralregister) of 2 September 1994, as amended by the Law of 21 June 2005, and having as its object the provision of support to the national authorities responsible for the application of the law relating to the right of residence does not satisfy the requirement of necessity laid down by Article 7(e) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, interpreted in the light of the prohibition on any discrimination on grounds of nationality, unless:

– it contains only the data which are necessary for the application by those authorities of that legislation, and

– its centralised nature enables the legislation relating to the right of residence to be more effectively applied as regards Union citizens who are not nationals of that Member State.

It is for the national court to ascertain whether those conditions are satisfied in the main proceedings.

The storage and processing of personal data containing individualised personal information in a register such as the Central Register of Foreign Nationals for statistical purposes cannot, on any basis, be considered to be necessary within the meaning of Article 7(e) of Directive 95/46.

2. Article 12(1) EC must be interpreted as meaning that it precludes the putting in place by a Member State, for the purpose of fighting crime, of a system for processing personal data specific to Union citizens who are not nationals of that Member State.

OPINION OF ADVOCATE GENERAL
POIARES MADURO
delivered on 3 April 2008 (1)
Case C-524/06
Heinz Huber
v
Bundesrepublik Deutschland
(Reference for a preliminary ruling from the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Germany))

1. The present case concerns the processing of the personal data of foreign EU citizens who reside in Germany. The referring court asks whether the processing of data in a central register operated by the Bundesamt für Migration und Flüchtlinge (Federal Office of Migration and Refugees), to which other public authorities also have access, is compatible with the prohibition of discrimination on the basis of nationality, the right of establishment and Directive 95/46, (2) given that no such register exists for German citizens.

I – Factual background

2. The claimant in the main proceedings, Mr Heinz Hubert, is an Austrian citizen. Since 1996, he has been living and working in Germany. The personal data of foreign citizens living in Germany, including those of citizens of other Member States, are stored in a central register operated by the Federal Office for Migration and Refugees. Information on Mr Huber stored in the register includes his personal details and marital status, passport details, the date of his first entry into Germany, his residence status, his various changes of domicile within the country as well as the details of the registration authorities and the names of the administrative offices that have communicated his data. Personal data of German citizens are stored only in local, municipal registers, as no central register at the federal level exists for them.

3. In 2002 Mr Huber, relying on Articles 12 and 49 EC and on Directive 95/46, requested the deletion from the central register of any data relating to him. His request was rejected by the Bundesverwaltungsamt (Federal Administrative Office), which was responsible at the time, while an administrative appeal within the same Office was also rejected. Then, Mr Huber brought an action before the Verwaltungsgericht (Administrative Court) with the same request. It upheld the action, finding that the storage of the claimant's data was incompatible with Community law. The Federal Office for Migration and Refugees appealed against the judgment of the Administrative Court, so the

Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Higher Administrative Court of North-Rhine Westphalia) stayed the proceedings and referred three questions to the Court of Justice:

'Is the general processing of personal data of foreign citizens of the Union in a central register of foreign nationals compatible with:

(a) the prohibition of discrimination on grounds of nationality against citizens of the Union who exercise their right to move and reside freely within the territory of the Member States (first paragraph of Article 12 EC in conjunction with Articles 17 EC and 18(1) EC),

(b) the prohibition of restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State (first paragraph of Article 43 EC),

(c) the requirement of necessity under Article 7(e) of [Directive 95/46]?'

II – Analysis

4. The first two questions referred to the Court of Justice by the national court concern the compatibility of the German system of processing the data of foreign Union nationals with, first, the general principle of non-discrimination enshrined in Article 12 EC (read in conjunction with Articles 17 EC and 18(1) EC on Union citizenship and the right to move and reside freely within the European Union respectively) and, second, the right to establishment guaranteed by Article 43 EC. I share the Commission's view that Article 12 EC is the most appropriate legal basis for analysing the issue, given that the claimant has clearly exercised his right under Community law, guaranteed by Article 18(1) EC, to move to another Member State. Indeed, I think that the question of discrimination is at the core of the present case. If the German system is considered to be incompatible with the prohibition laid down by Article 12 EC of discrimination on grounds of nationality in relation to the right to move and reside freely within a Member State, then it cannot be upheld regardless of whether it affects, or has the potential to affect, the claimant's rights of establishment. Therefore, I will first discuss the question of discrimination and then turn to the requirement of necessity under Directive 95/46, which is the subject of the third question referred to the Court. (3)

A – Does the German system discriminate against foreign EU nationals?

Comparable situations

5. It is common ground among all the parties that there are significant differences between the processing of the personal data of German citizens and the data of nationals of other EU Member States. Germany does not have a centralised system for recording, storing and processing the personal data of its nationals. There are, however, around 7 700 municipal population registers, which record the basic personal details of citizens but which are not linked to each other and cannot be searched centrally and simultaneously. By contrast, the personal data of foreign nationals, including those of nationals of EU Member States, are stored not only in the municipal registers but also in a central register of foreign nationals operated by the Federal Office for Migration and Refugees. Moreover, the central register is considerably more extensive in scope and contains additional information which is not recorded in the municipal registers such as passport details, dates of entry to and exit from the country, residence status, details of any application for refugee status and its outcome, particulars of deportation orders and measures to execute them, information about suspected criminal activities of the data subject and information on criminal convictions. Thus, there is a difference in treatment between German nationals and foreign Union nationals in three respects: first, the personal data of foreign nationals are recorded not only in the municipal registers, where the data of German nationals are recorded as well, but also in the central register of foreign nationals; second, the central register contains more information on data subjects than the local registers do; and third, the data of foreign nationals are readily available to various governmental authorities through the central register while no such possibility exists in relation to German nationals. The question is whether such a difference in treatment constitutes prohibited discrimination

6. The German Government reminds us that a finding of discrimination requires that there be two comparable situations which are treated differently. So, the obligation of Member States not to discriminate on the basis of national origin means that only similar cases should be treated alike. Since the residence status of German nationals is different from that of foreign nationals, these two categories of people are not in a similar position and, accordingly, no issue of discrimination arises. The same view is taken by the Danish Government, which notes that nationals of a particular State always have the right to enter and reside in their country, which, according to Article 3 of the Fourth Additional Protocol to the European Convention on Human Rights, can never deport them or refuse them entry, while foreign Union nationals are granted entry and residence rights only by virtue of Community law. According to the Dutch Government, the most pertinent criterion for deciding whether the two situations are comparable is the processing of data in relation to the right of residence. Since a German national living in Germany and a citizen of another Member State living in Germany have different residence rights – the former has an unlimited right based on his nationality, the latter a limited one granted by Community law – it is possible to treat their personal data differently without infringing the foreign citizens' right to be free from discrimination on grounds of nationality. Essentially, what is being argued is that although there are two different systems of data processing in Germany, which apply according to the nationality of the data subject, no issue of discrimination on the basis of nationality can arise because German citizens are not comparable to EU citizens. The former have an unlimited right to reside in the country while the latter have no such right.

7. I am not convinced by this line of reasoning. The starting point of our inquiry should be that there are two systems of data processing, one for Germans

and another one for Union nationals. It is, of course, descriptively accurate to state that the residence rights of German citizens and foreign nationals are not the same. But this is no more than stating the obvious; it says nothing about how this difference in residence status should relate to the collection and processing of the personal data of German citizens and citizens of other Member States. Put differently, the Governments of Germany, Denmark and the Netherlands would have us believe that the fact that foreign EU citizens have limited residence rights compared to indigenous citizens is the last word of the story, while the opposite is true: it is only the beginning. For a finding of non-discrimination, it is not sufficient to point out that German citizens and foreign nationals are not in the same situation. It is also necessary to demonstrate that the difference in their respective situations is capable of justifying the difference in treatment. In other words, the difference in treatment must relate and be proportionate to the difference in their respective situations. Therefore, I agree with the Commission that, in order to decide whether a German national is in a comparable situation to an EU national in relation to the collection and processing of personal data by the German authorities, we need to examine the purposes for which this collection and processing takes place. The German Government submits that a systematic processing of personal data in a central register is necessary for immigration law and residence status purposes, for effective general law enforcement and for the collection of statistical data. I will discuss each of them in turn.

Residence status and immigration rules

8. The primary argument of the German Government is that Community law allows Member States to impose limitations on the entry and residence, within their territory, of citizens of other Member States, who may even be deported. In order to be able to exercise this power, the German authorities need an effective mechanism for collecting the personal data and monitoring the movements of foreigners who take up residence in the country; such a mechanism is not necessary for Germans as they have an unlimited right to reside in the country and can never be deported. The German Government makes two points in support of this position. First, it argues that Directive 2004/38/EC, by giving the Member States the power to require resident foreign EU citizens to register with the relevant authorities, has implicitly authorised the collection and processing of their data. (4) Second, the German Government relies heavily on the Court's judgment in Watson and Belmann. (5) That case concerned an Italian law requiring all foreigners, including Community nationals, to register with the local police within three days of their entry to Italy, and provided for a fine or imprisonment and possible deportation in cases where an individual failed to comply. The Court held that deportation was 'certainly incompatible' (6) with the provisions of the Treaty, while any other penalty had to be proportionate to the gravity of the offence and not function as an obstacle to freedom of movement for persons. However, the Court explained: 'by creating the principle of freedom of movement for persons and by conferring on any person falling within its ambit the right of access to the territory of the Member States, for the purposes intended by the Treaty, Community law has not excluded the power of Member States to adopt measures enabling the national authorities to have an exact knowledge of population movements affecting their territory'. (7) The German Government argues that, since Member States have the power to adopt measures in order to have exact knowledge of population movements, it is clear that they have the power to establish a register containing information about who enters or leaves the country even when they do so only in relation to EU citizens.

9. Yet, neither Directive 2004/38 nor Watson and Belmann confer on Member States an unlimited power to adopt registration and monitoring systems for citizens of other Member States. Obviously, a registration requirement necessarily means that some personal data of EU citizens will be collected, stored and processed. Directive 2004/38, though, does not include any provisions about how this is to be done. That is a matter for each Member State, which, however, must exercise that power in a way which is compatible with its Community law obligations, including the obligation not to discriminate on the basis of national origin. Therefore, the fact that the Community legislature has implicitly accepted the possibility of some data collection taking place does not mean that it has authorised Member States to establish any system of data collection and processing they think appropriate.

10. Similarly, I think that the German Government reads too much into the excerpt from Watson and Belmann cited above. This case is authority only for the proposition that Member States may monitor population movements. It does not establish a general right for national authorities to carry out this monitoring in any way they think appropriate or convenient, and it certainly does not excuse Member States from complying with their obligations under Community law, and, in particular, the prohibition of discrimination on the basis of nationality. The German authorities may adopt measures to monitor population movements, but such measures must be compatible with the Treaty and any other relevant provisions of Community law.

11. Therefore, we need to examine those three features of the German system which lead to differential treatment between nationals and Union citizens and to assess whether they are justified as a means of enforcing residence and immigration rules.

12. Clearly, making the data of Union citizens available not only to immigration authorities but to the administration in general is not justified by any need to enforce residence rules. Even if the system under consideration is necessary so that the immigration authorities can perform their functions, it does not follow that the data stored therein should be made available to other administrative and criminal authorities and agencies. It is stated in the order for reference that the information stored in the register of foreign na-

tionals can be used not only by the Federal Office for Migration and Refugees but by many other public authorities and agencies such as the police, the security services, the public prosecutor's office and the courts. Certain of these authorities may retrieve data by means of an automated procedure. Access to this information can also be given to non-public, charitable organisations, public authorities from other States and international organisations. It is obvious that the scope of the data collection and processing through the central register for foreigners is very extensive and goes beyond immigration purposes to encompass all kinds of relationships between an individual and the State. Through the central register, the various authorities in Germany are in a position to retrieve data about the personal status of EU nationals living in the country, to monitor systematically and without difficulty their whereabouts and to share among themselves all the information they need for such monitoring. The register of the Federal Office for Migration and Refugees is, thus, much more than an immigration register; it is a comprehensive database through which State authorities have the personal data of EU citizens at their fingertips. The treatment of German citizens is completely different, as no similar data collection mechanism exists for them. An administrative agency which needs information on a German national would have to carry out a much more cumbersome and complicated search based on the municipal registers which are not centrally managed, cannot be searched simultaneously and contain less information than the register for foreign citizens.

13. For the same reason, I do not consider that the amount of data stored in the central register for foreigners can be justified. Registration of Union citizens is authorised by Directive 2004/38 exclusively for the purposes of ascertaining one's residence status and rights. It follows that the only pieces of data that Member States can legitimately collect and process are those that relate to residence rights of Union citizens. Article 8 of Directive 2004/38, paragraph 1 of which provides for the possibility of a registration requirement, states, in paragraph 3, which information and documentation national authorities may require in order to issue a registration certificate. Union citizens may be asked to prove their identity by showing their passport or identity card and provide documentation concerning employment or study in the host country (if they are coming as students or workers) or evidence of their financial resources; this list is restrictive and not indicative. By enacting Article 8(3), the European Parliament and the Council have made an assessment that the information referred to therein is enough to enable Member States to exercise their right to monitor who enters the country and takes up residence there. Accordingly, collecting, storing and processing more data than Article 8(3) of Directive 2004/38 allows, as Germany currently does, cannot be justified by the need to enforce residence and immigration rules.

14. The third element of the German system which leads to differential treatment between Germans and Union nationals, namely the existence of a central register for the latter as opposed to local ones for the former, gives rise to a more difficult question: is the systematic and centralised processing of the personal data of Union citizens necessary for the enforcement of Community law provisions on entry and residence?

15. I have to say from the outset that the existence of two separate data processing systems casts an unpleasant shadow over Union citizens, whom the German Government monitors much more strictly and systematically than German citizens. While the idea underlying the EU law provisions on citizenship and the right of entry and residence is that individuals should be able to integrate into the society of the host Member State and enjoy the same treatment as nationals, the system in question perpetuates the distinction between 'us' – the natives – and 'them' – the foreigners. Such a system can reinforce the prejudice of individuals or certain segments of society against foreigners and is likely to stigmatise Union citizens merely on account of their national origin. It must be also noted that the systematic monitoring of individuals is, in some European States, associated, for historical reasons, with undemocratic and totalitarian regimes, which explains, in part, why so many people in Europe find those systems particularly objectionable. On the other hand, there are European States where centralised systems of data processing do exist without raising any particular social controversy. In the present case, the sensitivity of the issue is enhanced by the fact that only the data of citizens of other Member States are subject to such a centralised processing. At the same time, this could be seen as a consequence of the different residential status of nationals of other Member States in Germany.

16. I think that the proper test here is one of effectiveness, and it is for the national court to apply it. The question it must ask is whether there are other ways of data processing by which the immigration authorities could enforce the rules on residence status. If it answers that question in the affirmative, the centralised data storage and processing for Union citizens should be declared unlawful. It is not necessary for the alternative system to be the most effective or appropriate; it is enough for it to be able to perform adequately. Put differently, even if the central register is more effective or convenient or user-friendly than its alternatives (such as the decentralised, local registers), the latter are clearly to be preferred if they can be used to indicate the residence status of Union citizens.

17. In assessing the effectiveness of the various registration systems, the national court should take into account the case-law of the Court of Justice on the right of entry to and residence in a Member State, as it is in those judgments that the powers of the national authorities in this field and their limits are defined. For example, it has been clear for many years now that a Member State can neither prevent a citizen of another Member State from entering its territory nor deport him at will; only an individual's personal conduct which poses a real and serious threat to society may justify a

prohibition of entry or a deportation order. (8) Moreover, this power must be narrowly construed, as it constitutes a derogation from the fundamental principle of freedom of movement within the Union. (9) These principles have been affirmed recently by the Court in Commission v Spain (10) and Commission v Germany (11) and given legislative recognition by the Community legislature in Directive 2004/38. (12)

18. Of course, any discussion of the right to reside in a Member State and its limits should take place against the concept of Union citizenship. Following the Treaty on European Union it is no longer possible to think about the status of EU nationals and the rights they have to enter a Member State and reside there in the same way as we did before it. The Court explained the rule in Baumbast as follows: '… Union citizenship has been introduced into the EC Treaty and Article 18(1) EC has conferred a right, for every citizen, to move and reside freely within the territory of the member States. Under Article 17(1) EC, every person holding the nationality of a Member State is to be a citizen of the Union. Union citizenship is destined to be the fundamental status of nationals of the Member States' (my emphasis). (13) As the Court held in Grzelczyk, the starting point in discrimination cases should be that Union citizens are entitled to the same treatment as nationals subject to express exceptions. (14) The prohibition of discrimination on the basis of nationality is no longer merely an instrument at the service of freedom of movement; it is at the heart of the concept of European citizenship and of the extent to which the latter imposes on Member States the obligation to treat Union citizens as national citizens. Though the Union does not aim to substitute a 'European people' for the national peoples, it does require its Member States no longer to think and act only in terms of the best interests of their nationals but also, in so far as possible, in terms of the interests of all EU citizens.

19. When the Court describes Union citizenship as the 'fundamental status' of nationals it is not making a political statement; it refers to Union citizenship as a legal concept which goes hand in hand with specific rights for Union citizens. Principal among them is the right to enter and live in another Member State. Directive 2004/38 reflects this new rule in recital 11, which states that 'the fundamental and personal right of residence in another Member State is conferred directly on Union citizens by the Treaty and is not dependent upon their having fulfilled administrative procedures'.

20. In the light of the foregoing analysis, I think that two of the elements of the data processing system under consideration, namely that it is accessible by authorities other than the Federal Office for Migration and Refugees and that it includes various pieces of personal information beyond those allowed by Article 8(3) of Directive 2004/38, cannot be justified by the need to enforce immigration law and residence status provisions. The centralised nature of the system can be justified only if the national court concludes, after considering the case-law of the Court of Justice on the right to enter and reside in a Member State, that a central register is the only effective way for enforcing immigration law and residence status provisions.

General law enforcement and statistical data

21. The German Government claims that in addition to issues relating to residence status and immigration rules, there are also general law-enforcement considerations, namely the combating of crime and threats to security, which justify the difference in treatment between Germans and citizens of other Member States. Indeed, law enforcement and the combating of crime could, in principle, be a legitimate public policy reason qualifying rights granted by Community law. What Member States cannot do, though, is to invoke it selectively, that is, against EU nationals living in their territory, but not against their own citizens. If a central register is so important for effective general policing, it should obviously include everyone living within a particular country regardless of his nationality. It is not open to national authorities to say that fighting crime requires the systematic processing of personal data of EU citizens but not of that relating to nationals. This would be tantamount to saying that EU nationals pose a greater security threat and are more likely to commit crimes than citizens, which, as the Commission points out, is completely unacceptable.

22. There is, of course, the issue of convenience. Having a comprehensive database containing the personal data of every foreigner in the country makes it easy for the police and security services to monitor an individual's movements and conduct. It is far more complicated and time-consuming to have to search thousands of local registers to get the information they may want, as they need to do with German citizens. However, first, administrative convenience can never be a reason justifying discriminatory treatment on the basis of nationality or any other restriction on the rights granted by Community law; (15) second, if the police need a convenient surveillance method, it is clear that they must need the same one for both Germans and foreigners.

23. Finally, the German Government claims that the central register for EU nationals is necessary in order to collect statistical information on migration and population movement in Europe. It cites, to this effect, Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection. (16) Yet, the Regulation neither requires nor authorises the establishment of a database containing the personal data of EU nationals who have exercised their rights to freedom of movement. Statistics are, by definition, anonymous and impersonal. All that the German authorities have to do to comply with their obligations under the Regulation is to compile this anonymous information on migration.

24. Therefore, I think that the Court should answer the question whether the German system constitutes discrimination on the basis of national origin as follows:

'A system of data storage and processing such as the one at issue in the main proceedings is incompatible

with the prohibition of discrimination on grounds of nationality in so far as it includes data beyond those specified in Article 8(3) of Directive 2004/38 and is accessible by public authorities other than the immigration authority. The centralised processing of personal data applicable only to citizens of other Member States will also be incompatible with the prohibition of discrimination on grounds of nationality if there are other effective ways for enforcing immigration and residence status rules, that being for the national court to assess.'

B – The requirement of necessity under Directive 95/46

25. For present purposes, the relevant provision is that of Article 7(e) of Directive 95/46, which states: 'Member States shall provide that personal data may be processed only if … processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed'. Therefore, the question we have to ask is whether this particular form of centralised processing is necessary for the achievement of a legitimate public interest objective.

26. In its written submissions to the Court, the German Government takes the view that the public interest at play here is the exercise by Member States of their power to enforce Community law in relation to the entry and residence of Union citizens in their territory. The data processing system currently in force, the German Government submits, is necessary for the performance of this task, as there are no other, less intrusive measures which could allow national authorities to enforce immigration law.

27. The concept of necessity has a long history in Community law and is well established as part of the proportionality test. It means that the authority adopting a measure which interferes with a right protected by Community law in order to achieve a legitimate aim must demonstrate that the measure is the least restrictive for the achievement of this aim. (17) Moreover, when the processing of personal data may be liable to infringe the fundamental right of privacy, Article 8 of the European Convention on Human Rights, which guarantees the right to private and family life, also becomes relevant. As the Court held in Österreichischer Rundfunk and Others, when a national measure is incompatible with Article 8 of the Convention, it also fails to pass the threshold of Article 7(e) of Directive 95/46. (18) The second paragraph of Article 8 stipulates that an interference with private life may be legitimate if it pursues one of the aims listed therein and is 'necessary in a democratic society'. The European Court of Human Rights has held that the adjective 'necessary' implies that there exists 'a pressing social need' for the State to act in a particular way and that the measure taken is proportionate to the legitimate aim pursued. (19)

28. All this means that, in view of the facts of this case, the answer to the third question turns out to depend on a substantially similar analysis to that employed to answer the question on discrimination on grounds of nationality. I have already explained that there are three objectionable elements in the data processing system at issue. For the first two of them, the reply to the question whether they are necessary under Directive 95/46 is the same as the conclusion in relation to the principle of non-discrimination on the basis of nationality: they are not necessary, at least for the purpose of enforcing the rules on the right of entry and residence of foreign EU citizens which is the public interest being claimed by the German Government, on the basis of Article 7(e) of Directive 95/46. For this task to be achieved, all that is required is that the relevant authority, namely the Federal Office for Migration and Refugees, processes the personal data of Union citizens. The transmission (20) of the data to other public authorities does not meet the requirement of necessity laid down under the Directive. The same is true of the amount of data collected in the central register. The only information that can be legitimately stored and processed is that which is essential for the enforcement of immigration and residence status provisions. For Union citizens, this information is exhaustively listed in Article 8(3) of Directive 2004/38; anything which goes beyond this cannot be deemed to be necessary for immigration law purposes. Therefore, the fact that the central register for foreigners includes additional data also fails to meet the requirement of necessity under Directive 95/46.

29. This leaves us with the third element of the German system, its centralised nature. Is such a manner of data processing compatible with the requirement of necessity under Directive 95/46? Again, the answer will not depart from the answer provided to the first question. I think it is for the national court to make a decision on this point on the basis of the elements put forward above. (21) While the German Government enjoys some leeway to decide how to pursue its legitimate objectives, the requirement of necessity under Directive 95/46 means that it has to demonstrate that it is impossible to enforce Community law provisions on entry and residence in Germany of citizens of other Member States unless their data are centrally processed. An argument that centralised processing is more convenient, easier or quicker than alternative forms of processing should not be enough for the Government to pass the test of necessity.

30. The question would be different and substantially more complex and potentially difficult to answer if the national court were asking the Court of Justice to give a ruling on the compatibility of a centralised system of data processing applicable to all individuals resident in Germany with the requirement laid down in Article 7(e) of Directive 95/46; the necessity for such a system would need to be argued on the basis of public interests other than immigration policy. That would require balancing the public interests to be pursued by such a centralised system with the individual rights protected by that Directive. While the Directive aims to remove the obstacles to flows of personal data which could affect cross-border economic activities, it also provides for the attainment of a high level of data pro-

tection throughout the Community. This concern with data protection and privacy is not subordinate to the aim of facilitating the free flow of data; it runs in parallel with it, and functions as the basis upon which any legitimate processing of data takes effect. Put differently, in the context of Directive 95/46, data protection is not merely incidental to the economic activity that may be facilitated by data processing; it is on a par with it. This is expressed in the title of the Directive ('on the protection of individuals with regard to the processing of personal data and on the free movement of such data'), in recitals 2, 10, 11 and 12 and, of course, in its numerous provisions imposing specific obligations on data controllers. Furthermore, the right to privacy, which, in essence, is at stake in data protection cases, is protected in Article 7 of the Charter of Fundamental Rights of the European Union. In any event, it is neither necessary nor appropriate to address this hypothetical question in the context of the current case.

31. Consequently, I think that the Court should answer the third question as follows:

A system of data storage and processing such as the one at issue in the main proceedings is incompatible with the requirement of necessity under Article 7(e) of Directive 95/46 in so far as it includes data beyond those specified in Article 8(3) of Directive 2004/38 and is accessible by public authorities other than the immigration authorities. The centralised processing of personal data applicable only to citizens of other Member States will also be incompatible with the requirement of necessity under Article 7(e) of Directive 95/46, unless it can be demonstrated that there is no other way of enforcing immigration and residence status rules, that being for the national court to assess.

III – Conclusion

32. For these reasons I propose that the Court give the following answers to the questions referred by the Oberverwaltungsgericht für das Land Nordrhein-Westfalen:

(1) A system of data storage and processing such as the one at issue in the main proceedings is incompatible with the prohibition of discrimination on grounds of nationality in so far as it includes data beyond those specified in Article 8(3) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States and is accessible by public authorities other than the immigration authority. The centralised processing of personal data applicable only to citizens of other Member States will also be incompatible with the prohibition of discrimination on grounds of nationality if there are other effective ways for enforcing immigration and residence status rules, that being for the national court to assess.

(2) A system of data storage and processing such as the one at issue in the main proceedings is incompatible with the requirement of necessity under Article 7(e) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data in so far as it includes data beyond those specified in Article 8(3) of Directive 2004/38 and is accessible by public authorities other than the immigration authorities. The centralised processing of personal data applicable only to citizens of other Member States will also be incompatible with the requirement of necessity under Article 7(e) of Directive 95/46, unless it can be demonstrated that there is no other way of enforcing immigration and residence status rules, that being for the national court to assess.

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1 – Original language: English.

2 – Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31) ('the Directive').

3 – A further reason to treat the first two questions together is that the order for reference does not provide sufficient information to enable the Court of Justice to examine whether this particular form of data processing has a negative impact on the claimant's right of establishment under Article 43 EC. The Greek Government also takes the view that the case must be examined under Article 12 EC and not 43 EC, as it raises no questions relating to the right of establishment.

4 – Article 8 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ 2004 L 158, p. 77) and corrigendum OJ 2004 L 229, p. 35.

5 – Case 118/75 [1976] ECR 1185.

6 – Ibid., paragraph 20.

7 – Ibid., paragraph 17.

8 – Case 41/74 Van Duyn [1974] ECR 1337; Case 67/74 Bonsignore [1975] ECR 297; Case 30/77 Bouchereau [1977] ECR 1999.

9 – Case 36/75 Rutili [1975] ECR 1219; Bouchereau.

10 – Case C-503/03 [2006] ECR I-1097.

11 – Case C-441/02 [2006] ECR I-3449.

12 – Article 27(2) of Directive 2004/38 provides that restrictions on the right of entry and residence are to comply with the principle of proportionality and are to be based exclusively on the personal conduct of the individual which must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Under Article 31, an individual who is subject to such measures is to have access to judicial and administrative redress, including interim relief.

13 – C-413/99 Baumbast [2002] ECR I-7091, paragraphs 81and 82.

14 – Case C-184/99 Grzelczyk [2001] ECR I-6193, paragraph 31.

15 – See Case C-18/95 Terhoeve [1999] ECR I-345, paragraph 45 ('Considerations of an administrative nature cannot justify derogation by a Member State from the rules of Community law. That principle applies

with even greater force where the derogation in question amounts to preventing or restricting the exercise of one of the fundamental freedoms of Community law').

16 – OJ 2007 L 199, p. 23

17 – See inter alia Joined Cases 133/85, 134/85, 135/85 and 136/85 Rau and Others [1987] ECR 2289.

18 – Joined Cases C-465/00, C-138/01 and C-139/01 Österreichischer Rundfunk and Others [2003] ECR I-4989, paragraph 91.

19 – See, inter alia, Gillow v United Kingdom (1989) 11 EHRR 335; Z v Finland (1998) 25 EHRR 371.

20 – Disclosure by transmission and dissemination of personal data constitute a form of processing: Article 2(b) of Directive 95/46.

21 – The same approach to the assessment of necessity was taken by the Court of Justice in Österreichischer Rundfunk and Others, paragraph 88.