Case Analysis

The Right to be Forgotten in Cases Involving Criminal Convictions

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Data subjects' rights; EU law; Human rights; Internet service providers; Personal data; Public interest; Right to erasure; Spent convictions

Abstract

In NT1 and NT2 v Google and The Information Commissioner *the High Court of England and Wales considered the applicability of the right to be forgotten to cases involving "spent" criminal convictions under the Data Protection Directive and in light of the decision of the Court of Justice of the European Union (CJEU) in* Google Spain v AEPD. *The decision represents an important development in the evolving body precedent concerning the right to be forgotten in European law while also offering an insight into a potential shift in attitude among common law courts towards the applicability of art.8 rights in the context of criminal convictions.*

Introduction

NT1/NT2[1] is perhaps the most high-profile consideration of the right to be forgotten in a common law jurisdiction following the decision in *Google Spain SL v Agencia Espanola de Proteccion de Datos (AEPD)*[2] in 2014. The case, more accurately two joined cases, concerns NT1 and NT2, two businessmen previously convicted of criminal offences. The claimants sought the removal by the defendant, Google, of search results concerning their previous convictions on the basis that the results conveyed inaccurate, out-of-date and irrelevant information, failed to attach sufficient public interest and/or otherwise constituted an illegitimate interference with their right to be forgotten as established in *Google Spain*.

1. The right to be forgotten in *Google Spain*

In *Google Spain* the CJEU interpreted art.14 of the Data Protection Directive 1995[3] and the Charter of Fundamental Rights of the European Union, in particular arts 7 and 8, as including a "right to be forgotten". In that case a Spanish national, Mr Gonzalez, complained to the AEPD that a Google search of his name revealed an article from Spanish newspaper *La Vanguardia* containing information related to the 1998 sale of his property in satisfaction of social security debts.

The AEPD upheld Costeja's complaint and ordered Google to delist the results. On appeal before the Spanish High Court a preliminary referral was made to the CJEU. The referral sought clarification in relation to three questions. First, the High Court queried the application of the Directive to Google as a US-based company. Secondly, the Court sought clarification on the "controller" status of a search engine

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[1] *NT1 and NT2 v Google and The Information Commissioner* [2018] EWHC 799 (QB).

[2] *Google Spain SL v Agencia Espanola de Proteccion de Datos (AEPD)* (C-131/12). Henceforth *Google Spain*.

[3] Directive 95/46/EC.

under the Directive and finally whether individuals had a "right to be forgotten" by a search engine and, if so, what the scope of such a right might be.

The CJEU found the Directive did apply to Google, and that in making the information containing personal data available an internet service provider processed personal data and was therefore a data controller for the purposes of art.2 the Directive.[4]

The Court also held a "right to be forgotten" exists under arts 7 and 8 of the Charter of Fundamental Rights, which entitles individuals to request that information no longer be made available to the general public by means of search engine results.[5] In acknowledging the right, the Court held privacy would "as a rule" outweigh the interests of internet users in finding information, and Google's economic interests, but noted the right was not absolute.

As a result of *Google Spain*, data subjects may apply to the relevant national authority or court under art.12(b) and/or art.14(1)(a) of the Directive to remove links to third party publications from the results of internet search engines.[6] Subsequent to the decision the art.29 Working Party issued Guidelines on the implementation of the judgment. Part II of the Guidelines outline common criteria for handling complaints pursuant to *Google Spain*, on which Warby J drew in assessing the claims of NT1 and NT2.[7]

2. Claims in the case

In accordance with *Google Spain* the claimants each sought delisting orders under s.14, and compensation under s.13 of the Data Protection Act 1998 (DPA), which gives effect to the Directive.[8] Additionally, the claimants sought compensation for the tort of misuse of private information as a result of Google's conduct in continuing to return search results in the period following their complaints.[9]

Drawing on the ruling in *Google Spain* as well as the art.29 guidelines, Warby J identified the main issues in *NT1/NT2* as:

1. Whether the claimants were entitled to have the links complained of excluded from Google's Search results:
   a. due to contents which constituted inaccurate personal data; or
   b. because the continued listing constituted an unjustified interference with the data protection or privacy rights of the complainant.
2. If the claimants were entitled to have the links excluded, whether the claimants were entitled to compensation for the persistence of the listing pending the judgment.[10]

3. NT1's case

In the late 1980s and early 1990s NT1 was involved in a property business in connection with which he was later convicted of a criminal conspiracy to defraud consumers and was sentenced to a term of imprisonment. NT1 was also accused, but not convicted of, a separate conspiracy connected with the same undertaking. There was contemporaneous media coverage of these and related matters, links to which were made available by Google Search. NT1 was released on licence having served half his custodial sentence in the early 2000s.

[4] *Google Spain* at [28], [33]-[34], [38].
[5] *Google Spain* at [94], [96].
[6] *Google Spain* at [81], [85], [94], [99].
[7] *Google Spain* at [135], [141], [159]. Article 29 Data Protection Working Party, "Guidelines on the Implementation of the Court of Justice of the European Union Judgment on Case C-131/12 Google Spain and Inc v Agencia Espanola de Proteccion de Datos (AEPD) and Mario Costeja Gonzalez", 26 November 2014, at *http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp225_en.pdf* [Accessed 25 May 2018].
[8] *NT1 and NT2* [2018] EWHC 799 (QB) at [26].
[9] *NT1 and NT2* [2018] EWHC 799 (QB) at [42]; *Campbel, McKennitt v Ash* [2006] EWCA Civ 1714; [2008] QB 73.
[10] *NT1 and NT2* [2018] EWHC 799 (QB) at [9].

After his conviction became spent NT1 requested that Google remove links to reports of his convictions.[11] The first request to delist was submitted in June 2014 following the ruling in *Google Spain* and sought the removal of six links. Google replied in October 2014 agreeing to delist one link but declining in respect of the remaining five. NT1 requested that Google reconsider the decision, which Google declined to do. Subsequently, NT1's solicitors repeated the request for removal, which was again refused. Consequently, NT1 brought suit leading to *NT1/NT2*.[12]

3.1 Abuse of process?

Warby J first considered Google's contention that NT1's claims were an abuse of the Court's process as they amounted to an illegitimate attempt to circumvent the procedural and substantive law applicable to claims in defamation.[13] Warby J dismissed this argument noting that a claimant may choose to "… rely on any cause of action that arises or may arise from a given set of facts" without such choice being considered an abuse.[14]

3.2 Google's claim of journalistic exemption

Warby J also rejected Google's contention that it should be permitted to avail of the journalism exemption contained in s.32 of the DPA which provided that processing for special purposes, included journalism, enjoyed exemptions from the provisions of the Act including s.14.[15] Google contended that the processing was undertaken with a view to publication for journalistic purposes and should therefore be exempted.

Warby J found that although he could accept that the concept of journalism was broad, the concept was not so elastic as to embrace every activity connected to conveying information or opinions.[16] Nor did he find that he could agree with the narrower version of Google's argument that the concept of journalism covered services the purpose of which was to enable users to access third-party publisher content which disclosed information, opinions and ideas. The judge noted that Google's service was a commercial one and that Google's own purposes were therefore separate and distinct in nature.[17]

The judge noted, obiter, that Google's argument, if accepted, would fail to meet the elements required by s.32(1)(b) and (c) as there was no evidence that Google had given consideration to the public interest in its continued publication of the URLs complained of at any time before NT1's delisting request.[18] Warby J thus found that the claim failed at the threshold stage and proceeded to consider the grounds on which the claimant might assert a successful claim for delisting pursuant to *Google Spain*.

3.3 Could a delisting order be made?

3.3.1 Were the data accurate?

NT1 made six complaints of inaccuracy in relation to the use of particular words or phrases though no particulars of the alleged inaccuracies were provided. This required the judge to carry out his own analysis from which he concluded that there were three complaints about the first article complained of, five about the second article complained of and two about a book extract.[19] In assessing whether inaccuracy was

[11] *NT1 and NT2* [2018] EWHC 799 (QB) at [5].
[12] *NT1 and NT2* [2018] EWHC 799 (QB) at [6].
[13] *NT1 and NT2* [2018] EWHC 799 (QB) at [57], [58].
[14] *NT1 and NT2* [2018] EWHC 799 (QB) at [61].
[15] *NT1 and NT2* [2018] EWHC 799 (QB) at [95].
[16] *NT1 and NT2* [2018] EWHC 799 (QB) at [98].
[17] *NT1 and NT2* [2018] EWHC 799 (QB) at [98]-[101].
[18] *NT1 and NT2* [2018] EWHC 799 (QB) at [102].
[19] *NT1 and NT2* [2018] EWHC 799 (QB) at [79].

indeed present, Warby J endorsed the understanding of the court in *Charleston v New Group Newspapers Ltd*[20] that words must be read and interpreted in context. NT1 resisted this view as imposing "artificial restrictions" on the meaning of words or phrases used — an assertion not accepted by the Court.[21]

Noting the inherent difficulty in assessing the truth of statements published two decades previously, particularly in light of the testimony of NT1 who under cross-examination tended to "evade, to exaggerate, [and] to obfuscate" Warby J found himself unable to accept much of the claimant's testimony and rejected all six complaints of inaccuracy.[22]

3.3.2 Was there an interference with NT1's privacy or data protection rights?

The CJEU in *Google Spain* made clear that where evidence exists that the availability of a search result is causing prejudice to the claimant's rights this would be a strong factor in favour of delisting. The Working Party in its discussion cited an example of undue prejudice in which a foolish misdemeanor, no longer the subject of public debate and with no wider public interest, would lead to a situation in which the disproportionately negative impact on the privacy of the data subject would merit delisting.[23]

In analysing the remaining information, Warby J noted the claimant's allegation that the continued availability of the information had infringed his right to privacy and caused substantial damage and distress to him as a result of his subsequent treatment as a "pariah" in his business and social life, as well as making him the subject of threats in public places. NT1 also alleged that there had been disruption to his family life.[24]

Warby J noted that while there was some information in the articles which related to the complainant's health, information which was prima facie private, the information was trivial, historic and made in public in the course of proceedings such that it was not intrinsically private.[25]

In assessing the remainder of the claims, Warby J noted NT1's case suffered from a lack of causation in establishing whether the harm would have resulted irrespective of Google's actions.[26] In particular, the judge noted that the only evidence of threats dated from incidents during NT1's term in prison and shortly after his release and could not be attributed to any illegitimate processing by Google.[27] Equally, the judge found he could not attribute the only specific incident recounted by NT1 in which a business deal was hindered by the counterparty's knowledge of his conviction to the behavior of Google as it occurred before NT1's conviction became spent.[28]

In relation to the impacts on the claimant's family and private life, the judge noted that the claims were little more than a reiteration of the pleaded case with no specific incidents or detail as to the nature of the impact with the result that the evidence of harm or prejudice to NT1's rights to privacy and data protection was insufficient to add any great weight in favour of delisting.[29]

3.3.3 Balancing individual rights and the public interest

In seeking to balance NT1's rights as against the public interest, Warby J noted that the Working Party Guidelines identified the overall purpose of its criteria as assessing whether the information is relevant according to the interest of the general public. The Guidelines noted that whether the claimant was still

[20] *Charleston v New Group Newspapers Ltd* [1995] 2 A.C. 65.
[21] *NT1 and NT2* [2018] EWHC 799 (QB) at [83], [142].
[22] *NT1 and NT2* [2018] EWHC 799 (QB) at [92]-[94].
[23] *NT1 and NT2* [2018] EWHC 799 (QB) at [147].
[24] *NT1 and NT2* [2018] EWHC 799 (QB) at [149].
[25] *NT1 and NT2* [2018] EWHC 799 (QB) at [140], [145], [146].
[26] *NT1 and NT2* [2018] EWHC 799 (QB) at [151].
[27] *NT1 and NT2* [2018] EWHC 799 (QB) at [152].
[28] *NT1 and NT2* [2018] EWHC 799 (QB) at [153].
[29] *NT1 and NT2* [2018] EWHC 799 (QB) at [154], [155].

engaged in the same professional activity and was a public individual would be particularly relevant in such an assessment.

Google contended that NT1's business career since his release from prison, combined with misleading claims made online,[30] supported their contention that the information should remain available to act as correction to the narrative promoted by the claimant.[31] In response, NT1 contended that the right to receive information is inherently less weighty than the right to impart it.[32]

Warby J found no support for NT1's contention at law or in the argument presented[33] and went on to note that NT1's post-prison career included lending money to businesses and individuals—a pursuit which the judge found it reasonable to assume was funded by the proceeds of the fraud perpetrated on consumers who had moved abroad prior to the claimant's arrest and imprisonment.[34] Warby J further noted that the scale of NT1's fraud was far from negligible and that the claimant's portrayal of himself online and on social media were aimed at the public and were known to be false and misleading.[35]

The judge then turned to examine whether, as a result of NT1's role in public life, the information complained of constituted genuinely private information. The Working Party Guidelines provide that there will be a stronger argument against delisting where the information concerns a public figure, or an individual playing a role in public life.[36] The judge noted the Working Party's definitions of "public figures", which includes individuals who have a degree of media exposure and "playing a role in public life" which the Working Party suggests should be guided by whether the public have an interest in information which may protect them against improper public or professional conduct.[37]

The judge noted that though NT1's role in public life was no longer prominent it subsisted, in light of which, and combined with the claimant's misrepresentation of his reputation online, Warby J found that NT1 was a public figure and that the Working Party Guidelines favoured the continued availability of the information.[38]

3.3.4 Criminal nature of the offence

Finally, Warby J considered the criminal nature of the offence involved. The judge noted that the context in which the information was published was that of substantially fair and accurate reporting in national media of public legal proceedings and that such reporting was both a natural and foreseeable result of the dishonest criminal conduct of the claimant.[39]

Warby J dismissed NT1's claim that he had a legitimate expectation of rehabilitation after leaving prison noting that, had the law remained as it stood when NT1 was released, his sentence would never have become spent, only becoming entitled to such an expectation in 2014 following the revision of the law.[40] The issue to be addressed was therefore whether the fact that the conviction was spent was sufficiently weighty to mandate an order for delisting.[41]

This section of Warby J's consideration is perhaps where the impact of *Google Spain* at a national level becomes most obvious—requiring the Court to reconcile, in light of legislation passed 25 years before the advent of the internet, the right to rehabilitation as an aspect of the law of personal privacy with

[30] Subsequent to his release and resuming his business NT1 also caused online postings to be made about his business experience and reputation which promoted the idea of NT1 as a man of "unblemished integrity". *NT1 and NT2* [2018] EWHC 799 (QB) at [123], [124].
[31] *NT1 and NT2* [2018] EWHC 799 (QB) at [117].
[32] *NT1 and NT2* [2018] EWHC 799 (QB) at [134].
[33] *NT1 and NT2* [2018] EWHC 799 (QB) at [132]-[134].
[34] *NT1 and NT2* [2018] EWHC 799 (QB) at [121].
[35] *NT1 and NT2* [2018] EWHC 799 (QB) at [130].
[36] *NT1 and NT2* [2018] EWHC 799 (QB) at [139]; *Von Hannover v Germany (No.1)* (2005) 40 E.H.R.R. 1 at [63].
[37] *NT1 and NT2* [2018] EWHC 799 (QB) at [137].
[38] *NT1 and NT2* [2018] EWHC 799 (QB) at [138].
[39] *NT1 and NT2* [2018] EWHC 799 (QB) at [157].
[40] *NT1 and NT2* [2018] EWHC 799 (QB) at [158].
[41] *NT1 and NT2* [2018] EWHC 799 (QB) at [163].

the competing right of the public to information.[42] At the beginning of his analysis the judge returned to first principles, noting that the starting point in the common law is that criminal proceedings are held in public and that a person will not enjoy a reasonable expectation of privacy in relation to their content. The judge went on to note that despite this there may come a time, determined by Parliament, when a conviction becomes spent and an individual's art.8 rights are engaged.

However, Warby J found that it did not follow from this that the individual's art.8 rights are of preponderant weight and observed that there is no bright line in art.8 jurisprudence on when the article will outweigh other rights.[43] The judge found that NT1's case lay at the very outer limit of those sentences which could become spent under the statutory scheme, and indeed would never have become spent under the law as it stood from 1974 to 2014 in accordance with the Rehabilitation of Offenders Act 1974.[44] Moreover, Warby J remarked that the comments of the sentencing judge clearly indicated the claimant's sentence would have been longer but for his ill-health.

Warby J concluded that NT1's art.8 rights were not engaged due to his conduct subsequent to his release, the nature of his offence, including the length of his sentence, and his failure to proffer detailed evidence of the impact on his rights which was attributable to the continued availability of the search results.[45]

The judge also emphasised that while it was of limited relevance to those with whom NT1 had business dealings to learn of his conviction, there were people who had a legitimate interest in such knowledge, still more so in circumstances where the claimant's own postings online had misrepresented his business record and reputation.[46] Warby J thus found that retention would serve the legitimate purpose of correcting the record in circumstances where it was not clear the relevance of the information had been exhausted.[47]

3.4 Decision and remedies

Warby J thus dismissed NT1's claims of inaccuracy and also dismissed the remainder of the delisting claim on the basis that the claimant had failed to satisfy the criteria established in *Google Spain*. Warby J further found that the claim for misuse of private information failed, having found Google's processing to be justified, and that there was thus no basis for the award of compensation.[48]

4. NT2's case

In the early 2000s NT2 was involved in a firm which was subject to public campaign of opposition due to its environmental practices. Criminal and nuisance acts were committed against the firm and NT2 received death threats. In response, the firm hired private investigators to seek to identify those responsible. In his role within the firm NT2 authorised these investigators to use surveillance methods which he knew to be illegal.[49]

NT2 pleaded guilty at an early stage and was sentenced to sixth months' imprisonment of a potential maximum sentence of 12 months, which was reduced in light of his guilty plea and the presence of personal mitigating factors.[50] Both the conviction and sentence were reported in national and local media. NT2 served six weeks in custody and was released in 2008. As with NT1 the conviction became "spent" but

[42] *NT1 and NT2* [2018] EWHC 799 (QB) at [165]-[166].
[43] *NT1 and NT2* [2018] EWHC 799 (QB) at [166].
[44] Subsequently the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) the rehabilitation period after which sentences became spent was reduced.
[45] *NT1 and NT2* [2018] EWHC 799 (QB) at [167].
[46] *NT1 and NT2* [2018] EWHC 799 (QB) at [168].
[47] *NT1 and NT2* [2018] EWHC 799 (QB) at [168], [169].
[48] *NT1 and NT2* [2018] EWHC 799 (QB) at [56].
[49] *NT1 and NT2* [2018] EWHC 799 (QB) at [179]-[181].
[50] *NT1 and NT2* [2018] EWHC 799 (QB) at [182].

the original news reports remained available. Unlike NT1, however, NT2's conviction and sentence were also mentioned in more recent publications, two of which were reports of interviews given by NT2.

NT2 requested the removal of eight links by Google in April 2015. [51] Google declined on the grounds that the reports related "to matters of substantial public interest regarding [NT2's] professional life".[52] NT2 subsequently issued proceedings seeking relief in respect of the eight links as well as three further links two of which were subsequently removed voluntarily.[53]

At the outset Warby J noted that Google's claims of abuse of process and journalistic exemption also failed in respect of NT2.[54]

4.1 Could a delisting order be made?

4.1.1 Were the data accurate?

The claimant alleged inaccuracy in respect of one of the articles only. NT2 alleged the piece was inaccurate as it suggested, incorrectly, that he had gained financially from his crime.[55] Google accepted that the item conveyed serious imputations against suspected criminals but argued that those portions of the piece could not have been understood as referring to NT2.[56] Warby J, however, found that the article was inaccurate as it gave the misleading impression that the claimant's criminality did result in financial gain, by describing and comparing the claimant's case to those involving instances in which individuals had received financial gain as a result of criminal activity.[57] The judge thus made the appropriate delisting order.[58]

4.1.2 Was there an interference with NT2's privacy or data protection rights?

As with NT1, NT2 claimed the availability of the links complained of had resulted in a profound impact on his business and personal life. Warby J noted that, as with NT1, much of the emphasis was on the impact of the listings on the claimants' business. In NT2's case the impacts were a subsequent disadvantage or difficulty in securing banking facilities and business opportunities. The judge noted that though the information given exceeded that provided by NT1, the claims remained vague and lacked detail.[59]

4.1.3 Balancing individual rights and the public interest

In considering whether NT2 constituted a public figure, the judge found that while the complainant did not enjoy the status as a public figure which he previously had, he remained a public figure in a reduced but not wholly eliminated capacity.[60]

Warby J continued, noting that the claimant was no longer involved with the industry of which he had been a part at the time of the crime nor had he misrepresented his reputation or history as NT1 had. Google maintained that despite this the information in NT2's case remained relevant and that the self-promotion engaged in by NT2 supported the claim that the articles complained of should remain available to correct the record.

Google drew, specifically, on two press interviews given by NT2 subsequent to his conviction becoming spent, as well as a personal website and online news reports which promoted NT2 as a successful

[51] *NT1 and NT2* [2018] EWHC 799 (QB) at [7].
[52] *NT1 and NT2* [2018] EWHC 799 (QB) at [8].
[53] *NT1 and NT2* [2018] EWHC 799 (QB) at [8], [174].
[54] *NT1 and NT2* [2018] EWHC 799 (QB) at [177].
[55] *NT1 and NT2* [2018] EWHC 799 (QB) at [212], [187].
[56] *NT1 and NT2* [2018] EWHC 799 (QB) at [188].
[57] *NT1 and NT2* [2018] EWHC 799 (QB) at [190].
[58] *NT1 and NT2* [2018] EWHC 799 (QB) at [191].
[59] *NT1 and NT2* [2018] EWHC 799 (QB) at [216]-[218].
[60] *NT1 and NT2* [2018] EWHC 799 (QB) at [210].

businessman with experience in finance and environmental matters. Warby J found that the interviews indicated NT2 was not seeking to hide his crime from the public and that neither the publications nor the interviews made claims which were inconsistent with the evidence against him or "extravagantly beyond what might have been justified by reference to the principle of rehabilitation".[61]

4.1.4 The criminal nature of the offence

The most significant point on which the cases of NT1 and NT2 differed, in the opinion of the judge, was the nature of the criminal offences involved. As with NT1 the judge noted that the reporting at issue was a natural, probable and foreseeable consequence of the complainant's conviction and that, with the exception of the article delisted for inaccuracy, the reporting was fair and accurate in the context of the remaining publications.[62]

Warby J noted that while a criminal offence was at issue in both cases, distinctions were apparent between the claimants' cases. The first was that NT2's conviction was always due to become spent—both under the 1974 Act as well as following its 2014 revision with the result that NT2 had a legitimate expectation of rehabilitation from the time of his release.[63] The judge also noted that, unlike NT1, NT2 provided credible evidence in support of his case that the availability of the search results had caused damage to his business. In a private context the judge noted that the presence of a young family in NT2's case strengthened his case for the existence of an interference with his art.8 rights.[64]

The judge also emphasised the nature of NT2's conviction as a significant factor in deciding whether the information had prejudiced his rights under arts 7 and 8. Warby J noted that the crime of invasion of privacy was not a crime of dishonesty, as had been the case with NT1 and that NT2 had acted in good faith believing his actions were necessary in light of his targeting by malign actors. The judge placed particular emphasis on the fact that NT2 did not contest the charges, had pleaded guilty at an early stage and showed an awareness and remorse for his crime which Warby J deemed to be genuine.[65] Finally, the judge repeatedly noted that the relevance of the crime to potential customers was "slender to non-existent" and that there was no suggestion the wrongdoing would be repeated.[66]

4.2 Decision and remedies

Based on these factors Warby J noted that the information complained of had become irrelevant and of insufficient, legitimate interest to users to justify its continued availability.[67] The judge found the information had been public at the time of publication but that that position had changed over time and that art.8 was engaged, in particular by the presence of a young family in NT2's life.[68]

While the judge noted the interference with the claimant's art.8 rights was not grave he found the impact on NT2's rights was nevertheless sufficient to require justification based on relevance which Google had been unable to provide.[69]

Therefore, Warby J, in addition to upholding the complaint of inaccuracy, found there had been a misuse of private information in as much as the claimant had established a reasonable expectation of privacy as a result of: the fact that his sentence would always have become spent; the change in the character of the information over time; and the engagement of his art.8 rights. As a result the judge issued

[61] *NT1 and NT2* [2018] EWHC 799 (QB) at [205], [206].
[62] *NT1 and NT2* [2018] EWHC 799 (QB) at [219]-[220].
[63] *NT1 and NT2* [2018] EWHC 799 (QB) at [222].
[64] *NT1 and NT2* [2018] EWHC 799 (QB) at [221]-[222].
[65] *NT1 and NT2* [2018] EWHC 799 (QB) at [222].
[66] *NT1 and NT2* [2018] EWHC 799 (QB) at [203], [204], [222].
[67] *NT1 and NT2* [2018] EWHC 799 (QB) at [223].
[68] *NT1 and NT2* [2018] EWHC 799 (QB) at [224].
[69] *NT1 and NT2* [2018] EWHC 799 (QB) at [226].

an order for delisting in respect of the remaining articles.[70] However, the Court found Google had taken reasonable care, and that as a result the claimant was not entitled to either compensation or damages.[71]

5. Analysis of the judgment

The decision in *NT1/NT2* is particularly relevant given the traditional hostility of common law jurisdictions to rights of privacy that extend to historical criminal convictions.[72] Common law jurisdictions have traditionally privileged principles of open justice in contrast to the approach of many civil law jurisdictions which, in general, opposes punitive shaming and presumes criminal records to be confidential.[73] The civil law approach is reflected in the 1981 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data as well as the Data Protection Directive art.8(5) and the General Data Protection Regulation.[74]

NT1/ NT2 thus represents an explicit departure from traditional common law attitudes toward criminal histories. However, several aspects of the judgment deserve particular attention in relation to the potential of the decision to act as a useful precedent.

The most evident issue is that the judgment has been anonymised and referred to the convictions and circumstances of the claimants' crimes as well as the impact on their private and family lives in a manner sufficiently broad so as to preserve their identities. The emphasis placed by Warby J on the personal dispositions of both claimants and the absence of detailed evidence presented in the case make this problematic. The result is a judgment whose criteria are largely subjective, and whose findings are rendered in broad strokes, lacking a nuanced analysis of the specific details, or levels of detail, futile to future claimants.

In particular, the anonymisation poses challenges in distinguishing the criteria which will be considered sufficient to trigger a "grave" interference with arts 7 and 8, though this may also be attributable to the paucity of evidence offered by the claimants themselves. As a result of the anonymisation it is difficult to determine accurately which, if either, is the case.

In relation to the criteria associated with a criminal offence which favour delisting, Warby J centred his analysis on the guidelines established by the Working Party, of which the presence of criminal convictions is an aspect. However, his judgment neglected to establish a more specific set of criteria.

Based on Warby J's remarks, it appears that the length of the sentence and its relative placing on the scale of offences which may become "spent" will be relevant. However, Warby J specifically noted that a spent conviction would not be determinative and would be merely "weighty" in balancing individual rights and the public interest. There was no clarification of whether convictions which were not, and would not, become spent would be amenable to delisting though given the differentiation between NT1 and NT2 based in part on the severity of their sentences such convictions would implicitly not be amenable to delisting.

The judge also referred in his decision regarding NT2 to the fact that the crime at issue was not one of "dishonesty". However, there was no discussion of whether the differentiation as between a crime of dishonesty and other crimes was a determinative factor. Again, the implication from the judgment is that, as with a spent conviction, this will be a consideration rather than determinative factor.

[70] *NT1 and NT2* [2018] EWHC 799 (QB) at [224]-[226].

[71] *NT1 and NT2* [2018] EWHC 799 (QB) at [227], [228], [230].

[72] For a comparative analysis as between a common law and civil law jurisdiction see J.B. Jacobs and E. Larrauri, "Are criminal convictions a public matter? The USA and Spain" (2012) 14(1) *Punishment and Society* 3. On the still recent change in the Irish position, see T.J. McIntyre, "Criminals, Data Protection and the Right to a Second Chance" (2017) 58 *The Irish Jurist* 27.

[73] J.B. Jacobs and E. Larrauri, "European Criminal Records & Ex-Offender Employment" *New York University Public Law and Legal Theory*, *http://lsr.nellco.org/nyu_plltwp/532/* [Accessed 25 May 2018].

[74] Article 6 provides that criminal convictions "may not be processed automatically unless domestic law provides adequate safeguards".

A more helpful analysis would arguably have focused solely on the public interest guaranteed by maintaining the listings. While the judgment emphasised differential impacts on the public in its discussion of the offences of both claimants it muddied the waters by introducing dishonesty as a factor. The result is an unclear *mélange* of a public interest test with a categorical sliding scale of offences defined in relation to their relative degrees of deception. The implication that a conviction for a violent crime committed without deception would be more favourably treated than a non-violent offence of dishonesty is problematic on a public policy basis.

Moreover, as criminal acts generally involve an individual recklessly or knowingly breaking the law, invariably in a manner which seeks to avoid detection, the merits of using honesty as a distinguishing metric is of questionable merit.

The most substantively considered and most portable aspect of the judgment is its treatment of self-help. Both claimants, on the advice of reputation management professionals, had generated content with the express aim of influencing Google's list of returned results prior to the decision in *Google Spain*. In differentiating between the legitimate self-help employed by NT2 and the misleading information promulgated by NT1, Warby J clarified that self-help can be counted against claimants only where it is deliberately misleading.

Conclusion

The decision in *NT1/NT2* is somewhat confined to its facts due to the emphasis placed by the judge on a subjective assessment of credibility and remorse. Despite this, the case offers a tentative first step towards clarifying the criteria for a delisting order in cases involving criminal convictions and offers a significant endorsement of the right to be forgotten in such cases.

The decision in relation to NT1 may be clarified on appeal. However, the trial judge's comments on the claimant's credibility and the paucity of evidence offered would seem to make the likelihood of a successful appeal remote. Furthermore, the High Court case has generated significant media attention and an appeal to the Supreme Court would likely generate still more. In such circumstances were the reporting restrictions to be lifted following an appeal NT1's conviction would, somewhat ironically, be more public than if had he chosen not to pursue a delisting, as indeed was the case with the original appellant in *Google Spain*.