Recommended court cases

If you want to build your knowledge, I recommend this selection of cases covering different DP and Privacy issues. Many of them aren't exclusively about one issue; I could easily have put the Jehovah's Witness case under the heading of 'Domestic Purposes, whereas Durant touches on all sorts of questions. One of the benefits of reading these cases is that many of them go back to basics and discuss a variety of different DP aspects, but I think each one has a distinctive element that makes them worth your time.

1) What is personal data?

Breyer (European Court of Justice) 2015

Case C-582/14: Patrick Breyer v Bundesrepublik Deutschland

A detailed case that sets out a useful test for how the question of identifiability should be answered. Every DPO needs to read it to understand that even under the old rules, the extent to which identifiability might be interpreted turns out to be much more elastic than many might have thought. Though the GDPR definition of personal data is intentionally broad, Breyer shows how wide the old version was, and is very helpful for the future.

Nowak (European Court of Justice) 2018

Nowak v Data Protection Commissioner (20 December 2017) (C-434/16)

Mr Nowak fails an accountancy exam and wants to see his exam script – the Irish DP Commissioner gives his claim short shrift (a theme that is mirrored in a number of UK decisions that the ICO got wrong), but the European Court applies the same broad approach to the definition of personal data.

Durant (UK Court of Appeal) 2003

Durant v Financial Services Authority [2003] EWCA Civ 1746

Although many assume that Durant is a dead duck, there is a lot in this decision about focus and filing systems that is still highly relevant to the GDPR. Moreover, it's impossible to understand the last fifteen years of Data Protection history in the UK without reading Durant. It's highly likely that Durant's themes of biographical significance and the purpose of subject access will come back to haunt DP in years to come.

See also:

- Edem v Information Commissioner and Financial Services Authority [2014] EWCA Civ 92 – a sequel to Durant via Freedom of Information, repudiating the idea of 'biographical significance'

- Common Services Agency v Scottish Information Commissioner (HL) [2008] UKHL 47 – Another case of Data Protection colliding with FOI, and turning on the definition of personal data

2) Main place of establishment

Weltimmo (European Court of Justice) 2015

Weltimmo s.r.o. v Nemzeti Adatvédelmi és Információszabadság Hatóság

Possibly superseded by arrangements in the GDPR, this is nevertheless an important decision that establishes the principle that "real and effective activity" in a country can leave a controller open to enforcement action there.

3) Data Controller?

Facebook Fan Pages (European Court of Justice) 2018

Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v. Wirtschaftsakademie Schleswig-Holstein GmbH

In a case that may have echoes for other uses of Facebook (and other websites), this one takes a broad view of who can be a controller, and kicks around the idea of joint controllership.

4) What is a filing system?

Jehovah's Witnesses (European Court of Justice) 2018

Case C-25/17 Tietosuojavaltuutettu v Jehovan todistajat - uskonnollinen yhdyskunta

All data processed automatically is covered, but the nature of a filing system has always been a slippery concept (the definition of a filing system in Durant is quite restrictive, for example). This recent decision gives some good guidance about how it works.

5) Transparency

Bara (European Court of Justice) 2015

Case C-201/14 Smaranda Bara and Others v Presedintele Casei Nationale de Asigurari de Sanatate and Others

In Bara, the Romanian Government uses data about self-employed workers collected for tax purposes for a secondary purpose. This is a useful illustration of the pitfalls of reusing data and data sharing, even for solid-seeming government purposes, but as in so many cases, the lack of transparency is a key factor.

6) Legal basis

Named Person (Supreme Court) 2016

The Christian Institute v Lord Advocate [2016] UKSC 51

If you think court decisions might be heavy-going, this one may confirm your prejudices. The Scottish Government's faltering attempt to launch the Named Person scheme to protect the safety and wellbeing of Scotland's children hit the buffers at the UK Supreme Court because of both Data Protection and Human Rights. This is dense and complicated, but it is the best example in the UK of a court scrutinising how the DPA 1998's lawful basis provisions (which are not dissimilar to the GDPR) collide with legislation, and legislation can come off second best. If you're new to Data Protection, the Named Person case should not be the first court decision you read, but it is one of the most important DP cases of recent years.

7) Subject Access

Dawson-Damer

Dawson-Damer v Taylor Wessing LLP [2017] EWCA Civ 74

Possibly the most boring subject matter of any of these decisions, Dawson-Damer nevertheless contains several different strands of interesting commentary on how subject access works. Given the issue of motive is unlikely to die out because of GDPR's unfounded provisions, the discussion of a SAR applicant's reasons for applying is evergreen, but the elements of the decision that cover what a controller might have to do to locate data (or not do) are the most ground-breaking. Even though the Court's approach is arguably built on shaky foundations, it's unlikely future courts will ignore it, and the ICO amended its Subject Access Code as a result of it.

DB v GMC (Court of Appeal) 2018

DB v GMC [2018] EWCA Civ 1497

An important recent case about so-called 'mixed SARs' (for most controllers, the familiar situation of finding the SAR applicant's data mixed up with that of another subject). A patient seeks a report from the General Medical Council outlining the actions of his GP following a failure to diagnose his bladder cancer, and following protracted legal action, the Court of Appeal has to weigh his interests against those of the GP. Especially as the DPA 2018 SAR exemption uses very similar language to the DPA 1998 provisions, the discussion of how to carry out that balancing act is very helpful.

See also:

- *Ezsias v The Welsh Ministers [2007] EWHC B15 (QB)* – a fairly eccentric reading of the DPA 1998 brings proportionality into SAR searches
- *Durant v Financial Services Authority [2003] EWCA Civ 1746; [2004] FSR 28* – Durant is the mother of all DP decisions in the UK, and is the first to raise the spectre of the SAR applicant's motive.

8) Enforcement

Borders (First Tier Tribunal) 2013

Scottish Borders Council vs The Information Commissioner EA/2012/0212

It's impossible to say for certain until they start, but GDPR monetary penalties may operate differently from the way they did before. DPA 1998 penalties require the Information Commissioner to show some evidence of likely damage or distress, an important element of the Borders case, whereas GDPR does not. However, the Borders case shows several interesting things – the importance of running an appeal well (especially having a good witness on your side), and the Information Commissioner's clumsiness when making their case. Former Deputy Commissioner David Smith doesn't cover himself in glory with evidence that suggests he doesn't know the difference between an incident and a contravention of the legislation. Many ICO staff still have this problem, and it may hobble them again, as it did here

9) Compensation

Google vs Lloyd (High Court) 2018

Lloyd v Google [2018] EWHC 2599

It is very tempting to put either Morrisons or Vidal-Hall in this section as the main decision, but instead, I think the hype and hysteria surrounding Data Protection and compensation should be counteracted with Lloyd. Richard Lloyd, formerly of the consumer pressure group Which?, launched a failed attempt to sue Google for compensation following Google's use of cookies to obtain information about users of Apple devices. This case failed, and the decision sets out in detail the need for claimants to establish the alleged damage or distress, rather than simply joining a class action case.

See also:

- *Vidal-Hall v Google Inc [2014] EWHC 13 (QB)* – first decision in UK that recognises that subjects can claim for distress as well as damage
- *Morrisons v Various Claimants [2018] WLR(D) 653* – employers can be vicariously liable for data breach claims

10) Disclosure of sensitive data (also Human Rights vs Data Protection)

Dunn (Court of Appeal) 2012

Durham County Council v Dunn [2012] EWCA Civ 1654

Another sad story that reveals how DP and human rights law work together (or indeed, how human rights can take precedence). Mr Dunn is pursuing a compensation case against the council, alleging historic abuse while in their care, and wants to locate possible witnesses. This case lays bare the tension between the right to privacy (other people who were also boys in the care of the council at the time of the alleged abuse) and the right to a fair trial (Mr Dunn's case against the council). This case is not quite the green light to disclosure that some law firms have painted it as, but it's an eloquent summary of the issues.

11) International transfers

Schrems (European Court of Justice) 2015

Maximillian Schrems v Data Protection Commissioner Case C-362/14

To the bewilderment of many lawyers and DP professionals who imagined that the practicalities of data sharing across borders were beyond question, Maximillian Schrems, an Austrian privacy activist, pulled at the threads of the Safe Harbor arrangement between the EU and the US. Perhaps unsurprisingly, he made the whole thing unravel. The Schrems decision affects both the role of individual supervisory authorities in examining the arrangements for international transfers, but more importantly, finds Safe Harbor to be fundamentally inadequate. As well as what it says about the vital issue of transfers, this decision is an example of a well-informed and well-supported complainant can do. Schrems himself is still active, but it is very unlikely he will be the only such activist on the march under GDPR.

12) Human Rights Privacy vs Freedom of Expression

Cliff Richard (High Court) 2018

Sir Cliff Richard OBE v BBC [2018] EWHC 1837 (Ch)

After the police were apparently bounced into giving them information about a raid on one of Cliff Richard's houses (which ultimately led to nothing), the BBC went to town, covering the event with much fanfare and helicopter shots. Richard sued under both Data Protection and Privacy, and this lengthy but very readable decision lays out all of the issues clearly. Noting the media interest, the judge did publish a two-page summary, but it scratches the surface.

See also:

- *Mosley v News Group Newspapers Ltd [2008] EWHC 1777 (QB); [2008] EMLR 20* (Max Mosley gets spanked in Germanic style while being spied on by the News of the World)

13) Human Rights Privacy / monitoring

Peck (European Court of Human Rights) 2003

Peck v United Kingdom (2003) 36 EHRR 41

Several eye-catching privacy cases feature a celebrity like Naomi Campbell or Max Mosley. The Peck case is the antidote to all that – Mr Peck is an innocent man in a moment of crisis, unwittingly captured on CCTV. Images of him, and his privacy, are badly misused by clumsy and thoughtless officials, and because of the absence of the Human Rights Act 1998, implementing the Human Rights Convention into UK, Mr Peck has an eight-year fight to set things right. The case establishes the right to expectations of privacy in public places and is an essential read for anyone dealing with CCTV or other forms of monitoring.

Bărbulescu (European Court of Human Rights) 2017

Barbulescu v. Romania (application no. 61496/08)

If Mr Peck is a reluctant privacy pioneer, Mr Barbulescu is possibly not quite as heroic, given that his story involves him sending messages to friends and family while at work, in breach of his employer's policy. Nevertheless, scaling the dizziest of heights at the ECHR Grand Chamber, the Barbulescu case is an important decision on expectations of privacy in the workplace, and once again, emphasises the importance of transparency.

14) Confidentiality

Maddock (High Court) 2003

Maddock v Devon County Council (13 August 2003) (QBD)

A council faces a dilemma when they discover that a former social care client is starting a course to become a social worker, despite their concerns that her history makes her an unsuitable candidate. The Maddock case is a text-book example of the balance between maintaining a legitimate duty of confidence, and the public interest in disclosure to prevent harm.