[IE] Data Protection Commissioner and Google Ireland win High Court appeal on first 'right to be forgotten' case

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On the 9 February 2018, the High Court overturned a finding by the Circuit Court in favour of a former local election candidate, in the first "right to be forgotten" case in Ireland concerning internet postings. In 2014, an election candidate, Mark Savage, had objected to a thread on a website, Reddit.com, describing him as a "homophobic candidate." Reddit.com is an online discussion website. A contributor to the website called "Soupynorman" had uploaded Mr Savage's election leaflet which referred inter alia to "gay perverts cavorting in flagrante on the beach in broad daylight" and stated that the "hedonistic" activity in gay culture of "crusin" [sic] on a Dublin beach denigrates the institution of marriage. The posting of Mr Savage's election leaflet received quite a number of responses. Mr Savage participated in this discussion forum later, posting three lengthy contributions and objecting to being labelled as homophobic. One of Mr Savage's posts stated inter alia "I have the same compassion for homosexuals as I do for heroin addicts and prostitutes who all belong to the same category of being barred for life from ever donating blood by virtue of their destructive lifestyles."

Mr Savage made a complaint to Google in August 2014, stating that when his name was typed in the Google search bar, the results included a reference to him being a "homophobic candidate" and this was "completely inaccurate and defamatory." Google responded in October 2014, stating that when a person chooses to willingly run for public office, "the legitimate interest in providing access to information and of the public, in being able to search for information which is directly relevant to that candidate's political, economic and cultural stances which may be of relevance to potential voters, and constituents' ability to make informed decisions about political candidates vastly outweighs the data subject's right to privacy." Google pointed out that even though Mr Savage had failed to win office, he might run again in the next election and this information still retains a strong public interest value in identifying the political and cultural positions of the past candidates for this office."

Following Google's refusal to de-index the thread, Mr Savage complained to the Data Protection Commissioner (DPC), who found that Google's refusal to remove the Uniform Resource Location (URL) did not breach the Data Protection Acts 1988 and 2003. Mr Savage appealed the DPC's decision to the Circuit Court. The

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Circuit Court found it likely that Internet users would consult online discussion forums such as Reddit as a source of verified facts and ruled that Mr Savage's fundamental rights and legitimate interests were prejudiced. The Data Protection Commissioner and Google Ireland Ltd subsequently appealed that decision under section 26 on points of law, contending that the Circuit Court erred in law in its application of the Court of Justice of the European Union's Google Spain case (see IRIS 2014-6/3) and had erred in law in finding that the content of the URL title was factual in nature and not an expression of opinion.

In the High Court, Justice Michael White stated that the Circuit Court Judge "in applying the jurisprudence of Google Spain had a duty to consider the underlying article the subject of the search." Justice White noted that the Circuit Court did refer to this matter by indicating that if that Reddit.com discussion was considered, it would become clear that the original post by Soupynorman was an "expression of opinion" and the Circuit Court judge was "incorrect in law to consider the URL heading in isolation." Justice White stated that "if the court had considered the underlying discussion thread it could not have come to the conclusion that it was inaccurate data and factually incorrect, or an appearance of fact."

The High Court Judge found that Google Ireland Ltd or its parent company "does not carry out any editing function in respect of its activities" and "to mandate a search engine company to place parenthesis around a URL heading would oblige it to engage in an editing process which is certainly not envisaged in the Google Spain decision." Accordingly, the High Court vacated the order of the Circuit Court and reinstated the original determination of the Data Protection Commissioner.

Savage v Data Protection Commissioner and Google Ireland Ltd [2018] IEHC 122, 9 February 2018

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