MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF
PHILIP SCIBERRAS

Seduta tat-3 ta' Ottubru, 2007

Appell Civili Numru. 16/2006

Vodafone Malta Limited

vs

Kummissarju ghall-Protezzjoni tad-Data;
u b' digriet tal-Qorti tal-25 ta' Ottubru 2006, il-Kummissarju tal-Pulizija gie ammess *in statu et terminis* bhala intervenut f' dawn il-proceduri

Il-Qorti,

Fl-4 ta' Awissu, 2006, il-Bord ta' l-Appelli dwar il-Protezzjoni tad-*Data* ppronunzja s-segwenti decizjoni fl-ismijiet premessi:-

> **"***The Tribunal,*
>
> *After having heard the submissions of the Data Protection Commissioner (the "Commissioner") and*

the reasons why it was necessary for the Police authorities to request both Vodafone Malta Limited ("Vodafone") and Mobisle Communications Limited ("Go Mobile") to provide location data to the said Police authorities, the said Commissioner by a letter sent to Vodafone Malta Limited dated 8th June 2006 (marked as document PMC5 in the acts of the proceedings) consented to the Police authorities' request after exercising his judgment in maintaining the balance between the rights of privacy of the data subjects and the rights and obligations of the Police authorities to sustain in the necessary measure the interest of national security, defence, public security, the prevention, investigation, detection and prosecution of criminal or administrative offences, or of breaches of ethics for regulated professions etc, and this as stipulated under regulation 11 of LN 16 of 2003. The said Commissioner informed Vodafone and Go Mobile that, after his prior checking as required by law, from a data protection perspective, Vodafone and Go Mobile may provide information to the Police on the following conditions, that is, that no information provided to the Police and which is not required for its operations shall be retained or used by the Police for any other purpose and Vodafone and Go Mobile shall inform the Police on the completeness, accuracy and the degree of reliability of the information provided.

Prior to the decision of the Commissioner, the Commissioner of Police by letter dated 9th May 2006, a copy of which is annexed to the proceedings and marked as document PMC1, requested authorization from the Commissioner to be able to have access to information held by Go Mobile and Vodafone.

Subsequently, Vodafone and Go Mobile, by separate letters dated 15th May 2006, marked as documents PMC3 and PMC2 in the acts of the proceedings, requested the Commissioner to make prior checking

in light of the fact that the processing of personal data that had to be carried out by Go Mobile and Vodafone involved particular risks of improper interference with the rights and freedoms of data subjects.

It has transpired that the Commissioner had fixed a meeting at his offices on the 22nd May 2006 between the Commissioner of Police, Go Mobile and Vodafone in order to try and solve this matter. However, the positions taken by the parties remained contrasting and so the Commissioner had to decide the matter as provided by law. In actual fact, the Commissioner decided the matter on the 8th June 2006 as per documents PMC4 and PMC5 and informed Vodafone and Go Mobile that the Police authorities were entitled at law to collect the data required.

By a letter dated 8n June 2006, marked as document PMC6 in the acts of the proceedings, the Commissioner informed the Police authorities that they were entitled to collect the data required subject to the restrictions imposed in the said letter.

Vodafone and Go Mobile appealed from the decision taken by the Commissioner and filed their appeal before this Tribunal in terms of article 49 of the Data Protection Act from the guidance decision of the Commissioner. Vodafone's request is dated 5th July 2006 whilst Go Mobile's request is undated.

The Tribunal fixed a sitting to hear these appeals on the 28th July 2006. The parties present were the Commissioner, Dr. Tufigno and Dr. Sammut on behalf of Go Mobile, Prof. Refalo and Dr. Refalo on behalf of Vodafone, whilst Inspector Micallef, Inspector Muscat and Inspector Caruana represented the Commissioner of Police.

It was agreed by all parties to the appeal that the representatives of the Commissioner of Police were to remain present during the sitting.

The Tribunal had ordered its secretary, Mr. Bartolo, to inform the Commissioner of Police that on the day the appeal was to be heard, the said Commissioner of Police had to send his representatives to give evidence before the said Tribunal.

The Tribunal heard the evidence of the Commissioner, Inspector Caruana, Inspector Cremona, Mr. Alan Zammit and Inspector Muscat.

After hearing all evidence, where the parties even cross-examined the witnesses heard before the Tribunal, they declared that they had no further evidence and/or documentation to present to the said Tribunal and the Tribunal adjourned the appeal for judgment.

All parties were invited to submit in writing their final submissions in the English language as agreed to.

The Tribunal has received and noted the written submissions of the Commissioner, Go Mobile and Vodafone as well as the written submissions of the Commissioner of Police despite the fact that the said Commissioner of Police is not a party to the proceedings. In actual fact, the Tribunal dismissed the said written submissions of the Commissioner of Police since according to the law of procedure once the Commissioner of Police is not a party to the proceedings he cannot be considered to form part of the acts of the proceedings.

The facts as emerge from the evidence produced are the following:

1. The police authorities were investigating a series of arsons taking place in various parts of

Malta. During the course of their investigations the police required location data from Go Mobile and Vodafone, particularly in connection with the arson attacks that took place on the properties of Mr. Saviour Balzan and Mrs. Daphne Caruana Galizia;

2. The Police authorities had requested Vodafone and Go Mobile location data and prior to these events they demanded location data only in another case and this concerning the murder of Dr. Michael Grech;

3. It has transpired that the Police authorities have not requested location data indiscriminately from Vodafone and Go Mobile but location data strictly relating to specific timeframes and geographical areas;

4. It has also resulted that Go Mobile and Vodafone have given the required information and location data concerning the investigation in the arson of the residence of Saviour Balzan in Naxxar;

5. It transpired that the location data requested by the police authorities although available to the service providers had to be further processed by Go Mobile and Vodafone and was therefore not readily available. The data requested had to be extrapolated and was not accurate. Moreover, it was also alleged by Alan Zammit on behalf of Go Mobile that the data requested has a margin of error which was not quantified;

6. The location data requested by the Police authorities could relate to other data subjects not involved in any way with the alleged crimes and also because according to the present technology in use by Go Mobile and Vodafone, and the topography of the Maltese islands a person's mobile phone could be in one particular geographical area but caught by a base station located in an other geographical area;

7. The Police authorities have a data protection unit headed by Inspector Mary Muscat, which unit has been established circa 6 months ago, and in liaison with the Commissioner establishes systems, guidelines and procedures relating the processing,

weeding and retention of personal data held by the Police;
8. The Commissioner on the 8th June 2006, by a letter sent to the Commissioner of Police, limited the processing of the data requested by the Police authorities from Go Mobile and Vodafone to the investigations related to the series of arsons.

After having considered the evidence produced, the documents exhibited and the final written submissions, the Tribunal has, considered, the legal issues involved:

1. Article 34 of Chapter 440 of the laws of Malta empowers the Commissioner to prior check the processing of personal data that involves particular risks of improper interference with the rights and freedoms of data subjects;
2. The said "prior checking" shall be carried out by the Commissioner following receipt of a notification from either the data controller or the data subject;
3. Regulation 12 of Legal Notice 142 of 2004 concerning Data Protection (Processing of Personal Data in the Police Sector) Regulations 2004 empowers the body exercising police powers, and this without prejudice to the provisions of these Regulations, that, in the course of executing their duties for the prevention, suppression, investigation, detection and prosecution of criminal offences, the said police authorities ***have*** *access to a personal data filing system held for purposes other than police purposes in accordance with the law provided that the communicating body or the Commissioner for Data Protection has authorized such access;*
4. According to Article 2 of Chapter 440, personal data means any information relating to an identified or identifiable natural person whilst "personal data filing system" means any structured set of personal data which is accessible according to specific criteria whether centralized, decentralized or dispersed on a functional or geographical basis;

5. Article 5 (b) of Chapter 440 states that the Data Protection Act shall not apply to processing operations concerning, public security, defence, State security (including the economic wellbeing of the State when the processing operation relates to security matters) and activities of the State in areas of criminal law provided that the Minister may issue regulations. Specific regulations have been issued by virtue of Legal Notice 16 of 2003, Legal Notice 153 of 2003, Legal Notice 142 of 2004, Legal Notice 522 of 2004 Legal Notice 109 of 2005;

6. Regulation 11 of Legal Notice 16 of 2003 stipulates that the provisions of regulations 5, 6, 7 and 8 shall not apply when a law specifically provides for the provision of information as a necessary measure in the interest of national security, defence, public security, the prevention, investigation, detection and prosecution of criminal or administrative offences or of breaches of ethics for regulated professions, an important economic or financial interest including monetary, budgetary and taxation matters etc.;

7. Article 355AD (4) of the Chapter 9 of the laws of Malta provides that any person who is considered by the police to be in possession of any information or document relevant to any investigation has a legal obligation to comply with a request from the police to attend at a police station to give as required any such information or document;

8. Article 355Q of Chapter 9 of the laws of Malta empowers to police, in addition to the power of seizing a computer machine, require any information which is contained in a computer to be delivered in a form in which it can be taken away and in which is visible and legible;

9. The Directive 2002/58/EC concerning the processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector.

Therefore, in the circumstances, the Police authorities are authorized by law that is Article 355AD (4) and 355Q of Chapter 9 of the Laws of

Malta to demand from Go Mobile and Vodafone the requested information as it is necessary and relevant to investigate crimes concerning the series of arson attacks. The Data Protection Commissioner was in duty bound to exercise the balance between the right of privacy of the data subject and the right and obligation of the Police authorities to investigate criminal offences. In the modern world we live in, scene of the crime investigations should not only be limited to the 'reperti' gathered from the scene of the crime but to all other evidence that can be collated through the use of technology. It is evident that mobile telecommunication technology is an important instrument for the investigation and solution of crimes. The legislator has recognized the important role that technology plays in the investigation and solution of crimes and tried to establish a balance between the right of privacy of the data subject and the duties of the Police by implementing specific regulations which regulate the processing of personal data by the police. Hence, the establishment of the Data Protection Commission manned by the Commissioner who acts as the arbiter when data subjects' rights are or can be violated.

It is to be made amply clear that the police authorities have no "carte blanche" to ask Vodafone and Go Mobile or any other service provider, information regarding data subjects in a general and most ample manner covering a particular geographical area for any alleged crime committed. The seriousness of the crimes is a major factor that is to be considered by the police authorities, service providers and the Commissioner before granting the request for information. The privacy, liberty and freedom of the individual are to be protected and not violated so long as national security, defence, public security and the heinousness of crimes justifies this intrusion taking note of the principle of proportionality and relevance. It must be stated that the crimes investigated by the

police authorities concerning the arson attacks fall within the ambit of this criteria and the Commissioner was correct in his judgment after prior checking in striking the balance between the right of privacy of the individual and the rights and obligations of the police authority to investigate the alleged crimes.

Furthermore, the police, in the investigations relating to the series of arson attacks would have not exercised their duty diligently and according to law if they did not request Go Mobile and Vodafone to have access to the information processed by Go Mobile and Vodafone and the Commissioner, after prior checking, was correct in his discretion to grant the Police authorities the right to demand from Go Mobile and Vodafone the location data requested. It has transpired that this location data is available but could be costly, both financially and in manpower, for Go Mobile and Vodafone to extrapolate. It is the legal and civic duty of these companies to give this information requested by the Police authorities who have only requested same in another occasion that is in the investigation of Dr. Michael Grech's murder. In these circumstances, the Commissioner has exercised his duties correctly and within the powers conferred to him by law and within the powers established by the Directive 2002/58/EC concerning the processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector which has been transposed into our law.

This Directive plays explicit attention to location data but leaves room for exceptions to the strict regime for certain applications. The Directive allows member states to restrict the scope of the provisions discussed within the Directive by legislative measures when this is a "necessary, appropriate and proportionate measure within a democratic society to safe guard national security, defence, public security and the prevention,

investigation, detection and prosecution of criminal offences or of unauthorized use of the electronic communication system". The interpretation of this article, in the aftermath of 9/11, the 2004 Madrid bombings as well as the London bombings of July 2005 is clearly different than it was five years ago and it is correct for democratic states to demand the retention of location data for a period of time in order to assist the administration of justice. Although our law does not at present regulate the retention of location data, this would not be amiss if our legislator would legislate accordingly provided that the fundamental human rights of individuals would be protected and safeguarded. The greatest risks for location privacy seems to come from governments when these exceptions would be applied too widely. However, in the circumstances under review, we find that the decision taken by the Data Protection Commissioner on the 8th June 2006 was exercised with due diligence and the balance between the rights of privacy of the data subjects and the administration of justice was duly taken into consideration. It is only just and equitable that Go Mobile and Vodafone give the information requested by the Police authorities relating to the series of arson attacks under investigation as soon as possible and without any further delay. Any delay will only be an instrument of advantage in the hands of these perpetrators which in a democratic society are to be suppressed as such arson attacks can destabilize our community.

However, the data collated is to be processed by the Police authorities within the limitations as specified by the Data Protection Commissioner in his letter to the Police Commissioner dated 8th June 2006, specifically:

1. that the data is to be processed by the Police authorities limitedly for the specific arson investigations;

2. the data will not be used or processed for any other purpose;
3. in the event that, after matching the data, it is found that some data has no relevance to the investigations, the said data must be erased or deleted immediately;
4. that the Police must take full consideration of the completeness, accuracy and the degree of reliability of the data being processed; and
5. that only the data which may be required for prosecution purposes shall be retained by the Police authorities;

The Tribunal feels that an obligation of the Data Protection Commissioner should be included and orders:

6. that the Data Protection Commissioner is to ensure that the limitations afore-mentioned are followed by the Police authorities and that the Data Protection Unit of the police authorities shall weed information regularly and to his satisfaction after the investigations and prosecution of the crimes would have been concluded.

*In the circumstances, the present appeal of Vodafone for the afore-mentioned reasons is being declined and the Data Protection Commissioner's decision dated 8th June 2006 is to be adhered to by Vodafone and all information requested by the Police authorities be immediately made available to the Police authorities.***"**

Bl-appell taghha minn din is-sentenza s-socjeta` rikorrenti tobbjetta fuq zewg livelli. Fl-ewwel lok tissottometti illi t-Tribunal zbalja kemm fl-applikabilita` kif ukoll fl-interpretazzjoni tal-provvedimenti tal-ligi ghal kaz. Sekondarjament, li d-decizjoni moghtija twassal ghal vjolazzjoni tad-dritt ta' kull *subscriber* ghal privatezza fil-komunikazzjonijiet, u dan meta c-cirkustanzi ghal liema

qeghda tintalab l-ipprocessar u t-trasferiment ta' l-informazzjoni ma jikkostitwux interferenza gustifikata;

L-antecedenti ta' fatt li taw lok ghall-appell quddiem it-Tribunal huma sew esposti fis-sentenza appellata u mhux il-kaz li din il-Qorti toqghod tirriproducihom, jekk mhux forsi biex tissottolineja, bhala l-aktar rilevanti, l-aspett illi kemm is-socjeta` appellanti (ara ittra taghha tal-15 ta' Mejju 2006), kif ukoll il-Kummissarju tal-Pulizija (ara *e-mail* tas-Supt. Peter Paul Zammit tad-9 ta' Mejju 2006) kitbu lill-Kummissarju ghal Protezzjoni tad-Data ghal verifika u parir deciziv tieghu riferibilment ghar-rikjesta maghmula mill-Pulizija ghall-ipprocessar ta' data fid-disponibilita` tas-socjeta` rikorrenti "*regarding calls through the cell communication apparata*", u ta' l-informazzjoni hekk mill-processar estratta. Hu spjegat illi tali rikjesta kienet qeghda issir in konnessjoni ma' investigazzjonijiet ta' incidenti ta' incendju b' konnotazzjonijiet xenofobi u razzjali li avveraw f' perjodu partikulari u hinijiet specifici f' lokalitajiet diversi. Ghall-ezattezza, bl-ittra taghha riferita s-socjeta` appellanti kkwerelat il-gustifikazzjoni tar-rikjesta li saritilha, u dik tan-necessita u l-proporzjonalita ta' l-informazzjoni mitluba, f' kuntest tad-dritt fundamentali ghal privatezza;

Dan premess, il-Qorti hi tal-fehma illi, gjaladarba, il-materja in diskussjoni hi terren ghal kollox gdid ghaliha, hu vitali li taghmel din l-introduzzjoni preliminari. Jidher ferm evidenti illi l-ghan centrali ta' l-Att dwar il-Protezzjoni u Privatezza tad-Data (Kapitolu 440) hu dak li jittutela l-individwi kontra l-lezjoni tal-privatezza taghhom bl-ipprocessar ta' "data personali", liema espressjoni, kif imfisser mill-Artikolu 2 ta' l-Att tinkorpora "kull informazzjoni li tirrigwarda persuna naturali identifikata jew identifikabbli". Storikament, jidher li din it-tutela akkordata mill-Att hi artikolata fuq id-dispost ta' l-Artikolu 286 tat-Trattat ta' l-Unjoni Ewropeja, id-Direttiva 95/46/EC, l-Artikolu 8 (1) tal-Konvenzjoni Ewropeja assorbit fil-Kapitolu 319 tal-ligijiet taghna u dawk tar-regolamenti maghmulin taht l-Att;

Wisq naturali, kif spiss inhu l-kaz, il-principju baziku appena accennat mhux assolut, tant li ghalih l-istess ligijiet, direttivi u regolamenti imsemmija jistabilixxu ezenzjonijiet u restrizzjonijiet. Ad ezempju, meta l-ingerenza minn awtorita` pubblika ghall-ipprocessar jew ksib ta' informazzjoni tkun hekk mehtiega ghal xi wiehed mill-ghanijiet specifici kalendati fl-Artikolu 23 (1) tal-Kapitolu 440. *Inter alia*, fl-interess "tas-sigurta pubblika" (subpara. "c") jew "tal-prevenzjoni, investigazzjoni, kxif u prosekuzzjoni ta' reati kriminali" (subpara. "d"). Ragonevolment, wiehed jifhem illi l-harsien tas-sikurezza tac-cittadini f' socjeta` demokratika, u dik tal-prosekuzzjoni tar-reati, huma wkoll prijorita centrali li tikkomporta f' min hu hekk responsabbli mill-garanziji xierqa illi jkun jista' jinqeda b' dawk l-ghodod legali biex jimpedixxi li haddiehor japprofitta ruhu mil-libertajiet iggarantiti. Logikament, pero`, trattasi ta' ezenzjonijiet jew restrizzjonijiet, hu kawtelat illi "*the proper approach is to construe them narrowly*" ("**Data Protection Law and Practice**" – **Rosemary Jay u Angus Hamilton,** Sweet & Maxwell, Second Edition, 2003, pagna 370). Li jfisser, illi wiehed ghandu joqghod ferm attent li jevita indhil zejjed fil-privatezza ghax dan kapaci jitraduci ruhu fi frustrazzjoni tal-principju fundamentali tutelat;

Il-kwestjoni hi certament wahda spinuza minhabba l-importanza tal-valuri guridici *in ballo*, u dik tal-konsiderazzjoni illi jkun assigurat illi ebda wiehed mill-valuri kostituzzjonali u konvenzjonali, potenzjalment konfliggenti, ma jkun distorpjat jew sagrifikat. Inevitabilment, il-gudizzju ma jistax ma jkunx soggetiv ghax, kif jinghad mill-awturi citati fl-opra surreferita, "*whether there is a likelihood of prejudice in a particular case will be a question of fact and judgement. In order for there to be prejudice there must be a positively detrimental effect and likelihood will be judged on the basis of whether it is more likely than not*" (Op. cit. pagna 371). Finalment, pero`, il-kwestjoni tirreduci ruhha ghal wahda ta' ricerka ta' dak il-bilanc, dejjem delikat, bejn l-

obbjettiv aspettat li jintlahaq bl-ipprocessar tad-data u d-dritt fundamentali ta' l-individwu ghal privatezza. B' mod partikulari, ir-raggungiment ta' dak l-ekwilibriju gust bejn it-trattament tad-data b' finalita ta' gustizzja u l-principju bazilari tal-harsien ta' l-isfera privata;

Koncizament, mill-ezami tal-ligijiet, direttivi u d-decizjonijiet tal-Qorti Ewropeja tad-Drittijiet tal-Bniedem il-Qorti tintravvedi dawn l-elementi ta' sustanza:-

(i) Kull korp jew enti li jipprocessa data personali ghandu jsegwi l-principji tad-"*data protection*". Jigifieri, li l-ipprocessar isir legalment u b' mod gust, fit-termini tad-drittijiet ta' l-individwu, kompriza dik tal-kunfidenzjalita` ta' kull forma ta' komunikazzjoni jew korrispondenza maghmula minnu. Ara Artikolu 41 (1) tal-Kostituzzjoni u Artikolu 8 (1) tal-Konvenzjoni;

(ii) Gjaladarba, il-ligijiet jiggarantixxu certu livell ta' protezzjoni f' materja ta' ipprocessar, access, utilizzazzjoni u kontroll tad-data, anke meta dawn ikunu trattati minn xi Awtorita`, jispetta lil min irid jiddeciedi jekk l-informazzjoni ghandhiex tkun disponibbli u f' liema mizura;

(iii) Ghall-intruzjoni minn Awtorita` fuq il-principju surreferit tal-kunfidenzjalita` ghandhom jigu provvduti ragunijiet legittimi ghal daqshekk u jkun sodisfacentement muri illi l-otteniment ta' l-informazzjoni huwa hekk necessarju skond il-precetti tas-subinciz (2) ta' l-Artikolu 8 tal-Konvenzjoni, l-Artikolu 23 (1) tal-Kapitolu 440 u r-Regolament 11 ta' l-Avviz Legali 16 ta' l-2003 dwar l-ipprocessar ta' Data Personali fis-Settur tat-Telekomunikazzjonijiet;

(iv) Dejjem skond dawn l-istess ligijiet u l-interpretazzjoni akkordata mill-Qorti Ewropeja tad-Drittijiet tal-Bniedem, kull kaz jesigi illi jkunu sodisfatti dawn it-tliet kriterji: (a) l-ezistenza ta' bazi legali, (b) il-htiega li l-mizura adotta tkun fl-interess ta' xi wiehed mill-iskopijiet legittimi elenkati, (c) li jkun rispettat il-principju tal-proporzjonalita`.

Innegabilment, hu, sew guridiku, sew logiku, illi l-ligijiet jassoggettaw l-akkwizizzjoni u l-uzu tad-data b' dawn il-kriterji in kwantu tali jkunu qed isiru kontra l-volonta ta' l-interessat jew minghajr il-kunsens preventiv tieghu;

Ferma din l-introduzzjoni generali qasira, meta jigu distillati l-kontenut ta' l-appell u tat-twegibiet ghalih, jidher li l-kwestjoni involuta tirreduci ruhha ghal dawn il-kweziti:-

(1) Jekk ir-rikjesta tal-Pulizija, fil-fattispeci, hijiex konformi ma' ligi specifika ghall-otteniment ta' l-informazzjoni;

(2) Jekk l-indhil fil-komunikazzjonijiet bil-*mobile* ta' firxa wiesgha ta' utenti huwiex hekk necessarju u approprijat;

(3) Jekk giex sodisfatt it-test tal-principju tal-proporzjonalita`;

S' intendi, jezistu wkoll aspetti ta' indoli preliminari sollevati mill-Kummissarju ghal Protezzjoni tad-Data u mill-Kummissarju tal-Pulizija fir-risposti taghhom ta' l-appell li hu opportun f' dan l-istadju li l-Qorti tghaddi biex tinvesti u tiddisponi minnhom;

Brevement, l-eccezzjonijiet preliminari mqanqla huma suddivizi kif gej:-

(1) L-inapplikabilita` tal-Kapitolu 440 ghal kaz in ispecje;

(2) Il-karenza ta' l-interess guridiku fis-socjeta` appellanti;

(3) Il-Kapitolu 440 ma jikkontemplax dritt ta' appell mill-procedura ta' "*prior checking*";

(4) In-nuqqas ta’ integrita` tal-gudizzju in kwantu tonqos il-presenza tal-Kummissarju tal-Pulizija fil-proceduri;

(5) L-appell huwa irritu u null ghal motiv li l-aggravji tas-socjeta` appellanti ma jammontawx ghal “punt ta’ ligi”;

(6) L-appell interpost hu frivolu u vessatorju intiz ghall-persistenza ta’ l-ostilita` da parti tas-socjeta` appellanti tal-ghoti ta’ informazzjoni ghall-investigazzjoni ta’ reati serji;

Qabel ma l-Qorti tghaddi ‘l quddiem biex tezamina singolarment dawn l-eccezzjonijiet jiswa li jigi premess is-segwenti. Salv ghal x’ uhud minnhom, maggorment il-precitati eccezzjonijiet qeghdin b’ mod formali jitqajmu ghall-ewwel darba quddiem din il-Qorti, meta, invece, skond l-ordni processwali, dawn kien messhom gew sollevati quddiem it-Tribunal adit biex dan jiddelibera dwarhom u jiddecidihom. Dan ghaliex, kif saput, il-kwestjonijiet li fuqhom jigi bazat l-appell jew it-twegiba ghalih iridu jkunu fformaw kontroversja quddiem l-ewwel tribunal. Ara **Kollez. Vol. XXXV P I p 160**. Tkun sovversjoni tad-dritt kieku kellu jigi permess li din il-Qorti ta’ revizjoni tindahal biex tezamina eccezzjonijiet sollevati *noviter deductus* fir-risposta ta’ l-appell. Kif sewwa nghad mill-Qorti kolleggjali ta’ l-Appell, “mhux lecitu li s-socjeta` konvenuta tqajjem materji ta’ din ix-xorta quddiem il-Qorti ta’ revizjoni kemm ghax dan ikun jissorprendi lil kontroparti u jipprivaha mid-dritt tad-*doppio esame*, kif ukoll ghaliex il-Qorti ma ghandhiex bhala regola tippermetti li dan isir meta l-fatti li fuqhom dawn il-kontestazzjonijiet ikunu bazati jkunu ovvjament diga` sewwa maghrufa lill-appellanti qabel u waqt it-trattazzjoni tal-kawza quddiem l-ewwel Qorti” (“**Malcolm Cachia *nomine* -vs- Joseph Apps *nomine***, 30 ta’ Gunju 1997). Ankorke din il-Qorti kienet fakoltizzata taghmel dan l-ezami, xorta wahda ma ssibx illi l-eccezzjonijiet ghandhom fondament;

Taht l-ewwel eccezzjoni l-appellati jirrikorru ghad-dispost ta' l-Artikolu 5 (b) ta' l-Att XXVI ta' l-2001 dwar il-Protezzjoni u Privatezza tad-Data (Kapitolu 440) li jipprovdi li l-Att ma japplikax "ghall-operazzjonijiet ta' ipprocessar li jirrigwardaw is-sigurta pubblika, id-difiza, is-sigurta ta' l-Istat (inkluz il-gid ekonomiku ta' l-Istat meta l-operazzjoni ta' processar tirrigwarda hwejjeg ta' sigurta`) u attivitajiet ta' l-Istat fil-kamp tal-ligi kriminali". Korrettement intiz, dan id-dispost jipresupponi l-kaz ta' operazzjonijiet ta' ipprocessar li jsiru mill-Awtoritajiet infushom u mhux ukoll meta dan l-ipprocessar ikun qed jintalab li jsir minn korpi u operaturi terzi li jkollhom data personali. Hu difatti mahsub bir-Regolamenti ta' l-Avvizi Legali 142 ta' l-2004 (maghmula bis-sahha ta' l-Artikolu 5 ta' l-Att principali) illi biex il-Pulizija, jew kull enti pubblika ohra, awtorita` jew korp li jezercitaw poteri ta' pulizija (ara d-definizzjoni relattiva fl-Artikolu 2 ta' l-Avviz Legali msemmi) ikollhom access ghal sistemi ohra fejn jinzammu data personali ghal ghanijiet mhux konnessi ma' ghanijiet tal-pulizija skond il-ligi, jrid ikollhom l-otteniment tal-kunsens mill-operaturi terzi jew l-awtorizzazzjoni preventiva ghal tali access u informazzjoni mill-Kummissarju ghall-Protezzjoni u Prevenzjoni tad-Data (ara Regolament 12). Kieku kellu jigi ragonat xort' ohra ma kien ikun hemm l-ebda htiega tal-*fax* tad-9 ta' Mejju 2006 mibghut mill-Kummissarju tal-Pulizija lill-Kummissarju tad-Data Protection ghall-parir deciziv tieghu biex is-socjeta` appellanti, *qua service provider,* tghaddilu l-informazzjoni opportuna wara l-ipprocessar minn din tat-traffiku tad-data, fit-termini tar-Regolament 11 ta' l-Avviz Legali 16 ta' l-2003 dwar l-Ipprocessar ta' Data Personali fis-Settur tat-Telekomunikazzjonijiet. Taht dan il-profil ta' hsieb, l-eccezzjoni mhix akkoljibbli;

In sostenn tat-tieni eccezzjoni, li minn imkien mill-atti ma jirrizulta li giet sollevata quddiem it-Tribunal, l-appellati jissottomettu illi n-nuqqas ta' interess guridiku fis-socjeta` appellanti jissussiti ghal raguni illi l-akkadut huwa sempliciment ir-rizultat tal-fatt illi l-Kummissarju ghal Protezzjoni tad-Data segwa l-procedura ta' "*prior*

checking" skond l-Artikolu 34 tal-Kapitolu 440. Din il-Qorti tistqarr illi sincerament ma tistax tapprezza l-motiv ghal din l-eccezzjoni. Certament, l-interess guridiku fis-socjeta` appellanti twieled mir-rikjesta tal-Pulizija ghall-ipprocessar tad-data u mill-accertament li htieglu jsir dwar jekk tali rikjesta kienetx tinvolvi riskju partikulari ta' indhil mhux dovut fid-drittijiet u libertajiet ta' l-abbonati taghha, *qua* suggetti tad-data. Koncettwalment, dan l-interess ma jistax ma jitqiesx wiehed dirett, legittimu u attwali. Hu wkoll f' relazzjoni mar-rizultament utli li jkun rimoss l-istat ta' incertezza fuq il-portata ezatta ta' l-obbligi tas-socjeta` appellanti taht l-Att. Dan, bl-intervent tal-Kummissarju ghall-Protezzjoni tad-Data li, skond in-nota marginali ghall-Artikolu 34, lilu riedet tkun riferita, b' notifikazzjoni obbligatorja, il-kwestjoni ghas-soluzzjoni deciziva minnu. *Qua* sokkombenti fil-gudizzju tal-Kummissarju, l-interess tas-socjeta` appellanti baqa' jippersisti kemm fil-proceduri quddiem it-Tribunal, kif ukoll issa quddiem din il-Qorti. B' dawn il-konsiderazzjonijiet anke din l-eccezzjoni hi destinata li tfalli;

Fl-analisi tat-tielet eccezzjoni hu necessarju li wiehed japporta ruhu ghad-dispost ta' l-Artikolu 40 ta' l-Att riferibilment ghal funzjonijiet tal-Kummissarju ghall-Protezzjoni tad-Data. Fost ohrajn, (i) l-ezercizzju ta' kontroll u verifikar jekk l-ipprocessar ikunx qed isir b' mod konformi mad-disposizzjonijiet ta' l-Att jew tar-regolamenti tahtu, (ii) li jimpartixxi istruzzjonijiet u ordnijiet dwar mizuri applikabbli biex l-istess processar ikun konformi ma' l-Att u, b' mod generali, ghal finijiet ta' l-Att. Funzjonijiet dawn li, ilkoll, jimportaw gudizzju u, kif inhu l-kaz hawnhekk, li s-*service providers* jghaddu lill-Pulizija l-informazzjoni mitluba. L-appellati donnhom jippretendu b' argoment illi la l-*prior checking* jaqa' fid-diskrezzjoni tal-Kummissarju ghal Protezzjoni tad-Data, u la dan iddetermina li l-ipprocessar seta' jsir allura, bhal speci, *omnia tacet*, ghax dik id-diskrezzjoni tieghu mhix sindakabbli minn ebda tribunal u s-socjeta` appellanti kellha *nolens volens* takkwieta ruhha ghal gudizzju tieghu. Ghal din il-Qorti dan l-argoment huwa inaccettabbli. Li kieku kien hekk, il-ligi ma kienx ikollha ghalfejn takkorda d-dritt ta' appell lit-

Tribunal kif hekk proprju tipprovdi bl-Artikolu 49 (1) ta' l-Att u, specifikament, bir-Regolament 15 ta' l-Avviz Legali 16 ta' l-2003 ghal kaz li l-persuna thossha aggravata bid-decizjoni tal-Kummissarju imsemmi ghax ikun jidhrilha li dan avvicina l-kwestjoni taht vizjoni skorretta tal-ligi, sew procedurali sew sostantiva, jew fil-kaz ta' irregolarita materjali, inkluza l-irragonevolezza jew nuqqas ta' proporzjonalita` [subinciz (2) ta' l-Artikolu 49]. Anke allura din l-eccezzjoni qed tigi skartata;

Il-Qorti ma jidhrilhiex li r-raba' eccezzjoni toffri vera diffikulta. Jidher mid-disposizzjonijiet espressament prevvisti mill-Att u, senjatament, in-natura partikulari u l-konfigurazzjoni tar-rapport guridiku dedott fil-gudizzju, tendenti ghar-revoka jew modifika tad-decizjoni tal-Kummissarju ghal Protezzjoni tad-Data, illi l-litiskonsorzju fil-procedimenti ma ghandux hlief ikun l-istess Kummissarju imsemmi. La f' dan il-kaz hekk sar u l-appell quddiem it-Tribunal validament instawrat fil-kontradittorju ta' dan l-istess Kummissarju, il-gudizzju kien diga` integru. Fil-fehma tal-Qorti dan hu sahansitra hekk deducibbli mit-test ta' l-Artikolu 51 ta' l-Att li jakkorda dritt ta' appell lil din il-Qorti kemm lil parti, kif ukoll lill-Kummissarju nnifsu. F' kull kaz, imbaghad, il-kwestjoni issa tinsab sorvolata bl-intervent fil-proceduri tal-Kummissarju tal-Pulizija. Ara digriet ta' din il-Qorti tat-23 ta' Ottubru 2006 li permezz tieghu giet akkolta t-talba ghall-intervenjenza mressqa mill-Kummissarju tal-Pulizija. Hu ghalhekk ukoll li l-Kummissarju tal-Pulizija ma qanqalx eccezzjoni simili fir-risposta tieghu ta' l-appell;

Is-sitt eccezzjoni li l-Qorti hi msejha tiddetermina hi forsi l-aktar wahda aspettata, anke jekk, fil-verita`, l-appellati jillimitaw ruhhom ghal generalizzazzjoni illi l-appell mhux ritwali ghax ma jmissx "punt ta' ligi", kif fl-Artikolu 51 ta' l-Att jinsab preskritt. M' hemmx dubju illi biex din il-Qorti jkollha gurisdizzjoni jkun irid jintwera li l-appell ikun bazat fuq punt ta' ligi, anke jekk ma hemmx ghalfejn taht l-Att regolatur illi dan ikun gie definit fis-sentenza appellata. Issa c-censura tas-socjeta` appellanti ghall-konkluzjonijiet

tat-Tribunal, u anke ghal parir deciziv tal-Kummissarju ghal Protezzjoni tad-Data, hi principalment fis-sens ili dawn enuncjaw skorrettement il-principji tal-ligi stabbliti fl-Artikolu 23 (1) ta' l-Att, ir-Regolament 11 ta' l-Avviz Legali 16 ta' l-2003 maghmul tahtu u l-Artikolu 8 tal-Konvenzjoni Ewropeja. Hu, difatti, evidenti mill-korp tar-rikors ta' l-appell illi l-kritika tas-socjeta` appellanti tikkoncerna l-interpretazzjoni tar-rekwiziti gja surreferiti, ossija dawk (i) tal-bazi legali ghall-ghoti ta' l-informazzjoni, (ii) bhala mizura mehtiega, u (iii) f' kombinazzjoni mal-principju tal-proporzjonalita`. Artikolat kif inhu taht dan il-profil l-appell sottomess jikkontjieni, fil-hsieb tal-Qorti, il-punt ta' ligi skond l-Artikolu 51 u dan jaghmel is-sentenza tat-Tribunal appellabbli. Proprju in tema gie ritenut illi "jekk it-Tribunal ikun enuncja skorrettement il-principju tal-ligi u mbaghad jaqta' l-kwestjoni ta' fatt in bazi ghal dik l-enuncjazzjoni zbaljata allura jkun hemm sostanzjalment kwestjoni ta' dritt u l-appell jista' jsir u l-Qorti ta' l-Appell tista' tirrevedi dak l-apprezzament ta' fatt maghmul in bazi ghall-ipotesi skorretta tal-ligi" (**Kollez. Vol. XXXVII P I p 126**). Konsegwentement, la l-appell jinvolvi is-succitati kwestjonijiet ta' ligi li jridu jigu rizoluti, l-inappellabilita` opposta mill-appellati ma tistax tigi milqugha u qed tigi respinta;

Is-sitt u l-ahhar eccezzjoni preliminari giet sollevata unikament mill-intervenjenti, il-Kummissarju tal-Pulizija. Bil-kontra tal-fehma espressa minnu, din il-Qorti ma ssibx li l-appell interpost hu wiehed van jew nieqes mis-serjeta biex ikun jista' jinghad li dan hu "frivolu u vessatorju". Anzi, il-Qorti tara li l-kwestjonijiet legali mqanqla jisthoqqilhom dik l-attenzjoni xierqa u d-dehen tal-gudikant sedenti ghall-ahjar konsiderazzjoni tal-punt kontrovertit dwar id-dritt ghal privatezza u dak tad-dritt ghall-access ghall-informazzjoni minn awtorita` pubblika. Ikollu jinghad illi rigwardata taht din il-perspettiva l-eccezzjoni hi ghal kollox inattendibbli;

Spjanat it-terren minn dawn l-eccezzjonijiet formali u legalistici li, bir-rispett dovut, x' aktarx iservu biex

jikkomplikaw il-proceduri, jidher li, kif gja ampjament ikkummentat *supra*, il-qalba tal-kontroversja, tirrigwarda r-retta interpretazzjoni tal-kriterji rilevanti tal-ligi, gja abbondantement riferenzjati;

B' mod generali, il-kwestjoni konkreta hawnhekk titratta milli jkunu individwati l-limiti u l-modalitajiet ta' dawk l-elementi ta' dritt ghall-iskop u sodisfaciment ta' finalita` investigattiva mill-Pulizija, u dik ta' l-indagini direttament konnessa ma' fatti, kriminalment rilevanti. F' dan l-istharrig hu importanti li tigi qabel xejn rikjamata l-attenzjoni ghall-osservazzjoni illi "*although telephone conversations are not expressly mentioned in para. 1 of article 8 (European Convention) the Court considers, as did the Commission, that such conversations are covered by notions of 'private life' and 'correspndence' referred to by this provision*." ("**Klass and Others -vs- Germany**", 5029/71, ECHR, 6 ta' Settembru, 1978);

Premess dan, in-natura dibattuta tal-process tidher minn Noti ta' osservazzjonijiet ipprezentati mill-partijiet quddiem it-Tribunal. Fil-kaz tas-socjeta` appellanti din tissottometti illi l-opposizzjoni taghha ghall-ipprocessar u l-ghoti ta' l-informazzjoni mitluba f' dan il-kaz hi artikolata fuq il-konsiderazzjoni illi l-interferenza rikjesta ma tilhaqx il-miri stabbiliti a norma tar-Regolament 11 ta' l-Avviz Legali 16 ta' l-2003 u l-Artikolu 8 (2) tal-Konvenzjoni. Inversament, il-Kummissarju ghal Protezzjoni tad-Data hu ta' veduta kuntrarja. In succinct, filwaqt li jirrikonoxxi l-ezistenza ta' theddida serja ghal privatezza ta' individwi, b' danakollu, konsiderat ukoll il-gravita` tar-reati kommessi, dan ma kienx ta' xkiel ghall-indhil rikjest, anke ghaliex hu ha hsieb jintroduci salvagwardji ghall-ahjar protezzjoni tad-dritt ghall-privatezza;

Minn dawn is-sottomissjonijiet hu bil-wisq evidenti illi l-kwestjoni centrali tirrigwarda maggorment l-interpretazzjoni tas-subinciz (2) ta' l-Artikolu 8 tal-Konvenzjoni u l-applikabilita` tieghu ghall-fattispeci. L-

imsemmi artikolu testwalment jiddisponi illi "**ma ghandux ikun hemm indhil minn awtorita` pubblika dwar l-ezercizzju ta' dan id-dritt hlief dak li jkunu skond il-ligi u li jkun mehtieg f' socjeta` demokratika fl-interessi tas-sigurta` nazzjonali, sigurta` pubblika jew il-gid ekonomiku tal-pajjiz, biex jigi evitat id-dizordni jew l-eghmil ta' delitti ghall-protezzjoni tas-sahha jew tal-morali, jew ghall-protezzjoni tad-drittijiet u libertajiet ta' haddiehor**";

Manifestament, l-appena riportat dispost tal-ligi jikkontempla ipotesi ta' ingerenza fuq id-dritt ghar-rispett tal-hajja privata u tal-korrispondenza. B' danakollu, kif denotat mill-awturi aktar 'il fuq citati, dan l-istess artikolu, krejattiv ta' l-eccezzjoni ghall-principju, ma ghandux jitqies, fil-qafas ta' l-ezenzjonijiet u restrizzjonijiet taht l-Artikolu 23 (1) tal-Kapitolu 440 u tar-Regolament 11 ta' l-Avviz Legali 16 ta' l-2003, bhala xi "*blanket provision*" u, anzi, ghandu jigi rigwardat "*on a case by case basis*" (Op. cit. pagna 370);

Minn dak ricerkat jidher li l-gurisprudenza tal-Qorti Ewropeja ghad-Drittijiet tal-Bniedem (anke jekk il-fatti fihom ma humiex identici ghal dawk tal-kaz prezenti) hi orjentata versu dawn il-linji gwida:-

(1) In linea ta' kumment generali, il-principju regolatur in materja hu dak li t-termini ta' l-Artikolu 8 (2) ghad-dritt baziku ggarantit mill-Konvenzjoni jridu jigu interpretati ristrettivament (*exceptiones sunt strictissima interpretationis*). Dan ghal raguni illi kwalunkwe disposizzjoni eccezzjonali bhal ma hi dik in kwestjoni ma timmeritax interpretazzjoni estensiva. L-ipprocessar ta' komunikazzjonijiet, minghajr il-konsapevolezza ta' l-utenti, ghandu jkun tollerat sa fejn dan hu strettament necessarju ghall-harsien ta' socjeta` demokratika. Ara "**Klass and Others -vs- Germany**", gja riferenzjata;

(2) L-indhil, meta permissibbli, ghandu jkun "*in accordance with the law*". Din l-espressjoni hi

ulterjorment imfissra bhala, li "*the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to forsee the consequences for him, and compatible with the rule of law*" ("**Kruslin -vs- France**", 11801/85, ECHR 10, 24 ta' April 1990);

(3) Fuq din l-ahhar parti ssokta jigi approfondit illi "*the requirement of forseeability cannot mean that an individual should be enabled to forsee when the authorities are likely to intercept his communications so that he can adopt his conduct accordingly. Nevertheless, the law should be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the the conditions on which public authorities are empowered to resort to any secret measures*". Ara "**Kopp -vs- Switzerland**", 23224/94, ECHR 18, 25 ta' Marzu, 1998 u "**Amann -vs- Switzerland**", 27798/05, ECHR 88, 16 ta' Frar, 2000);

(4) Kwantu ghall-espressjoni "dak li hu mehtieg f' socjeta` demokratika", dejjem fil-kuntest ta' l-Artikolu 8 (2) jinghad li din "*does not have the flexibility of such expression as 'useful', 'reasonable', or 'desirable', but implies the existence of a 'pressing social need' for the interference in question*." L-apprezzament dwar dan hu mholli f' idejn l-awtoritajiet gudikanti. Ara "**Dudgeon -vs- the United Kingdom**", 7525/76, ECHR 5, 22 ta' Ottubru, 1981);

(5) Hekk jinsab ritenut illi "*the Court must decide, on the basis of the different data available to it, whether the reasons given by the national authorities to justify the actual measures of 'interference' they take are relevant and sufficient*" ("**Handyside -vs- the United Kingdom**", 5493/72, ECHR 5, 7 ta' Dicembru, 1976);

(6) Akkoppjat ma' dan, l-istess gurisprudenza tal-Qorti Ewropeja ghad-Drittijiet tal-Bniedem zviluppat il-principju tal-proporzjonalita` bhala test krucjali ghal htiega ta' mizuri ristrettivi ghal liberatajiet iggarantiti. Ara, *inter*

alia, “**Buckley -vs- the United Kingdom**”, 20348/92, ECHR 39, 25 ta’ Settembru, 1996. Li jfisser, illi jokkorri jigi mghasses illi taht l-iskuza ta’ l-oggett investigat ma tinholoqx incidenza zejda li ggib riperkussjoni fuq id-dritt ghal privatezza. Li jfisser ukoll, allura, illi r-restrizzjonijiet mil-ligi prevvisti ghandhom ikunu approprijati, effettivi, necessarji u proporzjonati ghall-akkwizizzjoni ta’ l-obbjettiv aspettat li jintlahaq;

Applikati dawn l-espressjonijiet ta’ fehma tal-Qorti Ewropeja ghal kaz in disamina, din il-Qorti thossha in grad li taghmel is-segwenti riflessjonijiet:-

(1) Skond l-intervjenti in kawza t-talba tieghu ghall-informazzjoni hi legittima principalment in bazi ghall-Artikolu 355AD (4) tal-Kodici Kriminali u r-Regolament 12 tar-Regolamenti ta’ l-2004 dwar il-Protezzjoni u l-Privatezza tad-Data (Processar ta’ Data fis-Settur tal-Pulizija) li ddahhlu fis-sehh bis-setgha ta’ l-Avviz Legali 142 ta’ l-2004. Addizzjonalment, l-istess intervejnti u l-appellat l-iehor, il-Kummissarju ghal Protezzjoni tad-Data, jirreferu ghal disposizzjonijiet rilevanti ohra, senjatament l-Artikolu 23 (1) (d) tal-Kapitolu 440 u r-Regolament 11 tar-Regolamenti ta’ l-2003 dwar l-Ipprocessar ta’ Data Personali fis-Settur tat-Telekomunikazzjonijiet. Fuq l-interpretazzjoni taghha ta’ dawn in-normi ta’ dritt din il-Qorti hi tal-ferma konvinzjoni illi tezisti l-bazi legali ghal liema l-Awtorita` tal-Pulizija setghet titlob l-informazzjoni minghand l-operaturi tat-telekomunikazzjonijiet ghal wiehed mill-motivi legittimi espressi mil-ligi. Forsi mhux daqstant ghaliex jezisti f’ dawn l-operaturi dak l-“obbligu legali” li jippreciza l-Artikolu 355AD (4) tal-Kodici Kriminali daqskemm ghar-raguni illi l-ligi specjali (l-Att XXVI ta’ l-2001) u r-regolamenti maghmulin tahtu jipprovdu ghal mekkanizmu illi permezz tieghu jista’ jigi ottenut it-taghrif mill-Pulizija minghand is-*service providers*. Mhux dan biss pero`. L-istess disposizzjonijiet rilevanti ta’ l-Att u tar-Regolamenti, ghall-evitar ta’ l-abbuz, jiddettaw il-proceduri ghall-akkonsentiment tal-ghoti tat-taghrif tramite l-ipprocessar awtorizzat mill-Kummissarju ghal Protezzjoni tad-Data. Ukoll, l-Att jistabilixxi salvagwardji adegwati u

effettivi konsistenti fl-impunjattiva ta' l-ordni decisiva ta' l-istess Kummissarju permezz tal-proceduri ta' l-Appell lit-Tribunal u, issa, lil din il-Qorti. Minn din l-ottika, l-Att u r-regolamenti huma in sintonija mal-precizazzjonijiet maghmula mill-Qorti Ewropeja ghad-Drittijiet tal-Bniedem fi skorta ta' decizjonijiet taghha fir-rigward ta' dik il-protezzjoni legali u gudizzjarja akkordata mil-ligi domestika fil-konfront ta' interferenzi arbitrarji mill-awtoritajiet. Ara, ad ezempju, "**Crémieux -vs- France**", 11471/85, ECHR 5, 25 ta' Frar, 1993, apparti d-decizjonijiet l-ohra aktar 'il fuq surreferiti;

(2) Mhux disputat illi l-iskop ghal liema ntalbu l-ipprocessar u l-ghoti ta' l-informazzjoni jirrientraw fil-parametri ta' whud mir-ragunijiet legittimi stipulati fl-Artikolu 23 (1) ta' l-Att ghal liema l-ligi takkorda restrizzjoni fuq id-dritt ghal privatezza. Lanqas ma jidher li huwa assidwament ikkontestat bhala punt ta' partenza illi r-rikjesta ghall-informazzjoni mill-Pulizija tista' tkun pertinenti ghall-fini ta' investigazzjoni kriminali in konnessjoni ma' kazijiet ta' incendji doluzi. Il-veru kuntrast donnu jirporza fuq il-konsiderazzjoni ta' dik li s-socjeta` appellanti tikkwalifika bhala "*widespread request*" u dik tal-gustifikazzjoni, o meno, ghall-assens jew kunsens ghal simili rikjesta;

(3) Jirrizulta bhala fatt illi r-rikjesta tal-Pulizija tkopri l-otteniment ta' informazzjoni pprocessata ta' *mobile calls* u *text messages* fuq area topografika wiesgha – Msida, Pembroke, B'Kara, Sliema, M'Skala, Naxxar, Bidnija, Mgarr, Burmarrad u Dwejra – f' dati ffissati u hinijiet prestabbiliti. Dan, certament, jinvolvi valur qawwi ta' xoghol ta' ipprocessar tar-*raw data* ritenuta mis-*service providers*. Ovvjament, la tqajjem il-punt, il-Qorti trid tissottometti illi mhix koncernata mill-problemi teknici-finanzjarji ghal dan l-ipprocessar, ghal liema tirrikorri s-socjeta` appellanti, imma hi koncernata bosta, mill-perspettiva tad-drittijiet fundamentali tal-bniedem, ta' l-ingerenza li dan l-istess processar jista' jkollu fuq id-dritt ghal privatezza u tal-kunfidenzjalita` tal-komunikazzjonijiet. Ghax apparti l-konstatazzjoni determinata minn bosta decizjonijiet tal-Qorti Ewropeja illi

kull "*disclosure*" ta' informazzjoni ghandu jkun ristrett ghal minimu rilevanti necessarju, hu dejjem desiderabbli illi ma tinholoqx sitwazzjoni ta' inseriment penetranti u invaziv izzejjed fl-isfera privata ta' l-individwu, anke ghaliex mhux dejjem hu possibbli li wiehed jiddistingwi b' mod ezatt u preventiv l-invazjoni "proprja" minn dik ingustifikata u sproporzjonata. Dan qed jigi puntwalizzat ghaliex kemm il-Kummissarju ghal Protezzjoni tad-Data kif ukoll it-Tribunal adit jirrikonoxxu illi "*the information as required by the Police will involve the disclosure of a very high volume of personal data of persons who are completely unconnected with the investigations*" (ara parir deciziv tal-Kummissarju) u li, konsegwentement, "*the police authorities have no 'carte blanche' to ask Vodafone and Go Mobile or any other service provider, information regarding data subjects in a general and most ample manner covering a particular geographical area for any alleged crime committed*" (ara decizjoni tat-Tribunal);

(4) Innegabilment, din mhix semplici kwestjoni dwar jekk humiex ser jiddarsu jew le is-*subscribers* li t-telefonati taghhom ikunu pprocessati, kif hekk gie sottomess fil-kors tad-dibattitu orali quddiem din il-Qorti. In-necessita f' socjeta` demokratika li wiehed jiddevja mill-principju fundamentali tad-dritt ghar-rispett tal-hajja privata u tal-korrispondenza [Artikolu 8 (1) tal-Konvenzjoni] jimplika li l-materja trid tigi evalwata f' termini konkreti fl-ambitu tac-cirkustanzi partikulari tal-kaz. Jekk xejn, ghal fini tar-raggungiment ta' dak il-bilanc bejn l-ezercizzju mill-individwu tad-dritt iggarantit lilu taht il-Konvenzjoni u n-necessita li l-komunikazzjonijiet privati tieghu jkunu assoggettati ghal skrutinju fl-interess generali;

(5) Fl-izvolgiment ta' l-argomenti taghhom kemm l-appellat Kummissarju ghal Protezzjoni tad-Data kif ukoll l-intervenjenti, il-Kummissarju tal-Pulizija, u maghhom ukoll it-Tribunal, iqeghdu fuq quddiem il-gravita tar-reati kommessi u, wisq naturali, l-atmosfera skombussolata taz-zminijietna, konsegwentement ghall-episodji travolgenti tad-9 ta' Settembru fl-Istati Uniti u dawk ta' l-attakki terroristici bil-bombi f' Madrid u Londra. Fiz-zgur, din il-Qorti mhix ser toqghod lura milli hi wkoll taghraf ir-

realta` ta' dawn is-sitwazzjonijiet, ferm perikoluzi ghall-komunita tal-popli civilizzati, u, allura, ta' dik il-htiega, anke impellenti, illi l-Gvernijiet u Stati jadottaw dawk il-mizuri okkorrenti ghall-harsien u s-sikurezza pubblika u ghall-prevenzjoni jew prosekuzzjoni tar-reati. Fl-istess waqt, pero`, ma tistax lanqas titlef mill-miri taghha l-fattispeci singolari tal-kaz ezaminat u kif dawn ghandhom jigu rigwardati fl-ambitu tal-principji tad-dritt applikabbli ghalihom. Materja delikata bhal din ma tistax ma tigix interpretata bil-bon sens u fil-limiti ragonevoli dettati mil-ligi;

(6) Kif taraha din il-Qorti, presuppost preponderanti ghall-kisba ta' informazzjoni estrapolata mill-ipprocessar tad-data jkun dak illi tali informazzjoni hi hekk mehtiega ghax tkun tezisti bazi definita ta' suspett. Skond Lord Devlin, "*suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: I suspect but I cannot prove. Suspicion arises at or near the starting-point of an investigation of which the obtaining of prima facie proof is at the end*" ("**Sheeban Bin Hussein -vs- Chong Fook Kam**" [1970] AC942). Naturalment, hemm fil-qafas tal-Kodici penali taghna [ara, ad ezempju, l-Artikolu 355AD (2), Kapitolu 9], kemm skond il-Kostituzzjoni [ad ezempju, l-Artikolu 34 (3) (b)], mhux bizzejjed li jezisti mera suspett ghax dan irid ikun ukoll wiehed oggettivament ragjonevoli. Jinghad fis-sentenza fl-ismijiet "**Joseph Briffa -vs- Kummissarju tal-Pulizija**", Prim' Awla, Qorti Civili, 21 ta' Novembru 1994 per Imhallef Vincent De Gaetano, b' approvazzjoni tas-silta mis-sentenza tal-Qorti Ewropeja tat-30 ta' Awissu 1990 u re: "**Fox Campbell & Hartley**", illi "*having a reasonable suspicion presupposed the existence of facts or information which would satisfy an objective observer that the person concerned might have committed the offence although what might be regarded as 'reasonable' depended upon the circumstances. (**Berger V.**, "**Case Law of the European Court of Human Rights**", Vol. II p 198, para. 449)*";

(7) Issa fil-kaz prezenti tezisti c-certezza, hekk konsapevoli minnha wkoll l-istess Kummissarju ghal

Protezzjoni tad-Data, illi l-kxif ta’ volum qawwi ta’ data personali kif mitlub mill-Pulizija ghal skop ta’ investigazzjoni, mhux biss ma hijiex rilevanti imma, ukoll, tirrigwarda individwi ghal kollox skonnessi mal-fini ta’ l-investigazzjoni. Fil-fehma ponderata ta’ din il-Qorti, tali sitwazzjoni certament tiffrustra l-ghan fokali ta’ l-Att (Kapitolu 440) in diskussjoni u dan, fl-iskema tal-ligi, ma jidherx li huwa sewwa, la mal-hsieb profess tal-legislatur u lanqas mas-sens komuni. Mhux accettabli, ghallanqas ghal din il-Qorti, illi kotra gmiela ta’ utenti, li dwarhom ma jezisti ebda suspett ragjonevoli, ghandu jkollhom il-komunikazzjonijiet konfidenzjali u privati taghhom assoggettati ghal skrutinju u ghar-riskju ta’ arbitrarjeta. *Multo magis*, imbaghad, meta dan l-indhil ikun ser isir minghajr il-konoxxenza taghhom. Jekk hemm bzonn jigi ripetut, ma ghandu qatt jisfuggi di vista f’ din il-vicenda illi l-kunfidenzjalita ta’ data personali ta’ individwi innocenti li nzertaw ghamlu telefonati jew baghtu SMS fil-granet u hinijiet partikulari fil-lokalitajiet imsemmija hu l-ghan primarju ta’ tutela protettiva taht il-ligijiet, u mhux ukoll li dak primarju jigi relegat ghal post sekondarju u r-restrizzjoni jew l-ezenzjoni tinbidel f’ ghan principali. Ma jidherx li qatt kien intiz mill-kompilaturi illi l-Artikolu 8 (2) tal-Konvenzjoni, l-Artikolu 23 (1) ta’ l-Att u r-Regolament 11 ta’ l-Avviz Legali 16 ta’ l-2003, iservu bhala xi ziemel ta’ Troia biex tigi espunjata l-konfidenzjalita` tal-komunikazzjonijiet ta’ cittadini insospettati u li dwarhom, sa mill-punt ta’ tluq, tezisti l-konsapevolezza li mar-reati in kwestjoni ma ghandhom ebda konnessjoni;

(8) Mhux lanqas tollerat illi l-utenti kollha, indiskriminatament, jitqeghdu taht suspett biex a xelta taghha, il-Pulizija tkun tista’ tgharbilhom bil-process ta’ eliminazzjoni. Jekk dan jithalla jsir ikun qed javvicina l-qaghda ghal dak ta’ stat polizjesk jew totalitarju li man-nozzjoni ta’ socjeta` demokratika u libera, kif nafuha, ma ghandu xejn x’ jaqsam. Wiehed ma ghandux, ghas-serhan tal-mohh, jikkuntenta ruhu illi gjaladarba l-Kummissarju ghal Protezzjoni tad-Data jew it-Tribunal imponew kundizzjonijiet kawtelativi, allura tezisti dik il-gustifikazzjoni li tqieghed lil kulhadd f’ keffa wahda ta’ suspett biex il-komunikazzjonijiet jew il-korrispondenza

taghhom (u mhux ukoll ta' persuni specifici identifikati jew identifikabbli) jigu mikxufa, u b' mod generali t-taghrif estratt isib postu fil-*files* tal-Pulizija. Ara deposizzjoni ta' l-Ispettur Angelo Caruana quddiem it-Tribunal. Jittiehdu kemm jittiehdu prekawzjonijiet, mhux inimmaginabbli li fi gzira ckejkna bhal taghna titrapela informazzjoni kunfidenzjali fuq Tizju jew Sempronju, kultant anke personali hafna, li ma' l-investigazzjoni proprja ma jiccentraw xejn. Fic-cirkustanzi, il-Qorti ma thossx li tista' taghmel affidament fuq il-kundizzjonijiet iffissati;

(9) Hu anke sew evidenti minn dan illi ma tezisti ebda relazzjoni ta' proporzjonalita` bejn l-ghan legittimu konsegwit u l-interessi privati tal-bosta. Zgur imbaghad, ma tistax tezisti fic-cirkustanzi tal-kaz dik il-"*pressing social need*" li ssemmi l-gurisprudenza stante li l-ipprocessar u t-trasmissjoni ta' l-informazzjoni, hekk dikjaratament irrilevanti, ma tistax u ma ghandhiex tattira l-interferenza rikjesta;

(10) Meta jitqieghed dan kollu fil-mizien ta' l-interessi generali u dak ta' l-interessi individwali, akkoppjat mat-tifsira stringenti li solitament tinghata mill-Qorti Ewropeja lill-Artikolu 8 (2) tal-Konvenzjoni u tal-fatt li mhux maghruf jekk tali interferenza hijiex t-triq ewlenija disponibbli lill-Pulizija ghar-ricerka tal-hati jew hatja tar-reati, l-access ghat-traffiku tad-data ma ghandux, f' dawn id-dati cirkustanzi, jkun permissibbli. Forsi il-Qorti tista' zzid illi ma ssibx bhala argoment perswasiv illi l-ipprocessar ta' *traffic data* fuq skala hekk wiesgha, specjalment meta jonqsu r-rekwiziti tal-ligi ghal daqshekk, hija verament l-unika opzjoni ta' indagini mill-Pulizija jew l-aktar wahda determinanti u indispensabbli biex tigi kombattuta l-kriminalita` jew ghal harsien tas-sigurta pubblika. Il-libertajiet ta' l-individwu m' ghandhom qatt jigu ristretti fejn jinstab li dan ma huwiex strettament u gustifikament mehtieg;

In vista ta' dawn ir-riflessjonijiet il-Qorti thoss li ghandha tasal ghal konkluzjoni diversa minn dik tat-Tribunal u tal-Kummissarju ghal Protezzjoni tad-Data.

Ghal dawn il-motivi u fis-sens tal-konsiderazzjonijiet premessi din il-Qorti qed tiddeciedi billi tilqa' l-appell u konsegwentement tirrevoka s-sentenza appellata ta' l-4 ta' Awissu, 2006 moghtija mit-Tribunal ta' l-Appelli dwar il-Protezzjoni tad-Data. Stante in-novita` tal-kaz, l-ispejjez gudizzjarji jibqghu bla taxxa bejn il-partijiet.

< Sentenza Finali >

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