



**QORTI TAL-MAGISTRATI (GHAWDEX)
BHALA QORTI TA' GUDIKATURA KRIMINALI**

**Magistrat Dr. Joseph Mifsud B.A. (Legal & Int. Rel.),
B.A. (Hons), M.A. (European), LL.D.**

**Il-Pulizija
(Spettur Bernard Charles Spiteri)**

vs.

OMISSIS

Numru: 19/2017

Illum 1 ta' Dicembru 2017

Il-Qorti,

Rat l-imputazzjoni migjuba kontra l-imputat **OMISSIS** akkuzat talli waqt seduta tat-Tribunal Eklezjastiku ta' Djocesi ta' Ghawdex, f'xi hin matul il-gurnata ta' nhar is-16 ta' Jannar 2015 u/jew fil-hinijiet ta' qabel, gewwa r-Rabat, Ghawdex u/jew fil-vicinanze:

1. Minghajr ma kien awtorizzat processa data sensittiva personali minghajr ma gew adottati salvagwardji xierqa u l-process ma kienx mehtieg, dan bi ksur tad-dispozizzjonijiet tal-Artikolu 13 u 47(b) tal-Kapitolu 440;

Rat illi fis-seduta tat-8 ta' Gunju 2017 il-Qorti tat cans lill-Prosekuzzjoni, lill-parte civile u lid-difiza sabiex jipprezentaw is-sottomissjonijiet taghhom bil-miktub.

Rat illi l-Prosekuzzjoni baqghet ma pprezentatx is-sottomissjonijiet taghha bil-miktub, minkejja li nghatat il-fakolta' taghmel hekk.

Rat illi fl-24 ta' Lulju 2017, il-parte civile pprezentat is-sottomissjonijiet taghha bil-miktub.

Rat illi d-difiza pprezentat is-sottomissjoni taghha bil-miktub fit-30 ta' Awwissu 2017.

Rat l-atti kollha ta' dan il-procediment u d-dokumenti esebiti.

XHIEDA

F'dan il-kaz xehdu 12-il xhud:

Ian Deguara (a fol. 7 et seq.), l-Ispettur Bernard Charles Spiteri (a fol. 21 et seq.), PS 342 Johan Said (a fol. (33 et seq.), Pauline Camilleri (a fol. 46 et seq.), Jeanette Falzon (a fol. 51 et seq.), Rita Galea (a fol. 62 et seq.), Monsinjur Edward Xuereb (a fol. 83 et seq.), Rita Galea - riprodotta (a fol. 87 et seq.), Laura Cassar (a fol. 90 et seq.), Simone Grech (a fol. 92 et seq.), Noel Said (a fol. 94 et seq.) u Mary Agius (a fol. 96 et seq.).

KUNSIDERAZZJONIJIET LEGALI GENERALI

Livell ta' prova

Huwa principju baziku prattikat mill-Qrati taghna fil-procediment kriminali, li sabiex l-akkuzat jigi misjub hati l-akkuzi migjuba fil-

konfront tieghu dawn ghandhom jigu pruvati oltre kull dubju dettat mir-raguni.

F'dan ir-rigward issir referenza ghas-sentenza moghtija mill-**Qorti tal-Appell Kriminali fil-5 ta' Dicembru 1997** fil-kawza fl-ismijiet **Il-Pulizija vs Peter Ebejer**, fejn il-Qorti fakkret li l-grad ta' prova li trid tilhaq il-Prosekuzzjoni hu dak il-grad li ma jhalli ebda dubju dettat mir-raguni u mhux xi grad ta' prova li ma jhalli ebda ombra ta' dubju. Id-dubji ombra ma jistghux jitqiesu bhala dubji dettati mir-raguni. Fi kliem iehor, dak li l-gudikant irid jasal ghalih hu, li wara li jqis ic-cirkostanzi u l-provi kollha, u b'applikazzjoni tal-buon sens tieghu, ikun moralment konvint minn dak il-fatt li trid tipprova l-Prosekuzzjoni. Fil-fatt dik il-Qorti ccitat l-ispjegazzjoni moghtija minn **Lord Denning** fil-kaz *Miller v Minister of Pension* - 1974 - ALL Er 372 tal-espressjoni 'proof beyond a reasonable doubt.'

“Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence ‘of course it is possible but not in the least probable’, the case is proved beyond reasonable doubt, but nothing shall of that will suffice.”

Fil-kawza fl-ismijiet **Il-Pulizija vs Graham Charles Ducker** (Qorti tal-Appell Kriminali - deciza fid-19 ta' Mejju, 1997) gie ritenut illi:

“it is true that conflicting evidence per se does not necessarily mean that whoever has to judge may not come to a conclusion of guilt. Whoever has to judge may, after consideration of all circumstances of the case, dismiss one version and accept as true the opposing one.”

Din il-Qorti taghmel ukoll referenza ghas-sentenza moghtija mill-**Qorti tal-Appell Kriminali fid-9 ta' Settembru 2002** fil-kawza fl-ismijiet **Il-Pulizija v Martin Mark Ciappara** fejn spjegat x'jigri meta gudikant ikun rinfaccjat b'verzjonijiet konfliggenti u cioe' jistghu jigru zewg affarijiet u cioe' jew il-gudikant ikun tal-fehma li l-kaz tal-Prosekuzzjoni ma jkunx gie sodisfacentement ippruvat, u allura l-Qorti ghandha tillibera, jew jekk ikun moralment konvint li l-verzjoni korretta hija wahda u mhux l-ohra, jimxi fuq dik il-verzjoni li jaccetta u jekk dik il-verzjoni tkun timporta l-htija tal-imputat jew akkuzat, allura jiddikjara tali htija u jghaddi ghall-piena jew ghal xi provvediment iehor.

Apprezzament tal-provi fl-assjem

Il-Qorti tissottolinea li huwa ben risaput li l-apprezzament tal-provi ghandu jsir mhux biss b'mod spezzettat u individwali izda l-provi

għandhom jigu analizzati flimkien fl-assjem tagħhom sabiex wiehed jara x'inferenzi jew interpretazzjoni ragjonevoli u legali jista' jagħti lil dawk il-provi hekk interpretati. Ma tistax tinstab htija jew nuqqas ta' htija semplicement fuq analizi individwali jew separata tal-provi. Dawn għandhom jigu kkunsidrati kemm individwalment kif ukoll komplessivament. Dan hu appuntu l-ezercizzju li sejra tagħmel din il-Qorti, u cioè' li tezamina bir-reqqa kollha l-provi prodotti f' dan il-kaz.

Illi għalhekk m'hemmx dubju li kollox jiddependi fuq il-kredibilita` tax-xhieda u dan billi bhala Gudikant, il-Qorti sejra tagħti qies l-imgieba, il-kondotta u l-karattru tax-xhieda, tal-fatt jekk ix-xhieda għandiex mis-sewwa jew hix kostanti, u ta' fatturi ohra tax-xhieda u jekk ix-xhieda hix imsahha minn xhieda ohra, u tac-cirkostanzi kollha tal-kaz, u dan ai termini tal-Artikolu 637 tal-Kap 9 tal-Ligijiet ta' Malta.

Huwa principju baziku pprattikat mill-Qrati tagħna fil-procediment kriminali, li biex l-akkuzati jigu ddikjarati hatja, l-akkuzi dedotti, għandhom jigu ppruvati oltre kull dubju ragjonevoli, cioè' oltre kull dubju dettat mir-raguni.

Hawnhekk il-Qorti tagħmel referenza għal sentenza mogħtija mill-Qorti tal-Appell Kriminali nhar s-sebgha (7) ta' Settembru, 1994 fl-ismijiet '**Il-Pulizija v Philip Zammit et'** u tghid pero' li mhux kull l-icken dubju huwa bizzejjed sabiex l-imputat jigi ddikjarat liberat, hemm bzonn li '*dubju jkun dak dettat mir-raguni.*'

Il-Qorti se tara jekk il-*fattispecie* tal-kaz jammontawx ghar-reat addebitat lill-imputat.

Il-fatti specie tal-kaz

L-imputat u l-*parte civile* kienu jiffurmaw koppja mizzewga. F'xi zmien inbdew mill-imputat proceduri quddiem it-Tribunal Ekklezjastiku ta' Djocesi ta' Ghawdex u dana sabiex iz-zwieg ta' bejniethom jigi dikjarat null.

F'wahda mis-seduti, nhar il-Gimgha, 16 ta' Jannar 2015, l-imputat OMISSIS deher quddiem Fr. Edward Xuereb u fejn huwa pprezenta dokumenti sensittivi relatati mas-sahha mentali tal-*parte civile* OMISSIS.

Fl-istess seduta Fr. Edward Xuereb ghamel dikjarazzjoni fejn talab lill-imputat minn fejn gew dawn id-dokumenti u l-imputat kien ghazel li ma jwegibx ghad-domanda pero' kien iffirma d-dikjarazzjoni maghmula quddiem l-istess Fr. Edward Xuereb kopja ta' din id-dikjarazzjoni u tal-partijiet mill-file mediku tal-*parte civile* annessi wara fol. 20 u d-dikjarazzjoni mmarkata bhala 140A.¹

Tressqet talba mill-*parte civile* quddiem il-Kummissarju ghall-*Informazzjoni* u l-*Protezzjoni tad-Data* sabiex isiru l-investigazzjonijiet. Irrizulta li nharget data sensittiva personali tal-*parte civile* mill-Isptar Generali ta' Ghawdex relatati mas-sahha mentali taghha.

¹ L-istess dokumenti huma kkonfermati u ffirmati minn PS 342 Johann Said

Il-Kummissarju għall-Infurmazzjoni u l-Protezzjoni tad-Data fis-26 ta' Gunju 2016 kiteb lic-Chief Executive Officer tal-Isptar Generali ta' Ghawdex fejn infurmaha dwar l-investigazzjoni li saret²:

Reference is made to a complaint received by this Office from OMISSIS, lodged through her legal counsel, wherein she alleged that the Gozo General Hospital ('GGH') breached her data protection rights when copies of her medical file revealing, *inter alia*, clinical notes made by the medical professional who was dealing with her case, were presented by her husband before the Ecclesiastical Tribunal during the annulment proceedings.

By means of a letter dated 29th February 2016, in line with this Office's standing practice and as part of the investigation procedure, the data controller at the GGH was requested to send submissions on the case. The submissions were received within the timeframe established by the Commissioner and specifically included information on the action taken by the GGH when the management was first alerted about the alleged unauthorised disclosure by the Permanent Secretary of the Ministry of Health. An internal Board of Inquiry was set up in July 2015, however, its proceedings were inconclusive since the members of such board were not presented with the actual copies of the complainant's medical notes that were exhibited before the Ecclesiastical Tribunal. Consequently, the internal board could not establish whether such copies were indeed true copies of the originals or otherwise.

By means of a communication dated 14th March 2016, the Commissioner requested a meeting including an onsite inspection at the GGH, with the data controller to, *inter alia*, inspect OMISSIS's medical file and evaluate the safeguards which are in place to ensure that the personal data is indeed protected against any unlawful forms

² CDP/13/2016

of processing, including but not limited to, any unauthorised forms of disclosure. Following the inspection, this Office drew up a brief report establishing the main facts and which is being herewith enclosed and marked as 'Doc A'.

During the meeting, it was established that the copies presented by OMISSIS were true copies of the original medical notes contained in the patient's file. **From the investigation, it resulted that the processing operation involving the unauthorised disclosure of OMISSIS's sensitive personal data, constitutes a breach of article 13 of the Data Protection Act, CAP. 440 of the Laws of Malta and, consequently, in terms of article 47(b) thereof, such action is enforceable by prosecution in the Courts of Malta.** (Enfasi tal-Qorti)

In view of the above and, in terms of article 535 of the Criminal Code, CAP. 9 of the Laws of Malta, the Commissioner is providing information (*denunzja*) to the Police authorities.

L-Isptar Generali ta' Ghawdex kien investiga l-kaz billi hatar Board halli jwettaq investigazzjoni u jasal ghal konkluzzjonijiet tieghu. Ir-rapport tlesta nhar il-Gimgha 10 ta' Lulju 2015:

A board of inquiry appointed by Dr. Nadine Delicata - Chief Executive Officer GGH, met today 8th July, 2015 at the Boardroom - Tal-Ibragg Hospital. The board of inquiry was chaired by Mr. Robert Mallia (COO), assisted by Mr. Joseph Fenech (Head Nursing Services) and Mr. Euchar Sultana (MIS Officer). Ms. Rita Galea was appointed as secretary to this board.

The scope of this board of inquiry was to investigate the misappropriation of medical notes pertaining to a client who was and still is undergoing professional medical care and guidance offered at the Gozo General Hospital. It is believed that such sensitive

information was divulged to third parties without the indispensable authorization of the named entity or the referred client.

Mr. R Mallia remarked that he was appointed chairman of this Board of inquiry only three days in advance of the deadline for the submission of the Board's report. The restricted time frame may have possibly hindered the Board members from retrieving added information from relevant authorities which would have benefitted the outcome and conclusions drawn by this board of inquiry.

The Board observed the lack of a formal transcription indicating the complaint or accusation filed against the entity or particular public official. This was compounded by the lack of information associated with the chronological evidence of events. The Board did not have at its disposal any indication or information whatsoever of any possible dates denoted by the relevant disclosed documents. Consequently the Board was not in a position to establish an approximation of the interim period which could have led to the disclosure of such information.

Mr. E. Sultana (MIS Officer) presented a document retrieved from CPAS illustrating the most recent movements of the patient's medical disorder. A copy of this document is being attached to this report. It was noted by the Board members that the last movement of this dossier which was indicated as Vol. 1 and Vol. 2, transpired on the 5.11.15 from the Dental & A&E to the Short Stay Ward respectively.

A shortcoming which was noted by the Board was that in spite of the fact that the patient was dismissed on leave from the SSW, the relevant medical dossier was still kept in this same ward. Mr. J. Fenech commented that following discussions held with Ms. Mary Agius (CN-Short Stay Ward), the rationale presented for this considered limitation was due to an attempt in facilitating access to medical dossiers of patients who are 'on leave'. According to Ms. M.

Agius, this praxis also alleviates the inconvenience of reclaiming this dossier from the Medical Records department on each and every appointment or consultation the patient has at the Psychiatric Out-Pts. This praxis inhibits an accurate testimony of the dossier's movements during which such disclosure of documents was made possible. Despite these facts one must also mention that medical files are always kept under lock and key at the SSW.

Board Conclusions:

The Board concluded that it was not in a position to recommend any disciplinary action against any officers since no concrete evidence or chronological sequence of events was presented.

The Board recommends that once patients are sent on leave from any of the Mental Health wards, their personal Medical dossier should be returned immediately for safekeeping to the Medical Records Department.

An internal memo should be circulated highlighting the Data Protection Act with all its implications. A revision of the standard operation procedure for issuing of data from medical dossiers should be executed. The attention of all GGH staff should be sought and emphasized that no employee is authorised to generate copies or copies of extracts from medical reports found in medical dossiers devoid of requesting approval from the Data Protection Officer and the consent of the individual concerned³.

³ REPORT OF INTERNAL BOARD OF INQUIRY

Ir-rapport⁴ imhejji mill-Kummissarju għall-Infurmazzjoni u l-Protezzjoni tad-Data dwar l-investigazzjoni mitluba u li qieghed ikun referit fil-korrispondenza kkwotata bħal “Dok A” jghid:

Scope

The inspection was carried out as part of the investigation procedure following a complaint lodged by Dr Renata Formosa o.b.o. her client who is alleging a breach of the Data Protection Act when extracts from her medical file were presented by her husband during separation proceedings before the Ecclesiastical Tribunal.

Background

On 30th June 2015, the Chief Executive Officers of the Gozo General Hospital set up an internal Inquiry Board specifically to investigate the allegations raised by a patient, namely OMISSIS holder of ID Card No.. OMISSIS (represented by her legal counsel Dr Formosa), who contended that her clinical case notes were disclosed in an unauthorised manner to her husband OMISSIS. The case was brought to light when, a copy of such records, were presented by OMISSIS to the Ecclesiastical Tribunal during annulment proceedings. The inquiry board finalised the report on the 11th September 2015 and concluded that it was unable to, *inter alia*, establish that the copies of the clinical notes were indeed true copies taken from the original medical file since Dr Formosa, notwithstanding being called before the Board to give her version of events and support the case by producing the necessary evidence, did not present such copies. It was also mentioned that the patient’s husband was asked to appear before the Board, but failed to appear. The Board was re-appointed on 17th March 2016 following the request for submissions sent by this Office as part of the investigation of the complaint and, on 23rd March 2016,

⁴ Investigation report capturing the main points which were established and discussed during the onsite inspection held at Gozo General Hospital on 4th April 2016

concluded, *inter alia*, that the copies as presented by the IDPC in the request for submissions, were indeed true copies taken from the original patient's medical file. The Board made three recommendations which were the following:

1. That the medical file should be kept at the Short Stay Ward for not more than three weeks and that medical files requested by Psychiatric Out-Patients and are currently at the Short Stay Ward, are first transferred to Medical Records and then transferred to the Psychiatric Out-Patients;
2. That a record is kept of all medical files requested for the issuing of Social Security benefit purposes;
3. That an internal memo highlighting the data protection requirements, together with the standard operational procedures for issuing data from medical records, is to be re-circulated to all departments.

Facts and Findings

During the course of the inspection, the Commissioner requested the Hospital's management to describe the standing procedure specifically in relation to the movements of files which can be summarised as follows:

- A new file is opened for every patient by the medical records department;
- Any movement of the file is recorded in Central Patient Administration System (CPAS), which is the same system used at Mater Dei Hospital. It keeps a complete record of file movements in order to ensure traceability;
- Medical files are normally requested by the nursing officer; the procedure obliges the nursing officer to produce the personalised Hospital Identification Card together with the Medical Barcode Card to the Medical Records when making the request for the file. Whereas

the Hospital Identification Card ensures the identification of the nursing officer, and that such officer is indeed authorised to make the request for the file, the Records' officers. This procedure ensures that the necessary audit fields are registered in CPAS to track all the file movements.

The Commissioner was also provided with a physical run-through of the CPAS main functionality. A request for an audit trail concerning the complainant's two files, bearing reference numbers OMISSIS and OMISSIS respectively, was made by the Commissioner during the inspection and the documents were provided accordingly. A supporting document was also prepared identifying the usernames of all the persons who were listed in the audit trails and who had therefore gained access to such files.

It was also established that in the Short Stay Ward where the complainant was admitted, patients' medical files are kept inside such ward for a long period of time since, under general medical circumstances and depending on the therapy being provided, patients are normally allowed Leave from the ward for a period of given time on recommendation from the caring consultant. This means that during the patient's temporary absence from the ward, the medical files are retained there and not returned to the Medical Records Unit. The Nurse in charge is responsible for all the medical files which are kept at the Short Stay Ward. The files are kept under lock and key, however it was established that there exists no record which keeps a daily log of who was in possession of the cabinet key. Following this incident, this practice was revised and files are no longer held at the Short Stay Ward when the patient is on Leave but are sent back to the Medical Records and recalled only when patient is re-admitted. There may be instances where patient files may be requested by the

Department of Social Security in cases where the data subjects are being considered to be boarded out.

During the meeting, the following facts were also established:

- That no report was made to the Police about the unauthorised disclosure;
- That OMISSIS's files were not transferred to other government departments, particularly to the Department of Social Security;
- That OMISSIS submitted a subject access request to the PDO at the Gozo General Hospital on 6th July 2015 demanding copies of medical records from her personal medical file; the Commissioner was provided with the copy of OMISSIS's access request form;
- That OMISSIS had presented the documents to the Ecclesiastical Tribunal on the 16th of January 2015 and hence, before the subject access request made by OMISSIS on the 6th of July 2015;
- That the copies presented by OMISSIS during the annulment proceedings before the Ecclesiastical Tribunal are true copies of the original medical notes;
- That the recommendations made by the Board, were implemented by the Gozo General Hospital.

The Commissioner was also provided with a copy of the Standard Operating Procedures adopted by the Gozo General Hospital governing issues concerning data protection.

Kien ghalhekk li fuq talba tal-Kummissarju għall-Infurmazzjoni u l-Protezzjoni tad-Data mressqa lis-Supretendent Stephen Mallia ttiehdu passi quddiem din l-Qorti. Il-Kummissarju tal-Infurmazzjoni u l-Protezzjoni tad-Data ma jindikax lil min ghandha tressaq il-pulizija biex iwiegeb għal hrug tad-data sensittiva.

Il-Kummissarju għall-Infommazzjoni u l-Protezzjoni tad-Data Saviour Cachia fis-6 ta' Gunju 2016 kiteb dan lill-pulizija:

Illi dan l-ufficju fid-19 ta' Frar 2016 ircieva ilment kontra l-Isptar Generali ta' Ghawdex fejn is-suggett tad-data, OMISSIS, allegat ksur tad-dritt tagħha ta' l-Att dwar il-Protezzjoni u Privatezza tad-Data, Kap. 440 tal-Ligijiet ta' Malta ('Att'), meta kopji tal-file mediku tagħha gew ipprezentati minn zewgħa quddiem it-Tribunal Ekklezjastiku matul il-proceduri tal-annullament;

Illi l-Kummissarju wettaq investigazzjoni u hejja rapport bis-sejbiet ewlenin (hawn anness u mmarkat bhala Dok. A)

Illi mill-investigazzjoni rrizulta li l-izvelar mhux awtorizzat tad-data sensitiva personali, jikkostitwixxi ksur ta' artikolu 13 tal-Att u konsegwentement, skont artiolu 47(b) tal-istess Att, tali azzjoni hija infurzabbli bi prosekuzzjoni fil-Qrati ta' Malta; (Enfasi tal-Qorti)

Ghaldaqstant, fid-dawl ta' dawn ic-cirkostanzi, il-Kummissarju jhossu fid-dmir illi permezz ta' din id-denunzja, jattira l-attenzjoni tiegħek għal dawn il-fatti.

KUNSIDERAZZJONIJIET LEGALI DWAR DATA PROTECTION

Direttiva 95/46/EC u Data Protection Act 1998

Il-Qorti se tagħmel referenza għad-Direttiva 95/46/EC li hija wiehed mis-sorsi tal-ligi tagħna flimkien mal-Data Protection Act 1998 ("the DPA"):

The purpose of the Directive⁵

36. The purpose underlying the Directive is set out in its recitals. Recital (2) states that data processing systems must "respect [natural persons] fundamental rights and freedoms, notably the right to privacy." The emphasis on the right to privacy is repeated in recitals (7), (9), (10), (11) and (68). The question of access to personal data is dealt with in the following recitals:

"(25) Whereas the principles of protection must be reflected, on the one hand, in the obligations imposed on persons, public authorities, enterprises, agencies or other bodies responsible for processing, in particular regarding data quality, technical security, notification to the supervisory authority, and the circumstances under which processing can be carried out, and, on the other hand, in the right conferred on individuals, the data on whom are the subject of processing, to be informed that processing is taking place, to consult the data, to request corrections and even to object to processing in certain circumstances

(41) Whereas any person must be able to exercise the right of access to data relating to him which are being processed, in order to verify in particular the accuracy of the data and the lawfulness of the processing ..."

37. The European Court has also laid emphasis on privacy. In (Case C-553/07) *College van burgemeester en wethouders van Rotterdam v Rijkeboer* [\[2009\] 3 CMLR 28](#) the court said at [46] that the purpose of the Directive was "to protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data" and added at [47]:

⁵ [2017] EWCA Civ 121 Case No: A2/2015/1599, 1520 & 1524 ALIREZA ITTIHADIEH - and - 5-11 CHEYNE GARDENS RTM COMPANY LTD

"The importance of protecting privacy is highlighted in recitals 2 and 10 in the preamble to the Directive and emphasised in the case law of the Court [citing authority]."

38. In (Joined Cases C-141/12, C-372/12) *YS v Minister voor Immigratie, Integratie en Asiel, Minister voor Immigratie, Integratie en Asiel v M* [\[2015\] 1 WLR 609](#) the court referred at [46] to the Directive's "purpose of guaranteeing the protection of the applicant's right to privacy with regard to the processing of data relating to him".

The substantive provisions of the Directive

39. Article 1(1) of the Directive states:

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

40. It will be seen, therefore, that a key concept is "personal data". Article 2 (a) of the Directive defines that expression as follows:

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

41. Article 3 provides that the Directive does not apply to the processing of personal data "by a natural person in the course of a purely personal or household activity." This provision reflects recital (12) which says that:

"...there should be excluded the processing of data carried out by a natural person in the exercise of activities which are exclusively personal or domestic, such as correspondence and the holding of records of addresses."

42. Article 12 lays down the right of access. It provides, so far as material:

"Member States shall guarantee every data subject the right to obtain from the controller:

(a) without constraint at reasonable intervals and without excessive delay or expense:

- confirmation as to whether or not data relating to him are being processed and information at least as to the purposes of the processing, the categories of data concerned, and the recipients or categories of recipients to whom the data are disclosed,

- communication to him in an intelligible form of the data undergoing processing and of any available information as to their source, ...

(b) as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data..."

43. Article 13 enables member states to create exemptions and restrictions on (among other things) the right of access under article 12. It provides, so far as material:

"Member States may adopt legislative measures to restrict the scope of the obligations and rights provided for in Articles 6 (1), 10, 11 (1), 12 and 21 when such a restriction constitutes a necessary measures to safeguard

...

(g) the protection of the data subject or of the rights and freedoms of others."

44. Article 22 requires member states to provide for a judicial remedy for any breach of the rights guaranteed by the national law applicable to the processing in question.

Handbook dwar il-European data protection law

Il-Handbook on European data protection law⁶ jispjega dwar kategoriji specjali ta' data personali u dan minn kif johrog mill-Unjoni Ewropea kif ukoll dak li jipprovdu l-Kunsill tal-Ewropa.

Special categories of personal data

Under EU law as well as **CoE law**, there are special categories of personal data which, by their nature, may pose a risk to the data subjects, when processed, and need enhanced protection. The processing of these special categories of data ('sensitive data') must therefore be allowed only with specific safeguards.

On the definition of sensitive data, both **Convention 108** (Article 6) and the **Data Protection Directive** (Article 8) name the following categories:

- personal data revealing racial or ethnic origin;
- personal data revealing political opinions, religious or other beliefs; and
- personal data concerning health or sexual life.

In *Bodil Lindqvist*,⁷ the CJEU stated that "reference to the fact that an individual has injured her foot and is on half-time on medical grounds constitutes personal data concerning

⁶ European Union Agency for Fundamental Rights Council of Europe – European Court of Human Rights 2014

⁷ CJEU, C-101/01, *Bodil Lindqvist*, 6 November 2003, para. 51.

health within the meaning of Article 8 (1) of Directive 95/46.”

The role of private individuals needs to be mentioned in this context. **Under EU law**, private individuals, when processing data about others in the course of a purely personal or household activity, do not fall under the rules of the Data Protection Directive; they are not deemed to be controllers.⁸

In *I. v. Finland*,⁹ the applicant was unable to prove that her health records had been accessed illegitimately by other employees of the hospital where she worked. Her claim of a violation of her right to data protection was, therefore, rejected by the domestic courts. The ECtHR concluded that there had been a violation of Article 8 of the ECHR, as the hospital’s register system for health “was such that it was not possible to retroactively clarify the use of patient records as it revealed only the very most recent consultations and that this information was deleted once the it had been returned to the archives”. For the Court, it was decisive that the records system in place in the hospital had clearly not been in accordance with the legal requirements contained in domestic law, a fact that was not given due weight by the domestic courts.

⁸ Data Protection Directive, Recital 12 and Art. 3 (2) last indent.

⁹ ECtHR, *I. v. Finland*, No. 20511/03, 17 July 2008.

The users of personal data¹⁰

Whoever decides to process personal data of others is a 'controller' under data protection law; if several persons take this decision together, they may be 'joint controllers'.

A 'processor' is a legally separate entity that processes personal data on behalf of a controller.

A processor becomes a controller if he or she uses data for his or her own purposes, not following the instructions of a controller.

Anybody who receives data from a controller is a 'recipient'.

A 'third party' is a natural or legal person who does not act under instructions of the controller (and is not the data subject).

A 'third party recipient' is a person or entity that is legally separate from the controller, but receives personal data from the controller.

L-Artikolu 13 tal-Kap. 440

Illi l-ligi applikabbli f'dan il-kaz huwa l-Att dwar il-Protezzjoni u l-Privatezza tad-Data – Kapitolu 440 tal-Ligijiet ta' Malta.

L-iskop ta' dan l-Att hu deskritt bhala:

¹⁰ Pg. 55

“Sabiex jagħmel provvedimenti għall-protezzjoni ta’ individwi kontra l-ksur tal-privatezza tagħhom bl-ipproċessar ta’ data personali u dwar dak li għandu x’jaqsam ma’ dan jew li hu ancillari għalih.”

Il-ligi tistipula b’mod car li hadd ma jista jipprocessa data personali sensitivi ghajr f’dawk il-kazijiet imsemmija fl-Artikoli 12 (2) sa 16 tal-istess Kapitolu 440.

Illi l-istess ligi taghti wkoll definizzjoni tal-kliem *‘data personali sensitivi’*; *‘processar’* u *‘processar ta’ data personali’* b’dawn jigu riprodotti hawn taht:

"data personali sensitivi" tfisser data personali li jkunu jizvelaw ir-razza jew l-origni etnika, fehmiet politiċi, twemmin reliġjuż jew filosofiku, sħubija fi trade union, saħħa, jew attività sesswali;

"proċessar" u **"proċessar ta’ data personali"** tfisser kull tħaddim jew sett ta’ operazzjonijiet li jsiru dwar data personali, sew jekk dan jigri b’mezzi awtomatiċi sew jekk le, u tinkludi l-kollezzjoni, r-rekordjar, l-organizzazzjoni, il-ħzin, l-adattament, il-bdil, l-irkuprar, il-ġbir, l-użu, il-kxif permezz ta’ trasmissjoni, it-tixrid jew l-għemil xort’ohra ta’ informazzjoni disponibbli, l-allinjament jew il-kombinazzjoni, l-imblokkar, il-kancellament jew il-qerda ta’ tali data;

M'hemmx kontestazzjoni li d-data li giet svelata fit-Tribunal Eklessjastiku hija data sensittiva personali relatata mas-sahha tal-*parte civile* OMISSIS.

L-akkuza li qeghda tigi dedotta fil-konfront tal-imputat hija msejsa **unikament u esklussivament** fuq il-Kap. 440, precizament fuq dak ravvizat fl-artikolu 13 tal-Kap. 440. L-artikolu 47(b) ikkwotat qieghed jaghmel biss riferenza ghall-pieni li ghandhom jigu applikati meta jkun hemm ksur tal-artikolu 12 sa 17 tal-istess Att.

Id-dicitura tal-akkuza tirriproduci fedelment l-ewwel parti tal-artikolu 13 li jstabilixxi:

“Id-data personali sensittivi jistghu jigu pprocessati jekk jigu adottati salvagwardji xierqa u l-ipprocessar ikun mehtieg sabiex: (a) il-kontrollur jkun jista’ jikkonforma ruhu ma’ dmirijietu jew jezercita d-drittijiet tieghu taht xi ligi li tirregola l-kondizzjonijiet ta’ l-impieg; jew (b) l-interessi vitali tas-suggett ta’ data jew ta’ xi persuna ohra jkunu jistghu jigu protetti u s-suggett ta’ data ma jkunx fizikament jew legalment kapaci li jaghti l-kunsens tieghu; jew (c) ikunu jistghu jigu stabbiliti, ezercitati jew difizi talbiet legali.”

L-iskop wara l-Kap. 440 huwa biex tigi regolata entita’ li tkun kontrollur tad-data personali u data sensittiva personali u l-obbligi identifikati fl-artikolu 440 huma imposti biss fuq l-istess kontrollur. L-ghan tal-Att mhuwiex li jigu kontrollati individwi personali. **L-**

**artikolu 5 jistabilixxi li dan l-Att m'ghandux japplika ghall-
iprocessar ta' data personali meta dak l-iprocessar jitwettaq
minn persuna naturali fil-kors ta' attivita purament personali.**

Minn ezami tad-dibattiti parlamentari jirrizulta b'mod car x'kien l-iskop tal-legislatur wara l-introduzzjoni ta' dan l-Att. Huwa u jipprezenta l-abbozz tal-ligi l-Ministru Austin Gatt kien spjega li:

“Id-Data Protection Act li qed jipprezenta dan il-gvern trid tindirizza dawn id-diffikultajiet u qed tipproponi soluzzjoni serja ta' regolamentazzjoni dwar id-data li tista' tiġi maħżuna minn persuni u kumpanniji Maltin u tistabilixxi r-regoli dwar meta tista' tiġi pprocessata dik id-data, meta tista' tithaddem u kif għandha tiġi pprocessata. Id-data protection hu suġġett sensittiv ħafna għax jolqot l-aktar informazzjoni intima tal-persuna dwar l-istat tas-saħħa tiegħu, kemm mar jara tobba, mar jew ma marx l-isptar, x'jemmen politikament, ir-razza tiegħu, l-origini tiegħu, hux mizzewweg, kemm għandu tfal u fejn imorru skola. Is-saħħa ta' l-IT illum hija li tista' tikkollega informazzjoni minn sorsi ħafna differenti biex tagħmel psychological profile ta' persuna biex tiġbor l-iktar informazzjoni intima dwarha. Minħabba f'hekk l-argumenti dwar dan is-suġġett kienu spiss argumenti pjuttost sħan, speċjalment anke fis-snin sebgħin, meta l-IT kien għadu ġdid fuq ix-xena mondjali u l-ispekulazzjoni dwar l-abbuż tiegħu ġustament kienet għolja ħafna.”¹¹

¹¹ Id-Disa' Parlament, Seduta Numru 419, 7 ta' Novembru 2000, pagna 648.

B' riferenza ghat-Taqsima III tal-Att li tahtha jaqa' l-artikolu 13 tal-Att, il-Ministru Gatt kien kompla jispjega li:

“Fit-tielet parti qed niddefinixxu x'inhuma l-htegijiet u kriterji biex ikun jista' jsir processing. Dan hu l-process tekniku kif tqabbel ammont kbir ta' data li għandek. Mela jekk għandek ir-registru elettorali, fejn għandek hafna ismijiet, toroq, lokalitajiet u identity numbers, tista' tgħidlu biex joħroġlok il-lista ta' min għandu bejn 18 u 20 sena. Is-software li tuża u l-att fiziku biex toħroġ dik il-lista huwa magħruf bhala l-processing tad-data. It-tielet parti tistabbilixxi r-regoli ta' kif u meta għandu jsir il-processing tad-data. U jista' jsir għal raġunijiet li huma, skond il-liġi, speċifiċi u li jkunu magħrufa minn qabel li l-metodu tal-processing ikun korrett u up-to-date u limitat severament għal raġunijiet li jkunu ġew dikjarati minn qabel. Qegħdin nistabilixxu wkoll numru ta' kriterji dettaljati hafna li mhux se nidhol fihom f'dan l-istadju, fejn qed ngħidu li dan il-processing ikun jista' jsir biss jekk ikun hemm jew il-permess esplicitu tal-persuna konċernata li se tiġi processata d-data tagħha jew inkella meta jkun hemm il-kazijiet eċċezzjonali li semmejt qabel.

Qed nippermettu wkoll il-processing tad-data għad-direct marketing basta dan ikun mingħajr cost għaċ-ċittadin li jidhol fih, u jkun magħruf li jekk inti qed tibgħat dik l-informazzjoni, qed tagħti l-permess tiegħek biex dik l-informazzjoni tkun tista' tiġi processata għall-iskopijiet tad-direct marketing. Qed nesigu li għandu jkun hemm il-permess esplicitu taċ-ċittadin għal dak li għandu x'jaqsam ma' processar ta' sensitive data. Din hija data

*dwar xi hadd li minnha tista' tasal għar-razza jew l-etnia ta' dak li jkun, għall-opinjoni politika tiegħu, ir-religjon, il-philosophical beliefs, jekk hux imsieheb jew le fi trade union u l-hajja religjuża jew sesswali tiegħu. Biex tipproċessa xi haġa minn din id-data - u issa l-partiti politiċi jridu jħabbtu rashom - trid il-permess esplicitu ta' kull persuna u dak il-permess jista' jigi withdrawn minn dik il-persuna meta jrid u meta jogħġbu with no questions asked."*¹²

Huwa car għalhekk li hawn qeghdin nitkellmu minn entitajiet li fil-kors tal-attivitá' tagħhom ikollhom access għad-data ta' persuni individwali u mhux għall-persuna individwali. Anke jekk wiehed jaghti daqqa ta' ghajn għar-regolamenti mahruga taht l-istess Att, johrog bic-car kif l-enfazi qeghda unikament fuq entitajiet li minhabba l-funzjoni tagħhom ikollhom access għall-informazzjoni fuq l-individwu. Fil-kaz li għandha quddiemha din il-Qorti, ma saret l-ebda prova li l-imputat kien kontrollur fis-sens li jstabilixxi l-Att u li għalhekk huwa kien marbut b'mod specifiku ma' dak li jstabilixxi l-artikolu 13 tal-Kap. 440 u għalhekk l-imputat ma seta' qatt jitressaq u jigi akkuzat li huwa kiser l-artikolu 13 tal-Att.

Il-Qorti tagħmel riferenza għall-kaz li kien jinvolvi materjal li hareg mill-file tal-Korp tal-Pulizija li kien jikkoncerna l-Ispettur Elton Taliana. Dan il-materjal kien spicca prezentat minn Saviour Balzan f'kawza ta' libell li l-Ispettur Elton Taliana kien għamel kontra l-editur tal-Malta Today Saviour Balzan għal dak pubblikat fil-

¹² Ibid pagna 652.

gazzetta ta' Balzan fuq Taliana. F'dan il-kaz partikolari Saviour Balzan ma tressaqx il-Qorti akkuzat li kiser il-Kap. 440 ghax ipprezenta kopja tad-dokumenti mill-file tal-Pulizija fil-kawza ta' libell. Ghalkemm sar rapport lill-Kummissarju dwar id-Data, il-Kummissarju dwar id-Data ma investigax lil Saviour Balzan izda investiga lill-kontrollur tad-Data cioe' l-Kummissarju tal-Pulizija biex jistabilixxi jekk kienx hemm ksur tad-disposizzjonijiet tal-Kap. 440. Irrizulta li kien hemm ksur u l-Kontrollur sab hati lill-Korp tal-Pulizija u mhux lil Saviour Balzan. Il-Pulizija lanqas ma ressqet il-Qorti lil Saviour Balzan fuq dan il-kaz u ghamlet sewwa.

Il-Qorti taghmel referenza ghas-sentenza taghha fl-ismijiet **Il-Pulizija vs Jason Azzopardi**,¹³ li kien jikkoncerna allegat reat taht l-artikolu 252 tal-Kap. 9 li propju nibet mill-investigazzjoni li ghamlet il-Kummissarju tad-Data wara li Balzan kien ipprezenta d-dokument fil-kawza ta' libell. Il-kunsiderazzjonijiet li ghamlet il-Qorti dakinhar u b'mod partikolari dak li xehed il-Kummissarju tad-Data jitfghu dawl fuq l-ghan wara l-Kap. 440:

“Mhux il-kompitu ta' din il-Qorti u lanqas hi mitluba biex tibdel ir-rwol taghha ta' Gudikatura Kriminali li tinvestiga u tistabilixxi min kienet il-persuna li harget id-dokumenti mid-dossier tal-Ispettur Elton Taliana u esebiti mix-xhud Saviour Balzan f'wahda mill-kawzi ta' libell quddiem Qorti ohra u li wasslu ghall-ilment quddiem il-Kummissarju tad-Data. Dawn id-dokumenti kienu esebiti f' dawn l-atti mill-istess xhud.

¹³ Deciza mill-Qorti tal-Magistrati (Malta) Bhala Qorti tal-Gudikatura Kriminali fil-15 ta' April 2016.

Dawn il-proceduri mhumie x xi wahda mill-kawzi ta' libell civili li fetah l-Ispettur Elton Taliana li saret referenza ghalihom f'din il-procedura, lanqas huwa process dwar il-karriera tal-istess Spettur u konnessjonijiet li kien allegat li kellu.

Li rrizulta f'dawn l-atti hu li l-Kummissarju tad-Data Saviour Cachia ikkundanna lill-Kummissarju tal-Pulizija bhala l-controller u dan ghaliex mill-Korp tal-Pulizija kien hemm breach meta mill-file maghruf bhala dossier hargu dokumenti li huma intenzjonati biss ghal konsum intern.

Il-Kummissarju tad-Data ma sabx lil Peter Paul Zammit hati li kien hu li ghadda d-dokumenti esebiti fil-Qorti.

Ix-xhud Saviour Cachia (a fol. 6 et seq.) sostna:

Fid-decizjoni tieghi ma ghidtx li s-Sur Zammit hareg il-file. Jiena jigifieri allura hawnhekk irreferejtu ghal dik il-parti fejn qed jissemma' hu bhala data controller fejn hemm indikat illi kien hemm xhieda fejn kienet qalet illi s-Sur Zammit, dak iz-zmien bhala Kummissarju tal-Pulizija kien talab il-file u kien jigifieri qiegħed l-ufficcju tieghu. U naturalment peress li ahna – ghax ahna importanti li wiehed jghid illi meta ninvestigaw ahna, ahna ninvestigaw il-processi meta jkun hemm dak l-allegat, l-allegazzjoni ta' breach ta' data protection – ahna dejjem inharsu lejn il-processi biex naraw kif qiegħed il-process – qatt ma ninvestigaw in-nies. U fejn nikkonfermaw ahna illi kien hemm

allura breach, once li nikkonfermaw dak iktar u iktar ma nkomplux infittxu min huma n-nies, allura ahna meta wasalna f'dak l-istadju, ghalhekk id-decizjoni qieghda kif inhija, ahna ma nkomplux nghidu, isma', harigha t-tali u t-tali. Allura dik hawnhekk tajna spjegazzjoni fejn irreferejna illi allura x'qeghdin nghidu fid-decizjoni. Issa barra minn hekk, forsi hawnhekk m'hawnx riferenza ukoll, anke fl-istess decizjoni minghalija f'wahda mill-considerations hemm illi ma kienx hemm evidenza illi fil-fatt kien hemm who disclosed the data. Allura speci ahna konna morna naraw il-process u hareg li hareg.

Il-kundanna saret fi zmien meta l-Korp kien qieghed jitmexxa minn haddiehor.

*Irrid nghid ukoll illi ahna meta nitkellmu fuq data controller – ghax din hija importanti from a data protection point of view – ahna data controller meta ninvestigaw anke jekk il-kaz ikun gara hafna zmien qabel, ahna ninvestigaw id-data controller min ikun f'dak il-mument, jigifieri jekk bhalissa hemm il-Kummissarju Cassar biex niftehmu, is-Sur Cassar, allura jiena qed ninvestiga lilu, u anke meta jkun hemm data protection breaches ikun irid igorrha d-data controller prezenti; ahna mhux fuq in-nies min kien f'dak iz-zmien, ghax dan huwa punt importanti hafna. **Ghalhekk ahna bhala data protection authorities ninvestigaw relazzjoni taghna hija dejjem tkun mal-kontrolluri, dak li jissejjah il-kontrolluri tad-data.**"¹⁴*

¹⁴ Pagna 27 u 28 tas-sentenza.

Dan il-punt hareg ukoll fil-kaz odjern fix-xhieda li ta' Ian Deguara, rapprezentant tal-Kummissarju dwar il-Protezzjoni tad-Data fis-seduta tad-9 ta' Frar 2017 fejn xehed:

“Mela, nahseb tajjeb illi niccara illi ahna meta ircivejna l-ilment bdejna ninvestigawh. Ahna ninvestigawh mal-kontrollur illi kien l-isptar ta' Ghawdex jigifieri bdejna l-investigazzjoni mal-isptar ta' Ghawdex. Ahna ma nfittxux persuna. Ghalkemm kien hemm allegazzjoni li kien OMISSIS li harigha, tajjeb, jew inkella li kien fil-pussess tieghu peress li kellu forsi, jien naf, access intern gol-isptar, ahna xorta investigajna l-isptar. U sibna illi l-kopji li gew esebiti quddiem it-Tribunal Ekklezjastiku kienu kopji minn gol-file ta' OMISSIS. Bis-sahha ta' dik il-konkluzjoni ikkonkludejna illi effettivament l-isptar kiser l-Att, specifikament l-artiklu 13 tal-Att Dwar il-Protezzjoni u l-Privatezza tad-Data illi jghidlek illi isma', data sensittiva, din kienet medical record li kienet informazzjoni fir-rigward tas-sahha mentali tas-Sinjura, kisru l-Att. Allura l-pass li ridna niehdu kien kontra l-isptar ghax kisru l-ligi. Pero' peress li dak huwa reat kriminali ma stajniex nimponu multa ahna hemmhekk f'dan il-kaz. Kellna bilfors naghmlu denunzja mal-pulizija biex jipprosekwixxu huma jigifieri skont l-artiklu 47 tal-ligi tad-Data Protection. Jigifieri iva li nista' nghid konferma illi kien hemm ksur tal-Att ghax id-dokumenti hargu mill-isptar pero' ma stajniex naslu min kien il-persuna li harighom. Pero' li esebixxa OMISSIS

quddiem it-Tribunal kienu kopji veritieri li kien hemm kontentuni fil-file.

...

Kif spjegajt qabel lis-Sur Magistrat il-ligi taghna taghraf li hemm kontrollur. Jigifieri ahna r-relazzjoni taghna qieghda mal-kontrollur, mhux mal-persuna li setghet zvelat l-informazzjoni. Issa, jekk imbaghad, f'dan il-kaz l-isptar, kellhom provi biex isibu minn zvelaha dik, imbaghad jiehdur passi dixiplinarji huma internament. Pero' ahna r-relazzjoni taghna qieghda mal-isptar, mal-kap tal-isptar, u jekk kien hemm nuqqas, f'dan il-kaz kien hemm nuqqas, niehdu l-passi necessarji."¹⁵

Ix-xhud Ian Deguara kkonferma li l-artikolu 13 qieghed japplika ghall-Isptar bhala l-kontrollur tad-data u mhux ghall-individwu li hareg id-data mill-Isptar. Dan ifisser ghalhekk – li anke jekk ghall-grazzja tal-argument biss kellu jitqies li l-imputat hareg id-dokumenti mill-Isptar huwa personali jew inkella tali dokumenti gew fil-pussess tieghu – huwa ma kienx qieghed jikser l-artikolu 13 tal-Att, jista' jkun li kiser artikoli ohra fil-Kodici Kriminali.

Il-kliem tal-akkuza kif formulata huwa bazat fuq artikolu, li ma jistax jitqies li japplika fil-konfront ta' individwu li mhux kontrollur tad-data. Ghalhekk jekk kellha tittiehed xi azzjoni abbazi tal-artikolu 13 kellha tittiehed fil-konfront tas-Supretendent tal-Isptar bhala kontrollur tad-data kif sar fil-kaz tal-Korp tal-Pulizija fil-kaz

¹⁵ Fol. 7 – 9 tal-Process.

tal-Ispettur Taliana u mhux tal-individwu partikolari f'dan il-kaz l-imputat.

Fir-rapport li sar lill-Kummissarju ghall-Protezzjoni tad-Data, OMISSIS tramite l-legali taghha allegat li kien l-Isptar Generali ta' Ghawdex u mhux zewgha li kiser id-drittijiet taghha ghall-Protezzjoni tad-Data. Dan jinsab konfermat mill-ittra stess mahruqa mill-istess Kummissarju fejn informa lill-legali ta' OMISSIS u anke lil Dr. Nadine Delicata bl-ezitu tal-investigazzjoni tieghu in segwitu ghar-rapport tal-istess OMISSIS.¹⁶

Fil-fehma ta' din il-Qorti l-Prosekuzzjoni u l-*parte civile* qeghdin jakkuzaw lill-individwu b'reat li jista' jigi mwettaq biss minn kontrollur tad-data meta l-istess individwu mhuwiex kontrollur tad-data.

Dan il-kaz huwa analogu ghal dak li kien qieghed isehh meta kienu qeghdin jitressqu persuni li jaghmlu uzu hazin minn mezzi ta' komunikazzjoni bhal mobiles taht artikoli tal-ligi li kienu jikkoncernaw u li kienu applikabbli ghall-provdituri tas-servizz ta' telefonija cellulari (service providers). Il-Qorti taghmel riferenza ghall-kaz **Il-Pulizija vs Etienne Calleja** deciz mill-Qorti tal-Appell Kriminali fit-22 ta' Awissu 2007 fejn inghad li:

"Illi dawn ir-reati w ohrajn li jinsabu fis-subartikoli (2) (3) u 4) huma deskritti fin-nota marginali bhala "Reati ta' xorta kriminali

¹⁶ Ittra datata 6 ta' Gunju 2016 a fol. 17 tal-process.

specifici għall-komunikazzjonijiet elettronici

...

Jidher li l-ghan tal-ligi speċjali f'dan l-artikolu mhux li johloq jew jippunixxi b'mod aktar sever u gravuz reati kriminali li jinsabu f'ligijiet oħra li jsiru b'mezzi ta' telekomunikazzjoni, kif qed tinterpreta dan is-sub sub inciz (1) (d) tal-artikolu 35 il-Prosekuzzjoni, imma biex tipprevjoni abbuzi ta' natura teknika minn sistemi ta' komunikazzjonijiet elettronici.

...

Hu car għalhekk li l-kliem " għal għan li ma jkunx dak li jkun gie fornut għalih" u "jew tuzah b'mod mhux kif imiss" f'dan is-sub sub-inciz ma jirrifere għall-kommissjoni ta' xi reat iehor bl-uzu tat-telephone, imma għall-uzu ta' xi network jew apparat ta' komunikazzjonijiet elettronici fornut minn impriza mhux għal-ghan tekniku, awtorizzat, kompatibbi, eccetera, jew għall xi forma ta' abbuz iehor, imma dejjem fl-isfera tar-reati ta' l-istess natura teknika komprizi fis-sub-sub-incizi (a) (b) u (c) u reati oħra krejati fis-subartikoli (2) (3) u (4) li kollha jirrigwardaw abbuzi oħra bħal min jagħti informazzjoni falza jew qarrieqa (2); ta' impjegat ma xi impriza li tati informazzjoni dwar messaggi li jsir jaf bihom minnhabba l-kariga li jkollu, jibdel jew jahbi jew jommetti, jdewwem jew jostruwixxi milli jwassal xi messagg jew jeqred xi messagg jew ihassar jew jeqred xi messagg li ma jkunx indirizzat lilu, eccetera (3) jew inkella ta' min jattakka jew jostruwixxi xi impjegat ta' impriza fil-qadi tal-funzjonijiet tiegħu (4)."¹⁷

¹⁷ Pagni 8 u 9 tas-sentenza.

Wara din is-sentenza kellhom jigu implimentati reati specifici sabiex ikopru agir hazin ta' individwi personali minn mezzi ta' komunikazzjoni.

Mill-provi prodotti ma jirrizultax li l-imputat hareg data sensittiva personali tal-*parte civile* mill-Isptar Generali ta' Ghawdex, li kellu fil-pussess tieghu u dawn kienu esebiti fit-Tribunal Ekklesjastiku iva. Dan jirrizulta kemm mill-investigazzjonijiet li ghamel l-Ispettur Bernard Charles Spiteri u anke mill-Bord tal-Inkjesta Intern imwaqqaf mill-Isptar. L-Ispettur Bernard Charles Spiteri xehed:

“Jien kont kellemt ukoll lill-kap ezekuttiv tal-isptar, konna ghamilna laqgha u kien hemm anke wkoll membri ohra mit-tmexxija tal-isptar, fejn dawn jien kont staqsejthom jekk ghandhomx xi suspett jew xi informazzjoni kif setghet harget l-informazzjoni, biss huma ma taw l-ebda indikazzjoni kif din l-informazzjoni setghet giet f'idejn l-imputat OMISSIS. Biss, pero' qaluli li qabel is-sistema fejn kien jigi mmarkat u ibbukjat il-file ma kinitx daqshekk accurate u kien hemm certu sitwazzjonijiet fejn il-file kien jithalla jigri u jista' jkun li kien f'dawn ic-cirkostanzi li huwa l-file gie f'idejh.
(Enfasi tal-Qorti)

Li rrid nghid jien kont kellemt ukoll lil Noel Said li dak iz-zmien kien in charge mill-medical records bejn is-sena elfejn u tnax (2012) u s-sena elfejn u erbatax (2014). Biss, pero' dan ukoll kont hadtlu stqarrija, izda dan kien cahad li l-ewwel nett jaf lil

*OMISSIS jew lil OMISSIS u kien cahad ukoll li kien jaf xi informazzjoni kif dan il-file spicca wasal ghand OMISSIS. Kont kellemt ukoll lil Simone Grech li mis-sena elfejn u erbatax (2014) 'il hawn insomma sakemm hadtilha l-istqarrija jiena f'Settembru tas-sena elfejn u sittax (2016) kienet in charge ukoll mill-medical records tal-isptar ta' Ghawdex u l-istess din ma kien indikat l-ebda informazzjoni kif dawn seta' l-file, kopja minn dan il-file, hargu ghand l-imputat OMISSIS."*¹⁸

Fil-konkluzjoni tal-Bord tal-Inkjest Intern imwaqqaf mill-Isptar, gie ritenut: *"The Board concluded that it was not in a position to recommend any disciplinary action against any officers since no concrete evidence or chronological sequence of events was presented."*¹⁹

Irrizulta li lura fl-2011, l-imputat kien talab sabiex ikollu f'idejh data sensittivi personali ta' martu OMISSIS u dan bi hlas. Dan gie ikkonfermat mix-xhud **Jeanette Falzon** fix-xhieda taghha moghtija fid-9 ta' Marzu 2017 fejn hija xehdet²⁰:

"Spettur Bernard C. Spiteri:

Issa meta qed tghid li kien gie talbek biex taghtih xi karti mill-file mediku, kien indikalek x'karti jrid?

Xhud:

¹⁸ Seduta tad-9 ta' Frar 2017, fol. 22 tal-process.

¹⁹ Fol. 69 tal-process.

²⁰ Kif ukoll fix-xhieda taghha quddiem it-Tribunal Ekklezjastiku moghtija nhar it-Tlieta, 2 ta' Gunju 2015 li qieghda riprodotta fil-process odjern a fol 165-170.

Le, kien qalli li ghandu bzonn xi karti minn gol-file, imma ma kienx qalli il-karti specifici liema ried.

Il-Qorti:

Qallek ghal xhiex riedhom dawn il-karti?

Xhud:

Qalli li ghandhom bzonnhom biex juzahom minhabba xi affarijiet ghall-mara tieghu.

....

Xhud:

Jien kont ghidtlu li bhala professjonalment, etikament u anke moralment jien ma nistghax naghmel dawn l-affarijiet minhabba d-data protection tal-file. U hu kien qalli "Jien lest li nikkumpensak anke bi flus" ... (enfasi tal-Qorti)

L-istess xhud tghid li l-imputat kien gieli jitlobha xi informazzjoni meta dawn kienu ghadhom jiffurmaw koppja mizzewga fis-sena 2011 pero' waqaf meta dawn bdew il-procedura ta' separazzjoni. Issemmi li ma baqax ikellimha fis-sena 2012 u di fatti d-dokumenti jmorru ghas-sena 2012 u wara meta l-koppja kienet gia nfirdet. Ix-xhud tkompli tghid:

"Xhud:

Sur Magistrat li gara mbaghad, jiena dan il-kaz qisni baqa' ghaddej. Imma mbaghad darba minnhom kien gie Fr Edward fl-ufficju konna jien u Pauline Camilleri.

Il-Qorti:

Fejn gie?

Xhud:

Kien gie l-ufficju ta' Pauline Camilleri s-social worker, ghax hu kien hemm il-kaz tat-Tribunal ukoll. U gie hemmhekk biex jiddiskuti l-kaz. U kien qalilna li ghandu karti mill-file ta' OMISIS. U jien ghidt, bejni u bejn ruhi ghidt "Ara, mela ma tajthomlux jien, hargu b'xi mod iehor dawn." Qed tifhem? Jigifieri mbaghad meta xhedt fit-Tribunal tal-Kurja, Fr Edward urieni l-karti lili. Jigifieri hemmhekk jiena" (enfasi tal-Qorti)

KUNSIDERAZZJONIJIET LEGALI OHRA

Minn dak li analizzat il-Qorti fuq il-provi migjuba f'dan il-kaz il-Prosekuzzjoni setghet ikkontemplat li takkuza lill-imputat f'dawn ir-reati:

Il-Kodici Kriminali (Kap 9) jipprovdi:

290. Kull min jixtri jew b'xi mod iehor jircievi minghand persuna ohra jew jinsab li ghandu fil-pusses tieghu xi oggett li jkollu xi marka jew sinjal li juri li dak l-oggett huwa proprjeta tar-Repubblika ta' Malta, jew oggett illi l-pussessur tieghu jkun jaf li huwa proprjeta tar-Repubblika ta' Malta, li l-awtorita kompetenti ma tkunx tat permess bil-miktub sabiex wiehed jista' jiddisponi minnhom, u jonqos li jaghti kont sodisfacenti ta' kif l-oggett jew il-haga jkunu gew ghandu, jehel, meta jinsab hati, il-piena tal-multa jew ta' prigionerija ghal zimien mhux izjed minn xahar.

271. Is-serq huwa ikkwalifikat bix-"xorta tal-haga misruqa" -

(i) meta jsir fuq **records pubblici** kif imfissra fl-artikolu 2 tal-Att dwar Arkioji Nazzjonali. Kap. 477.

334. Kull min f'Malta xjentement **jilqa' ghandu** jew jixtri hwejjeg' misruqa, **meħuda b'qerq**, jew **akkwistati b'reat**, sew jekk dan isir f'Malta jew barra minn Malta, jew, xjentement, b'kull mod li jkun, jindaħal biex ibiegħhom jew imexxihom, jeħel, meta jinsab hati -

(a) jekk il-ħaga tkun geġja minn serq, bil-pieni tas-serq, skont il-valur tal-ħaga;

(b) jekk il-ħaga tkun geġja minn wieħed **mir-reati dwar hwejjeg' akkwistati jew mizmuma kontra l-ligi, bil-piena li hemm għal min hekk jakkwista jew izomm**;

(c) jekk tkun geġja minn frodi, bil-pieni li hemm għal dik ix-xorta ta' frodi li minnha l-ħaga tkun geġja ...

KONKLUZJONI

Il-*parte civile* OMISSIS garbet **ksur tal-privatezza tagħha** meta partijiet mill-file mediku meta hija kienet qiegħda rikoverata fl-Isptar Generali ta' Ghawdex fis-sezzjoni mentali gew esebiti fil-process quddiem it-Tribunal Ekklezjastiku.

Il-mod kif waslu dawn id-dokumenti għand l-imputat huwa moralment inaccettabbli. L-imputat inqeda bil-pozizzjoni li kellu

bhala impjegat tal-Isptar Generali ta' Ghawdex biex bi hbiberiji jew b'mod iehor kiseb kopji tad-dokumenti in kwistjoni.

Id-data sensittiva personali tal-*parte civile* ngabet b'mod illegali u minghajr awtorizzazzjoni.

L-imputat prova jargumenta li dan il-kaz jinkwadra f'wahda mill-eccezzjonijiet kontemplati fl-artikolu 13 li tippermetti l-uzu ta' data personali sensittiva.

Il-Qorti ma taqbilx mal-interpretazzjoni li nghatat li kieku l-artikolu 13 japplika fil-kaz in dizamina, xorta jista' jitqies li ma kien hemm l-ebda ksur ta' dan l-artikolu. Dan ghar-raguni li d-data personali sensittiva giet processata biex "*jigu stabbiliti, ezercitati jew difizi talbiet legali.*"²¹ Id-difiza sostniet li "mhux kontestat li fil-kaz in dizamina, kienu ghaddejjin proceduri quddiem it-Tribunal Ekklesjastiku ghal dikjarazzjoni ta' nullita taz-zwieg bejn l-imputat u OMISSIS. Id-dokumenti medici mertu ta' dan il-kaz gew prezentati fil-kors tal-proceduri ta' nullita li kienu ghaddejjin u ma intuzaw ghall-ebda skop iehor. In oltre jinghad wkoll li l-proceduri gew prezentati bhala atti sigrieti u cioe' li l-access ghalihom fl-istess process kellu jkun wiehed ristrett ghall-ahhar. Gia hemm certu riservatezza fil-proceduri ta' nullita quddiem it-Tribunal Ekklesjastiku fis-sens li terzi persuni estraneji ghall-process ma jkollhomx access ghall-process u ghax-xhieda moghtija; ahseb u ara li ssir dikjarazzjoni fi

²¹ Artikolu 13 (c) tal-Kap. 440.

proceduri li gia huma kunfidenzjali li l-atti ghandhom jinzammu b' mod sigriet."

Jekk kien jemma dan kellu jsib mezz legali kif jikseb dawn id-dokumenti u li zgur li kieku ha l-parir tal-abbli avukat difensur kien jinstab mezz moralment u etikament korrett biex dik l-informazzjoni tasal fit-Tribunal Ekklesjastiku.

DECIDE:

Din il-Qorti ma tistax tasal ghal konkluzjoni lil hinn minn kull dubju dettat mir-raguni illi fil-fatt l-imputat huwa hati tal-akkuza migjuba kontrih u dawn ghar-ragunijiet esposti aktar 'il fuq.

Ghal dawn il-mottivi l-Qorti ma ssibx lill-imputat hati tal-imputazzjoni migjuba kontrih u minnha tilliberah.

Finalment il-Qorti tordna d-divjett tal-pubblikazzjoni tal-isem tal-imputat u tal-parte civile OMISSIS f'kull mezz ta' komunikazzjoni.

Dr. Joseph Mifsud
Magistrat