



QORTI TA' L-APPELL

**ONOR. IMHALLEF
PHILIP SCIBERRAS**

Seduta tat-3 ta' Ottubru, 2007

Appell Civili Numru. 15/2006

Mobisle Communications Limited

vs

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

Il-Qorti,

Fl-4 ta' Awissu, 2006, il-Bord ta' l-Appelli dwar il-Protezzjoni tad-Data ppronunzja s-segweni 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 Mobisle Communications Limited dated 8th June 2006 (marked as document PMC6 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 Go Mobile 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 Go Mobile and all information requested by the Police authorities are to be immediately made available to the Police authorities."

L-appell devolut mis-socjeta` rikorrenti lil din il-Qorti mis-sentenza tat-Tribunal ta' l-Appelli dwar il-Protezzjoni tad-Data huwa sostanzjalment konsimili ghal dak ta' l-appell fl-ismijiet "Vodafone Malta Limited -vs- Kummissarju ghall-Protezzjoni tad-Data" (Nru. 16/06), deciz illum stess;

Fic-cirkustanzi u a skans ta' ripetizzjoni l-Qorti taghmel referenza ghall-konsiderazzjonijiet kollha zvolti f' dak l-

Kopja Informali ta' Sentenza

appell l-iehor u taghmilhom applikabbli *mutatis mutandis* ghall-appell prezenti.

Ghall-istess motivi f' dak l-appell l-iehor dedotti, l-appell qed jigi milqugh u s-sentenza appellata, revokata, bl-ispejjez jibqghu fic-cirkustanzi bla taxxa bejn il-partijiet.

< Sentenza Finali >

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