TRIBUNAL TAL-APPELLI DWAR L-INFORMAZZJONI U L-PROTEZZJONI TAD-DATA

Appell Numru 7/2017

Daphne Caruana Galizia

Vs

Il-Kummissarju għall-Informazzjoni u l-Protezzjoni tad-Data

Deċiżjoni 27 ta' Settembru 2018

Chairman: Dr Anna Mallia LL.D., LL.M. (Lond), Dip.Tax
Membri : Mr Charles Cassar M.B.A.(Exec.), Dip.Lab.Stud., Cert.Mediator (UK)
Mr David Bezzina HNDip C.S., BSc IT (Hons)

It-Tribunal

Dan huwa appell mid-deċiżjoni tal-Kummissarju appellat tas-7 ta' Awissu 2017 f'liema deċiżjoni l-Kummissarju kien iddeċieda li kien hemm ksur tad-drittijiet għall protezzjoni tad-data meta l-appellanta ppublikat blog posts u posts fuq Youtube bl-inklużjoni ta' prodott awdjo-viżwali; reġistrazzjoni rekordjar ta' video rigward laqgħa li saret bejn louai Aziz Michael Al-Twal u Abdelnaser Khalaf Mustafa Zayyar u ordna lill-istess appellant sabiex tneħħi l-video mit-tlett blog posts u fuq il-Youtube channel running Commentary f'mhux aktar tard minn tlett (3) ijiem wara li tirċievi d-deċiżjoni u fin-nuqqas l-Kummissarju kien ser jimponi multa amministrattiva ta' elfejn u ħames mitt ewro (€2500) u ta' mitejn u ħamsin ewro (€250 għal kull jum li l-vjolazzjoni tippersisti li tkun dovuta lill-Kummissarju bħala dejn ċivili.

Fl-appell tagħha l-appellanti tibbaża l-appell tagħha fuq interpretazzjoni żbaljata tal-Kap 440 tal-Ligijiet ta' Malta stante li louai Aziz Michael Al-Twal u Abdelnaser Khalaf Mustafa Zayyar kienu qed jaġixxu bħala rappreżentanti as-soċjetà Sadeen Education Investment Limited, li għalkemm il-laqgħa kienet f'post pubbliku bħal ma hija l-lobby tal-lukanda Hilton f'Malta skond l-appellanti dan huwa sit speċifikament kkrejat biex iservi skopijiet ta' negozju; stante li l-appellanti kienet għamlet tibdil fl-identità ta' min kien preżenti għal laqgħa in kwistjoni cioe l-ewwel semmiet lil Brian Tonna u wara lil Adrian Hillman iżda qatt ma qalet li jidhru fil-video iżda li kienu preżenti għal-laqgħa u għalhekk l-interess pubbliku kien jeżisti stante li rappreżentanti ta' din is-soċjetà Sadeen Education Investment Limited kienu qed jattendu din l-laqgħa li fiha kien hemm preżenti Brian Tonna li wara infurmawha li kien Adrian Hillman u mhux Brian tonna; li hija kienet tagħmel xogħolha ta' public watchdog u li l-fatt li Louai Aziz Michael Al-Twal u Abdelnaser Khalaf Mustafa Zayyar kien qed parti mit-'trattamenti mal-Gvern rigward liema kien hemm ħafna segretezza u misteri l-Qorti Ewropea stabbilit ukoll li "*The lack of any detailed information about the transaction from either the government or D.H. despite the applicant newspaper's attempts to obtain such details and the other uncontested facts raising legitimate doubts about the legitimacy of the deal could reasonably have prompted the journalist on anything that was available including unconfirmed rumours."*

Fir-risposta tiegħu l-Kummissarju jikkontendi li d-deċiżjoni tiegħu hija ġusta u timmerita konferma fir-risposta tiegħu u dana stante li tali pubblikazzjoni ma kienetx fl-interess pubbliku; li ma kien hemm ebda relazzjoni bejn il-blog post ippublikat li kien preżenti Brian Tonna mentri fil-fatt huwa ma kellu x'jaqsam xejn mal-laqgħat mertu ta' dan l-appell li seħħu fil l-lukanda Hilton u li wara li l-appellanti suggeswentement għamlet korrezzjoni u rreferiet għal Adiran Hillmanf I blog post suċċessivi jirrizulta li l-filmat ma żied ebda valur għall-istorja tant li fil-filmat lanqas biss jinkwadra Hillman iżda l-kwerelanti li ma humiex persuni pubbliċi u għalhekk kien hemm ksur tal-artikoli 7 u D tal-Kap 440 tal-Ligijiet ta' Malta.

L-ilment li sar lil Kummissarju kien sar fit-2 ta' Mejju 2017 minn Dr Louai Aziz Michael Al-Twal and Dr abdelnaser Khalaf Mustafa Zayyat li fih allegaw ksur tal-protezzjoni tad-Data meta l-appellanti fil-blog taghha tal-21 ta' April 2017 fid-9.32pm bl-isem Brian Tonna in meetings at the Hilton while his office is fake-raided for the PM u post iehor tat-8 ta' Mejju 2017 tat-12.13pm bit-titlu "While his office is raided by the policy study accountant Brian Tonna in Helton meeting with 'American Univesity' boss and Prince Jean of Luxembourg. .

Ikkunsidra

Preliminarjament

Illi t-Tribunal iħoss li fiċ-ċirkustanzi u minħabba li ħafna mir-riċerka magħmula hija bil-Lingwa Ingliża ikun għaqli li l-konsiderazzjoni ta' dan l-Appell issir bil-lingwa Ingliża.

Applicable Law

Chapter 440 of the Laws of Malta was repealed by Act XX of 2018 which came into force on 25 May 2018 but the applicable law is still Chapter 440 of the Laws of Malta as established by **Section 34 (2) of Act Xx of 2018 now Chapter 586 of the Laws of Malta** which states that: "*Art.34(2) Nothwithstanding the provisions of sub-article (1): (a) the repealed Act shall remain in force for the Purpose of any act, decision, action or proceedings taken in respect of any breach of the repealed Act that occurred or were instituted prior to the coming into force of this Act; and*

(b) any subsidiary legislation made under the provisions of the repealed Act shall, until other provision is made under or by virtue of this Act, continue in force and have effect as if it was made under this Act."

General Rule – the general rule is that the right to data protection is part of the right to privacy. The rule is that the protection of people with regard to their personal data is a fundamental right enshrined in the European Convention of Human Rights (article 8 respect for private life and Article 10 – freedom of expression), the Concil of Europe Convention for the Protection of Individuals with regard to automatic Processing of Personal Data known as Convention 108, The Charter of fundamental Rights of the European Union (article 8) and in the Treaty on the functioning of the European Union (article 16).

(a) Council of Europe

(i)The European Convention on Human Rights – Article 8 dealing with the respect for private life

(ii)The Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (known as Convention 108).

Within the framework of the council of Europe, the Data Protection Convention formulates a number of core principles for the collection and processing of personal data. The convention includes the following basic principles: Article 5 – quality of data, article 7 – Data security, Article 8 – Additional safeguards for the data subject , Article 9 – Exceptions and restrictions which states that:
"No exception to theprovisions of Articles 5, 6 and 8 of this Convention shall be allowed except within the limits defined in this Article.
Derogation from the provisions of Articles 5, 6 and 8 of this Convention shall be allowed when such derogation is provided by the law of the Party and constitutes a necessary measure in a democratic society in the interests of :

a) Protecting State security, public safety, the monetary interests of the State or the suppression of criminal offences;
b) Protecting the data subject or the rights and freedoms of others.
Restrictions on the exercise of the rights specified din Article 8 paragraphs b, c and d, may be provided by law with respect to automated personal data files used for statistics or for scientific research purposes when there is obviously no risk of an infringement of the privacy of the data subjects."

(b) European Union Law

Charter of Fundamental Rights of the European Union

Article 8(10(2) of the Charter provides:

Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposed and on the basis of the consent of the person concerned or some other legitimte basis laid down by law. Everyone has the right of access to data which have been collected concerning him or her and the right to have them rectified."

Exception to the general rule: Article 10 of the Charter grants the right to everyone to receive and impart information and foresees the possibility to resctrict this right when three conditions are fulfilled: "must be prescribed by law, pursue a legitimate aim and be necessary in a democratic society for the protection (mmm) of the reputation or rights of others." This concept covers the right to data protection.

The acts of the media, that is the freedom to collect, process and impart information on topic of general interest are protected by this Article 10 the so-called freedom of the press (see example ECtHR 11 July 2002 no 28957/95 Goodwin v the United Kingdom. Although it is not explicitly mentione din this article, the ECtHR expressed the view that it forms an integral part of the freedom of expression of article 10 ECHR:

> "*In this connection the Court has to recall that freedom of expression, as secured in paragraph 1 of article 10, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2, it is applicable not only to "information" or "ideas" that are favourably received or egarded as inoffensive or a sa matter of indifference, but also to those that offend, shock or disturb. Such are the demands fo that pluralism, tolereance and broadmindedness without which there is no "democratic society"..These principles are of particular importance as far as the press is concerned."* (**vide EctHR 8 July 1986 no 9815/82 Lingens v Austria para 41.42**)

Article 11 of the Charter reads as follows:
"Freedom of expression and information

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receie and impart information and ideas without interference by public authority and regardless of frontiers.

2. The freedom and pluralism of the media shall be respected."

Article 52(3) fo the Charter provides that, in so far ar the Charter contains rights which correspond to rights guaranteed by the Convention, the meaning and scope of those rights shall be the same as those laid down by the Convention. This provision of the Charter does not prevent EU law from providing more extensive protection.

According to the explanations relating to the Charter, Article 8 is based, inter alia, on Article 8 of the convention and on the Council fo Europe Convention of 28 January 1981 for the Protection of Individuals with regard to automatic Processing of Personal Data which has been ratified by all EU Member States. Similarly Article 11 of the Charter is said to correspond to article of the Convention.

(2) Data Protection Directive 95/46

This directive was repealed by Regulation (EU 2016/679) and remained into force until 25 May 2018.

According to Article 1(1) of the Directive, its objective is 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. In accordance with recital 11 of the Directive, the principles of the protection of the rights and freedoms of individuals, notably the right to privacy which are contained in the Directive, give substance to and amplify those contained in the above mentioned Data Protection Convention.

Personal data is defined in Article 2(a) as any information relating to an identified or identifiable person. The processing of personal data is defined as "any operation or set of operations which is performed upon personal ata, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or making available, alignment or combination, blocking, erasure or destruction (see Article 2(b)). A "controller" for the purposes of the Directive is a natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of

personal data (see Article 2(d), whereas a "processor" is a natural or legal person, public authority, agency or any other body which processes personal data on behalf of the controller (see Article 2(e)).

According to Article 3(1) , the Directive applies to the processing of personal data wholly or partly by automatic means and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system.

Article 9 of the Directive entitled 'Procession of personal data and freedom of expression provides:

"Member States shall provide for exemptions or derogations from the provisions of this Chapter (II), Chapter IV and Chapter VI for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression."

B. Relevant Maltese Law

As already stated, the relevant Maltese Law in this case is Chapter 440 of the Laws of Malta and its subsidiary legislation.

Article 2: Definition of Personal Data: 'personal data' means any information relating to an identified or identifiable natural person; 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.

Article 2:Definition of Processing and processing of personal data: any operation or set of operations which is taken in regard to personal data, whether or not it occurs by automatic means, and includes the collection, recording, organization, storage, adaptation, alteration, retrieval, gathering, use, disclosure by transmission, dissemination or otherwise making information available, alignment or combination, blocking, erasure or destruction of such data.

Article 2: Definition of controller of personal data or controller: a person who alone or jointly with others determines the purposes and means of the processing of personal data.

Article 3 : The Provisions of this Act shall apply to the processing of personal data, wholly or partly, by automated means and to such processing other than by

automated means where such personal data froms part of a filing system or is intended to form part of a filing system.

Article 7 provides that the controller shall ensure that (d) personal data is not processed for any purpose that is incompatible with that for which the information is collected; € personal ata that is processed is adequate and relevant in relation to the purposes of the processing; (f) : "no more personal data is processed than is necessary having regard to the purposes of the processing; (g) personal data that is processed is correct and if necessary up to date; (h) all reasonable measures are taken to complete , correct, block or erase data to the extent that such data is incomplete or incorrect having regard to the purposes for which they are processed."

Article 9(a)(e) : personal data may be processed only if "the data subject has unambiguously given his consent "or "processing is necessary for the persormance of an activity that is carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data is disclosed."

Article 6(1)(3)(4) : (1) subject to the following provisions of this article nothing in this Act shall prejudice the applications of the provisions of the European Convention Act relating to freedom of expression or the provisions of the Press Act.
(3) "..the Commissioner may establish specific measures and procedures to protect the data subjects; in such a case journalists and the media are to comply with measures and procedurs so established" and

(4) "if the measures and procedures contained in the code of conduct applicable to journalists and the media in terms of subarticle (2) or (3) are not compied with, the Commissioner may probibit any person concerned from carrying out any processing, in whole or in part, and order the blocking of data when , having regard to the nature of the data, the means of the processing or the effects that it may have, there is a serious risk of a relevant damage to one or more data subjects.".

Appellant is a journalist

Although none of the parties or the complainants contested that the applicant is a journalist the Tribunal feels that it make the following observations regarding bloggers since the appellant was a blogger.

Our Courts in the Case **Konrad Mizzi & Said Mizzi Liang v Daphne Caruana**

Galizia (Court of Magistrates per Depasquale 17.3.2016) decided that a blogger is a journalist and based its decision on the European Council's Committee of Ministers' recommendations which defines a 'journalist' as '*any natural or legal person who regularly of professionally engaged in the collection and dissemination of information to the public via any means of mass communication'* (Recommendation No R (2000) 7 of the C'Committee of Ministers to Member States on the right of journalists not to disclose their sources of information. 8 March 2000).

But, under Maltese law there is no definition of journalist, journalistic sources, media and each and every one of the legitimate aims for allowing the disclosure of journalistic sources. In Malta there are no entry requirements to become a journalist such as a minimum age, possession of academic qualifications or membership in a corporation as is required in Italy neither does one need to have a clean criminal record to qualifify for a press license as required in Portugal.

It is a pity that the new Media and Defamation Act Chapter 579 of the Laws of Malta does not give a definition of journalist.

According to the Maltese Institute of Journalism, any person employed as a journalist, photographer or cameraperson falls within the definition of a journalist. However this term is given a wide interpretation to include all those who by virtue of their work regularly engage in current affaris. However, the Institute excludes bloggers, columnists and broadcasters who write/produce features and programmes , respectively, on other areas such as social affairss, health and other life-style aspects from the definition of 'journalist'.

Unfortunately even the Media and Defamation Act (Chapter 579) failed to provide us with a definition of a journalist.

In EU countries such as Belgium, Netherlands and the United Kingdom bloggers are known to be ' citizen journalists' and not all of them are considered to fall within the definition of journalists.

In Belgium there is no definition of journalist and citizen journalists are not considered as journalists and do not enjoy the journalistic exception. However the Court of Appeal in the case instituted by Rita Wuyts against Eric Verbeeck who owns a website where he publishes regularly local and regional news, did not accepts Verbeeck's defence that the Press Council did not have the power and competence to take a decision on the complaint instituted by Wuyts and decided that whether a person does or does not have a press card and is or is not a member of a journalists' association is irrelevant; for the sake of the freedom of expression and the possibility for the media to self-regulate the Court found the Council

competent to decide on actions committed by non-professional journalists.

Similar to the Belgian system, in the Netherlands there is no legislation referring to the concept of citizen journalist but case-law shows implicit recognition of citizen journalists relying on the journalistic exception. One example is the judgement of the Court of Appeal of Den Haag in interlocutory proceedings of 26 July 2016 ((Rechtbank Amsterdam 6 Otober 2016 ECLI:NL:RBAMS:2016:6282). Taking into account the objective facts forming the basis of a blog and the personal data that was not only processed by the blogger, but also by others, makes the Court come to the conclusion that the applicant, who appeared in a amateur movie regarding a conversation for performing a murder and was later put on the blog , indeed was suffering reputation damage but nevertheless is responsible because it is a result of its own behavior. This theorgy was confirmed by the Tribunal of Amsterdam in interlocutory proceedings on 6 October 2016 (ECLI:NL:RBAMS:2016:6282) where it concluded it should stay possible for bloggers due to lack of options to verify the truthfulness of the facts, to publish about criminal proceedings. Concluding in the opposite sense would limit the freedom of expression and the freedom to inform the public on matters in the public interest.

The United Kingdom accepts individuals invoking the journalistic exception from the Data Protection Act if they are posting information or ideas for public consumption online even if they are not professional journalists and are not paid to do so (ICO – Data protection and journalism: a guide for the media', 30). Anyone with access to the Internet can engage in journalism at no cost under the sole condition the disseminated information to the public had the necessary public interest (The Law society and others v Kordowksi (2011) EWHC 3182 (QB), ICO ICO – Data protection and journalism: a guide for the media', 30).if their only purpose is to publish personal messages, opinions and comments they do not fall within the scope of article 32 of the DPA but rather the one relating to the exception solely for personal and household purposes

France may be clear in defining journalisim in its legislation on personal data protection and takes a very conservative attitude vis-à-vis citizen journalists. Although French case law acknowledges the existence of bloggers in the media environment in several circumstances (ex Cour D'appell de Paris 5 feb 2014 Tribunal de Grande Instance de Paris 27.6.2012; Cour d'Appell d'Orleas 22 3.2010), it seems not to be ready yet to treat blogggers as journalists in the context of the journalistic exception provision.

There is no code of ethics and no self regulatory bodies for journalism regulating citizen journalists because they are not considered as professional journalists who are bound by the journalistic codes of ethics. Some authors argue that citizen

journalists play a significant role as watchdog although they are considered as amateur journalists (Bloggers as amateur journalists and their position under the regulatory system of the press in the uK, N. Ismail, 2012 (69) 71).

In Malta the court decided in the case above quoted that a blogger is a journalist and the Tribunal therefore calls for a definition of journalist in our legal system and a code of ethics which will reflect the work of the bloggers.

(4) CJEu case law on data protection and freedom of expression

The CJEU has repeatedly held that the provisions of the Data Protective Directive, inasmuch as they govern the processing of personal data liable to infringe fundamental freedoms in particular the right to respect for private life must necessarily be interpreted in the light of the fundamental rights guaranteed by the Convention and the Charter (see variously Osterreichischer rundfunk and Others, C-465/00, C-138/01 and C 139/01, EU:C:2003:294, judgemmnt o 20 May 2003 para 68; Google Spain and Google C-131/12, £U:C:2014:317 judgement 13 May 2014 para 68.

In Lindqvist (Judgement of 6 November 2003 C-101/01, EU:C:2003:596) the CJEu held that the act of referring, on an Internet page, to various persons and identifying them by aname or by other mean, for instance by giving their telephone number or information regarding their working conditions and hobbies, constituted the processing of personal data wholly or partly by automatic means within the meaning of Article 3(10 of the Data Protection Directive. The provisions of the Directive do not, in themselves, bring about a restriction which conflicts with the general principles of freedom of expression or other freedoms and rights which are applicable within the EU and are enshrined inter alia in Article 10 of the Convention. It is, according to the CJEU for the national authorities and courts responsible for applying the national legislation implementing the Directive to ensure a fair balance between the rights and interests in question including the fundamental rights protected by the EU legal order (paragraphs 83-90).

In Volker and Markus Schecke GbR (judgement of 9 November 2010 C-92/09 and C-93/09, EU:C:2010:662), the CJEU held that the obligation imposed by EU regulations to publish on website data relating to the nefeiciaries of aid from EU agricultural and rural development funds, including their names and the income received constituted an unjustified interference with the fundamental right to the protection of personal data. As regards the proportionality of the interference with privacy rights, the CJEU held that it did not appear that the EU institutions had properly balanced the public interest objective in the transparent use of public funds against the rights which natural persons are recognized as having under

Articls 7 and 8 of the Cahrter. Regard being had to the fact tht derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary and that it was possible to envisage measures which would have affected less adversely that fundamental right of natural persons and which would still have contribution effectively to the objectives of the European Union rules in question, the CJEU held that the EU regulations in question exceeded the limits which compliance with the principle of proportionality imposes and struck them down.

In Google Spain cited above, the CJEU held inter alia that the processing of personal data may be incompatible with the Directive not only because the data was inaccurate but, in particular also because "they are inadequate, irrelevant or excessive in relation to the purposes of the processing, .."

In Schrems (judgement of 6 October 2015 (Grand Chamber) C-362/12, EU:C:2015:650, paragraphs 41-42), the CJEU held that national supervisory authorities must, in particular, ensure a fair balance between on the one hand, observance of the fundamental right to privacy and, on the other hand, the interests requiring free movement of personal data."

More recently in Tele2 Sverige (judgement of 21 December 2016 C-203/15, EU: C:2016:970), where it had to interpret an EU regulation concerning the processing of personal data and the protection of privacy in the electronic communications sector whose provisions partiularise and complement Directive 95/46 (paragraph 82), the CJEU held at paragraph 93: "accordingly the importance both of the right ot privacy guaranteed in article of the Charter and of the right to protection of personal data guaranteed in article 8 of the Charter, as derived from the Court's case law…. must be taking into consideration in interpreting Article 15(1) of directive 2002/58. The same is true of the right to freedom of expression in the light of the particular importance accorded to that freedom in any democratic society…"

In Connolly vs Commission (judgement of 6 March 2001, C-274/99P, EU:C:2001:127) the CJEu held at paragraphs 37-42: "those limitations (set out in article 10(2) of the convention must however be interpreted restrictively. According to the Court of Human Rights the adjective 'necessary' involves for the purposes of Article 10(2) a 'pressing social need' and whether such a need exists, the interference must be 'proportionate to the legitimate aim pursued and 'the reasons adduced by the national authorities to justify it must be' relevant and sufficient'. Furthermore the restrictions must be prescribed by legislative provisions which are worded with sufficient precision to enable interested parties to regulate their conduct taking if need be appropriate advice."

In the case T-259/03, NIKOLAOU V. COMMISSION, (decided 12.9.2007) ("NIKOLAOU") – this was an action for non-contractual liability based on acts and omissions of OLAF. OLAF had disclosed certain information about its investigation concerning the applicant: a leak of information to a journalist; its annual report with information about the investigation; and its press statement. The applicant had requested access to the file and the final case report.

In this case the court concluded that: (a)Definition of personal data: The information published in the press release was personal data, since the data subject was easily identifiable, under the circumstances. The fact that the applicant was not named did not protect her anonymity. (~ 222) ; (b)Definition of processing: 1. the leak (unauthorised transmission of personal data to a journalist by someone inside OLAF) and 2. the publication of press release each constitute processing of personal data. (~ 204) ; (c)Lawfulness: The leak constitutes unlawful processing in violation of Article 5 of Regulation 45/2001 because it was not authorized by the data subject, not necessary under the other sub- paragraphs and it did not result from a decision by OLAF. Even though OLAF has a margin of discretion on transmissions, here it was not exercised because the leak is an unauthorized transmission. OLAF is best placed to prove how the leak occurred and that the Director of OLAF did not violate his obligations under Article 8(3) of Regulation 1073/99. In the absence of such proof, OLAF (the Commission) must be held responsible. No concrete showing was made of an internal system of control to prevent leaks or that the information in question had been treated in a manner that would guarantee its confidentiality. (~~ 206-209) ; (d) Publication of the press release was not lawful under Article 5(a) and (b) because the public did not need to know the information published in the press release at the time of its publication, before the competent authorities had decided whether to undertake judicial, disciplinary or financial follow-up. (~224) ; (e) It is necessary to reconcile the various interests to be protected within the meaning of Article 10 § 2. Protection must be guaranteed for a person's reputation and confidential information or information of a private nature that any individual can legitimately expect not to see published without his or her consent.

The Court has held as follows in *K.U. v. Finland* and *Perrin v. the United Kingdom*, both cited above:

- "Although freedom of expression and confidentiality of communications are primary considerations and users of telecommunications and Internet services must have a guarantee that their own privacy and freedom of expression will be respected, such guarantee cannot be absolute and must yield on occasion to other legitimate imperatives, such as the prevention of

disorder or crime or the protection of the rights and freedoms of others." (*K.U. v. Finland*)

- "There is a clear difference between what is necessary to preserve the confidentiality of secret information, which is compromised after the very first publication of the information, and what is necessary to protect morals, where harm can be caused at any time at which a person is confronted with the material." (*Perrin v. the United Kingdom* (dec.))."

Article 8 , the right ot privacy and data protection

The Court has constantly reiterated that the concept of "private life" is a broad term not susceptible to exhaustive definition (see S. and Marper v the United Kingdom (GC) nos. 30562/04 and 30566/04, para 66 ECHR 2008).

Article 2 of the Data Protection Act (chapter 440 of the laws of Malta) defines personal data in article 2 as 'any information relating to an identified or identifiable individual." In Amann case para 65 the Court provided an interpretation of the notion of "private life" in the context of storage of personal data when discussing the applicability of Article 8:

"The Court reiterates that the storing of data relating to the 'private life' of an individual falls within the application of Article 8 para 1 (see Leander vs Sweden decided 26 March 1987 Series A no 116, p 22 para 48).

It points out in this connection that the term' private life' must not be interpreted restrictively. In particular, respect for private life comprises the right to establish and develop relations with other human beings; furthermore there is no reason of principle to justify excluding activities of a professional or business nature from the notion of 'private life' (see Niemietz v Germany judgement 16 December 1992 Series A no 251-B pp 33-34.)

That broad interpretation corresponds with that of the Council of Europe's Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data which came into force on l October 1985 and whose purpose is 'to secure the territory of each Party for every individual..respect of his rights and fundamental freedoms and in particular his right to privacy with regard to automatic processing of personal ata relating to him(article 1) such personal data being defined as "any information relating to an identified or identifiable individual.' (article 2). "

Legitimate aim

The core question in this case is whether the publication was 'necessary in a democratic society' and whether the publication struck a fair balance between that right and the right to respect for private life.

According to the Court's established case-law , the test of necessity in a democratic society required the Court to determine whether the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient (see The Sunday Times v the United Kingdom (no 1), 26 April 1979 para 62 Series A no 30). The margin of appreciation left to the national authorities in assessing whether such a need exists and what measures should be adopted to deal with it is not however unlimited but goes hand in hand with European supervision by the court whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by article 10.

The relevant criteria which must guide its assessment of necessity are: contribution to a debate of public interest, the degree of notoriety of the person affected, the subject of the news report, the prior conduct of the person concerned, the content, form and consequences of the publication and where it arises, the circumstances in which the data was published.

In this case the complainants were not know to the public and no proof was submitted by the appellant of their alleged connection , if any, with Sadeen Education Investment Limited.

Public Interest

In order to ascertain whether a publication concerning an individual's private life is not intended purely to satisfy the curiosity of a certain readership but also relates to a subject of general importance, it is necessary to assess the publication as a whole and have regard to the context in which it appears (see Tonsbergs Blad A.S. and Haukom v Norway no 510/04 para 87 l March 2007 and Erla Hlynsdottir v Iceland no 43380/10 para 64 10 July 2012)

Public interest ordinarily related to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community.

What is to be understood by *matters of general or public interest* cannot be defined. It depends on a continuous case-by-case analysis, where other purposes such as personal considerations do not count. There must exist a pressing social

need to keep the community informed on matters they could actually talk about. In the UK, the Joint Committee on Privacy and Injunctions concluded there should not be a statutory definition of the public interest, as *"the decision of where the public interest lies in a particular case is a matter of judgment, .."*

The publication of the information has to be regarded as contributing to a debate of public interest or assimilated to the kind of speech, namely political speech, which traditionally enjoys a privileged position in its case-law this calling for strict Conention scrutiny and allowing little scope of article 10(2) of the Convention for restrictions (see in this regard surek vs turkey (no 1) para 61).

Necessary in a democratic society

The criterion "necessary in a democratic society" is met if it is necessary to respond to a social imperative and it is is proportionate to the legitimate end and the reasons specified are relevant and sufficient.

Subject of the impugned blogs and how well known were the persons concerned

As the court has always stated, public figures inevitably and knowingly lay themselves open to close scrutiny by both journalists and the public at large (see in inter alia Lingens v Austria 8 July 1986 para 42 Series A no 103 and Couderc and Hachette Filipacchi Associes, para 120-121).

The complainants Dr Louai Aziz-Micheal Al-Twal and Dr Abdelnaser Khalaf Mustafa Zayyat were not public figures, and the public had no interest in knowing that they were in the lobby of the Hilton Hotel at that moment in time.

Incorrect information

The information published in the blogs in question were incorrect and untrue in that Brian Tonna did not meet the complainants as the appellant reported ; and that the subsequent correction made by the appellant that it was Adrian Hillman who was meeting them and not Brian Tonna, did not result from the video of the hotel or from the video produced she put on Youtube. In this case the appellant was hasty in publishing information, she was hasty in labelling the two persons mentioned, and did not verify according to our Media Law what was reported to her and published the video and the information which information proved to be incorrect and which video does not show Adrian Hillman. It cannot therefore be

said that she can be protected by the protection given to journalists by Chapter 440 when such report was not of public interest and she was not acting in good faith when she published the said blogs and put the video on youtube.

One can assume many things, but the role of a journalist is not to assume and neither is it the role of the Commissioner or this Tribunal. We are bound by the law and the law provides protection to those who abide by the law.

Now therefore the Tribunal decides by rejecting the appeal of the appellant and confirming the decision of the Commissioner of 7 August 2017 and orders the appellant to abide by the decision of the Commissioner of 7 August 2017.

(Signed)
Dr. Anna Mallia
Chairperson

(Signed)
Mr. Charles Cassar
Membru

(Signed)
Mr. David Bezzina
Membru