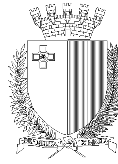

QORTI ĊIVILI – PRIM'AWLA

ONOR. IMĦALLEF DR. MIRIAM HAYMAN LL.D.

Fl-Atti tar-Referenza Kostituzzjonali Nru.: 829/2021 MH

Illum, 29 t'April, 2022

Fl-Ismijiet:

Il-Pulizija (Spettur Melvyn Camilleri)

vs

Martin Tabone

Il-Qorti:

Rat ir-referenza kostituzzjonali mibgħuta lilha mill-Qorti tal-Maġistrati bħala Qorti Istruttorja fejn b'digriet ta' l-istess[1] ġiet mitluba illi stante li ntalab eżami ta' DNA ta' xhud hemm imsemmi, u hawn din il-Qorti tagħżel li ma ssemmiex l-istess biex toqgħod ma l-ordni ġia mogħtija mill-Qorti Istruttorja fil-verbal tagħha tas-16 ta' Lulju, 2018, u stante li l-Qorti laqgħet din it-talba ta' l-Avukat Ġenerali prevja li jkun hemm il-kunsens tal-partijiet u ġara li din l-istess xhud ma tatx il-kunsens tagħha biex jittieħdilha l-istess eżami tramite *buccal swab*, qieset li tagħmel ir-referenza odjerna għal aħjar istruzzjoni minn din il-Qorti f'din il-kompetenza tagħha, biex jiġi determinat jekk tali teħid ta' kampjun mingħand

[1] Ara atti ta' kumpilazzjoni a folio 235

ix-xhud resistenti jilledix id-drittijiet ta' l-istess inkwantu jmur kontra l-artikolu 8 tal-Konvenzjoni Ewropeja dwar id-Drittijiet tal-Bniedem.

Sintetikament għandu ukoll jingħad illi ix-xhud mitluba biex tissottometti għal tali eżami kienet wara li rċeviet taħrika għal istess, għamlet rikors lil Qorti Istruttorja biex ma tissottomettix ruħha għal dan.[2] Wara lil Qorti tal-Maġistrati kienet semgħet lil partijiet, tat l-ewwel digriet tagħha u a bażi ta' l-artikolu 8 tal-Konvezjoni imsemmija kienet laqgħet din l-istess talba u kien fuq insistenza da parti ta' l-Avukat Ġenerali għal l-istess eżami li ġiet xprunata r-referenza odjerna.

Rat ukoll ir-risposta ta' l-Avukat Ġenerali u l-Kummissarju tal-Pulizija notifikat bl-istess referenza. Per parentesi n kwantu għal ewwel premessa ta' l-istess imsemmija, ċioe' jekk hux il-każ li jiġu kjamati n kawża il-vittma u x-xhud mitluba, tqies li hawn *non si tratta* t' ebda kawża imma analiżi ta' punt legali fuq l-esistenza ta' l-allegata leżjoni u talba minn Qorti ta' kompetenza diversa għal Qorti adita b'kompetenza kostituzzjonali biex tiġi gwidata fir-rigward. Fuq kollox il-parti leża pparteċipat biex twasslet din ir-referenza, anzi kienet hi li imbuttaha u dan il-Qorti Istruttorja ħaditu żgur in konsiderazzjoni. Inoltre x-xhud mitluba ġia semgħat leħinha bl-opposizzjoni tagħha meta għamlet rikors biex tiġi eżonerata minn dan l-eżami.

Jibda biex jibgħat lil Qorti Istruttorja hija mogħnija b'poteri ampji u wiesgħa biex tiġbor u tikkompila l-provi kollha favur u kontra l-persuna mressqa dan *ex lege* kif inhu ċar mill-artikoli 397 tal-Kap 9 tal-Liġijiet ta' Malta li jgħid li;

"397. *(1) Il-qorti tista' tordna t-taħrika ta' xhieda u l produzzjoni ta' provi li jkun jidhrilha meħtieġa, kif ukoll il-ħruġ ta' ċitazzjonijiet jew mandati ta' arrest kontra kull awtur ieħor jew kompliċi li hija tikxef. Il-qorti tista' tordna wkoll aċċessi, perkwiżizzjonijiet, esperimenti, u kull ħaġ'oħra li tinħtieġ biex il-ġabra tal-provi tal-kawża tkun kompluta minn kollox.*

(2) Il-qorti tista' wkoll, taħt dawk il-kawtieli li jidhrilha meħtieġa sabiex titħares id-deċenza, teżamina jew tordna li tiġi eżaminata minn periti xi parti tal-ġisem tal-imputat jew tal-persuna li fuqha jew li magħha jkun jingħad li sar id-delitt, kemm-il darba l-qorti tkun tal-fehma li minn dak l-eżami tista' toħroġ prova kontra jew favur l-imputat. "

[2] Folio 158 atti ta' l-Istruttorja

(3) Il-qorti tista' tordna wkoll, fuq talba tal-Pulizija, li l imputat jiġi iffotografat, meqjus jew li jittieħdu l-istampi ta' subgħajh:

"Iżda, jekk imputat, li qabel ma jkun ġie qatt ikkundannat fuq delitt, jiġi illiberat, il-fotografiji kollha (negattivi u kopji), l-istampi kollha tas-subgħajn, u n-notamenti kollha fuq ilqisien hekk meħuda, għandhom jiġu meqruda jew mogħtija lill-persuna illiberata.

"(4) Il-fotografiji, l-istampi tas-swaba u l-qisien imsemmijin fl-aħħar subartikolu qabel dan, jiġu meħuda skont irregolamenti li minn żmien għal ieħor jiġu magħmula millMinistru responsabbli għall-ġustizzja.

"(5) Il-qorti tista' wkoll tordna l-arrest tal-imputat li ma jkunx ġa taħt arrest."

Għalina t'interess ukoll dak li jgħid l-artikolu 355BB ta' l-imsemmi Kap u ċioe';

"355BB. Kampjuni minn persuna li ma tkunx persuna arrestata jistgħu biss jittieħdu bil-kunsens mogħti bil-quddiem u bil-miktubta' dik il-persuna:

Iżda fil-każ fejn persuna, li ma tkunx il-persuna arrestata,tirrifjuta li tagħti l-kunsens tagħha għat-teħid ta' kampjun, kemm jekk ikun kampjun intimu kif ukoll jekk ikun kampjun mhux intimu, tista' wkoll tinkiseb l-awtorizzazzjoni ta' Maġistrat wara li jsir rikors u, mingħajr ħsara għad-dispożizzjonijiet tal-artikolu355AZ, dik l-awtorizzazzjoni għandha tkopri wkoll it-teħid ta'dawk il-miżuri proporzjonati u neċessarji inkluż l-użu tal-forza mill-Pulizija Eżekuttiva biex jingħata effett għal dik l-awtorizzazzjoni ."

Mill-qari ta' dan jirriżulta ċar li m'hemm ebda dubju li l-Maġistrat Istruttur huwa mogħni b'poteri vasti fi stadju ta' kumpilazzjoni nkluż illi jordna *"..esperimenti, u kull ħaġ'oħra li tinħtieġ biex il-ġabra tal-provi tal-kawża tkun kompluta minn kollox."*[3] Issegwi li ordni għat-teħid ta' *buccal swabs* jew eżami ieħor relatat jaqa' sew sew fl-ambitu ta' dawn il-poteri."

Tqies li dak li jgħodd għal fini ta' dan l-eżami hu jekk din l-ordni flimkien ma l-eżekuzzjoni mandatorja tagħha jekk jirriżulta ir-rifjut (ara artikolu 355BB *supra*) jwasslux għal ksur lamentat.

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[3] Art. 397

Fid-deċiżjoni tal-Qorti Kostituzzjonali fl-ismijiet Il-**Pulizija (Spettur Stepehen Caruana) vs Stephen Caruana**[4] ingħad:

"Konsiderazzjonijiet ta' din il-Qorti

.

24. Il-kaz odjern jirrigwardja l-Artikolu 8 tal-Konvenzjoni li jaqra hekk:

(1) Kulħadd għandu d-dritt għar-rispett tal-ħajja privata u tal-familja tiegħu, ta' daru u tal-korrispondenza tiegħu.

(2) Ma għandux ikun hemm indħil minn awtorità pubblika dwar l-eżerċizzju ta' dan id-dritt ħlief dak li jkun skont il-liġi u li jkun meħtieġ f'soċjetà demokratika fl-interess tas-sigurtà nazzjonali, sigurtà pubblika jew il-ġid ekonomiku tal-pajjiż, biex jiġi evitat id-diżordni jew l-egħmil ta' delitti, għall-protezzjoni tas-saħħa jew tal-morali, jew għall-protezzjoni tad-drittijiet u libertajiet ta' ħaddieħor."

25. Ghalhekk, fid-dawl ta' dak li jghid l-artikolu konvenzjonali fuq citat, dak li jehtieg li jigi ezaminat sabiex jigi determinat jekk l-ordni moghtija mill-Qorti tal-Magistrati hijiex leziva ta' dan l-artikolu huwa: jekk din l-ordni tikkostitwixix interferenza fid-dritt fundamentali in dizamina u, fil-kaz affermattiv, jekk l-ordni ghandhiex bazi legali fil-ligi domestika u jekk hiex mehtiega f'socjeta` demokratika b'referenza ghal wiehed mill-fatturi indikati fis-subinciz 2 tal-istess artikolu.

26. Illi jirrizulta pacifiku li l-ordni in kwistjoni tikkostitwixxi interferenza fid-dritt fundamentali tal-privatezza protett bl-Artikolu 8. Di fatti kemm l-ewwel Qorti, kif ukoll iz-zewg partijiet jiccitaw il-kaz ***Schmidt v. Germany1***[5] *fejn il-Qorti Ewropea osservat hekk:*

"The taking of a blood and saliva sample from the applicant constitutes a compulsory medical intervention which, even if it is of minor importance, must consequently be considered as an interference with his right to privacy."

27. Kif kompliet tosserva dik il-Qorti:

"Such an interference gives rise to a breach of Article 8 unless it can be shown that it was 'prescribed by law', 'pursued one or more legitimate aim or aims' as defined in paragraph 2, and was 'necessary in a democratic society' to attain them."

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[4] Deċiża 29 ta' April, 2016; Rikors 38/13JZM

[5] Ara wkoll, **Jollah v Germany** deciza 11 Lulju 2006**, S and Marper v The United Kingdom** deciza 4 Dicembru 2008 u, **Van der Velden v The Netherlands** deciza 31 Lulju 2012

28. Id-divergenza bejn il-partijiet tibda mill-ewwel rekwizit jigifieri jekk l-ordni ghandhiex bazi legali fil-ligi domestika b'mod li tista' titqies bhala moghtija skont il-ligi. Fir-rigward issir referenza ghal ktieb ***Personal Data Privacy and Protection in a Surveillance Era: Technologies and Practices***[6] *fejn jinghad:*

*"The expression "in accordance with the law" not only requires that the impugned measure should have some basis in domestic law, but it also refers to the quality of the law in question, requiring that it should be accessible to the person and foreseeable as to its effects (****Kopp vs Switzerland****)..."*

29. Ma hemmx dubju li l-Artikolu 397 fuq citat jaghti poteri ampji lill-Qorti tal-Magistrati fl-istadju tal-kumpilazzjoni kif jirrizulta manifest mit-termini tal-istess artikolu li jaghti poter lil dik il-Qorti li taghmel "...esperimenti u kull haga ohra li tinhtieg biex il-gabra tal-provi tal-kawza tkun kompluta minn kollox". Ghalhekk huwa car li ordni maghmula mill-imsemmija qorti ghat-tehid ta' buccal swabs hija lecita inkwantu taqa' fil-parametri tal-istess artikolu.

...

34. Barra minn hekk, u bi twegiba ghas-sottomissjoni tal-appellata illi kampjuni jistghu jittiehdu biss minn persuna suspettata jew li titressaq bhala xhud, issir referenza ghad-dispost tal-Artikolu 355BB[7] *tal-istess kodici li jmeri din it-tezi tal-appellata inkwantu jaghti poter lill-Magistrat sabiex jawtorizza t-tehid ta' kampjun minn persuna li ma tkunx arrestata u li tkun qed tirrifjuta li tissottometti ruhha ghal gbir tal-kampjun.*

35. Rigward l-element tal-proporzjonalita` inghad li[8]*:*
"The Court has frequently reminded that: inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.[9]*"... In carrying out its review of whether domestic decisions are compatible with Article 8, the Court applies the proportionality test, which, at its simplest, involves balancing the rights of the individual and the interests of the State. The Court does not offer an appeal from the decisions of domestic courts, however, and it thus refrains from substituting its opinion on the merits of any individual case. Instead, its role is to consider whether, in the light of the case as*

[6] Christina Akrivopoulou (Author, Editor), Athanasios Psygkas (Editor), IGI Global 2011, Pg 146
[7] supra
[8] effett għal dik l-awtorizzazzjoni."
5" The Right to Respect for Private and Family Life A Guide to the implementation of Article 8 of the European Convention on Human Rights" - Ursula Kilkelly, Human Rights Handbooks No. 1, Pg 31-32
[9] Soering v. the United Kingdom, judgment of 7 July 1989

a whole, the authorities had "relevant and sufficient reasons" for taking the contentious measures.[10]

"Deciding whether the interference is proportionate to the aim which it pursues is frequently a complex process, which involves consideration of a number of factors. These include the interest to be protected from interference, the severity of the interference and the pressing social need which the State is aiming to fulfil.'

36. Fil-kaz de quo r-reat li bih qed jigi akkuzat ir-ragel tal-appellata huwa dak ta' omicidju, delitt li jgorr mieghu kundanna ta' ghomor prigunerija u ghalhekk, huwa mistenni illi l-Qorti tal-Magistrati bhala Qorti Struttorja tiehu dawk il-mizuri kollha necessarji sabiex il-provi quddiemha jkunu kompluti kemm jista' jkun. B'mod aktar specifiku din il-Qorti tosserva li r-rizultanzi tat-testijiet genetici jistghu jwasslu ghal konnessjoni bejn l-appellata u l-vittma tar-reat jew jeskludu tali konnessjoni u ghalhekk f'kaz ikunu jikkostitwixxu element ta' prova b'valur probatorju relevanti fil-process kriminali. Kif qalet il-Qorti tal-Magistrati li ghamlet ir-referenza "il-Qorti taqbel [u ghalhekk tat id-digriet taghha] li din hija prova importanti ghall-Prosekuzzjoni u tifhem ghala qed tigi mitluba mill-Avukat Generali, stante l-akkuzi u l-allegat motiv ghar-reat principali…….". Ghaldaqstant l-ordni moghtija hi proporzjonata ghall-ghan taghha.

37. Fid-dawl tal-premess il-mizura de quo ittiehdet abbazi ta' disposizzjonijiet tal-ligi kriminali li jissodisfaw il-kriterji ta' 'accessibility' u 'forseeability' u, fic-cirkostanzi tal-kaz huwa sodisfatt ukoll il-principju tal-proporzjonalita

…

40. Din il-Qorti tosserva li ghandu jkun car li l-ghan wara l-mizura huwa dak li tingabar prova forensi biex tghin fil-prosekuzzjoni ta' persuna akkuzata b'reat serju jigifieri dak ta' omicidju u ghalhekk ghandu "54........a 'legitimate aim' – namely the protection of society by inter alia 'the prevention of crime' t at concept encompassing the securing of evidence for the purpose of detecting and prosecuting crime (see Société Colas Est and Others v. France, no. 37971/97, § 44, ECHR 2002-III; see also K. v. Austria, no. 16002/90, Commission's report of 13 October 1992, § 47, Series A no. 255-B).[Van der Hejden v The Netherlands Appl.42857/08, deciza 3 April 3012]".

[10] Olsson v. Sweden, judgment of 24 March 1988

…

42. Rigward l-element tan-necessita' ta' tali mizura f'socjeta` demokratika din il-Qorti tosserva li l-prova kontestata hija necessarja ghall-ahjar amministrazzjoni tal-gustizzja stante li fil-kaz de quo l-materjal genetiku migbur permezz tal-ordni tal-Qorti tal-Magistrati jista' jwassal ghal prova xjentifika li tistabbilixxi konnessjoni bejn l-appellata u l-vittma tal-omicidju u ghalhekk tista' titfa' dawl jew tkompli ssahhah il-provi dwar kif sehh ir-reat u l-motiv warajh. Ghalhekk din il-Qorti hi tal-fehma li n-necessita` ta' tali interferenza fil-kuntest tal-proceduri kriminali in kwistjoni giet debitament provata."

Din l-istess deċiżjoni ċitata xprunat da parti tax-xhud involuta, li per parentresi kienet mart l-akkużat, li tressaq il-lanjanza tagħha għal ksur previst taħt l-artikolu 8 tal-Konvenzjoni quddiem il-Qorti Ewropeja għad-Drittijiet tal-Bniedem. Intqal fid-deċiżjoni fl-ismijiet **Romina CARUANA vs Malta**[11]

"26. The Court has previously held that the taking of cellular material and its retention as well as the determination and retention of DNA profiles extracted from cellular samples constitute an interference with the right to respect for private life within the meaning of Article 8 § 1 of the Convention (see, inter alia, Van der Velden v. the Netherlands, (dec.), no. 29514/05, ECHR 2006-XV, S. and Marper v. the United Kingdom [GC], nos. 30562/04 and 30566/04, §§ 71 to 77, ECHR 2008; and Peruzzo and Martens v. Germany, (dec.), nos. 7841/08 and 57900/12, § 33, 4 June 2013). In particular the respect for private life as protected by Article 8 involves respect for a person's physical integrity and the taking of a blood and saliva sample constitute a compulsory medical intervention which, even if it is of minor importance, must consequently be considered as an interference with the right to privacy (see Schmidt v. Germany, (dec.), no. 32352/02, 5 January 2006).

27. Such interference will be in breach of Article 8 of the Convention unless it can be justified under its paragraph 2 as being "in accordance with the law", as pursuing one or more of the legitimate aims listed therein, and as being "necessary in a democratic society" in order to achieve the aim or aims concerned (see Peruzzo and Martens, (dec.), cited above, § 34).

[11] Application no.41079/16.

B. Application to the present case

28. The Court notes that the present complaint does not concern the retention of material but the actual taking of the cellular material by means of a buccal swab. The Court accepts that the taking of a mouth swab in order to obtain cellular material from the applicant amounts to an interference with the right to respect for private life (see Van der Velden, (dec.), cited above; and W. v. the Netherlands, (dec.), no. 20689/08, 20 January 2009).

29. The Court observes that while it is possible that the applicant has not yet been subjected to the swab, the measure has been ordered by a court and is not subject to any further appeal – the Constitutional Court having rejected her claim, the order is now executable. It is also mandatory despite the applicant's unwillingness. Thus, the Court accepts that the applicant can be considered as a victim of the interference at issue (see, a contrario, Cakicisoy and Others v. Cyprus, (dec.), no. 6523/12, § 51, 23 September 2014 - where the Court found that there was no interference given that the applicants consented voluntarily to give the samples).

30. The Court observes that recourse to such compulsory testing may come about in various contexts, and will not necessarily raise an issue under the Convention (see, for example, Acmanne and Others v. Belgium, Commission decision of 10 December 1984, concerning compulsory tuberculosis testing on children; see also Mandet v. France, no. 30955/12, § 22, 14 January 2016, where the complaint under Article 8 included the compulsory genetic testing of a child; and Peruzzo and Martens (dec.), cited above, dealing with the taking, storing and retaining of DNA records - outside the ambit of criminal proceedings - obtained from persons who had been convicted of criminal offences). Compulsory DNA testing may also come into play in the context of paternity proceedings, where, however, it must be borne in mind that the protection of third persons may preclude their being compelled to make themselves available for medical testing of any kind, including DNA testing (see, for example, Mikulić v. Croatia, no. 53176/99, § 61; ECHR 2002-I, Pascaud v. France, no. 19535/08, § 62, 16 June 2011; and A.M.M. v. Romania, no. 2151/10, § 61, 14 February 2012).

31. The Court further notes that Article 8 of the Convention does not as such prohibit recourse to a medical procedure in defiance of the will of a suspect in order to obtain from him evidence of his involvement in the commission of a criminal offence (see Jalloh v. Germany [GC], no. 54810/00, § 70, ECHR 2006-IX).

32. The Court considers that recourse to such medical procedures, particularly when minor, is also not a prior prohibited in order to obtain evidence related to

the commission of a crime when the subject of the test is not the offender, but a relevant witness, as in the present case. It thus cannot be considered as inherently unlawful. What is of paramount importance is that the measure is in accordance with the relevant Convention requirements (see paragraph 27 above). (enfasi ta' din il-Qorti)

33. According to the Court's established case-law, the expression "in accordance with the law" requires that the impugned measure should have some basis in domestic law, and also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects (see Rotaru v. Romania [GC], no. 28341/95, § 52, ECHR 2000-V). The Court reiterates that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (ibid., § 53).

34. The Court accepts, as did the Constitutional Court (see paragraph 12 above), that the measure was ordered pursuant to Article 397 of the Criminal Code. It has not been submitted that this provision was not precise or foreseeable; there is therefore no reason for the Court to delve further into the matter.

…

37. In view of the above considerations, the Court is satisfied that the impugned measure was "in accordance with the law" within the meaning of Article 8 of the Convention.

38. The Court further considers that the interference pursued a "legitimate aim" – namely the protection of society by inter alia "the prevention of crime", that concept encompassing the securing of evidence for the purpose of detecting as well as prosecuting crime (see Van der Heijden, cited above, § 54). The Court reiterates that public interest in the prosecution of crime involves, of necessity, putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. Indeed the duty of High Contracting Parties to deter or punish crime extends to other Convention provisions involving the active protection of individuals' rights against harm caused by others (ibid., § 62).

39. As to whether the measure was necessary in a democratic society the Court has to determine whether a fair balance has been struck between the fundamental right of the individual to respect for his or her private life and the legitimate interest of a democratic State in prosecuting perpetrators of crimes and criminal offences. It notes that the national authorities enjoy a certain margin of appreciation in determining whether the impugned interference is proportionate

to the above aim, i.e. whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised by the contested measure (see Schmidt, (dec.), cited above).

….

41. The Court notes that the taking of a buccal swab is an act of a very short duration, it usually causes no bodily injury or any physical or mental suffering, and thus is of minor importance. The applicant did not submit that the sample had been taken or will be taken in a manner contrary to the relevant procedure (see, a contrario, Yuriy Volkov v. Ukraine, no. 45872/06, § 87, 19 December 2013) or in particular by using excessive use of force. In the present case, the applicant was a witness present on the scene of the murder. Moreover, according to the authorities, her sample was necessary to determine the accused's motive for the murder. Murder constitutes a serious offence, in respect of which the State has obligations arising under Article 2 of the Convention vis-à-vis the victims of such crime and their relatives. It was thus both reasonable and necessary to gather as much evidence as possible. Taking all these considerations into account as well as the important public interest in the prosecution of serious crime (see Van der Heijden, cited above, § 74) and the fact that Contracting States enjoy a certain margin of appreciation in this matter, the Court cannot find that the measure in question was disproportionate.

42. It follows that the application must be rejected as manifestly ill-founded, in accordance with Article 35 §§ 3 and 4 of the Convention."

Fid-deċiżjoni fl-ismijiet Rosalie Darmanin vs Prim. Ministru[12] insibu li dwar l-indħil permess bl-artikolu 8(2) tal-konvenzjoni nsibu li:

"Illi biex indħil bħal dak ikun "skond il-liġi", jeħtieġ mhux biss li jsir taħt is-saħħa ta' xi liġi li tkun fis-seħħ, imma wkoll li t-twettiq ta' kull għamil ma jkunx jiddependi minn diskrezzjoni bla rażan jew użata b'mod li ħadd ma jista' jobsru[13]*. Fuq kollox, biex miżura ta' ndħil tkun titqies bħala waħda "meħtieġa f'soċjeta' demokratika", jrid jintwera li kienet waħda mnissla minn ħtieġa urġenti soċjali li tkun proporzjonali mal-għan mixtieq*[14] *u prevedibbli fit-tħaddim tagħha biex tagħti ċ-"ċertezza" tad-dritt*[15]*. F'dan il-waqt ta' min isemmi li l-artikolu 8 tal-Konvenzjoni jitkellem dwar ir- "rispett" li l-Istat għandu juri għall-jeddijiet*

[12] P.A. Kost deċiża 20 ta' Ottubru, 2015 rikors 2/07JRM

[13] Q.E.D.B. 24,3.1988 fil-każ **Olsson vs Svezja** (Nru. 1) (Applik. Nru. 10465/83) § 62

[14] Q.E.D.B. 24.11.1986 fil-każ **Gillow vs Renju Unit** (Applik.Nru. 9063/80) §55

[15] Q.E.D.B. 26.3.1987 fil-każ **Leander vs Svezja** (Applik. Nru. 9248/81) §58

imsemmija f'dak l-artikolu. Dan tfisser bħala obbligazzjoni passiva fuq l-istat biex ma jindaħalx bla bżonn jew b'mod eċċessiv f'dawk il-jeddijiet[16]*, bil-konsegwenza li mhux kull indħil huwa projbit sakemm ikun joqgħod mal-għanijiet maħsuba flartikolu 8(2) tal-Konvenzjoni u jkun indħil magħmul b'mod proporzjonat ma' dawk l-għanijiet. Kif ingħad "In determining whether the interference was "necessary in a democratic society", the Court refers to the principles established in its case-law. It has to consider whether, in the light of the case as a whole, the reasons adduced to justify that interference were relevant and sufficient for the purposes of paragraph 2 of Article 8 (see, inter alia, T.P. and K.M. v. the United Kingdom [GC], no.28945/9,§ 70, ECHR 2001-V, and Sommerfeld v. Germany [GC], no.31871/96, § 62, ECHR 2003-VIII."* [17]*; Illi huwa stabilit li, fejn jidħol l-aspett tal-proporzjonalita' taħt il-Konvenzjoni "inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights". This balancing approach known under the term of principle of proportionality has acquired the status of general principle in the Convention system."* [18]*;*

Naraw ukoll li fis-sentenza li tat 12 ta` Jannar 2006 fil-każ ta` "**Mizzi vs Malta**[19]" l-ECTHR qalet :–

"*The Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by public authorities. There may in addition be positive obligations inherent in ensuring effective "respect" for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see Mikulić, cited above, § 57).*
"*106. However, the boundaries between the State`s positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are nonetheless similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see Keegan v. Ireland, judgment of 26*

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[16] Harris, O'Boyle & Warbrick Law of the European Convention on Human Rights (1995) f'paġ. 321

[17] Q.E.D.B. 18.2.2014 fil-kawża fl-ismijiet **A.L. vs Polonja** (Applik. Nru. 28609/08) § 65

[18] Van Dijk, van Hoof, van Rijn, Zwaak op. cit. (4th Edit, 2006), § 17.4.2, f'paġġ. 882 – 3 36 Att IX tal-2014 dwar l-Unjonijiet Ċivili (Kap 530

[19] Application 26111/02

May 1994, Series A no. 290, p. 19, § 49, and Kroon and Others, cited above, p. 56, § 31)."

Ikkunsidrat:

Applikati dawn l-insenjamenti tqies li hawn si tratta ta' kumpilazzjoni b'akkużi ta' stupru. Tqies illi l-ordni li għamlet il-Qorti tal-Maġistrati, *qua* Istruttur, fil-konfront tax-xhud hija waħda li tistrieħ fuq l-artikoli tal-liġi ġia ċitati. Hija ordni leġittima magħmula bis-saħħa tal-liġi u huwa għemil li huwa għal kollox previst, *foreseeable*, ċioe'li jkun użat b'mod li wieħed jista' jobsru.

Verament kif inhu stabbilit fil-ġurisprudenza ċitata t-teħid ta' likwidu uman, tramite *buccal swab,* jikkonsisti f'indħil ai terminu ta' l-artikolu 8(1) tal-Konvenzjoni. Pero bla dubju ta' xejn hu wieħed permess fl-ambitu ta' l-artikolu 8(2). Huwa ndħil li huwa neċessarju u "*meħtieg f'soċjeta' demokratika fl-interress tas-sigurta' nazzjonali, sigurta' pubblika.. biex jiġi evitat id-dizordni"* u dan jingħad għax il-kors tal-ġustizzja u l-amministrazzjoni tagħha huma immirat ukoll għalhekk.

Tara ukoll li l-istess indħil jżomm illi proporzjonalita' meħtieġa. Meqjus lir-reat li hu miġjub kontra l-imputat Tabone hu ta' stupru u lix-xhud imsejħa retiċenti hi mitluba biex tagħti *buccal swab* tagħha biex issaħħah o meno l-akkużi mressqa, meqjus ukoll kif ingħad supra illi it-teħid ta' saliva mhux xi att ikkonsidrat wieħed daqstant invasiv u li fuq kollox l-għan ta' tali invażjoni hu li jipproteġi l-interess nazzjonali u l-ordni pubbliku għax l-għan tal-kors tal-ġustizzja huwa ukoll dan, allura l-fehma tal-Qorti hija illi dan l'hekk imsejjaħ indħil huwa ben proporzjonat għal l-iskop li hu meħtieġ. Tqies għalhekk illi dan jaqa' sewwa sew f'dak li tgħid il-kelma tal-konvenzjoni fl-artikolu 8(2) hu konsegwentement ix-xhud mhu se ssoffri ebda leżjoni jekk jittieħdilha l-*buccal swab* mitlub.

Għaldaqstant tiddisponi mill-istess referenza b'dan illi ix-xhud sottomessa għal *buccal swab* mhux se ssoffri ebda leżjoni ai terminu ta' l-artikolu 8 tal-Konvenzjoni Ewropea għad-Drittijiet tal-Bniedem.

Tibgħat lura l-atti kollha, inkluż din ir-referenza, lil Qorti Istruttorja biex b'hekk tissokta l-istess kumpilazzjoni.

Bl-ispejjeż ta' din l-istanza a karigu ta' Martin Tabone.

Onor. Dr. Miriam Hayman LL.D.
Imħallef

Victor Deguara
Dep. Reġ.