

COURT OF ROME
Second Civil Division

The Court of Rome as represented by Justice Federico Salvati,
Lifting the reservation as previously entered,
Having regard to Section 702-a ff. of the Civil Procedure Code and Section 3 of Legislative Decree
No. 150/2011;
Issues the following

ORDER

In the first-instance civil proceedings registered under No. 49444 of the General Register of
Litigations for the year 2012 between

XY
ASSOCIAZIONE 21 LUGLIO
ASGI – Associazione Studi Giuridici sull’Immigrazione
OPEN SOCIETY JUSTICE INITIATIVE
(with counsel Elisabetta Pezzi and Salvatore Fachile)

Being the Claimants

And

PRESIDENZA DEL CONSIGLIO DEI MINISTRI
PREFETTURA DI ROMA
MINISTERO DELL’INTERNO
(Avvocatura Generale dello Stato)

Being the Defendants

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1. – XY and the associations mentioned in the preamble, which are all listed in the “Register of Associations and Organizations Working in the Sector of the Fight against Discrimination”, have sued the Presidenza del Consiglio dei Ministri [Prime Minister’s Office], the Prefecture of Rome and the Questura [Police Headquarters] of Rome under Section 44 of legislative decree No. 286/1998 and Section 4 of legislative decree No. 215/2003 to establish the discriminatory nature of both the Order issued by the Prime Minister’s Office No. 3676 of 30 May 2008 – which had laid down “urgent civil protection measures to counter the emergency situation related to the nomad encampments in the territory of Latium” – and the conduct held by the Prefecture of Rome and the Police Headquarters of Rome – which had consisted in the fingerprinting XY had undergone on 3 January 2010 and the unlawful processing, i.e. the retention, of the relevant sensitive data. The claimant also requested that the Prefecture of Rome and the Police Headquarters of Rome should be ordered to terminate the discriminatory conduct consisting in the retention of the sensitive data and do away with the effects it had produced by ensuring that such data would be removed from the filing system where they had been entered at the Immigration Office of the Police Headquarters of Rome and that the filing system as a whole be eliminated if such filing system only included information of an ethnic nature. Finally, the claimants requested that the defendants should be ordered to pay compensation for the non-pecuniary damage suffered as

consisting in the violation of XY's right to honorability, decorum, reputation and privacy, whereby such compensation should be determined in equity – the sum of Euro 30,000 being suggested as a possible benchmark – and the relevant order should be published in a nationwide circulation newspaper at the expense and under the responsibility of the defendant administrations.

The claimants submitted in short that – following adoption of the Prime Minister's Decree of 21 May 2008 declaring the state of emergency in connection with the nomad encampments as well as following the relevant implementing order No. 3676 of 30 May 2008, which had provided, in particular, for identifying and fingerprinting the individuals, including underage individuals, and family groups present both in the "authorized encampments hosting nomad communities" and in the unauthorized settlements in the territory of Latium – XY, an Italian national belonging to the Roma community, had been taken to the Immigration Office at the Police Headquarters of Rome in connection with the dismantling of the encampment where he lived (known as "Casilino 900") on 3 January 2010. There he had been fingerprinted and mug shots had been taken of him. The claimants submitted further that XY had not been informed on that occasion as to the reasons underlying this identification procedure, that he was not the subject of whatever administrative or judicial measure, and was the holder of an ID card which he duly showed as requested. After filing a petition for access to official records, which was only granted after lodging a complaint with the Regional Administrative Court (TAR) of Latium, the claimant had been provided with a copy of the list of the fingerprinting records concerning him along with a statement by the Office whereby mug shots had also been taken of both him and his family "in order to crystallize the composition of the relevant family group". Further, it was submitted that the data relating to XY were still kept at the Immigration Office of the Police Headquarters of Rome in spite of XY's being an Italian national and accordingly falling outside the scope of the individuals in need of a stay permit and/or the granting of Italian citizenship – which was in breach of the provisions contained in the "Guidelines" issued by the Ministry of Home Affairs on 17 July 2008 with a view to implementing the Prime Minister's orders No. 3676, 3677 and 3678.

The Ministry of Home Affairs, the Prefecture of Rome and the Prime Minister's Office have alleged that the discriminatory nature of their respective conduct was unsubstantiated and submitted, in particular,

- That the survey of the individuals in the encampment hosting XY's family and the relevant fingerprinting and photographing had been performed with the data subjects' consent in accordance with the principles set forth in the "Guidelines" implementing the Prime Minister's orders No. 3676, 3677 and 3678, and that all the individuals in the encampments had undergone the said fingerprinting and photographing whether they were authorized to stay or not and regardless of their respective nationalities or religious beliefs;
- That the emergency measures had been taken primarily in order to only cope with and overcome a risky situation in environmental, health, social and public security terms such as might have impacted the population residing in the relevant areas, first and foremost the nomad communities, exactly on account of the factually dilapidated conditions that prevailed in the encampments.

The defendants requested accordingly that the petition filed by the counterparts should be rejected on account of its being unsubstantiated.

2. – This court declines examining the petition lodged by the *Associazione 21 luglio, ASGI - Associazione studi giuridici sull’immigrazione* and *Open Society Justice Initiative* because the claimant associations failed to bring the action “based on delegated powers as conferred” by the victim of discrimination “under penalty of voidance, via either a notarized deed or a deed entered into by the parties and subsequently certified true” in pursuance of Article 5(1) of legislative decree No. 215/2003.

Having been invited via an order issued on 7-8 March 2013 to remedy the flawed representation requirements, since the case file did not include any instrument whereby XY delegated powers, the claimant associations filed an instrument delegating powers to them within the terms set by the judge; such instrument had been undersigned by XY and certified true by the latter’s defense counsel, Attorney Salvatore Fachile.

Indeed, Section 83(3) of the Civil Procedure Code empowers the defense counsel to certify true a signature affixed by his/her client to the special *ad litem* POA conferred on the said counsel.

However, the delegation of power referred to in Section 5(1) of legislative decree No. 215/2003 is not meant as an *ad litem* POA conferred on the defense counsel; in fact, it consists in conferring, on an association filing a lawsuit under Sections 4 and 4a of the said decree, the power to act in a judicial proceeding “on behalf and in the name” of the entity delegating such power. Accordingly, the delegation of powers is in this case utterly different in terms of its nature and scope from the *ad litem* POA and does not empower the defense counsel to certify true the signature affixed by his/her client as per Section 83(3) of the Civil Procedure Code. Nor may one consider that the scope of application of the provision contained in the Civil Procedure Code may be extended to the case mentioned in Section 5(1) of legislative decree No. 215/2003, because the said provision is to be construed as specific in nature.

Since the defense counsel is accordingly not empowered to certify true the signature affixed to the instrument whereby the victim of discrimination – who, if represented by the association, might also fail to appear in court – delegated powers to the association, it is to be concluded that the instrument filed on 26 April 2013 to delegate powers is null and void under the law and cannot confer any power of representation on the claimant associations as it does not meet the standard of a “deed entered into by the parties and subsequently certified true” that is set forth in Section 5(1) of legislative decree No. 215/2003.

3. – Notwithstanding the above, the merits of the case are to be considered since the “victim of discrimination”, i.e. XY, entered an appearance as required by the law. XY’s claim will be assessed by investigating the discriminatory nature of the activities at issue with particular regard to, on the one hand, the claimant as such and, on the other hand, the concept of discrimination on account of racial or ethnic origin as set forth in Section 2 of Legislative decree No. 215/2003 – which transposed directive 2000/43/EC ‘implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.’

3.1. The order issued by the Prime Minister’s Office on 30 May 2008 (No. 3676) was grounded in the Prime Minister’s Decree of 21 May 2008 that had declared a state of emergency until 31 May 2009 with regard to the encampments of *nomad communities* in the territory of Latium, Campania and Lombardy; this was due to the situation, considered to be highly serious, that had arisen in the territory of Latium on account of the presence of *many non-EU nationals, whether without residence permits or nomads*, who had settled permanently in the said areas.

Consideration was also given in this respect to the social perturbation caused; the need to take measures *of an extraordinary nature derogating from statutory provisions* in order to expeditiously overcome the emergency situation; and the need to implement all actions that could ensure respect for fundamental rights and dignity of individuals whilst affording *reliable identification procedures* - partly with a view to applying the humanitarian and migration-related measures in force along with provisions to enable access to fundamental welfare and health care services. The said order had accordingly provided that the Prefect of Rome should, in his capacity as commissioner delegated to implement measures for overcoming the emergency situation, inter alia,

- Monitor the authorized encampments where *nomad communities* were present and detect unauthorized encampments;
- Identify and make a survey of the individuals, including underage individuals, and family groups that were present in the encampments, whether authorized or not, *by way of fingerprinting and mug shots*.

Additionally, the Commissioner delegate was authorized to derogate from several statutory provisions in order to carry out the actions set forth in the order, if this was considered to be indispensable, though by complying with the general principles of our legal system, EC directives and the Prime Minister's Directive of 22 October 2004.

The aforementioned order was declared to be null and void by the Regional Administrative Court [TAR] of Latium via its decision No. 6352/2009 as regards the provisions enabling 'identification of individuals to be carried out *sic et simpliciter*, including underage individuals, by way of fingerprinting and mug shots'. The said decision pointed out that 'Section 1(2), letter (c), of the Prime Minister's Orders dated 30 May 2008 would appear to provide – based on their wording – that identification measures should be implemented in all cases irrespective of whether they are actually necessary, and in spite of such measures being invasive of personal freedom – that is, regardless of whether the individuals concerned are in a position to provide proof of their identities in any other manner as well as in respect of underage individuals and in the absence of any legal provision authorizing the processing of sensitive data by the competent public bodies and/or of any specific authorization issued by the Italian Data Protection Authority. From this standpoint, the above provision is therefore in breach of the general principles applying to personal freedom, the legislation aimed specifically at protecting children, and Section 20 of legislative decree No. 196/2003 on the processing of sensitive data.'

The decision rendered by the Regional Administrative Court was upheld by the Council of State via decision No. 6050/2011, which also declared the Prime Minister's Decree of 21 May 2008 to be null and void. A few considerations made by the Council of State in this regard are reported below insofar as they are relevant to the proceeding at issue: 'it is unquestionable that the primary purpose aimed at by way of the declaration of a state of emergency should be considered to consist in *protecting the population residing in the urban areas concerned against an allegedly dangerous situation resulting from the existence of nomad encampments*'; 'no specific factual circumstances can be highlighted such as to allow stating that a "causation relationship" exists – to quote the wording used by the first-instance judge – between the presence of nomad encampments in a given area and an extraordinary, exceptional perturbation of public security in the said area'; 'the specific, isolated events' referred to 'though highly significant and fraught at the time with considerable societal and media impact may not be considered per se to be proof of

the allegedly exceptional and extraordinary situation'; 'in none of the actions that led to adopting the decree of 21 May 2008 can one discern traces of a previous fruitless attempt to implement the said standard measures, or else of factual circumstances such as to clearly and unambiguously point to the uselessness of such measures'; further, it was not possible 'to conclude that the whole administrative activity at issue had been aimed mainly and exclusively to implement racial discrimination measures against the Roma community' because 'the declaration of a state of emergency was not aimed per se to bring about the "ghettoization" of the Roma communities living in the Regions concerned, as it was meant primarily to remedy a "socially alarming situation" that was deemed to have arisen – without prejudice to the above considerations on the lack of any evidence that such a situation did exist and was actually extraordinary in nature' as well as because 'the measures that were taken – regardless of their being possibly illegitimate under different, additional respects – were actually applicable to all the individuals that were present in nomad encampments including individuals outside such encampments'; as for the measures found to be null and void by the decision being challenged (identification measures by way of fingerprinting and mug shots), 'this does not rule out in any manner that individual measures or provisions may have produced factually illegitimate and/or discriminatory effects.'

The Council of State also stated the following: 'the "Guidelines" issued by the Ministry of Home Affairs on 17 July 2008 (...) are in the nature of a mere circular letter; accordingly, they are unquestionably subordinate to the provisions contained in Prime Minister's orders', so that '(...) the aforementioned "Guidelines" are not binding on their addressees or the Administration that had issued them, since the latter was empowered at any time to refrain from applying them, derogate from them or amend them, which means that they are utterly incapable to prevent illegitimate interpretations and/or applications of the higher-level orders';

By its decision No. 9687 of 22 April 2013, the Court of Cassation rejected the action brought against the above decision of the Council of State, which has thus become final.

3.2 The present case is not aimed at finding any illegal elements in orders or conduct but their possible discriminatory intent or even only their possible discriminatory effects on racial or ethnic grounds. In fact, discrimination may also stem from formally legal acts or conduct: conversely, their illegality may even not give rise to any discrimination. As a consequence, the damage to be compensated here is not the damage caused by the illegality of the Administration's acts or conduct, but that caused by its discriminatory conduct (which is actually the claim made by the claimant).

However, the analysis of the content of the orders issued by first and second instance administrative courts - which were requested to assess, *inter alia*, the lawfulness of the Prime Minister's Decree of 30 May 2008, which the claimant considers to be discriminatory, and of the Prime Minister's Decree of 21 May 2008, for whose implementation the order had been adopted - provides a useful, authoritative contribution to reconstruct and assess the factual antecedents of this case. This also applies to the identification of any discriminatory elements that may be inferred from the reasons that have led the said administrative courts to consider unlawful, in whole or in part, the orders submitted for their consideration.

Hence, the notion of discrimination must be recalled, as far as it is relevant for the purposes of the present case.

Section 43, paragraph 1, of Legislative Decree No. 386 of 1998 provides that *'any conduct that, directly or indirectly implies a distinction, exclusion, or preference based on race, color, descent or national or ethnic origin, religious beliefs and practices and that has the aim or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social and cultural or any other field of public life, shall be considered discrimination'*.

Section 2, paragraph 1, of Legislative Decree No. 215 of 2003 lays down the notions of direct and indirect discrimination and states that: a) *'direct discrimination shall be taken to occur where one person is treated less favorably than another person is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin'*; b) *'indirect discrimination shall be taken to occur when an apparently neutral provision, criterion, practice, act, agreement or conduct would put persons of a certain race or ethnic origin at a particular disadvantage compared with other persons'*.

In paragraph 3 of the same section it is specified that: *'Discrimination shall be deemed to also occur (...) when an unwanted conduct takes place on grounds of racial or ethnic origin with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.'*

3.3. The reservations expressed by the claimant mostly concern the alleged discriminatory nature of Prime Minister's Order No. 3676 of 30 May 2008 and the implementation of the provisions contained therein, in the part in which they (i.e., both the order and the conduct) have ordered and enforced the taking of fingerprints and mug shots and, subsequently, the retention thereof.

Although it must be excluded that - in line with the arguments of the Council of State - the entire administrative action was uniquely and mainly aimed at a racial discrimination against the Roma community, it has to be assessed whether XY's identification through fingerprinting and photographing has amounted to a discriminatory conduct and, even before that, whether the same discriminatory character also applies to the provision included to this effect in Prime Minister's Order No. 3076.

First, the court observes that the facts at issue are undisputed, as the defendant Administrations have admitted that fingerprinting and photographing were carried out and that the relevant records have been retained, although for purposes that were deemed to be lawful. Nor has it been challenged that XY is an Italian national who held an ID card at the material time. The only circumstance that was disputed was the coercive identification, as the defendant Administrations maintained that the affected party's consent had been obtained. The claimant has not succeeded in suggesting any measure of enquiry to deny this challenge, as the application for the admission of witness evidence on page 46 of the initial claim does not comply with the requirements under Section 244 of the Civil Procedure Code, which is considered to be applicable also to this case under Sections 702bis ff. and Section 3 of Legislative Decree No. 150 of 2011.

Moving on to assessing whether the identification through fingerprinting and photographing is discriminatory in nature, importance attaches particularly to the convincing declaration of invalidity of the provision contained in Order No. 3676 made by Regional Administrative Court of Latium. Under the criticized provision, identification through fingerprinting and photographing should take place *'regardless of their necessity and, therefore, even when the parties are able to prove their identity by other means'*.

Hence, the claimant was identified through fingerprinting and photographing ("in any case invasive of personal liberty"), even though his ID card could have been used for that purpose. The identification activities carried out in this manner concerned all the individuals found in the settlements where the survey took place, regardless of their race, ethnicity, religious beliefs and nationality.

Therefore, help comes once again from the remarks made by the Council of State, which - after observing that 'it is a fact that, while in the President of the Republic's Decree and Ordinances the state of emergency has always been associated with the presence of "nomads", of the "nomad communities", and of the "illegal encampments", no reference being made to ethnic or racial aspects, this does not hold true for the preceding acts and, in particular: - in the Decree of 21 May, reference is made to the "Memorandum of understanding for the implementation of the Roma Emergency Strategic Plan in the city of Milan", signed on 21 September 2006 by the Milan Prefect, the President of the Lombardy Region, the President of the Milan Province and the Mayor of Milan; - also in the Minister of Home Affairs' proposals of 14 and 16 May 2008, based on which the emergency was then declared, specific reference is made to a "Roma Emergency" to identify the key problem that needed to be solved; - in many other acts of the proceedings irregular encampments are defined as "Roma camps", instead of simply "nomad camps"'.

The Council of State has then rightly observed that 'it is certainly a fact of common knowledge that the vast majority of the individuals present in the concerned encampments actually has a precise ethnic background, insofar as they have Roma origin' and has stated that these elements are 'perhaps apt to reveal a discriminatory intent by some of the institutional subjects involved'.

Therefore, the administrative action that was carried out as a whole – though, as noted, not specifically aimed at discriminating the Roma community – was addressed in practice especially to the members of that community and this connotation was undoubtedly visible from the outside. Moreover, that action was characterized by a conduct (identification through fingerprinting and photographing of individuals holding valid ID cards) that was against the law, invasive of personal liberty and not justified by any specific needs.

Based on these considerations, the Court holds that the order providing for the general identification through fingerprinting and photographing of the individuals found in settlements, even when this was not necessary, and the consequent implementation activities, have caused discrimination against the Claimant, an Italian national of Roma ethnicity holding a valid ID card issued by the Rome Municipality.

In fact, these identification methods have caused discrimination on grounds of ethnic origin, because that person of Roma ethnicity, an Italian national holding a document, was for no reason identified through fingerprinting and photographing as he was involved in an operation that was *de facto* directed to the Roma community.

The circumstance that identification may have been carried out after obtaining XY's consent does not rule out discrimination, as it was in any case an unlawful activity carried out in the exercise of public authority and affecting the rights relating to the individual's personality. In this regard, the presence or absence of the consent of the person entitled to give it is totally irrelevant.

The treatment to which he was subjected has had the effect of both violating the Claimant's dignity – in consideration of its invasiveness and of the absence of legal requirements for its

justification – and of creating a hostile environment (Section 2, paragraph 3, of Legislative Decree No. 215 of 2003). The latter was undoubtedly due to the association made by the general public between belonging to a specific ethnicity and the ‘situation of social perturbation’ to be ‘remedied’ which, as emphasized by the Council of State, had represented the ‘primary goal’ of that administrative activity.

The discriminatory nature of XY's identification through fingerprinting and photographing necessarily entails that the retention of the data collected through those means must be considered discriminatory as well.

4. – As requested by the Claimant, the termination of the only ongoing harmful conduct, consisting in the retention of XY's personal data obtained through identification by means of fingerprinting and photographing, and the removal of its effects has to be ordered.

For this purpose, the Ministry of Home Affairs – also through its domestic local branches– is to be ordered to destroy all the documents (in paper, digital or any other format) containing sensitive personal data as created through the identification procedure of XY by means of fingerprinting and photographing that took place on 3 January 2010 and stored at the Immigration Office of the Police Headquarters of Rome or in any other relevant site of the Ministry of Home Affairs and its local branches.

The claim for compensation of non-pecuniary damage caused to the Claimant by the violation of his rights to reputation and privacy must also be granted. This was due to the discriminatory conduct of the Prime Minister's Office, being the entity that issued Order No. 3676 of 30 May 2008 under which the identification through fingerprinting and photographing was allowed, and of the Ministry of Home Affairs, which is to be held accountable for the conduct of the Prefecture and Rome Police Headquarters staff.

In the absence of specific evidence, the existence of non-pecuniary damage may also be inferred through presumptions. In the case at issue, it can be reasonably held that being taken to a police station to undergo an identification procedure through discriminatory measures for no apparent reason and the subsequent protracted and unjustified retention of data obtained in that way has violated both his right to reputation – as the Claimant was made to appear as if he was living in a dangerous and illegal condition – and his right to privacy, as some of his sensitive data were obtained and retained for no reason, and were held by an entity that was not entitled to do so.

As the requirements are met, damages may be determined according to equitable principles in € 8,000.00, including all items and revaluation, plus legal interests accrued since the publication of this order.

5. Furthermore, this decision is to be published once and at the Defendants' expense in the daily newspaper ‘Il Corriere della Sera’ on an internal page thereof.

Since they have lost, the Prime Minister's Office and the Ministry of Home Affairs are ordered to pay costs for XY. The latter are determined in the operative part of the order (ex officio, if the relevant fees note is not submitted).

The costs incurred by the defendant Administrations, on the one hand, and the claimant associations, on the other, must be balanced as the defendants have submitted observations that

were integrally aimed at challenging the claim submitted personally by XY and have not considered by any means the issue of the associations' lack of power of representation.

ON THESE GROUNDS

After rejecting any claim, plea, defense and petition to the contrary, ruling finally on the petition submitted by XY, ASSOCIAZIONE 21 LUGLIO, ASGI – Associazione Studi Giuridici sull'Immigrazione and OPEN SOCIETY JUSTICE INITIATIVE against the PRIME MINISTER'S OFFICE, the ROME PREFECTURE and the MINISTRY OF HOME AFFAIRS, the Court:

a) declares the inadmissibility of the claims put forward by Associazione 21 Luglio, ASGI – Associazione Studi Giuridici Sull'immigrazione and Open Society Justice Initiative;

b) granting XY's claim:

- orders the Ministry of Home Affairs to destroy all the documents (in paper, digital or any other format) containing the sensitive personal data that were collected through the identification procedure of XY by means of fingerprinting and photographing that took place on 3 January 2010, as stored at the Immigration Office of the Police Headquarters of Rome or in any other relevant site of the Ministry of Home Affairs and its local branches;
- orders the Prime Minister's Office and the Ministry of Home Affairs jointly and severally to pay the sum of € 8,000.00 to XY as compensation for the non-pecuniary damage, plus interests at the statutory rate pursuant to Section 1248 of the Italian Civil Code from the date of publication of this order until payment;

c) orders the publication of this order, once and at the expense of the Prime Minister's Office and of the Ministry of Home Affairs, in the daily newspaper 'Il Corriere della Sera' on an internal page thereof;

d) orders the Prime Minister's Office and the Ministry of Home Affairs jointly and severally, to pay costs to XY, which costs are determined ex officio as a whole in the sum of € 2,747,82 (of which € 2,500.00 for attorney's fees and € 247.82 for court fees), plus VAT and social security contributions.

e) balances the costs between the claimant associations and the defendant Administrations.

Service is hereby ordered.

Decided in Rome, on 24 May 2013.

Signed: the Judge

[Stamp of Rome's Court's Clerk Office]