



**The Court of Magistrates (Malta)
As a Court of Preliminary Inquiry
(For purposes of the Extradition Act referred to as
a Court of Committal)**

Magistrate Dr Aaron M. Bugeja M.A. Law, LL.D. (melit)

**The Police
(Inspector Mario Cuschieri)**

vs.

**Johan Germaine Corneille Van Oudenhove
(hereinafter referred to as the “Requested Person”)**

Today the 26th October 2016

The Court,

Having seen the Schengen information System Alert issued for the purposes of extradition bearing number BEC0000000226337000001 as well as the European Arrest Warrant (EAW) issued by Diedrik Deraeve, an Investigating Judge at the Court of First Instance, West Flanders, District of Veurne, Belgium, dated 13th September 2016 as well as the Attorney General’s certificate issued on the 7th October 2016 against

Johan Germaine Corneille Van Oudenhove, 54 years of age, of Belgian nationality, son of Andre and Anny nee Dool, born in Dendermonde, Belgium on the 17th May 1963 and residing in Malta at 12, The Gary Mansions, Block C, Flat 1, Triq il_Qaliet, Marsascala (hereinafter referred to as the **“Requested Person”**) and this for the purpose of prosecution for the offence of “abuse of confidence” (misappropriation) in terms of Article 491 of the Belgian Criminal Code and which is punishable with a maximum term of five years imprisonment

Having seen the certificate issued by the Attorney General in terms of Regulation 7 of Legal Notice 320 of 2004 (hereinafter referred to as “the Order”) wherein it was certified that Diedrik Deraeve, an Investigating Judge at the Court of First Instance, West Flanders, District of Veurne, Belgium had the necessary authority to issue the SIS alert and EAW abovementioned;

Having seen that during the sitting of the 12th October 2016 Inspector Dr. Mario Cuschieri confirmed on oath the contents of the EAW and requested this Court to proceed against the requested person in terms of the Order;

Having seen that both from a visual inspection of the requested person in Court, as well as from an analysis of all the documents submitted, this Court established the person arraigned before it was, on a balance of

probabilities, the same person mentioned on the SIS alert and EAW and therefore it established his identity for the purposes of the Order.

Having also ascertained that the requested person was duly served with the EAW and in fact he declared that he received a copy thereof;

Having seen that the Court explained to the requested person and in simple language :

- (a) the contents of the EAW and having verified that the requested person understood the contents thereof;
- (b) the right to be assisted by a lawyer;
- (c) the right to be assisted by an interpreter from the Maltese language to the Dutch language and vice versa in case he was not English Speaking or Maltese Speaking in terms of Chapter 189 of the Laws of Malta (and the requested person opted to be assisted by specifically hired lawyers and to have these proceedings conducted in English and this after the Court ascertained that the requested person was English speaking in terms of Chapter 189 of the Laws of Malta;
- (d) the right to grant his consent for the surrender as well as the meaning of granting his consent and the consequences arising from giving his consent to his extradition as well as all the information about consent;

Having seen that the requested person declared that he was not giving his consent for his extradition;

Having seen the order to proceed with the extradition hearing;

Having seen that during the sitting of the 21st October 2016, after having seen the contents of the EAW, the SIS alert, Article 491 of the Belgian Criminal Code, Articles 293 and 294 of the Maltese Criminal Code, and regulation 59(3) of the Order, the Court declared that the offence specified in the EAW was an extraditable offence;

Having also seen that the Defence raised no bars to extradition in terms of regulation 13 of the Order;

Having seen the plea raised by the Defence relating to the extraditability of the Requested Person, that is to say that Defence pleaded that the requested person's return could not take place on account of the fact that from the information supplied in the European Arrest Warrant the extradition of Van Oudenhove was being requested for the purpose of an investigation and not for the purpose of criminal prosecution for a criminal offence. This was being stated on account of the fact that the European Arrest Warrant did not mention that formal charges had been issued against the requested person. Furthermore, regulation 59(1)(a) of Legal Notice

320 of 2004 stated that the requested person had to be "accused in a scheduled country of the commission of an offence constituted by the conduct". This therefore implied that the person requested had to be charged with a specific offence in the scheduled country.

Having seen the reply of the Prosecution, stating that contrary to what was being alleged by the Defence, the Belgian Judicial Authority proceeded on the strength of a European Arrest Warrant that clearly stated that it was being issued for the arrest of the person requested for the purposes of conducting a criminal prosecution;

Having seen the record of the proceedings and having heard the submissions of the Prosecution and the Defence;

Having Considered that according to the Framework Decision on the European Arrest Warrant, a warrant is defined as -

a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order

This is also reflected in regulation 5(2) of Legal Notice 320 of 2004 where it is stated that reference to any arrest warrant in sub-article (1) was a reference to a relevant arrest warrant for prosecution or a relevant arrest warrant after conviction.

More importantly the European Arrest Warrant exhibited at fol 12 itself mentions clearly that it was issued by a competent judicial authority and that Van Oudenhove was to be arrested and surrendered for the purposes of conducting a criminal prosecution.

As Defence mentioned, regulation 59(1)(a) of Legal Notice 320 of 2004 states that the requested person has to be "accused in a scheduled country of the commission of an offence constituted by the conduct". According to the Defence, this implied that there had to be a prosecution against him and not just an investigation.

However this Court had already the opportunity to deal with a similar plea in the extradition proceedings *Il-Pulizija vs Philip Mifsud* decided on the 18th October 2013 wherein this Court made reference to the English case : *In Re Ismail (Application for Writ of Habeas Corpus) (On Appeal From a Divisional Court of the Queen's Bench Division)* of the 29th July 2008 wherein the Law Lords decided to uphold the Opinion of Lord Steyn on the meaning of the term "accused", which is the equivalent of "accused" in Legal Notice 320 of 2004. The most relevant part of this case is as follows : -

The meaning of "accused" person

It is common ground that mere suspicion that an individual has committed offences is insufficient to place him in the category of "accused" persons. It is also common ground that it is not enough that he

is in the traditional phrase "wanted by the police to help them with their enquiries." Something more is required. What more is needed to make a suspect an "accused" person? There is no statutory definition. Given the divergent systems of law involved, and notably the differences between criminal procedures in the United Kingdom and in civil law jurisdictions, it is not surprising that the legislature has not attempted a definition. For the same reason it would be unwise for the House to attempt to define the word "accused" within the meaning of the Act of 1989. It is, however, possible to state in outline the approach to be adopted. The starting point is that "accused" in section 1 of the Act of 1989 is not a term of art. It is a question of fact in each case whether the person passes the threshold test of being an "accused" person. Next there is the reality that one is concerned with the contextual meaning of "accused" in a statute intended to serve the purpose of bringing to justice those accused of serious crimes. There is a transnational interest in the achievement of this aim. Extradition treaties, and extradition statutes, ought, therefore, to be accorded a broad and generous construction so far as the texts permits it in order to facilitate extradition: *Reg. v. Governor of Ashford, Ex parte Postlethwaite* [1988] A.C. 924, 946H-947D. That approach has been applied by the Privy Council to the meaning of "accused" in an extradition treaty: *Rey v. Government of Switzerland* [1998] 3 W.L.R. 1, 7B. It follows that it would be wrong to approach the problem of construction solely from the perspective of English criminal procedure, and in particular from the point of view of the formal acts of the laying of an information or the preferring an indictment. Moreover, it is important to note that in England a prosecution may also be commenced if a custody officer decides that there is sufficient evidence to charge an arrested person and then proceeds to charge him: section 37 (7) of the Police and Criminal Evidence Act 1984; and see generally as to the commencement of prosecutions *Card, Cross and Jones, Criminal Law*, 13th ed., (1995) Chapter 4. Despite the fact that the prosecuting authorities and the court are not involved at that stage, the charging of an arrested person marks the beginning of a prosecution and the suspect becomes an "accused" person. And that is so even if the police continue to investigate afterwards.

It is not always easy for an English court to decide when in a civil law jurisdiction a suspect becomes an "accused" person. All one can say with confidence is that a purposive interpretation of "accused" ought to be adopted in order to accommodate the differences between legal systems. In other words, it is necessary for our courts to adopt a cosmopolitan approach to the question whether as a matter of substance rather than form the requirement of there being an "accused" person is satisfied. That

such a broad approach to the interpretation of section 1 of the Act of 1989 is permissible is reinforced by the provisions of section 20. This provision deals with the reverse position of an extradition of a person "accused" in the United Kingdom and contemplates that "proceedings" against him may not be commenced ("begun") for six months after his return. This provides contextual support a correspondingly broad approach to "accused" in section 1. For my part I am satisfied that the Divisional Court in this case posed the right test by addressing the broad question whether the competent authorities in the foreign jurisdiction had taken a step which can fairly be described as the commencement of a prosecution. But in the light of the diversity of cases which may come before the courts it is right to emphasize that ultimately the question whether a person is "accused" within the meaning of section 1 of the Act of 1989 will require an intense focus on the particular facts of each case.

Having also seen that the Court decided that a purposive interpretation had to be given to the term "accused" in this case too. On the basis of the information supplied and the documents produced, for the reasons abovementioned, the Court rejected the preliminary plea of the accused and considered that the Belgian Judicial Authorities' request was a request for the purpose of conducting a criminal prosecution in Belgium.

Having seen therefore that there were no further bars to the extradition of the requested person or any other reasons that in terms of the Order the requested person's return ought to be refused or delayed;

ORDER OF COMMITTAL

Consequently, this Court orders the return of **Johan Germaine Corneille Van Oudenhove** to the Kingdom of Belgium on the basis of the European Arrest Warrant issued against him and commits him to custody while awaiting his return to the Kingdom of Belgium and this in terms of Regulations 13(5) and 24 of the Order.

This Order of Committal is being made on condition that the present extradition of the Requested Person be subject to the law of speciality and thus in connection with those offences mentioned in the European Arrest Warrant issued against him deemed to be extraditable offences by this Court.

In terms of Regulation 25 of the Order as well as Article 16 of the Extradition Act, Chapter 276 of the Laws of Malta, this Court is informing the Requested Person that :-

- (a) He will not be returned to the Kingdom of Belgium until after the expiration of seven days from the date of this order of committal and that,
- (b) he may appeal to the Court of Criminal Appeal, and
- (c) if he thinks that any of the provisions of article 10(1) and (2) of the Extradition Act, Chapter 276 of the Laws of Malta has been

contravened or that any provision of the Constitution of Malta or of the European Convention Act is, has been or is likely to be contravened in relation to his person as to justify a reversal, annulment or modification of the court's order of committal, he has the right to apply for redress in accordance with the provisions of article 46 of the said Constitution or of the European Convention Act, as the case may be.

Delivered today the 26th October 2016 in the Court of Justice Building, Valletta.

Aaron M. Bugeja