



## **Court of Criminal Appeal**

**Hon. Justice Giovanni M. Grixti LL.M., LL.D.**

**Appeal Nr: 532 /2017**

**The Police**

**(Inspector Chris Galea Scannura)**

**vs**

**Marek Drga**

Sitting of the 12<sup>th</sup> January, 2018

The Court,

Having seen the appeal application of Marek Drga, a Czech national, holder of Residence Permit MT3593108, Maltese Identity Card 0082411A and Czech Passport 41085917, presented in the registry of this Court on the 14<sup>th</sup> of December, 2017 through which he requested this Court to revoke the judgement of the Court of Magistrates (Malta) as a Court of Committal delivered on the 7 of December 2017 ordering the return of appellant to the Czech Republic on the basis of a European Arrest Warrant issued against him and committed him to custody while awaiting his return to the Czech Republic;

Having seen the judgement of the Court of Magistrates (Malta) as a Court of Committal of the 7<sup>th</sup> December, 2017, whereby it ordered the return of Marek Drga to the Czech Republic on the basis of the European Arrest Warrant issued against him and committed him to custody while awaiting his return to the Czech Republic and this in terms of Regulations 13(5) and 24 of Legal Notice 320 of 2004;

Having seen the grounds of appeal;

Having heard the evidence tendered by Marek Drga and seen the documents submitted by him and the Attorney General;

Having see the note of appellant of the the 11 January through which he presented a duly attested translation of Document MD1 from the Czech to the English language;

Having seen the records of the case;

Having seen the updated conduct sheet of the appellant, presented by the prosecution as requested by this Court;

Having heard submissions by Counsel to appellant and by the Attorney General;

Considered:

1. That the facts of this case relate to a Schengen information System Alert issued for the purposes of extradition bearing number CZ00000005609877000001 as

well as the European Arrest Warrant (EAW) issued by Monika Horakova', a judge at the District Court in Zlin, Czech Republic, dated 3<sup>rd</sup> October 2014 as well as the Attorney General's certificate signed by the Acting Attorney General on the 13<sup>th</sup> November, 2014 against **Marek Drga**, with personal details as listed above;

2. Marek Drga is wanted by the Czech Authorities to be prosecuted for the offence, described as 'extremely serious' of evading a tax charge or similar obligatory payment pursuant to Section 240(1)(2)(a)(3) of Act number 40/2009, of the Czech Criminal Code committed in the form of complicity pursuant to section 23 of the Czech Criminal Code and which is punishable with a maximum term of ten years imprisonment;

3. Following due judicial process in accordance with The Extradition Act - Chapter 276 of the laws of Malta and Legal Notice 320 of 2004, the Court of Magistrates (Malta) as a Court of Committal, dispensed with the request of the prosecution by judgement of the 7 December 2017 declaring that after having seen its decree of the 30 November 2017 whereby it declared that the proceedings in the Czech Republic were not subject to prescription, and having seen that there were no further bars to the extradition of the requested person, ordered the return of Marek Drga to the Czech Republic and committed him to custody while awaiting his return;

4. Before the First Court, appellant raised the bar to extradition on the basis that the alleged offence was time barred. The First Court, in its decree of the 30 November 2017 as aforesaid, declared that in accordance with Article 16 of Legal Notice 320 of 2004 the return to the scheduled country is barred by prescription if the prosecution for that offence is barred by prescription in accordance with Maltese

law **and** the acts constituting the offence fall within the jurisdiction of the Maltese Criminal Courts. The Court dismissed the plea of prescription since the facts of the case did not satisfy the latter requirements;

5. Subsequent to the above decree, the parties to the proceedings before the First Court declared that there were no further bars to extradition and the Court delivered judgment on the 7 December 2017 as above described;

6. Appellant felt aggrieved by judgement of the First Court and brought forward the following ground of appeal reproduced hereunder:

*“That by reason of the passage of time since appellant is alleged to have committed the crime and / or because the accusation against him is not made in good faith in the interest of justice, it is, having regard to all the circumstance, unjust and /or oppressive to return him to the Czech Republic in terms of article 20 of Chapter 276 of the Laws of Malta [Extradition Act] and this as will be sufficiently and satisfactorily proven before this Honourable Court in the course of the oral pleading of this appeal in terms of Section 22(3) of Chapter 276 of the Laws of Malta.”*

7. Considered further that in his oral submission before this Court, learned Counsel to appellant noted that the appeal is not on the First Court’s decision regarding the plea of prescription *per se* and that the decision, namely that the proceedings against appellant are not time barred, is not being contested. That which appellant is contesting is the effects of the decision of the First Court, in that after the lapse of so much time from the commission of the alleged offence it would be unjust and / or oppressive to return the applicant to the Czech Republic;

8. Appellant further underlines that the accusation brought against him is not made in good faith and in the interest of justice;

9. Considered further that the following details emerge from the supporting documents available to the First Court. The European Arrest Warrant (EAW), a translation thereof exhibited as Document CGS 2, states that: During the period from 9 March 2011 to 2 of May 2011, in his place of residence and/or in the offices of his companies and with the intention of evading the value added tax and this enriching himself to the detriment of the Czech Republic, after previous agreement on divisions of tasks within the group, after agreement with Miroslav Zaremba, he [the requested person] first arranged for the Future Construction s.r.o. Company so as to involve it in purposive [sic] retail chains within which deals were realized where the value added tax to be paid by Future Construction s.r.o. was evaded. In advance, he negotiated the transfer of the share in business and the powers of its executive manager to Renata Sedlackova, the transfer was performed as of 3 March 2011. Further, he agreed with Renata Sedlackova that she would yield the Company fully at his disposal for his business activities and that she would give him the chip card and the PIN number so that he could make electronic transactions on the Company's bank accounts. He purchased nicked cathodes, in two cases from SP-CENTRUM SK s.r.o. as the supplier and in one case from Slovak Metal Trading s.r.o. selling them immediately to Ladyss Stav s.r.o, he issued, or made issued, the relevant documents of these purchases/sales, and he made payments from Future Construction s.r.o. for the purchase of goods from Slovak suppliers, i.e SP-CENTRUM SL s.r.o. and Slovak Metal Trading s.r.o., according to instructions from Mgr. Rene' Barta given through Radim Caganek. He also

elaborated, or made elaborated, [sic ..] the value added tax return for March 2011 on behalf of Future Construction s.r.o. in which he declared falsely that the goods in the total value of CZK 43,519,618 – purchased by the Company and SP-CENTRUM SK s.r.o and Slovak Metal Trading s.r.o. from Slovakia, had been purchased in the Czech Republic. He presented the tax return to Renata Sedlackova for signature, and he gave it to her so that she could submit it to the Revenue Office, which Renata Sedlackova did. He unlawfully claimed VAT deduction for domestic purchase of goods in the amount of CZK 8,703,923 – based on these false statements, thus evading the tax in the cited amount”;

10. Under the heading entitled: Nature and Legal classification of the offence(s) and the applicable statutory provision/code, the EAW classifies same as “Extremely serious offence of evading a tax, charge or similar obligatory payment pursuant to Section 240 (1), (2) (a), (3) of Act no 40/2009 Sb. , Criminal Code, committed in the form of complicity pursuant to Section 23 of the Criminal Code;

11. Under the heading entitled “Full descriptions of offence(s) not covered by section I above”, the same facts as appearing in paragraph 9 of this judgement, were reproduced therein without any further details or explanations. These therefore were the only facts available for the First Court in order to arrive at its decision;

12. Appellant tendered his evidence before this Court with the intention of demonstrating that the request of the Czech Authorities was made in bad faith and not in the interest of justice. Marek Drga stated that he purchased a shell company, Future Construction s.r.o. in August 2009 in order to start a construction business but he soon sold all his interests to Tomas Frana in August 2010 because he needed to be spend more time with his girlfriend after problems with

her pregnancy. Document MD1, exhibited by appellant is a download from the official website justice.cz which outlines the history of this company and shows that appellant was registered as the owner of same on the 28 August 2009 and then transferred his interests to Tomas Frana on the 24 August 2010 but would remain as an employee to help him with some pending contracts and in fact stayed on for six months till the 18 February 2011 when he resigned as Frana was selling the company to settle in Australia. From that date onwards, appellant had no further connection with Future Construction s.r.o. and he fails to understand why the Czech Authorities are alleging his involvement in the alleged tax evasion in collusion with Miroslav Zaremba between **9 March 2011 and 2 May 2011** when he had relinquished his interests as of the 20 August 2010 by notarial deed published on the Czech Government website (Dok MD1) some two weeks later and then had absolutely no connection when he resigned on the **18 February 2011** when Frana sold the company to Renata Misurcova and appellant was employed with another company;

13. Frana sold the company to Renata Misurcova who later changed her name to Renata Sedlackova who is mentioned in the EAW. Renata Misurcova acquired the company from Tomas Frana on the 3rd of March 2011 and not from himself. Appellant never traded with SP-CENTRUM SK s.r.o. or Slovak Metal Trading s.r.o. and the first time he saw the names of these companies was in the EAW;

14. Appellant further testified that in the days when Tomas Frana was selling his company, he was contacted by Miroslav Zaremba asking him to meet a Mr. Barta when appellant informed him that the company was in the process of being sold and that he had no control within the company but he insisted for this meeting. Barta requested him to sign a

contract for the purchase of one truck, 24 tonnes of nickel cathode which Zarmeba was interested in purchasing through Future Constructions to sell to another company in February 2011 but declined to do so as it was against to law since he had no position in the company and asked him why the transaction could not be made directly between the two companies instead of through Future Constructions;

15. One year later appellant was contacted by persons unknown to him asking questions as to who was the owner of Future Constructions s.r.o. and he asked whether they were speaking about Renata Misurcova. He was later approached again about the whereabouts of Tomas Frania as they needed him to amend some documents and he informed them that he now lives in Australia and so they asked him to sign the documents but he refused. They again contacted appellant and said that he could sign the documents since he was authorised to do so when working with Tomas Frania. Contacted another time, these persons demanded that he sign documents to change the date of a deal regarding a deal between Future Constructions and another company to be back dated to the first half of February 2011. These persons alleged that they had sold material to Mr Zarembe and wanted to change the date on the documents so he contacted Mr. Zarembe to see what that was all about and he replied that he had received his material and had nothing else to do with it;

16. The same people managed to trace him and threatened him to sign the documents to which he replied that he will be informing the police. At that stage one of them started laughing and showed him his id stating that he is the police. His girlfriend's father, a police officer said that the police cannot help him and that he is not happy about his relationship with his daughter. He was again stopped and



threatened with causing harm to his mother. In October 2012 these people tried to kidnap him at a fuel station but managed to escape and hid in his mothers apartment until the next day when he fled to Germany to look for his mother who works there and drove him all the way to Italy. She called his uncle who had been a high ranking police officer for 25 years who in turn was of the opinion that he could not get any help from the police and that his only option was to go into hiding. His cousin knew a friend in Gozo who offered him shelter and so came over to Gozo and has been living there ever since without leaving the Island. It is not true that he resided in Cyprus as stated in the EAW and he has never been there either on holiday;

17. One and a half months after arriving in Gozo he was at the bus terminus when someone called his name and was shocked when he realised that he was surrounded by people that had tracked him down. He was taken by car to Sannat cliffs where there was another car standing by and was forced to sign some 50 pages under threat of death. He has no idea what these papers were and was about to be killed when following an argument between his abductors he was let free and taken back to his residence and again threatened with his and his mother's death should he ever return to the Czech Republic. Appellant stated he never made a report to the local police about this last abduction because he never felt safe since these people found him without him ever making contact with his family or friends. He never filed a report with the Czech police because there were corrupt secret police involved. In May or June 2013, after having signed the documents, the Czech police contacted his mother in Germany and told her that if he talked to them they will protect him;

18. Appellant concluded his testimony by stating that he was afraid of these people and that even if extradited under protection the police will let him go and he will be in the same situation. He has no faith in the justice system of the Czech Republic;

19. Considered further that after hearing the evidence of appellant, it must be stated that the remit of this Court is not to decide whether he truly participated in a tax evasion scheme or not in the Czech Republic. Those facts are to be decided upon by the Courts of the Czech Republic and it is for this Court to decide whether to allow or dismiss the appeal over the judgement of the First Court that ordered the extradition of applicant;

20. It is also to be noted that the grounds of appeal brought forward by appellant were not raised by him before the First Court and furthermore never made any reference to the alleged frame up as recounted by him in his testimony before this Court;

21. The ground of appeal submitted for the consideration of this Court is that it would be unjust and oppressive for him to be returned to the requesting state. Appellant is basing his argument on the fact that the alleged offence of tax evasion took place in 2011 whereas his arrest to answer for this crime was executed in 2017 and that therefore by reason of the passage of time it would be unjust or oppressive to return him to the requesting State. Appellant, however, combined this ground of appeal with the plea that the accusation brought against him was not made in good faith and that it would be unjust or oppressive to return him;

22. Article 20 of the Extradition Act Chapter 276 of the laws of Malta clearly states that the Court may order the person committed to be discharged from custody if it appears to such court that: a) by reason of the trivial nature of the offence of

which he is accused or was convicted; or (b) by reason of the passage of time since he is alleged to have committed it or to have become unlawfully at large, as the case may be; or (c) because the accusation against him is not made in good faith in the interest of justice, it would, having regard to all the circumstance, be unjust or oppressive to return him;

23. In his oral submission, appellant alleges that the records manifestly demonstrate that he had no connection with Future Construction s.r.o. after selling the company to Tomas Frana in August 2010 and yet the Czech Authorities are alleging that he transferred the company to Renata Sedlackova when it was Frana who transferred the company to Renata Sedlackova in March 2011. Appellant contends that this is no mere mistake but a deliberate action to force him back to the Czech Republic for reasons other than those indicated in the European Arrest Warrant and that is the reason why he chose to join together the two issues, that of prescription and that of bad faith. This Court, however, must deal with the issue of prescription separately from that of an accusation made in bad faith even though they can both separately give rise to release from custody on the basis of them being unjust and oppressive;

24. The Court, however, observes that there is nothing unjust and oppressive by requesting the return of appellant to the requesting State if the law of the requesting state provides for a prescriptive period which is longer than that prescribed in Maltese law for the same offence. The onus of proving that the passage of time would be “unjust” , there being a risk of prejudice to the accused in the conduct of the trial, and “oppressive”, referring to hardship to the accused resulting from changes in circumstances taking place in the period such as the establishment of a family in Malta since taking up residence here, the inability of his family to adjust to the

reality of his absence or his own inability to adjust as a consequence of his return, amongst other criteria, rests with appellant and in this regard failed to show that there exists any such reason. The alleged offence took place in 2011 and a detention order was requested in 2014 following the necessary investigation by the Czech Authorities. The requested person could not be notified of the charges brought against him as he himself admits having fled the jurisdiction for his safety. There is nothing extraordinary in the length of time it took the authorities to investigate their case and conclude that appellant should be brought to answer for his alleged actions;

25. Appellants contention that a substantial amount of time has elapsed from the commission of the alleged offence such as to render his return unjust and oppressive is therefore being dismissed;

26. Appellant also argues that the accusation made against him by the Czech Authorities is not made in good faith in the interest of justice and that therefore it would be unjust or oppressive to return him to the requesting State. This Court considered the testimony of appellant and reproduced herein a substantial part of the transcript because it considers the allegations made therein of a very serious nature. However, it must be said that it is not for this Court to decide whether or not appellant was framed and by whom. Furthermore, applicant's mere declaration that he has no faith in the justice system of the Czech Republic does not, on its own, merit a refusal to send applicant to the requesting State on the basis that the accusation brought against him are not made in good faith and in the interests of justice;

27. It is only applicant's conclusion that the Czech Authorities' request to have him extradited are for reasons other than those mentioned in the EAW. It is also applicant's

conclusion that the Czech Police are involved in the alleged abductions to obtain his signature on the documents against his will and with the use of force. Applicant, however, fails to show even on a balance of probability that such request is not made in good faith and in the interest of justice. No doubt it is the responsibility of the requesting State to consider the serious allegations made by appellant, to investigate and afford him all necessary protection and safeguards on his return;

28. Applicant's failure to show, even on a balance of probability, that the request is not made in good faith leads this Court to the conclusion that it would not be unjust or oppressive to return him to the requesting State. As stated in the learned opinion of Lord Diplock in the judgment **Kakis v Government of the Republic of Cyprus** (1978) 2 All ER 634, "*Unjust*' I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, '*oppressive*' as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration ... between them they would cover all cases where to return him would not be fair". The case in hand does not satisfy any of the above criteria;

29. The Court, therefore, dismisses applicant's request to revoke the judgement of the First Court of the 7 December 2017 which judgement is hereby being confirmed and that appellant Marek Drga will be kept in custody to await his return to the Czech Republic and is also being informed that he will not be extradited until the expiration of seven days from today, and that if he is of the opinion that any provisions 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 Chapter 319 of the laws of Malta;

30. Orders that a copy of this judgement be sent without delay to the Minister responsible for Justice.

(sgn) Judge

True Copy

Joyce Agius

Deputy Registrar