COURT OF CRIMINAL APPEAL

JUDGE

The Hon. Dr. Antonio Mizzi LL.D., Mag. Juris (Eu Law)

Appeal no. 171/2017

The Police
(Inspector Christopher Galea Scannura)

Vs

Alberto Samuel Chang Rajii

Chilean Citizen, holder of (Chilean) Identity Card No. 8,952,310-9

This, 6th November, 2018

The Court,

Having seen the charges brought against the appellant **Alberto Samuel Chang Rajii** before the Court of Magistrates (Malta) :

That by virtue of an 'Authority to Proceed' issued by the Honourable Minister for Justice, Culture, and Local Government of the Republic of Malta, dated the 14th November 2016, the said Honourable Minister, by virtue of the powers conferred upon him by Article 13 of the Extradition Act (Chapter 276 of the Laws of Malta) rendered applicable by Article 30A of the same Act, ordered that the said Mr. Alberto Samuel Chang Rajii be proceeded by

the Honourable Court of Magistrates (Malta) as a Court of Committal against as provided in the said Act.

The Charges:

That by virtue of the proceedings in the above-mentioned names, the Republic of Chile is seeking the extradition of Mr. Chang Rajii for the purpose of prosecution for the offence of fraud as prescribed by Article 468 of the Chilean Criminal Code and punished under Article 467, final paragraph of the same Code; violation of Article 39 of the General Banking Act, violation of Article 60, of Act 18,045, and for the offences prescribed by letters (a) (b), Article 27, of Act 19, 913.

Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 7th April, 2017, by which, That by virtue of an Order of the 7th April 2017, the Honourable Court of Magistrates (Malta) as a Court of Committal (hereinafter in this application referred-to as the First Honourable Court), after seeing the 'Authority to Proceed' aforementioned, the relative documentation, the Warrant of Arrest issued on the 7th December 2016, and after hearing Inspector Galea Scannura, Mr. Chang Rajii (for identification purposes), Dr. Vincienne Vella from the Attorney General's Office, Mr. Chang Rajii and other witnesses produced by the defence, and after seeing all documents and acts exhibited and hearing oral submissions by the parties, decided that at this specific moment in time, based on the documents submitted to this Court in their current state and form, and at the current stage of the criminal proceedings in Malta and those undertaken in Chile, for the reasons mentioned in the Order, and in particular due to the lack of **admissible** evidence that satisfied the First Honourable Court that the extraditability criteria in terms of Article 16 of the Palermo Convention have been fulfilled in relation to the offences for which Chang was requested by the Chilean Authorities and as proffered in the Minister's Authority to Proceed, in terms of Article 8 of the Extradition Act this Court **concluded that the Prosecution had failed to sufficiently prove that the**

offences with which Chang Rajii is accused in Chile are extraditable offences in accordance with the Palermo Convention.

Consequently, the First Honourable Court at that stage of these proceedings, **dismissed the request for the extradition and ordered the discharge of Alberto Samuel Chang Rajii from custody**.

Finally the First Honourable Court ordered the service of the record of the proceedings together with the Decision / Order to Mr. Chang Rajii and to the Attorney General within twenty-four hours in terms of Law.

Having seen the application of Attorney General filed on the 11th April, 2017, wherein they humbly pray this Court to to vary the judgement of the Court of Magistrates (Malta) As a Court of Criminal Judicature, whilst formally appealing (in terms of Article 19 of the Extradition Act) from the Decision / Order delivered by the Honourable Court of Magistrates (Malta) as a Court of Committal on the 7th April 2017 in the above-captioned names and whilst making reference to the acts of the proceedings, humbly prays this Honourable Court to reverse the Decision / Order appealed-from, and instead commit him to custody to await his return to the requesting country in terms of Chapter 276 of the Laws of Malta.

That the grounds of appeal of the Attorney General consist of the following:

That appellant Attorney General received the Acts of the Proceedings on Friday 7th April 2017 and felt aggrieved by the said Decision / Order, and is hereby filing this appeal application in terms of Article 19 of the Extradition Act, Chapter 276 of the Laws of Malta.

That appellant's grievances are, in essence, the following:

That it transpires from the said Decision / Order that the First Honourable Court concluded that the Prosecution had failed to sufficiently prove that the offences with which Chang Rajii is accused in Chile are extraditable offences in accordance with the Palermo

Convention and consequently ordered the discharge of the said Mr. Chang Rajii on the basis of three (3) considerations, which, in essence, can be summarised as follows:

1. That the documents or, more precisely, the witnesses' declarations were not confirmed on Oath or by means of an affirmation or declaration by the said witnesses explicitly declaring that their declarations were the truth and nothing but the truth;

2. That the person who translated the documents forwarded by the Chilean authorities did not declare on Oath or by means of an affirmation or declaration that his translations were faithful translations of the original documents; and

3. That in any case most of the testimonies provided by the Chilean Authorities were given by persons who, under Maltese law, would be deemed to be co-principals or accomplices, and hence not competent and not able to testify in the proceedings even if they were willing to testify against him unless and until the proceedings against them are *res judicata*.

That with regards the first consideration, namely that the witnesses' declarations were not confirmed on Oath or by means of an affirmation or declaration by the said witnesses explicitly declaring that their declarations were the truth and nothing but the truth, the First Honourable Court based its conclusions on Article 22(1)(a) of the Extradition Act as further analysed in the judgment *Il-Pulizija vs Andiy Petrovych Pashkov* delivered by this Honourable Court (*per* Hon. Justice DeGaetano) on the 10th September 2009. In essence, the First Honourable Court, basing itself on the Pashkov judgment held that although the form of the Oath or affirmation or declaration could very well vary between one jurisdiction and another, it was imperative *ad validitatem* that such 'Oath', 'affirmation', or 'declaration' amounted to ***"a positive affirmation that what was stated is the truth, or an equivalent phrase".*** This restrictive approach was in fact extrapolated from Pashkov:

> *"Huwa minnu li l-formula tal-gurament jew tad-dikjarazzjoni jew affermazzjoni tista' tvarja minn pajjiz ghal iehor, izda jibqa' l-fatt li, kif*

intqal fil- kaz ***R. v. Governor of Pentonville Prison, ex parte Harmohan Singh*** *[1981] 1 WLR 1031 a fol. 1038: "Documents put forward as an affirmation must contain, or show on its face, a solemn declaration by the witness before a judicial authority that its contents are true."* (sottolinear ta' din il-Qorti). *Hija proprju din l-affermazzjoni pozittiva da parti ta' min ikun qed jirrelata l-fatti, u cioe` li dak li qed ighid huwa l-verita`, li tiddistingwi semplici "stqarrija" minn "prova" ghall-finijiet tal-Artikolu 22 tal-Att. U din l-affermazzjoni pozittiva trid tirrizulta, b'xi mod, mid-dokument innifsu. Id-dikjarazzjonijiet f'dawn id-diversi dokumenti li "The records have been read by me, they were written from my words correctly", jew "The record was read by me, it was written down right", jew "The testimony by my words is written down correctly", u varjazzjonijiet ohra ta' dawn l-espressjonijiet li wiehed isib fid-dokumenti in kwistjoni, ma jammontawx ghal affermazzjoni pozittiva li dak li nghad huwa veru, izda biss li dak li nghad mid-diversi xhieda tnizzel, mill-investigatur li kien qed jinterrogah, korrettement. Fi kliem iehor, dawn id-dikjarazzjonijiet juru biss li dak li hemm imnizzel veru nghad, izda mhux li dak li nghad huwa l-verita`. Ghalhekk ma jistax jinghad li gie sodisfatt ir-rekwizit tal-Art. 22(1)(a) tal-Att."*

That with all due respect to the First Honourable Court and to this Honourable Court's reasoning in the Pashkov judgment, appellant Attorney General is of the view that in the realm of extradition proceedings one must not interpret legal concepts restrictively and neither should a Court of Committal delve more than necessary into technical legal concepts with a restrictive perspective. On the contrary, when it comes to such proceedings, a Court of Committal should adopt a broad view when it comes to legal technicalities. This is mainly due to the fact that extradition proceedings do not deal with the merits of criminal proceedings against the requested person but are merely a tool of mutual legal assistance between states, aimed at co-operating with the aim of curtailing crime and bringing fugitive criminals to justice. As a matter of fact, a Court of Committal is precluded from delving into the merits of the case, but its task according to law is that of determing, **on a *prima facie* basis**, whether the requested person has a case to answer and whether the offences for which he is wanted are indeed extradictable offences in terms of law.

Indeed, Article 22 of the Extradition Act (Chapter 276 of the Laws of Malta) does not state that the Oath (or affirmation or declaration) are required *ad valididitem* for admissibility, but merely states that a document, duly authenticated, which purports to set out evidence given on oath in the requesting country shall be admissible as evidence. In other words, the law is simply indicating what kind of evidence / proof is admissible. It is *not* providing an exhaustive list of what constitutes admissible evidence, in default of which evidence / proof would be inadmissible. All the witnesses' statements / declarations forwarded by the Chilean authorities were not only duly signed by the witnesses themselves, but were counter-signed by the Police Officers taking such statements / declarations and by the witnesses' lawyers. This, in itself, is *prima facie* evidence that what is written in these statements / declarations is actually what was said by the interviewees (as attested by their own lawyer/s and the interviewing Police Officer/s who counter-signed), and, moreover, fully subscribed-to by the interviewee through his/her very own signature. This satisfies the requisites of Article 22 of the Extradition Act, which, in subarticle (4) specifically atates that "oath" includes affirmation or declaration and that nothing in that section shall be construed as prejudicing the admission in evidence of any document which is admissible in evidence apart from that article.

Having established that these statements / declarations are *prima facie* evidence of their contents (and are hence admissible as such) it remains ti determine whether such statements / declarations pass the test of authentication laid down in Article 22. It clearly transpires that these documents were duly authenticated by the competent Chilean authorities in terms of law – a fact which is uncontested.

Hence, in view of the above considerations, appellant Attorney General is of the view that these statements / declarations should not have been disposed of as 'inadmissible' by the First Honourable Court.

That with regards the second consideration by the First Honourable Court, namely that the person who translated the documents forwarded by the Chilean authorities did not declare on Oath or by means of an affirmation or declaration that his translations were faithful translations of the original documents, once again appellant Attorney General begs to

differ. In the light of what has been submitted above, namely that in the realm of extradition proceedings one must not interpret legal concepts restrictively as these proceedings do not deal with the merits of criminal proceedings against the requested person but are merely a tool of mutual legal assistance and co-operation between states, once the Chilean authorities have duly authenticated the said translations after said translations were duly signed by the translator (a fact which, as stated above, is undisputed), a Court of Committal in the requested country should not put into doubt the validity of such translations. If the Chilean authorities authenticated (i.e. ratified and signalled their trust in the translations forwarded) this should not be put into doubt by a court of committal. It has to be constantly stressed that extradition proceedings are based on *prima facie* evidence, and if, in this case, the competent Chilean authorities have duly authenticated the translations, then such translations are *prima facie* faithful translations of the originals. As a matter of fact, nowhere does the Extradition Act (Chapter 276 of the Laws of Malta) pose a requirement of confirming translations on Oath. The requirement is that of *authenticity* – once again, substance prevailing over form.

That with regards the third consideration by the First Honourable Court, namely that most of the testimonies provided by the Chilean Authorities were given by persons who, under Maltese law, would be deemed to be co-principals or accomplices, and hence not competent and not able to testify in the proceedings even if they were willing to testify against him unless and until the proceedings against them are *res judicata*, appellant Attorney General stresses that this consideration would be very pertinent to the court **deciding the merits of the case** - i.e. the court of criminal jurisdiction in Chile - and *not* to a court of committal (i.e. the First Honourable Court), whose task is not to consider the evidence submitted *vis-a-vis* its merit, but is to determine, on a *prima facie* basis and on the submitted evidence (in conformity with Article 22 of the Extradition Act) whether the requested person has a case to answer and whether the offence/s for which he/she is requested is/are extradictable.

Whilst being in a better position to amplify the arguments aforementioned in his oral submissions before this Honourable Court, appellant Attorney General contends that by their very nature extradition proceedings are *sui generis* proceedings and that the Extradition Act is a *lex specialis*. This for the reason that these proceedings are *not* criminal proceedings against an individual (where technical legalisms are to be considered

meticulosly and restrictively) but are meant to be an efficient means of co-operation and legal assistance between sovereign states (with varying and distinct legal and procedural regimes) with the aim of combatting crime and bringing fugitive criminals to justice. In such a scenario, whilst assuring adherance to the provisions of the Extradition Act (Chapter 276 of the Laws of Malta) and to the applicable international Conventions on the matter, one should not restrict the application of the same in such a manner to render these instruments ineffective.

Having seen the records of the case.

Having seen the updated conviction sheets of the defendants.

Now therefore duly considers.

It is of essence that this Court reiterates certain principles that govern the institute of extradition. Unlike the procedure which is applicable to a European Arrest Warrant in this particular case we have a request for extradition by a country which is not a member state of the European Union. This means that an extradition of this type would be regulated by the traditional laws where the powers of this Court are limited. Both Malta and Chile are signatories to the United Nations Convention against Transnational Organized Crime, in short known as the Palermo Convention. This is the legal basis where we have the interaction of these two countries. There is no other legal basis. The fact that the requested person is a citizen of Chile makes no difference if the extradition were requested by Chile for a Maltese national. This will be analysed hereunder.

The first point at issue is what is the relation between the Extradition Act, Chapter 276 of the Laws of Malta and the Criminal Code, Chapter 9 of the laws of Malta. Without any doubt the Extradition Act is a 'lex specialis'. However, it must be seen in conjunction with the Criminal Code which lays down several issues which are not expounded by the Extradition Act. This Court does not need to delve into a number of issues with the exception of section 22(3) which lays down:

"It shall be lawful for the Commissioner of Police or for the Attorney General as the case may be, as well as for the person the return of whom is requested, to produce evidence before the Court of Criminal Appeal even though such evidence shall not have been produced before the Court of Committal."

This means that even at appeal stage the prosecuting entity or the person whose return is requested can present new evidence. This goes completely counter to our general principles of law that at the appeal stage new evidence is not allowed. This means that the person or entity at the receiving end would be at a considerable disadvantage as there would be no option to have such evidence reviewed by a second Court.

In the light of the foregoing a second problem raises its head. What form has the appeal to take when it is filed by any of the parties. The Extradition Act spells out in section 18(1) that an appeal by a person committed to custody shall be made by an application to the Court of Criminal Appeal containing a demand for the reversal of the court's order. Section 19(1) of this same Act deals with an appeal by the Attorney General. He has to appeal to the Court of Criminal Appeal by an application accompanied by the judgement of the court of committal. The Extradition Act does not tell us what the application has to include or how it is to be presented to the court. It is clear that the Attorney General has to go back to basic principles. This means that he has to have a look at the Criminal Code to file such an appeal. Ignoring the dictates of the Criminal Code would mean that an endless discussion would ensue to establish the form of such an appeal. The concept of 'lex specialis' does not mean that any of the parties can do as they please. The institute of extradition is special in that it facilitates the transfer of a requested person to a requesting state but it does not mean that it creates havoc when it comes to the application of our laws of procedure.

In this scenario section 419 of the Criminal Code deals with the contents of an application for appeal. It states:

"(1) ... the application shall, under pain of nullity, contain -

(a) a brief statement of the facts;

(b) the grounds of the appeal;

(c) a demand that the judgement of the inferior court be reversed or varied."

This means that a party appealing an extradition order, be it the person requested or the Attorney General must abide by these rules. There is no question of a 'lex specialis' on this score. This is borne out by our case-law. In the case: "Il-pulizija v. Carmelo Abela" decided by this Court on the 20th January, 1997 it was held that:

"... din il-Qorti ma tistax tiehu konjizzjoni ta' ragunijiet ta' l-appell, ossia ta' aggravji, li ma jkunx gew imsemmija fir-rikors ghax altrimenti jigi stultifikat wiehed mill-paragrafi tal-artikolu 419(1) imsemmi..."

A more recent judgement is the one delivered by the Court of Criminal Appeal in the case: "Ir-Repubblika ta' Malta v. Ronald sive Ronnie Azzopardi" decided on the 26th April, 2018. This Court reiterated the principle spelt out above in no unclear terms, namely:

"10. Hija gurisprudenza kostanti li gjaladarba tigi specifikata r-rraguni, jew jigu specifikati r-ragunijiet ta' l-appell, l-appellant ikun marbut b'dik ir-raguni jew b'dawk ir-ragunijiet, fis-sens li tkun biss dik ir-raguni jew dawk ir-ragunijiet li jistghu jigu kkunsidrati mill-Qorti, salv, naturalmen, aggravju jew aggravji li jistghu jitqiesu li huma komprizi u involuti fl-aggravju jew fl-aggravji kif specifikati. (cf. Il-Pulizija v. Darren Attard decided on the 3rd September, 2001)."

In its judgement the Court made referenza to another judgement in the names: "Ir-Republika ta' Malta v. Mark Pace" decided on the 7th November, 2002 where it was outlined that:

"Hija gurisprudenza ormai pacifika li l-Qorti ta' l-Appell ma tistax tiehu konjizzjoni ta' ragunijiet ta' l-appell, ossia aggravji, li ma jkunux gew imsemmija fir-rikors ta' appell. Dan johrog car minn dak li jipprovdi s-subartikolu (1) ta' l-artikolu 505 tal-Kodici Kriminali li tali rikors 'ghandu jkun fih il-fatti tal-kawza fil-qosor imma cari, ir-raguni ta' l-appell u it-talba ta' l-appellant'".

Consequently, it is quite clear that this Court is bound by the reasons of appeal adduced by the appellant. This is a position that this Court, as presided, subscribes to without any hesitation. From the above it is very clear that even though as stated above this is a 'lex

specialis', however, it is subject to the ordinary laws of our criminal procedure. This must be interpreted in a form which is consonant with common practice and no deviation to the same is to be entertained. The fact that the appellant desires that the criminal procedure be relaxed in its application to extradition cases finds no comfort in the law and so this court cannot enterain such arguments.

This Court has made this analysis as the Attorney General adduced three reasons why it does not agree with the conclusion of the court of committal. It is now obvious that the Attorney General is limited to these three reasons and cannot adduce any other reason for consideration by this Court. An added issue to this problem is that at appeal stage the Attorney General presented other documents for consideration by this Court.

It must be pointed out that the Attorney General in his appeal application simply states that he does not agree with the decision of the court of committal for those three reasons, which are found further up. At no point in the Attorney General's application do we find a statement to the effect that the court of committal made a wrong interpretation of the law or a wrong appreciation of the facts warranting a re-visitation of all the evidence. Therefore, the role of this Court will be limited to an analysis of these so called three grievances and the effect of these new documents filed at the appeal stage of the proceedings.

In his first grievance the Attorney General is of the opinion that the court of committal should not have taken a restrictive approach which was suggested by the case in the names of "Il-Pulizija v. Andiy Petrovych Pashkov " decided by this court on the 10th September, 2009 (per Hon. Justice DeGaetano). It is true that as a consequence of this judgement our Parliament amended section 22 by means of Act VII of the year 2010 to try to ease the difficulties which were posed by this judgement. The court of committal is of the opinion that notwithstanding this amendment of the law that particular judgement is still valid. This court is of the opinion and as was stated above that it is not acceptable that in extradition proceedings the level of interpretation of our local legal concepts be rendered irrelevant. This court does not accept the view propounded by the Attorney that a court of committal should adopt a broad view when it comes to legal technicalities. Practically this would mean that a Maltese Court is rendered irrelevant as it must accept all that the Attorney

General declares that is admissible and acceptable and stop at that. Quite frankly, this would usher into an era where one does not need the Courts anymore and what the Executive via the Attorney General decides would be enough to grant or not an extradition. Definitely, this is a provocation and such a position would not be tenable according to our legal concepts which have been with us for the last one hundred and fifty odd years. The court of committal holds the view that the presentation of all the documents must be in accordance with our laws of procedure and they have to be evaluated by the Maltese Courts. This is a view which is endorsed by this court. Documents which are to presented to the Maltese courts have to withstand the test of these courts. Our courts cannot concede this issue otherwise it would mean that we are abdicating our legal concepts to other legal concepts which are alien to our system. Let us not forget that here we are not dealing with an extradition to a European Union member state. We are dealing with a country that is not in the European Union and the only link between Malta and Chile is the Palermo Convention. It would have been useful for the Chilean Ministry of Foreign Affairs to enquire with its Maltese counterpart what would be required of them in terms of the preparation and transmission of documentation for their request for the extradition of the requested person to succeed. The documents presented to the court of committal were not according to our legal principles as expounded in the first judgement to which reference is made. As indicated above if the Attorney General's position is to be upheld this would mean that our courts would have to accept all foreign documents as correct with a very limited power of scrutiny. This court does not subscribe to this view. Nor has the Attorney General given an plausible reason why the court of committal was wrong in its decision. The Attorney General does not agree. Fair enough, but it does not mean that it can expect this court to overturn the decision of the court of committal without any satisfactory reason or reasons.

The Attorney General, as authorized by the Extradition Act, presented fresh documents to this court. Reference is being made to Document CMG. This particular document contains the solemn declarations of several persons plus other documents. These documents do not help the Attorney General's position for two main reasons. First of all, these would have been admissible had the Attorney General requested this court to evaluate 'ex novo' the evidence tendered before the court of committal. This was not done nor was there a grievance in this sense. Secondly, there is no evidence that an oath was administered bu

an authority with power to administer such an oath. Al the other documents presented to this court relate to the institution of several cases instituted in Chile which have no bearing on this case, which is a case dealing with extradition according to the rules of the Palermo Convention.
In the light of all this, the court cannot entertain the first grievance of the Attorney General.

The second grievance of the Attorney General states that another reason why the court of committal did not grant the extradition requested was that the person who translated the documents forwarded by the Chilean authorities did not declare on oath or by means of an affirmation or declaration that his translations were faithful translations of the original documents. The Attorney General begged to differ adducing the reasons above which have already been discussed. In the discussion of this issue the Attorney General is of the opinion that legal concepts must not be interpreted restrictively. Moreover, he is of the opinion that the request for an extradition is a tool of mutual legal assistance and co-operation between states with the consequence that once the Chilean authorities have duly authenticated the said translations signed by the translator than the court of committal should not put in doubt the validity of such translations. Again, the court of committal gave ample reasons which are legally sound in this matter expounding why it did not agree with such a thesis. This court agrees entirely with the first court. Not agreeing would mean an abdication of our legal systems. Extradition is a very formal institute and consequently strict rules have to apply. Again, a reference is made to the Pashkov case, mentioned above. In the body of this judgement the following quotation from the English case: R. v. Governor of Pentonville Prison, ex parte Harmohan Singh [1981] 1WLR 1031 a fol. 1038 is found - "...Documents put forward as an affirmation must contain, or show on its face, a solemn declaration by the witness before a judicial authority that its contents are true...". Hence, the translator should have declared on oath or affirmed in front of a competent judicial authority which can administer oaths that he has executed the translation to the best of his ability and that the document is a true and faithful translation of the original. One must not forget that the English translation is the working document of this court. The Court must be satisfied, according to Maltese law, that the document being examined has all the correct requisites as per our legal system. The same element is lacking with all the documents which have been presented to this court. This is another reason why this court cannot accept any of the translations forwarded by the Chilean authorities.

In the light of all this, the court cannot entertain the second grievance of the Attorney General.

The third grievance of the Attorney General deals with the problem of co-principals or accomplices as expounded by the court of committal. The Attorney General does not state that the legal position expounded by the court of committal is wrong or not legally sound. He is of the opinion that the court deciding the merits of the case would have to take notice of these issues. However, if the Chilean authorities transmitted documentation with referencce to the above persons, then the court of committal was right in analysing these issues according to Maltese law since it is the 'lex fori' which applies. However, the court of committal did not even have the need to rise these issues for discussion. This arises from the fact that the court of committal had at its disposal documents, where the translation of the same is not according to Maltese law. Consequently, this court need not delve further with this issue.

In the light of all this, the court cannot entertain the third grievance of the Attorney General.

It is pertinent to observe that the Attorney General in his note of submissions of the 28th September, 2018 introduced the element of reciprocity and the general principles of international law. He quoted a judgement delivered by a Romanian court which authorized the extradition of a Chilean citizen on the basis of general principles of international law. He also quoted foreign judgements which granted an extradition on the basis of reciprocity. However, our courts do not deal with foreign governments. This is left to our government. Our courts get their strength from a strict observation of our principles of law enshrined in our laws. In our legal system there is no place for reciprocity. This is left to the Executive.

Consequently, for the foregoing reasons this Court does not uphold the appeal filed by the Attorney General and confirms the judgement of the court of committal dismissing the request for the extradition and orders the discharge of Alberto Samuel Chang Rajii.