THE COURT OF CRIMINAL APPEAL

The Hon. Mr. Justice Aaron M. Bugeja M.A. (Law), LL.D. (melit)

Appeal number – 180/2019

The Police

(Inspector Mark Galea)

vs

MORE Christopher Guest

Sitting of the 23rd July 2019

The Court,

Having seen the appeal application filed by "the requested person" filed in the Registry on the 27th June 2019 wherein he requested this Court to revoke the judgment of the Court of Magistrates (Malta) as a court of committal delivered on the 21st June 2019 ordering the appellant to be held in custody while awaiting his return to the United Kingdom, subject to the rule of speciality and thus solely in connection with the offences mentioned in the European Arrest Warrant (EAW) issued against the requested person;

Having seen the said judgment;

Having seen the grounds of appeal, as well as the documents submitted by the parties as well as the records of the proceedings;

Having heard the submissions made by Counsel to the appellant and by the Attorney General (henceforth referred to as the ***AG***);

Considered the following : -

That the facts of this case relate to a Schengen Information System Alert issued for the purposes of arrest and surrender or extradition in terms of article 26 SIS II Decision bearing number GBP180000120706000001 dated 13th May 2018 as well as a European Arrest Warrant (EAW) issued by Roy Anderson, District Judge (Magistrates' Courts) (Leeds Magistrates Courts, PO Box 97, Westgate, LEEDS LS1 3JP on the 21st May 2004 as certified by the Attorney General's declaration in terms of article 7 of Legal Notice 320 of 2004.

According to these documents, MORE Christopher Guest, a British national, born on the 30th December 1977 whose last known address was Burford Farm, 82, Burford Lane, Lymm, Cheshire was wanted for the purposes of prosecution by the Judicial Authorities of England and Wales for the alleged commission of criminal offences, as detailed in a warrant of arrest dated 27th August 2003 issued at Macclesfield Magistrates Court for the offences of :

(a) murder;

(b) conspiracy to murder;
(c) manslaughter;
(d) causing grievous bodily harm with intent (two charges)
(e) conspiring to cause grievous bodily harm with intent (two charges);
(f) causing grievous bodily harm (two charges); and
(g) false imprisonment (five charges)

as detailed in narrative part of the EAW which forms part of the records of these proceedings.

During the course of the proceedings before the Court of Magistrates (Malta), the person brought before that Court declared that his name and surname were ANDREW LAMB.

Both during the initial hearing as well as during the extradition hearing, the issue relating to the identity of the requested person was raised. The Prosecution presented the Court of Magistrates with witness statements as well as documents, including ***Sirpit's Fingerprint Transmission Form*** that the Prosecuting Officer Inspector Mark Galea declared were attached to the SIS Alert. The Court of Magistrates proceeded with the appointed fingerprint expert Joseph Mallia tasking him with the taking of fingerprint impressions from the requested person and with the comparative analysis of these prints with the fingerprints found on the ***Sirpit's Fingerprint Transmission Form***. The Court received the report of expert Joseph Mallia who confirmed that the fingerprints of the person who appeared in the Court room were compared to the fingerprints attached to the EAW and were found to produce a positive match. Joseph Mallia concluded

that after conducting the requested comparision examinations between the prints which were printed on the Fingerprints Transmissions Printout form marked as document MG11 and the fingerprints of "Andrew Lamb" which were printed on the fingerprint form marked as document AL1 were carried out, it resulted that all the prints were found to be positively identical, hence belonging to the same person. In view of this the Court of Magistrates (Malta) concluded that :

> any lingering doubts as to the true identity of the person appearing before the Court of Committal, are hereby entirely dispelled now that the issue as to the identity of the person appearing before this Court has been definitely determined beyond any doubt whatsoever, and
>
> **Decides** that the person appearing in these proceedings is none other than **Christopher Guest MORE**, **a United Kingdom national, born on the 30th December 1977, the person requested in the European Arrest Warrant issued by the Macclesfield Magistrates' Court dated the 21st May 2004, and the Schengen Information System Alert number GBP1890000120706000001 dated the 13th May 2018**.

Furthermore, as for the Extraditable Offences status, the Court of Magistrates (Malta) decided that all of the offences mentioned in the EAW were to be deemed extraditable offences in terms of Legal Notice 320 of 2004.

The Court of Magistrates (Malta) noted also that there were no bars to extradition that were raised and that therefore the return of Christopher Guest More to the United Kingdom was not prohibited by any of the reasons mentioned in regulation 13(1) of the said Legal Notice. Consequently the Court of Magistrates (Malta) as a court of committal

proceeded to commit the requested person to custody while awaiting his return to the United Kingdom.

The appellant felt aggrieved by this decision and brought forward grounds of appeal (hereinafter referred to as the ***EAW appeal proceedings***), that in brief are the following : -

1. The appellant disagrees with the Court of Magistrates that the identity of the person brought before that Court was "*definitely determined beyond any doubt whatsoever*" : -
    (a) Because the documents filed by the Prosecution, including the information regarding Christopher Guest More and Andrew Christopher Lamb as well as other witness statements of Gary Stephen Rathbone, Imogen Smart and Robert David Balfour were not admissible statements and should not have been admitted as evidence by the Court of First Instance;
    (b) Because appellant did not have the opportunity to challenge these witness statements by means of cross examination or in any other manner allowed by law since these witnesses were never brought to Malta to testify on oath and confirm the contents of such statements. These statements were not released on oath in the United Kingdom.
    (c) Inspector Mark Galea submitted document MG11 to the Court, which contained a set of fingerprints allegedly pertaining to Christopher Guest More, which document

was attached to the Alert. From the SIRENE communication to the Malta Police it was stated that these fingerprints were legitimately obtained from Christopher Guest More on the 11th April 1998. These documents were used by the Court appointed expert Joseph Mallia such that he compared the fingerprints of the person appearing in Court to those indicated on the form submitted by Inspector Galea. However the appellant contends that this document contains ambiguities since :

(i) on the form itself there is no indication as to the person from who these fingerprints were lifted;

(ii) there was no basis for Inspector Mark Galea's statement on oath that the prints found on this form were legitimately taken;

(iii) it was not known how these prints were taken, who authorised their taking and who collected them.

No person was produced by the Prosecution to confirm this process and hence the appellant was not given the opportunity to challenge this document.

Consequently appellant claims that the statements and documents should not have been considered as admissible evidence and consequently the Court of Magistrates could not base its decisions in relation to the identity of the requested person on such documents.

2. The appellant claims that the "nullities of the warrant" on account of the fact that a SIS Alert was issued in terms of article 26 of the Order and therefore the provisions of Article 6A of the Order were applicable ad validitatem for the return decision to be made.

During the sitting of the 9th instant, the Attorney General raised a preliminary plea, claiming the nullity of the appeal application based on the fact that the considerations and grievances raised in the same appeal application do not constitute legal grounds under Legal Notice 320 of 2004 (the Order) and Chapter 276 of the Laws of Malta (the Extradition Act). The AG claimed that under the Order, appeals were regulated by regulation 32 which made explicit reference to sections 18 and 19 of the Extradition Act. However nowhere in the appeal application was reference made to any one of the grounds mentioned by section 20 of the Extradition Act. The AG claimed that this Court had to ensure that the provisions of section 20 of the Extradition Act were to be upheld since they were applicable to this procedure. According to the AG on an appeal made to this Court or on an application for redress to the Constitutional Court under article 46 of the Constitution, either of the said courts might, without prejudice to any other jurisdiction, order the person committed to be discharged from custody if it appears to any 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 circumstances, be unjust or oppressive to return him.

The AG contended that even if Defence managed to successfully argue and squeeze in any of its grievances under any one of the grounds mentioned in section 20 of the Extradition Act, it was nonetheless clear that none of these grounds could be upheld by this Court in this case. Even though section 18 of the Extradition Act was widely drafted, this appeal was based on considerations that went beyond what the law provided in section 20 of the Extradition Act and therefore had to be discarded.

Defence Counsel replied to this preliminary plea during the sitting of the 11th July 2019 claiming that this plea was legally unfounded. Defence claimed that not all provisions mentioned in the Extradition Act were applicable to these proceedings. The main provision of the Order that regulated the relationship between the Order and the Extradition Act was regulation 3 of the Order. This regulation stated that only the provisions of the Order, save where otherwise expressly indicated, applied to requests received or made by Malta on or after the relevant date for the return of a fugitive criminal to or from a scheduled country, or to persons returned to Malta from a scheduled country in pursuance of a request made under the Order. Moreover, the provisions of the Extradition Act had effect in relation to the return under this Order of persons to, or in relation to persons returned under the Order from, any scheduled country

subject to such conditions, exceptions, adaptations or modifications as are specified in the Order. Defence claimed that Regulation 32 made reference to sections 18 and 19 of the Extradition Act while no reference was made to section 20 of the Extradition Act. Since no such reference was made, this section could not be deemed to be automatically applicable. Futhermore case law established that where appeals were upheld under the Order, they were not based on section 20 of the Extradition Act. Defence Counsel requested the Court to quash this preliminary plea.

The AG retorted that section 20 of the Extradition Act was applicable to these EAW appeal proceedings as shown in the case ***The Police vs Marek Drga*** decided by this Court, as differently presided, on the 12th January 2018.

Considers the following : -

Regulation 3 of the Order clearly stated that only the provisions of the Order, save where otherwise expressly indicated, applied to requests received or made by Malta on or after the relevant date for the return of a fugitive criminal to or from a scheduled country, or to persons returned to Malta from a scheduled country in pursuance of a request made under the Order. Moreover, the provisions of the Extradition Act had effect in relation to the return under this Order of persons to, or in relation to persons returned under the Order from, any scheduled country subject to such conditions, exceptions, adaptations or modifications as are specified

in the Order. The Court agrees with Defence that this Order, therefore claims supremacy over EAW proceedings. However, the Order does not operate in a vacuum. It operates in symbiosis with the Extradition Act, up the extent mentioned in the said regulation 3 of the Order.

The Court agrees with the Prosecution that in the ***Marek Drga*** case this Court, as differently presided had taken cognizance of the submissions made by the Defence claiming the operation of section 20 of the Extradition Act to EAW appeal proceedings involving ***Drga***. Apart from the fact that the substantive arguments were dismissed by that Court, fact remains that even if applicable to these EAW appeal proceedings, they cannot have the effect prospected by the Prosecution.

Even if section 20 of the Extradition Act could be deemed applicable, its application cannot be deemed to limit the rights of appeal of an applicant simply to the three grounds mentioned by this section. According to that section, this Court has to power, without prejudice to any other jurisdiction, to order the discharge from custody of the committed person if any one of the grounds mentioned in section 20 result to it. That does not mean that these three grounds constituted an exhaustive list of grievances to the person committed to custody. It simply means that if it appears, from the evidence that the offences of which he was accused or convicted were of a trivial nature, **or** due to the passage of time since he was alleged to have committed the offence or have become unlawfully at large, **or** because the accusation made against him was not made in good faith in the interest of justice, it would, having regard to all the circumstances, in any one of the three grounds mentioned deemed to be

unjust or oppressive to return him, then this Court had the power to order his discharge irrespective of any other ground warranting his extradition. At most this provision added further safeguards to the rights of the person committed to custody rather than curtailing or circumscribing his rights of appeal to this Court or recourse to the Constitutional Court.

This Court does not agree with the interpretation granted to section 20 of the Extradition Act as is being proposed by the AG, and it therefore rejects this preliminary plea.

Considers as follows: -

That on the sitting of the 11th instant, the Prosecution requested this Court to receive the testimony of PC864 Duncan Cassar, Lieutenant Helenio Galea and WPC365 Edith Borg and this in terms of regulation 73B of the Order that refers to the applicability of sections 22(3) and 27 of the Extradition Act. Defence Counsel remitted itself to the Court's decision on this matter. After hearing the submissions of the parties, the Court acceded to the request of the Prosecution limitedly to the testimony of PC864 Duncan Cassar and of Lieutenant Helenio Galea.

PC864 Duncan Cassar confirmed his role with the SIRENE Bureau Malta while confirming and exhibiting the documents marked as Doc DCZ1. He confirmed that Doc MG11 was received together with the EAW. He also confirmed the manner in which SIRENE operate, including the fact that the SIRENE database is restricted to Police access and that there is no

access to third parties. Neither can third parties operate this database or have access to the alerts.

Lieutenant Helenio Galea confirmed and presented documents HGZ1 and HGZ2, confirming that the person sitting in the dock was visited by the persons mentioned in Doc HGZ1 and HGZ2.

Considers the following: -

The Court is going to first deal with the plea of nullity of the EAW raised in its second grievance. The appellant claims that the "nullities of the warrant" on account of the fact that a SIS Alert was issued in terms of regulation 26 of the Order and therefore the provisions of Article 6A of the Order were applicable *ad validitatem* for the return decision to be made.

Prosecution contended that this issue was not raised before the Court of Magistrates (Malta) as a Court of Committal. The Court is going to consider this grievance nonetheless.

Defence Counsel contends that in this case, once a SIS II alert was issued by the scheduled country then the actual and original EAW had to be filed in records of these proceedings and not an email attachment as was done in this case. European Union Law on the electronic transmission of documents was very limited and was not applicable to criminal proceedings – not even in relation to EAW. Neither the EAW Framework

Decision nor the SIS II Council Decision enacted provisions relating to this.

Furthermore, not even the provisions relating to authentication of documents mentioned in regulation 73A of the Order could be successfully invoked in this case for the EAW to be saved. Given that the Part III warrant was filed by Inspector Mark Galea, who is not an officer of the scheduled country, all this witness could do was to confirm that he had received a copy of a Part III warrant from the scheduled country, but he could not claim that this document was duly authenticated on the lines set out in regulation 73A of the Order.

This interpretation follows also more recent case law on this matter and in particular the judgment delivered by the Court of Magistrates (Malta) as a Court of Committal in the case ***Il-Pulizija vs. Paul Attard*** decided by Magistrate Donatella Frendo Dimech on the 6th June 2019 where the Court delved into the need for the original document of the EAW.

The AG retorted that in this case the warrant was issued was a Part II warrant (it was mentioned as a Part III warrant since it was issued in 2004) and it followed the issue of a national arrest warrant as could be seen from Doc. MG4. The AG made reference to Regulation 2018/1862 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 of the European Parliament and

of the Council and Commission Decision 2010/261/EU that clearly explains how an article 26 alert operated and the rules regulating it.

Considers the following: -

This Court has analysed the documents submitted to it in these proceedings, as well as the records of this case. It has also taken notice of the case ***Il-Pulizija vs. Paul Attard*** referred to by Defence as well as the Regulation 2018/1862 referred to by the Prosecution. The Court considers this case to be different from the ***Attard*** case in that the problems encountered in the Attard case are completely missing. In this case the Part III warrant was issued on the 21st May 2004 signed by District Judge Roy Anderson of Leeds Magistrates' Court. This EAW specifically mentioned that it was based on a warrant of arrest dated 27th August 2003 issued at Macclesfield Magistrates Court for offences of

(a) murder;
(b) conspiracy to murder;
(c) manslaughter;
(d) causing grievous bodily harm with intent (two charges)
(e) conspiring to cause grievous bodily harm with intent (two charges);
(f) causing grievous bodily harm (two charges); and
(g) false imprisonment (five charges)

The requested person was Christopher Guest More, a British national, born on the 30th December 1977 and whose last known address was Burford Farm, 82, Burford Lane, Lymm, Cheshire. Together with the EAW, the said District Judge certified that a photograph and the

fingerprints of the requested person were being attached. The said District Judge used the approved form for the EAW and filled it in with all the relevant details, giving not only a detailed description of the facts of the case, but also a thorough exposition of the applicable law regulating the offences for which the requested person was being sought. This can be seen in doc MG5.

The SIS II alert filed as doc MG3 shows that it was inserted in SIS II on the 13th May 2018 at 11:37. It was inserted by the United Kingdom with a Schengen ID GBP180000120706000001 and related to offences against the person. According to the SIS II alert the confirmed identity type was that of More Christopher Guest, United Kingdom citizen, whose date of birth was 30th December 1977 and who was wanted for offences against the person. Various aliases were also included in the alert.

The details provided in the Form A exhibited as doc MG4, tally with the details contained in the SIS II alert and the EAW relating to the requested person. From the information abovementioned it transpires that the national arrest warrant was issued first, followed by the EAW and then the SIS II alert. This documentation was forwarded to the Office of the Attorney General who, as the Maltese Competent Authority certified, in virtue of regulations 6A and 7 of the Order that Macclesfield Magistrates Court in the United Kingdom had the function of requesting the issue of alerts in the United Kingdom and under whose Authority the alert was issued for Christopher Guest More, British Nationality, born on the 30th December 1977. This ties to the information mentioned on the Form A at fol 15.

In this case therefore the national arrest warrant was followed by the issue of the European Arrest Warrant and a SIS II alert was issued after that the national arrest warrant was issued by the competent judicial authority of the scheduled country and after that the EAW was issued. Furthermore the details required in terms of regulation 5 of the Order were satisfied, including regulation 5(9) of the Order that states that any arrest warrant to which that Part applied might be transmitted by any secure means capable of producing written records and under conditions permitting the ascertainment of its authenticity. This too was satisfied inasmuch as the EAW, together with the attached documents were transmitted together with the SIS II alert, which is a secure means capable of producing written records, and under conditions permitting the ascertainment of their authenticity.

The Court therefore deems this preliminary plea as being unfounded and consequently rejects it.

Considers as follows : -

On the merits of the appeal, the appellant claimed to have been aggrieved by the decision of the Court of Magistrates that the identity of the person brought before that Court was "*definitely determined beyond any doubt whatsoever*". The appellant claims that : -

a. the documents filed by the Prosecution, including the information regarding Christopher Guest More and Andrew Christopher Lamb as well as other witness statements of Gary Stephen Rathbone,

Imogen Smart and Robert David Balfour were not admissible statements and should not have been admitted as evidence by the Court of First Instance;

b. the appellant did not have the opportunity to challenge these witness statements by means of cross examination or in any other manner allowed by law since these witnesses were never brought to Malta to testify on oath and confirm the contents of such statements. These statements were not released on oath in the United Kingdom.

c. Inspector Mark Galea submitted document MG11 to the Court, which contained a set of fingerprints allegedly pertaining to Christopher Guest More, which document was attached to the Alert. From the SIRENE communication to the Malta Police it was stated that these fingerprints were legitimately obtained from Christopher Guest More on the 11th April 1998. These documents were used by the Court appointed expert Joseph Mallia such that he compared the fingerprints of the person appearing in Court to those indicated on the form submitted by Inspector Galea. However the appellant contends that this document contains ambiguities since :

(i) on the form itself there is no indication as to the person from who these fingerprints were lifted;

(ii) there was no basis for Inspector Mark Galea's statement on oath that the prints found on this form were legitimately taken;

(iii) it was not known how these prints were taken, who authorised their taking and who collected them.

(iv) No person was produced by the Prosecution to confirm this process and hence the appellant was not given the opportunity to challenge this document.

Consequently appellant contends that the statements and documents should not have been considered as admissible evidence and consequently the Court of Magistrates could not base its decisions in relation to the identity of the requested person on such documents.

During the course of the oral submissions, Defence Counsel claimed that:-

1. the issue raised in the appeal was not centred round whether the Malta Police received documents from their British counterparts but rather whether the Court of Magistrates (Malta) as a Court of Committal could legally and reasonably confirm the identity of the requested person based on the documents transmitted by the UK Authorities. Defence Counsel contended that despite the fact that these proceedings were EAW execution proceedings, the general principles of Extradition Law still applied. The Court of Magistrates (Malta) as a Court of Committal was bound by its own law of evidence given that it was the Lex Fori. This Law required that witness statements be confirmed on oath. This was still required in EAW execution proceedings. All the witness statements exhibited in the records of the proceedings before the Court of Magistrates (Malta) as a Court of Committal were not confirmed on oath. Furthermore, as far as the report of Elisabeth Briggs, this report was an expert report. According to Maltese Law this could not be

admitted as evidence in as much as this expert was not a Court appointed expert but an *ex parte* expert, whose expert evidence was inadmissible before a Maltese Court of criminal jurisdiction.

2. Given that Maltese Law was the Lex Fori governing extradition proceedings, according to this Law the right of cross-examination of witnesses was inalienable. Defence Counsel lamented that the situation created in these proceedings was such that Defence had to accept the documents submitted by the Prosecution and take them for granted. Defence Counsel labelled this as an outright human rights breach. The appellant was not given the possibility to be able to cross-examine the witnesses or the persons drawing up the documents. The documents on the basis of which the identity of the requested person was determined by the Court of Magistrates (Malta) as a Court of Committal during the initial hearing were filed precisely at that stage, without the appellant being given the possibility to challenge or question them. The Law obliged the Court of Committal to ascertain the identity of the requested person at the initial hearing. That Court arrived at its conclusion on the basis of the documents supplied to it by the Prosecution in breach of the rights of the appellant to have sworn witness statements and the possibility of cross-examination of these witnesses.
3. The Court of Committal had, by Law, the same rights as those conferred to the Court of Magistrates as a court of criminal inquiry. That Court had the power to appoint expert Joseph Mallia in order for him to carry out whatever examinations the Court deemed necessary. The findings of this Court expert were found in fol 101, where he stated that after all the requested comparisons between

the prints found in the Fingerprints Transmissions Printout form marked as document MG11 and the fingerprints of Andrew Lamb which were printed on the fingerprints form marked as document AL1 were carried out, it resulted to him that all the prints were positively identical, and hence belonging to the same person. However there was stark difference between the document found at fol 64 marked as doc MG11 and the document found at fol 59 marked as doc EB. Even though the Maltese and UK systems were similar, it clearly transpired that the Maltese fingerprint form marked as doc EB at fol 59 contained many more details relating to the identity of the person who was taking the prints as well as the person giving the prints than the document found at fol 64 marked as doc MG11 that contained absolutely no information as to who took the prints and by reference to who gave them. It was only thanks to the information obtained from the SIRENE UK Bureau submitted as doc MGZ at fol 71 that a reference was made to the fingerprints being *legitimately obtained from Christopher Guest MORE on 11/04/1998 in relation to a criminal matter that the UK police dealt with*. While EAW were based on trust between Judicial Authorities with the EU, this trust existed among the Prosecutors within the EU. While the Courts had to accord a degree of trust to Prosecuting Authorities, they could not trust Prosecutors in the requesting state. This was the reason why the requested person could contest his extradition. The EAW Framework Decision simplified procedures between Member States yet that was the most that it could do. It did not do away with the basic principles of the Law of evidence in the respective Member States. Trust was only for Prosecuting

Authorities and did not bind the national Courts – so much so that at times the European Court of Justice shot down Schengen Area requests where Member States had failed. Defence Counsel stressed that the Malta Police claim to have received doc MG11 from their British counterparts. Yet they are not in a position to answer very basic questions relating to the essence of this document such as who these prints really belonged to, who took these prints and under what conditions.

4. Defence Counsel insisted that the Lex Fori principle emanated also from Maltese case Law, in particular the case ***The Police vs Alfred John Gaul*** of 1981. Even though regulation 73A of the Order provided for specific rules regarding the authentication of documents, this regulation did not dispense with the ordinary rules of criminal procedures in these matters. While this regulation provided how documents were to be brought forward in a given case, it did not stop the Defence from making questions on the documents themselves. Though this regulation admitted what could be accepted as evidence, it did not stop the requested person from questioning or challenging the contents of the documents by and through the one method that was possible and open to him – that is through cross-examination. Regulation 3(1) of the Order did not exclude general principles of criminal law applicable to any person facing EAW proceedings. Cross-examination was a right of the requested person that was still applicable even in relation to these special proceedings.

Defence Counsel contended that on the basis of the above, the conclusions reached by the Court of Magistrates (Malta) as a Court of Committal both at the Intial Hearing as well as the subsequent Extradition Hearing were not founded at law and were neither safe nor satisfactory according to Law. Defence Counsel requested this Court to overturn the relative decrees and order the discharge of the person requested.

Considered as follows :

The Prosecution replied that it presented the Court of Magistrates (Malta) as a Court of Committal with a Part III warrant together with the AG certification. This on its own was already sufficient. However Prosecution went further by producing other information and documents as supplementary information on matters that required clarification.

It contended that this EAW was issued against a person who was on the run for 16 years and who was using false particulars and a false identity. The UK Authorities pre-emptied the various issues that were expected to crop up by providing sufficient information. They submitted the documents marked as MG9 and MG 11 specifically to present a clear picture for the requirements of regulation 10 of the Order in order for the Court of Committal to be able to identify the requested person. The Court of Committal had to determine the identity of the requested person on a balance of probabilities. Thanks to the information and the documents supplied, the Court could confirm the identity of the requested person beyond that level of sufficiency of evidence.

Prosecution contended that Defence had at its disposal these documents from the very start of these EAW proceedings as could be seen by the fact that Defence was able to evaluate the documents submitted in doc MG9 page by page.

Furthermore the AG contended that in EAW proceedings the normal rules of evidence applicable before Courts of Criminal Judicature did not apply unless specified by Law. The Order provided specific rules of evidence and procedure that were different from the ordinary rules and yet were still made applicable to these specific procedures. The Prosecution contended that it was not necessary for it to produce the actual witnesses personally in Court and there was no need to have cross-examination of witnesses in these particular EAW procedures.

Moreover as far as doc MG11 was concerned, this was attached to the SIS II alert. This was confirmed both by Inspector Mark Galea as well as by PC864 Duncan Cassar. This document was part of the Alert and it was already presented at the Initial Hearing. All the documents that were filed by the SIRENE UK Bureau's SIS alert pertained to Christopher Guest MORE. Moreover the Prosecution obtained an official declaration from the SIRENE UK Bureau about the authenticity of these documents. The document at fol 71 was the evidence on the basis of which the identity of the requested person could be based. The issue relating to who took the prints and under what conditions was a matter that could be dealt with before the UK Courts. As far as these procedures were concerned the required level of sufficiency was satisfied in terms of regulation 10 of the Order – and even beyond reasonable doubt. The expert witness who

declared the prints of More being identical to the person requested was not even cross-examined by the Defence. It was the requested person himself who identified himself as Andrew Lamb with Joseph Mallia.

Furthermore, the Prosecution contended that the references that were made to case law in the appeal application by Defence Counsel were not related to extradition proceedings.

Prosecution concluded by stating that in the production of documents, it had followed the provisions of regulation 5(9) of the Order in that it supplied the EAW, together with photograph and fingerprint impressions of the requested person.

Considers further : -

These are proceedings conducted in terms of the Order, which, in turn transposes into Maltese Law the provisions of the Council Framework Decision of the 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures between Member States done at Luxembourg on the 13th June, 2002, adopted pursuant to Title VI of the Treaty, the terms of which are set out in the relative arrangement published in the Government Gazette dated the 1st June, 2004, as amended by Council Framework Decision 2009/299/JHA of the 26th February, 2009 (hereinafter referred to as the *FD*). According to regulation 3(1) of this Order:

> Only the provisions of this Order, save where otherwise expressly indicated, shall apply to requests received or made by Malta on or after the

> relevant date for the return of a fugitive criminal to or from a scheduled country, or to persons returned to Malta from a scheduled country in pursuance of a request made under this Order, and the provisions of the relevant Act shall have effect in relation to the return under this Order of persons to, or in relation to persons returned under this Order from, any scheduled country subject to such conditions, exceptions, adaptations or modifications as are specified in this Order.

As the name indicates clearly, with the adoption of this Framework Decision, the European Union decided to make a paradigm shift in relation the extradition of fugitive criminals. Indeed, this was the shift from extradition to surrender, which has had very serious legal and practical implications. Of course this shift had, and still has, its fair share of controversy and disputes. However this shift is real and is having real implications in concrete cases. The difference between surrender and traditional extradition is of a procedural nature. The EAW did away with the traditional and formal extradition procedures. It shifted the surrender of a person from the political realm to the judicial realm. This is one of the consequences stemming from the Tampere Programme of 1999 which aims at establishing the EU to become an area of freedom, security and justice, shifting the balance in favour of a political rather than merely an economic union. This FD has shifted the power of surrender to the Judicial Authorities of the participating EU Member States while it did away with Extradition Treaties among EU Member States, removed the double criminality requirement in relation to a set of scheduled offences, while limiting the speciality rule, and allowing surrender to EU Members States of own nationals.

This FD procedure places huge reliance on the issue of the EAW by the issuing Member State. The EAW becomes the basis for the surrender of

the fugitive. Clearly this has to be a judicial decision issued by the competent judicial authorities of the issuing Member State and it is this decision that forms the basis of surrender, without the Executive organs of the issuing Member State having a say in the process. This sharply contrasts the position under formal extradition proceedings. This results in a less formal, resource intensive and time consuming procedure than formal extradition. It is even more efficient and effective as the Judicial Authorities are the sole executors of surrender requests, based on the overriding principle of mutual trust among Judicial Authorities of EU Member States and more importantly on the concept of mutual recognition of Judicial decisions. This means that as a rule, EAW had to be recognised and executed throughout the EU; and that a limited number of bars to extradition could be raised by the executing Member State under specific circumstances.

It was the UK Presidency of the EU that pushed in favour of this system, aiming to achieve in the criminal justice sphere what the *Cassis de Dijon* case did to the civil sphere – namely the achievement of a unified system based on the concept of mutual recognition. Instead of embarking on the herculean task of harmonizing criminal laws of EU Member States this system aimed at achieving the same aims through the development of judicial co-operation mechanisms without the need to overhaul domestic criminal laws. In a nutshell the concept of equivalence and mutual trust could achieve the same aims, at a fraction of the effort and cost. This led to the free circulation of judicial decisions within the EU territory, having full direct effect.

The natural consequence of this was the fact that the judicial decision issued by the Judicial Authority of the Member State had to be executed, based on the mutual trust that was inherent in the mechanism. This is coupled by the removal of the double criminality requirement for the 32 scheduled offences and the limited grounds for the refusal of surrender thus resulting in much shorter time limits for the execution of the EAW.

In ***Routledge Handbook of Transnational Criminal Law***, edited by Neil Boister and Robert J. Currie, published in 2015 by Routledge, New York, page 129 it was stated as follows : -

> To what extent is MR different from MLA? The basic idea was that despite the differences between the procedural regimes in the Member States, they were all party to the European Convention on Human Rights and could thus trust each other. Mutual trust was presupposed and considered sufficient grounds to apply MR, even with little or no harmonization in the field. This means that MR order or warrants coming from an issuing Member State have legal value in the AFSJ (area of freedom, security and justice) and could thus automatically be executed without an *exequatur* procedure. Legal doubts about the order or warrant, linked to, for instance, the legality of the evidence that served to justify the order or warrant, could only be challenged in the issuing Member State.
>
> In 2002 the Council of Ministers adopted the first MR instrument: the European Arrest Warrant (EAW) replacing the extradition conventions. The EAW was adopted under a fast-track procedure after the 9/11 events and did not include harmonization of investigative acts or procedural safeguards. An EAW, whether meant to bring a suspect to trial or to execute a trial sentence, is based on mutual trust and must thus be recognised and executed, unless mandatory or optional grounds for non recognition apply. However, the grounds are strongly restricted, compared to the refusal grounds under the MLA extradition treaty, and do not contain grounds that are based directly on a human rights clause.

In Malta, the EAW procedure is regulated by the Order, working in tandem with the Extradition Act. The drafting of the Order bear resemblance to the United Kingdom Extradition Act, 2003, Part 1, extradition to category 1 territories.

Insofar as EAW proceedings in Malta are concerned, it is the rules and procedures mentioned in the Order that enjoy precedence. The Extradition Act provisions operate only *subject to such conditions, exceptions, adaptations or modifications as are specified in this Order*.

This Court agrees that the Order does not do away with the general principles of criminal procedure; however it introduces certain provisions that are aimed to ease and facilitate EAW proceedings. Maltese Law does not spell this out clearly, but in the absence of a specific provision on the matter it is reasonable to conclude the where the Special Law is silent on the matter, the Ordinary Law of the Land applies. In this sense some provisions may be seen to depart from the procedural rules applicable in trials before Courts of criminal jurisdiction.[1]

Considers further :

That in this particular case, Defence did not raise any bars to extradition. The main point raised relates to the fact that it claims that the person arrested by the Maltese Police and who was subsequently surrendered by the Court of Magistrates (Malta) as a court of committal, was not the same person who was being sought by the Judicial Authorities of the United Kingdom. The person brought before the Maltese Court claims to be

[1] Even though extradition proceedings are brought before criminal courts, they cannot be regarded as criminal trials. This can be seen not only from a reading of judgments of ordinary criminal courts in Malta and abroad, but also from judgments of the European Court of Justice and the European Courts of Human Rights (ECtHR). Consequently this decision is going to be based on these special principles applicable to these particular proceedings.

Andrew Christopher Lamb, whereas the Judicial Authorities of the United Kingdom contend that he is Christopher Guest More. Defence contends that the documents on the basis of which the Court of Magistrates (Malta) based its decision that the arrested person was in fact Chritopher Guest More and not Andrew Christopher Lamb on documents that could not be admitted as evidence according to the ordinary laws of criminal procedure of Malta, given that Malta was the Lex Fori and therefore the Court of Magistrates (Malta) could not resort to those documents in order to ascertain the identity of the arrested person. Apart from this the persons whose unsworn declarations were submitted to the Court of Magistrates were not brought to Malta for cross-examination purposes and therefore Defence was forced to face these documents without the possibility of asking questions about them and their contents. The Court expert appointed based his conclusions on a document that contained fingerprints but that had no indication as to who took those fingerprints and who they belonged to. Despite the expedited procedures envisaged in the EAW FD, this did not dispense with the ordinary rules of criminal procedure and evidence applicable in Malta and therefore the identity of the person arrested could not be established by reference to these documents that were not legally admissible.

According to regulation 10 of the Order, during the initial hearing the Court of Committal had to decide whether the person brought before it was the same person mentioned in the EAW. This decision had to be based on a balance of probabilities.

This procedure was gone through during the sitting of the 8th June 2019. During that sitting Inspector Mark Galea, Inspector Gabriel Micallef and WPC365 Edith Borg testified on oath before Magistrate Dr. Josette Demicoli and filed various documents.

Defence Counsel requested the production of an original birth certificate of Andrew Christopher Lamb. Prosecution objected. However the Court, on the basis of regulation 73A(3) proviso of the Order decided to admit this document as evidence.

The Court took cognisance of the fact that the person brought before it was contesting his identity in the sense that he stated he was Andew Christopher Lamb and not Christopher Guest More. That Court took note of the documents presented by the Prosecution and Defence and heard submissions by the parties in relation to his plea. The Court took note of regulations 10(3) and 73A of the Order in relation to the admissibility of document MG9. That Court decided that it was rejecting the plea that document MG 9 was inadmissible given that these documents were presented on oath by Inspector Mark Galea and they had been transmitted by the UK Authorities. It noted further that the document submitted by Defence, doc AL 2 was qualified by a declaration stating that *a certificate was not evidence of identity*. That Court therefore concluded that upon the evidence produced the person appearing before it was the person in respect of whom the EAW was issued by the UK Authorities, namely Christopher Guest MORE.

Clearly the Court of Magistrates admitted document MG9, that according to the testimony of Inspector Mark Galea, consisted of twenty six documents, as evidence in these proceedings on the basis of the provisions of regulation 73A of the Order.

During the sitting of the 10th June 2019, the Court, now presided by Magistrate Dr. Donatella Frendo Dimech received the testimony of Inspector Mark Galea who exhibited document MGZ. Moreover, that Court appointed Joseph Mallia to take fingerprint samples of the requested person and to conduct a comparative analysis with Doc MG11.

During the sitting of the 14th June 2019 Joseph Mallia testified and declared that after retrieving doc MG11 from the court records, on the 11th June 2019 he repaired to Corradino Correctional Facilities from where he met the requested person and took his finger and palm prints. Mallia claims that the requested person identified himself as being Andrew Lamb, holder of Maltese identity card number 042381A, residing at Swieqi. His forms were marked as documents AL1 and AL2. Comparison was carried out in four stages. The fingerprints that were printed on doc MG11 and fingerprints on doc AL1 were photographed and enlarged for comparison purposes. Then each and every finger was compared according to the box, thumb, forefinger, etc. Each finger was compared to one another. The expert concluded that the characteristic points were positively compared and coordinated with one another in sufficient number. In this case the expert noted that there were not only fourteen, but sixteen characteristic points.

This expert noted also that there was only one difference between doc MG 11 and doc AL1 – on AL1 the right thumb and on the right forefinger there were big scars that were absent on the form marked MG11. The expert noted that these were deep and permanent scars. He further confirmed that when all the comparative studies were carried out by him it resulted that the fingerprints printed on doc MG11 and the fingerprints that he took from *Andrew Lamb* were made by the same person and belonged to the same person.

The Court of Magistrates (Malta) as a court of committal presided by Dr. Donatella Frendo Dimech pronounced herself too on this issue in her decision of the 21st June 2019 stating that during the initial hearing that Court had already established that the person appearing before it, (as differently presided) was the person cited in the EAW. However, following the expert report filed by Joseph Mallia, any lingering doubts as to the true identity of the person appearing before her were entirely dispelled since his identity was established beyond a reasonable doubt.

Clearly the Court of Magistrates (Malta) as a court of committal, in two separate stages, and using documents produced by the Prosecution, arrived at the same conclusion relating to the identity of the person arrested. Defence contends that these documents were inadmissible, or incomplete or anonymous.

Evidently the Court of Magistrates rested on these documents and considered them as admissible evidence. The issue is whether that Court could do so. Defence contends that the Court had to apply ordinary rules

of procedure in order to assess the admissibility of those documents as evidence and by applying these ordinary rules those documents would not have passed the legal test of admissibility.

The Court of Magistrates (Malta) as a court of committal, during the initial hearing, clearly rested its decision in favour of admissibility basing itself on the provisions of regulation 73A of the Order that says : -

> (1) A Part II warrant may be received in evidence in proceedings under this Order.
> (2) Any other document issued in a scheduled country may be received in evidence in proceedings under this Order if it is duly authenticated. Any such document may be transmitted as provided under article 5(9).
> (3) A document is duly authenticated if (and only if) one of these applies -
> (a) it purports to be signed by a judge, magistrate, any other judicial authority or an officer of the scheduled country;
> (b) it purports to be authenticated by the oath or affirmation of a witness:
>
> Provided that subarticles (2) and (3) do not prevent a document that is not duly authenticated from being received in evidence in proceedings under this Order.

This provision bears close resemblance to section 202 of the UK Extradition Act 2003 that says :

> (1)A Part 1 warrant may be received in evidence in proceedings under this Act.
>
> (2)Any other document issued in a category 1 territory may be received in evidence in proceedings under this Act if it is duly authenticated.
>
> (3)A document issued in a category 2 territory may be received in evidence in proceedings under this Act if it is duly authenticated.
>
> (4)A document issued in a category 1 or category 2 territory is duly authenticated if (and only if) one of these applies—
>
> (a)it purports to be signed by a judge, magistrate or **[F1**officer**]F1** of the territory;
>
> **[F2**(aa)it purports to be certified, whether by seal or otherwise, by the Ministry or Department of the territory responsible for justice or for foreign affairs;**]**
>
> **F2**(b)it purports to be authenticated by the oath or affirmation of a witness.

(5)Subsections (2) and (3) do not prevent a document that is not duly authenticated from being received in evidence in proceedings under this Act.

A Part I warrant for the UK Law is the equivalent of a Part II warrant in terms of the Order.

In their work ***Nicholls, Montgomery, and Knowles on The Law of Extradition and Mutual Legal Assistance,***[2] when commenting on the form of evidence and issues as to admissibility, they state that :

> The evidence in extradition cases generally consists of a combination of one or more of the following forms of evidence : -
>
> (a) Written documentary evidence from the requesting state, for example a statement from a witness, translated in an admissible fashion, and duly authenticated in accordance with EA 2003, s 202. The process of authentication under s 202 makes potentially admissible in evidence in extradition proceedings documents containing written statements of fact, nothwithstanding that under English laws of evidence what appears in the statement would only be admissible in the form of oral testimony given on oath by the maker of the statement. The purpose of s 202 is to obviate the necessity of bringing witnesses from the requesting state to give oral evidence in the extradition proceedings. It should be noted that s 202 permits authenticated 'documents' to be received in evidence. This represents a loosening of the former requirements under the EA 1989, Sch 1, para 12, which provided that only certain types of document, namely authenticated 'depositions and statements on oath', could be received in evidence. However, authenticated documents from the requesting state are not necessarily admissible in evidence. They are receiveble, (ie, capable of being received) in evidence and only admissible to the extent that what is contained within them complies with English rules of evidence. The foreign state's documents do not have to be in any particular form. Section s 84(2) of the EA 2003 does not require that something which on its face is a statement within the ordinary meaning of that term should take the exact form of a statement made for the express purpose of prosecution in the UK. The requesting state is able to rely on a statement made by a co-accused implicating the defendant notwithstanding that he would not be a competent witness at the time the statement was made. The press are entitled to inspect and take copies of documentary evidence in extradition proceedings.

[2] Third Edition, Oxford University Press, Great Britain, 2013, at page 112 et seq,

(b) Live evidence. Witnesses who appear in person may be cross-examined, and the old practice of recording their evidence in the form of a deposition under the Magistrates' Courts Act 1980 has continued even though the procedure now is that of a summary trial. Where properly authenticated evidence is presented, however, there is no duty on the requesting state to make the witnesses available for cross-examination.
(c) Written evidence in the form required by s 9 of the Criminal Justice Act, 1967, read by consent. Section 9 is applied to extradition proceedings by EA 2003, s 205(2)(a).
(d) Formal admissions (ie, agreed facts) under s 10 of the Criminal Justice Act, 1967, which is applied to extradition proceedings by EA 2003, s 205(2)(b).

The exclusion of evidence in extradition proceedings

Whilst the evidence tendered by the requesting state must in general comply with the ordinary rules of evidence, failure to observe English procedural rules relating to evidence does not necessarily render the evidence inadmissible.

The Court agrees with Defence that in this case, the evidence that was brought by the Prosecution did not consist of sworn declarations or original documents. However, as shown above, in particular in the work of ***Nicholls, Montgomery and Knowles*** that does not mean that they are not admissible in evidence. To the contrary, applying by analogy the principles that clearly transpire from this excerpt, the process of authentication in terms of regulation 73A of the Order makes potentially admissible in evidence in these proceedings documents containing written statements of fact, even though under Maltese Laws of Evidence what appears in the statement would only be admissible in the form of oral testimony given on oath by the maker of the statement.

This means that the documents submitted by the UK Authorities have to pass the test of authentication. Once they pass that test, they are receiveble, that is, capable of being received in evidence and only

admissible to the extent that what is contained within them complies with Maltese rules of evidence.

Now as far as the evidence submitted to the Court of Magistrates (Malta) is concerned, this consists of :

1. The testimony of Inspector Mark Galea together with the documents he produced, being : -

a. MG1 and MG2 – the Attorney General's certificates;
b. MG 3 – the SIS II alert;
c. MG 4 – the Form A, supplementary information relating to the extradition;
d. MG 5 - the EAW;
e. MG 6 and MG 7– a passport issued in the name of a certain "Andrew Christopher Lamb" and a photocopy of it;
f. MG 8 – a photocopy of a Maltese driving licence issued in the name of "Andrew Christopher Lamb";
g. MG 9 - a set of documents that includes :
    - A certification signed by a certain Kenneth Jones M.D. of Pionex Limited certifying that the photograph (at fol 31 and the blow up at fol 33) was a true likeness of the applicant, presumably "Lamb Andrew Christopher";
    - A photocopy of a witness statement signed by Gary Stephen Rathbone (at fol 34 – 36);
    - A photocopy of a witness statement signed by Imogen Smart (at fol 37 – 39);

- Colour copies of pictures of a male person who has been identified by Gary Stephen Rathbone as being pictures of Christopher Guest More in his witness statement abovementioned (at fol 40 and 41);
- A photocopy of a police print of PNC record (fol 42 and 43);
- A photocopy of a witness statement signed by Alannah Harrison together with an identification sheet of a certain Andrew Lamb (fol 45 till 47);
- A photocopy of a witness statement of Robert David Balfour together with a report signed by Elisabeth Briggs for Cheshire Police (fol 48 till 56).

2. The testimony of Inspector Gabriel Micallef (fol 56a);
3. The testimony of WPC 365 Edith Borg who also filed document EB (fol 58a till 61);
4. The testimony of Inspector Mark Galea who presented also documents :
   a. MG10 – a photocopy of a picture allegadly of Christopher Guest More (fol 62-63);
   b. MG 11 – A Sirpit's Fingerprint Transmission Printout (fol 64);
5. Document AL2 – a certified copy of a birth certificate of Andrew Christopher Lamb (fol 66) ;
6. The testimony of Inspector Mark Galea who exhibited document MGZ (fol 69-71);
7. The testimony of Joseph Mallia and his expert report (fol 73-137)
8. The testimony of PC864 Duncan Cassar who filed documents DCZ1;

9. The testimony of Lieutenant Helenio Galea who exhibited documents HGZ1 and HGZ2.

The testimony of all the witnesses who appeared before the Court of Magistrates (Malta) and before this Court testified on oath, as can be seen from the transcripts of their recorded testimony.

Inspector Mark Galea confirmed, among other things, that the fingerprints allegedly pertaining to Christopher Guest More were inserted by the UK Police in the *information system*, that is the SIS database. He says that the Malta Police requested duty Magistrate so that the fingerprints of the person arrested be taken, after that he had refused to give them to the Police. However, WPC365 Edith Borg from the Forensic section took these fingerprints from the arrested person and compared these fingerprints with those provided by the UK Authorities in the SIS database and found that they matched. However the Maltese Police did not stop at that. Inspector Galea stated that the Maltese Police asked for supplementary information from the UK Police after that the Maltese Police confirmed that they had a person with a different name but whose fingerprints matched. Inspector Galea stated that the UK Police confirmed to the Malta Police that from a search carried out by the UK Registry database there was only one person with the name of Lamb Andrew Christopher, date of birth 12th December 1975 who never left the UK and was held in a medical institution. Inspector Galea stated that he was informed by his British counterparts that following an investigation by the UK Police it transpired that the passpost that was in possession of the arrested person was obtained by him after making a false declaration

with the British Authorities in order to get a passport with a different identity. Later on Inspector Galea testified also at fol 69 where he stated that the UK Authorities provided supplementary information in relation to the fingerprints that was made available on the SIS database allegedly belonging to Christopher Guest More which information confirmed that these fingerprints were legitimately obtained from Christopher Guest More on the 11th April 1998 in relation to a criminal matter that the UK Police dealt with. Inspector Galea confirmed that these prints were attachted with the EAW and with the SIS alert.

Inspector Gabriel Micallef testified about his involvement in the investigations in this case. He stated that he came across a picture of a person that resembled the wanted person. This person carried the name of Christopher Andrew Lamb. The Malta Police kept the address of this person under surveillance. The Police went to verify the identity of this person Christopher Andrew Lamb and received confirmation that a certain Christopher Andrew Lamb really existed in the UK and "*most currently*" was residing in the UK. The Malta Police carried out visual comparisons of photographs of the wanted person in their possession with other pictures supplied by the UK Authorities of that same person and it resulted in a 99.9% match. Following this match, he proceeded with the arrest of the requested person. Inspector Micallef handed the requested person a copy of the EAW and informed about the SIS II alert and gave him a "*copy of his legal rights*". They proceeded to the GHQ and asked the arrested person to provide them with a copy of his fingerprints in order for them to match them with the fingerprints made available by the UK authorities and who claimed that belonged to Christoper Guest

More. The arrested person requested to speak to his lawyer, Dr. Arthur Azzopardi. Following that consultation he refused to supply fingerprints. Inspector Micallef informed the duty Magistrate Dr. Claire Stafrace Zammit with the arrest and the outcome of the investigation and he filed a request to the Magistrate so that the Magistrate orders the taking of fingerprints from the person arrested. The Magistrate acceded to this request and ordered the arrested person to supply fingerprints and appointed WPC365 Edith Borg. Later he was informed that there was a positive match between the fingerprints supplied by the arrested person and the copy of the fingerprints supplied by the UK Authorities who claimed that they belonged to Christopher Guest More. He exhibited a copy of the application filed to the duty Magistrate marked as dok AL.

WPC 365 Edith Borg testified that Magistrate Claire Stafrace Zammit appointed her to take the fingerprints from the arrested person. WPC 365 read, in Maltese, from what she referred to as application (*sic! Decree*) in terms of articles 355(ab) (*??*) and 355(bb) *(?!*) (*of the Criminal Code*) authorising her to lift fingerprints from the arrested person. She stated that two templates were given to her by Inspector Micallef. She said that she had taken his fingerprints. At this stage, her deposition was suspended.

These were the depositions on oath taken by the Court of Magistrates. As usually happens with depositions of Police Officers, various parts of the testimony of Inspector Galea and also of Inspector Micallef, may be regarded as falling within the ambit of hearsay evidence. It is interesting to note that under English Law, the rules of evidence are simplified in the

sense that according to sections 84(2) and 86(2) of the Extradition Act of 2003 :

> In deciding the question in subsection (1) the judge may treat a statement made by a person in a document as admissible evidence of a fact if—
>
> (a)the statement is made by the person to a police officer or another person charged with the duty of investigating offences or charging offenders, and
>
> (b)direct oral evidence by the person of the fact would be admissible.

This, in practice means that English Law admits hearsay evidence during extradition proceedings. ***Nicholls, Montgomery and Knowles*** are of the same opinion.[3] Maltese Criminal Law also admits hearsay evidence, albeit with some degree of caution. Both articles 520 and 645 render applicable articles 598 and 599 of the Code of Organisation and Civil Procedure to courts of criminal justice. Article 598 and 599 state : -

> 598. (1) As a rule, the court shall not consider any testimony respecting facts the knowledge of which the witness states to have obtained from the relation or information of third persons who can be produced to give evidence of such facts.
> (2) The court may, either ex officio or upon the objection of any party, rule out or disallow any question tending to elicit any such testimony.
> (3) Nevertheless the court may require the witness to mention the person from whom he obtained knowledge of the facts to which any such question refers.
>
> 599. The court may, according to circumstances, allow and take into consideration any testimony on the relation of third persons, where such relation has of itself a material bearing on the subject-matter in issue or forms part thereof; or where such third persons cannot be produced to give evidence and the facts are such as cannot otherwise be fully proved, especially in cases relating to births, marriages, deaths, absence, easements, boundaries, possession, usage, public historical facts, reputation or character, words or deeds of persons who are dead or absent and who had no interest to say or write a falsehood, and to other facts of general or public interest or of public notoriety.

[3] Ibid. Page 111.

The Court of Magistrates (Malta) could therefore legally and reasonably, albeit cautiously, allow and take into consideration any testimony on the relation of third persons, where such relation has of itself a material bearing on the subject-matter in issue or forms part thereof. What the Police Inspectors testified, did indeed have of itself a material bearing on the subject-matter in issue or formed part thereof. So when reaching their conclusions on the identity of the requested person, the Magistrates presiding the Court of Magistrates could arrive at the conclusion about the identity of the requested person also on the testimony of the Police Inspectors Galea and Micallef.

The Court deems that the testimony of WPC 365 Edith Borg and that part of the testimony of Inspectors Galea and Micallef making reference to the involvement of WPC 365 Edith Borg could not be deemed to be admissible evidence before a court of criminal justice. First of all there is the issue relating to the legal basis for the taking of the fingerprints from the arrested person. Secondly there is the issue relating to the comparative analysis carried out by this Police Officer. The Constitutional Court in the case ***The Police vs Longinu Aquilina*** of the 23rd January 1992 had censored the practice of Police officers carrying out comparative analysis of fingerprints, though it found no issue with Police Officers taking such fingerprints.

However apart from these pieces of sworn testimony that could help the Court of Magistrates arrive at its conclusions about the identity of the requested person on a balance of probabilities, there are also other documents produced in the records of these proceedings.

Regulation 73A of the Order states that the EAW itself may be received as evidence in these proceedings, admissible if transmitted by any secure means capable of producing written records and under conditions permitting the ascertainment of its authenticity. Inspector Galea and PC864 Darren Cassar confirmed that the EAW was transmitted together with the SIS Alert. Apart from Judicial notice by this Court of the SIS Regulation abovementioned, from the testimony of PC685 Duncan Cassar it also transpired that the SIS database is essentially a secure means capable of producing written records.

Kai Ambos, in his European Criminal Law, Cambridge University Press, UK, 2018, on pages 424 et seq, states that the transposition of the Schengen aquis into Union Law turned the SIS into a European information system. SIS is a database containing alerts on persons and proprety situated in a centralised database in Strasbourg and national databases in the Member States that connect to the central database visa SIRENE (Supplementary Information Request at the National Entry). This aims at maintaining public security and order in the Schengen Area using information that can be communicated via this system. An entry into the system is called an "*alert*" and this is made by the requesting State. These alerts can be issued on persons for the purpse of extradition or surrender, on aliens for the purpose of refusing entry, on missing persons, persons requiring protection, on witnesses or persons charged with or sentence for criminal offences, on persons for discreet surveillance or in case of suspicions of serious offences, as well as on objects that are sought for the purposes of seizure or use as evidence in criminal proceedings. Alerts made for the

purposes of extradition have been put on the same footing as requests for provisional arrest as understood in traditional extradition law. In the automated procedures of the SIS it is not the requested State that reviews the admissibility of the arrest but it is the requesting State, that is the State that would have issued the alert (which could be a prosecuting authority) that reviews whether the arrest is admissible according to the law of the requested State. Ambos argues that the requested State becomes a blind executive body of the requesting State. This anticipated the later development in extradition law, stemming from the concept of mutual recognition, that culminated in the EAW for the purposes of prosecution. Later on with the advent of SIS II new functionalities were adopted. SIS II contains not only alerts but also contains supplementary information necessary for the purposes of surrender or extradition, including particular biometric data such as fingerprints or photographs or other information on misused identity in order to prevent the misidentification of persons. Each Member State has a national SIS II office and a SIRENE Bureau that is responsible for the exchange of supplementary information and checks the quality of the information that is entered in the SIS II database. Access to the SIS II information is by border control, police and customs authorities as well as judicial authorities in the context of criminal proceedings.

On the otherhand any other document, apart from the EAW itself, issued in the scheduled country could be received as evidence if it passed the authentication test. Transmission of any such document could be made by any secure means capable of producing written records and under

conditions permitting the ascertainment of its authenticity. Documents are duly authenticated if (and only if) :

(a) They purport to be signed by a judge, magistrate, any other judicial authority or an officer of the scheduled country;

(b) It purports to be authenticated by the oath or affirmation of a witness.

More radical than this, is the fact that these rules do not prevent a document that is not duly authenticated from being received in evidence in proceedings under the Order. These rules are aimed to facilitate the execution of EAW in an area of freedom, security and justice, based on the principle of mutual trust and mutual recognition. The Court of Magistrates could therefore also receive in evidence in these EAW proceedings documents that were not duly authenticated under the Order.

The witness statements and the documents attached to them, or the documents that were referred to by the witnesses in their witness statements exhibited in these proceedings or specifically attached to witness statements, may therefore have been admitted as evidence by the Court of Magistrates on the basis of these provisions of regulations 73A and 5(9) of the Order.

First of all these are documents that purport to be signed by officers of the scheduled country transmitted by secure means capable of producing written records and under conditions permitting the ascertainment of its authenticity. If not personally or digitally signed by the officers

themselves, these documents were electronically inserted on the SIS II database, that is a restricted access database operative only among Sirene Bureaux in the EU and taken from the said database[4] or transmitted to the Maltese Police by the UK Police Authorities in line with the provisions of regulation 5(9) of the Order, as confirmed on oath by Inspectors Galea, Micallef or PC 864 Cassar.

Secondly, even though the witness statements and accompanying or referring documents were not executed under oath, they may still be received as evidence in EAW proceedings, as ***Nicholls, Montgomery and Knowles*** argue in their work.

Thirdly because even though these witness statements were not taken on oath, they still satisfy the minimum requirements of Maltese Law given that regulation 73A of the Order dispenses with the mandatary requirement of witness testimony being exclusively admissible if tendered on oath by the contemporaneous inclusion of the form of affermation alongside the oath.

According to ordinary Maltese law of evidence witness statements can only be admitted as evidence if confirmed by the oath. This is the position under the Code of Organisation and Civil Procedure and the Criminal Code. Indeed the more solemn meaning of "*oath*" in Maltese Law is found in the judgment delivered by this Court as diffently presided in the

[4] As can be seen from the electronic address printed at the foot of the documents, such as MG3, MG4, MG 10, MGZ and DCZ1

case ***Il-Pulizija vs Andiy Petrovych Pashkov*** decided on the 10th September 2009, wherein it was held that:

> **9.** Kwantu ghax-xiehda tad-diversi nies li jinsabu fil-faxxikolu ezibit mill-Avukata Dott. Donatella Frendo Dimech fil-kors tad-deposizzjoni taghha tas-27 ta' Marzu 2009 (fol. 49) -- liema xiehda giet ezibita sabiex il-prosekuzzjoni tistabilixxi kaz *prima facie* ghall-finijiet tal-Artikolu 15(3)(a) tal-Att -- ma hemmx dubbju li dawn id- deposizzjonijiet ittiehdu skond il-procedura investigattiva tal-Ukrajina. Dan il-fatt wahdu pero`, u cioe` li ttiehdu skond il-procedura tal-Ukrajina, ma jezentax lill-pajjiz rikjedent milli jottempera ruhhu ma' dak li huwa l-minimu rikjest skond l-Artikolu 22 tal-Att sabiex il-prova tkun ammissibbli quddiem il-Qorti Rimandanti, u cioe` li x-xiehda titwettaq bil-gurament jew b'affermazzjoni jew dikjarazzjoni, u li tkun awtentikata kif aktar 'l fuq spjegat. Din il-Qorti ma tistax taccetta t-tezi tal-prosekuzzjoni li l-ewwel wiehed minn dawn ir-rekwiziti (it-twettiq bil-gurament jew b'affermazzjoni jew dikjarazzjoni) gie sodisfatt. Ezami akkurat ta' dawn id-dokumenti kollha juri li d-diversi persuni li stqarrew dak li kienu jafu dwar il-fatti meritu tal-investigazzjoni li kienet qed tigi kondotta imkien u f'ebda kaz ma wettqu dak li kienu qalu bil-gurament jew b'dikjarazzjoni jew affermazzjoni. 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. Isegwi ghalhekk li l-imsemmija dokumenti ma kienux ammissibbli bhala prova, u kwindi t-tieni aggravju tal-appellant ghandu jintlaqa'. Din il-Qorti m'ghandhiex ghalfejn tidhol fil-kwistjoni tal-awtentikazzjoni (Art. 22(2)(a) tal-Att).[5]

[5] In the context of this case that presented formal extradition proceedings, the Court of Criminal Appeal held firm the requirement that a document purporting to set out evidence on oath in the requesting country must still satisfy the basic Maltese Law of evidence – namely that the declarant makes the declaration subject to a positive affirmation that what is stated is the truth. However in this particular

According to articles 631 and 632 of the Criminal Code :

> 631. A witness professing the Roman Catholic faith shall be sworn according to the custom of those who belong to that faith; and a witness not professing that faith shall be sworn in the manner which he considers most binding on his conscience.
> (2) The provisions of this article shall apply in all cases in which an oath is administered.
>
> 632. The form of oath to be administered to witnesses shall be the following:
> *You A. B. do swear (or do solemnly affirm) that the evidence which you shall give, shall be the truth, the whole truth, and nothing but the truth. So help you God.*

The position under the Code of Organisation and Civil Procedure is clearly based on the oath of the witness. However, exceptionally, dying declarations may be admitted in evidence despite them not necessarily being tendered on oath. According to article 600 of Chapter 12 of the Laws of Malta : -

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case, the judgment was delivered before the amendments to article 22 of the Extradition Act where the requirement of the oath was, then, exclusive. In 2009, article 22 of the Extradition Act read as follows:

> 22.(1) In any proceedings under or for the purposes of this Act in respect of a person in custody thereunder -
> (a) a document, duly authenticated, which purports to set out evidence given on oath in the requesting country shall be admissible as evidence of the matters stated therein;
> (b) a document, duly authenticated, which purports to have been received in evidence, or to be a copy of a document so received, in any proceeding in any such country shall be admissible as evidence;
> (c) a document, duly authenticated, which certifies that a person was convicted on a date specified in the document of an offence against the law of, or of part of, any such country shall be admissible as evidence of the fact and date of the conviction.
> (2) A document shall be deemed to be duly authenticated for the purpose of this section -
> (a) in the case of a document purporting to set out evidence given as aforesaid, if the document purports to be certified by a judge or magistrate or officer in or of that country to be the original document containing or recording that testimony or a true copy of that original document;
> (b) in the case of a document that purports to have been received in evidence as aforesaid or to be a copy of a document so received, if the document purports to be certified as aforesaid to have been, or to be a true copy of a document which has been, so received;
> (c) in the case of a document which certifies that a person was convicted as aforesaid, if the document purports to be certified as aforesaid, and in any such case the document is authenticated either by the oath of a witness or by the official seal of a Minister in or of the requesting country.

> 600. It shall be lawful to produce any declaration made in writing in any place before a magistrate or other person, whether in articulo mortis or at any other time, in the presence or in the absence of the parties, with or without oath, provided it is shown that such declaration was made deliberately and in such circumstances as lead to the belief that there was no intention to depart from the truth, and that the party who made such declaration would have been a competent witness if he could be called to give his evidence at the trial.

This provision is also generally rendered applicable to courts of criminal justice by specific cross reference in article 520(1)(d) of the Criminal Code.

The position at Maltese ordinary of procedure and evidence is clearly based on the necessity of the oath of the witness. However the form of the oath that may be adopted for criminal proceedings may vary depending on whether the person taking the oath or by solemn affirmation. The form of the oath depends on whether the witness professes the Roman Catholic Faith or not. In the case of a Roman Catholic witness, he is sworn according to the custom of those who belong to that faith. However if the witness does not profess that faith, he is to be sworn in the manner which he considers most binding on his conscience. Article 632 of the Criminal Code then distinguishes between these two forms by using the phrase ***swear (or do solemnly affirm)***.

According to Professor Anthony Mamo in his Notes on Criminal Law,[6] states that for the purposes of Maltese Law on perjury, if the testimony is not given on oath, no statement or affirmation, however false, may constitute the crime of perjury. According to the English Perjury Act, 1911, that is still in operation:

[6] Volume 1, pages 63 to 64.

> In this Act—
>
> • The expression "oath" . . . **F21** includes "affirmation" and "declaration," and the expression "swear" . . . **F21** includes "affirm" and "declare"; and
>
> • The expression "statutory declaration" means a declaration made by virtue of the **M2**Statutory Declarations Act 1835, or of any Act, Order in Council, rule or regulation applying or extending the provisions thereof; and

However there is in general no analogous provision at Maltese Law. In this land, an affirmation cannot be put on the same footing as an oath. However at English Law, for the purposes of the Perjury Act, 1911, an oath includes an affirmation or declaration.

Interestingly, regulation 73A of the Order does not mention *solemn affirmation*, but refers only to *affirmation,* which as mentioned above, does not carry the morally binding nature of an oath at Maltese Law. *Ubi lex voluit dixit*. Therefore, for the purposes of Maltese Law, in the absence of legal equivalence by operation of law, an affirmation cannot be deemed to carry the same legal meaning as that of a solemn affirmation – which produces the same legal consequences as an oath. And where the law speaks of *affirmation*, then this cannot be deemed to exclusively mean *solemn affirmation*.

An affirmation is defined as :

> A solemn and formal declaration of the truth of a statement, such as an Affidav it or the actual **or prospective** testimony of awitness or a party that takes the pl ace of an oath. An affirmation is also used when a person cannot take an oath b ecause ofreligious convictions.[7] (**emphasis added**).

[7] < https://legal-dictionary.thefreedictionary.com/affirmation> accessed on the 17th July 2019

This Court considers all the witness statements produced in these proceedings as constituting affirmations for the purposes of regulation 73A of the Order. The witness statements exhibited purport to have been made in England subject to a declaration that the statement is true to the best knowledge and belief of the declarant and that if it is tendered in evidence, he will be liable to prosecution if he shall have wilfully stated in it anything which he knew to be false or did not believe to be true. These witness statements were released by the witnesses in accordance with the Criminal Procedure Rules 16.2; Criminal Justice Act 1967, s 9; and the Magistrates' Courts Act 1980, s. 5B. These statements are tantamount to an *affirmation* in terms of Maltese Law, and in particular of regulation 73A of the Order also because, even though they fall short of being sworn declarations, they still satisfy the minimum mandatary truth-based test established by the ***Pashkov*** judgment in that in them the declarant makes his declaration **subject to a positive affirmation that what is stated in the statement is the truth**. Therefore the Court finds that these witness statements exihibited satisfy the basic requirements of regulation 73A of the Order that does not require the statement to be made only and exclusively on oath, an affirmation being sufficient. The Court of Magistrates could therefore legitimately and reasonably admit them as evidence in these proceedings as affirmations for the purposes of regulation 73A and for the purposes of the execution of the EAW.

The Court however notes that, in line with ordinary law of evidence applied to the contents of the witness statements, it cannot consider that part of the witness statement of Robert David Balfour wherein it makes reference to the report of handwriting expert Elisabeth Briggs as

admissible in line with Maltese Law; nor can the report of Elisabeth Briggs itself be admitted as evidence given that this report is clearly an *ex parte* report.[8]

Defence laments that the document marked as MG11, that is the Sirpit's Fingerprint Transmission Printout was completely anonymous – lacking all details as to who these fingerprints belong to and who took them. While it is true that document MG11 does not contain these details mentioned by Defence on it, on the otherhand, this document cannot be considered in isolation. It was proved by the testimony of Inspector Galea and PC 864 that it was produced by the requesting state's authorities together with their SIS Alert.

Moreover, this Sirpit's Fingerprint Transmission Printout was also the subject-matter of supplementary information obtained by the Prosecution from the UK Sirene Bureau. This Bureau confirmed via document MGZ that the fingerprints were legitimately obtained from Christopher Guest More on the 11th April 1998 in relation to a criminal matter that the UK police dealt with. This declaration is digitally signed by SIRENE UK and was transmitted through SIS databse as an official Form M.

Moreover, the Court of Magistrates could also see that the EAW itself, purporting to be signed by District Judge Roy Anderson, states that together with it there were attached a photograph and fingerprints form

[8] The same applies to that part of the testimony of the Inspectors Galea and Micallef wherein reference is made to the report of WPC 365 Edith Borg and the testimony of WPC 365 Edith Borg herself in relation her conclusions after carrying out her comparative analysis of the fingerprints taken from the arrested person and the form submitted by the UK Authorities.

of Christopher Guest More. This is mentioned in 'section a' where it states clearly that together with the EAW there was a photograph and fingerprints of the requested person that were attached (tergo fol 18). Indeed Inspector Galea exhibited MG10 (photo of Christopher Guest More) and MG 11 (the Sirpit's Fingerprint transmission printout) confirming that both were attached to the SIS alert. This also results from the documents submitted by PC864 Duncan Cassar when he filed document DCZ1 from which it transpires that apart from the EAW there were also, inter alia, these two documents being the photograph of Christopher Guest More and the Sirpit's Fingerprint Transmission Printout. PC 864 Cassar confirmed also to have received these documents together with the SIS Alert.

Furthermore, these documents and information were transmitted by the Authorities of the issuing state, which was a scheduled country in terms of the Order, and not by any organisation, body or person. In an English case ***Prendi (aka Kola) v The Government of the Republic of Albania***, which entailed formal extradition proceedings, the appellant in this case, very much similar to this case, contended that he was not Mr Prendi, that is the person requested by the Albanian Authorities. He claimed that he was Mr Kola and that therefore the extradition request from Albania was for another person.

The District Judge declared that, on a balance of probabilities, the appellant was indeed Mr Prendi. Given that these were Category 2 extradition proceedings he sent the case to the Secretary of State for the Home Department who then ordered the extradition. During these

proceedings it transpired that Mr Prendi was convicted in absentia by an Albanian Court that he killed Gjovalin Prendi and sentenced to twenty one years imprisonment. Consequent to this conviction an Interpol Red Notice was issued on the 7th February 2005. According to this Red Notice, Mr Prendi's date of birth was mentioned as 27th September 1980 and he was described being 168cm tall. The Red Notice contained a photograph which the court described as being of *relatively poor quality*. Interpol published an addendum to the Red Notice, containing copied images of the finger prints of Mr Prendi. But, to a certain extent differently from this present case, Interpol did not make any declaration explaining when, how and by whom the Interpol photograph and the finger prints were taken or how the images of the fingerprints were created.

When the appellant was arrested, he disclosed his name as being Aleks Kola, born on the 5 October 1980. At the police station, he was measured to be 179cm tall.

The person arrested challenged the identity in terms of section 78(4)(a) of the Extradition Act 2003 that states that the District judge must decide whether the person appearing or brought before him is the person whose extradition is requested, which decision had to be decided on a balance of probabilities. The District judge admitted in evidence the Interpol Red Notice and the Interpol addendum and concluded that on a balance of probabilities, the person brought before him was Mr Prendi.

The person arrested and surrendered appealed.

The appellant claimed that the criteria for admitting into evidence the Red Notice and addendum material were not met since they were not '*authenticated*' documents in terms of Section 202 Extradition Act 2003. The representative of the Government of Albania conceded that if the Red Notice and addendum notice were not receivable into evidence, then Government would not be able to lawfully establish that the appellant was, on the balance of probabilities, Mr Prendi.

The Court of Appeal was confronted with the legal issue as to when may a document be received as evidence of the facts contained in it in relation to an extradition procedure to a Category 2 territory when an issue of identity arises, and in particular when the document in question would not have been authenticated in line with the provisions of section 202(4) of the Extradition Act 2003.

The Court noted that extradition proceedings were criminal proceedings nonetheless and therefore the ordinary English law of evidence applied to them.[9] These rules had to be followed at the hearing when the District Judge had to decide whether or not an unauthenticated document could be received as evidence of its contents. The Court found that the District Judge declared the Interpol Red Notice and the information addendum as admissible evidence because he considered them as coming from a reliable source. But the

[9]Per : - ***R(B and others) v. Westminster Magistrates' Court and others [2014] UKSC 59)***.

Appellate Court decided that the test that should have been adopted by the District Judge had to be different. He should have analysed whether the document, that had **not** been authenticated in line with the provisions of section 202(3) of the Extradition Act, could be deemed to be admitted as evidence of the facts stated in it in accordance with the ordinary rules of English law of evidence. In this particular case the Appellate Court replied in the negative given that the actual source of the information was not reliable. Given that the Interpol Red Notice and the addendum should not have been admitted into evidence, the Court allowed the appeal and discharged the arrested person.

This case however proves that English ordinary law of criminal evidence was applied in a scenario where documents allegedly proving the identity of the requested person were unauthenticated in terms of section 202 of the Extradition Act 2003. Conversely, if these documents would have been authenticated in terms of section 202 of the Extradition Act, then they could have been deemed to be admissible evidence.

As was mentioned in the Scottish case,[10] Opinion of the Appeal Court, High Court Justiciary delivered by Lady Paton in the Appeals under sections 103 and 108 of the Extradition Act 2003 by **ZAIN TAJ DEAN vs The Lord Advocate and The Scottish Ministers**, **[2015] HCJAC 5**

The effect of *Kapri v Lord Advocate*

[10] that, to a certain extent compares the position under English and Scottish case law on the matter

[7] On 25 April 2014 , in the course of the extradition proceedings in the sheriff court, the judgment of the appeal court in Kapri v Lord Advocate 2015 JC 30, 2014 SLT 557, 2014 SCCR 310, became available. In Kapri, Lord Justice Clerk Carloway gave guidance as to the law of evidence in extradition proceedings. In particular, he explained:

"[125] the rules of criminal evidence and procedure are, in the absence of some special circumstance, normally applicable (HM Advocate v Havrilova 2012 SCCR 361) … If a fact, including a substantial ground, requires to be established, the normal rules must apply …

[126] The ECtHR [may feel free] … to look at 'all the material placed before it, or, if necessary, material obtained proprio motu' … This may be entirely sensible for a court which operates across several jurisdictions …[but] the stark position is that it is not the law of evidence in criminal cases, which… applies in extradition proceedings such as these.

[127] There are specific provisions regarding the proof of documents emanating from extraditing states under the 2003 Act (s.202). However there is no general provision which allows the court to hold as proof of fact, merely by their production, the contents of reports or other papers emanating from foreign governments, international governmental or non-governmental bodies, or academic or research institutions.

[128] The approach of both parties was to put selected passages of reports and papers to one or other or both of the two witnesses, even if they had never seen the documents before, and ask them to confirm what was written in the document … this left the court in a quandary about just what to do with the mass of material lodged, insofar as a part of it may have been put to the witnesses. In particular … it is not at all clear what status ought to be afforded to the work of [certain] organisations … [and the court] has difficulty with the concept that a judicial body should simply accept as true, and thus as proof of fact, the statements of officials in the executive of governments … or in international institutions … far less those in NGOs or groups with a particular human rights or other agenda …

[129] Whether, and to what extent, there is corruption in the judiciary in Albania is not a matter of opinion. It is a matter of fact. It is for the court (and not an expert) to decide that matter based upon competent and relevant evidence placed before it. The role of the expert may be to interpret that evidence, where his or her special skills are required to do this. However, in relation to the content of the documents, that was not the role played by the witnesses. Rather, they were used almost as commentators to introduce material, most of which was never proved as fact, contained in the large range of documents lodged. The

witnesses were not using their expertise as lawyers to assist the court's understanding of the material. The court was essentially just as capable of reading and understanding the documents as they were…"

[9] Senior counsel for the appellant submitted that the Lord Justice Clerk's observations in paragraph [125] et seq of Kapri were obiter. The more flexible approach outlined in paragraph [13] of HM Advocate v Havrilova 2012 SCCR 361, (namely bringing into play the evidential rules of criminal summary cause procedure "wherever circumstances allow") was to be preferred, certainly in extradition cases concerning human rights, abuse of process and extraneous considerations (cf dicta of Lord Mance in R(B) v Westminster Magistrates' Court [2014] 3 WLR 1336, paragraphs 22 - 23). Section 77(2) of the Extradition Act 2003 did not say in terms that criminal evidential rules were to apply. If Scotland were to adopt a stricter approach than England to evidential rules in extradition cases, that would put the Scottish courts at risk of breaching the ECHR: cf Mamazhonov v Russia [2014] ECHR 1135 paragraphs 156 - 158. The practical difficulties of finding, instructing, and funding an appropriate expert and reports, all within the extradition timescales, should be borne in mind. The terms of section 202 of the 2003 Act (which assisted the requesting state) together with the more nuanced approach in Havrilova suggested a less rigorous approach to evidence than that set out in Kapri. But when dealing, for example, with article 3 of the ECHR (prison conditions) the sheriff had not made clear whether he was rejecting certain documents lodged as not complying with the guidance in Kapri, or whether he was taking them into account despite Kapri. But on any view, it would be unfair to apply the more rigorous approach set out in Kapri (and to find, for example, that insufficient evidence had been led relating to prison conditions) when the case had initially been conducted on the basis described in R(B) v Westminster Magistrates' Court cit sup. Senior counsel accordingly invited this court, when assessing extraneous considerations, human rights, and abuse of process in the context of extradition, to take into account all the information contained in documents which had been lodged in process, even if their provenance was unknown or doubtful, and even if no relevant witness had spoken to them.

[10] The solicitor advocate for the Lord Advocate referred to practice pre-Kapri. The courts had, in the context of human rights, taken into account reports from international organisations such as the Committee for the Prevention of Torture. But the weight given to such productions might vary. Section 202 of the 2003 Act permitted "a document issued in a category 2 territory" to be "received in evidence in proceedings under [the 2003 Act] if it is duly authenticated". It was accepted that the sheriff did not appear to state expressly in his note how ultimately he had reconciled practice to date, section 202, and the guidance in Kapri.

[11] In our opinion, we are bound by the guidance given in Kapri v Lord Advocate, cit sup. While section 202 of the 2003 Act permits duly authenticated documents emanating from the requesting state to be "received in evidence in

> proceedings under [the 2003 Act] if … duly authenticated", that provision applies only to documents "issued in a category 2 country" (i.e. the requesting state), and in any event, a document may be "received" but its contents are not necessarily thereby proved. Accordingly it seems to us that section 202 does not elide the guidance in Kapri. We do not therefore consider that a court in Scotland is entitled, in extradition proceedings, to hold facts proved by the methods disapproved of in paragraph [127] et seq of Kapri. We acknowledge that the present extradition proceedings commenced prior to the issuing of the judgment in Kapri, but in our view that does not detract from the need to comply with Kapri. As it happens, we consider that the only chapter in this case affected by the ruling in Kapri concerns prison conditions and article 3 of the ECHR, in relation to which, see paragraph [58] et seq below.

This goes in line with the ruling in ***Prendi*** in as much as the documents deemed to be unauthenticed in ***Prendi*** were not issued in a category 2 country, but were issued by Interpol.

In the case before this Court, it means that if the documents were issued by a scheduled country they could be authenticated in terms of the provisions of regulation 73A of the Order and if authenticated they could be received in evidence, in which case ***Prendi*** would not apply.

This Court therefore considers that the documents submitted by the authorities of the scheduled country, in this case the United Kingdom could also be considered to satisfy the basic requirements of regulation 73A of the Order such that the Court of Magistrates could rely on these documents for the purposes of further ascertaining the identity of the person requested in the context of EAW proceedings.

Of course this does not mean that the requested person cannot raise these issues and challenges before the UK Courts in case of his surrender to face trial there because as mentioned earlier on by ***Boister and Currie*** :

> Legal doubts about the order or warrant, linked to, for instance, the legality of the evidence that served to justify the order or warrant, could only be challenged in the issuing Member State.

Defence also claims that the persons whose unsworn declarations were submitted to the Court of Magistrates were not brought to Malta for cross-examination purposes and therefore Defence was forced to face these documents without the possibility of asking questions about them and their contents. As quoted earlier from ***Nicholls, Montgomery and Knowles***, where properly authenticated evidence is presented, however, there is no duty on the requesting state to make the witnesses available for cross-examination. This seems to be a consolidated position adopted not only in the UK, but also in other Common Law countries, who draw a distinction between the right to cross-examination in ordinary criminal trials and extradition proceedings. Thus, even in the context of formal extradition proceedings, the right to cross-examination is not as sacrosanct as Defence claims; and by implication, more so in the context of EAW surrender proceedings.

In Canada, and in the context of formal extradition proceedings :

> A peculiar feature of the Extradition Act lies in its allowance of the admissibility of foreign affidavit evidence at an extradition hearing even though the affiants have not been subjected to cross-examination by op- posing counsel. In the vast majority of cases, this evidence is alone tendered to show the commission of the offense and the identification of the fugitive. The absence of a right of cross-examination has proven to be a source of much controversy and, with the proclamation into force of the Charter, promises to be problematic.
>
> Prior to the Charter, the absence of the right of cross-examination was attacked on two grounds. First, it was argued that the absence of such right violated the Canadian Bill of Rights, in particular sections 1(a) and 2(e), which encompass the right of the individual not to be deprived of his liberty except by due process and the right of a person not to be deprived of a fair hearing in accordance with the

principles of fundamental justice. In *Re Wisconsin v. Armstrong* the Federal Court of Appeal disposed of the argument in a most authoritative manner. Judge Thurlow, in an opinion cited in two subsequent cases before the same court, said:

While the Extradition Act provides that the procedure is to follow that of a preliminary inquiry it is to do so only as nearly as may be and the use in such proceedings of affidavits in proof of the alleged crime is specifically provided for. If the proceedings were in the nature of a trial on the subject of guilt or innocence the absence of a right or opportunity to test the evidence of the applicants by cross-examination might well be a serious objection to the fairness and justice of such a rule but **...** that is not the situation. The hearing is a mere inquiry and what the extradition judge has to determine is not the guilt or innocence of the fugitive but the question whether evidence produced would justify his committal for trial .... *He (the extradition judge) is not empowered to decide the merits of guilt or innocence or to pass upon the credibility of witnesses but simply to determine whether there is a sufficient case against the fugitive to justify his committal.*"

A second argument stemmed from a section 28 application to the Federal Court of Appeal, in that the absence of a right or opportunity to cross-examine constituted a violation of natural justice. In *Sudar v. United States* this argument was rejected by the Federal Court of Appeal on the ground that "natural justice" in section 28 of the Federal Court Act was in substance the equivalent of "fundamental justice" in section 2(e) of the Canadian Bill of Rights, thus duplicating the ruling of *Re Wisconsin v. Armstrong.*"

Under the Charter, there have been renewed attacks upon the constitutional validity of section 16 of the Extradition Act. In *North Carolina v. Copses,* Judge Locke of the Ontario County Court ruled that section 16 of the Act was inconsistent with section 11(d) of the Charter. Section 11(d) provides that any person charged with an offense has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. In interpreting section 11(d) Judge Locke noted that the word "hearing" was used rather than the word "trial," concluding that this must comprehend a judicial hearing and further, that fairness must include equal treatment to both sides. However, in *Re Legault,* Judge Riopel of the Quebec Superior Court held that a fair hearing implied that the fugitive be informed of the specific offense with which he is charged and of the evidence adduced as to its commission. Judge Riopel also reiterated that the extradition hear- ing was not a determination of guilt or innocence. To the same effect is *Re De Marco,*

where Judge Kane of Ontario County Court expressly referred to the decision of *Wisconsin v. Armstrong*" and its interpretation of the Canadian Bill of Rights. [11]

The issue relating to the right to cross examintion was also raised in a human rights context in the case *E.M. Kirkwood v. United Kingdom*,[12] wherein it was stated, in the context of formal extradition proceedings by the then European Commission that: -

> It is the applicant's submission that, bearing in mind the probability of the imposition of the death penalty in the event of his return to the United States and trial and conviction, and taking account of the automatic appeal procedure operated in California and the consequent delay in the implementation of any such death penalty, his extradition to the United States would constitute inhuman and degrading treatment contrary to Art. 3 of the Convention. He also invokes Art. 6 in relation to the fairness of the committal proceedings and in particular the opportunity to cross-examine witnesses against him.
>
> In addition, the applicant complains that he has been denied the opportunity to cross-examine the sole witness against him. On the basis of this testimony his extradition is sought. Under Section 10 of the 1970 Extradition Act, under English law, the magistrate is not required to decide upon the merits of the criminal charges against a fugitive as such, but he is required to decide whether the evidence adduced amounts to prima facie evidence of the commission of the offences charged. In these circumstances, it is argued that the right provided under Art. 6 (3)(d) applies to extradition proceedings and the failure of the magistrate to make the witness against the applicant available for cross-examination was in violation of that right.
>
> According to the Commission's case-law, and most recently its decision in X. v. Ireland (Application N° 9742/82) it has affirmed that the applicability of Art. 6 to extradition proceedings remains an open question.
>
> **6. Under Art. 6 of the Convention**

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[11] The Impact of Recent Extradition Cases Involving Canada and the United States: A Canadian Perspective, L.M. Bloomfield, Canada – United States Law Journal, Volume 7, Issue Article 6, 1984, Shool of Law, Case Western University.

[12] Council of Europe: European Commission on Human Rights, 12 March 1984, available at: <https://www.refworld.org/cases> COECOMMHR,3ae6b6fc1c.html [accessed 15 July 2019]

With regard to the applicant's complaint that he was unable to cross-examine the witness against him at his committal, the Government contend that the complaint is manifestly ill-founded.

The specific guarantees of Art. *6(3)* of the Convention must be examined in the context of the general entitlement to a fair and public hearing which is protected by Art. 6(1), and must usually be considered by reference to the criminal proceedings as a whole (Application N° 8303/79, D.R. 22, p 147). Due to this perspective the committal proceedings for extradition can be seen as a preliminary step in the criminal process and it would be wholly inappropriate to accord the full panoply of rights contemplated in Art. 6 to an accused at committal proceedings.

This view is supported by the underlying principles and object of extradition, to deny fugitive offenders a safe haven and to facilitate their return to a jurisdiction where they may be tried for the offence which prompted their flight. The role ofthe requested State, without jurisdiction to try the offence, is necessarily limited and the preliminary nature of the committal proceedings is self-evident. Whereas the United Kingdom may be the only member State of the Council ofEurope which insists that a prima facie case be made against the alleged offender, it is a common limitation on requested States that they are unable to compel the attendance of witnesses who are probably aliens resident abroad.

Article 12 of the European Convention on Extradition makes provision for extradition requests to be supported by documentary evidence only, no mention being made of the attendance of witnesses, and it must be assumed that that Convention and the Convention on Human Rights must be construed comparatively.

Furthermore, the fugitive offender is protected by the terms of Art. 5(4) of the Convention and is thereby able to challenge the validity of his detention pending extradition. Such proceedings are not intended to e subject to the stricter requirements of Art. 6.

It follows that this aspect of the application is inadmissible.

9. Article 6

The applicant invokes Article 6 in relation to the proceedings concerning his extradition from the United Kingdom and contends that he has not been afforded the guarantees of Article 6 (3) (d) and specifically the opportunity to cross-examine the prosecution witness against him at the committal stage of the extradition proceedings. He points out that, whereas in normal trial proceedings in the United Kingdom, any mistake occurring at the committal stage could be rectified during the trial itself, in the present case the committal stage takes on an unique significance, since the applicant's trial will take place out of the jurisdiction of the United Kingdom.

> The Commission recalls its decision on the admissibility of application No. 10227/82, H against Spain [2], where it considered whether extradition proceedings involved the "determination" of a criminal charge. It recognised that the word "determination" involve the full process of the examination of an individual's guild or innocence of an offence. Since the proceedings in Spain did not involve an examination of the question of the applicant's guilt, but merely whether formal extradition requirements had been fulfilled, that application was declared inadmissible.
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> The present case also concerns extradition, but the Commission notes that the tasks of the Magistrates' Court included the assessment of whether or not there was, on the basis of the evidence, the outline of a case to answer against the applicant. This necessarily involved a certain, limited, examination of the issues which would be decisive in the applicant's ultime trial. Nevertheless, the Commission concludes that these proceedings did not in themselves form part of the determination of the applicant's guilt or innocence, which will be the subject of separate proceedings in the United States which may be expected to conform to standards of fairness equivalent to the requirements of Article 6, including the presumption of innocence, notwithstanding the committal proceedings. In these circumstances the Commission concludes that the committal proceedings did not form part of or constitute the determination of a criminal charge within the meaning of Article 6 of the Convention. This aspect of the applicant's complaint is accordingly incompatible ratione materiae with the provisions of the Convention, within the meaning of Article 27 (2) of the Convention.
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> For these reasons, the Commission
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> DECLARES THE APPLICATION INADMISSIBLE.

In the Guide on Article 6 of the European Convention on Human Rights (ECHR), periodically issued by the Council of Europe, with the latest version updated on the 30th April 2019, it transpires that the procedures for extradition or proceedings relating to the EAW do not fall under the criminal head of Article 6, notwithstanding the fact that they may be brought in the context of criminal proceedings.[13] The ECtHR did not even require Contracting Parties to impose their standards on other States or

[13] See : Penafiel Salgado vs Spain and Monedero Angora vs Spain.

their territories[14] and therefore they do not need to verify whether the third party State trial would be Article 6 compliant.

The ECtHR did however exceptionally extend Article 6 standards to protect requested persons' rights following extradition decisions the consequence of which would lead to the risk of flagrant denial of justice in the requesting country.[15] This on account of the fact that ECtHR would consider that the third party State trial would go manifestly against the provisions and principles of Article 6.[16] The ECtHR has established certain stringent criteria on the basis of which flagrant denial of justice argument can be upheld, which criteria go beyond mere irregularities or lack of safeguards in trial proceedings. The ECtHR applied this argument in those cases where the potential breach of Article 6 would be so fundamental as to amount *to a nullification, or destruction of the very essence, of the right guaranteed by that Article (Ahorugeze v. Swede, §115; Othman (Abu Qatada) v. The United Kingdom, §260*). The ECtHR examines this flagrant denial of justice argument on the basis of the same standard and burden of proof applicable for examinations of extraditions issues under Article 3, and thus it is incumbent on the applicant to prove substantial grounds that if removed the territory of a Contracting Party he would be subject to flagrant denial of justice. In those cases where this evidence is adduced, it would then be up to the Government to dispel *any doubts about it (Saadi v. Italy [GC], § 129; J.K. and Others v. Sweden [GC], § 91; Ahorugeze v. Sweden,*

[14] See : Drozd and Janousek vs. France and Spain.
[15] See : Soering vs. The United Kingdom; Mamatkulov and Askarov vs Turkey; A;-Sadoon and Mufdhi vs the United Kingdom; Othman (Abu Qatada) vs the United Kingdom.
[16] See : Sejdovic vs Italy; Stoichkov vs Bulgaria; Drozd and Janousek vs. France and Spain

§ 116; Othman (Abu Qatada) v. the United Kingdom, §§ 272-280; El Haski v. Belgium, § 86).

With specific reference to the EAW procedure, the Guidelines clearly state the following : -

> 525. Lastly, in the context of a European Arrest Warrant (EAW) between the EU member States, the Court has held that in cases in which the State did not have any margin of manoeuvre in applying the EU law, the principle of "equivalent protection", as developed in the Court's case-law (Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland [GC], §§ 149-158; Avotiņš v. Latvia [GC], §§ 115-116), applied. This is the case where the mutual recognition mechanisms require the court to presume that the observance of fundamental rights by another member State has been sufficient. As envisaged by the EAW framework, the domestic court is thus deprived of discretion in the matter, leading to automatic application of the presumption of equivalence. However, any such presumption can be rebutted in the circumstances of a particular case. Even taking into account, in the spirit of complementarity, the manner in which mutual recognition mechanisms operate and in particular the aim of effectiveness which they pursue, the Court must verify that the principle of mutual recognition is not applied automatically and mechanically to the detriment of fundamental rights (Pirozzi v. Belgium, § 62).
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> 526. In this spirit, where the courts of a State which is both a Contracting Party to the Convention and a member State of the European Union are called upon to apply a mutual recognition mechanism established by EU law, such as the EAW, they must give full effect to that mechanism where the protection of Convention rights cannot be considered manifestly deficient. However, if a serious and substantiated complaint is raised before them to the effect that the protection of a Convention right has been manifestly deficient and this situation cannot be remedied by EU law, they cannot refrain from examining that complaint on the sole ground that they are applying EU law. In such instances, they must apply the EU law in conformity with the Convention requirements (ibid., §§ 63-64).

The argument expressed by Defence in relation to manifest human rights breaches in relation to these proceedings, in particular by reference to the alleged breach of the right to cross-examination of witnesses has to be assessed in the lights of the abovementioned pronouncements of the

ECtHR, which do not appear to militate much in favour of the arguments raised by Defence.

The Court therefore considers that on the basis of the evidence submitted to it, the Court of Magistrates could lawfully and reasonably arrive at the conclusion that, on a balance of probabilities, the person appearing in those proceedings was none other than Christopher Guest MORE, that is the same person that is being requested by the United Kingdom in terms of the EAW.

Consequently

There being no further grievances to be decided, the Court, therefore :

(a) dismisses the preliminary plea raised by the Attorney General;
(b) dismisses applicant's appeal requesting the annulment or revocation of the judgment of the Court of Magistrates (Malta) as a Court of Committal of the 21st June 2019;
(c) confirms the judgement of the Court of Magistrates (Malta) as a Court of Committal of the 21st June 2019 ordering the surrender of Christopher Guest MORE to the Judicial Authorities of the United Kingdom;
(d) and orders that appellant Christopher Guest MORE will be kept in custody to await his return to the United Kingdom;

(e) while 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.

Aaron M. Bugeja
Judge