In the Court of Magistrates (Malta)
As a Court of Preliminary Inquiry

(For purposes of the Extradition Act referred to as a Court of Committal)

Magistrate Dr. Donatella M. Frendo Dimech LL.D., Mag. Jur. (Int. Law)

The Police
(Inspector Robinson Mifsud)
(Inspector Kurt Ryan Farrugia)

-vs-

Biondy Clayd RAAFENBERG

Extradition (EAW) Proceedings No.653/2019

Today the 26th day of November, 2019

The Court,

Having seen that on the 30th October, 2019, the prosecution arraigned under arrest **Biondy Clayd RAAFENBERG, a Dutch national, holder of Dutch Passport number NPL926329 and Maltese Residence Document MT7073436** hereinafter referred to as 'the person requested';

Having seen the European Arrest Warrant issued by the Examining Magistrate in Amsterdam dated the 14th October, 2019,[1] and the Schengen Information System Alert number NL00000103453380000001 of the 18th October, 2019;[2]

Having taken cognizance of the examination of the person requested as well as the documents exhibited by the prosecution;

Having taken cognizance of the fact that the person requested was served with a copy of the European Arrest Warrant upon his arrest;[3]

In terms of Regulation 11 of the Extradition (Designated Foreign Countries) Order, S.L. 276.05, hereinafter referred to as "the Order", having seen that the person requested was informed of the contents of the Part II warrant and was given the required information about consent as provided in para (2) of the same article;[4]

Having seen that Regulation 11(1A) of the Order has been complied with;

Having explained the provisions of Regulation 43 of the said Order;

Having heard submissions by the prosecution on the European Arrest Warrant and having seen the Certificate of the Attorney General in terms of Regulation 7 of the Extradition (Designated Foreign Countries) Order, S.L. 276.05;[5]

Having heard submissions by counsel for the person requested;

Considers,

Whereas the conduct for which the person requested is being sought, the offence of fraud, constitutes a *scheduled offence*;

Whereas Regulation 59(2) of the Order provides:

[1] **Doc. KRF5** a fol. 13-15
[2] **Doc. KRF3** a fol.10
[3] Fol.3
[4] Fol.3-4; Vide also Minutes of the 5th November, 2019
[5] **Doc KRF-KRF1** a fol. 7-8

(2) The conduct constitutes an extraditable offence in relation to the scheduled country if these conditions are satisfied:
(*a*) the conduct occurs in the scheduled country and no part of it occurs in Malta;
(*b*) a certificate issued by an appropriate authority of the scheduled country shows that the conduct is scheduled conduct;
(*c*) the certificate shows that the conduct is punishable under the law of the scheduled country with imprisonment or another form of detention for a term of three years or a greater punishment.

Whereas reference is made to the Opinion of Lord Bingham of Cornhill in the Judgement (appellate Committee) delivered by the House of Lords in ***Office of the King's Prosecutor, Brussels (Respondents) v. Armas:***[6]

5. Paragraph 2 of article 2 of the Framework Decision is central to the main issue in this appeal. It sets out a list of offences which have been conveniently labelled "framework offences". These are not so much specific offences as kinds of criminal conduct, described in very general terms. Some of these, such as murder and armed robbery, are likely to feature, expressed in rather similar terms, in any developed criminal code. Others, such as corruption, racism, xenophobia, swindling and extortion, may find different expression in different codes. Included in the list, and relevant to this case, are the offences of trafficking in human beings, facilitation of unauthorised entry and residence and forgery of administrative documents. Underlying the list is an unstated assumption that offences of this character will feature in the criminal codes of all Member States. Article 2(2) accordingly provides that these framework offences, if punishable in the Member State issuing the European arrest warrant by a custodial sentence or detention order for a maximum period of at least three years, and as defined by the law of that state, shall give rise to surrender pursuant to the warrant "without verification of the double criminality of the act".

This dispensation with the requirement of double criminality is the feature which distinguishes these framework offences from others. The assumption is that double criminality need not be established in relation to these offences because it can, in effect, be taken for granted. The operation of the European arrest warrant is not, however, confined to framework offences. Paragraph 4 of article 2 provides:

> "For offences other than those covered by paragraph (2), surrender may be subject to the condition that the acts for which the European arrest warrant has been issued constitute an offence under the law of the executing [i.e., the requested] Member State, whatever the constituent elements or however it is described."

While, therefore, Member States may not require proof of double criminality where framework offences are in question they may do so in relation to any offence not covered by that list…….

[6] 17 November, 2005; SESSION 2005–06; [2005] UKHL 67; Hearing Date 12 October, 2005

Having heard defence counsel agree that the said conduct for which extradition is being sought constitutes extraditable offences;

Having heard defence counsel agree that the person's return to the scheduled country is not prohibited by any of the reasons mentioned in Regulation 13(1) of the Order;

Considers,

Whereas learned counsel for the requested person submitted that extradition should be refused on the basis that proceedings in the Netherlands are merely at an investigative stage and that the person requested is not wanted for purposes of prosecution, citing the decision pronounced by the Court of Criminal Appeal in ***Il-Pulizija vs Antonio Ricci;*** defence makes reference to the fact that the issuing authority cited in the warrant is *'the examining magistrate'*.

Additionally, learned defence counsel submits that the information contained in the document submitted by the Attorney General[7] received from the Public Prosecutor's Office in Amsterdam, should be disregarded since that information was not reproduced in the European Arrest Warrant or the Alert.

It is appropriate for the Court to deal with this latter submission in the first place.

Reference is made to the dictates of Regulation 73A of the Order which provides:[8]

> (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 sub articles (2) and (3) do not prevent a document that is not duly authenticated from being received in evidence in proceedings under this Order.

[7] **Doc. YA**

[8] In **The Police vs Christopher Guest MORE**, the Court of Criminal Appeal examined *funditus* this legal provision. Dec. 23rd July 2019 per Hon. Mr. Justice Aaron Bugeja. Appeal number – 180/2019

This regulation follows upon regulation 13 of the Order which in turn states:

> **13A.** In the event that the Court finds the information communicated by the authority which issued a Part II warrant to be insufficient to allow it to decide on surrender, it shall request the necessary supplementary information subject to any time limit which it may lay down for the purpose.

Evidently the prosecution thought it fit to obtain this information before the extradition hearing pre-empting any such request by this Court.

In view of these clear and unequivocal provisions the Court deems such information admissible in terms of law.

Considers,

Whereas as required by Article 34 of the ***Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States*** the Netherlands notified the General Secretariat of the Council and the Commission,[9]

> "The *issuing judicial authorities* are: all the public prosecutors in the Netherlands."

Having taken note that in its ***Implementation of the Framework Decision on the European Arrest Warrant***[10]

> All public prosecutors in the Netherlands can act as issuing judicial authorities, since they are competent to issue a European arrest warrant.

Having taken note of the documentation submitted by the Attorney General containing information received from the Public Prosecutor's Office in Amsterdam, clearly stating that *"it is not the intention that further investigation takes place into the suspect, Raafenberg, but that we prosecute him here in the Netherlands for attempted robbery. This means that we will summon him for a hearing of the Three-Judge Division of the Court of Amsterdam."*

Considers,

In **The Police vs Christopher Guest More** cited above the Court held:

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[9] **Brussels, 29 April 2004 (04.05) (OR. nl) 9002/04; COPEN 55 EJN 26 EUROJUST 32**
[10] **Brussels, 13 December 2004 15945/04 COPEN 149 EJN 71 EUROJUST 101**

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.

Reference is also being made to the **Opinion of Lord Scott of Foscote** in the **Judgement (Appellate Committee), House of Lords, Office of the King's Prosecutor, Brussels (Respondents) v. Armas:**[11]

50. Lord Hope has referred to the background to the European Council Framework Decision of 13 June 2002. The Framework Decision was intended to simplify the procedures for extradition of individuals from one Member State to another either for the purpose of being prosecuted for alleged criminal conduct or for the purpose of serving a sentence imposed after conviction. There were two particular features of the Framework Decision extradition scheme that, having regard to the issues raised by this appeal, deserve mention. First, in relation to offences falling within the so-called Framework List the requirement of double criminality was removed, that is to say, it would not be necessary to show that the conduct of the accused for which he was to be prosecuted in the requesting State, or which had constituted the offence of which he had been convicted in the requesting State, would have been criminal conduct for which he could have been prosecuted or convicted in this country.

[11] 17 November, 2005; Session 2005–06; [2005] UKHL 67; Hearing Date 12 October, 2005

51. Secondly, the Framework Decision was intended to make it unnecessary, whether in relation to Framework List offences or any other offences, for the requesting State to have to show that the individual had a case to answer under the law of that State. **The merits of the extradition request were to be taken on trust and not investigated by the Member State from which extradition was sought**. Article 1(2) says that:

> "Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision."

And recital (5) of the Framework Decision speaks of

> "abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities."

52. The principle underlying these changes is that each Member State is expected to accord due respect and recognition to the judicial decisions of other Member States. **Any enquiry by a Member State into the merits of a proposed prosecution in another Member State or into the soundness of a conviction in another Member State becomes, therefore, inappropriate and unwarranted.** It would be inconsistent with the principle of mutual respect for and recognition of the judicial decisions in that Member State.

53. Accordingly, the grounds on which a Member State can decline to execute a European arrest warrant issued by another Member State are very limited. Article 3 sets out grounds on which execution must be refused. Article 4 sets out grounds on which execution may be refused.

None of these grounds enable <u>the merits</u> of the proposed prosecution or the soundness of the conviction or the effect of the sentence **to be challenged.** There is one qualification that should, perhaps, be mentioned. The execution of an arrest warrant can be refused if, broadly speaking, there is reason to believe that its execution could lead to breaches of the human rights of the person whose extradition is sought (see recitals (12) and (13)).

54. These features of the Framework Decision explain, I think, the inclusion in the 2003 Act of the requirement that if an arrest warrant is issued for the purpose of prosecuting the person named in the warrant, the arrest warrant must so state (see section 2(3)(b)). Extradition for the purpose of interrogation with a view to obtaining evidence for a prosecution, whether of the extradited individual or of anyone else, is not a legitimate purpose of an arrest warrant. **But the judicial authority in the requested State cannot inquire into the purpose of the extradition**.

In the ***Handbook on How to Issue and Execute a European Arrest Warrant (2017/C 335/01)*** issued by the European Commission in October, 2017, and published in the Official Journal of the European Union,[12] one finds -

[12] Brussels, 28.9.2017 C(2017) 6389 final. At. P.10:

> This handbook takes into account the experience gained over the past 13 years of application of the European Arrest Warrant in the Union. The purpose of this revision is to update the handbook and make it more comprehensive and more user-friendly. To prepare this latest version of the handbook, the Commission consulted various stakeholders and experts, including Eurojust, the Secretariat of the European Judicial Network, and Member States' government experts and judicial authorities.

1.2. Definition and main features of the EAW

The EAW is a judicial decision enforceable in the Union that is issued by a Member State and executed in another Member State on the basis of the principle of mutual recognition.

As noted by the Court of Justice in its judgments in Case C-452/16 PPU *Poltorak*8 and Case C-477/16 PPU *Kovalkovas*9, it follows from Article 1(1) of the Framework Decision on EAW that the EAW constitutes a 'judicial decision', which must be issued by a 'judicial authority', within the meaning of Article 6(1) thereof. **The Court of Justice ruled that the words 'judicial authority', contained in Article 6(1) of the Framework Decision on EAW, are not limited to designating only the judges or courts of a Member State, but may extend, more broadly, to the authorities required to participate in administering justice in the legal system concerned**. However, the Court of Justice found that the term 'judicial authority', referred to in that provision, cannot be interpreted as also covering the police service or an organ of the executive of a Member State, such as a ministry, and that acts issued by such authorities cannot be regarded as 'judicial decisions'……..

The Framework Decision on EAW reflects a philosophy of integration in a common judicial area. It is the first legal instrument involving cooperation between the Member States on criminal matters based on the principle of mutual recognition. The issuing Member State's decision must be recognised without further formalities and solely on the basis of judicial criteria……..

2.1. Scope of the EAW

A judicial authority may issue a EAW for two purposes (Article 1(1) of the Framework Decision on EAW):

(a) criminal prosecution; or

(b) execution of a custodial sentence or detention order.

……

In some Member States' legal systems, a EAW for the execution of a custodial sentence or a detention order can be issued even if the sentence is not final and still subject to judicial review. In other Member States' legal systems, this type of EAW can be issued only when the custodial sentence or detention order is final. It is recommended that the executing judicial authority recognises the issuing judicial authority's classification for the purpose of execution of the EAW, even if it does not correspond to its own legal system in this regard.

……..

2.1.3. The requirement for an enforceable judicial decision

The issuing judicial authorities must always ensure that there is an enforceable domestic judicial decision before issuing the EAW. The nature of this decision depends on the purpose of the EAW. When the EAW is issued for the purposes of prosecution, a national arrest warrant or any other enforceable judicial decision having the same effect must have been issued by the competent judicial authorities of the issuing Member State (Article 8(l)(c) of the Framework Decision on EAW) prior to

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The handbook is available on the internet at: https://e-justice.europa.eu in all official languages of the Union.

issuing a EAW. It was confirmed by the Court of Justice in its judgment in Case C-241/15 *Bob-Dogi16 that the national arrest warrant or other judicial decision is distinct from the EAW itself. When the EAW is issued for the purposes of execution of a custodial sentence or a detention order there must be an enforceable domestic judgment to that effect…..*

The term **'judicial decision'** (that is distinct from the EAW itself) was further clarified by the Court of Justice in its judgment in Case C-453/16 PPU *Özçelik*17, where it was concluded that a confirmation by the public prosecutor's office of a national arrest warrant that was issued by the police, and on which the EAW is based, is covered by the term 'judicial decision'.

Judgment of the Court of Justice in Case C-453/16 PPU, *Özçelik*

'Article 8(1)(c) of the Council Framework Decision 2002/584/JHA (…) must be interpreted as meaning that a confirmation, such as that at issue in the main proceedings, by the public prosecutor's office, of a national arrest warrant issued previously by a police service in connection with criminal proceedings constitutes a 'judicial decision', within the meaning of that provision.'

The existence of the domestic judicial decision or arrest warrant must be indicated on the EAW form when the EAW is issued (Article 8(l)(c) of the Framework Decision on EAW and see Section 3.2 of this Handbook). The decision or warrant does not need to be attached to the EAW.

In view of the foregoing the Court is satisfied that the European Arrest Warrant is based on a judicial decision issued on the 13th May, 2019. More importantly, and on the basis of the documentation before it, the Court finds that there is no doubt that the warrant was issued by a competent judicial authority in the Netherlands for the purposes of conducting a criminal prosecution for the commission of an offence specified in the warrant.

The Court,

Having seen Regulations 13(5) and 24 of the Order,

Orders the return of **Biondy Clayd RAAFENBERG** to the Netherlands on the basis of the European Arrest Warrant and Schengen Information System Alert issued against him on the 14th October, 2019 and the 18th October, 2019, respectively, and commits him to custody while awaiting his return to the Netherlands.

This Order of Committal is being made on condition that the present extradition of the person requested to the Netherlands be subject to the law of speciality and thus solely in connection with those offences mentioned in the European Arrest Warrant issued against him and deemed to be extraditable offences by this Court, namely for armed robbery and grievous bodily harm.

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

(a) he will not be returned to the requesting country until after the expiration of seven days from the date of this order of committal and that,

(b) he may appeal to the Court of Criminal Appeal, and

(c) if he thinks that any of the provisions of Article 10(1) and (2) of the Extradition Act, Chapter 276 of the Laws of Malta has been contravened or that any provision of the Constitution of Malta or of the European Convention Act is, has been or is likely to be contravened in relation to his person as to justify a reversal, annulment or modification of the court's order of committal, he has the right to apply for redress in accordance with the provisions of article 46 of the said Constitution or of the European Convention Act, as the case may be.

Dr. Donatella M. Frendo Dimech LL.D., Mag. Jur. (Int. Law)
Magistrate