In the Court of Magistrates (Malta)
As a Court of Criminal 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
(Superintendent George Cremona)
(Inspector Omar Zammit)

-vs-

LOIAI ALJELDA

Extradition (EAW) Proceedings No. 173/2020

Today the 3rd day of June, 2020

The Court,

Having seen that on the 11th May, 2020, the prosecution arraigned under arrest **LOIAI Aljelda, holder of Maltese Identity Card no.138210A and Maltese Passport No.9025254,** hereinafter referred to as 'the person requested';

Having seen the European Arrest Warrant issued by the District Court of Györ, in Hungary, dated the 4th December, 2019,[1] and the Schengen Information System Alert number HU00000215850740000001 dated the 16th January, 2020;[2]

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

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 Regulation 11 of the ***Extradition (Designated Foreign Countries) Order***, S.L. 276.05, hereinafter referred to as "the Order";[3]

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

Having explained the provisions of Regulation 43 of the said Order;[4]

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 Order;[5]

Having heard submissions by counsel for the person requested;

Considers,

I. <u>The Certificate by the Attorney General</u>

A preliminary consideration being raised by the Court *ex officio* regards the Certificate by the Attorney General issued in terms of Regulation 7 of the Order which certificate was exhibited only in the Maltese language.

Regulation 73B of the Order provides:

> **73B.** Articles 22(3) and 27 of the relevant Act shall apply to proceedings in connection with a request for extradition to a scheduled country under this Order:

[1] **Doc. OZ5** a fol. 17 et seq
[2] **Doc. OZ7** a fol.37
[3] Fol.4-5.
[4] Ibid.
[5] **Doc.OZ2** a fol.7

> Provided that for the purposes of this Order, the words "the Minister may ask" in article 27 of the relevant Act, shall be read and construed as "the Court may ask".

Whereas Article 27 of the Extradition Act, rendered applicable to European Arrest Warrant proceedings, states:

> **27.** Any document which is to be produced in connection with a request for the return of a person according to the provisions of the Act shall be in either the Maltese or the English language, and, when any such document is in neither of these languages, the Minister may ask for its translation into the English language.

Consequently, there can be no issue as to the admissibility of the said Certificate and cognisance thereof. The fact that it was exhibited only in the Maltese language in no way detracts from its admissibility and probative value.

II. EAW for Purposes of Prosecution

It ought to be mentioned that whilst the European Arrest Warrant (EAW) was issued by the District Court of Györ on the 4th December, 2019,[6] based on a National Arrest Warrant no. 29022/484/448/2016 issued on the 18th November, 2019,[7] it is highly evident that following the issuance of the EAW, proceedings in Hungary continued to evolve culminating with the issue of a Bill of Indictment dated the dated the 28th April, 2020, issued by the Györ-Moson-Sopron County Prosecutor General's Office,

The Hungarian National Member at Eurojust states:

> "HU PPO issued indictment already in this case, the trial court is the County Court in city Györ, the Györi Törvényszék, its case nr: B.86/2020. It is different than the one, the District Court in Györ, that issued the EAW. Therefore, the case has been no longer in investigation phase in Hungary".[8]

Hence there can be no doubt that the person requested is wanted for purposes of prosecution. This confirmation followed clarifications from the Hungarian judicial authorities upon a request by this court in terms of Regulation 13A of the Order, through a decree dated the 13th May, 2020, seeking a declaration as to whether the investigations being carried out by the Hungarian authorities and referred to in the EAW had been finalised.[9]

[6] Fol.27
[7] Fol.17
[8] **Doc.OZ14** a fol.99
[9] Minutes of the 13th May, 2020, a fol.44

Moreover, following a further request by this Court in terms of the same provision[10], the Hungarian authorities clarified that the offences for which his return to Hungary is sought, namely **multiple counts of the same offence**, were committed between the 9th July, 2015 and the 21st April, 2016.[11]

III. Identity of the person requested

Having seen that in the course of the Initial Hearing it was already established, in terms of Regulation 10(2)(3) of the Order, that the person appearing before the Court was the person cited in the European Arrest Warrant;[12]

Having also noted that in the initial hearing the person requested himself confirmed that he was the person whose extradition to Hungary was being requested in the European Arrest Warrant object of these proceedings;[13]

Whereas the EAW cites the alias of the person requested as being Abu Hamza, Lui;

Considers,

In the sitting of the 13th May, 2020, the person requested confirmed that he is known as Abu Hamza Loiai.[14]

Consequently, there remains no doubt that the person appearing before this Court is the person whose surrender is being requested by the Hungarian authorities in the European Arrest Warrant issued by the District Court of Györ.

IV. Extraditable Offences

Whereas in the course of the Extradition Hearing of the 13th May, 2020, defence submitted that *"the offences for which the requested person is being requested in Hungary are extraditable offences".*[15]

[10] Minutes of the 20th May, 2020, fol.55
[11] **Doc.OZHU** a fol.177
[12] Fol.4
[13] Ibid.
[14] Fol.44
[15] Fol.43

Whereas on the 20th May, 2020, defence submitted that *"in spite of having been an [recte: in] agreement the offences in question are extraditable offences there is still a great deal of difference between offences of human trafficking and migrant smuggling as stated by other jurists".*[16]

Considers,

Defence counsel is absolutely correct in this submission, namely that the offence of trafficking in human beings differs from that of illegal immigration smuggling or its facilitation. This notwithstanding, it is not unheard of that circumstances exist which can cause a series of acts to fall within and partake of both categories of offences.

Yet, defence's submission remains immaterial and of no consequence within the context of EAW proceedings given that both offences are extraditable offences.

A Court of Committal is called upon to decide whether the conduct, however described in the European Arrest Warrant, is extraditable conduct and nothing further.

What differs, depending on the type of the offence described in the warrant - scheduled or non-scheduled, is the assessment with which the Court is tasked with undertaking in determining whether the offence is extraditable or not in terms of Regulation 59 of the Order.

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,[17] hereinafter referred to as 'the Handbook', one finds -

5. SURRENDER DECISION
5.1. General duty to execute EAWs

[16] Fol.54

[17] 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.
>
> The handbook is available on the internet at: https://e-justice.europa.eu in all official languages of the Union.

> The executing judicial authority has a general duty to execute any EAW on the basis of the principle of mutual recognition and in accordance with the provisions of the Framework Decision on EAW (Article 1). …..
>
> **5.2. The list of 32 offences which give rise to surrender without verification of double criminality**
>
> The executing judicial authority should check whether any of the offences have been determined by the issuing judicial authority as belonging to one of the 32 categories of offences listed in Article 2(2) of the Framework Decision on EAW. **The executing judicial authority can only verify double criminality for offences that are not in the list of 32 offences**.
>
> It should be emphasised that **it is only the definition of the offence and maximum punishment in the issuing Member State's law that is relevant.** The executing judicial authority **must recognise** what the issuing judicial authority has indicated in the EAW.

Thus, in the best-case scenario for the person requested, this would entail the court treating the conduct as a non-scheduled offence as described hereunder, and not holding *a priori* that the conduct does not amount to an extraditable offence as suggested by learned defence counsel, simply because the issuing authorities chose to classify conduct under two different categories.

Scheduled Conduct

When an offence is classified as scheduled conduct, falling under any one of the 32 categories of offences, the only requirement a Court must satisfy itself of, is that under the law of the issuing state (Hungary, in this case), that offence carries a punishment of at least three years and nothing further!

To impose additional elements, when the Framework Decision clearly sought to entrust the Issuing Authority (Hungary) with decisions as to the merits for which an EAW is issued, would mean that the Executing Authority (the Court of Committal), would ultimately be usurping the functions reserved exclusively to the Issuing Authority if it were to dictate how an offence ought to have been classified by its counterpart in the requesting State.

More importantly in such cases, the doubly criminality requirement is obviated; a treatment reserved for non-scheduled offences as explained hereunder when Regulation 59(3) of the Order is considered.

In the present case the offence for which the return of the person requested is being sought is that of *"illegal immigrant smuggling carried out for financial gain"*. Moreover, the Hungarian authorities indicated as finding

application the offences of ***"trafficking in human beings"*** and ***"facilitation of unauthorised entry and residence",*** both being scheduled offences.[18]

Considers,

A reading of the description of the circumstances in which the offence was committed, Para (e) of the warrant, clearly indicates that the activity described therein is tantamount to the facilitation of illegal immigration. Yet the Hungarian authorities chose to classify the conduct, for which the person requested is being sought, as falling under two categories of *"scheduled offences"* and in so doing precluding the Court from enquiring further as to the double criminality requirement, which as stated, only finds application only with respect to *"non-scheduled offences"*.

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:***[19]

> 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."

[18] Fol.23-24

[19] 17 November, 2005; SESSION 2005–06; [2005] UKHL 67; Hearing Date 12 October, 2005

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…….

Lord Scott of Foscote also delivered an Opinion in the same judgement and stated:

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.

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 the merits 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)).

The Court of Criminal Appeal declared:[20]

> ……..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.

[20] Per The Hon. Mr. Justice Aaron M. Bugeja. **The Police vs MORE Christopher Guest**; Decided 23rd July, 2019; Appeal number – 180/2019

In view of the foregoing, any attempt by this Court to decide to classify and categorize conduct based upon its own understanding and in adherence to its national law, would be tantamount to acting *ultra vires* its functions under the Framework Decision and ultimately usurping a judgment reserved exclusively to the issuing judicial authority!

Consequently, when an offence is listed as a scheduled offence, the executing authority is barred from enquiring any further into this decision; a decision duly taken by the Issuing Authority!

It is altogether futile and beyond the scope of this Court's competence to enter into the merits as to whether the conduct should have been classified solely as "*facilitation of unauthorised entry and residence*", as would have probably been the case had similar facts been brought before a local court. In truth, the conduct imputed to the person requested, had it occurred in Malta, would have constituted the offence envisaged by Article 337A of the Criminal Code,[21] rather than that under Article 248A *et sequitur* of the Code. This becomes all the more evident when the Bill of Indictment which followed upon the European Arrest Warrant is considered.

On the contrary, this Court is solely tasked to ascertain whether the requirements under Regulation 59(2) of the Order have been satisfied in relation to the scheduled offences indicated by the Hungarian judicial authority which issued the EAW.

Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, 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, in its Article 2.2 provides:

> 2. The following offences, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall, under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European arrest warrant:
> …….
> - trafficking in human beings,
> ……
> - facilitation of unauthorised entry and residence,

[21] Traffic in persons to enter or leave Malta illegally as well as an offence under Article 32(1)(a) of the Immigration Act, Chapter 217 of the Laws of Malta

Regulation 59(2) of the Order correctly implements the Framework Decision as evidenced by the above-cited extract from the Handbook, namely Para 5.2.[22] The said regulation provides:

> (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.

In the present case, the illegal immigrant smuggling attributed to having been carried out by the person requested, besides being classified under two different categories of scheduled conduct, is described as having been carried out for financial gain, committed in an organised fashion on a commercial scale as the organizer and co-actor, thereby attracting punishments of imprisonment where the maximum terms of incarceration vary from that of three (3) years, five (5) years, eight (8) years and twenty (20) years respectively.[23]

For the said reasons,

Decides that Regulation 59(2) of the Order is thus satisfied with respect to the said offence given that the conduct is classified under scheduled offences punishable by a maximum term of imprisonment of at least three (3) years.

b). Non-Scheduled Offences

As considered earlier, in the case under review, the best-case scenario for the requested person would be that the Court disregards the fact that the Issuing Authority chose to classify the conduct attributed to the person requested as scheduled offences.

[22] **5.2. The list of 32 offences which give rise to surrender without verification of double criminality**
The executing judicial authority should check whether any of the offences have been determined by the issuing judicial authority as belonging to one of the 32 categories of offences listed in Article 2(2) of the Framework Decision on EAW. **The executing judicial authority can only verify double criminality for offences that are not in the list of 32 offences**.

It should be emphasised that **it is only the definition of the offence and maximum punishment in the issuing Member State's law that is relevant.** The executing judicial authority **must recognise** what the issuing judicial authority has indicated in the EAW.

[23] Fol.22-23

Hence this Court would proceed to regard the described conduct as falling under ***non-scheduled offences*** thereby necessitating that the double criminality requirement is satisfied, namely that the conduct described in the warrant constitutes an offence under Maltese law, had it occurred in Malta**.**

Regulation 59(3) in para (c) thereof, adds that it is immaterial how that conduct is described under the issuing state's law:

> (3) The conduct also constitutes an extraditable offence in relation to the scheduled country if these conditions are satisfied:
> (*a*) the conduct occurs in the scheduled country;
> (*b*) the conduct would constitute an offence under the law of Malta if it occurred in Malta;
> (*c*) the conduct is punishable under the law of the scheduled country with imprisonment or another form of detention for a term of twelve months or a greater punishment (however it is described in that law).

Hence, all that is required is that the conduct would tantamount to an offence under Maltese law.

Under Maltese law ones finds corresponding offences of the traffic of persons as well as the traffic in persons to enter or leave Malta illegally, with the conduct for which the return of the person requested is being sought, falling under the latter rather than the former offence.

Moreover, and for completeness sake, it must be emphasized that although the substantive elements of these offences differ, the two offences are not mutually exclusive; a person may be trafficked into a country illegally only to end up being trafficked for purposes of exploitation!

This evidences the wisdom of the drafters of the EAW Framework Decision, entrusting such a determination as to how to classify offences to the Issuing Authority; the authority best placed to take such a decision given that it is the only authority privy to all the particular details of the case before it, having lived the proceedings from their inception, witnessing their evolution as evidence continues to be gathered and culminating with its' own decision to issue a warrant and prosecute a person or persons for the conduct sanctioned under its own penal system.

Bearing in mind the Rule of Speciality, what remains paramount in these proceedings, is that however described and categorised under Hungarian law, the conduct for which extradition can be granted remains ultimately that described in the warrant:

"1 count of the felony of illegal immigrant smuggling carried out for financial gain by crossing the state border, committed repetitively in an organised fashion as the organiser of the criminal act and as co-actor on a commercial scale by providing aid to multiple persons as defined under Section 353(1), qualified by Subsection (2)a),b) and punishable according to Subsections (3)d) and (5), in view of Section 459(1)1) of the Criminal Code".[24]

A reading of the Bill of Indictment clearly describes the conduct as that of smuggling of human beings.[25]

Regulation 59(3) of the Order lays down the cumulative requirements which must be satisfied when a court must determine whether a non-scheduled offence is an extraditable offence:

> (3) The conduct also constitutes an extraditable offence in relation to the scheduled country if these conditions are satisfied:
> (*a*) the conduct occurs in the scheduled country;
> (*b*) the conduct would constitute an offence under the law of Malta if it occurred in Malta;
> (*c*) the conduct is punishable under the law of the scheduled country with imprisonment or another form of detention for a term of twelve months or a greater punishment (**however it is described in that law)**.

A reading of the description of the circumstances in which the offence was committed[26] and as confirmed in Form A,[27] shows the conduct having been committed on Hungarian soil, thus satisfying para (a) of Regulation 59(3).

Consequently, it remains to be seen whether the smuggling of human beings constitutes an offence under Maltese law, given that, *inter alia*, the double criminality requirement needs to be satisfied in relation to non-scheduled offences.

For purposes of assessing whether Regulation 59(3)(b) of the Order is also satisfied, thus enabling the court to assess whether the circumstances of the offence as described in para (e) of the warrant,[28] constitute an offence under Maltese law, reference is first made to Article 248A of the Criminal Code:

> 248A. (1) Whosoever, by any means mentioned in sub-article (2), traffics a person of age for the purpose of exploiting that person in:
> (*a*) the production of goods or provision of services; or
> (*b*) slavery or practices similar to slavery; or

[24] Fol.22
[25] **Doc.OZ13** a fol.94
[26] Para (e) a fol.20-22
[27] **Doc.OZ7** a fol. 38
[28] Folo.20-22

(*c*) servitude or forced labour; or
(*d*) activities associated with begging; or
(*e*) any other unlawful activities not specifically provided for elsewhere under this sub-title,

shall, on conviction, be liable to the punishment of imprisonment from six to twelve years.

For the purposes of this sub-article exploitation includes requiring a person to produce goods and provide services under conditions and in circumstances which infringe labour standards governing working conditions, salaries and health and safety.

(2) The means referred to in sub-article (1) are the following:
(*a*) violence or threats, including abduction;
(*b*) deceit or fraud;
(*c*) misuse of authority, influence or pressure;
(*d*) the giving or receiving of payments or benefits to achieve the consent of the person having control over another person;
(*e*) abuse of power or of a position of vulnerability:
Provided that in this paragraph "position of vulnerability" means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved.

More importantly Article 32(1)(a) of the Immigration Act provides:

Any person who -(a) aids or assists any person to land or attempt to land in Malta, or to reside in Malta, contrary to the provisions of this Act, or any person to land or attempt to land, or to reside in, or to leave any other State contrary to the law on entry, residence and exit of that State, or conceals or harbours any person whom he knows, or has reasonable ground for believing, to be in Malta contrary to the provisions of this Act;

Yet **it is Article 337A of the Criminal Code that assumes the greater relevance** in this Court's determination of the issue before it:

337A. (1) Any person who with the intent to make any gain whatsoever aids, assists, counsels or procures any other person to enter or to attempt to enter or to leave or attempt to leave or to transit across or to attempt to transit across, Malta in contravention of the laws thereof or who, in Malta or outside Malta, conspires to that effect with any other person shall, without prejudice to any other punishment under this Code or under any other law, be liable to the punishment of imprisonment from six months to five years or to a fine (*multa*) of twenty-three thousand and two hundred and ninety three euro and seventy-three cents (23,293.73) or to both such fine and imprisonment and the provisions of articles 21 and 28A and those of the Probation Act shall not apply:

Provided that where the persons aided, assisted, counselled, procured or the object of the conspiracy as aforesaid number more than three the punishment shall be increased by one to three degrees:

Provided also that where the offence is committed -
(*a*) as an activity of a criminal organization; or

(*b*) while endangering the lives of the persons aided, assisted, counselled, procured or the object of the conspiracy as aforesaid, the punishment shall always be increased by two degrees even when the first proviso does not apply.

In view of the foregoing, there is no doubt whatsoever that the conduct described by the Hungarian authorities and which was **categorised under two different scheduled offences**, also **constitute offences under Maltese law** had the conduct therein described occurred in Malta.[29]

Lastly in order to satisfy the requirement under Regulation 59(3)(c) the Court notes that these offences would be punishable under Hungarian law – *"under the law of the scheduled country"* - with imprisonment for a term of twelve months or greater punishment. It has already been stated when considering the scheduled offences that the offence for which the LOIAI's return is sought carries a punishment which varies in maximum terms of imprisonment of three (3), five (5), ten (10) and twenty (20) years. Consequently,

Decides that the offence for which the return of Aljelda LOIAI is sought and which is listed in the European Arrest Warrant in para (e) thereof,[30] is also an extraditable offence in terms of Regulation 59(3) the Order.

V. Bars to Extradition

I. Ne bis in Idem

Defence counsel raised the plea of *ne bis in idem* as a bar to extradition, claiming that LOIAI had been convicted by an Austrian Court for the same offence for which his return to Hungary is being sought.

Regulation 13 of the Order provides:

> **13.** (1) If the court is required to proceed under this article it must decide whether the person's return to the scheduled country is prohibited by reason of -
>
> (*a*) the rule of *ne bis in idem*;

Regulation 14 of the Order in turn states:

[29] In order to establish whether Malta would have had jurisdiction in similar circumstances Article 248E(5) and 337A(2) of the Criminal Code assume relevance respectively.
[30] Fol.22

14. For the purposes of this Order, a person's return to a scheduled country is barred by reason of the rule of *ne bis in idem* if, and only if, it appears that he would be entitled to be discharged under any rule of law relating to previous acquittal or conviction on the assumption –

(*a*) that the conduct constituting the extraditable offence constituted an offence in Malta;
(*b*) that the person were charged with the extraditable offence in Malta.

The Court notes that although it ought to have been the said defence who should have provided the evidence to substantiate its own plea, it was the prosecution who sought and obtained the necessary clarifications from both the Austrian as well as the Hungarian competent judicial authorities following a request by this Court in terms of Regulation 13A of the Order.

Information was obtained from SIRENE channels, *inter alia* through through SIS, and more importantly from the Austrian and Hungarian desks within Eurojust.

A. The European Arrest Warrant[31] & the Bill of Indictment[32] issued by the Hungarian Authorities

From a reading of the description of the circumstances of the **various counts of the only offence**[33] for which LOIAI is wanted to face prosecution in Hungary, the following facts emerge:

a). The investigation leading to the issue of this warrant was initiated on the 18th April, 2016, when a Megane bearing Hungarian registration plates was intercepted by Győr-Moson-Sopron County Police in Borcs[34] carrying 4 Afghan nationals heading to Austria. The driver Gabor Gonczi had in total transported 14 migrants from Hungary to Austria between the 10th April and 18th April, 2016. The vehicle had been given to him by Marton Sztojka who commissioned Gabor and paid him €100 for every successful transport. Another person, Otto Keszthelyi, using a Suzuki bearing Hungarian registration plates (MTT586) on at least 5 occasions drove ahead of Gabor as a look out and was commissioned to do so by both Sztojka and LOIAI, the person requested. Otto leased the Suzuki for the period of the 8th April, 2016 – 21 April, 2016 and both Marton nd LOIAI paid for its leasing the amount of HUF5,000.[35]

[31] **Doc.OZ5** a fol. 17 et seq.
[32] **Doc.OZ13** a fol.86 et seq
[33] Fol.20-22
[34] Börcs is a village in Győr-Moson-Sopron county in Hungary
[35] Fol.20

This account is reflected in Charge No.1 of the Bill of Indictment.[36]

b). Police from Győr-Moson-Sopron county pulled over an Audi with French registration plates being driven by a Romanian Jolt-Cristi Kocze on the 8th March, 2016. In the vehicle were 5 Moroccans who Jolt was intending to take into Austria. Marton and LOIAI commissioned this trip after having personally met Jolt in Budapest.[37]

Charge No.7 of the Bill of Indictment reflects these facts.[38]

c). On the 16th March, 2016, an officer from the Bacsalmas Border Station pulled over a Citroen Jumper van bearing Slovakian registration plates driven by Romanian national Florin Ion Covaci outside the municipal boundary of Kunbaja. Fifteen Palestinian and Syrian nationals were intercepted after having been brought into Hungary from Serbia after being picked up at the Serbian-Hungarian border with the intention of taking them to Austria, Germany and Switzerland. LOIAI (who Florin knew as Lui) and Marton had commissioned Florin.[39]

Charge No.8 of the Bill of Indictment reflects the circumstances described in the European Arrest Warrant. [40]

d). On the 20th February, 2016, a Seat Ibiza (driven by Jozsef Laszlo Ali), and a Suzuki Swift (driven by Zsolt Sztojka) which was following the Ibiza, both bearing Hungarian plates, were pulled over in Austria. 4 Somali nationals were being illegally transported from Hungary into Austria. The drivers were prosecuted in Austria.[41]It was established that on the 17th February, 2016, together with Marton, LOIAI had leased the Suzuki Swift (KLY024) and commissioned it for the illegal transportation of people.

Charge No.4 in the Bill of Indictment reflects this count.[42]

e). On the 29th February, 2016, the Austrain authorities pulled over a Ford Focus bearing German registration plates driven by Attila Szolosi on Austrian territory. On board were 4 Moroccans who had been driven into Austria from Bicske in Hungary. Attila was prosecuted by the Austrian authorities. LOIAI

[36] Fol.88-89
[37] Fol.20-21
[38] Fol.91
[39] Fol.21
[40] Fol.91-92
[41] Ibid
[42] Fol.90

and Martin had similarly commissioned Attila to transport migrants from Hungary into Austria.[43]

This account is further expounded upon in Charge No.5 of the Bill of Indictment.[44]

f). On the 7th March, 2016, the Austrian authorities pulled over a Ford Mondeo bearing Romanian plates driven by Laszlo Raski and a Ford Escort with Hungarian plates driven by Gyorgy Czeripp in Braunau Austria. Nine (9) migrants were found in the vehicles and criminal proceedings were instituted against the drivers. LOIAI had commissioned the transportation of these migrants and was the one who handed over the Ford Mondeo to Laszlo in Budapest. It was established that Gyorgy had, on another two separate occasions prior to his detection, transported from Hungary into Austria seven (7) persons; this transportation had not been intercepted.[45]

Charge No.6 in the Bill of Indictment describes LOIAI's involvement in greater detail.[46]

B. The Austrian Judgment

A judgment by the Criminal Court of Vienna dated the 13th November, 2017,[47] shows that LOIAI was convicted of having in Vienna, in Austrian federal territory and in the European Union, *"in a number of offences that* ***can no longer be precisely determined"*** as part of a criminal organization composed of his co-accused (LAND, MERSCHOEV and ELBIEV) and a number of named individuals *"as well as other, in part unknown offenders"* assisted *"the unlawful entry of aliens into or travel through Member States of the European Union"*.[48] LOIAI was found guilty of having *"in the period of mid-2015 to 21.7.2016 in relation to 55 aliens…smuggled to Selim LAND, Besland ELBIEV and Alischan MERSCHOEV….for instance inter alia 5 aliens on 7.9.2015, whereby the people-smuggling operation was carried out by the driver Roland HORVATH"*.[49]

It is in the reasons for its decision that the Court provides an insight as to the particular facts upon which LOIAI's conviction was founded. This in turn

[43] Fol.21-22
[44] Fol.90
[45] Fol.22
[46] Fol.90-91
[47] Ref 43 HV 61/17d
[48] Fol.65
[49] Fol.65-66

will help the Court determine whether defence's plea of *ne bis in idem* is justified.

The Viennese Court states that it relied on evidence by witnesses HOLKOVICS, AKAEV, HORVATH and ARTBAUER and could only ascertain that "*No later than summer 2015, the first accused (LOIAI) spotted a source of income in the "people smuggling operation business model" and decided to establish an organization. This was necessary because international people smuggling demands a high degree of organization and also the rise in state measures to prevent illegal entry by persons, such as increased border controls, has gradually made people-smuggling more difficult. ……The criminal organization hereby usually proceeded as follows: the prospective illegal alien migrants were brought from their homelands to Hungary by unknown people-smuggling organizations…usually acting as head of the organization from Budapest, Hungary, acquired the aliens in Budapest…..The accused* ***organised numerous people smuggling operations, and it is impossible to determine the precise number."***[50]

The Court notes that the judgement is scant in details of the distinct episodes of LOIAI's "people-smuggling" operations. One finds **no dates** of these individual episodes except for the incident of the 7.9.2015 which led to the apprehension of Roland HORVATH who was caught attempting to smuggle 5 aliens:

"*In implementing the plan, Loiai ALJELDA had commercially assisted the unlawful entry by aliens into or travel through Member States of the European Union with a view to illegal enrichment of himself or a third party from a payment made for the same, specifically in the period of mid-2015 to 21.7.2016 in relation to at least 55 aliens, whereby he primarily recruited individuals who wished to be smuggled from Budapest, negotiating the prices and passing the individuals to be smuggled to Selim LAND, Beslan ELBIEV and Alischan MERSCHOEV as well as in some cases directly to the people smuggling drivers, thereby organizing their onward transportation, as well as collecting and sharing payments for people smuggling, for instance inter alia 5 aliens on 7.9.2015 ….by the driver Roland HORVATH. The people smuggling operation by Roland HORVATH took place as follows: HORVATH was contacted in Budapest by an unknown person who wanted to pass on a people-smuggling job to him. This person then introduced HORVATH to the first accused (LOIAI) at the M+D Hotel in Budapest. The first accused (LOIAI) discussed the details of the people smuggling operation with HORVATH: 5 individuals were to be transported to Vienna…. The first accused (LOIAI) himself collected the 5 aliens and brought them to HORVATH in the car. The car then subsequently broke down on the road, on account of a fault, and the aliens as we'll as HORVATH were picked up by the police."*[51]

[50] Fol.70
[51] Fol.71

Thus, in mentioning the names of his partners in this illicit venture and the drivers which were used to carry out the operation, it allows the Court to ascertain that **the facts of which the Viennese Court convicted LOIAI are altogether different from the facts of the illicit activity for which his return to Hungary is being requested:**

The Austrian judgement states that LOIAI's co-accused were Selim LAND, Beslan ELBIEV and Alischan MERSCHOEV. Other persons cited in the judgement as being prosecuted or sentenced by the Austrian courts in connection with the same offences as LOIAI are BABIJEV, DADALOW, AKAEV, TURASHEV, NATSIURI, BAJTIMIEV, MAMBAKH, SPULING, SAVELEV, MULLER and ZAREMBA.[52]

On the other hand, whilst the Hungarian arrest warrant and increasingly so, the Bill of Indictment, abound in details specifying the time, place, date of each operation of traffic in migrants, for which LOIAI is being sought for prosecution in Hungary, details are also provided as to the identity of his partners in crime including the drivers with whose involvement the traffic in migrants was taking place:

The names of the drivers and the members of the criminal organization, cited in the Hungarian EAW and the relative Bill of Indictment, are totally different from the names mentioned in the Austrian judgement, these being: Gabor GONCZI, Marton SZTOJKA, Otto KESZTHELYI, Jolt-Cristi KOCZE, Florin Ion COVACI, Jozsef Laszlo ALI, Zsolt SZTOJKA, Attila SZOLOSI, Laszlo RASKI, Ferenc Sandor KISS and Geza SCHAHAY.

Moreover it is also interesting to note that whilst the Austrian judgement does not cite the smuggled persons' nationalities, the Hungarian warrant and indictment cite Moroccans, Afghans, Palestinian, Syrian and Somali nationals.

Also of relevance is the fact that throughout the judgement, one finds various instances marking **a vagueness** in details: *"in a number of offences that **can no longer be precisely determined";** "as well as other, in part **unknown offenders**"; "in the period of mid-2015 to 21.7.2016 in relation to at least 55 aliens".*[53]

Moreover, the Austrian Court in its considerations regarding the person requested stated:

[52] Fol.65
[53] Ibid.

"It cannot be established with the certainty necessary for criminal proceedings that the first accused organised other people smuggling operations in the period of 2015 to 21.7.2016 in addition to the number of aliens given in the statement, or participated in them in other ways".[54]

Earlier in the judgement it held:

"Loiai Aljelda,….in Vienna and other locations in the Federal territory and in the European Union in a number of offences that can no longer be precisely determined.[55]*…..committed the crime of people-smuggling*[56] *under Section 114(1), (3)(1), (4) first case FPG.*[57]

Towards the end of the judgement this is reiterated:

"It could not be established by means of the available evidence with the certainty necessary for criminal proceedings that the first accused had smuggled more aliens than the number named in the verdict."[58]

It is also interesting to note what the Deputy National Member for Austria states in his communication dated the 20th May, 2020:

"The only specific offence that could be proven was the smuggling of 5 persons taking place on 7 September 2015 carried out by Roland Horvath. The remaining 50 persons are based on the confession by the convicted person himself, whereby he didn't give any more details on when the offences exactly took place other than between mid-2015 and 21 July, 2016. Therefore the wording in the verdict is as vague as you saw…. the exact time and quantity of these transports cannot be determined".[59]

There is no basis to conclude that LOIAI's Austrian conviction included acts for which his return to Hungary is sought! How can one be found guilty of accusations which remain unformulated and unknown to his very same accusers? How is it possible to arrive at a finding of guilt for that which has not yet come to light? Even worse, such a stance would lead to the absurdity that

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[54] Fol. 71

[55] Fol.65

[56] Fol.67

[57] Federal Act on the Conduct of Aliens Police Operations, the Issue of Documents for Aliens and the Granting of Entry Permits; (2005 Aliens Police Act – Fremdenpolizeigesetz 2005) Section 2 Penal provisions; Smuggling of persons:
Article 114. (1) Any person who knowingly assists in the unlawful entry or transit of an alien into or through a Member State of the European Union or neighbouring State of Austria shall be sentenced by the court to a term of imprisonment of up to one year. ……
(3) Any person who commits the offence under paragraph (2) above on a commercial basis (article 70 of the Criminal Code) or in a manner that subjects the alien to a state of torture for a prolonged period of time, in particular during transport, shall be sentenced by the court to a term of imprisonment of six months up to five years.

[58] Fol.77

[59] **Doc.KB1** a fol.194

if, in the future, criminal activity becomes known, one is regaled with impunity for one's acts due to some umbrella conviction for acts which at the time of the conviction all and sundry remained oblivious to!!

Also weighing in on this Court's considerations is the fact that the Hungarian indictment makes mention of **eight (8) instances of migrant smuggling which led to a total of 93 people being smuggled**,[60] indicating with meticulous detail the particular facts surrounding each episode, coupled to the different persons involved in the LOIAI's criminal activity.

This serves to dispel all doubts that LOIAI is wanted in Hungary for the same facts upon which he was convicted by the Austrian Court since there is absolutely no evidence to suggest, that these were the same facts for which he will be prosecuted upon his return to Hungary.

It is interesting to note that as stated by the Austrian Deputy National Member in Eurojust, the conviction in Austria rested on a confession by the intercepted driver, Roland Horvath.[61] However it results very clearly that t**he names of the members of the criminal organization mentioned by Horvath and which are cited in the Austrian judgement,[62] are altogether different from the names of the members of LOIAI's operation in Hungary.[63]**

The Criminal Court had these considerations to make when a plea of *ne bis in idem* was raised:[64]

> Ikkunsidrat,
>
> Illi l-principju tan-*ne bis in idem* jinsab imhaddan mhux biss fid-dritt penali taghna u cioe' fil-Kodici Kriminali izda ukoll fil-Kostituzzjoni u l-Konvenzjoni Ewropeja tad-Drittijiet tal-Bniedem. Illum bis-shubija ta' Malta fl-Unjoni Ewropeja dan il-principju jinsab imhaddan ukoll fl-artikolu 50 tac-Charter of Fundamental Rights of the European Union li jaqra hekk:
>
> **"L-ebda persuna ma tista' terġa' tkun ipproċessata jew ikkundannata għal reat li għalih tkun diġà instabet mhux ħatja jew ikkundannata fl-Unjoni b'sentenza li daħlet in ġudikat skond il-liġi**.
>
> Illi ukoll l-artikolu 54 tal-Konvenzjoni Schengen (14 June 1985 il-Konvenzjoni ghall-Implimentazzjoni tal-Ftehim Schengen KIFS) jistipula:
>
> **"Persuna li l-każ tagħha jkun inqata' b'mod finali f'Parti Kontraenti waħda ma tistax tiġi mixlija f'Parti Kontraenti oħra għall-istess azzjonijiet sakemm, jekk tkun ġiet imposta**

[60] **Doc.OZ13** a fol.92. **Doc.OZHU** a fol.177**; Doc.KB** a fol.193
[61] **Doc.KB1** a fol.194
[62] Vide fol.64-67, fol.70-71
[63] Fol.86-92
[64] Decision on Preliminary Pleas Per Mdme Justice Dr. Edwina Grima; Dec.30th November, 2016. Bill of Indictment No.39/2009; **Ir-Repubblika ta' Malta Vs Omissis, Romeo Bone**

penali, din tkun ġiet infurzata, tkun fil-fatt fil-proċess li tiġi infurzata jew ma tkunx tista' tiġi infurzata iżjed taħt il-liġijiet tal-Parti Kontraenti fejn tkun ingħatat is-sentenza."

……..

Illi stabbiliti dawn il-principji ta' dritt ewropew in materja iqum id-dibattitu li ta sikwit isib ruhu f'hogor kemm il-qrati lokali kif ukoll dawk fuq livell ewropew dwar dak li ghandu jikkostitwixxi l-"idem" u cioe' jekk huwiex il-process gudizzjarju mill-gdid dwar l-istess 'reat jew reati' jew inkella dwar l-istess 'fatti' jew 'azzjonijiet', u allura il-kwistjoni dwar liema ligi hija applikabbli issa meta Malta hija Stat Membru ta'l-Unjoni Ewropeja. Dan ghaliex anke fil-ligi penali taghna u fil-jedd imhares mill-Kostituzzjoni tinsorgi din id-distinzjoni kif ukoll f'dak dikjarat fir-raba artikolu tas-Seba Protokol tal-Konvenzjoni Ewropeja Dwar id-Drittijiet tal-Bniedem.

Illi l-artikolu 527 tal-Kapitolu 9 tal-Ligijiet ta' Malta jaqra testwalment;

"*Wara sentenza li f'kawza tillibera imputat jew akkuzat, dan ma jistax ghall-istess fatt ikun soggett ghal kawza ohra*."

Dana jippostula zewg elementi importanti u cioe' fl-ewwel lok irid ikun hemm sentenza fejn l-individwu jigi illiberat mill-akkuzi u fit-tieni lok illi l-persuna ma tigix sottoposta ghal proceduri godda dwar l-istess fatt u mhux l-istess reat, kuntrarajament ghal jedd imhares mill-kostituzzjoni u il-Konvenzjoni Ewropeja li jitkellmu dwar "ir-reat"[65].

Wiehed allura jistaqsi b'liema kejl ghandha tigi deciza l-eccezzjoni ta *ne bis in idem*, hux jekk bil-fatt illi il-gudikabbli ikun gie ipprocessat dwar l-istess fatti jew jekk ikunx gie hekk ipprocessat dwar l-istess reati. Dan huwa il-kwezit legali li qed jigi sottopost ghal gudizzju ta' din il-Qorti, ghaliex filwaqt li id-difiza tikkontendi illi l-fatti li dwarhom l-akkuzat gie ipprocessat gewwa it-tribunal ta' Catania huma l-istess bhal dawk li issa qed jiffaccja permezz tal-presenti istanza, l-Avukat Generali minn naha tieghu jirribatti illi ghalkemm uhud mill-fatti huma identici, madanakollu dan il-kaz idur madwar fatti ohra li ma ingiebux a konjizzjoni ta' dak it-tribunal oltre ghal fatt illi l-akkuzi huma differenti bl-akkuzat jigi ipprocessat gewwa Catania ghar-reat tat-traffikar u importazzjoni ta' droga filwaqt illi bil-presenti istanza huwa qieghed jiffaccja l-akkuza dwar assocjazzjoni ghall-importazzjoni u traffikar ta' droga. [emphasis by this Court]

Issa l-qrati taghna dejjem applikaw it-test biex wiehed jistabbilixxi jekk hix applikabbli l-eccezzjoni ta' *ne bis in idem,* bhala dak citat fid-decizjoni **"Sua Maesta' il-Re versus Agata Mifsud e Carmelo Galea" [15.6.1918] u cioe' fejn intqal li :**

"un criterio pratico non meno che ragionale per determinare se ad un dato caso si applichi la regola "non bis in idem" e' quello appunto affermato dalla giurisprudenza ed accolto dalla dottrina giuridica in Inghilterra ***. "The true test by which the question whether such a plea (i.e. Autrefoit acquit) is a sufficient bar in any particular case may be tried, is whether the evidence to support the second indictment would have been sufficient to prove a legal conviction upon the first."***[66]

[65] Ara artikolu 39(9) tal-Kostituzzjoni

[66] Qorti ta'l-Appell Kriminali (per Imhallef Galea Debono) deciza fis-17 ta' Marzu 2008 fil-kawza fl-ismijiet **il-Pulizija vs Nicolai Magrin**

Illi s-sentenza taghmel esposizzjoni tajba ta' dana il-principju kif jinsab imhaddan fil-ligi taghna kemm penali kif ukoll kostituzzjonali hija dik moghtija mill-Qorti Civili Prim'Awla (Gurisdizzjoni Kostituzzjonali) **Il-Pulizija vs Nicolai (Nicolai-Christian) Magrin.**[67]

"... Il-principju tan-*ne bis in idem* imhares fl-artikolu 39(9) tal-Kostituzzjoni jimplika li persuna li tkun ghaddiet minn process dwar reat, m'ghandha qatt terga' tghaddi minn process iehor **dwar tali reat jew dwar reati ohra li setghet tinstab hatja dwarhom fl-ewwel process.** .... Illi dana is-subartikolu fil-Kostituzzjoni jaghti harsien usa lil-persuna mixlija minn dak moghti mill-artikolu 527 tal-Kodici Kriminali, sewwasew ghaliex jgholli l-eccezzjoni tan-*ne bis in idem* ghall-livell ta' garanzija kostituzzjonali bil-konsegwenza li persuna li jkollha dan il-jedd mhedded jew attwalment miksur quddiem qorti kriminali ghandha l-jedd tirrikorri ghall-protezzjoni quddiem qorti ta' xejra kostituzzjonali."

Kif mistqarr mill-kompjant Imhallef William Harding ghar-rigward tat-thaddim tar-regola *ne bis in idem*: "*The criminal action is extinguished ... when there has been one act on the part of the accused and he has already been convicted (or acquitted) of an offence founded on such act, and afterwards, he is again brought up for judgment on a different charge, but <u>founded on the same act</u>.*"

Illi ghalhekk kif gie sottolinjat iktar 'il fuq fis-sentenza citata l-artikolu 39(9) tal-Kostituzzjoni jipprovdi dwar id-dritt li l-ebda persuna li tkun ghaddiet minn procediment quddiem Qorti kompetenti dwar reat kriminali (sew jekk tkun inhelset mill-akkuza u sew jekk tkun instabet hatja) ma tista' terga' titressaq mixlija fi proceduri ohrajn dwar dak ir-reat jew xi reat iehor li ghalih setghet instabet hatja fl-ewwel procediment.

Illi imbaghad l-artikolu 4 tas-Seba' Protokoll tal-Konvenzjoni, li jifforma parti mil-ligi ta' Malta, jipprovdi li hadd ma jista' jigi pprocessat jew ikkastigat ghal darba ohra fi procediment kriminali taht il-gurisdizzjoni tal-istess Stat ghal xi reat li dwaru jkun gie ipprocessat (kemm jekk ikun inheles kif ukoll jekk ikun instab hati) skond il-ligi u l-procedura penali f'dak l-Istat. L-imsemmi artikolu jaghmel eccezzjoni fil-kaz li, skond il-ligi u l-procedura penali ta' xi Stat, kaz jista' jerga' jinfetah jekk ikun hemm provi ta' fatti godda li jkunu ghadhom kif irrizultaw, jew jekk fl-ewwel procediment ikun sehh xi "vizzju fondamentali", li f'kull kaz minnhom jista' jkollhom effett fuq kif jisvolgi l-kaz.

Illi il-Qorti Ewropeja Dwar id-Drittijiet tal-Bniedem fid-decizjoni fl-ismijiet **Sergey Zolotukhin vs Russja** moghtija mill-Grand Chamber tal-Qorti Ewropea tad-Drittijiet tal-Bniedem:

"*takes the view that Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second 'offence' in so far as it arises from identical facts or facts which are substantially the same. The guarantee enshrined in Article 4 of Protocol No. 7 becomes relevant on commencement of new prosecution, where a prior acquittal or conviction has already acquired the force of res judicata. At this juncture, the available material will necessarily comprise the decision by which the first 'penal procedure' was concluded and the list of charges leveled against the applicant in the new proceedings. Normally, these documents would contain a statement of facts concerning both the offence for which the applicant has already been tried and the offence for which he or she stands accused. <u>In the Court's view, such statements of fact are an important starting point for its determination of the issue whether the facts in both proceedings were identical or substantially the same.</u> The Court emphasises that it is irrelevant which parts of the*

[67] Sentenza deciza is-26 ta' Marzu 2009.

new charges are eventually upheld or dismissed in the subsequent proceedings, because Article 4 of Protocol No. 7 contains a safeguard against being tried or being liable to be tried again in new proceedings rather than a prohibition on a second conviction or acquittal. The Court's inquiry should therefore focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings"[68]

Illi kif inghad bis-shubija ta' Malta fl-Unjoni Ewropeja u fid-dawl tal-fatt illi skond l-Artikolu 1 tal-Protokoll li jintegra l-*acquis* ta' Schengen fil-qafas ta' l-Unjoni Ewropea, anness mat-Trattat dwar l-Unjoni Ewropea u mat-Trattat li jistabbilixxi l-Komunità Ewropea, din il-kwistjoni ta' territorjalita' giet imwessa sabiex il-gurisdizzjoni ma hijiex limitata biss ghall-Istat Membru li fih ikun inbeda tali procediment, izda anke l-Istati Membri l-ohra fejn allura il-principju tan-*ne bis in idem* gie rikonoxxut bhala principju fundamentali tal-ligi kommunitarja. Ghalkemm ghandu jinghad illi min ezami kemm tad-dritt komunitarju kif ukoll tal-Qorti Ewropeja dwar id-drittijiet tal-Bniedem jidher illi l-interpretazzjoni ta' dan il-principju ta' dritt hija wahda komuni fis-sens illi l-Qorti trid tinvestiga u tara jekk il-fatti jew l-azzjonijiet humiex marbuta flimkien fiz-zmien u fl-ispajzu, iktar milli jekk hemmx intenzjoni kriminuza unika u immaterjalment mill-klassifikazzjoni legali moghtija lil dawk il-fatti fl-Istati Membri differenti. Dan ghaliex huwa indubitat illi jekk il-fatti tal-kaz huma marbuta flimkien allura l-provi ser ikunu identici ghalkemm l-akkuzi jista' ikun differenti.

……

Illi t-test li ghandu jigi applikat minn din il-Qorti huwa dwar **l-identita ta'l-atti materjali u cioe' tal-fatti marbuta flimkien tal-kaz** u dan immaterjalment mill-offiza li titwieled abbazi ta' dawk il-fatti. Illi kif iddecidiet l-Qorti tal-Ġustizzja Ewropeja l-uniku kriterju rilevanti għall-finijiet ta' l-applikazzjoni ta' l-Artikolu 54 tal-KIFS huwa l-kriterju ta' l-**identiċità tal-fatti materjali**, **mifhuma bħala l-eżistenza ta' ġabra ta' ċirkustanzi konkreti inseparabbilment marbuta bejniethom**. **Sabiex jiddeterminaw jekk teżistix tali ġabra ta' ċirkustanzi konkreti, din il-Qorti għandha tiddetermina jekk il-fatti materjali taż-żewġ proċeduri jikkostitwixxux ġabra ta' azzjonijiet inseparabbilment marbuta fiż-żmien, fl-ispazju kif ukoll permezz tas-suġġett tagħhom**. "Minn dan isegwi li l-punt tat-tluq għall-evalwazzjoni tal-kunċett ta' l-"istess azzjonijiet" fis-sens ta' l-Artikolu 54 tal-KIFS huwa evalwazzjoni globali ta' l-imġieba illegali konkreta li tat lok għall-proċeduri kriminali quddiem il-qrati taż-żewġ Stati kontraenti[69]." [emphasis by this Court]

Stabbilit dan allura, ma hemmx dubbju illi ghalkemm l-akkuzat gie sottopost ghal proceduri penali gewwa l-Italja dwar l-komplicita fl-importazzjoni tad-droga kokajina u cannabis, liema droga qatt ma wasslet fi xtutna. madanakollu jidher illi l-assocjazzjoni li dwaru Bone jinsab akkuzat f'dawn il-proceduri ikopri fatti ohra li ma kenux il-mertu tal-fatti esposti quddiem il-Qorti f'Catania. Fil-fatt jekk wiehed ihares lejn id-deposizzjoni ta' Neil Harrison, dak iz-zmien supretendent tal-pulizija, fl-atti kumpilatorji ghandu jirrizulta illi l-akkuzat kien sahansitra allegatament mar f'zewg okkazjonijiet gewwa l-Olanda bil-hsieb li tigi importata d-droga gewwa Malta u mhux biss dik l-okkazzjoni fejn huwa gie imwaqqaf mill-pulizija taljana

……..

Illi minn ezami ta' dawn il-fatti li jemergu kemm mill-atti kumpilatorji, kif ukoll mis-sentenza moghtija mit-Tribunal f'Catania, huwa indubitat illi l-akkuza addebitata lil Bone f'dawn il-proceduri

[68] **Il-Pulizija vs John Micallef** – Prim'Awla Kost. 28/02/2007
[69] **Norma Kraaijenbrink, - C-367/05** - 18 ta' Lulju 2007

tkopri **fatti u cirkostanzi li certament ma jistghux ikunu marbuta mal-att materjali wahdu** fejn allegatament sehhet l-importazzjoni tad-droga gewwa l-Italja. Dan ghaliex hawnhekk titwieled **azzjoni separata u distinta** mill-azzjoni li wasslet lil Bone gewwa l-Italja. Anke l-investigazzjoni tal-pulizija maltija sa dan il-punt u cioe' sal-wasla ta' Bone fl-Italja kienet distinta mill-investigazzjoni li imbaghad segwiet fejn necessarjament kellhom jigu involuti il-pulizija taljana. Ghalhekk ghalkemm soggettivament jista' jidher illi l-azzjonijiet inkriminatorji maghmula mill-akkuzat jistghu ikunu marbuta, madanakollu il-Qorti hija tal-fehma illi oggettivament ma tistax tirriskontra dan l-irbit bejniethom billi il-ftehim, l-assocjazzjoni li taghha l-akkuzat kien jifforma parti, wassal sabiex allegatament saru azzjonijiet minnu li ma kenux jifformaw il-bazi tal-process gudizzjarju gewwa l-italja. ..... [emphasis by this Court]

Illi ghalhekk ghalkemm il-linja ta' demarkazzjoni hija wahda sottili billi jista' jirrizulta soggettivament, kif tikkontendi del resto id-difiza illi l-fatti huma identici u il-kaz huwa wiehed, madanakollu l-Qorti ma tistax taqbel ma din il-linja difenzjonali u dan ghaliex jirrizulta illi l-fatti addebitati lill-akkuzat permezz tal-presenti istanza jikkostitwixxu imgieba illegali usa minn dik mistharrga fil-Qorti fl-Italja ghar-raguni hawn fuq indikata. ……

This judgement found confirmation by the Court of Appeal (Superior Jurisdiction):[70]

Dan premess, u b`debita konsiderazzjoni ghal dak li jghidu d-disposizzjonijiet tal-Kodici Kriminali u tal-Kostituzzjoni dwar *ne bis in idem,* hija l-fehma ta` din il-Qorti illi dak li huwa krucjali ghall-fini ta` din id-decizjoni huwa jekk il-fatti li abbazi taghhom l-appellant kien mixli bir-reati fuq riferiti quddiem it-Tribunal ta` Katanja, fejn kien processat u liberat b`sentenza li ghaddiet in gudikat, humiex <u>l-istess fatti jew sostanzjalment l-istess fatti</u>, li abbazi taghhom l-appellant huwa mixli bir-reat mertu tal-procediment odjern. ….

Tistqarr *in primis* illi l-fatti u cirkostanzi taz-zewg procedimenti m`ghandhomx jitqiesu bhala l-istess (jew sostanzjalment l-istess). Il-fatti abbinati mar-reat li fuqu qed ikun akkuzat l-appellant fil-procediment odjern mhumiex dawk li abbazi taghhom kien processat u liberat fl-Italja. M`ghandux ikun hemm dubju li huma diversi l-fatti li jsawwru z-zewg procedimenti. Dan tal-lum mhuwiex kaz fejn l-appellant kien liberat abbazi ta` akkuzi fondati fuq fatti partikolari, u wara, tressaq dwar dawk l-istess fatti sabiex iwiegeb ghal reati ohra fi procediment gdid.

Irrizultaw il-fatti li fuqhom tmexxew il-proceduri kontra l-appellant fl-Italja. Ghamlet referenza ghalihom l-Ewwel Qorti fis-sentenza taghha. L-istess ghamlu l-partijiet mill-ottika taghhom. Il-grajjiet kollha li sehhew fl-Italja fil-kuntest tar-reati li bihom l-appellant kien akkuzat fl-Italja tressqu kollha ghall-konsiderazzjoni tat-Tribunal ta` Katanja li ghamel il-gudizzju tieghu. Fil-procediment odjern, il-fatt li d-droga kienet gejja mill-Olanda, kienet destinata ghal Malta, kienet intercettata l-Italja, bir-retroscena u bid-dettalji tal-kaz, mhumiex il-fatti li jikkostitwixxu l-mertu tar-reat li bih huwa mixli l-appellant fil-kawza tal-lum. Il-fatti tal-kaz odjern huma l-grajjiet li sehhew Malta, distakkati minn dak li gara barra minn xtutna, u li huma relatati mar-reat tal-assocjazzjoni. Fil-kaz ta` dan ir-reat, il-fatti huma, mill-bidu sal-ahhar, konnessi ma` dak li allegatament sar Malta mill-

[70] Per His Excellency The Chief Justice, Joseph Azzopardi; Mr. Justice Joseph Zammit McKeon; Mr. Justice Giovanni M. Grixti; Dec. 13th February, 2019;

appellant. Ghalhekk tajjeb osservat l-Ewwel Qorti li ma tirrizultax l-identicita` tal-fatti materjali fiz-zewg procedimenti.

Ma tistax tirnexxi l-eccezzjoni ta` *ne bis in idem,* invokata mill-appellant, ghaliex ma tirrizultax rabta guridika bejn il-fatti li wasslu ghall-gudizzju definittiv ta` l-appellant fl-Italja fuq reati partikolari, mal-fatti li abbazi taghhom l-appellant qed ikun akkuzat b`reat distint minn dak tal-procediment l-iehor.

In **Criminal Proceedings against Leopold Henri Van Esbroeck v Openbaar Ministerie C-436/04,** the Court of Justice of the European Union held:[71]

> There is a necessary implication in the ne bis in idem principle … that the Contracting States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Contracting States even when the outcome would be different if its own national law were applied" The Judgment established that "the relevant criterion for the purposes of the application of [Art 54 Schengen Convention][72] is identity of the material acts, understood as the existence of **a set of facts which are inextricably linked together**, irrespective of the legal classification given to them or the legal interest protected.

Not a shred of evidence was brought forward to indicate that the facts for which LOIAI is sought in Hungary are the same facts as those on which his conviction was based in Austria.

The fact that the person requested committed similar offences in the same period of time, is not tantamount to a finding that there is identity of the material acts and thus,

Decides that the return of ALJELDA LOIAI to Hungary is not prohibited by reason of the rule of *ne bis in idem* in terms of regulation 13(1)(a) of the Order, nor for any other reason as cited in the said regulation.

VI. Documents received from Judicial Authorities

Whereas throughout this judgement, several were the references to communications made by the Austrian and Hungarian authorities as well as those emanating from SIRENE and Eurojust.

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[71] 9th March, 2006

[72] Article 54 enshrines the *ne bis in idem* principle: 'A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.'

Regulation 73A of the Order addresses the of authentication of documents.

> **73A.** (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.

In the **Police vs MORE Christopher Guest** cited above, the Court of Criminal Appeal held:[73]

> 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 …….
>
> This provision bears close resemblance to section 202 of the UK Extradition Act 2003 …….
>
> 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***,[74] 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

[73] Per The Hon. Mr. Justice Aaron M. Bugeja. **The Police vs MORE Christopher Guest**; Decided 23rd July, 2019; Appeal number – 180/2019

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

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, notwithstanding 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.

(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…….

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……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 other hand 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……..

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 or transmitted to the Maltese Police by the UK Police Authorities in line with the provisions of regulation 5(9) of the Order,……

…..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……

In **Il-Pulizija vs Donatella Concas,** the Court of Committal differently presided, considered:[75]

Il-Qorti qieset sewwa il-preġudizzjali sollevata mid-Difiża kif ukoll is-sottomissjonijiet tal-partijiet, nonche d-dokumenti kollha eżibiti f'dawn l-atti. Din il-Qorti jidhrilha li l-iskop ewlieni u aħħari wara l-ħolqien tal-mandati t'arrest ewropej kien wieħed li jassikura speditezza u mill-anqas burokrazija fit-twettieq ta' deċiżjonijiet tal-Awtoritajiet Ġudizzjarji fit-territorju tal-Unjoni Ewropeja fir-rigward tar-ritorn ta' persuni rikjesti u li jkunu jinstabu fit-territorju Ewropew li għall-fini tal-koperazzjoni ġudizzjarja kellu jitqies bħala territorju uniku. Dawn il-prinċipji huma msejsa fuq il-kunċett tal-fiduċja reċiproka li għandu jsaltan bejn l-Awtoritajiet Ġudizzjarji Ewropej u l-istati membri Ewropej li għażlu fis-sovranita tagħhom li jillimitaw l-istess sovranita u jagħtu spinta lil fiduċja reċiproka fl-Awtoritajiet Ġudizzjarji Reċiproċi.

Il-komunikazzjonijiet bejn l-istess Awtoritajiet għandhom jitqiesu li jkunu qegħdin isiru fi ħdan din il-filosofija kif ukoll b'rispett lejn il-verita' proċesswali, b'responsabbilta' u dejjem *in buona fede*. U allaħares kien mod ieħor, għaliex altrimenti l-pilastru tal-fiduċja reċiproka li fuqu hija msejsa l-proċedura tal-eżekuzzjoni tal-MAE jikkrolla.

Il-proċedura tal-eżekuzzjoni tal-MAE mhix bħal proċeduri penali oħra. Għalhekk ikun żbaljat li jiġu adottati il-kriterji t'applikazzjoni u interpretazzjoni stretta li jikkaratterizzaw il-proċedura penali f'dan il-kamp bl-istess mod bħal ma jsir fi proċeduri penali fejn Qorti tkun trid tiddetermina r-responsabbilta' penali o meno ta' persuna imputata. Dan japplika wkoll għall-xi provi jridu jitresqu f'dawn il-proċeduri kif ukoll il-livell ta' suffiċjenza probatorja.

L-anqas ma huma applikabbli bl-istess mod ir-regoli tradizzjonali tal-estradizzjoni. Anzi din il-proċedura ġiet maqbula bejn l-Istati Membri tal-Unjoni Ewropeja speċifikament sabiex ma jkunx hemm l-istess kriterja applikabbli f'każijiet t'estradizzjoni bejniethom.

Dan huwa qasam li huwa divers u sa ċertu punt uniku għall-Unjoni Ewropeja. Għalkemm ċertu veduti tradizzjonalisti ċċensuraw din il-modalita tal-ħsieb, il-fatt jibqa' li l-proċedura tal-eżekuzzjoni tal-mandat t'arrest ewropew teżalta għall-fini ta' koperazzjoni ġudizzjarja l-unifikazzjoni tat-territorju tal-pajjiżi tal-Unjoni Ewropeja ghall-fini ta' kooperazzjoni Gudizzjarja li aderew ruħhom għal din il-proċedura.

B'hekk l-istqarrijiet u d-dokumenti mibgħuta mill-Awtoritajiet Ġudizzjarji Ewropej fil-qafas ta' proċedura għall-eżekuzzjoni tal-MAE, u fl-ewwel lok il-MAE innifsu u d-dikjarazzjonijiet

[75] Per Magistrate Dr. Aaron Bugeja; Decided 14th November, 2016

> magħmula mill-Awtoritajiet Ġudizzjarji rispettivi għandhom piż u valenza qawwija f'dawn il-proċeduri.

Therefore, and in the light of these judgements, the Court deems the communications emanating from the Austrian and Hungarian authorities, from Eurojust as well as SIRENE, *inter alia* through SIS, as satisfying the requirements of Regulation 73A of the Order.

II. Conditions of Detention in Hungary

In considering bars to extradition, the person requested also presented a Council of Europe ***Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the prevention of Torture and Inhuman or Degrading Treatment*** in November 2018, published on the 17 March, 2020,[76] in a bid to indicate that police establishments wherein persons where kept in detention, were *"inappropriate for the prolonged periods for which remand prisoners may be held in such facilities"*[77].

First of all, it must be emphasized that the list of grounds cited in Regulation 13 of the Order is an exhaustive list. Other considerations fall outside the scope of any determination by a Court of Committal.

Indeed, the Court of Committal's functions are clearly defined by the governing legal framework, namely the ***Extradition (Designated Foreign Countries) Order***, S.L.276.05 and the ***Extradition Act,*** Chapter 276 of the Laws of Malta, to which the former refers on numerous occasions, "the relevant Act".

Thus, the Court of Committal's powers are those pertaining to a court of criminal inquiry, "as nearly as may be". Article 15(1) of the Extradition Act which is rendered applicable to EAW proceedings through Regulation 8(4) of the Order, provides:

> 15.(1) A person arrested in pursuance of a warrant under article 14 shall (unless previously discharged under subarticle (3)of that article) be brought as soon as practicable and in any case not later than forty-eight hours from his arrest before the Court of Magistrates (Malta) as a court of criminal inquiry (in this Act referred to as the court of committal) which shall have for the purposes of proceedings under this section the same powers, as nearly as may be, including power to remand in custody or on bail, as the said court has when sitting as aforesaid.

[76] **Doc.RBS** a fol. 103 et seq
[77] Fol.107 (highlighted by defence counsel)

Whilst under the Extradition Act, a Court of Committal when deciding on an extradition request, is entitled to assess whether any of the general restrictions on return exist, under the European Arrest Warrant procedure, this determination is specifically entrusted to Civil Court, First Hall. In fact, Article 16 of the Extradition Act, which clearly lays down the procedure to be followed once a person is committed to custody to await his return to the issuing authority, is rendered applicable to EAW proceedings through Regulation 25 of the Order.

On the other hand in proceedings on a European Arrest Warrant, the Court of Committal is limitedly and exclusively tasked with deciding:

(i) the identity of the person arrested (Regulation 10 of the Order);
(ii) (ii) whether the offence specified in the warrant is an extraditable offence (Regulation 12 of the Order), and
(iii) (iii) whether there exist any bars to extradition as are listed in Regulation 13 which provides for an exhaustive list of circumstances the existence of any of which brings about the person requested's discharge (Regulation 13 of the Order),.

Reference is made to the judgement by the Court of Criminal Appeal when a breach of one's right to a fair trial was raised:

> 16. Ghalhekk id-difiza qed issejjes l-eccezzjoni taghha dwar l-inammissibilita ta' l-istqarrija ta' l-akkuzat rilaxxjata fid-19 ta' Ottubru 2014 mhux fuq xi regola penali tal-evidenza li teskludi dik il-prova peress li l-istess stqarrija kienet konformi mal-ligi penali vigenti dak iz-zmien, izda fuq l-allegata lezjoni potenzjali tal-jedd tieghu ghal smigh xierq taht l-artikolu 6 tal-Konvenzjoni Ewropea kif spjegat mill-Qorti fi Strasburgu, jekk isir uzu minn dik l-istqarrija fil-guri tieghu specjalment, iktar u iktar, meta l-prova dwar l-importazzjoni ta' madwar hames kilos *cannabis* allegatament tohrog biss mill-konfessjoni maghmula minnu f'din l-istqarrija.
>
> 17. Izda kif gia gie ritenut:
>
> **"Il-gurisdizzjoni tal-Qorti Kostituzzjonali u dik tal-Qorti ta' l-Appell huma ben delineati u distinti. Infatti l-istess Qorti ta' l-Appell, bhal kull Qorti ohra li ma tkunx il-Prim'Awla (li ghandha gurisdizzjoni originali in materja) jew il-Qorti Kostituzzjonali (li hija l-Qorti tat-tieni grad f'dawk il-kazi kollha elenkati fil-paragrafi (c) sa (f) tas-subartikolu (2) ta' l-Artikolu 95 tal-Kostituzzjoni) hija prekluza milli tiehu konjizzjoni ta' kwistjonijiet dwar il-ksur ta' xi wahda mid-disposizzjonijiet tal-artikoli 33 sa 45, u sahansitra jekk tali kwistjoni titqanqal fl-istadju ta' l-appell quddiem il-Qorti ta' l-Appell dik il-Qorti ghandha tibghat il-kwistjoni quddiem il-Prim'Awla tal-Qorti Civili kemm-il darba fil-fehma taghha t-tqanqil tal-kwistjoni ma tkunx semplicement frivola u vessatorja. Il-posizzjoni hija identika ghal dak li jirrigwarda l-Kap. 319 - ara l-Art. 4(3) ta' l-imsemmi Kapitolu[78]."**

[78] **Tabone Computer Centre Limited vs Direttur tat-Telegrafija Minghajr Fili –** app. Civili – 16/04/2004 66/1999

> 18. Ghalhekk, il-kwistjoni sollevata fl-eccezzjoni tal-akkuzat appellat, arginata kif inhi esklussivament fuq id-dispozizzjonijiet tal-artikolu 6(1) u (3) tal-Konvenzjoni Ewropea dwar Drittijiet tal-Bniedem (u l-artikolu korrispondenti tal-Kostituzzjoni, l-artikolu 39(1)(6)) hi wahda li, minkejja dak sottomess mill-appellat waqt it-trattazzjoni, taqa' biex tigi regolata skont l-artikolu 46(3) tal-Kostituzzjoni u l-artikolu 4(3) tal-Att dwar il-Konvenzjoni Ewropea, li jipprovdu li l-Qorti li quddiemha tqum il-kwistjoni ghandha tibghat il-kwistjoni quddiem il-Prim Awla tal-Qorti Civili kemm-il darba fil-fehma taghha t-tqanqil tal-kwistjoni ma tkunx semplicement frivola jew vessatorja. Il-kwistjoni sollevata fl-eccezzjoni tal-akkuzat appellat, ghalhekk, ma tistax tigi deciza *a priori* minn din il-Qorti, u lanqas setghet tigi hekk deciza mill-Qorti Kriminali qabilha.

Based on the foregoing reasons, a Court of Committal is precluded from taking cognisance of any such plea given that it is not one upon dictated by Regulations 10, 12 and 13 of the Order. Consequently,

The Court,

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

Orders the return of **ALJELDA LOIAI to Hungary** on the basis of the European Arrest Warrant and Schengen Information System Alert issued against him on the 4th December, 2019,[79] and the 16th January, 2020[80] respectively, and commits him to custody while awaiting his return to Hungary.

This Order of Committal is being made on condition that the present extradition of the person requested to Hungary be subject to the law of speciality and thus solely in connection with the offences, (multiple counts of the same offence: counts 1. to 6.[81]), mentioned in the European Arrest Warrant issued against him and deemed to be extraditable offences by this Court.

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

[79] **Doc.OZ5** a fol. 17 et seq
[80] **Doc.OZ7** a fol.37-38
[81] Fol.20-22

(a) He will not be returned to Hungary 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