



# THE COURT OF CRIMINAL APPEAL

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

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Appeal number - 69/2020

**The Police**

**(Inspector Omar Zammit)**

**vs.**

**Loiai ALJELDA**

*Extradition (EAW) Proceedings number 173/2020*

Sitting of the 7th July 2020

The Court,

1. Having seen the appeal application filed by “the requested person” filed in the Registry on the 8th June 2020 wherein he requested this Court to reverse the order made by the Court of Magistrates (Malta) as a court of committal delivered on the 3rd June 2020 ordering the appellant to be held in custody while awaiting his return to the Republic of Hungary, subject to the rule of speciality and thus solely in connection with the offences mentioned in the European Arrest

Warrant (EAW) (multiple counts of the same offence: 1. To 6. as found at fol 21 and 22 issued against the requested person;

2. Having seen that the facts of this case relate to a Schengen Information System Alert issued for the purposes of arrest and surrender or extradition in terms of article 26 SIS II Decision bearing number HU0000021585074000001 dated 16th January 2020 as well as a European Arrest Warrant (EAW) issued by Judge Dr. Adrienn Nagy-Berces from the District Court of Győr, Republic of Hungary dated 4th December 2019 as certified by the Attorney General's declaration in terms of article 7 of Legal Notice 320 of 2004.
3. Having seen that according to these documents, Loiai ALJELDA alias Abu Hamza Lui, Stateless, born on the 9th January 1972 whose last known address was 1181 Budapest, Hasszuház u 17 fszt./1, Hungary, was wanted for the purposes of prosecution by the Judicial Authorities of the Republic of Hungary for the alleged commission of the criminal offence of illegal smuggling of immigrants as detailed in narrative part of the said EAW.
4. Having seen that during the sitting of the 11th May 2020 the Court of Magistrates as a court of committal decided that the person appearing before it was the same person against who the EAW had been issued. The requested person confirmed that he was the same person and that the information in the EAW was correct.

5. Having seen that the Court of Magistrates explained to the requested person the contents of the EAW and gave him the required information about his choice of consent.
6. Having seen that after that that Court gave sufficient time to the requested person to consult his legal Counsel the requested person declared that he was not giving his consent to be surrendered in accordance with the EAW.
7. Having seen that during the extradition hearing it was declared by the Court, with the concurrence of Defence Counsel that the offences for which the requested person was being requested in the Republic of Hungary were extraditable offences.
8. Having seen that Defence Counsel raised the bar to extradition of *ne bis in idem*.
9. Having seen the Decree for surrender delivered by the Court of Magistrates as a court of committal on the 8th June 2020 wherein it based its order on the following reasons (in brief) :
  - i. The Certificate issued by the Attorney General in terms of regulation 7 of Legal Notice 320 of 2004 (the Order) in the Maltese Language satisfied the requirements of Article 27 of the Extradition Act and there could be no issues as to the admissibility of the said certificate.
  - ii. This was an EAW issued for the purpose of Prosecution against the requested person. The Court saw the documents issued by the Judicial Authorities of the Republic of Hungary showing that the requested person was subject to judicial criminal proceedings in connection with the subject matter of the EAW.
  - iii. The identity of the requested person was clearly established.
  - iv. That the offence for which the requested person is requested by the Judicial Authorities of the Republic of Hungary in paragraphe (e) of the EAW is also an extraditable offence in terms of Regulation 59(3) of the Order.

- v. (i) The *Ne bis in idem* bar to extradition could not subsist in this case since the fact upon which the requested person was convicted by the Court of Vienna in the Republic of Austria was substantially different from that for which the EAW was issued. No evidence was submitted tending to show that the facts for which he was convicted by the Court of Vienna were the same facts for which he was to be prosecuted upon his return to the Republic of Hungary. Moreover the fact that the requested person committed similar offences in the same period of time was not tantamount to a finding that there was the identity of the material acts. Hence the Court dismissed this bar to extradition in terms of regulation 13(1)(a) of the Order.
- vi. The communications emanating from the Austrian and Hungarian Authorities as well as from Eurojust and SIRENE satisfied the requirements of regulation 73A of the Order.
- vii. The Court of Magistrates (Malta) as a court of committal was precluded from taking cognisance of any plea relating to the conditions of detention in the Republic of Hungary on account of the fact that it could only take cognisance of issues raised as specified in regulations 10, 12 and 13 of the Order.
- viii. Consequently that Court ordered the surrender of the requested person to the Judicial Authorities of the Republic of Hungary.

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

**A. The first grievance**

The Court of Magistrates (Malta) as a court of committal erred in deciding that the return of the appellant to Hungary was not prohibited by reason of *ne bis in idem*. This on account of the fact that :-

- i. The period covered by the appellant's Austrian conviction was the period between mid 2015 and 21st July 2016;
- ii. The offences for which he was convicted consisted of "*people smuggling*" in relation "*to at least 55 aliens*";
- iii. The location of the offences was Vienna, other locations in the Federal territory of the Republic of Austria, and elsewhere in the European Union, including the route leading away from Budapest in the Republic of Hungary.
- iv. The interpretation given by the Court of Magistrates (Malta) as a court of committal to the principle of *ne bis in idem* was not in line with the autonomous interpretation given to this concept by the Court of

Justice of the European Union (CJEU) in various judgments pronounced by it in relation to the *ne bis in idem* principle.

- v. The Court of Magistrates (Malta) as a court of committal had to determine whether the set of facts at issue fulfilled the notion of “*the same acts*” for the purpose of article 54 of the Convention Implementing the Schengen Agreement (CISA). That Court had to necessarily look at the relevant timelines. The timelines mentioned in the judgment delivered by the Court of Vienna coincided perfectly with the timeframes mentioned by the Hungarian Judicial Authorities in their bill of indictment against the requested person. Therefore the “*same acts*” requirement was satisfied insofar as the timelines were concerned.
- vi. The judgment delivered by the Court of Vienna stated that the precise amount of people smuggled between Hungary and Austria could not be determined. The Austrian Court did not limit itself to offences carried out solely in Austria but extended the prosecution of the criminal action also elsewhere in the European Union. However the Austrian Court did not impose this limit.
- vii. The Austrian Court also failed to impose a limit on the number of persons smuggled. In fact the Court referred “*to at least 55 aliens*” that were smuggled.
- viii. In the case *Kraaijenbrink* the CJEU stated that in order for the notion of “*same acts*” to be fulfilled, one had to establish that the material acts in the two proceedings – in this case in Austria and in Hungary – constituted a set of facts that were inextricably linked in time, in space and in subject matter. Due to the scant information mentioned by the Court of Vienna in its judgment, the Court of Magistrates (Malta) as a court of committal concluded that since there were different sets of people that had been named as accomplices by the Austrian Authorities and by the Hungarian Authorities constituted an altogether different set of facts. However in this case the timelines coincided perfectly. The material facts happened both in Austria as well as in Hungary. People were recruited to be smuggled from Hungary to be transported to Austria; thus a cross-border operation that took place in regions where Austria and Hungary met. When the Austrian Court convicted the requested person for the acts of people smuggling in Austria and elsewhere in the European Union it was therefore also convicting him for his operations in Hungary.
- ix. There was no evidence to show that the Republic of Hungary did not also issue EAW or EIO against other persons named in the Austrian judgment. The Austrian Court did not mention the nationality of the people that were smuggled. Therefore it could not be ascertained whether these were the same people mentioned by the Hungarian Authorities or not.
- x. The Court of Magistrates (Malta) as a court of committal quoted extensively from the judgment delivered by the Criminal Court and

Court of Criminal Appeal in re *Ir-Repubblika ta' Malta vs. Omissis, Romeo Bone*. However this case was different from the scenario in these proceedings on account of the fact that in the *Bone* judgment, unlike in this case, the Court of Catania had not referred to offences committed in Italy as well as elsewhere in the European Union.

- xi. In its judgment the Court of Vienna made it clear that it knew that there could be things that could not be precisely determined and yet, it proceeded to include those things in its judgment. It did not list in an exhaustive and detailed fashion what facts it knew for certain and what parts of the story were still unestablished, in such a way as to make sure that the appellant was only being convicted of those things that could be precisely determined.

#### **B. The second grievance**

The iter of the case before the Court of Magistrates was prejudicial to the Defence in the sense that as appeared from the minutes of the proceedings, at no point did the Prosecution declare that it had no further evidence to produce and at no point was it made clear that following the end of the stage where the prosecution presents its evidence, it was the Defence's turn to present its evidence.

#### **C. The third grievance**

The inconsistencies in the documentation and communications presented by the Police and the consequent unreliability of the same documentation should have resulted in the Court of Magistrates refusing to execute the EAW.

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

12. Having seen the record of the proceedings, in particular the documents that were submitted by the Competent Authorities of the Republic of Austria, the Republic of Hungary as well as Eurojust.

*Considers as follows : -*

13. First of all this is an appellate Court tasked with the revision of the decision made by the Court of Magistrates (Malta) as a Court of Criminal Inquiry, in these proceedings acting as a Court of Committal. This Court does not change the analysis of the facts and the law as well as and the decision made by the Court of Magistrates when it appears to it that the Court of Magistrates was legally and reasonably correct. In the judgment delivered by the Court of Criminal Appeal in its Superior Jurisdiction in the case *Ir-Repubblika ta' Malta vs Emanuel ZAMMIT*<sup>1</sup> it was held that this

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<sup>1</sup> 21st April 2005. See also, inter alia, *Ir-Repubblika ta' Malta vs Domenic Briffa*, 16 th October 2003; *Ir-Repubblika ta' Malta vs Godfrey Lopez* and *Ir-Repubblika ta' Malta v. Eleno sive Lino Bezzina*, 24th April 2003, *Ir-Repubblika ta' Malta vs Lawrence Ascjak sive Axiak* 23rd January 2003, *Ir-Repubblika ta' Malta vs Mustafa Ali Larbed*; *Ir-Repubblika ta' Malta vs Thomas sive Tommy Baldacchino*, 7th March 2000, *Ir-Repubblika ta' Malta vs Ivan Gatt*, 1st December 1994; *Ir-Repubblika ta' Malta vs George Azzopardi*, 14th February 1989; *Il-Pulizija vs Andrew George Stone*, 12th May 2004, *Il-Pulizija vs Anthony Bartolo*, 6th May 2004; *Il-Pulizija vs Maurice Saliba*, 30th April 2004; *Il-Pulizija vs Saviour Cutajar*, 30th March 2004; *Il-Pulizija vs Seifeddine Mohamed Marshan et*, 21st October 1996; *Il-Pulizija vs Raymond Psaila et*, 12th May 1994; *Il-Pulizija vs Simon Paris*, 15th July 1996; *Il-Pulizija vs Carmel sive Chalmer Pace*, 31st May 1991; *Il-Pulizija vs Anthony Zammit*, 31st May 1991.

In *Ir-Repubblika ta' Malta vs Domenic Briffa* it was further stated:

Kif gie ritenut diversi drabi, hawn qieghdin fil-kamp ta' l- apprezzament tal-fatti, apprezzament li l-ligi tirrizerva fl- ewwel lok lill-gurati fil-kors tal-guri, u li din il-Qorti ma tid-disturbahx, anke jekk ma tkunx necessarjament taqbel mija fil-mija mieghu, jekk il-gurati setghu legittimament u ragonevolment jaslu ghall-verdett li jkunu waslu ghalih. Jigifieri l-funzjoni ta' din il-Qorti ma tirrizolvix ruhha f'ezercizzju ta' x'konkluzjoni kienet tasal ghalih hi kieku kellha tevalwa l-provi migbura fi prim'istanza, imma li tara jekk il-verdett mil-huq mill-gurija li tkun giet "properly directed", u nkwadrat fil-provi prodotti, setax jigi ragonevolment u legittimament mil-huq minnhom. Jekk il- verdett taghhom huwa regolari f'dan is-sens, din il-Qorti ma tid-disturbahx (ara per eżempju *Ir-Repubblika ta' Malta v. Godfrey Lopez* u *r-Repubblika ta' Malta v. Eleno sive*

Court makes its own detailed analysis of the record of the proceedings before the Court of first instance in order to see whether that Court was reasonable in its conclusions. If as a result of this detailed analysis this Court finds that the Court of first instance could not reasonably and legally arrive at the conclusion reached by it, then this Court would have a valid, if not compelling reason, to vary the discretion exercised by the Court of first instance and even change its conclusions and decisions. In the ordinary course of its functions, this Court does not act as a court of retrial, in that it does not rehear the case and decide it afresh; but it intervenes when it sees that the Court of Magistrates, would have mistakenly assessed the evidence or wrongly interpreted the Law - thus rendering its decision unsafe and unsatisfactory. In that case this Court has the power, and indeed, the duty to change the decision of the Court of Magistrates or those parts of its decision that result to be wrong or that do not reflect a correct interpretation of the Law.

*Considers further :-*

14. These proceedings are conducted in terms of the Order, which, in turn, transposes into Maltese Law the provisions of the Council Framework Decision of the 13<sup>th</sup> June, 2002 on the European Arrest

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Lino Bezzina decizi minn din il-Qorti fl-24 ta' April 2003, Ir-Repubblika ta' Malta v. Lawrence Ascjak sive Axiak deciza minn din il-Qorti fit-23 ta' Jannar 2003, Ir-Repubblika ta' Malta v. Mustafa Ali Larbed deciza minn din il-Qorti fil-5 ta' Lulju 2002, ir-Repubblika ta' Malta v. Thomas sive Tommy Baldacchino deciza minn din il-Qorti fis-7 ta' Marzu 2000, u r-Repubblika ta' Malta v. Ivan Gatt deciza minn din il-Qorti fl-1 ta' Dicembru 1994).



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

Only the provisions of this Order, save where otherwise expressly indicated, shall apply to requests received or made by Malta on or after the relevant date for the return of a fugitive criminal to or from a scheduled country, or to persons returned to Malta from a scheduled country in pursuance of a request made under this Order, and the provisions of the relevant Act shall have effect in relation to the return under this Order of persons to, or in relation to persons returned under this Order from, any scheduled country subject to such conditions, exceptions, adaptations or modifications as are specified in this Order.

15. As the name indicates clearly, with the adoption of this Framework Decision, the European Union (EU) decided to make a paradigm shift in relation to the extradition of fugitive criminals. This was the shift from extradition to surrender, which has had very serious legal and practical implications. This shift has had its fair share of controversy and disputes. But this shift is real across the EU and is having real implications in concrete cases.

16. 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 requested person from the political realm to the judicial realm. This is one of the consequences stemming from the Tampere Programme

of 1999, aimed at establishing an area of freedom, security and justice within the EU - thus shifting the balance in favour of a political, rather than merely an economic, Union.

17. 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 these States; it removed the double criminality requirement in relation to a set of scheduled offences; it limited the speciality rule, and allowed surrender to EU Member States of own nationals.

18. 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. The EAW is a **judicial** decision issued by the competent Judicial Authorities of the Issuing Member State. The EAW is the 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 EAW procedure therefore results in a less formal, resource intensive and time consuming procedure of surrender of fugitive criminals than formal extradition.

19. The EAW procedure 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, the EAW has to be recognised and executed throughout the EU; and its non-execution remaining the exception, based only a limited number of bars to extradition can be raised by the Executing Member State under very specific circumstances.

20. The EU 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 achieved 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 achieved the same aims, at a fraction of the effort and cost, and leading to the free circulation of judicial decisions within the EU territory, having full direct effect.

21. The natural consequence of this paradigm shift brought about by the EAW surrender procedure was the fact that as a default position, the judicial decision issued by the Judicial Authority of the Member State had to be executed by the Judicial Authority of the Executing Member State, based on the mutual trust between Judicial Authorities inherent in the mechanism. This is buttressed by the removal of the double criminality requirement for the thirty two (32) scheduled offences and the limited specific grounds for the refusal of surrender. The end result is a more efficient, faster, less

bureaucratic mechanism of surrender, that is also more difficult to halt or refuse.

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

To what extent is MR different from MLA? The basic idea was that despite the differences between the procedural regimes in the Member States, they were all party to the European Convention on Human Rights and could thus trust each other. Mutual trust was presupposed and considered sufficient grounds to apply MR, even with little or no harmonization in the field. This means that MR order or warrants coming from an issuing Member State have legal value in the AFSJ (area of freedom, security and justice) and could thus automatically be executed without an *exequatur* procedure. Legal doubts about the order or warrant, linked to, for instance, the legality of the evidence that served to justify the order or warrant, could only be challenged in the issuing Member State.

In 2002 the Council of Ministers adopted the first MR instrument: the European Arrest Warrant (EAW) replacing the extradition conventions. The EAW was adopted under a fast-track procedure after the 9/11 events and did not include harmonization of investigative acts or procedural safeguards. An EAW, whether meant to bring a suspect to trial or to execute a trial sentence, is based on mutual trust and must thus be recognised and executed, unless mandatory or optional grounds for non recognition apply. However, the grounds are strongly restricted, compared to the refusal grounds under the MLA extradition treaty, and do not contain grounds that are based directly on a human rights clause.

23. In Malta, the EAW procedure is regulated by the Order, working in tandem with the Extradition Act. The drafting of the Order bears resemblance to the United Kingdom Extradition Act, 2003, Part 1, extradition to category 1 territories. Insofar as EAW proceedings in Malta are concerned, it is the rules and procedures mentioned in the Order that enjoy precedence. The Extradition Act provisions operate only *subject to such conditions, exceptions, adaptations or*

*modifications as are specified in this Order.* This Order does not do away with the general principles of criminal procedure; however it introduces certain provisions that are aimed to ease and facilitate EAW proceedings. Maltese Law does not spell this out clearly, but in the absence of a specific provision on the matter it is reasonable to conclude that where the Special Law is silent on the matter, the Ordinary Law of the Land applies. In this sense some provisions may be seen to depart from the procedural rules applicable in trials before Courts of criminal jurisdiction.<sup>2</sup>

*Considers further : -*

*A. The first grievance - ne bis in idem*

24. In its assessment of this case, and in particular in relation to the correct interpretation of the *ne bis in idem* bar to extradition, this Court has first of all analysed the provisions of regulation 14 of the Order which provides as follows : -

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.

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<sup>2</sup> Even though extradition proceedings are brought before criminal courts, they cannot be regarded as criminal trials. This can be seen not only from a reading of judgments of ordinary criminal courts in Malta and abroad, but also from judgments of the European Court of Justice and the European Courts of Human Rights (ECtHR). Consequently this decision is going to be based on these special principles applicable to these particular proceedings.

25. The *ne bis in idem* plea raised before the Court of Magistrates (Malta) is limited within the parameters set in regulation 14 of the Order. This regulation states that the *ne bis in idem* bar to extradition can only be successful if it appeared to the Court of Magistrates (Malta) as a court of committal that the requested person would be entitled to be discharged under any rule of law relating to previous acquittal or conviction **on the assumption** -

(a) that the conduct for which his return is being requested constituted the extraditable offence constituted an offence in Malta; and

(b) that the requested person were charged with the extraditable offence in Malta.

26. The Court saw that no party to these proceedings made specific reference to how and to what extent the evidence produced in this case satisfied these principles mentioned in this regulation.

27. The Court of Magistrates however still delved in detail on the position of the requested person in relation to the *ne bis in idem* claim as raised by reference to the facts mentioned in the judgment of the Criminal Court of Vienna and those mentioned in the EAW. As a court of revision, this Court was called to review the reasons leading to the Court of Magistrates (Malta) decision, namely, that at any rate, it found no evidence on which to uphold the *ne bis in idem* claim despite its clear efforts to obtain as much information as possible from the Judicial Authorities of the Republic of Austria, the Republic of Hungary and the Eurojust desks.

28. Defence claimed that the principle to be followed were the rulings of the Court of Justice of European Union (CJEU) and its interpretation of this *autonomous* principle (and consequently, the principles highlighted by the case law of the European Court of Human Rights (ECtHR)).<sup>3</sup> After its thorough assessment of the documents submitted to it, the Court of Magistrates (Malta) decided that it found no evidence to substantiate the existence of the *ne bis in idem* bar to extradition in this case. It held that there was no basis to conclude that the facts for which the requested person had previously been convicted by the Criminal Court of Vienna were the same acts for which his return to the Republic of Hungary was being sought.

29. The Court of Magistrates (Malta) noted that the judgment of the Criminal Court of Vienna contained *various instances marking a vagueness in details*. In particular the Court of Magistrates mentioned that the judgment of the Criminal Court of Vienna made reference to *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*.

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<sup>3</sup> noting that:

Also between Article 50 Charter and Article 4P7 ECHR, where there are obvious differences too, the CJEU has underlined that the guaranteed right of the Charter has the same meaning and the same scope as the corresponding right in the ECHR (Åkerberg Fransson, M.) and that it is necessary to ensure that the interpretation of Article 50 Charter does not disregard the level of protection guaranteed by the ECHR in so far as Article 50 Charter contains a right corresponding to that provided for in Article 4P7 ECHR (Orsi and Baldetti). In this regard, it is particularly interesting to notice that the CJEU and the ECtHR referred already, on different occasions, to each other's case law. For instance, in the Zolotukhin judgment, the ECtHR referred to the CJEU's Van Esbroeck judgment and in M., the CJEU referred to the CJEU's Zolotukhin judgment.

See - *The Principle of Ne Bis in Idem in Criminal Matters in the Case Law of the Court of Justice of the European Union*, Eurojust Publications, September 2017.

30. The information submitted to the Court of Magistrates (Malta) in relation to the facts on which the Criminal Court in Vienna based its conviction against the requested person were indeed very limited. The Criminal Court of Vienna clearly had evidence relating to the facts of the case decided by it, that did not reach the Court of Magistrates (Malta). To compound matters further, the judgment of the Criminal Court of Vienna used certain generic expressions, making any subsequent assessment by a foreign Court of Criminal Jurisdiction very taxing.

31. The judgment of the Criminal Court of Vienna condemned the requested person for a set of facts that according to the Law of the Republic of Austria amounted to a criminal offence. In its judgment, that Court on the one hand made reference to a set of specific facts and circumstances, such as the example given based on the testimony of a certain Roland HORVATH; then on the other it also used certain generic and wide expressions relating to its jurisdiction and certain factual aspects of the case decided by it. This, too, is what that Court of Magistrates (Malta) seems to have referred to when it mentioned a certain *vagueness in details*.

32. In its judgment, the Criminal Court of Vienna convicted the requested person not only on the basis of the testimony of Roland HORVATH but also on the basis of a statement that the requested person himself had released to the Austrian Authorities. While that judgment mentioned certain specific factual details relating to what



transpired from Roland HORVATH's testimony and the requested person's statement, on the otherhand, the Court of Magistrates (Malta) was not furnished with the contents of the statement that was released by the requested person. The Court of Magistrates (Malta) could not establish a link between any facts furnished by the requested person in his statement - and for which he was prosecuted and convicted - and the facts for which the Hungarian Judicial Authorities are now lodging their request for surrender - thus ascertaining up to the level of sufficiency necessary for these proceedings that these were the same acts.

33. In its decision, the Court of Magistrates (Malta) highlighted the fact that the Criminal Court of Vienna itself stated in its judgment that it could not establish with the certainty necessary for criminal proceedings that the requested person organised other people smuggling operations in the period of mid-2015 up to 21st July 2016 **in addition to** the number of aliens given in his statement or participated in them in other ways. The Court of Magistrates (Malta) therefore could not determine whether the requested person was convicted of the "*same acts*".<sup>4</sup>

34. Defence raised the *ne bis in idem* bar to extradition and based its argument on the autonomous interpretation of the *ne bis in idem*

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<sup>4</sup> For example : whether the requested person was involved in one and the same criminal organisation that involved all the persons mentioned in the judgment of the Criminal Court of Vienna and the EAW of the Judicial Authorities of the Republic of Hungary as being engaged in all the people smuggling operations within the same time-frames and territories as were mentioned; or whether the requested person was involved in multiple, separate and distinct criminal organisations specialising in people-smuggling operations conducted within the same territories and time-frames, but not being linked with each other organisationally, logistically, operationally etc.

principle as stemming from the cases decided by the CJEU, in particular, that the material acts on the basis of which the requested person was convicted by the Criminal Court of Vienna were the same material acts forming the basis of the EAW, and which acts were inextricably linked together in time, in space and by their subject matter.

35. However there were various gray areas left by the judgment of the Criminal Court of Vienna that needed to be addressed in order for the Court of Magistrates (Malta) to be able to determine, up to the level of sufficiency required in these proceedings, that *ne bis in idem* existed in this case. The Court of Magistrates (Malta) exercised its powers to try to obtain the information necessary in order to settle the question relating to “*same acts*” in this case. However the Court of Magistrates (Malta) could not, on the basis of the evidence available to it, conclude that the material acts on the basis of which the requested person was convicted by the Criminal Court of Vienna were the same material acts forming the basis of the EAW, and which acts were inextricably linked together in time, in space and by their subject matter. Hence it could not uphold the bar to extradition of *ne bis in idem*.

36. The Court of Magistrates (Malta) tried to obtain supplementary information in regulation Article 13A of the Order so that it could reach a decision on *ne bis in idem* bar to extradition raised in this case, up to the level of sufficiency necessary. This on account of the

fact that according to the case *Il-Pulizija vs Alfred John Gaul*<sup>5</sup> in extradition proceedings, as a rule, whenever a court of committal is faced with doubt, it has to rule in favour, and not against, committal. In that case the Court stated that :-

The Court as presided has already had an occasion to delve deeply into the merit of this test in a judgment pronounced on the 30th October 1978 in re. Antonio sive Antony Cassar. This Court in that judgment had accepted as a test the dictum of the Canadian Court in 1981 in re. Letta 36, W.W.R, 699, 36 C.R. 432 namely the following: "the words 'if in his opinion' in the Criminal Code 1953-54 sec. 460 lays a heavy and inescapable responsibility on a Magistrate at the termination of the preliminary inquiry; he must do more than decide that there is evidence for a jury to consider. In order to commit for trial, the evidence must be such as to cause him to form the opinion that the accused is probably guilty; if he has any doubt he must commit for trial. If there is no or insufficient evidence he must discharge the accused, but before doing so he must satisfy himself beyond all probabilities and be careful not to usurp the jury's functions and not deal with the preponderance of evidence. If the evidence is such that, if presiding at a jury trial, he would direct a verdict of not guilty he must discharge the accused."

Complimentary to this Canadian case are some other importance Canadian cases which deserve mention in this context.

In *R. vs Cowden*, 1948, 1 DLR 880, the Canadian Court said that a mere possibility or suspicion that an accused is guilty is not enough to warrant his committal for trial for murder. The Crown, however, need only show on the preliminary inquiry that the accused is probably guilty and any doubt in this respect should be resolved in favour of committal.

37. According to CJEU, the *ne bis in idem* principle may be successful when the Court dealing with the second criminal prosecution finds that the material acts, by being linked in time, in space and by their subject

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<sup>5</sup> Decided by the Court of Magistrates (Malta) on the 16th July 1981.

*matter, make up an inseparable whole.*<sup>6</sup> Of course, the Court of Magistrates (Malta) was not the Court dealing with the criminal prosecution and so it faced a herculean task in this case, but it was the Court examining whether the requisites for the execution of a EAW were met after ascertaining that the requirements for the existence of the *ne bis in idem* exception were satisfied in terms of regulation 14 of the Order.

38. At any rate, from the evidence supplied to the Court of Magistrates, the “*same person*” requirement has been satisfied. The “*bis*” requirement is satisfied too. From the sentence of the Criminal Court of Vienna it transpires that it conducted a criminal trial against the requested person, finally disposing of the trial by means of a criminal conviction followed by a sentence of imprisonment for a period of three years, the repayment of the costs of the criminal proceedings, the confiscation of a Samsung Galaxy S5 mobile phone together with two SIM cards as well as the forfeiture of the secured amount of EUR 650 and EUR 1850. The “*final*” nature of this judgment is also shown in the Form M at fol 59.

39. The “*enforcement*” requirement was also satisfied as from the Form M at fol 59 it transpires that the judgment of the Criminal Court of Vienna of the 13th November 2017 was rendered final on the 17th November 2017 and that the requested person was released from Prison on the 19th July 2019 at 0800. The “*criminal nature*” requirement has also been satisfied in this case given that the

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<sup>6</sup> In re Kraaijenbrink (C-367/05).

requested person was subject to a criminal trial for a criminal offence and the trial ended with a conviction whereby the requested person was sentenced as abovementioned.

40. However the remaining “*idem*” requirement proved problematic.

As for this requirement : -

In a series of judgments beginning with *Van Esbroeck*, the CJEU was confronted with a number of cases in which persons who had been sentenced on the basis of a legal qualification in one Member State (e.g. export of drugs) were standing trial in another Member State on the basis of a different legal qualification (e.g. import of drugs). In these judgments, the CJEU had to decide whether the concept of *idem* refers to the facts, to their legal classification or to the legal interest being protected. The CJEU<sup>7</sup> ruled in *Van Esbroeck* in favour of the first option and stated that the “same acts” is to be understood as the identity of the material acts in the sense of “a set of concrete circumstances which are inextricably linked together in time, in space and by their subject-matter”. Consequently, punishable acts consisting of exporting and importing the same illegal goods constitutes conduct which may be covered by the notion of “same act”.

The final assessment of the “*idem*” requirement is, however, in hands of the competent national court.

In subsequent judgments, the CJEU has confirmed this approach (e.g. *Gasparini*, *Kretzinger*) and has further explained that the inextricable link does not require that the quantities of the drug at issue in the two Contracting States are identical (*Van Straaten*) and that such link does not depend solely on the intentions of the defendant (*Kraaijenbrinck*).

Even though Article 58 CISA entitles the Contracting States to apply broader national provisions on the *ne bis in idem* principle with regard to judicial decisions taken abroad, this margin of discretion is not unlimited (*Kraaijenbrink*).<sup>7</sup>

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<sup>7</sup> THE PRINCIPLE OF NE BIS IN IDEM IN CRIMINAL MATTERS IN THE CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION, SEPTEMBER 2017, Eurojust publication.

41. Defence claims that in this case the *idem* requirement is satisfied in the light of the meaning given to it by the case law of the CJEU. In a nutshell, the argument of the Defence claims that the *same acts* requirement has been met since the Criminal Court of Vienna convicted the requested person for all people-smuggling operations in which he was involved in Austria and within the EU territory between mid-2015 and July 2016. Irrespective of the nationality of the people smuggled, the identity of the co-conspirators or accomplices mentioned in the judgment of the Criminal Court of Vienna and the EAW, the requested person was convicted for the material acts constituting the criminal offence of people-smuggling within the same time-frames and geographical areas as those requested by the Hungarian Judicial Authorities.

42. The time-frames mentioned in the judgment of the Criminal Court of Vienna and the EAW issued by the Hungarian Judicial Authorities coincide. The Austrian Courts' Judgment refers to the criminal offence being committed between "mid-2015" to 21st July 2016. The Hungarian Judicial Authorities are requesting the surrender of ALJELDA for the prosecution of the crime allegedly committed between July 2015 and April 2016.

43. The criminal offence for which the requested person was convicted by the Criminal Court of Vienna was *the crime of people-smuggling under Section 114(1), (3)(1), (4) first case FPG*. In particular the Criminal Court of Vienna declared that :-

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, as a member of a criminal organisation, being a structured association, established over a period of time, of more than two persons consisting of themselves as well as at least the separately prosecuted and in part already sentenced Orhan BABIJAIEV, Ramzan DADALOW, Osman AKAIEV, Ruslan TURASHEV, Artur NATSIURI, Sulejman BAJTIMEV, Mikhail BAMBACH, Denis SPULING, Mikhail SAVELEV, Robert MUELLER, Dariusz ZAREMBA, as well as other, in part unknown offenders, formed with a view to committing ongoing offences under Section 114(1) and (3)(1) FGP, commercially (Section 70(1)(3) Strafgesetzbuch, StGB (Austrian Penal Code) assist the unlawful entry by aliens into or travel through Member States of the European Union with a view to illegal enrichment of themselves or of a third party from a payment made for the same, specifically

**A./ Loiai ALJELDA** 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 passing them directly to the people-smuggling drivers, as well as organising their onward transportation, as well as collecting and sharing out payments for people-smuggling, for instance inter alia 5 aliens on 7.9.2015, whereby the people smuggling operation was carried out by the driver Roland HORVATH;

.....

Hereby, Loiai ALJELDA, Selim LAND, Alischan MERSCHOEV and Beslan ELBIEV committed the crime of people-smuggling under Section 114(1), (3)(1), (4) first case FPG - Alischan MERSCHOEV and Beslan ELBIEV a partial attempt under Section 15 StGB - and are punished for this in each case in application of Section 28(1) StGB under Section 114(4) FGP as follows :

1st accused Loiai ALJELDA **Imprisonment of 3 (three) years** ....

44. The criminal offence for which the requested person's surrender is being sought by the Judicial Authorities of Hungary is the :

felony of smuggling human beings committed in a criminal organisation, as a leader of the criminal organisation, assisting several persons in crossing the border, for the purpose of monetary gain, continuously, set out in Section 353(1) of the Criminal Code, classified and to be punished pursuant to Subsection (2)(a) and (b), (3)(d), and (5), in view of Section 459(1)(1) of the Criminal Code (indictments 1-8).

45. The Crimes are therefore very similar.

46. The circumstances of person accused, time-frames, geographical areas and places, criminal offence and *modus operandi* for the commission of the crime mentioned in the judgment of the Criminal Court of Vienna and the EAW as well as the bill of indictment filed by the Hungarian Prosecutor before the Criminal Court of Győr tally. But were they the “*same acts*”?

47. The judgment of the Criminal Court of Vienna states that the offence of people smuggling was committed :

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, as a member of a criminal organisation, being a structured association...

48. Defence Counsel claims that this wide jurisdictional net catches also the alleged acts of people-smuggling that the Hungarian Judicial Authorities are requesting the requested person for. Defence Counsel argues that this is even more pronounced by the fact that person accused, time-frame, geographical areas and places, as well as crime and *modus operandi* for the commission of the crime are practically the same and forming one inseparable whole.

49. The Court of Magistrates (Malta) concluded that it found no evidence to conclude that these were indeed the “*same acts*”<sup>8</sup> when it compared the factual details for which the requested person was convicted and sentenced by the Criminal Court of Vienna, which

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<sup>8</sup> This conclusion is also based on the fact that the “*vagueness*” lamented by the Court of Magistrates (Malta) was, to a certain extent, clarified by the correspondence found in the records between the Office of the Attorney General in Malta and the Eurojust Deputy National Member of Austria a fol. 194 till 201 of the records of these proceedings.



are found in the reasons for the decision<sup>9</sup> with the factual details for which the requested person is being sought by the Judicial Authorities of Hungary mentioned in the EAW, and further elaborated in the bill of indictment that in the meantime was sent to the Court of Magistrates (Malta) during the course of the EAW proceedings before it.

50. The Court of Magistrates (Malta), and the Judicial Authorities of Hungary,<sup>10</sup> contend that the episodes of people smuggling mentioned in this judgment appear to be different from the ones mentioned by the Hungarian Judicial Authorities in the EAW and the bill of indictment. The explanation given by the Eurjost Deputy National Member of Austria in his email at fol 194 and 195 clarifies the legal position in relation to some of the generic wording used by the Criminal Court of Vienna and which the Court of Magistrates (Malta) considered to be vague, and contributed to the Court of Magistrates' conclusion that there was no *ne bis in idem* in this case.

51. The requested person features both in the Austrian case and in the Hungarian case as the main protagonist, who was directly involved in the people-smuggling organisations and operations between Hungary and Austria taking place by land transport between mid-2015 and July 2016. However the persons accused together with him in the two separate judicial proceedings as being involved in

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<sup>9</sup> Fol 69 et seq.

<sup>10</sup> See the correspondence of the National Member of Hungary at fol 81 and 82, as well as the letter sent by Dr. Tunde Forman at fol 177

the criminal organisations engaged in people-smuggling operations clearly result to be different.<sup>11</sup>

52. Defence Counsel argues that this is of no consequence given that the judgment of the Criminal Court of Vienna, thanks to its wide and generic wording by reference to place, time and circumstances, and not less the wide jurisdictional parameters which it was meant to cover led to a conviction against the requested person for all people-smuggling operations he was involved in and which fell within those temporal, geographical, circumstantial and legal parameters.

53. Essentially the argument raised by Defence is that this as an “*umbrella conviction*” that extinguished all criminal responsibility and the prosecution of all criminal actions against the requested person for people-smuggling operations that he carried out or might have carried out with others during the specified time-frames and geographical areas within the EU since these formed part of the same “*same acts*” in line with CJEU decisions.

54. If this line of argument is correct, it means that the judgment delivered by the Criminal Court of Vienna extinguished the merits of all those episodes of people-smuggling discovered by the Hungarian Judicial Authorities, not only within Austrian territory, but also those that were stopped by the Hungarian Police, within Hungarian borders, even before stepping over Austrian soil,<sup>12</sup> and

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<sup>11</sup> and no evidence of any specific organisational, operational, logistical or other link between them was proven.

<sup>12</sup> as mentioned in points 1, 2 and 3 of pages 4 and 5 the EAW.

even though the Criminal Court of Vienna was not even aware of the existence of these incidents or had no evidence about them. The judgment of the Criminal Court of Vienna does not appear to make specific reference to the episodes of people-smuggling mentioned in the Hungarian EAW.

55. The Court of Magistrates (Malta) was therefore confronted with a decision as to whether the expression “*same acts*” included all people-smuggling acts carried out by the requested person within the EU during the time frames mentioned above, thus forming a “one inseparable whole” for which the requested person was convicted by the Criminal Court of Vienna as Defence contends; or whether it was to analyse the available details supplied by the Judicial Authorities of Austria and Hungary in order to see whether the people-smuggling operations for which the requested person was convicted by the Criminal Court of Austria were the same people-smuggling acts for which the Hungarian Judicial Authorities were requesting the requested person. So it analysed whether it should accept a “*broader*” interpretation propounded by Defence, or whether it should afford it a “*stricter*” interpretation as the one adopted by the Hungarian Judicial Authorities, to the concept of “*same acts*”.

56. The Court of Magistrates (Malta) found the communication of the Deputy National Member for Austria on Eurojust of the 20th May 2020 as particularly significant in that it explains certain aspects behind the generic words used by the Criminal Court of Vienna in

its judgment. In reply to an email sent by Dr. Maria Baldacchino from the Attorney General's Office of Malta, at 2:58pm Michael Schmid replies about the meaning and correct legal interpretation of the judgment of the Criminal Court of Vienna as follows:-

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 in the time period between Mid 2015 and 21 July 2016.

Therefore the wording in the verdict is as vague as you saw and it is mentioned in the reasoning of the judgment that the exact time and quantity of these transports cannot be determined.

Attached you can see the indictment leading to the trial. Here, altogether 8.000 smuggled persons are mentioned in the same time period but also no specific dates for the offences.

Mr. Aljelda was not convicted for the remaining 7.550 persons as this could not be proven. Please note however that according to the Austrian legislation he was not acquitted from that accusation either.

57. This means that the requested person did confess to his involvement relating to the smuggling of fifty persons. However this communication states that he gave no further details. This partly explains why the verdict of the Criminal Court of Vienna was "*vague*" in its details. The exact time and quantity of the transports could not be determined by the Austrian Judicial Authorities – despite the other evidence gathered by them. The fact that the requested person released a statement confessing his involvement in the smuggling of fifty people to Austria, when in point of fact the Hungarian Judicial Authorities claim to have evidence to prove that that he was involved in smuggling of ninety three persons is also telling.

58. It is true that the Criminal Court of Vienna convicted the requested person for smuggling of *at least 55 aliens*. However, it is crucial to note that according to the Eurojust Deputy National Member for Austria, according to the Law of Austria, the requested person **was not convicted by the Criminal Court of Austria for those other transports that could not be proven attributable to the involvement of the requested person in the crime.** On the otherhand this Officer stresses that according to Austrian Law, **the requested person was not acquitted from that accusation either.**

59. The Court of Magistrates (Malta) therefore saw that according to Austrian Law, the requested person was convicted for the crime of people smuggling in relation to the number of persons that the Austrian Judicial Authorities could establish from the evidence submitted to them as attributable to the criminal involvement of the requested person – the number of at least 55 aliens. But according to the same Austrian Law as explained by the Eurojust Deputy National Member of Austria, the requested person **was not acquitted from those episodes of people smuggling that could not be proven, up to the required level of sufficiency of evidence in criminal proceedings, as being attributable to the criminal involvement of the requested person.** Consequently this implies that his alleged participation in the other criminal offences of people-smuggling that were not deemed proven by the Criminal Court of Vienna as attributable to the requested person, were not prejudiced by the conviction and sentence of that Court. This also

points towards an evidence-based approach adopted by the Criminal Court of Vienna in relation to the conviction of the requested person for the people-smuggling operations in which he was involved. This militates against the “*umbrella conviction*” argument adopted by reference to the judgment of the Criminal Court of Vienna; and it does not support the interpretation that the judgment of the Criminal Court of Vienna extinguished all actions against the requested person – even for those cases of which it was not made aware of, or of which it had no evidence of his involvement. After all, thanks to the clarification provided by the Deputy National Member of Austria in Eurojust, the judgment of the Criminal Court of Vienna was not meant to, and did not, extinguish all episodes of people smuggling carried out by the requested person.

60. This meant that “*same acts*”, had to be given a *stricter* interpretation as otherwise, if a *broader* interpretation were to be applied, a requested person could easily go unpunished for unrelated serious crimes that he would have committed within the same timeframe and geographical area. Therefore the Court of Magistrates (Malta) saw that an evidence-based analysis had to be carried out in order to determine whether the facts mentioned in the judgment of the Criminal Court of Vienna were the “*same acts*” as those mentioned in the Hungarian EAW. If the documents submitted showed, up to the required level of sufficiency that they were materially the same, and thus making up one inseparable whole, then the test would be

satisfied and *ne bis in idem* could apply. If there was no sufficient evidence to show, up to the level of sufficiency required that the facts mentioned in the judgment of the Criminal Court of Vienna were the “*same acts*” as those mentioned in the Hungarian EAW, then the Court of Magistrates (Malta) could not conclude that *ne bis in idem* applied.

61. While it is clear that both the Austrian and Hungarian Judicial Authorities required the requested person for essentially the same criminal offence, the documents and the limited evidence submitted to the Court of Magistrates (Malta) left doubt as to whether the acts of people-smuggling in these two separate procedures were the same. It could not be sufficiently proved that the criminal organisation in which the requested person was involved and mentioned by the judgment of the Criminal Court of Vienna was the same criminal organisation that the Hungarian Judicial Authorities mention in their EAW. It could not be sufficiently proved that the acts of people-smuggling mentioned in the judgment of the Criminal Court of Vienna were the same acts of people-smuggling mentioned in the Hungarian EAW.

62. No sufficient link could be established between the two, except, of course the involvement of the requested person. The identities of the persons involved in the execution of the crime of people-smuggling mentioned in the judgment of the Criminal Court of Vienna were different from those mentioned in the Hungarian EAW. It was not sufficiently proven, at least, that they formed part

of the same criminal organisation and engaged on the same operations of people-smuggling as one inseparable whole.

63. The Court of Magistrates (Malta) saw that the Hungarian EAW speaks of the criminal organisation featuring the requested person as well as Marton SZTOJKA, Gabor GONCZI and Otto KESZTHELYI as the main smugglers. The bill of indictment submitted in the course of the EAW proceedings includes also Geza SCHAHAY and Ferenc Sandor KISS among the people forming part of the organisation of people-smuggling with the requested person. On the otherhand the judgment of the Criminal Court of Vienna convicted the requested person for his participation in the crime of people-smuggling via a criminal organisation engaged in the land transportation from Hungary to Austria and Germany together with Selim LAND, Alishan MERSCHOEV and Beslan ELBIEV who, in Vienna, and other locations in the Federal Territory (of Austria) and in the European Union committed this crime together with (as well as) separately prosecuted and in part already sentenced Orhan BABIJAEV, Ramzan DADALOW, Osman AKAEV, Ruslan TURASHEV, Artur NATSIURI, Sulejman BAJTIMEV, Mikhail BAMBAKH, Denis SPULING, Mikhail SAVELEV, Robert MUELLER, Dariusz ZAREMBA, as well as other, in part unknown offenders.

64. The Court of Magistrates (Malta) noted that the Hungarian EAW indicates that the ethnicity of the persons smuggled by the criminal organisation of the requested person, Marton Sztojka as the others,



were Afghans, Moroccans, Palestinians, Syrians and Somalis. The judgment of the Criminal Court of Vienna simply refers to the smuggled people as *aliens* and does not give any specific reference to their origin or ethnicity.

65. On the otherhand the judgment of the Criminal Court of Vienna condemned the requested person for his specific involvement in people-smuggling operations together with the second accused in that case, that is Selim LAND. The judgment adds : -

Through the second accused, with whom the first accused became acquainted in the course of buying a car, the possibility arose of making contact with people who can largely be categorised as from the **Chechen community**, who were willing to join the criminal organisation and act as people smugglers.

66. Therefore from the abovementioned quotation it results that the requested person was, *inter alia*, convicted for his criminal association with Selim LAND and others, as aimed at the recruitment of people-smugglers coming from the Chechen community. The persons involved in the execution of these operations were, apart from the requested person, Selim LAND - who, though having Austrian nationality was born in Grozny, that is the capital of Chechnya in the Russian Federation; Alishan MERSCHOEV, a Russian national, born in Bamut, which is also a rural locality in Chechnya, Russian Federation; and Beslan ELBIEV, a Russian national, who was born in Urus-Martan, that is also a town in Chechnya, Russian Federation. While the judgment of the Criminal Court of Vienna does not specify the identity of the people smuggled, it does give an indication that the Austrian Authorities

disbanded this criminal organisation specialised in people-smuggling and that was principally made up of people coming from the Chechen community, apart from the requested person.

67. From the evidence submitted to the Court of Magistrates (Malta) it transpired that while with Marton SZTOJKA, Geza SCHAHAY, Ferenc Sandor KISS, Gabor GONCZI and Otto KESZTHELYI the requested person was engaged in a people-smuggling organisation aimed at smuggling Afghans, Moroccans, Palestinians, Syrians and Somalis, the same requested person had also developed or participated in what appears to be a parallel criminal organisation with Selim LAND, Alishan MERSCHOEV and Beslan ELBIEV which was aimed at the smuggling people in Austria and Germany through Hungary. However it could not be established that these were one and the same criminal organisation as there was no evidence showing that these people formed part of the same organisation of which Marton SZTOJKA and the others, or that they worked together or that they carried the people-smuggling operations mentioned in the judgment of the Criminal Court of Vienna and the Hungarian EAW jointly, in part or in whole.

68. The Court of Magistrates (Malta) rightfully claimed that, on the basis of the evidence available to it, it could not conclude that in this case the "*same acts*" requirement was satisfied such that the material acts, although linked in time and in space were also linked by their subject matter, thus making up an inseparable whole. The evidence

presented to the Court of Magistrates (Malta) did not present these acts as forming part of an inseparable whole.

69. Indeed the factual context of the judgment of the Criminal Court of Vienna, and the explanation given by the Eurojust Deputy National Member of Austria in his correspondence abovementioned in relation to certain “vagueness” encountered by the Court of Magistrates in that judgment point towards the direction that the Criminal Court of Vienna could not have the power to extinguish the criminal action against the requested person **also** for those crimes of people-smuggling of which the Criminal Court of Vienna was not aware at the time of the delivery of its judgment or for which it had no evidence on which to convict the requested person.

70. In fact the **main focus** of the judgment of the Criminal Court of Vienna centered on the criminal responsibility of the requested person in relation to his participation in the criminal organisation that carried out people-smuggling **together with** Selim LAND, Alishan MERSCHOEV and Beslan ELBIEV and their activities involving the recruitment of people smugglers *who can largely be categorised as from the Chechen community and who were willing to join the criminal organisation created by the first accused* – that is the requested person. Even though the nationality of the people smuggled is not known, the judgment speaks of *at least 55 aliens*.

71. While the facts of the case in the judgment of the Criminal Court of Vienna clearly portray a *modus operandi* similar to that adopted by

the requested person with the other persons mentioned in the EAW and the bill of indictment issued by the Hungarian Judicial Authorities, the main focus of the judgment of the Criminal Court of Vienna still rested on the evidence that was presented to it in relation to the operations of the requested person **together with** Selim LAND, Alishan MERSCHOEV and Beslan ELBIEV. So much so that at fol 70 it continues as follows :

The criminal organisation hereby usually proceeded as follows: the prospective illegal alien migrants were brought from their homelands to Hungary by unknown people-smuggling organisations. The first accused (the requested person) usually acting as head of the organisation from Budapest, Hungary, acquired the aliens in Budapest and then introduced them while arranging the pricing to the second (Selim LAND), third (Alishan MERSCHOEV) and fourth accused (Beslan ELBIEV) as well as other drivers. Then they served as sub-organisers, who then organised the onward transport of the aliens to or via Austria to Germany, by making contact with people-smuggling drivers and organisation of the people-smuggling vehicles.

The accused organised numerous people-smuggling operations, and it is impossible to determine the precise number. They proceeded in an extremely cautious and conspiratorial way in the organisation of the people-smuggling operation, for instance, details were rarely discussed via telecommunications, or they switched to the more tap-proof WhatsApp and Viber. People-smuggling routes were first of all scouted out and then passed on to drivers. The payment for people smuggling was partly collected by themselves and passed on to organised drivers. The accused also used code words, such as “pellet” for prospective illegal migrants or “paper” for money to the amount of EUR 100.00 or “dogs” for the police.

Re: the first accused :

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 of 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 organising their

onward transportation, as well as collecting and sharing out payment for people smuggling, for instance inter alia 5 aliens on 7.9.2015, whereby the people smuggling operation was carried out by 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 (the requested person) at the M+D Hotel in Budapest. The first accused discussed the details of the people-smuggling operation with HORVATH: 5 individuals were to be transported to Vienna, Austria, HORVATH would have received approx. EUR 1,000,00 for this. In fact HORVATH was paid in advance of EUR 200,00 by the first accused. The first accused then 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 well as HORVATH were picked up by the police.

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.

72.The Criminal Court of Vienna conceded that, on the basis of the evidence supplied to it, *it could not be established with the certainty necessary for criminal proceedings* that the requested person organised other people-smuggling operations in the period between 2015 and 21st July 2016 in addition to the number of the aliens given in the statment or whether he participated in them in other ways. This means that the requested person did in point of fact mention to the Austrian Judicial Authorities facts relating to his activities of people-smuggling which facts were presented to the Criminal Court of Vienna. However these same facts were not also produced before the Court of Magistrates (Malta). The Court of Magistrates (Malta) was not provided evidence as to what the requested person stated; and whether he confessed only to his involvement with Selim LAND, Alishan MERSCHOEV and Beslan

ELBIEV, or whether he mentioned also his alleged involvements with Marton SZTOJKA, Geza SCHAHAJ, Ferenc Sandor KISS, Gabor GONCZI and Otto KESZTHELYI or whether he did not mention any details at all.

73. The indication stemming from the wording of the judgment of the Criminal Court of Vienna is that apart from his association with Selim LAND, Alishan MERSCHOEV and Beslan ELBIEV and the operations that led to the smuggled *at least 55 aliens*, no further information relating to other associations with other persons or other episodes of people-smuggling were given by the requested person to the Austrian Judicial Authorities.

74. The judgment of the Criminal Court of Vienna adds the following details : -

Re: the first accused:

Here, based on his confession, there is first of all no doubt that the first accused was involved as organiser or middleman in relation to at least 50 smuggled migrants. The witness Roland HORVATH was able to describe credibly that the first accused was also involved in price negotiations. Further, the witness Roland HORVATH incriminates the first accused with an additional 5 smuggled migrants. The first accused declared that he had not commissioned the witness Roland HORVATH to carry out people-smuggling operations. The court here accepts the testimony of witness Roland HORVATH, as he credibly and with sufficient detail stated how the acquisition and organisation took place on 7.9.2015. For instance, he gave testimony that the meeting place was the M+D Hotel in Hungary, a hotel in which the first accused was actually staying. These statements were also compatible with the statements made by HORVATH to the police on his arrest by PI Bruck at Leitha (ON 723 AS 133). Further, the first accused is incriminated by the results of the telephone surveillance that was carried out.

75. The Criminal Court of Vienna convicted the requested person also on the basis of the confession released in his statement. That Court compared the statement released by the requested person with the deposition made by Roland HORVATH, and found that HORVATH's testimony was more reliable. This means that the Criminal Court of Vienna did not really believe that the requested person's involvement was limited to what he stated in that statement. So much so that from the Eurojust Deputy National Member of Austria's communication it transpired that the requested person admitted to the smuggling of fifty people whereas Roland HORVATH confirmed his involvement in the smuggling of another five people being smuggled - thus leading the Criminal Court of Vienna to conclude that the requested person was involved in the smuggling of at least 55 aliens. So if that were the case, and the requested person deliberately gave incomplete information to the Austrian Judicial Authorities, how could the Court of Magistrates (Malta) conclude that he could also benefit from *ne bis in idem* thanks to his knowingly incomplete and misleading statement released to those Judicial Authorities, forming part of his effort to limit his criminal responsibility?

76. From what the Hungarian Judicial Authorities claim in their EAW and bill of indictment, it appears that the requested person did have other associations with other persons engaged in other people smuggling operations that were not divulged to the Austrian Judicial Authorities; or if divulged to the Austrian Judicial

Authorities, these were not brought as evidence before the Court of Magistrates (Malta) in these proceedings.

77. Clearly here the Criminal Court of Vienna states that the requested person himself had confessed to the Austrian Authorities that he was involved in the smuggling of fifty people to Austria. But the Court of Magistrates (Malta) had no further information whether these fifty people were smuggled in the course of his operations in association with LAND *et al* only or whether these included also the cases carried out in association with with SZTOJKA *et al*. From the judgment no other names of other co-conspirators or people smugglers result apart from Selim LAND, Alishan MERSCHOEV and Beslan ELBIEV and the other persons mentioned in the judgment. No reference is made to Marton SZTOJKA, Gabor GONCZI and Otto KESZTHELYI or Geza SCHAHAY and Ferenc Sandor KISS, who appear to have been central to the investigations and prosecutions carried out by the Hungarian Judicial Authorities.

78. After an initial uncertainty shown by the correspondence with the Hungarian Eurojust desk and SIRENE, the reply by the Hungarian Judicial Authorities came very clear - namely that they were continuing with the prosecution of the criminal action against the requested person despite them being clearly informed that the requested person was raising the *ne bis in idem* bar to extradition. The Hungarian Judicial Authorities confirmed that they were treating the case of the requested person as not being barred by the *ne bis in idem* exception, based on the fact that the material acts in



their case were different from those for which the requested person was convicted by the Criminal Court in Vienna. The Hungarian Judicial Authorities claim that their request centred round the alleged involvement of the requested person in other people smuggling operations, carried through a criminal organisation involving Marton SZTOJKA, Geza SCHAHAJ, Ferenc Sandor KISS, Gabor GONCZI and Otto KESZTHELYI for a total of 93 smuggled persons – albeit being carried out within the same timeframes and with the similar *modus operandi*.

79. The Court of Magistrates (Malta) was correct to conclude that it found no evidence on which to uphold the *ne bis in idem* bar to extradition in this case. Indeed there was no sufficient evidence to show that in the second criminal prosecution the material acts were not only linked in time and space **but also** by their subject matter – in order to make **one inseparable whole**; and that the acts that formed the subject matter of the conviction by the Criminal Court of Vienna were the same acts for which the Hungarian Judicial Authorities require the requested person for prosecution. If indeed they were the same material acts – in whole or in part - **they were not portrayed by sufficient evidence to the Court of Magistrates (Malta)**. Consequently on the basis of the evidence in the records of the proceedings the Court of Magistrates (Malta) was reasonably and legally correct to dismiss the *ne bis in idem* bar to extradition.

80. However, the fact that the Court of Magistrates (Malta) could not arrive at *ne bis in idem*, does not bar the requested person from raising the matter before the Courts of the Republic of Hungary. In fact, according to *Kraaijenbrink*, the analysis of “*same acts*” in terms of Article 54 of CISA implies the consideration of the :

specific unlawful conduct which gave rise to the criminal proceedings before the courts of the two Contracting States as a whole. Thus, Article 54 of the CISA can become applicable only where the court dealing with the second criminal prosecution finds that the material acts, by being linked in time, in space and by their subject matter, make up an inseparable whole.

81. This finds also reassurance in the letter sent by the Head of Department of International Criminal Law in the Ministry of Justice of the Republic of Hungary, Dr. Tunde Forman dated 21st May 2020 wherein she assures that :

It will be the court’s task to determine during the proceedings whether Loiai Aljelda was sentenced totally or partially for the same offences in Austria or not, or these offences are completely different.

82. Given that these proceedings are EAW proceedings, they do not deal with the merits of the case and the quality and quantity of evidence to be submitted to the Court of Magistrates as a court of committal is limited to the scope of the same *sui generis* proceedings. The plea of *ne bis in idem* may still be raised before the Courts of the Republic of Hungary since they enjoy full competence to deal with the merits of the applicant’s case. Those Courts are best placed to determine this plea given that they would be entrusted with the analysis of the full and complete body of evidence, buttressed by a higher level of sufficiency of evidence and confidence.

*Considers further : -*

**B. The second grievance**

83. Defence claims that the *iter* of the case before the Court of Magistrates (Malta) was prejudicial to the Defence in the sense that as appeared from the minutes of the proceedings, at no point did the Prosecution declare that it had no further evidence to produce and at no point was it made clear that following the end of the stage where the prosecution presents its evidence, it was the Defence's turn to present its evidence. The Defence claims that the Court failed to follow the provisions of article 374(i) of the Criminal Code, duly adapted to these extradition proceedings. There was no indication that the Police were to produce evidence, that the Police concluded with their evidence or that after that the Police concluded with their evidence it was up to the Defence to produce its evidence. The way sittings were carried out was such that either side could make statements or submit evidence at any point in time. Defence did state its defences this notwithstanding.

84. Defence said that it raised the bar to extradition of *ne bis in idem* and the Court demanded further clarifications. The Court had already concluded in its mind that *ne bis in idem* did not apply but wanted further evidence to ascertain any doubt. This request for further clarification seemed to indicate that the proceedings were conducted in such a way as to enable the Police to produce all information and documentation to neutralise the arguments of the

Defence, with the emails at fol. 183 and 184 being particularly revealing. The records of the proceedings of the 20th May 2020 revealed that the prevailing *forma mentis* was to leave no stone unturned to neutralise the defence of *ne bis in idem*. “*Had the forma mentis been otherwise, it would have stated that the Police had had enough time to produce their evidence and clarifications and that their time was up.*” The appellant claimed that the way sittings were conducted was prejudicial to the Defence.

85. This Court considers that the provisions of article 374 of the Criminal Code are not applicable to the current proceedings. That article applies to *ex officio* proceedings before the Court of Magistrates as a court of criminal judicature. According to the judgment delivered by this Court in re : *Il-Pulizija vs. Emanuel Borg*, on the 19th September 2007

Il-Qorti Rimandanti hi effettivament il-Qorti tal-Magistrati bhala Qorti Istrutturja - fl-Artikolu 15 tal-Kap. 276 tintuza l-espressjoni ekwipollenti “qorti ta’ kumpilazzjoni” - izda tissejjah “Qorti Rimandanti” (“Court of Committal” bl-Ingiliz) u ghandha listess poteri ta’ Qorti Istrutturja izda modifikati skond il-Kap. 276 u ligijiet sussidjarji ghall-finijiet ta’ proceduri ta’ estradizzjoni.

86. Regulation 3 of the Order clearly states that only the provisions of the Order, save where otherwise expressly indicated, applied to requests received or made by Malta on or after the relevant date for the return of a fugitive criminal to or from a scheduled country, or to persons returned to Malta from a scheduled country in pursuance of a request made under the Order. Moreover, the provisions of the Extradition Act had effect in relation to the return under this Order of persons to, or in relation to persons returned under the Order

from, any scheduled country subject to such conditions, exceptions, adaptations or modifications as are specified in the Order. The Order, therefore claims supremacy over EAW proceedings. However, the Order does not operate in a vacuum. It operates in symbiosis with the Extradition Act, up the extent mentioned in the said regulation 3 of the Order. Moreover, to the extent that is compatible with the above, the procedure applicable before the Court of Committal is that governing the Court of Magistrates (Malta) as a court of criminal inquiry, always adapted to the specific, *sui generis* requirements of these EAW proceedings.

87.As Defence claimed, the Court of Magistrates (Malta) gave either side the possibility to make statements or submit evidence at any point in time. The Court of Magistrates (Malta) adopted a practical approach in the conduct of these proceedings aimed at expediting the same. It does not transpire that the Court of Magistrates (Malta) stopped, hindered or created any obstacles for the Defence to make any submissions, representations or requests for the production of witnesses, documents, exhibits or otherwise.<sup>13</sup>

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<sup>13</sup> The following are the instances where the Court of Magistrates took note of the submissions or requests made by Defence during these proceedings : -

- i. The minutes of the proceedings state that during the sitting of the 11th May 2020 Defence Counsel was given a copy fo the arraignment and the details about the EAW. The requested person confirmed his identity. The requested person, after consulting with Legal Counsel declared that he was not giving his consent to be extradited. The Defence agreed with the Prosecution that following that hearing and in terms of Legal Notices 61 and 65 of 2020 the term for the conclusion of the extradition was once again suspended. Defence Counsel requested bail. The Court denied the request.
- ii. During the sitting of the 13th May 2020 the requested person mentioned to the Court that in July 2017 he was arrested in relation to similar offences of trafficking. The Court added the following : - *“Since the requested person is maintaining that he has already been judged for the same offences indicated in the warrant, the Court demended confirmation or otherwise of such a claim”*. Inspector Omar Zammit took the witness stand, gave evidence under oath and exhibited Docs

88. As Defence rightly remarked the Court of Magistrates (Malta) took the initiative in terms of regulation 13A of the Order to seek clarification in relation to the plea of *ne bis in idem* raised by Defence. The Court of Magistrates (Malta) took a pro-active stance, as it was within its powers under regulation 13A of the Order, so as to make up for the insufficient information that was supplied to it, and in order for it to be able to decide on surrender. Part of this analysis entailed the analysis of the Court to ascertain whether the plea of *ne bis in idem* was founded in fact and at law.

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OZ, OZ1 and OZ2. At that stage Defence Counsel agreed that the offences for which the requested person was being requested in Hungary were extraditable offences. Defence Counsel claimed that there was a bar to extradition namely because of the rule of *ne bis in idem*. At that stage the Court of Magistrates (Malta) in terms of regulation 13A of the Order demanded (i) information confirming that investigations with regards to the requested person in Hungary had been finalised. (ii) whether the requested person has been convicted in Austria or Hungary for the crimes of illegal immigration and trafficking of persons given that he is alleging that he served a three year sentence. (iii) confirmation of the reasons for such arrest and any judgment to show the crimes for which he was convicted. The requested person confirmed that he was also known as Abu Hamza Loiai which was a mode of referring to him by reference to his son.

- iii. Then during the sitting of the 20th May 2020 Defence Counsel submitted that the sentence of imprisonment which the requested person served was served in Austria for the crimes mentioned in the judgment dated 13th November 2017 ref. No. 43HV61/17d. Defence Counsel were not insisting on the need of any further authentication of the said documents. Defence Counsel had no further documents to exhibit to justify its submissions on bars to extradition. Furthermore Defence Counsel referred to the previous sitting and noted that in spite of having been in agreement that the offences in question were extraditable offences there was still a great deal of difference between offences of human trafficking and migrant smuggling as stated by other jurists. Defence exhibited Doc. RBS.
- iv. The Court declared that it was not satisfied with the replies that were forthcoming from the Hungarian Authorities in that in the bill of indictment there was no clear indication as to the Place and Date of the offences for which the return of the requested person was sought. This was necessary in order to ascertain beyond doubt that the facts for which Aljelda was wanted in Hungary were different from the facts and dates for which he was sentenced in Austria.
- v. During the sitting of the 25th May 2020, inter alia, the parties declared that they had nothing further to add. Defence stated only that a bar to extradition on the ground of *ne bis in idem* existed. The Court adjourned the case for the delivery of the decree on the merits of the EAW.

89. The records of these proceedings do not show any particular bias being exercised by the Court of Magistrates (Malta) against the requested person. Nor do they show any decisions that limit the rights of defence of the requested person. It is true that the minute of the sitting of the 20th May 2020 states that the Court felt it necessary, in order **to ascertain beyond doubt** that the facts for which Aljelda was wanted in Hungary were different from the facts and dates for which he was sentenced in Austria. But this has to be understood in the light of the duty of that Court to dispel, as much as possible, any doubts it might have had in relation to the existence of the requirements of *ne bis in idem* in this case, given that, as mentioned earlier, the presumption goes in favour of the execution of an EAW, its non execution being the exception. The plea of *ne bis in idem* had to be substantiated by evidence up the level of sufficiency required by Law for these proceedings. That Court could not decide that plea without first ensuring that there was sufficient evidence supporting it. That Court felt that it could not arrive at its decision simply by relying on the documents presented to it originally as these were not sufficient. That Court could not simply accept that there was *prima facie* doubt and leave it at that as any doubt goes in favour of committal. One of the purposes behind regulation 13A of the Order is precisely that of giving the Court of Magistrates as a court of committal the practical mandatory<sup>14</sup> tool of requesting supplementary information in case

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<sup>14</sup> Regulation 13A of the Order states that “...it ***shall*** request the necessary supplementary information subject to any time limit which it may lay down for the purpose – emphasis added by the Court.

where it deems the information to be insufficient for it to arrive at its decision.

90. Defence Counsel could not expect the Court of Magistrates simply to rest on insufficient documents without trying to seek the truth further by using its powers and seeking further information. That is not a matter of bias. That is a matter of duty that the Court of Magistrate has towards the correct administration of Justice and towards the high principles of mutual trust between Judicial Authorities within the EU on the basis of which the EAW proceedings are based upon. Furthermore, as stated earlier on in this judgment, according to Maltese case law, and in particular in re *Gaul* any doubts, however, as to such possibility of guilt must not be ruled upon by that court, which would therefore be bound to commit. Hence the need felt by that Court to obtain further information in order to clarify the situation further before it decided the matter.<sup>15</sup>

91. Moreover, the emails exhibited at fol 183 and 184 of the records of the proceedings are emails exchanged between the Attorney General's Office and the Hungarian Eurojust Desk and the comments made therein are those of the Officer at the Office of the Attorney General and are not the comments of the Court.

92. This Court sees no basis for this grievance and is therefore rejecting the same.

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<sup>15</sup> In view of this case law, the initiative taken by the Court of Magistrates was in favour, and not against the rights and interests of the requested person.



### C. The third grievance

93. Defence contends that due to the inconsistencies in the documentation and communications presented by the Police, this documentation was unreliable and should have resulted in the Court of Magistrates (Malta) refusing to execute the EAW.

94. As already stated, EAW proceedings are *sui generis* proceedings. They are based on mutual trust among Judicial Authorities within the EU and on mutual recognition of their respective decisions. During the course of these proceedings the parties may submit documents or other evidence specifically and limitedly in relation to the scope of these special proceedings.

95. At the beginning of the proceedings, the Court of Magistrates (Malta) felt that the position relating to the status of the case of the requested person required clarification as the information available was insufficient for it to reach its conclusions on the matter of surrender. The Court of Magistrates therefore requested supplementary information on the basis of regulation 13A of the Order. Supplementary information was subsequently delivered by the Hungarian and Austrian Authorities as well as Eurojust.

96. Among other things, the Hungarian Judicial Authorities clarified that their request for the requested person was not simply based for investigative reasons only but it was based on the prosecution of the

criminal action against him in line with a bill of indictment bearing the date of the 28th April 2020. The Hungarian Authorities supplied also a copy of this bill of indictment as part of the evidence in this case. It must be noted that the EAW proceedings before the Court of Magistrates (Malta) started on the 11th May 2020 – that is around two weeks after that the bill of indictment had been drawn up. The fact that this supplementary information clarified the position of the requested person to that obtaining originally did not shift any goal posts. These proceedings are not a criminal trial. They are proceedings aimed at determining whether a person should be surrendered to an EU Judicial Authority for prosecution as based on a EAW and the documentary and other evidence submitted during the course of the EAW proceedings. Not all procedural rules and principles governing and applicable to criminal trials apply to these proceedings in like and in equal degree.

97. Defence Counsel would have been right had the Hungarian Judicial Authorities, during the course of the EAW proceedings, failed to declare or substantiate their request that they wanted the requested person for the purpose of prosecution of the criminal action for the crime mentioned in the EAW. In this case, however, the Hungarian Authorities did provide supplementary information proving that they required the arrested person for the purposes of prosecution of the criminal action. Indeed in this case the Hungarian Judicial Authorities went as far as submitting a copy of the formal

accusatory document to the Court of Magistrates (Malta) for its guidance.

98. The fact that at one stage the Hungarian Judicial Authorities appeared uncertain or considering whether to withdraw the EAW is true. But even that issue was clearly settled, thanks to the letter sent by the Head of Department of the International Criminal Law Department of the Ministry of Justice of the Republic of Hungary of the 21st May 2020. The fact is that these Authorities did not change their minds and continued with their request does not change the position of the requested person.

99. Moreover the fact that the Hungarian Judicial Authorities might have had other investigations under way, this fact per se, does not exclude the fact that they are requesting the requested person for the purposes of prosecution of the criminal action. At any rate, the decision of the Court of Magistrates (Malta) was issued subject to the rule of speciality.

100. As for the document exhibited at fol 178 the Court finds that Defence Counsel is correct in claiming that it was not translated in the Maltese or English language. This document may be expunged from the records of these proceedings. However this does not really change the position of the decision of the Court of Magistrates (Malta) in relation to the execution of the EAW.

101. Defence Counsel criticises the bill of indictment on account of the fact that in his email Laszlo Venczl claims that the appellant “*played a role in the illegal trafficking of 93 migrants through state borders*” without specifying the specific offences for which he was indicted. Once again, this Court cannot assess this bill of indictment as it is beyond its powers. However in the accusatory part of the bill of indictment on page 9 the Hungarian Public Prosecutor accuses Aljelda Loiai, as joint offender of the felony of smuggling human beings, committed in a criminal organisation, as leader of the criminal organisation, assisting several persons in crossing the border, for the purpose of monetary gain, continuously, set out in Section 353(1) of the Criminal Code, classified and to be punished pursuant to Subsection 2(a) and (b), (3)(d), and (5), in view of Section 459(1) (1) of the Criminal Code (Indictments 1-8). That is a very clear accusation and leaves little to the imagination of the reader.

102. Defence Counsel criticises also the flimsiness of the said bill of indictment especially thanks to the details in the email exchange that it claims took place between Laszlo Venczl and Dr. Maria Baldacchino at fol 194 and 195. However this Court notes that the email exchange at fol 194 and 195 is between Dr. Maria Baldacchino and Michael Schmid, the Deputy National Member of Austria on Eurojust, and not as stated by Defence Counsel. At any rate, whether the bill of indictment is flimsy or not is not something that is up to the Court of Magistrates (Malta) or this Court to determine. It is a matter that the Judicial Authorities of the Republic of Hungary will have handle.

## *Consequently*

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

- (a) dismisses applicant's appeal requesting the reversal of the Order of the Court of Magistrates (Malta) as a Court of Committal of the 8th June 2020;
- (b) confirms the decision of the Court of Magistrates (Malta) as a Court of Committal of the 8th June 2020 ordering the surrender of Loiai ALJELDA to the Judicial Authorities of the Republic of Hungary;
- (c) and orders that appellant Loiai ALJELDA be kept in custody to await his return to the Republic of Hungary;
- (d) while also being informed that he will not be extradited until the expiration of seven days from today, and that if he is of the opinion that any provisions of the Constitution of Malta or of the European Convention Act, is, has been or is likely to be contravened in relation to his person as to justify a reversal, annulment or modification of the Court's order of committal, he has the right to apply for redress in accordance with the provisions of article 46 of the said Constitution or of the European Convention Act Chapter 319 of the laws of Malta.

*Aaron M. Bugeja*  
*Judge*

