



IN THE COURT OF MAGISTRATES (MALTA)
AS A COURT OF CRIMINAL INQUIRY

(FOR PURPOSES OF THE EXTRADITION ACT REFERRED TO AS A COURT OF COMMITTAL)

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

The Police
(Inspector Mark Galea)
-vs-
VOGT Maximilian

Today the 17th day of August, 2020

The Court,

Having heard the prosecution arraign under arrest **VOGT Maximilian, without having identification documents**, hereinafter referred to as 'the person requested';

Having seen the European Arrest Warrant issued by the Landgericht (Regional Court) of Berlin, Germany,¹ a competent judicial authority of a scheduled country in terms of the Extradition (Designated Foreign Countries) Order, S.L. 276.05, dated the 31st January, 2020, the Schengen Information System Alert number DEP951780125116000001 dated the 25th February, 2020² and the Supplementary Information relating to an extradition.³

Having heard submissions by the Prosecution on the European Arrest Warrant and having seen the Certificate of the Attorney General in terms of Regulation 7 of the Extradition (Designated Foreign Countries) Order, S.L. 276.05, hereinafter referred to as 'the Order';

¹ Dok.D a fol.19 *tergo* - 23

² Dok.B a fol.9-10;

³ Dok.E, *Form A* a fol.24-25

Having heard submissions by counsel for the person requested;

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

Having seen that the person requested was informed of the contents of the Part II warrant and was given the required information about consent as provided in Regulation 11 of the *Extradition (Designated Foreign Countries) Order*, S.L. 276.05, hereinafter referred to as “the Order”;⁴

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

Having explained the provisions of Regulation 43 of the said Order;⁵

Having heard submissions by the prosecution on the European Arrest Warrant and having seen the Certificate of the Attorney General in terms of Regulation 7 of the Order;⁶

Having heard submissions by counsel for the person requested;

Considers,

Preliminary Considerations

Learned defence counsel requested to receive information on a number of issues which the Court deemed necessary for it to be able to make an informed decision as to its deliberations on the European Arrest Warrant. As such it invoked Regulation 13A of the Order and acceded to defence counsels’ request.

The German authorities duly complied in providing the requested information, which initially being provided only in the German language, was translated on instructions by this Court. The documentation emanated from the Landgericht Berlin, Berlin’s Regional Court, the issuing authority.⁷

⁴ Fol.4-5 and fol.33

⁵ Ibid.

⁶ **Doc.A** a fol.7-8

⁷ **Dok.ME** a fol.36 et seq.

Article 27 of the Extradition Act, rendered applicable to these proceedings through Regulation 73B⁸ of the Order provides:

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

By a note filed on the 6th August, 2020, the Attorney General filed a further document containing the requested information duly translated into English.⁹

The Court shall proceed to deal with the requests for information made under Regulation 13A of the Order.¹⁰

a). Whether trials *in absentia* are possible under German Penal Law.

The German authorities responded in the negative to this question which strictly speaking has no bearing on the issues that a Court of Committal is called to decide upon.

b). A detailed summary of the facts on the basis of which the person requested is being deemed an accomplice acting in concert with a certain Dr. Bente.

A copy of the national arrest warrant issued by the Landgericht (Regional Court) of Berlin dated the 27th November, 2019,¹¹ which also appears as the decision on which the EAW was based,¹² outlines the decision on which the person requested is being sought for prosecution before the German courts.

From this documentation it transpires that Vogt and Bente fraudulently acquired €23,124,905.11 (€19,753,630.00 plus costs and interests) to the detriment of Kleihhues & Kleihues society of architects. On the 30th December 2011, after several actions before the local courts, Deutsche Bank AG transferred almost 15,978,445.86 USD into Bente's account. On the 4th January,

⁸ **73B.** Articles 22(3) and 27 of the relevant Act shall apply to proceedings in connection with a request for extradition to a scheduled country under this Order:

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

⁹ **Doc.MEX** a fol.109 et seq

¹⁰ Fol.34

¹¹ Fol.57 et seq. In the German language at fol.64-67

¹² Fol.18 *tergo* et seq. Vide fol.20 para (b)

2012, Bente transferred 15, 858,420.08USD to the account of Fa. Raymax Film GmbH belonging to Vogt. Through this plan, Libya Africa Investment Portfolio suffered a loss of 16,002,664.00USD.¹³

This satisfies the requirements of the EAW itself which, in section (e) of the Form, i.e. the Annex to the Arrangement, only requires that the requesting authorities give a “Detailed description of the circumstances in which the offence(s) was (were) committed, including the time, place and degree of participation in the offence(s) by the requested person:”.¹⁴

Moreover, Regulation 5A of the order provides:

5A. (1) A form, as contained in the Annex to the Arrangement, purporting to reproduce details setting out the information required by the same form and containing the statement referred to in article 5(4), shall constitute a relevant arrest warrant for prosecution for the purposes of this order.

(2) A form, as contained in the Annex to the Arrangement, purporting to reproduce details setting out the information required by the same form and containing the statement referred to in article 5(7), shall constitute a relevant arrest warrant after conviction for the purposes of this order

Through further information received by the Attorney General’s Office from the Public Prosecutor in Berlin,¹⁵ further details are shed on the requested person’s role in the fraudulent activity attributed to him. So much so, that he is not simply and no longer referred to as an accomplice but “*is quasi the ‘principal offender’*”.¹⁶

Hence in the Court’s opinion, not only were the requisites fully satisfied *ab initio* through the EAW form being completed as required by the text of the Form itself coupled to the supplementary information in Form A, but the decision on which the EAW was based and to which it specifically refers in section (b) of the Form, reaffirms the said details accounting for the decision to prosecute the requested person.

Consequently, the Court finds that the EAW Form has been duly completed.

¹³ Fol.58

¹⁴ Regulation 2 of the Order: "the Arrangement" means the Council Framework Decision of the 13th June, 2002 on the European arrest warrant and the surrender procedures between Member States done at Luxembourg on the 13th June, 2002, adopted pursuant to Title VI of the Treaty, the terms of which are set out in the relative arrangement published in the Government Gazette dated the 1st June, 2004, as amended by Council Framework Decision 2009/299/JHA of the 26th February, 2009

¹⁵ Initially translated as **Doc.ASZ** a fol.94-95 (translated in English); **Doc.MEZ** a fol.82-84 (in German)

¹⁶ Fol.94

c). Notification of the decision on which the EAW was based.

Let it be stated from the outset that neither the Order, nor the Framework Decision impose, as a legal requirement, informing a fugitive of the issue of a national arrest warrant.

However, having reviewed the documentation received, it clearly results that the national arrest warrant issued on the 27th November 2019 was issued after several attempts were made to hold the trial against Vogt who, notwithstanding having been duly summoned, failed to present himself before the Court.¹⁷

This is evidenced also by the information sent to the Attorney General via electronic mail of the 27th July, 2020.¹⁸

It is stated therein that Vogt failed to appear (for his trial and Bente's) before the Main Criminal Court in Berlin both in January 2018 and in October 2019, having been duly summoned to appear on both occasions. After his failure to appear before the court in October 2019, on the 27th November, 2019, following a request by the public prosecutor, the Main Criminal Court issued a national arrest warrant on the basis of which the present EAW is based.¹⁹

"During the main trial held in October and November 2019, which on account of the accused Maximilian Vogt's failure to appear, could not be heard, it was established that the accused, by his own account, could not travel to Berlin in October 2019 due to illness."

This led the chamber handing down judgement to uphold the public prosecutor's request and issue an arrest warrant for VOGT, *"Since he is on the run and evaded the legal proceedings"*.²⁰

Although not required to do so for purposes of these proceedings, this Court examined the documentation sent by the German authorities substantiating their claim that Vogt was aware of the proceedings instituted against him, having also instructed legal counsel to appear in his stead, file claims on his behalf (as his complaint against Justice Herb manifests²¹) and even entrusting legal counsel with a power of attorney. This is evidenced thus:

¹⁷ Dok.MEZ a fol.109 et seq.

¹⁸ Dok.ASZ a fol.94-95

¹⁹ Fol.95

²⁰ Ibid.

²¹ Dok.AA1 a fol. 133 et seq

a). From documentation filed by the requested person, attesting to a claim for the institution of disciplinary proceedings against the presiding judge in the proceedings he is facing before the German courts, it is precisely a Steffen J. Tzschope who appears as VOGT's attorney.²²

Mr. Tzschope is the same attorney who appears as the recipient of the Affidavit of Service of documents emanating from the District Court of Berlin and addressed to Maximilian Vogt.²³

The very fact that the person requested objected to a judge's presence in criminal proceedings wherein he was involved as the accused is, in itself, an attestation of not simply his knowledge of those proceedings, but active participation therein.

b). VOGT was served with documentation relating to the proceedings having reference no. **530-8/13**.²⁴ The criminal proceedings leading up to the local arrest warrant issued on the 27th November, 2019, bear reference **(530-)241Js 293/12 KLS (8/13)**:²⁵

- (i) In the first affidavit of service one finds the reference **530-8/13 E.v.27.03.2013**.²⁶ Service took place on the 30.03.2013.²⁷ It is clearly stated therein that the addressee in that case was "**Maximilian Vogt Monumentenstr.9, 10829 Berlin**".²⁸ As evidenced by the marking of the relevant fields, 9 and 10.²⁹ and the translation of same by Scalpello, this shows that the document was left "X the apartment letterbox or similar place".³⁰

²² Dok.AA1 a fol.133

²³ Fol.51

²⁴ Fol.42 Notice of summons of the 26.09.2019. Fol.44-55 Notice of Summons of the 30.03.2013

²⁵ Fol.20 of the EAW indicating the local decision on which warrant was based. Vide also fol.57

²⁶ Fol.51et seq. In German a fol. 42-45. Although in the translation by Alfred Scalpello it is indicated that the postal article was received by a Mr. Tzschope Steffens since the translator indicated item 5.4 as bearing the name "Tzschope"(Fol.52. Vide 5.4 and 10.1) the form in the German language makes no mention of Tzschope and in fact para 5.4 is left blank. (Fol.45 another copy a fol.69)

²⁷ Fol.53 and in the German original a fol. 45. Another copy a fol. 69

²⁸ Fol.51 and in German original a fol.58

²⁹ Fol.45 (another copy a fol.69)

³⁰ Fol.52

- (ii) The second Affidavit of Service bears the reference **530-8/13 T.22.10.2019+FS**.³¹ This time, the documentation which was delivered on the 26.09.2019,³² was addressed to "Maximilian VOGT via lawyer Steffen J. Tzschoppe Pariser Str.42. 10707 Berlin".³³ It was similarly sent by the District Court of Berlin.³⁴ 5.4 of the said notice³⁵ indicates that it was handed over to the delivery address, to an authorised representative.³⁶

The Court, having read the documentation sent by the German authorities cannot but note that Maximilian Vogt was represented by no less than three lawyers: Tzschoppe of Pariser Str 42 (the address to which documents addressed to Vogt) were sent; Kelz and Radtke.³⁷

Consequently, there is no doubt that had Mr. VOGT chosen to participate in the criminal proceedings instituted against him amongst others ("*In the criminal case Maximilian Vogt et alia*"³⁸), he had every occasion to do so.

In fact, as evidenced by documentation dated the 28th October 2017,³⁹ R.A. Tzschoppe of Parisierstr 42., was designated with a power of attorney regarding VOGT Maximilian and thus authorised to represent him in, *inter alia*, "both out of court representation of all kinds and also for all court proceedings in all instances".⁴⁰

These proceedings bear the reference **530-8/13**, which is the reference appearing not merely on the local court's decision to arrest VOGT, on which decision the EAW was based, but on both *Affidavts of Service* to which reference has already been made.

The second affidavit of summons dated September 2019 and bearing the said reference, was addressed and duly served on VOGT's legal representative Tzschoppe.⁴¹

³¹ Fol.54 et seq. In German a fol. 42-43

³² Fol.43

³³ Fol.54

³⁴ Fol.54

³⁵ Fol.43

³⁶ Fol.55

³⁷ Fol.57

³⁸ Ibid.

³⁹ Fol.62 in English and Fol.61 in German

⁴⁰ Fol.62

⁴¹ Fol.54-56. In the German language a fol.42-43

Finally, definitive evidence that VOGT knew of the trial dates in which he absented himself claiming medical reasons, results from the complaint filed by VOGT's lawyer, Mr. Tzschope, in the proceedings instituted against Judges HERB⁴² and TAKE.⁴³

c). (i). The communication by the public prosecutor Michael Klockgether⁴⁴ also acquires relevance in this regard since it provides the Court with the background leading up to the issue of the national arrest warrant in November 2019, precisely for Mr. VOGT having absented himself from proceedings of which he was certainly aware having also served time in prison on remand for the said offence:

"Vogt has since May 2012 been aware of the legal proceedings and the allegations against him, since he from the 21st May 2012 up to the 28th June 2012 was in prison on remand for the current criminal charge....on the 21st March 2013 ...he was charged, which charge was approved by the district court of Berlin for a main hearing."

(ii). Moreover, the communication sent by the Chief Public Prosecutor's Office of Berlin,⁴⁵ continues to shed light on the events leading up to the issue of the national arrest warrant.⁴⁶

(iii). A reading of the decision of the 27th November, 2019, which led to that Court upholding the request made by the public prosecutor seeking VOGT's arrest, cites no less than three defence counsels appearing in the proceedings for VOGT.⁴⁷

Ultimately, it is common knowledge that arrest warrants need not be notified in advance to the wanted person. Indeed, such a move could be counter-productive defeating the very goals that an arrest warrant seeks to achieve in alerting the wanted person that his liberty is at risk. **An arrest warrant simply demands execution and not notification;** certainly under Maltese law and most definitely in the context of extradition proceedings!

d). the German prosecutorial authority on the request of which the national arrest warrant was issued.

⁴² Doc.AA1 a fol.137

⁴³ Doc.AA1 a fol. 133

⁴⁴ Doc.MEZ a fol.82

⁴⁵ Dok.MEX a fol.109-112

⁴⁶ Doc. AS a fol.58-59; Doc.ASZ a fol.94-95; Dok.MEZ a fol.111-112

⁴⁷ Fol.57

In the Notification under Article 34(2) of the Framework Decision concerning incorporation into domestic law, Germany had made the following notification wherein an issuing authority can be a Regional Court as well as a public prosecutor's office.

Re Article 6(3) of the Framework Decision: Under Article 6 the competent judicial authorities are the Ministries of Justice of the Federal Republic and of the Länder. As a rule, these have transferred the execution of the powers resulting from the Framework Decision for the submission of outgoing requests (Article 6(1))⁴⁸ to the public prosecutor's offices of the Länder and **to the regional courts**, and the powers to meet incoming requests (Article 6(2)) to the chief public prosecutor's offices of the Länder.⁴⁹

The documentation filed in these proceedings, shows that the national arrest warrant was issued by the 30th Grand Criminal Division of the Berlin Regional Court after the defendant Vogt again failed to appear at the trial in October 2019, despite having been duly summoned, following "*an application by the Public Prosecutors Office*".⁵⁰

Considers,

In the course of final submissions, learned counsel for the requested person submit that in the light of recent judgments by the Grand Chamber,⁵¹ coupled to events which saw a trial judge gain access to the residential complex where VOGT lives, this court is obliged to refuse the present EAW since it undermines the principle of mutual trust between judicial authorities.

A complaint and challenge proceedings filed by VOGT's counsel before the German courts, reveal that a judge who had, until her retirement, sat on the trial court, had gained access to the building where VOGT resides. A criminal complaint was also filed with Malta Police regarding the matter on the 28th November, 2019, incidentally on the day following the issue of the national arrest warrant by the Regional Court in Berlin, on the 27th November, 2019.

⁴⁸ Article 6 of the Framework Decision provides: 1. The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State.

⁴⁹ Brussels, 7 September 2006 (11.09) (OR. de) 12509/06 LIMITE COPEN 94 EJM 22 EUROJUST 43

⁵⁰ Fol.111

⁵¹ Dok.AAZ

Defence submitted a translated copy of the claim for disciplinary supervision dated the 29.06.2020, filed by VOGT's lawyer Steffen J. Tzschope, against Judges HERB and TAKE.⁵² Whilst on vacation in Malta, TAKE managed to gain access to VOGT's apartment. It is alleged that Judge HERB knew of this event yet did not disclose same. These facts gave cause to a motion of challenge on the ground of possible bias the said judges' acts displayed.

No decision has as yet been taken on VOGT's complaint, as the document dated the 7th July, 2020 shows.⁵³

Upon reviewing the claims filed before the President of the Regional Court of Berlin, the Court, finds affirmation of what has been stated by the German authorities, namely that it was **due to VOGT's lack of appearance before the trial court that a national arrest warrant**, followed by an EAW, were issued:

By his own declaration, Mr. Tzschope confirms that before retiring, Judge TAKE was an associate judge and rapporteur in the proceedings against VOGT. Those proceedings commenced on 22nd October, 2019,⁵⁴ as had already been stated by the German judicial authorities in their communications with the Attorney General exhibited in these proceedings. Mr. Tzschope goes on to mention that on the 8th November, 2019, there was another attempt to start the trial yet, since Mr. VOGT was absent, this was to no avail; details similarly communicated to the Maltese authorities.⁵⁵ The German lawyer states in his complaint filed with the Landgericht Berlin that "*the defendant has been living in Malta for many years*".

The Court will proceed to consider the two⁵⁶ judgements cited in final submissions, (a copy of which was exhibited) by learned defence counsel, in a bid to assess whether the said decisions weigh in on the considerations and decision this Court, acting **as a Court of Committal** is called upon to make.

i. Judgment of the 27th May 2019 In Joined Cases C-508/18 and C-82/19 PPU

⁵² **Doc.AA1** a fol.133 et seq

⁵³ Fol.148

⁵⁴ **Doc. AS** a fol.58-59; **Doc.ASZ** a fol.94-95; **Dok.MEZ** a fol.111-112

⁵⁵ Ibid.

⁵⁶ Learned counsel exhibited also a copy of the judgement of the 5th April, 2016 **In Joined Cases C-404/15 and C-659/15 PPU**. However, this judgement finds no relevance to the issue being considered given that it concerns a breach of one's right not to suffer inhuman or degrading treatment due to detention conditions in the issuing state.

The Grand Chamber decided that the concept of an ‘issuing judicial authority’, within the meaning of Article 6(1) of Council Framework Decision 2002/584/JHA, must be interpreted as not including public prosecutors’ offices of a Member State which are **exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive**, such as a Minister for Justice, in connection with the adoption of a decision to issue a European arrest warrant.

In the present case, the application for the issue of the national arrest warrant was made by the Public Prosecutor following repeated failures by VOGT to appear before the Court.⁵⁷ As already stated, there is no contestation of the fact that VOGT failed to appear before the Court on a number of occasions thereby thwarting commencement of his trial. His lawyer says as much in his complaint.⁵⁸

Thus, it is readily evident that the issuing judicial authority of the present EAW⁵⁹ was the **Landgericht (Regional Court) of Berlin**; a Court not a public prosecutor.

Moreover, no allegation let alone evidence to substantiate same, was even made before this Court to suggest that in this case, the German executive played a role in the warrants issue. The motivation for the issue of the warrants appears to have been **solely and exclusively the failure by the defendant VOGT to appear** in those proceedings despite being duly summoned. Thus, the circumstances described in the cited Grand Chambers’ judgement find no application to the case before this Court.

ii. Judgement of the 25th July, 2018 **C-216/18 PPU**

A preliminary ruling regarding the interpretation of Article 1(3) of Council Framework Decision, was sought in connection with the execution, in Ireland, of European arrest warrants issued by Polish courts:

Article 1(3)must be interpreted as meaning that, where the executing judicial authority, called upon to decide whether a person in respect of whom a European arrest warrant has been issued for the purposes of conducting a criminal prosecution is to be surrendered, has material, indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, on account of **systemic or generalised deficiencies** so far as concerns the **independence of the issuing Member State’s judiciary**, that authority must determine,

⁵⁷ **Doc. AS** a fol.58-59; **Doc.ASZ** a fol.94-95; **Dok.MEZ** a fol.111-112

⁵⁸ **Dok.AA1** a fol. 133 and 137

⁵⁹ Fol.22 *tergo*-23

specifically and precisely, whether, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant, and in the light of the information provided by the issuing Member State pursuant to Article 15(2) of Framework Decision 2002/584, as amended, there are substantial grounds for believing that that person will run such a risk if he is surrendered to that State.

Notwithstanding that this Court as a Court of Committal, does not have the competence to consider such matters, it must be emphasised that similarly with reference to the first cited judgement, no evidence whatsoever was produced indicating a **systemic or generalised deficiency** regarding the **independence** of the German judiciary. Indeed, not even an allegation in this sense was made by the person requested.

Witness to this was the fact that the complaint was filed limitedly against two (2) members of the judiciary and was not directed at the institution itself!

Indeed, Mr. VOGT's complaint seeks redress against Judges HERB and TAKE precisely from the President of the Regional Court, **the same court which issued the local arrest warrant and subsequently, the EAW**. It is not without relevance that VOGT perceived in the German judicial system, a means of redress beseeching it to protect his rights and ensure fairness of the proceedings. In so doing, VOGT is effectively reaffirming his trust in the German judicial system by seeking protection to his right to due process.

On the other hand, the cited Judgement extends to the systemic or generalised deficiency in the Polish judicial system as a whole. The issues and concerns encountered by the Grand Chamber find no parallel in the present circumstances. By no stretch of the imagination can one equate the situation in Poland with that obtaining in Germany!

16. In support of his opposition to being surrendered, the person concerned submits, inter alia, that his surrender would expose him to a real risk of a flagrant denial of justice in contravention of Article 6 of the ECHR. In this connection, he contends, in particular, that the recent legislative reforms of the system of justice in the Republic of Poland deny him his right to a fair trial. In his submission, those changes fundamentally undermine the basis of the mutual trust between the authority issuing the European arrest warrant and the executing authority, calling the operation of the European arrest warrant mechanism into question.

17 The person concerned relies, in particular, on the Commission's reasoned proposal of 20 December 2017 submitted in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland (COM(2017) 835 final) ('the reasoned proposal') and on the documents to which the reasoned proposal refers.

18 In the reasoned proposal, the Commission, first of all, sets out in detail the context and history of the legislative reforms, next, addresses two particular issues of concern — namely (i)

the lack of an independent and legitimate constitutional review and (ii) the threats to the independence of the ordinary judiciary — and, finally, invites the Council to determine that there is a clear risk of a serious breach by the Republic of Poland of the values referred to in Article 2 TEU and to address to that Member State the necessary recommendations in that regard.

19 The reasoned proposal also sets out the findings of the Commission for Democracy through Law of the Council of Europe relating to the situation in the Republic of Poland and to the effects of the recent legislative reforms on its system of justice.

Moreover, and solely for the sake of completeness, the Court considers that there is no contestation as to the fact that **VOGT repeatedly absented himself from proceedings thus leading to the issue of a national arrest warrant.** As stated in the Disciplinary Supervision complaint filed by VOGT before the German Courts, *“The defendant, however, again failed to attend. He again asked to be excused due to an intervertebral disc problem that rendered him unable to stand trial and to travel”*.⁶⁰

The German authorities themselves describe the various sittings appointed for the trial to commence; sittings wherein Mr. VOGT failed to appear notwithstanding having been duly summoned. It was VOGT’s non-appearance before the Court which ultimately lead to the issue of the local arrest warrant on the 27th November 2019;⁶¹ that warrant was issued by the **Landgericht (Regional Court) Berlin** and signing same was not merely Judge HERB (against whom a claim was also filed) but also two other Judges, BEZZPALLO and UNGER, who in January 2020, also issued the European Arrest Warrant.⁶²

Considers,

A Court of Committal is only called upon to determine whether the **requisites for extradition** are satisfied.

The Court sought to act within its prescribed competence when addressing the issues raised by learned defence counsel. In going any further, a Court of Committal would be acting *ultra vires* and usurping the functions of the trial court.

For even when a Court of Committal, in traditional extradition proceedings, must decide on the *prima facie* requirement - a requirement made alien to

⁶⁰ Fol.133

⁶¹ **Dok.MEX** a fol.110-112

⁶² Fol.22 *tergo*.

EAW proceedings - it has constantly been held that the court must limit its decision to one merely ascertaining the existence of the legal and factual requisites, as laid down under Maltese extradition law.

In its decision in **Il-Pulizija vs Stefan Predescu** the Court of Criminal Appeal considered:⁶³

Kull ma trid taghmel il-Qorti Rimandanti hu li **tara jezistux il-presupposti fattwali biex issir l-estradizzjoni**.

[emphasis by this Court]

The same Court in extradition proceedings in the names **Il-Pulizija vs Angelo Fregapane** held:

14. Il-Qorti Rimandanti u, bħal f'dan il-każ, din il-Qorti (tal-Appell Kriminali) huma msejħa biex jiddeterminaw biss jekk jezistux il-presupposti legali u fattwali li jintitolaw lill-awtorita`Eżekuttiva (il-Ministru responsabbli mill-Ġustizzja) li jibgħat lura l-Italja lill-imsemmi appellant.⁶⁴

[emphasis by this Court]

The same Court in **Il-Pulizija vs Bernard Moore** considered:⁶⁵

It must be remembered that the magistrate investigating a case of demanded extradition is not quite in the same position as if he were deciding on a charge of crime committed within his own jurisdiction. In the latter case he has full jurisdiction, he may and often does discharge the accused, because although there is prima facie evidence of guilt, the circumstances are so obscure, the intent so doubtful, the testimony so conflicting, that he thinks a jury would not be likely to convict; but in a case of extradition he cannot consider these matters.

Again, the same Court in **Il-Pulizija vs Stefano Mirabelle** found:⁶⁶

Kien bizzejjed li jirrizulta prima facie cirkostanzi abbastanza gravi a kariku tal-appellanti fil-konfront tal-imputazzjonijiet, li jiggustifika ricerka ulterjuri permezz ta' att ta' akkuza, minghajr ma kien hemm allura il-bzonn tad-demostrazzjoni vera u propju tal-kolpevolezza tal-estradand;

and

Biex l-ewwel Qorti setgħet tasal għall-konkluzzjonijiet li għalihom wasslet kien bizzejjed illi, mill-materjal li kellha quddiemha tiggenera ruhha l-probabilita' li l-appellant bhala awtur jew komplici ikkometta r-reati lilu adebitati.

⁶³ Per Mr. Justice David Scicluna; Dec. 9th January, 2012; Crim. App. No. 519/2011

⁶⁴ Per Mr. Justice David Scicluna; Dec. 16th January, 2013; Crim. App. No. 593/2012.

⁶⁵ Per Mr. Justice Oliver Gulia; Dec. 09.10.80

⁶⁶ Per Mr. Justice J. Flores; Dec. 13.01.71

The Court of Magistrates also had occasion to pronounce itself on the matter as to how, even when deciding on the preponderance of evidence for *prima facie* to exist, its' considerations differed from considerations in a local context. In **Il-Pulizija vs Alfred John Gaul** it held:⁶⁷

If on the other hand, upon evaluating the evidence adduced, the Court is of the opinion that such evidence on the face of it does not reasonably point to a possibility of guilt, than the court must discharge the defendant. Any doubts, however, as to such possibility of guilt must not be ruled upon by this court would therefore be bound to commit.

And in the Canadian judgement **Regina vs Latta** (36, WWR 699 36 CR 42), 1961 it was stated:

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...but before doing so he must satisfy himself beyond all probabilities and be careful not to usurp the juror's function and not to deal with the preponderance of evidence.

Given that the person requested alleges bias by two members of the judiciary who presided over the criminal proceedings in Germany, reference is made to **Il-Pulizija v. Antonio sive Anthony Satariano**:⁶⁸

Il-provi li ggib persuna mressqa quddiem il-Qorti rimandanti, ma ggibhomx ghal-difiza taghha. Effettivament din il-persuna ma tkunx akkuzata quddiem il-Qorti rimandanti, izda quddiem il-Qorti barranija. **Il-provi li ggib din il-persuna ma jkunx ghad-difiza taghha mill-akkuzi fil-Qorti rimandanti barranija, izda biex turi li l-Qorti rimandanti Maltija ma jkollhiex tkun sodisfatta li r-reat in kwistjoni jkun estradibbli**

Huwa pacifku fil-gurisprudenza li l-kriterju dwar is-sufficjenza tal-provi ghall-fini tad-decizzjoni mill-Qorti Rimandanti dwar jekk ghandhiex jew le tibghat lill-persuna ghallestradizzjoni, ghandu jkun identiku ghall-kriterju dwar is-sufficjenza tal-provi ghall-fini tad-decizzjoni mill-Qorti Istrutturja dwar jekk ikunx hemm jew le ragunijiet bizzejjed biex l-imputat jitqieghed taht att ta' akkuza. Dan il-kriterju gie dezinjat f'dawn it-termini. F'kaz li l-Qorti issib li l-provi *prima facie* jindikaw il-probabbilta` ta' htija, jew anke jekk ikollha dubbju f'dan ir-rigward, hija ghandha tibghat lill-persuna ghallestradizzjoni. Il-Qorti rimandanti ma ghandhiex tuzurpa l-funzjoni tal-gudikant: ma ghandhiex tikkonsidra l-preponderanza tal-provi;

Il-persuna mressqa quddiem il-Qorti Rimandanti ma tistax iggib provi biex tattakka l-kredibbilita` tal-provi igjuba kontra taghha. Il-provi li tista ggib huma dawk li jistghu juru li l-provi migjuba kontriha, fl-assjem taghhom, ma jindikaw ebda kaz kontra taghha, li minnu jkollha tiddefendi ruhha;

⁶⁷ Per. Magistrate C. Agius; Dec.16.07.81

⁶⁸ Per Mr. Justice Victor Caruana Colombo; Dec. 16th June, 1997. Vide also **Il-Pulizija vs Fatiha Khallouf (25/9/2001)** and **Il-Pulizija vs Raymond Gauci, Anthony Bartolo (25/9/2001)**.

Ghalhekk il-provi li tista' tipproduci l-persuna mressqa quddiem il-Qorti rimandanti, biex ikunu rilevanti ghall-procedura odjerna, ghandhom ikunu diretti ghall-fini imsemmi fil-paragrafu precedenti jew biex juru li r-reat dedott kontra taghha mhuwiex estradibbli.

[emphasis by this Court]

Similarly, in **Il-Pulizija vs Anthony Roberts, maghruf ukoll bhala Anthony Joseph Gaetano Mario Busuttil** the Court of Appeal held:⁶⁹

...Il-forza probatorja rikjesta ...ma tistax, ghalhekk tigi dezunta unikament minn provi rigwardanti akkuzi partikolari, imma mill-kumpless kollu tal-provi. Naturalment...**kwistjonijiet ohrajn, ta' fatt jew ta' dritt, li jistghu jispustaw l-akkuza fuq il-pjan legali u li forsi jistghu anke jwasslu ghall-eventwali liberazzjoni tal-estraddand huma estranei ghal dawn il-proceduri ghax dawn jidhlu fil-procediment veru u propju dwar il-meritu u dan il-procediment jista' 'sir biss mill-qorti estera, u mhux minn din il-Qorti.**

[emphasis by this Court]

The cited judgements clearly evidence the circumscribed functions of a court of committal; a court tasked solely with establishing whether the legal and factual requisites laid down by the governing extradition framework, in this case the Order, have been satisfied.

Considers,

I. Identity of the person requested

In the sitting of the 20th July, 2020, the person requested confirmed that he is the person for whom the European Arrest Warrant above-mentioned was issued.⁷⁰

⁶⁹ Per Mr. Justice F.Mizzi; Dec.16.12.76,

⁷⁰ Fol.4

II. Extraditable Offence

Defence counsel confirmed that “no bar exists with regards to the extraditability of the crime. Defence is confirming that the crimes for which the requested person is wanted in Germany are extraditable crimes.”.⁷¹

Article 2.2 of *Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States*, adopted pursuant to Title VI of the Treaty, the terms of which are set out in the relative arrangement published in the Government Gazette dated the 1st June, 2004, as amended by Council Framework Decision 2009/299/JHA of the 26th February, provides:

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

.....

- trafficking in human beings,

.....

- facilitation of unauthorised entry and residence,

Regulation 59(2) of the Order correctly implements the Framework Decision as evidenced by the extract from the *Handbook on How to Issue and Execute a European Arrest Warrant (2017/C 335/01)* issued by the European Commission in October, 2017, and published in the Official Journal of the European Union,⁷² hereinafter referred to as ‘the Handbook’.⁷³

⁷¹ Fol.46

⁷² Brussels, 28.9.2017 C(2017) 6389 final. At. P.10:

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

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

⁷³ **5.2. The list of 32 offences which give rise to surrender without verification of double criminality**

The executing judicial authority should check whether any of the offences have been determined by the issuing judicial authority as belonging to one of the 32 categories of offences listed in Article 2(2) of the Framework Decision on EAW. **The executing judicial authority can only verify double criminality for offences that are not in the list of 32 offences.**

The said regulation provides:

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

In the present case, Form A indicates that under German law, the offence of fraud carries a maximum term of punishment of 10 years.⁷⁴

Consequently, and notwithstanding learned counsels' declaration, the Court confirms that the crime of fraud is a scheduled offence and, as indicated in Form A itself, is punishable by a maximum term of 10 years imprisonment (under German law).

For the said reasons,

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

Thus, in terms of Regulation 12(4) of the Order the Court must consider whether there exists any bar to extradition as laid down in Regulation 13 of the Order.

III. Bars to Extradition

Learned Counsel for the person requested declare that there are no bars to extradition under regulation 13 of the Order.⁷⁵

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

⁷⁴ Dok.E a fol.24

⁷⁵ Fol.93A

IV. Endangerment to Life or Health

Defence counsel requested the Court to appoint a neurosurgeon to examine the person requested and, *inter alia*, to testify as to whether his medical condition allows him to travel outside Malta.

The Court acceded to this request and appointed Dr. Anthony Galea Debono and Dr. Antoine Zrinzo to examine Maximilian VOGT.

In their report the court-appointed experts, after pointing out that VOGT “*exhibited and exaggerated antalgic gait*”, conclude “*there is **no contraindication for Mr. Vogt being able to travel to Germany**. In view of the fact that he does not tolerate sitting down, he should be given the opportunity to travel as a stretcher case*”.⁷⁶

Testifying *viva voce*, Dr. Antoine Zrinzo declared that there was **malingering** on VOGT’s part:

*“Now, on examination there is a lot of, **practically malingering on the patient’s part.... Malingering, exaggeration**. So the scans are there, there are discs but we know loads of patients who have discs and still work in the fields and work as mechanics, doing heavy manual work and have a slipped disc. Neurologically one cannot really find anything which is subjectively confirmed that there is a neurological deficit..... **there is nothing that he cannot be transported**. If necessary as a stretcher case because he claims that he cannot sit down but then there were instances where we managed to get him into the sitting position..... **He is over stating his case.**”*.⁷⁷

Dr. Mario Scerri also testified that he had examined VOGT on two separate occasions. On one occasion in 2015 VOGT claimed to have “*slipped on the wet fore ship*”.⁷⁸ . In January 2018 he again examined him after VOGT claimed he had been carrying wine bottles and slipped.⁷⁹

Considers,

⁷⁶ Fol.97

⁷⁷ Fol.95A-95D

⁷⁸ **Dok.MS** a fol.106

⁷⁹ Fol.107

Regulation 31 of the Order which provides:

31. (1) This article applies if at any time in the extradition hearing it appears to the court that the condition in subarticle (2) is satisfied.

(2) The condition is that the physical or mental condition of the person in respect of whom the Part II warrant is issued is such that it would endanger his life or health to extradite him.

(3) The court shall postpone surrender until it appears to it that the condition in subarticle (2) is no longer satisfied.

A reading of this provision clearly provides that it is not the decision on whether the European Arrest Warrant is to be upheld or otherwise which is to be postponed but the actual physical surrender, the transfer and handing over to the requesting State, of the person requested.⁸⁰

Postponement of surrender, should there be case for such, is thus conditional on there existing "*substantial grounds for believing that the surrender would manifestly endanger the requested person's life or health*".

However, based on the evidence tendered by the court appointed medical experts, there is no reason for such a postponement given that there exists no such danger in surrendering Mr. VOGT's transfer to Germany.

⁸⁰ The Handbook provides the following with regard to Article 23(4) of the Framework Decision, which was transposed into Maltese law through regulation 31 above-cited:

5.9. Postponement or temporary surrender

5.9.1. Serious humanitarian reasons

After the executing judicial authority has decided to execute the EAW, the 10 day time limit for surrendering the person starts to run (as explained in Section 4.2). However, the executing judicial authority may, exceptionally, decide to postpone the surrender temporarily for serious humanitarian reasons, for example, where there are substantial grounds for believing that the surrender would manifestly endanger the requested person's life or health (Article 23(4) of the Framework Decision on EAW).

The execution of the EAW must take place as soon as these grounds have ceased to exist. The executing judicial authority must immediately inform the issuing judicial authority and agree on a new surrender date. In that event, the surrender must take place within 10 days of the new date thus agreed. After the expiry of that deadline, the person can no longer be held in custody by the executing Member State on the basis of the EAW and the person must be released (Article 23(5) of the Framework Decision on EAW).

In situations where such humanitarian reasons are **indefinite or permanent** the issuing and executing judicial authorities might consult and consider whether there are alternatives to the EAW. For example, possibilities to transfer proceedings or the custodial sentence to the executing Member State or to withdraw the EAW (for example in the case of serious permanent illness) might be examined.

The Court,

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

Orders the return of **Maximilian VOGT to Germany** on the basis of the European Arrest Warrant and Schengen Information System Alert issued against him on the 31st January, 2020,⁸¹ and the 25th February, 2020,⁸² respectively, and commits him to custody while awaiting his return to Germany.

Orders that Maximilian VOGT be transferred to Germany as a stretcher case, unless the extradited person communicates to the Director of Prisons and through legal counsel, that this mode of transportation is no longer warranted.

This Order of Committal is being made on condition that the present extradition of the person requested to Germany be subject to the law of speciality and thus, solely in connection with the offence mentioned in the European Arrest Warrant issued against him and deemed to be an extraditable offence by this Court.⁸³

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

- (a) He will not be returned to Germany until after the expiration of seven days from the date of this order of committal and that,
- (b) He may appeal to the Court of Criminal Appeal, and

⁸¹ Fol.19 *tergo*-23

⁸² **Dok.B** a fol. 9-10

⁸³ Vide minutes of the 6th August, 2020, a fol.93B

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

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