



Court of Criminal Appeal

Hon. Judge Dr. Edwina Grima LL.D.

EAW Proceedings Number: 167/2023

The Police

(Inspector Roderick Spiteri)

Vs

Marcian Viorel Otan

Today the 24th of April 2023,

The Court,

Having seen the arraignment of appellant Marcian Viorel Otan, holder of Maltese Identity Residence Document Number MT7515362 (ID 124684A), and Maltese Identity Card Nr. 0265103L, before the Court of Magistrates (Malta) as a Court of Committal, wanted by the judicial authorities in Romania, a scheduled country in terms of Regulation 5 of Subsidiary Legislation 276.05, for the purpose of the execution of a custodial sentence of three years imprisonment after having been found guilty in the issuing country for the crimes of forgery of administrative documents, trafficking of forged administrative documents, swindling and tax evasion, which are extraditable offences.

The Court was requested to proceed against Marcian Viorel Otan according to the provisions of the Extradition Act, Chapter 276 Laws of Malta and Subsidiary Legislation 276.05.

Having seen the judgement of the Court of Magistrates (Malta) As a Court of Preliminary Inquiry (For purposes of the Extradition Act referred to as a Court of Committal) of the 27th day of March 2023, whereby the Court ordered the return of Marcian Viorel OTAN to Romania, on the basis of the European Arrest Warrant and Schengen Information System Alert issued against him on the 3rd June, 2020 and the 9th June, 2020 respectively, and committed him to custody while awaiting his return to Romania. The Order of Committal was made on condition that the present extradition of the person requested be subject to the law of speciality and thus in connection with those offences mentioned in the European Arrest Warrant issued against him deemed to be extraditable offences by the Court. In terms of Regulation 25 of the Order as well as Article 16 of the Extradition Act, Chapter 276 of the Laws of Malta, the Court informed the person requested that : -

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

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

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

Having seen the appeal application of Marcian Viorel Otan, filed on the 30th of March 2023, whereby he requested this Court to **revoke** the appellate judgment of the 27th of March 2023 and instead order his immediate release from custody. Alternatively, requests that should the judgment be confirmed, his return to the judicial authorities of Romania be postponed until the determination of his request to serve his punishment in Malta.

Having seen the acts of the proceedings.

Having seen the updated conduct sheet presented by the prosecution as requested by the Court.

Having seen the grounds of appeal as presented by appellant Marcian Viorel Otan.

Having seen the documentary evidence brought forward by appellant, field as Documents JH1 and JH2.

Having heard submissions.

Considers,

In pursuance of the Order of Committal delivered by the Court of Magistrates on the 27th of March 2023, and feeling aggrieved by the said decision ordering his surrender to the Requesting State, being Romania, and this for the purpose of serving a custodial sentence for the offences of forgery of administrative documents, trafficking of forged administrative documents, swindling and tax evasion, appellant has put forward an appeal to the said Committal Order and this for mainly two grievances as outlined in detail in his appeal application.

The first ground set forth in his application, in actual fact, takes the shape of a request rather than a grievance, appellant demanding that he serve his custodial sentence in Malta rather than be surrendered to Romania. Appellant is putting forward this request since, he affirms that, his habitual residence is in Malta, having resided on the Islands for the last couple of years together with all his family, such request being in line with Council Framework Decision 2008/909/JHA as transposed into our legislation by means of Subsidiary Legislation 9.17. He basis this request also on article 4(6) of Council Framework Decision 2002/584/JHA of the 13th of June 2002 on the European Arrest Warrant and the surrender procedures between Member States.

Now, appellant erroneously puts forward this request to this Court since it is not within its remit to decide on such matters, this being entrusted to the competent authority who is tasked with dealing with such requests, in Malta being the Office of the Attorney General who will liaise with the Judicial Authorities in Romania in order to reach a final decision on such a request.

Indeed, Article 4(5) of the Council Framework Decision envisages the possibility of the sentenced person requesting the competent authorities of the issuing State or of the executing State to initiate such procedure. However, there shall be no obligation for the issuing State to comply with the requested forwarding of the judgment. This emanates logically from the fact that the issuing State remains the sole actor whose judicial authorities have delivered a judgment for which it had the sovereign competence to do so. As such, the issuing State retains the discretionary margin to assess the request of the sentenced person. Having thus premised, it is abundantly clear that it is not within the remit of the Court to entertain a request by the convicted person to serve his custodial sentence in the country in which he resides. For example, the issuing State might not wish to transfer the sentenced person if a less lengthy incarceration is foreseen in the executing State, considering the provisions on early and conditional release in that State. Victims' interests might also be taken into account in deciding where the offender could best serve his or her sentence. Besides, this assessment will be subject to the convicted person's eligibility for the consideration of such a request on the basis that his habitual residence is in the executing State. Such assessment is never carried out by the Court, as already pointed out, but is solely in the discretion of the competent authorities in the issuing state and the executing state. In fact from a minute entered into by the Attorney General in the sitting of the 21st April 2023, it results that appellant's request has already be forwarded by the Attorney General to the Romanian authorities, which request is still being processed.

Consequently, for the above-mentioned reasons this grievance is being rejected as unfounded.

Considers further:

Appellant puts forward another objection to the decision delivered by the Court of Committal ordering his surrender to Romania lamenting that his committal to the requesting State will lead to a serious breach of his fundamental human rights, although he does not specify which rights are under threat. The Court understands that appellant is referring to a possible breach of article 3 of the European Convention

of Human Rights should surrender take place. Now it must be stated at the outset that appellant never raised this issue before the Court of Magistrates raising this plea only at this late stage of the proceedings, and has resorted only recently to the judicial remedies provided by our law in instances where a serious fear of violation of human rights exists, by referring his plea to the competent court being the Constitutional Court, for redress, although such proceedings allegedly relate to a violation of his right to a fair hearing, as declared by the defence during oral submissions¹, and not a breach of article 3 as submitted in the appeal application. Nonetheless, it is appellant's right under the Extradition Act to apply for constitutional redress, wherein it is specifically stipulated in article 16 (rendered applicable to proceedings in a European arrest warrant by regulation 25 of LN 320/04) that:

"Where a person is committed to custody under article 15, the court shall, besides informing him that he will not be returned until after the expiration of fifteen days from the date of its order of committal and that, except in the case of a committal to custody to await return under the provisions of article 15(5), he may appeal to the Court of Criminal Appeal, also inform him that, if he thinks that any of the provisions of article 10(1) and (2) 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."

Article 25(2) of the Subsidiary Legislation 340 of 2002 then specifies that:

(2) Article 16 of the relevant Act shall apply as if for the words "fifteen days" therein there were substituted the words "seven days".

Appellant alleges that there is a well-known documented scenario in the Romanian prisons of inhuman and degrading treatment outlined in various judgments delivered by the Court of Human rights in Strasbourg finding a violation of article 3 of the Convention against Romania due to inadequate detention conditions consisting in serious overcrowding and precarious material living conditions. He relies on a report carried out by the Council of Europe Committee for the Prevention of Torture and

¹ Application 196/2023 Otan Marcian Viorel vs Avukat Generali et.

Inhuman and Degrading Treatment or Punishment of 2021 on the matter, exhibited as Document JH2, and a report by Amnesty International on The State of the World's Human Rights 2022/2023, Document JH1.

Now, although appellant makes various allegations with regards to the abysmal conditions in Romanian prisons, he fails to bring forward concrete evidence linked directly to his case to prove that this violation will actually take place should he be surrendered. This Court is therefore faced with a situation where although it is alleged that the Romanian prisons face serious problems regarding overcrowding and poor living conditions, however it is not possible to determine whether such allegation is well-founded or that these sub-standard conditions will be presented to appellant during his detention, and above-all whether these facts would constitute a breach of article 3 of the Convention as alleged. The Court has no way to find out, for example, in which prison appellant will in actual fact be detained, and what the living conditions of such an institution would present themselves to appellant.

The 2021 report of the Council of Europe which appellant makes reference to in his appeal application states thus on the allegation of ill-treatment, and this after an on-site review carried out in May 2021 in Romania:

“61. The delegation again met many committed managers and staff dedicated to their work and who were striving to improve the situation in their prisons. Many of the persons interviewed by the CPT’s delegation stated that they were treated correctly by prison officers and that relations were based upon mutual respect. This was notably the case at Galați Prison where the climate of fear prevalent at the time of the 2018 visit had dissipated. In the course of the 2021 visit, the CPT’s delegation found that detained persons were no longer afraid to talk and that relations with staff appeared calmer and more respectful.

That said, the CPT’s delegation once again received a significant number of allegations of ill treatment of detained persons by prison staff, including by members of the masked intervention groups (EOS), at Giurgiu Prison in particular but also at Craiova Prison. Allegations were also received, to a lesser extent, at Mărgineni Prison and even at Galați Prison. The ill-treatment was said to have been inflicted as a punishment for arguing with custodial staff or infringing the rules.

The CPT has noted the clear response of the Romanian Prison Administration (NAP) to its delegation’s preliminary observations in which it clearly states that there is no tolerance for any acts of ill-treatment by prison staff and that all allegations will

be communicated to the prosecutor's office and thoroughly investigated. Such an approach must be inculcated throughout the prison service.²

With regards to the issue of overcrowding the report found the following:

"55. At the time of the 2021 visit, the challenges facing the Romanian prison system remained extensive: reducing the number of persons in prison, improving the living conditions in which prisoners were held, offering a range of purposeful activities for prisoners to assist them in preparing for reintegration into the community, increasing prison staff numbers and ensuring that health care services in prisons met the needs of prisoners. As described in the report on the 2018 visit, the adoption of new criminal legislation in 2014 and the European Court of Human Rights pilot judgment in the case of Rezmiveş and Others of 25 April 2017 provided an impetus to the current reform programme. In November 2020, the Romanian Government submitted to the Committee of Ministers of the Council of Europe an updated Action Plan for the period 2020-2025. The 2020-2025 Action Plan envisages the modernisation of 946 places and the creation of 7,849 new accommodation places, including the construction of two new prisons. Emphasis is also placed on enhancing educational and reintegration programmes, and on better management of the current prison population.

56. As pointed out in the report on the 2018 visit, the reform measures resulted in a significant reduction of the prison population from 32,428 persons in June 2014 to 21,342 persons in March 2018 (i.e. the rate of imprisonment dropped from around 160 to 117 per 100,000 inhabitants). This positive trend continued until 31 January 2020 when the prison population stood at 20,570 (i.e. an imprisonment rate of 107). Nevertheless, overcrowding remains a feature of the Romanian prison system and during the Covid-19 pandemic the situation has further degenerated. At the time of the May 2021 visit, the prison population had increased to 22,608 (i.e. an imprisonment rate of 118) for an official capacity of 17,779 places.

57. The CPT recalls that overcrowding is an issue of direct relevance to its mandate. All the services and activities within a prison are adversely affected if it is required to cater for more prisoners than it was designed to accommodate; the overall quality of life in the establishment will be lowered, perhaps significantly. Overcrowding entails several features: cramped and unhygienic accommodation; a lack of privacy including when performing basic tasks such as using a sanitary facility; reduced opportunities in terms of employment, education and other out-of-cell activities; increased pressure on health care and social/reintegration services; increased tension and hence more violence between prisoners and between prisoners and staff. This list is far from exhaustive."

.....

"58. The CPT recommends that the Romanian authorities pursue their reform agenda in order to ensure that all persons in prison are held in decent conditions and with those living in multiple-occupancy cells afforded a minimum of 4m² of living space each (excluding the sanitary annexe). The CPT would like to be provided with an update

²<https://rm.coe.int/0900001680a62e4b>

on the implementation of the prison estate reforms. Further, it would like to receive a detailed breakdown of the number of persons held in each prison establishment according to regime on a trimesterly basis.

Further, in addition to increasing the capacity of the prison estate, the CPT recommends that the Romania authorities make increased efforts to tackle the phenomenon of overcrowding in the prisons through promoting greater use of alternatives to imprisonment."

Having thus premised, the Court although it cannot ignore these reports filed by international institutions, finds however that it cannot entertain this grievance without having factual and concrete evidence in the acts to support the allegation, the evidence brought forward consisting only in the arguments put forward by appellant both in his written pleadings and his oral submissions, being third party findings and judicial pronouncements on the matter. In such cases of alleged breach, it is necessary for the requested person to demonstrate that there are strong grounds for believing that, if returned, he will face **a real risk** of being subjected to torture or to inhuman or degrading treatment or punishment. (see R v Special Adjudicator ex parte Ullah (2004) AC). **"This does not mean proof `on the balance of probabilities` but there needs to be a risk that is substantial and not merely fanciful."**

The Court referred to two interesting judgments being **Saadi v Italy** (Application 37201/06) wherein the European Court of Human Rights in its judgment dated 28th February 2008 (paragraph 124) stated that in order to determine whether there is a real risk of ill-treatment, it is necessary to examine the foreseeable consequences of sending the person to the receiving country, **bearing in mind the general situation and his personal circumstances**. Also:

"In Miklis v Lithuania (2006) EWHC (Admin) Lord Justice Latham stated, in dismissing Mr Miklis` appeal, "The fact that human rights violations take place is not of itself evidence that a particular individual would be at risk of being subjected to those human rights violations in the country in question. That depends upon the extent to which the particular individual could be said to be specifically vulnerable by reason of a characteristic which would expose him to human rights abuse"

The core of this challenge comes down to whether the prison conditions that await the requested persons in Lithuania are such that an Article 3 challenge

can succeed. In Richards v Ghana (2013) All ER (D) 254 (May), in dismissing Mr Richards` appeal against the decision to send the case to the Secretary of State, the Divisional Court stated that albeit the requirements of Article 3 were absolute, in the sense that they were not to be weighed against other interests such as public interest in facilitating extradition, there was nevertheless an element of relativity involved in the application of those requirements. In deciding whether treatment or punishment was inhuman or degrading, it was appropriate to take account of local circumstances and conditions, such as climate and living conditions.

.... it is to be noted that the Divisional Court stated that although there were aspects of the conditions in the anticipated prison that would have been considered unacceptable in a prison in the UK, those conditions did not attain, or come close to attaining, the level of severity which would have been necessary to constitute a violation of Article 3."

In another decision of the Strasbourg court in [KRS v The United Kingdom](#), the Court succinctly summarised the law as follows:

"Expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3."

After all as stated in the case [Khan v Government of the United States of America](#), Mr Justice Griffiths Williams observed that *"there is a fundamental presumption that a requesting state is acting in good faith and the burden of showing an abuse of process rests upon the person asserting such an abuse with the standard of proof on the balance of probabilities"*.

It is clear from the above-premised that no court will turn a blind eye to a person's outcry of a serious risk of breach of his rights and freedoms and will provide all the safeguards necessary to prevent any abuse from inhuman and degrading treatment which a requested person could be subjected to. However, such a risk has to be a concrete and real risk vis-à-vis the person appearing before the court and not a possible fear of subjection to such treatment. As pointed out it rests upon appellant to bring sufficient evidence to convince this court that he will be subjected to such a treatment and this in a concrete manner. Such circumstances have not been placed before this court sufficient to establish that appellant is seriously risking inhuman treatment upon his surrender. Not only but appellant has failed to seek the redress

available to him at law so far on this alleged breach, raising such an allegation only at this late stage of the proceedings in his attempt to delay his surrender to the Requesting State.

The Constitutional Court in a similar case involving the extradition of a Maltese national to California where an alleged breach of article 3 was raised stated the following:

“Extradition is accepted by the Convention organs as a legitimate means of enforcing criminal justice between states. There is no right not to be extradited. Usually issues arise, under the Convention, where it is alleged, as in the present case, that a breach of human rights will occur, if extradition is carried out. There is no general principle that a State cannot surrender an individual unless it is satisfied that all the conditions awaiting him in the receiving State are in full accord with each of the safeguards of the Convention. (see Soering case).

“The abhorrence of torture is also recognized in Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It states that “no State Party shall... extradite a person where there are substantial grounds for believing that he would be in danger of being subject to torture.” This extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment prescribed by that Article.

“In order that an applicant succeeds in his application, he will have to advance rather strong arguments as to whether there is a real danger of such ill-treatment. The risk alleged must relate to a treatment which attains a certain minimum level of severity, taking into account all the circumstances, including the physical and mental effects, and where relevant the age, sex, and health of the victim (Soering Case). The risk of the ill-treatment alleged must be real and account will be taken of the assurances given by the authorities of the State requesting the extradition (2274/93 France - 20/1/1994 - case involving extradition to face murder charges in Texas).

“As regards overcrowding, it results that this has always been a problem and not just in the last few years (page 161). Overcrowding as such, though it varies from time to time, cannot be considered as tantamount to torture, or to degrading or inhuman treatment, although it should not be acceptable.” (emphasis added by this court). Now this is perfectly in line with the case law of the European Court of Human Rights, indeed even with what is stated in the judgments referred to by appellant himself, that is the Dougoz and Peers cases. Overcrowding ut sic does not amount to torture or inhuman or degrading treatment or punishment; if however that overcrowding is coupled with other factors, such as restrictions on movement for very long periods, inadequate ventilation or practically no ventilation at all, inability to sleep because of that overcrowding, inadequate sanitary facilities or food – than in that case

overcrowding becomes a relevant factor” – Constitutional the Police vs Lewis Muscat 09/03/2007

With regards to allegations of ill-treatment, suffice it to refer to the decision delivered by the ECHR on the matter wherein it was decided:

“The Court reiterates that allegations of ill-treatment must be supported by appropriate evidence....According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake (see, among others, Nachova and Others v. Bulgaria [GC], nos. [43577/98](#) and [43579/98](#), § 147, ECHR 2005-VII; Ilaşcu and Others v. Moldova and Russia [GC], no. [48787/99](#), § 26, ECHR 2004-VII

Only a credible and reasonably detailed description of the allegedly degrading conditions of detention constitutes a prima facie case of ill-treatment and serves as a basis for giving notice of the complaint to the respondent Government.” (emphasis added)

The test to be applied was whether there were substantial grounds for believing extradition would result in real risk of exposure to human or degrading treatment or punishment. Reports of human rights violations are not in themselves evidence that a person would be at risk, and that the determining factor was whether violations were systemic and the extent to which a particular individual could be said to be specifically vulnerable to them.

Having premised these legal considerations lying at the basis of article 3 of the ECHR and article 6 of the Treaty, it is evident that what must be proven is that appellant faces a specific, personal, and significant risk of torture or of inhuman or degrading treatment or punishment. There is no evidence in this case to prove that such risk exists, appellant referring to such alleged breach in his appeal application and final submissions before this court to documentary reports and judgments finding that the penitentiary system in Romania suffers from problems which unfortunately are not uncommon in other penitentiary systems, the main issue in this case being a situation of overcrowding.

Bearing in mind the reports carried out by European Institutions and cases which have been brought forward for an assessment of an alleged violation of article 3 with regard to detention in Romanian prisons, the Court is presented with a picture of a legal and judicial system where the necessary checks and balances are in place so as to ensure adequate redress where such abuses have occurred. Suffice it to point out that although appellant makes reference to the said reports and jurisprudence emanating from the Court in Strasbourg, however he presents no concrete evidence sufficient to convince this court that the circumstances, including his own personal circumstances where he alleges issues related to his mental health, are such that if he is sent to Romania he faces a **specific, personal and significant (that is substantial, real)** risk of torture or of being subjected to inhuman or degrading treatment or punishment as already stated. No evidence is put forward regarding the actual conditions of detention he may have to face, the conditions of overcrowding he alleges, the freedom of movement afforded to inmates, the access to natural light and air, lack of ventilation amongst other factors. So, although this Court opines that prison overcrowding is a form of inhuman treatment, the damage to human dignity being the basis of the violation, however appellant does not present sufficient evidence in the case to warrant this Court to uphold his grievance. Nor does appellant advance any strong argument as to the existence of a real danger of ill-treatment **in his regard** which in his view attains that level of severity which is sanctioned by article 3 of the European Convention. A generic allegation is definitely not sufficient to warrant this Court to act counter to the principle of mutual recognition, which is the “cornerstone” of judicial co-operation and to its obligation in terms of the Framework Decision, to give effect to a European arrest warrant.

For the above reasons consequently, appellant’s grievance that he will suffer a breach of his fundamental human rights should he be surrendered to the Requesting State is being rejected since there is not sufficient evidence in the acts to sustain the said allegation. This decision however leaves unprejudiced appellant’s rights under the Extradition Act to apply for redress before the Constitutional Court in terms of article 16, should he deem it necessary.

Finally, although no formal grievance has been filed on the matter, appellant alleges that the judgment of the Romanian Prahova County Court wherein a three-year custodial sentence was imposed upon him is not final and is subject to appeal. Apart from the fact that as already stated no formal grievance has been raised in this regard, from an examination of the acts it is evident that upon a request by the Attorney General for supplementary information from the Romanian authorities, it was confirmed by the said authorities that the judgment which is at the basis of the European Arrest Warrant is final³ and therefore relying on the principle of mutual recognition and judicial cooperation between member states at the heart of the European arrest warrant, the Court feels that it can rely on the documentation found in the acts and the information therein provided, thus rejecting this further grievance as unfounded.

Consequently, for the above-mentioned reasons, the Court dismisses applicant's appeal requesting the reversal of the Committal Order, thus confirms the decision of the Court of Magistrates (Malta) as a Court of Committal of the 27th of March 2023 ordering the surrender of Marcian Viorel Otan to the Judicial Authorities of Romania. Orders that appellant Marcian Viorel Otan be kept in custody to await his return to the Judicial Authorities of Romania. Furthermore, in view of the fact that a request has been put forward by appellant to the competent Judicial Authorities of Romania and the Attorney General of Malta to serve in Malta the sentence meted out against him by the Court in Romania in terms of Framework Decision 909/2008/JHA, this Court authorises that the return of the appellant to the Judicial Authorities of Romania be postponed until the determination of this request by the competent Judicial Authorities of Romania and of the Republic of Malta - it being made explicitly clear that if, for any reason, no agreement is reached by these Judicial Authorities, the appellant is to be surrendered and returned to the Judicial Authorities of Romania in accordance with this decision and the provisions of the Order, which surrender will not however take place until the expiration of seven days from the notification to the appellant of the decision not acceding to his

³ Document RS1 states Decision no. 400 Final and binding on 21.05.2020, Dec. Ref. 4303/105/2019

request. Moreover, in view of the application for redress filed by appellant regarding an alleged violation of his human rights in relation to his person in terms of the Constitution of Malta and of the European Convention Act, such as to justify a reversal, annulment or modification of the Court's order of Committal, his return is also suspended pending the outcome of these proceedings filed 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.

Edwina Grima

Judge