IL-QORTI TAL-MAGISTRATI (MALTA)
BHALA QORTI ISTRUTTORJA
(Fl-Att dwar l-Estradizzjoni msejjħa l-Qorti Rimandanti)

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

Il-Pulizija
(Spettur Roderick Spiteri)
-vs-
Marco German

Illum, 26 ta' Ġunju, 2023

Il-Qorti,

Wara li rat li l-Pulizija ressqu b'arrest lil **Marco GERMAN, imwieled il-Pietà, Malta, nhar it-03 ta' Ġunju, 1964, residenti f' 47, 'Ave Maria', Flat 1, Triq Gianni Raimondo, Kalkara, detentur tal-karta tal-identità numru 303264M,** aktar il-quddiem imsejjaħ 'l-estradant';

Wara li rat is-*Schengen Information System Alert*[1] datat l-20 ta' Frar 2023, kif ukoll il-ħruġ ta' Mandat t'Arrest Ewropew maħruġin mill-Giudice per le Indagini Preliminari del Tribunale di Catanzaro fl-20 ta' Jannar 2023,[2] fl-Italja, pajjiż skedat a tenur tar-regolament 5 ta' l-Ordni dwar Pajjiż i Barranin Appuntati dwar l-Estradizzjoni (aktar il-quddiem imsejjaħ 'l-Ordni'), Avviż Legali 320 ta' l-2004 (Liġi Sussidjarja 276.05);

Wara li rat iċ-Ċertifikat maħruġ mill-Avukat Ġenerali a tenur tar-regolament 7 tal-istess Ordni maħruġ fi-7 ta' Marzu, 2023;

[1] **Dok. RS** a fol.7-7A
[2] **Dok.RS3** a fol.18 et seq

Wara li rat il-verbali ta' din il-Qorti, kif diversament preseduta, tad-29 ta' Mejju, 2023, u kif preseduta tas-6 u tad-19 ta' Ġunju, 2023;

Ikkunsidrat

Illi fil-verbal tas-6 ta' Ġunju, 2023 l-abbli difiża iddikjarat li ma kienx hemm kontestazzjoni dwar il-fatt li r-reati li dwarhom qed tintalab it-treġġija tal-estradand huma reati estradibbli ai termini tar-Regolament 12 tal-Ordni. Ġie dikjarat ukoll li ma jeżistu l-ebda *bars to extradition* kif kontemplat bir-Regolament 13 tal-Ordni.[3]

Il-lanjanza tal-abbli difiża hi biss li l-Mandat t'Arrest Ewropew (aktar il-quddiem imsejjaħ 'MAE') ma jistax jintlaqa peress li mhux minnu li dan inħareġ **għall-finijiet tat-tmexxija ta' prosekuzzjoni kriminali** għall-għemil ta' reati imsemmija fil-mandat. Isosstni li l-proċeduri fl-Italja għadhom fi stadju ta' investigazzjoni tant li għadu ma ħariġx l-ordni ta' *rinvio a giudizio*.

Ikkunsidrat,

Xi tfisser "mandat t'arrest rilevanti għall-prosekuzzjoni"?

Issir riferenza għad-deċiżjoni tal-Qorti Rimandanti fl-ismijiet **Il-Pulizija vs Philip Mifsud**[4] fejn f'dak il-każ kien ġie trattat *funditus* dak li hu meħtieġ biex Qorti tkun sodisfatta li l-persuna li tagħha qed tintalab it-treġġija tkun hekk mitluba "**għall-finijiet tat-tmexxija ta' prosekuzzjoni kriminali"** (*"for the purposes of conducting a criminal prosecution")* **–** Regolament 5(4) tal-Ordni. Jitfakkar li sa dak iż-żmien l-Ordni kien jitkellem biss fuq persuna *li "tkun akkuzata fil-pajjiż skedat bl-ghemil ta' reat"* u mhux dwar persuna mfittxija *"għall-finijiet tat-tmexxija ta' prosekuzzjoni kriminali"*.

F'dik is-sentenza l-Qorti ikkunsidrat:

> 8. It-terminu "akkużat" fir-regolament 5 tal-Ordni tfisser li l-estradant ma jkunx biss suspettat li kkommetta reat iżda jehtiegu li huwa jkun gja ġie formalment akkużat quddiem l-awtoritajiet gudizzjarji kompetenti fil-pajjiż skedat.
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> Fuq dan il-punt il-Qorti taghmel riferenza għal zewg punti li fil-fehma tagħha huma importanti – (a) it-tifsira tal-kelma "akkużat" fil-kuntest tal-Arrangament u tal-Ordni kif imfisser fir-Regolament 5(4)(a) u (b) il-kuntest innifsu tal-mod kif dan ir-regolament huwa redatt.

[3] Fol.42

[4] Per Onor. Maġistrat Dr. Aaron Bugeja; Deċiża nhar it-18 ta' Ottubru, 2013; Numru. 911/2013. Vide ukoll deċiżjonijiet mogħtija mill-istess qorti fl-istess sens **Il-Pulizija vs. Michael Spiteri; Il-Pulizija vs Francis Xavier Galea**

(a) Kwantu ghat-tifsira tat-terminu “akkużat”, il-Qorti taghmel riferenza ghas-sentenza In Re Ismail (Application for Writ of Habeas Corpus) (On Appeal From a Divisional Court of the Queen's Bench Division) moghtija fid-29 ta’ Lulju 1998 fejn dawn il-Law Lords iddecidew li jilqghu l-Opinjoni ta’ Lord Steyn dwar it-tifsira tat-terminu “accused” – ekwivalenti għal accused fl-Ordni. Il-Qorti sejra ticcita testwalment minn din is-sentenza is-silta l-aktar rilevanti :-

> The meaning of "accused" person
>
> It is common ground that mere suspicion that an individual has committed offences is insufficient to place him in the category of "accused" persons. It is also common ground that it is not enough that he is in the traditional phrase "wanted by the police to help them with their enquiries." Something more is required. What more is needed to make a suspect an "accused" person? There is no statutory definition. Given the divergent systems of law involved, and notably the differences between criminal procedures in the United Kingdom and in civil law jurisdictions, it is not surprising that the legislature has not attempted a definition. For the same reason it would be unwise for the House to attempt to define the word "accused" within the meaning of the Act of 1989. It is, however, possible to state in outline the approach to be adopted. The starting point is that "accused" in section 1 of the Act of 1989 is not a term of art. It is a question of fact in each case whether the person passes the threshold test of being an "accused" person. Next there is the reality that one is concerned with the contextual meaning of "accused" in a statute intended to serve the purpose of bringing to justice those accused of serious crimes. There is a transnational interest in the achievement of this aim. Extradition treaties, and extradition statutes, ought, therefore, to be accorded a broad and generous construction so far as the texts permits it in order to facilitate extradition: **Reg. v. Governor of Ashford, Ex parte Postlethwaite [1988] A.C. 924, 946H-947D**. That approach has been applied by the Privy Council to the meaning of "accused" in an extradition treaty: **Rey v. Government of Switzerland [1998] 3 W.L.R. 1, 7B.** It follows that it would be wrong to approach the problem of construction solely from the perspective of English criminal procedure, and in particular from the point of view of the formal acts of the laying of an information or the preferring an indictment. Moreover, it is important to note that in England a prosecution may also be commenced if a custody officer decides that there is sufficient evidence to charge an arrested person and then proceeds to charge him: section 37 (7) of the Police and Criminal Evidence Act 1984; and see generally as to the commencement of prosecutions **Card, Cross and Jones, Criminal Law, 13th ed., (1995) Chapter 4**. Despite the fact that the prosecuting authorities and the court are not involved at that stage, the charging of an arrested person marks the beginning of a prosecution and the suspect becomes an "accused" person. And that is so even if the police continue to investigate afterwards.
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> It is not always easy for an English court to decide when in a civil law jurisdiction a suspect becomes an "accused" person. All one can say with confidence is that a purposive interpretation of "accused" ought to be adopted in order to accommodate the differences between legal systems. In other words, it is necessary for our courts to adopt a cosmopolitan approach to the question whether as a matter of substance rather than form the requirement of there being an "accused" person is satisfied. That such a broad approach to the interpretation of section 1 of the Act of 1989 is permissible is reinforced by the provisions of section 20. This provision deals with the reverse position of an

extradition of a person "accused" in the United Kingdom and contemplates that "proceedings" against him may not be commenced ("begun") for six months after his return. This provides contextual support a correspondingly broad approach to "accused" in section 1. For my part I am satisfied that the Divisional Court in this case posed the right test by addressing the broad question whether the competent authorities in the foreign jurisdiction had taken a step which can fairly be described as the commencement of a prosecution. But in the light of the diversity of cases which may come before the courts it is right to emphasize that ultimately the question whether a person is "accused" within the meaning of section 1 of the Act of 1989 will require an intense focus on the particular facts of each case.

The facts

My Lords, I would reject as unrealistic the argument that the appellant is a mere suspect whose presence is required in Germany for the purposes of questioning. I would rest my decision on the cumulative effect of three matters. First, it is common ground that the German judge had been satisfied on compelling evidence that the appellant was guilty of conspiracy to defraud and fraudulent mis-representation before he ordered the warrant of arrest to be issued. Secondly, although the point was disputed, it is clear beyond any doubt that the senior public prosecutor of Bochum had been satisfied that there was sufficient evidence to justify criminal proceedings against the appellant. He had to be so satisfied to apply for the warrant of arrest. It is true that there is no evidence that he transmitted the papers to the State Court. But he certainly had decided that there was sufficient evidence for a criminal prosecution against the appellant. Thirdly, and most importantly, there are the terms of the particular Warrant of Arrest. It is true that the German lawyer disputes the translation in certain respects. For my part I find some of his criticisms less than convincing. But I do not have to examine these points. He does not dispute that the warrant of arrest recites that "The accused is charged with the following", and that it then sets out at some length the criminal conduct alleged against the appellant and the statutory provisions under which the charges are brought. In combination these three circumstances point irresistibly to the conclusion that the appellant is a person "accused" under section 1 of the Act of 1989. And he is certainly a person "against whom the competent authorities of the requesting party are proceeding for an offence" within the meaning of article 1 of the Convention.

Din il-Qorti hija sodisfatta mill-fatt li Silvia Carpanini hija giudice per le indagini preliminari fit-Tribunal ta' Genova u hija sodisfatta wkoll li din hija awtorità kompetenti biex tohrog il-MAE. **Dan fl-ahhar mill-ahhar iccertifikah l-Avukat Ġenerali u huwa konklusiv**. Dan il-MAE huwa maħruġ fuq il-principji bazilari ta' "mutual trust" u "mutual recognition" li fuqhom huwa bazat l-Arrangament. Il-MAE jibda biex jghid li "chiedo che la persona appresso sia consegnata **ai fini dell'esercizio dell'azione penale o dell'esecuzione di pena o misure di sicurezza preventive di liberta'"**. Din il-Qorti ma ghandhiex ghalfejn tiddubita li jekk ikun hemm il-konsenja tal-estradant huwa sejjer ikun qieghed jiffaccja proceduri penali quddiem it-Tribunal Taljan in segwitu għal dan il-MAE ghaliex wara kollox għal dan il-ghan qed tiġi formalment mitluba l-konsenja tiegħu u għal ebda raguni oħra. Dan wara kollox johrog ukoll mid-definizjoni tal-MAE skont l-istess Arrangament li jghid li l-MAE jikkostitwixxi decizjoni ġudizzjarja u huwa definit hekk:-

The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

Il-Qorti hija sodisfatta li l-Awtoritajiet Taljani huma gwidati min dawn il-principji wkoll u għalhekk iridu l-estradant sabiex fil-konfront tiegħu jitkompla l-procediment penali ghar-reati imsemmija fil-MAE u li gew mibdija bil-MAE.

F'dan is-sens tal-Arrangament u tal-Ordni il-Qorti qeghdha tqis li l-procediment penali kontra l-estradant sejrin jissuktaw u għalhekk għandu jitqies li huwa "akkużat" ghall-fini ta' prosekuzzjoni li ser tissokta quddiem it-Tribunal Taljan, fil-każ li jiġi konsenjat lil dawk l-Awtoritajiet.

Minbarra dan, jingħad ukoll li l-kuntest ta' dan ir-Regolament juri kemm dan huwa s-sens li johrog mil-Ordni. Ir-Regolament 5(4) jghid hekk-

Id-dikjarazzjoni hija wahda li :

(a) Il-persuna li dwarha jkun hareg il-mandat tkun akkuzata fil-pajjiż skedat bl-ghemil ta' reat imsemmi fil-mandat u,

(b) Il-mandat jinħareġ bil-għan tal-arrest u l-estradizzjoni tal-persuna lejn il-pajjiż skedat bil-għan li jinbdew proċeduri kontriha għal dak ir-reat.

Minn qari ta' din id-disposizzjoni, u jekk l-interpretazzjoni tad-difiza hija korretta, kif jista jkun hemm persuna diga akkuzata fil-pajjiż skedat meta l-mandat ikun inħareġ precizament sabiex l-estradant ikun jista jmur lejn dak il-pajjiż biex jinbdew proceduri kontrih. Jekk huwa akkużat fis-sens li trid id-difiża, allura l-proceduri jkunu diga inbdew kontrih u allura t-tieni subinciz jiġi kwazi superfluwu fit-tieni parti tiegħu "bil-għan li jinbdew proceduri kontriha għal dak ir-reat". Il-Qorti tqis li t-tifsira "akkużat" għandha tinghat tifsira "purposive" kif imsemmi aktar il-fuq. Ghalhekk din l-eccezzjoni mhix qed tiġi milqugha.

Illi wara l-emenda li saret bl-Avviż Legali 421 tal-2013 it-terminoloġija wżata fl-Ordni ma baqgħetx tirreferi għal "akkużat" iżda ttramandat il-frażi li tikkontempla d-***Deċiżjoni Kwadru tal-Kunsill 2002/584/ĠAI, tat-13 ta' Ġunju 2002,*** b'mod li tieħu in konsiderazzjoni <u>n-natura stess tal-estradizzjoni</u>.

Kif ġie mgħallem tali interpretazzjoni ma tista' qatt tkun limitata għall-kunċetti legali domestiċi ta' Malta. Proċedura t'estradizzjoni tineċċessità interpretazzjoni li tikkunsidra li fil-proċeduri t' estradizzjoni jeżistu sistemi ġudizzjarji bi tradizzjonijiet legali differenti, partikularment l'hekk msejjħa *civil law jurisdictions* bħal ma hi Italja.

Isegwi fuq l-insenjament ta' ***R vs Ismail (1998)* 3 WLR 495 (HL),** li l-MAE irid juri li fil-konfront tal-persuna rikjesta fil-pajjiż rikjedenti hemm **imputazzjoni formali minn awtorità ġudizzjarja** li dan ikkommetta xi reat kriminali u mhux mera allegazzjoni jew suspett mill-pulizija. Dak li neċessarjament għandu jiġi ikkunsidrat hu **s-sustanza tal-kunċett** u mhux lejn il-kelma jew il-forma tat-terminoloġija adoperata.

Illi li tfisser il-frażi *"wanted for the purposes of conducting a criminal prosecution"* fl-ambitu tal-liġi dwar l-estradizzjoni ma tfisser xejn ħlief li l-awtorità ġudizzjarja estera jidrilha li hemm raġunijiet biżżejjed biex b' *mod formali* jimputalek ċertu għemil li jikkostitwixxi reati li dwarhom ikun imiss li jissokta l-proċediment penali bit-tmexxija ta' prosekuzzjoni kriminali.

Issir riferenza għal dak deċiż mill-Qorti tal-Appell fis-sentenza fl-ismijiet **Il-Pulizija vs George Cauchi:** [5]

> 3. Il-ligijiet li jitrattaw dwar l-estradizzjoni, galadarba ma humiex strettament ligijiet ta' natura penali – intizi, jigifieri, biex jikkwalifikaw xi ghemil jew nuqqas bhala reat u jippenalizzawh, bhalma hu, per ezempju, il-każ tal-Kodici Kriminali **– għandhom jigu interpretati b'mod li, sa fejn hu possibbli, jintlahaq l-iskop li għalih saru, u cioe` li jkun hemm ko-operazzjoni internazzjonali b'tali mod li reati ta' certa` gravita` jigu puniti fil-pajjiż fejn ikunu twettqu**. Tali ligijiet, għalhekk, ma hux meħtieġ li jinghataw interpretazzjoni restrittiva – bhalma huwa l-każ ta' ligijiet penali. Kif tajjeb osserva Lord Steyn fil-House of Lords filkawza ***In re Ismael*** (deciza fid-29 ta' Lulju, 1998): **Next there is the reality that one is concerned with the contextual meaning of "accused" in a statute intended to serve the purpose of bringing to justice those accused of serious crimes. There is a transnational interest in the achievement of this aim. Extradition treaties and extradition statutes, ought, therefore, to be accorded a broad and generous construction so far as the texts permit in order to facilitate extradition.** (sottolinear ta' din il-Qorti).

Issa hu minnu li l-MAE in deżamina jaddebita lill-estradand b'fatti u akkużi speċifiċi, bid-data li fih twettaq, ma min, il-lok.

Fil-fatt fis-sezzjoni (d) tiegħu jagħti deskrizzjoni tal-fatti dwar kif l-estradand hu involut fir-reati addebitati lilu fl-Italja. L-estradand qed jiġi imputat lilu r-reat ravviżat bl-artikoli 416 u 416*bis* tal-Codice Penale, il-**parteċipazzjoni f'organizzazzjoni kriminali**, liema reat qed jiġi allegat li twettaq **f'Parma, Malta, ir-Rumanija u Ricadi sa minn Ġunju 2018** sad-data tal-ħruġ tal-Mandat. Kif ukoll bir-reat ta' **riċiklaġġ** li hu addebitat lil German bħala li twettaq **f'Ricadi w r-Rumanija fil-jiem ta' bejn it-22 u l-25 t'Ottubru, 2018.** [6]

Fid-deskrizzjoni li tingħata dwar kif hu maħsub li twettqet il-kondotta kriminuza tiegħu, l-estradand qed jiġi akkużat li kien wieħed minn żewġ sewwieqa li *"participated as drivers and organised the exports of the construction vehicles from Calabria to Malta; in addition they were assigned the task of finding purchasers in that foreign country"*.[7]

[5] Per S.T.O. Prim Imħallef Vincent De Gaetano; Deċiża 06.01.2004 p.10
[6] Fol.12-14.
[7] Fol.13.

L-istess Mandat ikompli jagħti dettalji fuq l-involviment ta' German u saħansitra jindika l-inġenji speċifiċi li n-numru ra' reġistrazzjoni tagħhom ġew **falsifikati** minn German kif ukoll wettaq falsifikazzjoni fuq *invoices* relatati ma dawn l-inġenji u oħrajn.[8]

Altru` li l-awtoritajiet għandhom f'idejhom evidenza biżżejjed li tmur lill' hinn mis-sempliċi suspett. Evidenza li rriżultat minn investigazzjonijiet.

Ikkunsidrat,

Illi gwidata mill-prinċipju ta' *mutual trust* u *mutual confidence* f'deċiżjonijiet t' awtoritajiet ġudizzjarji oħra, Qorti li trid teżegwixxi MAE trid tkun ferm attenta biex ma tużurpax il-funzjoni tal-awtorità emittenti.

Isegwi li ibbażat fuq il-prinċipju ta' *mutual trust* li huwa l-pedament għal *mutual recognition* ta strumenti legali fosthom il-MAE, fejn *mutual recognition* hi rikonoxxuta bħala l-ġebla tax-xewka tal-koperazzjoni ġudizzjarja f'materji kriminali, qajla Qorti Rimandanti tista' tissindika r-raġuni li għalih ikun inħareġ il-MAE. Daqstant ieħor irid altru jkollha raġunijiet eċċezzjonali biex tiddeċiedi ma tistrieħ fuq xi dikjarazzjoni li tkun għamlet l-awtorità ġudizzjarja emittenti, u senjatament dik li l-persuna tkun mfittxija sabiex titmexxa prosekuzzjoni kriminali fil-konfront tagħha.

Fil-fatt fil-Preambolu tad-Deċiżjoni Kwadru jingħad-

> (1) According to the Conclusions of the Tampere European Council of 15 and 16 October 1999, and in particular point 35 thereof, the formal extradition procedure should be abolished among the Member States in respect of persons who are fleeing from justice after having been finally sentenced and extradition procedures should be speeded up in respect of persons suspected of having committed an offence……
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> (5) The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. Further, the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of **free movement of judicial decisions in criminal matters**, covering both presentence and final decisions, within an area of freedom, security and justice.
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> (6) The European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the 'cornerstone' of judicial cooperation……

[8] Fol.14

(10) The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof.

Imbagħad fl-**Opinion ta' Lord Scott of Foscote fil-Judgement (Appellate Committee), House of Lords, Office of the King's Prosecutor, Brussels (Respondents) v. Armas** is-segwenti:[9]

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

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

"Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision."
And recital (5) of the Framework Decision speaks of

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

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

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

[9] 17 November, 2005; Session 2005–06; [2005] UKHL 67; Hearing Date 12 October, 2005

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

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

Il-Qorti tal-Appell Kriminali fil-proċediment **Il-Pulizija vs Marek Drga ikkunsidrat:**[10]

9. 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 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures between Member States done at Luxembourg on the 13th June, 2002, adopted pursuant to Title VI of the Treaty, the terms of which are set out in the relative arrangement published in the Government Gazette dated the 1st June, 2004, as amended by Council Framework Decision 2009/299/JHA of the 26th February, 2009 (hereinafter referred to as the FD). According to regulation 3(1) of this Order:

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

10. 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.

11. 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.

12. 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

[10] Per Onor. Imħallef Dr. Aaron M. Bugeja, Extradition (EAW) Proceedings number 421/2021. Sitting of the 6th August 2021

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

13. 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.

14. 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.**

15. 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.

16. 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.

17. 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.

Fil-każ tal-MAE maħruġ fil-konfront ta' Marco German, huma d-dikjarazzjonijiet magħmulha mill-awtoritajiet Taljani infushom li qed jindikaw li ittieħed pass lura mid-dikjarazzjoni inizjali li dan ili l-MAE hu għat-tmexxija ta' prosekuzzjoni kriminali.

F'każ simili u abbażi tal-prinċipji enunċjai ta' *mutual trust* u *mutual confidence*, il-Qorti trid tirrikonoxxi bl-istess mod u qies it-tieni dikjarazzjoni, li kif ser jintqal aktar l-isfel, hi inkonsistenti u saħansitra konfliġġenti mal-ħruġ tal-MAE innifsu!

Rinfaċċjata bil-lanjanza tal-abbli difensuri li l-proċedimenti fl-Italja għadhom huma biss fi stadju t'investigazzjoni li nhar is-6 ta' Ġunju 2023[11] il-Qorti talbet għall-informazzjoni ai termini tar-regolament 13A tal-Ordni:

> *1. If in this case, there is the intention to Prosecute as stated in the European Arrest Warrant (Wanted for Prosecution)?*
>
> *2. If in fact all investigations have been completed, so that once there is the extradition, Prosecution will start immediately?*[12]

B'kommunikazzjoni li ġiet riċevuta minn Sirene Malta, il-Pulizija Maltija ingħatat is-segwenti informazzjoni li indubbjament ħolqot preokkupazzjoni għaliex mill-ewwel dehret dijammetrikament opposta għal dak li kien oriġinarjament qed jiddikjara f'termini definiti w preċiżi il-MAE, u cioe li dan kien MAE maħruġ sabiex fil-konfront ta' German titmexxa prosekuzzjoni Kriminali:

> *Dear colleagues, reference previous correspondence in this case, and at the light of what communicated us to our J.A., a judicial Act named "rinvio a giudizio" doesn't exist. However as communicated to you with our M form dated 31.05.2023, There is a request for precautionary measure detention order in prison issued by our competent J.A. the Magistrate in charge for preliminary investigation at the Court of Catanzaro, where all the charges against GERMAN*

[11] Fol.42
[12] Fol.46

*Marco are specified because the **first step of investigations** are concluded for the **possible** prosecution.*[13]

Il-frażijiet "***first step of investigations***" u l-kelma "***possible***" b'riferenza għall-prosekuzzjoni li suppost kellha tkun il-mottiv wara l-ħruġ tal-MAE, ikkonfondit mhux ftit lil din il-Qorti tenut kont li l-MAE in deżamina hu kategoriku li dan hu mandat *"for conducting a criminal prosecution"*.[14] Iktar u iktar meta hu paċifiku li:

5.7. Proportionality — the role of the executing Member State

The Framework Decision on EAW does not provide for the possibility of evaluation of the proportionality of an EAW by the executing Member State. This is in line with the principle of mutual recognition[15].

It-tħassib u perplesità għal Qorti jemana mill-fatt li r-regolament 5(3) tal-Ordni jirrikjedi li l-MAE irid ikun mandat maħruġ minn **awtorità ġudizzjarja** ta' pajjiż skedat li jkun fih fosthom id-dikjarazzjoni li l-persuna li dwarha jinħareġ il-mandat hija mfittxija fil-pajjiż skedat **għall-finijiet tat-tmexxija ta' prosekuzzjoni kriminali** għall-għemil ta' reat imsemmi fil-mandat:

(3). Mandat ta' arrest rilevanti għall-prosekuzzjoni hu mandat maħruġ minn awtorità ġudizzjarja ta' pajjiż skedat u li jkun fih -

(a) id-dikjarazzjoni msemmija fis-subartikolu (4), u

(b) l-informazzjoni msemmija fis-subartikolu (5).

(4) Id-dikjarazzjoni msemmija fis-subartikolu (3)(a) hi waħda li l-persuna li dwarha jinħareġ il-mandat hija **mfittxija fil-pajjiż skedat għall-finijiet tat-tmexxija ta' prosekuzzjoni kriminali** għall-għemil ta' reat imsemmi fil-mandat.

Konsegwentement filwaqt li l-frażi "*mfittxija fil-pajjiż skedat għall-finijiet tat-tmexxija ta' prosekuzzjoni*" ma tipprefiġġi ebda data jew perijodu li fiha għandha tinbeda l-prosekuzzjoni, ma jagħmilx sens li dwar l-istess proċeduri jintqal li it-tmexxija ta' prosekuzzjoni kriminali hi biss triq **potenzjali** li l-awtoritajiet jistgħu jew ma jistgħux jieħdu!!

[13] Fol.45

[14] Fol.11

[15] Commission Notice — Handbook on how to issue and execute a European arrest warrant (europa.eu)

Tant hu hekk li fil-***Manwal dwar kif toħroġ u teżegwixxi mandat ta' arrest Ewropew (2017/C 335/01)*** maħruġ f'Ottubru, 2017, mill-Kummissjoni Ewropeja u ppublikat fil-Ġurnal Uffiċjali tal-Unjoni Ewropeja,[16] insibu li:

> 2.1.3. Ir-rekwiżit għal deċiżjoni ġudizzjarja eżegwibbli
>
> L-awtoritajiet ġudizzjarji emittenti jridu dejjem jiżguraw li jkun hemm **deċiżjoni ġudizzjarja domestika eżegwibbli** qabel ma joħorġu MAE. In-natura ta' din id-deċiżjoni tiddependi fuq l-iskop tal-MAE. **Meta jinħareġ l-MAE bl-iskop ta' prosekuzzjoni, mandat ta' arrest nazzjonali jew kull deċiżjoni ġudizzjarja eżegwibbli li jkollha l-istess effett trid tkun saret mill-awtoritajiet ġudizzjarji kompetenti tal-Istat Membru emittenti (l-Artikolu 8(1)(c) tad-Deċiżjoni Kwadru dwar l- MAE) qabel ma jinħareġ l-MAE.** Ġie kkonfermat mill-Qorti tal-Ġustizzja Qorti tal-Ġustizzja fil-Kawża C-241/15 Bob- Dogi (2) li l-mandat ta' arrest nazzjonali jew deċiżjoni ġudizzjarja oħra hija distinta mill-MAE nnifsu…….

L-artikolu 8.1.c tad-Deċiżjoni Kwadru jipprovdi:

> (c) evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2;

Il-Qorti tal-Ġustizzja tal-Unjoni Ewropeja fil-proċediment **Case C-414/20 PPU** tat-13 ta' Jannar 2021:[17]

> 2. Article 8(1)(c) of Framework Decision 2002/584, as amended by Framework Decision 2009/299, must be interpreted as meaning that a European arrest warrant must be regarded as invalid where it is not based on a '[national] arrest warrant or any other enforceable judicial decision having the same effect' for the purposes of that provision. That concept covers national measures adopted by a judicial authority to search for and arrest a person who is the subject of a criminal prosecution, with a view to bringing that person before a court for the purpose of conducting the **stages** of the criminal proceedings. It is **for the referring court** to determine whether a national measure putting a person under investigation, such as that on which the

[16] **C335:** Dan il-manwal iqis l-esperjenza miksuba fl-aħħar 13-il sena mill-applikazzjoni tal-Mandat ta' Arrest Ewropew fl-Unjoni. L-għan ta' din ir-reviżjoni huwa li jiġi aġġornat il-manwal u jsir aktar komprensiv u faċli għall-utent. Biex tipprepara din l-aħħar verżjoni tal-manwal, il-Kummissjoni kkonsultat ma' diversi persuni kkonċernati u esperti, inklużi l-Eurojust, is- Segretarjat tan-Netwerk Ġudizzjarju Ewropew, u l-esperti governattivi u l-awtoritajiet ġudizzjarji tal-Istati Membri.
Dan il-Manual jinsab fuq l-Internet fil-paġna: https://e-justice.europa.eu fil-lingwi uffiċjali kollha tal-Unjoni.

[17] *Request for a preliminary ruling under Article 267 TFEU from the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria), made by decision of 3 September 2020, received at the Court on 4 September 2020, in the criminal proceedings against* ***MM,*** *interested party:* ***Spetsializirana prokuratura***

European arrest warrant at issue in the main proceedings is based, produces such legal effects.[18] [Emfażi tal-Qorti]

Mis-sezzjoni (b) tal-Mandat t'Arrest Ewropew jirrizulta li fil-fatt li hemm viġenti mandat t'arrest domestiku li abbażi tiegħu inħareġ il-MAE - ***"Ordinanza di applicazione di misura cautelare della custodia in carcere"*** – li nħareġ fl-10 ta' Jannar 2023[19] biex b'hekk dan ir-rekwiżit ġie sodisfatt.

Però tenut kont ta' dak li ġie preżentat quddiemha l-Qorti Rimandanti tpoġġiet fi dmir li tistudja aktar fil-qrib dak li wassal għal ħruġ tal-MAE fis-sens li tistħarreġ l-istadju li fih dan ġie maħruġ fl-Italja u jekk inħariġx b'mod korrett in pjena konformità mad-dettami tad-Deċiżjoni Kwadru.

Wara kollox hi l-istess Deċiżjoni Kwadru li tippermetti li awtorità eżekuttiva, rinfaċċjata b'diffikultajiet biex takkolji MAE, tagħmel rikors għall-artikolu 15(2) tad-Deċiżjoni. Kif sar minn din il-Qorti fis-6 ta' Ġunju kif fuq ingħad, tenut kont li hu obbligu fuq Qorti Rimandanti li tassigura li dan l-istrument Ewropew essenzjali fil-ġlieda kwotidjana tal-kriminalità, inħareġ tassew skond id-dettami tal-istess strument leġislattiv li welldu.

Fid-deċiżjoni[20] li saret riferenza għaliha l-Qorti Ewropeja kellha s-segwenti konsiderazzjonijiet x'tagħmel:

49 The principles of mutual recognition and mutual confidence which form the basis of the European arrest warrant system are founded inter alia on the premiss that the European arrest warrant concerned has been issued in conformity with the minimum requirements necessary for it to be valid, which include the requirement laid down in Article 8(1)(c) of Framework Decision 2002/584. The dual level of judicial protection is, in principle, lacking in a situation where a procedure to issue a European arrest warrant has been applied without a decision, such as a decision to issue a national arrest warrant on which the European arrest warrant is based, having been taken by a national judicial authority, before the issuing of the European arrest warrant (see, to that effect, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, EU:C:2016:385, paragraph 57).

50 From that point of view, Framework Decision 2002/584 provides, in particular, in Article 8(1)(c) thereof, that a European arrest warrant must contain information, set out in accordance with the form contained in the Annex to that framework decision, regarding evidence of an 'enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2' of that framework decision. That information must be given in section (b) of the form included in that Annex, headed 'Decision on

[18] Case-law by the Court of Justice of the EU on the European Arrest Warrant (europa.eu)
[19] **Dok. RS1** a fol.8 u **Dok. RS2** a fol.2; **Dok.RS3** a fol.18
[20] **Case C-414/20 PPU**

which the warrant is based', point 1 of which requires the mention of the 'arrest warrant or judicial decision having the same effect'.

51 It should be borne in mind that, whereas Framework Decision 2002/584 does not provide a precise definition of the concept of an 'arrest warrant or … enforceable judicial decision having the same effect', it is apparent from the Court's case-law that that concept refers, in the first place, to a national measure that is distinct from the European arrest warrant decision (see, to that effect, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, EU:C:2016:385, paragraph 58).

52 As regards, in the second place, what must be understood by the term 'judicial decision', it has been held that that term covers all the decisions of the Member State authorities that administer criminal justice, but not the police services (judgment of 10 November 2016, *Özçelik*, C-453/16 PPU, EU:C:2016:860, paragraph 33).

53 As regards, in the third place, the nature of the measure referred to in Article 8(1)(c) of Framework Decision 2002/584, as the Advocate General stated, in essence, in points 90 to 93 of his Opinion, in order to fall within the scope of the concept of a '[national] arrest warrant or any other enforceable judicial decision having the same effect' for the purposes of that provision, a national measure serving as the basis for a European arrest warrant must, even if it is not referred to as a 'national arrest warrant' in the legislation of the issuing Member State, produce equivalent legal effects, namely the legal effects of an order to search for and arrest the person who is the subject of a criminal prosecution. That concept **does not therefore cover all** the measures which initiate the opening of criminal proceedings against a person, but only those intended to enable, by a coercive judicial measure, the arrest of that person with a view to his or her appearance before a court for the purpose of conducting the stages of the criminal proceedings.

54 In the present case, it is apparent from the information given in the order for reference that the national measure on the basis of which the European arrest warrant concerning MM was issued is the order of 9 August 2019 adopted by the public prosecutor putting him under investigation, the sole purpose of which is **to notify the person concerned of the charges against him and to afford him the possibility to defend himself by providing explanations or presenting offers of evidence.**

[Emfasi u sottolinejar tal-Qorti]

Dak li seħħ b'kommunikazzjoni tal-*Giudice degli Indagini Preliminari* (GIP) fi ħdan il-Qorti ta' Catanzaro, Dott. Chiara Esposito, tat-12 ta' Ġunju 2023, minflok serva biex jikkjarifika s-sitwazzjoni serva biss biex aktar jikkawża inċertezza w joħloq aktar dubbji dwar l-stat tal-proċeduri fl-Italja:

"the penal proceeding against the w/p will continue its course...".[21]

"il processo seguira il suo corso e che l'indagato sara portato dinanzi all' autorità giudiziaria per essere sottoposto ad interrogatorio di garanzia non appena fara l'ingresso nello stato Italiano".[22]

[21] Fol.47

[22] Fol.48.

Dan meta l-GIP tibqa tirreferi għal German bħala l-**"indagato"** filwaqt li donnu hemm bħal preżunzjoni li Qrati esteri ikunu konversanti ta' kull proċediment penali li jeżisti fl-Istati Membri, fejn għal kuntrarju kien għalhekk li d-Deċiżjoni Kwadru provdiet għal fakultà li tintuża rikjesta għal informazzjoni supplimentari fl-artikolu 15(2) tagħha, dispożizzjoni li sar rikors għaliha minn din il-Qorti meta rrikorriet għaliha ai termini tar-regolament 13A tal-Ordni kif ingħad.

Konsegwentement fin-nuqqas t'informazzjoni li ntalbet li tintbagħat mill-awtoritajiet Taljani w unikament sabiex bħala awtorità eżekuttiva l-Qorti Rimandanti tassew isegwi t-tagħlim enunċjat f'**Reg. v. Governor of Ashford, Ex parte Postlethwaite [1988] A.C. 924, 946H-947D** fejn intqal dan dwar il-United Kingdom ***Extraditon Act 1989***:

> ....a statute intended to serve the purpose of bringing to justice those accused of serious crimes. There is a transnational interest in the achievement of this aim. Extradition treaties, and extradition statutes, ought, therefore, to be accorded a broad and generous construction so far as the texts permits it in order **to facilitate extradition**:
> [Emfasi tal-Qorti]

Kien b'dan il-ħsieb u aktar minn hekk, fil-konsapevolezza tal-obbligi ta' awtorità eżekuttiva kif naxxenti mid-Deċizjoni Kwadru, li l-Qorti għaddiet biex tiddetermina hi jekk l-istadju tal-proċess ġudizzjarju imsemmi mill-GIP u ċioe l-*interrogatorio a garanzia*, istitut regolat bl-artikolu 294 tal-Codice di Procedura Penale, iwassalx definittivament għal prosekuzzjoni kriminali:

> **Art. 294.**
>
> Interrogatorio della persona sottoposta a misura cautelare personali
>
> 1. Fino alla dichiarazione di apertura del dibattimento, il giudice che ha deciso in ordine all'applicazione della misura cautelare se non vi ha proceduto nel corso dell'udienza di convalida dell'arresto o del fermo di indiziato di delitto procede all'interrogatorio della persona in stato di custodia cautelare in carcere immediatamente e comunque non oltre cinque giorni dall'inizio dell'esecuzione della custodia, salvo il caso in cui essa sia assolutamente impedita. PERIODO ABROGATO DALLA L. 8 AGOSTO 1995, N. 332. (82) (101)

Jiġi spjegat li:

> "L'interrogatorio di garanzia è un adempimento che il giudice è tenuto a compiere quando (durante le indagini preliminari, durante l'udienza preliminare o fino alla dichiarazione di apertura del dibattimento) decide in ordine a una misura coercitiva o restrittiva.

Si tratta di un momento fondamentale del procedimento cautelare penale, in quanto rappresenta il primo contatto che la persona sottoposta a misura cautelare ha con il giudice a garanzia del più ampio diritto di difesa dell'indagato.[23]

Hemm provdut li:

L'interrogatorio di garanzia è sottoposto a termini ben precisi che sono di massimo cinque giorni dall'inizio e dall'esecuzione della custodia in caso di custodia cautelare in carcere e di massimo dieci giorni dall'esecuzione del provvedimento o dalla sua notificazione con riferimento a tutte le altre misure cautelari, sia coercitive che interdittive.

Se il pubblico ministero ne fa espressa istanza nella richiesta di custodia cautelare, l'interrogatorio della persona sottoposta a tale misura deve invece avvenire entro il termine di quarantotto ore.

La conseguenza del mancato rispetto dei termini sopraindicati comporta come conseguenza la perdita di efficacia della misura cautelare.

Jingħad ukoll li:[24]

L'interrogatorio di garanzia è obbligatoriamente previsto dalla legge ogni volta che il giudice ha deciso di applicare una misura cautelare. Le misure cautelari sono quei provvedimenti che **incidono sulla libertà del soggetto accusato di un reato** che, però, non è stato ancora ritenuto responsabile in base a una sentenza definitiva. In casi del genere, la legge prevede che il giudice debba verificare accuratamente se la misura inflitta all'indagato/imputato sia legittima o meno. Proprio a questo serve l'interrogatorio di garanzia.

Cos'è l'interrogatorio di garanzia?

L'**interrogatorio di garanzia** è quello a cui si sottopone la persona raggiunta da una misura cautelare. Come detto in apertura, infatti, chi è **indagato** per aver commesso un reato potrebbe subire una restrizione della propria libertà anche se non è stato condannato.

L'interrogatorio di garanzia, quindi, è quello che si svolge davanti al giudice dopo che è stata inflitta una **misura cautelare personale**, cioè un provvedimento che limita la libertà personale (tipo gli arresti domiciliari o la custodia in carcere, per intenderci).
Interrogatorio di garanzia: a cosa serve?

L'interrogatorio serve al giudice per poter **verificare la legittimità** della misura appena inflitta. L'interrogatorio di garanzia mette a diretto contatto il giudice che ha emesso la **misura cautelare** con il soggetto che l'ha subita, in modo tale che quest'ultimo possa raccontare la sua versione dei fatti e il giudice possa decidere se confermare le restrizioni oppure eliminarle. Se, ad esempio, una persona è stata raggiunta da un'ordinanza cautelare che impone gli arresti domiciliari perché c'è il pericolo di inquinamento delle prove, ma il giudice, dopo l'interrogatorio, ritiene che tale timore non vi sia, allora il giudice stesso potrà decidere di revocare la misura, oppure di sostituirla con una meno afflittiva.

[23] L'interrogatorio di garanzia (studiocataldi.it)
[24] Interrogatorio di garanzia: entro quando va comunicato? (laleggepertutti.it)

Interrogatorio di garanzia: come funziona?

La legge dice che, **entro cinque giorni** dall'esecuzione della custodia cautelare in carcere, oppure entro dieci se si tratta di un'altra misura **cautelare personale** (tipo l'obbligo di dimora, il divieto di espatrio, ecc.), il giudice che ha disposto la misura è tenuto a procedere all'interrogatorio della persona sottoposta a restrizione **[**Art. 294 cod. proc. pen.**]**. È escluso, quindi, l'interrogatorio di garanzia nel caso di **misura reale**, cioè di sequestro.

Nel caso in cui questi termini non siano rispettati, la misura si intende estinta e l'individuo che ne era destinatario riacquista appieno i suoi diritti e la sua libertà. La legge, tuttavia, consente al giudice, in casi eccezionali, di rinviare l'interrogatorio mediante decreto.

L'**interrogatorio di garanzia** è condotto dal giudice che ha disposto la misura cautelare; hanno diritto di presenziare sia il magistrato del pubblico ministero che il difensore della persona attinta dal provvedimento restrittivo. Nel caso in cui il giudice, anche all'esito delle dichiarazioni rese dall'interrogato, dovesse ritenere di modificare la misura cautelare in una meno afflittiva, o addirittura dovesse ritenere inesistenti le esigenze cautelari, provvede a modificare la misura ovvero a revocarla del tutto.

L'interrogatorio di garanzia del quale all' articolo 294 del c.p.p., è condizione necessaria ai fini della valida applicazione di una qualsiasi misura cautelare ed è eseguito dal giudice procedente nei confronti del destinatario della misura stessa entro un termine perentorio di dieci o cinque giorni giorni dall'esecuzione della misura, a seconda che si tratti della custodia cautelare (cinque giorni) o di altra misura cautelare (dieci giorni).

In seguito all'interrogatorio dell'indagato, il giudice valuta se permangono le condizioni di applicabilità e le esigenze cautelari.[25]

Għalhekk jirrizulta li dan *l'interrogatorio a garanzia* hu stadju fejn persuna soġġetta għall-*ordine di custodia cautelare* tingħata l-ewwel opportunita tiltaqa' ma' l-awtorità li tkun ħarġet dak l-*ordine.*

Ma hemm ebda rabta mal-prosekuzzjoni li tibqa biss stadju **potenzjali**!

Fil-fatt wara li jsir dan l-*"interrogatorio di garanzia",* il-*pubblico ministero* ikompli bl-investigazzjonijiet tiegħu (*"indagini preliminari")* fejn skond l-Artiklu 407 tal-codice di procedura penale dawn l-indaġni preliminari jistgħu idumu għaddejjin sa massimu ta' tmintax il-xahar jew sentejn għal reati aktar serji.

Meta jintemmu dawn l-*"indagini preliminari"* il-prosekutur jista' jiehu waħda minn żewġ toroq: (a) jgħaddi biex jarkivja l-istess indaġni *("l'archiviazione del procedimento")* jew (b) jitlob il-*"rinvio a giudizio"* (Articolo 405 c.p.p.).

[25] L'interrogatorio di garanzia | Il portale giuridico online per i professionisti - Diritto.it

Għalhekk qatt ma jista' jkun hemm ċertezza li ser ikun hemm rinvio a giudizio peress li fil-mankanza ta' biżżejjed indizzji fil-konfront tal-indagat, ikun għadu fl-istadju fejn l-*"archiviazione del procedimento"* tibqa miżura potenzjali.

Issa għalkemm hu minnu li fil-każ tal-MAE in deżamina lill-estradand ġie imputat lilu għemil pjuttost preċiż u definit, minn dak li ġie preżentat quddiem il-Qorti - u senjatament l-aħħar komunikazzjonijiet li ġew mibgħuta mill-awtoritajiet Taljani li baqgħu ma wieġbux b'mod ċar għad-domandi li intalbu jiġu risposti in segwitu għat-talba għall-informazzjoni supplimentari - jidher li hu minnu li l-proċeduri fl-Italja għadhom ma wasslux sal-grad fejn jista' jingħad b'ċertezza li fil-konfront tiegħu, dawk il-proċeduri ser jevolvu fi prosekuzzjoni kriminali u għalhekk ma jistax jitqies bħala sodisfatt ir-rekwiżit kontemplat bir-regolament 5(4) tal-Ordni.

Tant hu hekk li fl-***articolo 407-bis c.p.p.*** jiġi espressament indikat meta jinbeda l-proċediment penali:

Art. 407-bis.
Inizio dell'azione penale. Forme e termini ([1])

1. Il pubblico ministero, quando non deve richiedere l'archiviazione, esercita l'azione penale, formulando l'imputazione, nei casi previsti nei titoli II, III, IV, V e V- bis del libro VI ovvero **con richiesta di rinvio a giudizio.**

2. Il pubblico ministero esercita l'azione penale o richiede l'archiviazione entro tre mesi dalla scadenza del termine di cui all'articolo 405, comma 2, o, se ha disposto la notifica dell'avviso della conclusione delle indagini preliminari, entro tre mesi dalla scadenza dei termini di cui all'articolo 415-bis, commi 3 e 4. Il termine è di nove mesi nei casi di cui all'articolo 407, comma 2.

Bl-għeluq tal-*"indagini preliminari"* fejn ma jkunx hemm l-*"archiviazione del procedimento"* jiġi notifikat l-persuna li issa tkun ġiet formalment imputata w d-difensur tagħha kif jikkontempla l-***articolo 415-bis c.p.p.*** li jkompli joħroġ fid-deher id-distinzjoni bejn l-istadji diversi li li jwasslu għall-bidu tal-proċediment penali fil-konfront ta' min ikun ġie indagat u sussegwentement imputat.

Art. 415-bis.
Avviso all'indagato della conclusione delle indagini preliminari. ([1])

1. Salvo quanto previsto dai commi 5-bis e 5-ter, prima della scadenza del termine previsto dal comma 2 dell'articolo 405, anche se prorogato, il pubblico ministero, se non deve formulare richiesta di archiviazione ai sensi degli articoli 408 e 411, fa notificare alla persona sottoposta alle indagini e al difensore nonché, quando si procede per i reati di cui agli articoli 572 e 612-bis del codice penale, anche al difensore della persona offesa o, in mancanza di questo, alla persona offesa avviso della conclusione delle indagini preliminari ([2]).

2. L'avviso contiene la sommaria enunciazione del fatto per il quale si procede, delle norme di legge che si assumono violate, della data e del luogo del fatto, con l'avvertimento che la documentazione relativa alle indagini espletate è depositata presso la segreteria del pubblico ministero e che l'indagato e il suo difensore hanno facoltà di prenderne visione ed estrarne copia.

DECIDE

Fid-dawl ta' dawn il-konsiderazzjonijiet u fuq dan l-insenjament il-Qorti tqis li li r-rekwiżiti dettati bir-regolament 5(4) tal-Ordni ma ġewx sodisfatti w għalhekk,

Ai termini tal-Artikolu 15(3) tal-Att dwar l-Estradizzjoni, Kapitolu 276 tal-Liġijiet ta' Malta, kif reż applikabbli bir-Regolament 27 tal-Ordni, qed tipprojbixxi li l-estradant jintbagħat taħt kustodja għal fini tat-treġġigħ tiegħu lejn l-Italja

Konformament tordna r-rilaxx tal-imsemmi Marco German salv dak li hemm kontemplat fil-*proviso* tal-imsemmi Artikolu 15(3) tal-Att dwar l-Estradizzjoni.

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