



**COURT OF MAGISTRATES (MALTA)
AS A COURT OF CRIMINAL INQUIRY**

[IN THE ACTS OF THE EXTRADITION CALLED AS THE COURT OF COMMITTAL]

Magistrate Dr. Leonard Caruana LL.D., M.A. (Fin. Serv)

The Police
(Inspector Roderick Spiteri)

Vs

Robert LUKADINOVIC

Today, the 3rd May 2024.

The Court,

Having seen that Robert LUKADINOVIC, of 46 years, born in Vinkovci, Croatia, on the 15th June 1977, holder of Croatian Passport Number 083187051 , Croatian Identity Card number 112134567 and Maltese Residence Permit number MT8721684 (225091A). was arraigned under arrest as he is wanted by the Croatian Competent Authorities in terms of Article 5 of Subsidiary Legislation 276.05 for the purposes of prosecution;

Having seen the European Arrest Warrant (EAW) of the 8th March 2024 issued by the Municipal Court in Vukovar;

Having seen the Certificated dated the 26th March 2024 issued by the Attorney General in terms of Regulation 6A of the Extradition (Designated Foreign Countries) Order (S.L. 276.05) hereinafter referred to as the "Order";

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Having seen the European Arrest Warrant (EAW) of the 24th March 2023 issued by the Municipal Court in Osijek;

Having seen the Certificated dated the 26th March 2024 issued by 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";

Having seen that during the sitting of the 11th April 2024, the Court ascertained that the person arraigned is, in fact, the person wanted by the mentioned foreign authorities;

Having seen the evidence submitted;

Having heard the submission of the parties;

Considers;

That the European arrest Warrant is regulated within the Member States of the European Union by means of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between the Member States (2002/584/JHA), which Framework Decision forms the basis of our law in this regard.

That Article 1 (1) and (2) of the Framework Decision stipulate that:

1. 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.

2. 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.

That the general principle which forms the basis of the Framework Decision is explained in the Commission Notice – Handbook on how to issue and execute a European Arrest Warrant¹ which states: -

“The Framework Decision on EAW reflects a philosophy of integration in a common judicial area. It is the first legal instrument involving cooperation between the Member States on criminal matters based on the principle of mutual recognition. The issuing Member State’s decision must be recognised without further formalities and solely on the basis of judicial criteria.

The surrender of nationals is a principle and a general rule, with few exceptions. These exceptions concern the enforcement of custodial sentences in one’s home country and apply equally to residents. In practice, about one fifth of all surrenders in the Union concern a country’s own nationals.”

Our courts also had the opportunity to underline this principle. In fact, in the judgement **Carmelo Borg et vs Ministru Responsabbli mill-Ġustizzja u l-Intern et**² it was held that:

“Fil-fehma kunsidrata ta’ din il-Qorti, l-Ordni dwar Pajjizi Barranin Appuntati dwar l-Estradizzjoni jagħmel restrizzjonijiet fuq il-verifika gudizzjarja li huma permissibbli, ma humiex irragjonevoli, ma jikkozzawx ma’ xi principji ta’ gustizzja naturali, u li jinkwadraw fl-iskop tal-ligi principali, cioe` dak li tigi regolata l-estraddizzjoni ta’ persuna minn Malta għal pajjiz barrani – f’dan il-kaz pajjizi ta’ l-Unjoni Ewropea fejn principju bazilari huwa dak tal-fiducja reciproka li dawn il-pajjizi għandhom fis-sistema tal-gustizzja ta’ xulxin.”

Although the principle is one of full cooperation between Member States, the surrender of a person from a requested country to the requesting country is not automatic and

¹ **Commission Notice – Handbook on how to issue and execute a European Arrest Warrant** (C/2023/1270), dated 15 December 2023, p. 10/166.

² **Carmelo Borg et vs Ministru Responsabbli mill-Ġustizzja u l-Intern et**, Constitutional Court, 15th May 2006 (App. Ċiv Nru 1080/2005/1)

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the Court of the requested country must examine whether there is any impediment to extradition, as laid down in the Framework Decision and also in our Order.

Considered

At the outset, it must be highlighted that these present proceedings have been initiated by the Republic of Croatia by means of two separate instruments: (i) The European Arrest Warrant issued by the Municipal Court of Osijek on the 24th March 2023 and (ii) The European Arrest Warrant issued by the Municipal Court in Vukovar on the 8th March 2024. Under Maltese law, both European Arrest Warrants are regulated by the Extradition (Designated Foreign Countries) Order,³ which entered into force on the 7th June 2004 and by The Extradition Act⁴ save where it is inconsistent with the mentioned Order.

Regulation 3(1) of the Order stipulates, *inter alia*, that only the provisions of the Order, except where expressly indicated otherwise, will apply to requests received by Malta for the return of a fugitive criminal to a scheduled country in pursuance to a request made under the Order and the provisions of the Extradition Act shall have effect in relation to the return under this Order of persons to any scheduled country subject to such conditions, exceptions, adaptations or modifications as are specified in the same Order. Moreover, Regulation 5(3) defines what a European Arrest warrant is, that is, a warrant issued by a judicial authority of a scheduled country.

Therefore, one of the essential elements for the validity of the European Arrest Warrant is that it is issued by the judicial authority of a Scheduled Country. There is no dispute that the issuing authority is a valid judicial authority,⁵ however, upon looking at Schedule 1⁶ it is evidently clear that the Republic of Croatia **is not included** in the list of Scheduled countries.

Considered;

³ Subsidiary Legislation 276.05.

⁴ Cap. 276 of the Laws of Malta.

⁵ As is certified by the Attorney General in terms of Regulations 6A and 7 of the Order.

⁶ Reg. 2 of the Order stipulates that "scheduled country" means a country listed in Schedule 1.

In its note of submissions, the prosecution argues that although the Republic of Croatia is not in the list of scheduled countries, this Court should still consider it as a scheduled country in terms of Regulation 3. The prosecution argues that this omission appears to be a genuine oversight by the Maltese legislator on account of Croatia's later accession to the European Union⁷ and also because the Court should apply the spirit of mutual co-operation as intended by Framework Decision 2002/584/JHA and applied by the Member States.

At the outset, it should be pointed out that Framework Decisions were the main legal instruments under the third pillar of the Treaty on European Union, which reached its legal force after the entry into force of the Treaty of Amsterdam on the 1 May 1999 and which replaced the intergovernmental co-operation mechanisms set forth by the Maastricht Treaty, which entered into force on the 1 November 1993. Although with the entry into force of the Treaty of Lisbon,⁸ no more Framework Decisions could enter into force, those Framework Decisions enacted prior this Treaty remained in force and regulated by the Treaty on European Union, as amended.

In the paper entitled "**The Legal Effect of Framework Decisions – A Case-Note on the Pupino Decision of the European Court of Justice**"⁹ it is stated that:

*"According to Art. 34 (2) (b) EUT, framework decisions serve the purpose of approximating of the laws and regulations of the Member States. They shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. **In no case shall they entail any direct effect.**" (emphasis of this Court).*

The above is also in line with Article 34 of the Treaty on the European Union, as amended but prior to its repeal by the Treaty of Lisbon, which stated that:

⁷ The Republic of Croatia joined the European Union on the 1 July 2013.

⁸ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (OJ C 306, 17.12.2007); entry into force on 1 December 2009.

⁹ Lorenzmeier S., **The Legal Effect of Framework Decisions – A Case-Note on the Pupino Decision of the European Court of Justice**, *Zeitschrift für Internationale Strafrechtsdogmatik*, ZIS 12/2006, p. 583, available online at https://www.zis-online.com/dat/artikel/2006_12_97.pdf (accessed on 01 May 2024).

2. *The Council shall take measures and promote cooperation, using the appropriate form and procedures as set out in this title, contributing to the pursuit of the objectives of the Union. To that end, acting unanimously on the initiative of any Member State or of the Commission, the Council may:*

... omissis....

*(b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. **They shall not entail direct effect;***" (emphasis of this Court)

Therefore, similar to the Directives of the European Union and unlike Regulations, Framework Decisions are not directly applicable to the Member States of the European Union although each Member State has the obligation to achieve the result intended by the Framework Decision. There is no doubt that the end result sought to be achieved by Framework Decision 2002/584/JHA is the hastened surrender of persons by the requested state to the requesting state for the purposes of prosecution or serving a custodial sentence without, as much as possible, the bureaucratic process typically associated with traditional extradition proceedings and this on the basis of mutual trust and co-operation between Member States. This goal, however, may only be achieved through the form and method as chosen and implemented in its national law by each Member State.

Reference is made to the **Case C-573/17 Poplawski**¹⁰ wherein the European Court of Justice held that:

"68 As confirmed by the case-law recalled in paragraphs 64 to 67 above, a national court's obligation to disapply a provision of its national law which is contrary to a provision of EU law, if it stems from the primacy afforded

¹⁰ Case C-573/17: Judgment of the Court (Grand Chamber) of 24 June 2019 (request for a preliminary ruling from the Rechtbank Amsterdam — Netherlands) — Execution of the European arrest warrant issued against Daniel Adam Popławski.

to the latter provision, is nevertheless dependent on the direct effect of that provision in the dispute pending before that court. Therefore, a national court is not required, solely on the basis of EU law, to disapply a provision of its national law which is contrary to a provision of EU law if the latter provision does not have direct effect.

69 *It should be stated, in the second place, that neither Framework Decision 2002/584 nor Framework Decision 2008/909 has direct effect. That is because those framework decisions were adopted on the basis of the former third pillar of the European Union, in particular, under Article 34(2)(b) EU. That provision stated, first, that framework decisions are binding on the Member States as to the result to be achieved, but leave to the national authorities the choice of form and methods, and, second, that framework decisions are not to entail direct effect (judgments of 8 November 2016, Ognyanov, C-554/14, EU:C:2016:835, paragraph 56, and of 29 June 2017, Popławski, C-579/15, EU:C:2017:503, paragraph 26).*

70 *In that regard, it is important to point out that, in accordance with Article 9 of Protocol (No 36) on transitional provisions, annexed to the treaties, the legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted on the basis of the Treaty on European Union prior to the entry into force of the Treaty of Lisbon are to be preserved until those acts are repealed, annulled or amended in implementation of the treaties. Since Framework Decisions 2002/584 and 2008/909 have not been subject to any such repeal, annulment or amendment, they continue therefore to have the legal effect attributed to them under Article 34(2)(b) EU (judgment of 8 November 2016, Ognyanov, C-554/14, EU:C:2016:835, paragraph 57).*

71 *Since those framework decisions do not have direct effect under the EU Treaty itself, it follows from paragraph 68 above that a court of a Member State is not required, solely on the basis of EU law, to disapply a*

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provision of its national law which is contrary to those framework decisions.”

Therefore, on the basis of the above observations made by the European Court of Justice, owing to the fact that Framework Decision 2002/584/JHA does not have direct applicability, this Court is bound to abide by the Extradition (Designated Foreign Countries) Order even though such Order might inaccurately reflect the end result intended by the Framework Decision.

On the basis of the above, it is clear from Schedule 1 of the Order that the Republic of Croatia, being the requesting state in these proceedings, **is not** a scheduled country and therefore, the European Arrest Warrants subject to these proceedings do not comply with Regulations 5(1)(2)(3) of the Order.

Decide:

Therefore, on the basis of the above, the Court finds that the Republic of Croatia is not a Scheduled Country and therefore, after having seen Regulations 10(1)(2) and 12(1)(2)(3) of the Order is ordering the discharge of Robert LUKADINOVIC.

Ft.Dr Leonard Caruana
Magistrate

Sharonne Borg
Deputy Registrar