COURT OF CRIMINAL APPEAL

Hon. Mr. Justice Dr. Neville Camilleri
B.A., M.A. (Fin. Serv.), LL.D., Dip. Trib. Eccles. Melit.

Appeal Number 534/2024/1

The Police

vs.

Thomas Zaugg

Today 14th. of August 2024

The Court,

Having seen that the appellant **Thomas Zaugg**, holder of Swiss Passport Number X7414163, was arraigned in front of the Court of Magistrates (Malta) as a Court of Criminal Inquiry (In the Act of Extradition referred to as the Court of Committal) where the following was stated:

"Who is wanted by the competent Judicial Authorities of the Belgian authorities, a scheduled country in terms of Article 5 of Subsidiary Legislation 276.05, to serve several sentences of imprisonment."

The Court of Magistrates (Malta) as a Court of Criminal Inquiry (In the Act of Extradition referred to as the Court of Committal) was requested:

"to proceed against Thomas Zaugg, according to the provisions of the Extradition Act Chapter 276 Laws of Malta and Subsidiary Legislation 276.05."

Having seen the judgment/Order of the Court of Magistrates (Malta) as a Court of Criminal Inquiry (In the Act of Extradition referred to as the Court of Committal) dated 24th. of July 2024, where the mentioned Court decided the following:

"Therefore, on the basis of the above, the Court, in accordance with the Extradition (Designated Foreign Countries) Order (S.L. 276.05), is hereby deciding that the return of ***Thomas Zaugg*** *to the Belgian Authorities on the Basis of the European Arrest Warrant dated the 27 January 2023 and the European Arrest Warrant dated the 2 April 2024* ***is not barred*** *and therefore, in accordance with Regulations 24 of the Order:*

1. *is ordering Thomas Zaugg to custody to await his return to Belgium, being the scheduled country which issued both present warrants.*

In accordance with Regulation 25 of the mentioned Order, read in conjunction with Article 16 of the Extradition Act, (Cap. 276 of the Laws of Malta) the Court is informing the person requested that: -

(a) He will not be returned to Belgium until after the expiration of seven days from the date in which this order of committal comes into effect and that,

(b) He may appeal this decision 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.

*SOHOWEVER, the Court, in accordance with Article 28A(1) and (2) of the Order is hereby **postponing** the surrender of Thomas Zaugg to the Belgian Authorities until any of the following occurs:*

(i) the charge is disposed of;
(ii) the charge is withdrawn;
(iii) proceedings in respect of the charge are discontinued; or
(iv) the proceedings are put off sine die;

and this in regard to the pending proceedings which the Requested Person is presently facing before these Courts in Malta."

Having seen the appeal filed by the appellant on the 29th. of July 2024 by which he requested this Court: "*to accept his appeal and annul the judgment given by the Court of Magistrates as a Court of Criminal Inquiry (Court of Committal) on 24 July 2024 and remits the case back before the Court of Magistrates Inquiry (Court of Committal) to proceed according to law or alternatively to accept his grievances and refuses the two European Arrest Warrants issued by the Belgian authorities against the applicant.*"

Having seen all the acts and documents, including the document filed by the appellant in front of this Court during the sitting of the 12th. of August 2024.

Having seen the Reply filed by the appellate Attorney General on the 6th. of August 2024, which reply was filed as regards the appeal filed by the appellant.

Having seen the updated conviction sheet of the appellant exhibited by the Prosecution as ordered by the Court.

Having heard the final oral submissions.

Considers

That this is a judgment pertaining to an appeal from a judgment that is an Order given by the First Court on the 24th. of July 2024.

That from the acts of the case it transpires that the Belgian Authorities have issued the following European Arrest Warrants against the appellant:

- one on the 27th. of January 2023 (Doc. "RS 2" – *a fol.* 15 *et seq.*) and

- another one on the 2nd. of April 2024 (Doc. "RS 6" – *a fol.* 32 *et seq.*).

The two warrants cover several criminal cases that have been decided against the appellant.

That as far as the European Arrest Warrant dated 27th. of January 2023 (Doc. "RS 2" – *a fol.* 15 *et seq.*) is concerned, it covers the following judgments:

- Turnhout Criminal Court on 17.09.2014 – Reference: 1996
  Punishment: Imprisonment of 30 months, suspended for a period of 5 years for a part of 10 months prison sentence;

- Antwerp Court of Appeal on 29.06.2016 – Reference C/386/216
  Punishment: Imprisonment for 50 months;

- Antwerp Court of Appeal on 23.03.2016 – Reference: C/386/2016
  Punishment: Revocation of suspended sentence for 10 months imprisonment (Title A);

- Antwerp Criminal Court on 02.05.2017 – Reference 2172
  Punishment: Revocation of suspended sentence for 10 months imprisonment;

- Antwerp Criminal Court on 10.10.2018 – Reference 2018/4011
  Punishment: Imprisonment of 1 year;

  Remaining sentence to be served: The judgment of the Court for the enforcement of custodial sentences of 15.11.2022 revoked Thomas Zaugg's conditional release and set the remaining sentence at 721 days imprisonment;

- Court for the enforcement of custodial sentences of Antwerp on 25.11.2022 – Reference SR 22/2660
  Punishment: Revocation of conditional release with a remaining sentence of 721 days.

That the European Arrest Warrant dated 2nd. of April 2024 (Doc "RS 6" – *a fol.* 32 *et seq.*) covers the following judgement:

- Sentence of the Criminal Court of Antwerp – division Antwerp dd. 17/01/2024. Sentence number: 2024/332 – File number: 21CO1935 – AN47.LB.3712/2021

  Length of the custodial sentence or detention order imposed: 50 months of imprisonment with immediate arrest:

  Remaining sentence to be served: 50 months of imprisonment to be reduced by the preventive custody already served from 07/02/2021 to 09/02/2021.

That on the 31st. of January 2023, an alert (Doc. "RS 8"– *a fol.* 39) was issued in the Schengen Information System. Subsequently the Public Prosecutor's Office of Antwerp, Belgium issued the two European Arrest Warrants mentioned above. Eventually, on the 11th. of June 2024 the Attorney General of Malta issued a declaration (Doc. "RS 4" – *a fol.* 26 *et seq.*) in terms of Article 6A of

Legal Notice 320 of 2004 (Subsidiary Legislation 276.05 of the Laws of Malta).

Considers

That before proceeding any further this Court makes reference to the judgment delivered on the 27th. of February 2024 in the names **Il-Pulizija vs. Daniel-Joe Meli** (Number 117/2024/1) where this Court as presided stated the following:

> "Illi qabel din il-Qorti tgħaddi sabiex tagħmel il-konsiderazzjonijiet tagħha dwar l-aggravji mressqa mill-appellant fir-Rikors tal-appell tiegħu tinnota li in kwantu hija Qorti tal-Appell ma tbiddilx l-analiżi tal-fatti u tal-liġi sakemm id-deċiżjoni meħuda mill-Qorti tal-Maġistrati kienet legalment u raġonevolment korretta. Fil-kors ordinarju tal-funzjonijiet tagħha, din il-Qorti ma taġixxix bħala qorti ta' ritrattazzjoni, fis-sens li ma terġax tisma' l-każ u ma tiddeċidiex mill-ġdid iżda tintervjeni meta tara li l-Qorti tal-Maġistrati tkun għamlet evalwazzjoni żbaljata tal-evidenza jew interpretat il-liġi ħażin – u b'hekk tirrendi d-deċiżjoni tagħha mhux sigura u mhux sodisfaċenti. F'dak il-każ din il-Qorti għandha s-setgħa u d-dmir li tbiddel id-deċiżjoni tal-Qorti tal-Maġistrati jew dawk il-partijiet tad-deċiżjoni tagħha li jirriżultaw li huma żbaljati jew li ma jirriflettux interpretazzjoni korretta tal-liġi."

That before making considerations regarding the grievances raised by the appellant in his appeal, this Court notes that it is in agreement with the two preliminary points mentioned by the Attorney General in his reply filed on the 6th. of August 2024. These preliminary points are the following:

- that this Court cannot overturn a judgment unless it is demonstrated that the decision by the Court of Committal to send the appellant back to Belgium was manifestly erroneous resulting in a miscarriage of justice and

- that since the legal process of extradition between EU Member States is predicated on the foundation of the principles of mutual trust and cooperation, the duty of this Court is limited to ascertaining the existence of any legal impediments to extradition as per Regulation 13 of Subsidiary Legislation 276.05 of the Laws of Malta.

That this Court will now proceed to address the grievances raised by the appellant in his appeal.

Considers

That in the first grievance the appellant complains that the First Court was not correct when it determined that Article 4a(1) of the Framework Decision was not applicable to the judgment delivered by the Belgian Court which he says was delivered on the 27th. of January 2023. The appellant points out that by means of the judgment delivered by the Court in Antwerp on the 27th. of January 2023 he was found guilty of breaching several conditions. As a result of this decision, the appellant has been condemned to a cumulative sentence of imprisonment of 721 days. He also points out that he was not present during the sitting and was not represented by a lawyer. In front of the First Court, the appellant submitted that given that the judgment was delivered *in absentia* the European Arrest Warrant (EAW) should be refused.

That whilst mentioning the reference made by the First Court to the judgment delivered on the 22nd. of December 2017 by the European Court of Justice bearing the name **Ardic** (Number C-571/17), the appellant states that the decision of the Belgian Court is not a suspension revocation decision. On the contrary, he alleges that the Belgian Court enjoyed a level of discretion. In this respect, the appellant argues that the proceedings before the Belgian Court should enjoy the guarantees offered by Article 4a(1) of the Framework Decision. In this respect the appellant refers to the judgment delivered by the European Court of Justice, **Zdziaszek** (Number C-271/17)). The appellant concludes this grievance by stating that from the second page of the judgment

delivered by the Belgian Court it did not make a simple arithmetic exercise but rather it had a degree of discretion in determining the length of the prison time and considered a number of issues including his behaviour.

That the Attorney General rebuts the first grievance by bringing forward the following five arguments:

- that he agrees with the decision of the First Court in respect to the application of Article 4a(1) of the Framework Decision i.e. that it does not apply to this case;

- that the wording of Article 4a(1) of the Framework Decision is clear and states that *"the executing judicial authority may refuse to execute the European Arrest Warrant"* and that therefore the First Court had no legal obligation to refuse such extradition from taking place and it is in the discretion of the Court to decide on a case-by-case basis;

- that the requesting state has sought the surrender of the appellant so that he could face a multitude of convictions, collectively demonstrating a persistent pattern of criminal behaviour;

- that in the spirit of mutual trust and cooperation enshrined in the Framework Decision, there is no basis to question the veracity of the Belgian Court of First Instance Antwerp's (Sentence Enforcement Court) determination that the appellant was validly summoned in its judgment of 25th. of November 2022 (ref SR22/2660);

- that in terms of Article 4a(1) of the Framework Decision, the Court may refuse to execute the EAW (in instances where a judgment was awarded *in absentia*) unless one of the guarantees is provided in accordance with Articles 4a (1)(a)-(d) of the Framework Decision. That in this respect the Attorney General underlines that in these proceedings, the

> relevant guarantee was provided by the Belgian authorities by means of a Note filed on the 24th. of July 2024 (*a fol.* 295) by himself (acting as the designated Central Authority) and that consequently, since such guarantee was provided by the Belgian authorities, the executing judicial authority (which in this case was the First Court) was in fact obliged to execute such EAW as failure to do so would have constituted a breach of the Framework Decision.

That having established the above, this Court notes that the appellant refers to a judgment dated 27th. of January 2023. This Court reviewed all the judgments in the acts of the case and did not find a judgment with such a date. This Court deems that from the reference quoted by the appellant in his appeal he is in actual fact referring to the judgment delivered by the Court of First Instance in Antwerp dated 25th. of November 2022 (*a fol.* 245 *et seq.*).

That as regards the complaint pertaining to the decision whereby the First Court decided that Article 4a(1) of the Framework Decision was not applicable to the judgment delivered by the Court of First Instance in Antwerp dated 25th. of November 2022 (*a fol.* 245 *et seq.*), this Court starts by referring to the preliminary ruling delivered by the European Court of Justice on the 23rd. of March 2023 in the names **LU and PH and Minister for Justice and Equality as intervener** (Joined Cases C-514/21 and C-515/21) wherein the mentioned Court summarised the development on the jurisprudence on this point. In particular, the European Court of Justice stated the following:

> "52. In the third place, it is apparent from the Court's case-law that the concept of 'trial resulting in the decision', within the meaning of Article 4a(1) of Framework Decision 2002/584, must be understood as referring to the proceeding that led to the judicial decision which finally sentenced the person whose surrender is sought in connection with the execution of a European arrest warrant (judgments of 10 August 2017,

Tupikas, C-270/17 PPU, EU:C:2017:628, paragraph 74, and of 22 December 2017, *Ardic*, C-571/17 PPU, EU:C:2017:1026, paragraph 64).

53. By contrast, a decision relating to the execution or application of a custodial sentence previously imposed does not constitute a 'decision', within the meaning of Article 4a(1), except where it affects the finding of guilt or where its purpose or effect is to modify either the nature or quantum of that sentence and the authority which adopted it enjoyed some discretion in that regard. It follows that a decision revoking the suspension of a custodial sentence on account of the breach by the person concerned of an objective condition attached to that suspension, such as the commission of a new offence during the probation period, does not fall within the scope of Article 4a(1), since it leaves that sentence unchanged with regard to both its nature and its quantum (see, to that effect, judgment of 22 December 2017, *Ardic*, C-571/17 PPU, EU:C:2017:1026, paragraphs 77, 81, 82 and 88).

54. Furthermore, since the authority responsible for deciding on such a revocation is not called upon to re-examine the merits of the case that gave rise to the criminal conviction, the fact that that authority enjoys a margin of discretion is not relevant, as long as that margin of discretion does not allow it to modify either the quantum or the nature of the custodial sentence, as determined by the decision finally convicting the requested person (see, to that effect, judgment of 22 December 2017, *Ardic*, C-571/17 PPU, EU:C:2017:1026, paragraph 80)."

That this Court will now refer to the way the Belgian Court determined the penalty that is to be faced by the appellant. In particular, the Belgian Court stated the following (*a fol.* 246):

> "- the probation period has elapsed in an acceptable manner for a period of 929 days, i.e. until 12 April 2022;
>
> - the court takes into account the efforts you've made to comply with the conditions and thus 929 days of the successful probation period are taken into account for the reduction of the remaining sentence;
>
> - the remaining sentence at the time the conditional release decision became enforceable amounted to 1469 days and the probation term was set at 5 years or 1825 days;
>
> - the remaining sentence to be served is equal to: remaining sentence – ((remaining sentence / probation term) x days to be served) or 721 days."

That from an analysis of the above-quoted text it transpires that the Belgian Court determined punishment on the basis of a mathematical formula rather than it being a matter of discretion. The appellant states that one should base this decision on what is stated in the reference for a preliminary ruling delivered by the European Court of Justice on the 10th. of August 2017 in the name **Sławomir Andrzej Zdziaszek** (Number C-271/17 PPU) which in this respect states the following:

> "88. This is the case with respect to specific proceedings for the determination of an overall sentence where those proceedings are not a purely formal and arithmetic exercise but entail a margin of discretion in the determination of the level of the sentence, in particular, by taking account of the situation or personality of the person concerned, or of mitigating or aggravating circumstances (see ECtHR, 15 July 1982, *Eckle v. Germany*, CE:ECHR:1983:0621JUD000813078, § 77, and 28 November 2013, *Dementyev v. Russia*, CE:ECHR:2013:1128JUD004309505, § 25 and 26)."

That despite the fact that the Belgian Court stated that it will take into account the efforts by the appellant, it does not mean that it was exercising a form of discretion but rather that such an element was part of the mathematical formula it mentioned afterwards. Hence the First Court was correct to base its decision on the reference for a preliminary ruling delivered by the European Court of Justice on the 22nd. of December 2017 in the name **Samet Ardic** (Number C-571/17 PPU) wherein the following was stated:

> "80. In that context, under the relevant national rules, the competent court only had to determine if such a circumstance justified requiring the convicted person to serve, in part or in full, the custodial sentences that had been initially imposed and the execution of which, subsequently, had been partially suspended. As the Advocate General pointed out in point 71 of his Opinion, while that court enjoyed a margin of discretion in that regard, that margin did not concern the level or the nature of the sentences imposed on the person concerned, but only whether the suspensions should be revoked or could be maintained, with additional conditions if necessary.
>
> 81. Accordingly, the only effect of suspension revocation decisions, such as those in the main proceedings, is that the person concerned must at most serve the remainder of the sentence initially imposed. Where, as in the main proceedings, the suspension is revoked in its entirety, the sentence once again produces all its effects and the determination of the quantum of the sentence still remaining to be served is derived from a purely arithmetic operation, with the number of days already served in custody being simply deducted from the total sentence imposed by the final criminal conviction.
>
> 82. In those circumstances, and in the light of what was stated in paragraph 77 of the present judgment, suspension revocation decisions, such as those at issue in

> the main proceedings, are not covered by Article 4a(1) of Framework Decision 2002/584, since those decisions leave unchanged the sentences imposed by the final conviction decisions with regard to both their nature and level.
>
> 83. While it cannot be denied that a suspension revocation measure is likely to affect the situation of the person concerned, the fact remains that that person cannot be unaware of the consequences that may result from an infringement of the conditions to which the benefit of such a suspension is subject."

That in dealing with these types of warrants one necessarily needs to keep in mind the scope underlying the Framework Decision. In this respect this Court makes reference to a preliminary ruling delivered on the 10th. of August 2017 in the name **Tadas Tupikas** (Number C-270/17 PPU) where the European Court of Justice stated the following:

> "49. As a preliminary point, it should be borne in mind that, according to the Court's settled case-law, Framework Decision 2002/584 is based on the principle of mutual recognition, which itself, as a 'cornerstone' of judicial cooperation, as is apparent from recital 6 of that Framework Decision, is based on the mutual trust between Member States with a view to achieving the objective set for the Union to become an area of freedom, security and justice (see, to that effect, judgment of 10 November 2016, *Kovalkovas*, C-477/16 PPU, EU:C:2016:861, paragraphs 25 to 28 and the case-law cited).
>
> 50. To that end, Article 1(2) of the Framework Decision lays down the rule that Member States are required to execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of that Framework Decision. Except in

> exceptional circumstances, the executing judicial authorities may therefore refuse to execute such a warrant only in the exhaustively listed cases of non-execution provided for by Framework Decision 2002/584 and the execution of the European Arrest Warrant may be made subject only to one of the conditions listed exhaustively therein. Accordingly, while the execution of the European arrest warrant constitutes the rule, the refusal to execute is intended to be an exception which must be interpreted strictly (see judgment of 29 June 2017, *Popławski*, C-579/15, EU:C:2017:503, paragraph 19 and the case-law cited)."

That after taking into account the above-mentioned considerations, this Court deems that the First Court was correct when it decided that Article 4a(1) of the Framework Decision does not apply to the judgment being contested. Hence the first grievance is being rejected.

Considers

That in his second grievance the appellant complains that the First Court did not consider that the decision of the Belgian Court is not final. He refers to the judgment delivered by the First Court wherein it states that there is no evidence that the judgment delivered is not final. That whilst referring to the Belgian Juridical System which has a number of layers, the appellant argues that it may well be that the case is subject to an appeal. He continues by saying that the First Court could have easily addressed this by means of a request for additional information. The appellant argues that one cannot conclude that the decision of the Belgian Court became a *res judicata* due to the passage of time. He states that such an assumption would result in a breach to Article 4a(1)(d) of the Framework Decision and is in breach of his right to a fair hearing and the Framework Decision.

That the appellant states that once he has been tried *in absentia* and in the absence of the circumstances described under Article 4a

(1)(a)(b)(c) of the Framework Decision, then it was the responsibility of the issuing member to provide a guarantee in terms of Article 4a(1)(d) of the Framework Decision. He argues that the latter article allows him the right to ask for re-examination of the decision of the 25th. of November 2022 and that if the EAW does not contain sufficient information for its execution, the First Court should have requested further information rather than making assumptions that the judgment is final. In this respect the appellant refers to the judgment **Zdziaszek** (Number C-271/17).

That the Attorney General replies to this grievance by saying that he agrees with the decision of the First Court namely that there is no evidence to indicate that the judgment handed down is not final. Furthermore, the Attorney General points out that there is no law, both under Chapter 276 of the Laws of Malta and similarly under the Framework Decision, that stipulates that a custodial sentence needs to be final for the extradition to take place. He argues that this criterion is therefore not a legal impediment that may hinder an extradition from taking place. The Attorney General refers to Regulation 5(6)(7) which lays down in very clear terms what a relevant warrant (after conviction) should constitute. He affirms that there is a conviction against the appellant and due to this fact, it is irrelevant whether or not the decision has been made final or not. The Attorney General also underscores that the Belgian authorities did in fact present a guarantee which may be found in the acts of the proceedings (*a fol.* 297 *et seq.*) and that therefore such guarantee should quash any doubts raised by the appellant.

That regarding the grievance under examination, this Court makes reference to the above-quoted judgment delivered on the 23rd. of March 2023 in the names **LU and PH and Minister for Justice and Equality as intervener** (Joined Cases C-514/21 and C-515/21) wherein the European Court of Justice stated the following:

> "52. In the third place, it is apparent from the Court's case-law that the concept of 'trial resulting in the

> decision', within the meaning of Article 4a(1) of Framework Decision 2002/584, must be understood as referring to the proceeding that led to the judicial decision which finally sentenced the person whose surrender is sought in connection with the execution of a European arrest warrant (judgments of 10 August 2017, *Tupikas*, C-270/17 PPU, EU:C:2017:628, paragraph 74, and of 22 December 2017, *Ardic*, C-571/17 PPU, EU:C:2017:1026, paragraph 64)."

That this Court agrees with the argument expressed by the Attorney General in respect to the guarantees that will be afforded to the appellant as expressed by E. Corazza on the 23rd. of July 2024 (*a fol.* 297 *et seq.*). On the other hand, given that as decided by this Court under the previous grievance namely that Article 4a(1) of the Framework Decision is not applicable to the decision contested, this Court deems that any argument on this article as being not consequential.

That regarding the argument made by the appellant in respect to the information that has been made available, this Court deems that the proceedings in question have sufficient information and there is no need for any additional request for information. In addition, this Court notes that Article 4a of the Framework Decision does not prescribe mandatory grounds in terms of which it may refuse to enforce the EAW.

That, for argument's sake, even if all of the guarantees mentioned in Article 4a of the Framework Decision were not to be satisfied, the Court of Committal was still entitled to enforce such an EAW. In this respect this Court refers to the reference for a preliminary ruling delivered on the 10th. of August 2017 bearing the name **Tadas Tupikas** (Number C-270/17 PPU) where the European Court of Justice stated the following:

> "96. Moreover, since Article 4a of Framework Decision 2002/584 provides for an optional ground for non-execution of the European arrest warrant, and as the

> cases described in paragraph 1(a) to (d) of that Article were conceived as exceptions to that optional ground for non-recognition, the Court has already held that the executing judicial authority may, even after it has found that those cases do not cover the situation of the person who is the subject of the European Arrest Warrant, take into account other circumstances that enable it to ensure that the surrender of the person concerned does not entail a breach of his rights of defence (see, to that effect, judgment of 24 May 2016, *Dworzecki*, C-108/16 PPU, EU:C:2016:346, paragraphs 50 and 51)."

That as a consequence of what has been stated above it results that the second grievance will be rejected too.

Considers

That in the third grievance the appellant refers to that part of the appealed judgment where the First Court reached the conclusion that he was validly summoned. He re-submits that the decision delivered by the Belgian Court lays down a cumulative term of imprisonment against him and is not simply revocation of a suspension. The appellant argues that the EAW does not provide any evidence that he was summoned in person on the date of the decision. He argues that such information must result from the decision itself. He refers to references in the judgment pertaining to this matter and notes that it is necessary that one proves that he was informed that a decision may be handed down if he does not appear 'for trial'. The appellant once again complains that he had asked for additional information and that this request had been turned down by the First Court. In respect to the decision by the First Court, the appellant states that it has not been 'unequivocally' established that he was aware of the trial and 'was informed that a decision may be handed down if he does not appear for trial'.

That with reference to the information provided by the Belgian Court, the appellant complains that this is scarce, but it transpires

that two sittings have taken place. With reference to the procedure carried out, the appellant complains that one can suspect of the procedure for the following three reasons:

- the issuing Member State provides that the applicant's whereabouts were unknown to them throughout the proceedings, indeed he was not summoned for the first sitting;

- if the issuing Member State could not locate and 'validly summon' him for the first sitting, what changed within six days for the sitting wherein the decision was handed down?;

- why didn't the issuing Member State provide evidence of 'valid summons' within the EAW itself when such 'valid summons' should be readily available.

That the appellant requests that this Court, whilst annulling the decision of the First Court, to remit the acts back for this information to be provided. Alternatively, he requests this Court to exercise the power granted to it by means of Regulation 13A of Subsidiary Legislation 276.05 of the Laws of Malta and request from the Belgian Authorities, evidence of valid summons regarding the decision handed down on the 25th. of November 2022.

That the Attorney General replies to this grievance by countering what is stated by the appellant namely that this judgment (alone) does not form the basis of the EAW which was issued on the 27th. of January 2023 but there are a total of six convictions from six separate sentences which form the basis of this specific EAW. In addition the Attorney General states that in the spirit of mutual trust and cooperation, there is no basis to question the veracity of the Belgian Court of First Instance Antwerp's (Sentence Enforcement Court) determination that the appellant was validly summoned in its judgment of 25th. of November 2022 (ref SR22/2660).

That the Attorney General affirms that in terms of Article 4a(1) of the Framework Decision, the Court may refuse to approve the EAW unless one of the safeguards mentioned in the same Article is given. In this case, the Attorney General alleges that the guarantee in paragraph D has been given by the Belgian Authorities. The Attorney General also rebuts the request made by the appellant for additional information in accordance with Regulation 13A of Subsidiary Legislation 276.05 of the Laws of Malta, since there is no legal basis for such a request. He argues that this is even more so when one considers that the First Court was given the necessary guarantees from the Belgian authorities that such summons was validly made.

That this Court notes that it has already been stated that the execution of an EAW is based on an element of mutual trust and that hence this Court is not at liberty to ignore the statements of the requesting authority. It has also been stated that this Court would be obliged to execute an EAW in respect to a judgment delivered *in absentia* if any of the obligation listed in Article 4a of the Framework Decision is satisfied. In this respect this Court refers once again to the reference for a preliminary ruling delivered on the 22nd. of December 2017 in the name **Samet Ardic** (Case C-571/17 PPU) already quoted above, where the Court stated the following:

> "69. In that regard, it should be pointed out that Framework Decision 2002/584 seeks, by the establishment of a simplified and effective system for the surrender of persons convicted or accused of having infringed criminal law, to facilitate and accelerate judicial cooperation with a view to contributing to the objective set for the European Union to become an area of freedom, security and justice, founded on the high level of trust which should exist between the Member States in accordance with the principle of mutual recognition (see, to that effect, judgments of 26 February 2013, *Melloni*, C-399/11, EU:C:2013:107, paragraphs 36 and 37, and of 5 April 2016, *Aranyosi and Căldăraru*, C-

404/15 and C-659/15 PPU, EU:C:2016:198, paragraphs 75 and 76).

70. To that end, Article 1(2) of the Framework Decision lays down the rule that Member States are required to execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of that Framework Decision. Except in exceptional circumstances, the executing judicial authorities may therefore refuse to execute such a warrant only in the exhaustively listed cases of non-execution provided for by Framework Decision 2002/584 and the execution of the European arrest warrant may be made subject only to one of the conditions listed exhaustively therein. Accordingly, while the execution of the European arrest warrant constitutes the rule, the refusal to execute is intended to be an exception which must be interpreted strictly (see judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, EU:C:2017:628, paragraph 50 and the case-law cited).

71. As regards, more particularly, Article 4a of Framework Decision 2002/584, inserted by Article 2 of Framework Decision 2009/299, this seeks to restrict the possibility of refusing to execute the European arrest warrant by listing, in a precise and uniform manner, the conditions under which the recognition and enforcement of a decision given following a trial in which the person concerned did not appear in person may not be refused (judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, EU:C:2017:628, paragraph 53 and the case-law cited).

72. Under that provision, the executing judicial authority is obliged to execute a European arrest warrant, notwithstanding the absence of the person concerned at the trial resulting in the decision, where one of the situations referred to in Article 4a(1)(a), (b), (c) or (d) of that Framework Decision is established (judgment of 10

August 2017, *Tupikas*, C-270/17 PPU, EU:C:2017:628, paragraph 55).

73. Accordingly, that provision seeks to improve judicial cooperation in criminal matters by harmonising the conditions of execution of European arrest warrants issued for the purposes of executing decisions rendered *in absentia*, which is likely to facilitate mutual recognition of judicial decisions between Member States. At the same time, that provision strengthens the procedural rights of persons subject to criminal proceedings, guaranteeing them a high level of protection by ensuring full observance of their rights of defence, flowing from the right to a fair trial, enshrined in Article 6 of the ECHR (see, to that effect, judgments of 26 February 2013, *Melloni*, C-399/11, EU:C:2013:107, paragraph 51, and of 10 August 2017, *Tupikas*, C-270/17 PPU, EU:C:2017:628, paragraphs 58 to 60)."

That apart from what has been quoted above and from what had been stated earlier, this Court will stand by what the Belgian authorities stated regarding the appellant being validly summoned and this apart from the fact that the EAW in question refers to other convictions and not just one. Consequently, in view of the above, this Court deems that even the grievance under examination should also be rejected.

Considers

That in the fourth grievance the appellant refers to the part of the decision delivered by the First Court where it determined that the EAW dated 2nd. of April 2024 is in full conformity with Article 4a(d) of the Framework Decision. The appellant complains that the Belgian authorities did not attempt to notify him with his trial neither was he summoned in person nor was he informed with the date and time of the proceedings. He says that he was not informed of the consequences of not attending and did not appoint a legal counsel to represent him. This allegedly took

place despite the fact that the Belgian authorities knew about his possible whereabouts. The appellant refers to the judgment delivered sent by the judicial authorities where his address is indicated on page 2: "*choosing domicile in Belgium, 2000 Antwerp, Kattendijkdok-Westkaai 41/0103*". In addition, Form A attached to the EAW, at the bottom of the third page it is clearly indicated that the police "*suspect that the person is with his grandparents in Switzerland*". The appellant notes that the latter statement is also reflected in the EAW issued on the 27th. of January 2023, however for some reason is omitted from the EAW which seeks the extradition for the decision handed down *in absentia* dated 2nd. of April 2024. He alleges that the EAW seeking extradition includes misleading information.

That the appellant refers to Article 8 of the Directive (EU) 2016/343 and states that a decision *in absentia* can be carried out only if the state made reasonable efforts to notify the accused. He complains that had he been duly notified he would not have been placed in custody pending the trial and also states that in the absence of evidence that the Belgian authorities attempted to locate and summon him, the execution of the EAW is disproportionate and shall violate Articles 5 and 6 of the Charter of Fundamental Human Rights, Article 4a of the Framework Decision 2002/584/JHA (consolidated version) and Article 8 of Directive (EU) 2016/343. The appellant concludes the fourth grievance by reserving the right to lodge a request for preliminary reference in line with Article 276 of the Treaty on the Functioning of the European Union, which request was minuted during the sitting held on the 12th. of August 2024 and which was eventually rejected by this Court.

That the Attorney General rebuts this grievance by reaffirming once again that Article 4a(1) of the Framework Decision or our law do not prohibit extradition in cases where judgments are given *in absentia* in as long as the necessary guarantees are afforded. In addition, with reference to the claims made by the appellant that the Belgian authorities did not attempt to notify him or that there were "misleading and incorrect assertions" in

the EAW itself, the Attorney General contends that at this stage these claims are simply claims which are not substantiated and therefore carry no legal weight. The Attorney General underscores that the Belgian authorities have requested the surrender of the appellant because he has been convicted on several instances and for this reason the Belgian authorities are exercising their right within the European Council Framework Decision to have the appellant surrendered by the Maltese authorities.

That regarding the claim that the appellant's human rights claims have been breached, the Attorney General notes that it is essential to acknowledge the delicate balance between individual rights and the legitimate interests of the State, in this case, a European Union Member State – Belgium. The Attorney General maintains that this equilibrium has been observed throughout the proceedings and there has been no infringement of the appellant's fundamental human rights.

That whilst referring to the considerations made under the previous grievances and, for avoidance of repetition, applies same *mutatis mutandis* to this grievance, this Court deems it necessary to make reference to a preliminary ruling delivered by the European Court of Justice on the 17th. of December 2020 in the names **TR and Generalstaatsanwaltschaft Hamburg** (Number C-416/20 PPU) where the European Court of Justice in respect to the application of Directive 2016/343 in the context of Framework Decision 2002/584 stated the following:

> "45. It should be noted that Framework Decision 2002/584 contains a specific provision, namely Article 4a, which covers, specifically, the situation of a European arrest warrant issued for the purpose of executing a custodial sentence or a detention order, concerning a person who did not appear in person at the trial resulting in the decision imposing that sentence or order.

> 46. In that context, any possible non-conformity of the national law of the issuing Member State with the provisions of Directive 2016/343 cannot constitute a ground which may lead to a refusal to execute the European arrest warrant.
>
> 47. Reliance on the provisions of a directive in order to prevent the execution of a European arrest warrant would make it possible to circumvent the system established by Framework Decision 2002/584, which provides an exhaustive list of the grounds for non-execution. This is a fortiori the case when Directive 2016/343 does not contain provisions applicable to the issue and execution of European arrest warrants, as the Advocate General stated, in essence, in points 62 and 63 of his Opinion.
>
> […]
>
> 56. It follows from all the foregoing that Article 4a of Framework Decision 2002/584 must be interpreted as meaning that the executing judicial authority may not refuse to execute a European arrest warrant issued for the purpose of executing a custodial sentence or a detention order, where the person concerned has prevented the service of a summons on him in person and did not appear in person at the trial because he had absconded to the executing Member State, on the sole ground that that authority has not been given the assurance that, if the person is surrendered to the issuing Member State, the right to a new trial, as defined in Articles 8 and 9 of Directive 2016/343, will be respected."

That what has been quoted above is amply clear and needs no further explanation. Bearing in mind what has been stated by the European Court of Justice in the quote here-above referred to, this Court once again notes that the Belgian authorities have given the

necessary assurances in respect to the appellant. Therefore, it is evident to this Court that the obligations established under Directive 2016/343 will nonetheless be observed. Hence using the words of the European Court of Justice in the ruling quoted above: *"any possible non-conformity of the national law of the issuing Member State with the provisions of Directive 2016/343 cannot constitute a ground which may lead to a refusal to execute the European arrest warrant."*

That in view of the above the fourth grievance is also being rejected.

Decide

Consequently, for all the above-mentioned reasons, this Court rejects the appeal filed by the appellant Thomas Zaugg and confirms the judgment delivered by the First Court in its entirety, including the order that the appellant be kept in custody to await his return to Belgium and including the postponement of the surrender of the appellant to the Belgian Authorities until any of the conditions listed by the First Court in the *decide* of its Order occurs.

Thereby the appellant is also being informed that if he is of the opinion that any provisions of the Constitution of Malta or of the European Convention Act is, has been or is likely to be contravened in relation to his person as to justify a reversal, annulment or modification of the Court's order of committal, he has the right to apply for redress in accordance with the provisions of Article 46 of the said Constitution or of the European Convention Act (Chapter 319 of the Laws of Malta).

Dr. Neville Camilleri	**Alexia Attard**
Hon. Mr. Justice	**Deputy Registrar**