Court of Criminal Appeal

Hon. Judge Dr. Edwina Grima LL.D.

Extradition (EAW) Proceedings No.99/2025

The Police

(Inspector Roderick Spiteri)

Vs

Timothy Alan Mackay, 65 years, born in Australia on the 28th of February 1960, holder of Maltese residence permit document MT0892365, 0159311A, and Australian Passport PE0389522

Today the 24th of March 2025

The Court,

Having seen the arraignment of appellant Timothy Alan Mackay, holder of Maltese residence permit document MT0892365 and Australian passport number PE0389522, before the Court of Magistrates (Malta) as a Court of Committal, wanted by the judicial authorities in Legnica, Poland, a scheduled country in terms of Regulation 5 of Subsidiary Legislation 276.05, for the purpose of prosecution for the offences listed in the European Arrest Warrant issued against him.

Having seen the European Arrest Warrant of the 31st of December 2024 issued by the district Court of Legnica – III Criminal Department.

Having seen the Certificate dated the 21st of January 2025 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'.

Having seen the judgement of the Court of Magistrates (Malta) As a Court of Preliminary Inquiry (for purposes of the Extradition Act referred to as a Court of Committal) of the 28th of February 2025 wherein the Court:

> ***"….. in accordance with the Extradition (Designated Foreign Countries) Order (S.L. 276.05), is hereby deciding that the return of Timothy Alan Mackay to the Polish Authorities on the Basis of the European Arrest Warrant dated the 31 December 2024 is not barred and therefore, in accordance with Regulation 24 of the Order:***
>
> 1. ***is ordering Timothy Alan Mackay to custody to await his return to Poland, being the scheduled country which issued the present warrant.***
>
> ***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 Poland 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.***

Having seen the appeal application of Timothy Alan Mackay, filed on the 6th of March 2025, whereby he requested this Court to:

1. Revoke the decision given on the 28th of February 2025 by the Court of Magistrates (Malta) as a Court of Criminal Inquiry for the purposes of the Extradition Act referred to as the Court of Committal presided by Magistrate Leonard Caruana, whereby the Court found no exceptional circumstances

which merit rejecting the present European Arrest Warrant and ordered that the appellant be held in custody to await his return to Poland.

2. And instead orders that the appellant should be discharged.

Having seen the acts of the proceedings.

Having seen the grounds of appeal put forward by appellant Timothy Alan Mackay.

Having seen the reply of the Attorney General of the 13th of March 2025.

Having seen the decree of this Court of the 17th of March 2025 wherein the request put forward by appellant for a referral to the First Hall of the Civil Court in its constitutional jurisdiction for an alleged breach of his right to a fair hearing, or alternatively to decide the issue itself and if in the affirmative remit the acts of the case back to the Court of Criminal Inquiry as a Court of Committal, was denied.

Having seen all the evidence and documents found in the acts.

Having heard submissions both by the defence for requested person/appellant, as well as by the Attorney General.

Having seen the minutes of the sitting of the 18th of March 2025 wherein the appeal was put off for judgment for today's hearing.

Having seen all the acts of the case.

Considers,

The main grievance which appellant brings forth on appeal deals with human rights violations on various grounds. Appellant is of the firm opinion that the conditions found in prisons in Poland fall way below the minimum standards required at an international level to guarantee his right against inhuman and degrading treatment. He laments that the size of the prison cells are too small, the hygiene and sanitary conditions are very poor, there is a lack of access to healthcare during detention and there is established proof of ill treatment of foreign nationals coupled with incidents of violence. Appellant relies in his grievance on *the Commission Recommendation (EU)*

2023/681 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions, and the report on *Criminal detention in the EU: Conditions and Monitoring (FRANET)* in relation to Poland, which reports are exhibited in the acts of the case as Documents AZ10 and AZ11. Quoting the oft-cited judgment in the *Aranyosi and Caldararu* and the *Dumitru-Tudor Dorbantu* cases before the CJEU, appellant submits that a risk of inhuman and degrading treatment within the meaning of article 4 of the Charter has been found to pose a limitation to the principles of mutual trust and recognition at the heart of the EAW. Appellant criticizes the appealed judgment when it concluded that a risk of inhuman and degrading treatment cannot result solely from an overview of the general conditions of detention in the Issuing State such that a refusal to surrender may be justified, and this after that Court expressly found a dichotomy between the international reports submitted by appellant and the position expressed by the Polish authorities. In the light of such considerations, appellant believes that the Court of Committal should have carried out an in-depth assessment of the evidence brought forward by him and not simply rely on the assurances given by the Polish authorities.

Appellant is of the opinion that the supplementary information supplied by the Issuing Member State did not address all the concerns raised by him, foremost amongst which were guarantees regarding healthcare, specialised medical care and medical staff, especially in view of his health condition and advanced age. Also, the concerns regarding polish prisons as indicated by *the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* within the Council of Europe were not sufficiently addressed in the information provided by the Polish authorities.

Appellant fails to agree also with the conclusion reached by the Court of Committal that it was not in possession of any data or information specific to the requested person, when this information was available to that Court, foremost amongst which was his health condition and age, coupled with the fact that he is a foreign national with no knowledge of the Polish language. The assurances provided by the Polish

authorities were biased emanating from the district police who had an interest in the outcome of the proceedings.

Moreover, appellant considers that another violation of his rights will occur when upon surrender he will be subjected to a 30-day pre-trial detention period. In the opinion of the Defence this runs counter to our national legislation wherein article 355AJ(3) of the Criminal Code lays down a 48-hour pre-trial detention time-limit such that a suspect will not be held under arrest for an unreasonable time unless arraigned in Court and given a hearing.

Finally, appellant believes that he will suffer a breach of his right to a fair hearing should he be surrendered to the Polish authorities, due to a documented lack of independence of the judiciary in Poland and relies on the CJEU judgment in the cases *Minister for Justice and Equality (Deficiencies in the system of Justice)* decided on the 25th of July 2018 which permits the executing judicial authority to refrain, by way of exception from giving effect to an EAW. He criticizes the appealed judgment where this line of Defence was rejected due to the fact that the Court considered that in this particular case there was no proof that this deficiency would affect due process in his regard. It is appellant's opinion that such documented shortcomings are in themselves enough to cast a doubt on the impartiality of the proceedings which will be initiated against him. Appellant feels aggrieved also by the decision of the Court of Committal to reject his request for supplementary information from the Polish authorities regarding the appointment of the judges who issued the EAW and who will preside over his case, since it held that in this case the Court did not find the need to investigate the matter further. This, in his opinion, denied him the right to a fair trial since he was prevented from bringing forward evidence which was crucial to his defence.

Appellant's next grievance concerns the lack of a polish arrest warrant in his regard and this in view of what is provided for in article 8(1)(c) of the Framework Decision which necessitates evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect. No such documents were

exhibited in this case with the Court of Committal relying solely on the narrative found in the EAW instrument itself.

Appellant's final grievance relates to the lack of clarity with regards to the basis of the European Arrest Warrant. He maintains that although the Court of Committal stated in its judgment that it was clear from the EAW instrument itself that the requested person was wanted for a criminal prosecution, however when requesting supplementary information, the Court of Committal asked for a clarification from the Polish Judicial authorities since this matter was not clear to it. Furthermore, appellant is of the opinion that the reply of the Polish authorities was contradictory and indicates that he is wanted for investigation purposes and not for prosecution, and thus the request being made does not fall within the parameters of article 1(1) and (2) of the FD. Appellant further reiterates that he has already been subjected to three separate investigations on the same facts and was never arraigned or charged. He submits that there are several measures available under Union Law on judicial cooperation in criminal matters that complement the EAW like, for example, the European Investigation Order, which instrument should have been utilized in this case rather than the EAW.

In his reply to the appeal application the Attorney General affirms that the judgment of the Court of Committal is just and legally valid and thus the grievances brought forward by appellant should be dismissed by this Court. With regards to the first grievance he maintains that a mere apprehension regarding potential endangerment of fundamental human rights does not suffice to prevent extradition, but a real risk must be proven substantiated by facts relating to the specific case in issue. He reiterates that the First Court fulfilled its obligations when ascertaining whether the requested person upon surrender would face a risk of a breach of his fundamental human rights. With regards to the prison conditions present in Poland, the Attorney General contends that the Court of Committal observed the guidelines laid down by the CJEU, with the generic information provided by appellant not being sufficient to warrant a refusal by the Executing judicial authority to surrender the requested person, and with the two-tiered test as established by the said Court not being satisfied

in this case. The appellant, in the Attorney General's opinion, barring the question regarding the independence of the Judiciary in Poland, was given ample opportunity to put any other questions to the Issuing state regarding prison conditions even in view of appellant's medical health, however he failed to request specific medical guarantees and instead sought general information with regards to prison conditions in Poland.

With regards to the grievance relating to 30-day time limit of pre-trial detention upon surrender, the Attorney General maintains that if appellant is extradited to Poland the procedure adopted in the criminal prosecution against him will be solely regulated by Polish law. Moreover, according to the Attorney General the judicial decision justifying this pre-trial detention period was justified by the Polish authorities, which decision was exhibited by the Attorney General together with his reply to the appeal application. Also, the grievance regarding the lack of independence of the judiciary is also based on generic information with no specific facts relating to the person of appellant being supplied, as the First Court rightly concluded, in the Attorney General's opinion.

Finally with regards to the two grievances relating to the procedure adopted in the issuance of the present EAW, the Attorney General maintains that the decision of the Regional Polish Court amounts to a judicial decision on the basis of which the EAW was issued as indicated in the instrument itself. Moreover, both from the information contained in the EAW itself, as well as from the supplementary information provided by the Issuing Judicial authority, it is evident that appellant is wanted by the Issuing Member State for the purposes of conducting a criminal prosecution against him, and not as alleged by the Defence solely for investigation purposes. He deems also that the argument by the Defence that appellant has already been subject to investigations by Panama, the United States and Belgium with no charges brought against him as flawed, since the investigations by other foreign jurisdictions are extraneous to the present extradition proceedings, and also the polish investigations are not contingent upon, nor influenced, by actions taken by other sovereign states. This coupled with the serious nature of the charges which are being made against appellant who was

allegedly involved in a large-scale Ponzi scheme where over 400 individuals were defrauded of substantial sums of money thus making investigations by the Polish authorities against him manifestly justified.

Considers,

The scope behind the introduction of the procedure relating to the European arrest warrant has been to allow member states to pursue prosecutions and custodial sentences across borders and doing away with the often cumbersome and time-consuming procedures adopted in the extradition procedures utilized in member states thus effectively combatting cross-border crimes and threats such as terrorism. The EAW however, could have a draconian impact on the fundamental rights of the person sought to be extradited and thus both the CJEU and the ECtHR have held that in the execution of the EAW, although based on the mutual trust and recognition between member states, should also seek to safeguard the requested person from a violation of his human rights as laid out in the *Charter of Fundamental Human Rights of the European Union* and the *European Convention on Human rights* to which the Member states are signatories. In fact, several judgments by the CJEU and the ECtHR have addressed the issues regarding alleged human rights violations in the execution of the EAW, and have established that in such exceptional circumstances where in the specific case relating to the requested person there is a clear risk of a violation, this would pose a limitation on the principles of mutual recognition and trust between member states.

In fact, the rights guaranteed in Recital 12 and 13 of the Preamble to the Framework Decision have consistently been held to constitute a further bar to the execution of the EAW and to the principles of mutual recognition and trust between Member states, as already pointed out.

> **(12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued**

when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.

This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media.

(13) No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

Now, although national legislation precludes the Maltese executing authority from assessing a violation of human rights since this falls within the competence of the Constitutional Court, however in its judgment of the 9th of July 2024, the said Court stated *inter alia*:

33. Minn din is-sentenza hu ċar li l-qrati ta' kompetenza kriminali li jiddeċiedu każijiet dwar l-eżekuzzjoni ta' mandat ta' arrest Ewropew, għandhom dmir jiddeċiedu jekk mill-provi jirriżultax li hemm riskju reali li t-treġġigħ lura tal-persuna jwassal għal trattament inuman u degradanti tal-persuna li tintalab mill-awtorità ġudizzjarja emittenti. ….

34 Għalhekk hi żbaljata t-teżi li l-qrati ta' kompetenza kriminali m'għandhomx kompetenza li jikkunsidraw ilmenti relatati mad-drittijiet fundamentali tal-persuna f'proċeduri relatati mal-eżekuzzjoni ta' mandat ta' arrest Ewropew. Pożizzjoni li tissarraf f'nuqqas ta' implimentazzjoni tad-dritt Ewropew li jinkludu l-Karta tad-Drittijiet tal-Bniedem tal-Unjoni Ewropea, u taf ikollha konsegwenzi fuq il-proċeduri.

35. Għaldaqstant, fil-każ ta' mandat ta' arrest Ewropew, l-Ordni dwar Pajjiżi Barranin Appuntati dwar l-Estradizzjoni (Leġislazzjoni Sussidjarja 276.05) u l-Att dwar l-Estradizzjoni (Kap. 276) huma soġġetti għad-dritt Ewropew[1].

[1] 33. From this judgment it is clear that the courts of criminal jurisdiction hearing cases in proceedings regarding the execution of a European arrest warrant, have a duty to determine whether from the evidence it results that there is a real risk that the return of the person leads to inhuman and degrading treatment of the person who is requested by the issuing judicial authority. ….

Consequently, acting upon the direction given by the Constitutional Court and applying European Law as contemplated in the Council Framework Decision of the 13th of June 2002, the Court of Committal rightly assessed this bar to the execution of the EAW, on the basis of all the evidence brought before it by the parties.

Appellant, in the present instance is in fact objecting to his surrender to the Polish authorities, in the main, on a risk of several human rights violations which were addressed by the Court of Committal and were rejected. Aggrieved by this decision appellant entered an appeal before this Court insisting that such violations could not be discounted by the First Court since they were serious and well-founded as evidenced from the documents exhibited by the Defence before that Court, the replies provided by the Polish Judicial authorities to questions put by the Court of Committal in terms of regulation 13A of the Order, and the testimony of the witnesses brought to testify before the said Court. Moreover, appellant also argues that the EAW violates various dispositions of the FD itself with the main argument made by appellant being that he is wanted solely for investigation purposes and not for prosecution.

A. An alleged breach of article 4 of the Charter of Fundamental Rights of the European Union and article 3 of the European Convention on Human Rights.

The first alleged human rights' violation put forward by appellant relates to the prison conditions present in the Polish penitentiaries which appellant alleges to be abysmal, not in conformity with international and European standards, and with no guarantee of adequate medical care and attention considering his health and age, coupled with the fact that he is a foreign national with no knowledge of the polish language making him a target of well-documented violence against foreign nationals present in the said

34 Therefore, the argument that the courts of criminal competence do not have the competence to consider complaints related to the fundamental rights of the person in procedures related to the execution of a European arrest warrant is wrong. A position that translates into a lack of implementation of European law that includes the Charter of Human Rights of the European Union and can have consequences on the procedures.

35. Accordingly, in the case of a European arrest warrant, the Designated Foreign Countries Order on Extradition (Subsidiary Legislation 276.05) and the Extradition Act (Cap. 276) are subject to European law.

prisons. These deficiencies in the polish prison administration in appellant's opinion will result without doubt in inhuman and degrading treatment in his regard.

The oft-cited Aranyosi *and Caldararu* judgment[2] emphasises the guarantees which EU law indiscriminately and persistently grants where there is a risk of a violation of the fundamental rights of the requested person as laid out in the Charter. The judgment goes on to outline the guidelines which a court is to follow in assessing the defence of a violation of article 4 of the Charter raised by a requested person in EAW proceedings:

88.It follows that, where the judicial authority of the executing Member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State, having regard to the standard of protection of fundamental rights guaranteed by EU law and, in particular, by Article 4 of the Charter (see, to that effect, judgment in Melloni, C-399/11, EU:C:2013:107,paragraphs 59 and 63,and Opinion 2/13, EU:C:2014:2454, paragraph 192), that judicial authority is bound to assess the existence of that risk when it is called upon to decide on the surrender to the authorities of the issuing Member State of the individual sought by a European arrest warrant. The consequence of the execution of such a warrant must not be that that individual suffers inhuman or degrading treatment.

89.To that end, the executing judicial authority must, initially, rely on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State and that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention. That information may be obtained from, inter alia, judgments of international courts, such as judgments of the ECtHR, judgments of courts of the issuing Member State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN.

90.In that regard, it follows from the case-law of the ECtHR that Article 3 ECHR imposes, on the authorities of the State on whose territory an individual is detained, a positive obligation to ensure that any prisoner is detained in conditions which guarantee respect for human dignity, that the way in which detention is enforced does not cause the individual concerned distress or hardship of an intensity exceeding the unavoidable level of suffering that is inherent in detention and that, having regard to the practical requirements of imprisonment, the health and well-being of the prisoner are adequately protected (see judgment of the ECtHR in *Torreggiani and Others v. Italy*, Nos 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10, and 37818/10, of 8 January 2013, § 65).

[2] Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, Judgment of 5 April 2016

91. Nonetheless, a finding that there is a real risk of inhuman or degrading treatment by virtue of general conditions of detention in the issuing Member State cannot lead, in itself, to the refusal to execute a European arrest warrant.

92. Whenever the existence of such a risk is identified, it is then necessary that the executing judicial authority make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State.

93.The mere existence of evidence that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, with respect to detention conditions in the issuing Member State does not necessarily imply that, in a specific case, the individual concerned will be subject to inhuman or degrading treatment in the event that he is surrendered to the authorities of that Member State.

94.Consequently, in order to ensure respect for Article 4 of the Charter in the individual circumstances of the person who is the subject of the European arrest warrant, the executing judicial authority, when faced with evidence of the existence of such deficiencies that is objective, reliable, specific and properly updated, is bound to determine whether, in the particular circumstances of the case, there are substantial grounds to believe that, following the surrender of that person to the issuing Member State, he will run a real risk of being subject in that Member State to inhuman or degrading treatment, within the meaning of Article 4.

It follows, as this Court has already had occasion to emphasize when addressing similar grievances, that evidence on two levels must be produced in order to assess this bar to extradition, consisting of a general assessment regarding the prison conditions in the Issuing State of the Warrant and a personal assessment relating to the specific circumstances of the requested person and the conditions of the prison where he or she is actually going to be detained upon surrender:

1. information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State and that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention.
2. make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to

that risk because of the conditions for his detention envisaged in the issuing Member State.

Ergo, although the prison conditions in some Member States may fall below minimum standards and thus endanger the right of the requested person not to be subjected to ill-treatment as guaranteed under the ECHR and CFREU, such systemic failures do not necessarily amount to a violation, but specific evidence on the individual risk can evoke the obligation to refuse to execute the warrant. Of significance are the Court's directions in this case:

> **The executing judicial authority should seek additional information from the issuing authority and until they are satisfied that there is no such risk to the individual the national judicial authority should postpone executing the warrant. If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end in the light of Article 6 Charter. In accordance, Member States are in principle obliged to act on an EAW due to the principle of mutual trust and mutual recognition. However, in exceptional circumstances these principles can be limited.[3]"**

These rules and guidelines were re-affirmed in judgments following the **Caldararu** case such as the cases of **Dumitru-Tudor Dorobantu**[4] and **Generalstaatsanwaltschaft**[5] which assert that in order to ensure the observance of Article 4 of the Charter in the procedure of a European arrest warrant, the executing judicial authority, when faced with evidence of the existence of such deficiencies that is objective, reliable, specific and properly updated, is then bound to determine, specifically and precisely, whether, in the particular circumstances of the case, there are substantial grounds for believing that, following the surrender of that person to the issuing Member State, he/she will run a real risk of being subjected to inhuman or degrading treatment in that Member State, within the meaning of Article 4 of the Charter.

[3] https://charter.humanrights.at/caselaw/detail/13

[4] Case C-128/18, *Dorobantu*, Judgment of 15 October 2019.

[5] C-220/18 PPU, *Generalstaatsanwaltschaft*, Judgment of 25 July 2018.

Other judicial pronouncements regarding the non-execution of a European Arrest Warrant similarly indicate that in such cases of alleged breach, it is necessary for the requested person to demonstrate that there are strong grounds for believing that, if returned, he will face **a real risk** of being subjected to torture or to inhuman or degrading treatment or punishment. (see UK *judgment Regina v Special Adjudicator ex parte Ullah (2004) AC*). **"This does not mean proof `on the balance of probabilities` but there needs to be a risk that is substantial and not merely fanciful."**

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

> ***"In Miklis v Lithuania (2006) EWHC (Admin) Lord Justice Latham stated, in dismissing Mr Miklis` appeal, "The fact that human rights violations take place is not of itself evidence that a particular individual would be at risk of being subjected to those human rights violations in the country in question. That depends upon the extent to which the particular individual could be said to be specifically vulnerable by reason of a characteristic which would expose him to human rights abuse"***
>
> ***The core of this challenge comes down to whether the prison conditions that await the requested persons in Lithuania are such that an Article 3 challenge can succeed. In Richards v Ghana (2013) All ER (D) 254 (May), in dismissing Mr Richards` appeal against the decision to send the case to the Secretary of State, the Divisional Court stated that albeit the requirements of Article 3 were absolute, in the sense that they were not to be weighed against other interests such as public interest in facilitating extradition, there was nevertheless an element of relativity involved in the application of those requirements. In deciding whether treatment or punishment was inhuman or degrading, it was appropriate to take account of local circumstances and conditions, such as climate and living conditions.***
>
> ***…. it is to be noted that the Divisional Court stated that although there were aspects of the conditions in the anticipated prison that would have been considered unacceptable in a prison in the UK, those conditions did not attain, or come close to attaining, the level of severity which would have been necessary to constitute a violation of Article 3."***

In another decision of the Strasbourg court in *KRS v The United Kingdom*, the Court succinctly summarised the law as follows:

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

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

It is clear from the above-premised that no court will turn a blind eye to a person's outcry of a serious risk of breach of his rights and freedoms and will provide all the safeguards necessary to prevent any abuse from inhuman and degrading treatment which a requested person could be subjected to upon surrender. However, as oft stated by this Court, such a risk has to be a concrete and real risk vis-à-vis the person appearing before the court and not a possible fear of subjection to such treatment.

The Court of Committal when addressing this ground of Defence decided as follows:

> **That in accordance with Regulation 13A of the Order, the Court requested additional information to the Polish Authorities on the prison conditions as were being alleged by the Requested Person. By a reply dated the 24th February 2025, the Polish Authorities replied that according to the Act of 6th June 1997 – the (Polish) Executive Penal Code, (i) they will be given the adequate and nutritional food and drink taking into account various considerations such as their age etc. (ii) the cells are not less than 3m2 in size and are equipped with a separate space for sleeping, having proper hygienic conditions, fresh air and good temperature; (iii) they get 8 hours sleep per day and a minimum of one hour stroll every day; (iv) the administration of the penitentiary are to ensure the personal safety of each inmate; (v) any intentional breach by a person in custody of the Act is subject to disciplinary action and this ensures that the Requested Person is not discriminated.**
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> **That there appears to be a dichotomy between the submissions of the Requested Person, basing on international reports cited by him, and the position of the Polish Authorities in regard to the respect for the fundamental human rights of the Requested Person. Both the Requested**

Person and the Polish Authorities, however, agree that the minimum size of a cell in a Polish Penitentiary is of 3m2. The Requested Person further argues that this size is below the minimum standard of 6m2 of living space in a single-person cell and of 4m2 in a multi-person cell as recommended by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) within the Council of Europe. Although this submission of the Requested Person is factually correct, the Court makes reference to the CJEU judgement in the names Puig Gordi and Others wherein it was held that in assessing the first step as required by the Aranyosi and Căldăraru judgement, although the Court may rely on objective, reliable, specific and properly updated information obtained from, inter alia, reports and other documents produced by bodies of the Council of Europe, the executing judicial authority is not bound by the conclusions set out in such report.

…

Therefore, although it has been proven by the Requested Person that the living space in residential cells is indeed lower than the recommendation of the CPT, this fact by itself does not militate in favour of the refusal of the EAW. The Court is not in possession of any data or information specific to the Requested Person so as to satisfy the second step of the Aranyosi and Căldăraru test.

The same observations made above apply mutatis mutandis with regard to the submissions made by the Requested person in connection with the hygiene and sanitary conditions, access to healthcare, prevention of violence and ill-treatment and the treatment as foreign nationals.

Therefore, basing on the above, the Court finds that there are no exceptional circumstances which merit the overturning of the principle of mutual assistance and recognition by rejecting the present EAW.

In his grievance appellant once again relies on documents AZ10 and AZ11 presented by him and refers to the judgments already cited by this Court and by the First Court but presents no new evidence or arguments to substantiate his claims. He laments that once the Court of Committal itself found the presence of a dichotomy between the international reports cited and the information provided by the Polish authorities, it should have been evident that the risk of such a breach was real and present, which information that Court should have examined in detail and not simply rely of the assurances given by the Polish authorities emanating from the office of the Public Prosecutor and which in his opinion were biased. The guarantee provided in the reply of the 24th of February 2025 by the Polish authorities were not sufficient, in his opinion, to address his concerns in this regard, lamenting further that in view of his medical

condition and his age no guarantee was forthcoming regarding medical attention and care whilst in pre-trial detention. Contrary to what was decided by the Court, it had sufficient information regarding his medical health conditions, his age, his status as a foreign person with no knowledge of the polish language.

Now, the Polish authorities provided the supplementary information requested by the Court of Committal, upon the following request:

> **The Court has no information on whether the conditions of the prison facility where the requested person will be detained pending the proceedings and after judgment in the event of a verdict of guilt are in conformity with the European standards:**
>
> a. **Therefore the Maltese authorities are asking clarification on which penitentiary will the Requested Person be detained if surrendered to the Polish authorities?**
>
> b. **What are the generic and specific conditions (including population size of living space, access to natural light and fresh air, sanitary and hygienic conditions, and quality of food, water, medical services and physical activities) of the penitentiary in which the Requested Person will be detained if he is surrendered to the Polish authorities?**
>
> **Also, what mechanisms are there in place to ensure that Requested Person will not be discriminated whilst in custody and will not be subject to arbitrary punishment or treatment by the prison officials and/or authorities?**

Now, the information provided fell short of what was requested. To begin with, no information was provided as to the specific penitentiary where the Requested Person will be detained upon his surrender to Poland, with the District Prosecutor stating that upon arrival appellant will be placed in a "*detention facility of Warszawa, and next they shall be brought before the District Prosecutor's Office of Legnica in order to conduct procedural acts with them in form of pronouncing the decision to present charges to them and questioning them as suspected persons*", after which it will be the public prosecutor who will make the decision whether to release the requested person or to submit a request to the Court for a prolonged period of pre-trial detention. Where the Requested Person will be detained should this prolonged pre-trial detention be decided upon does not result from the supplementary information provided.

Furthermore, there is no information with regard to the population size of the penitentiary where appellant will be held in remand and although generic conditions were given in the information supplied, however no specific details were given with regards to the person of appellant being a male of 65 years of age, and a foreigner suffering from medical conditions. Even the reply to the question regarding the measures in place guaranteeing safety from discrimination and ill-treatment was lacking with the Polish authorities simply stating that they would take all steps to ensure the sentenced person's personal safety when he is serving his penalty but provides no information as regards safety measures while in remand during the pre-trial detention should this be deemed necessary.

Now, although meagre information was provided to the Court of Committal with regard to the prison conditions in Poland, this Court, however, as the executing Judicial authority within a member state of the European Union, and with respect to the principles of mutual trust and assistance between Member states, will apply the direction given by the CJEU in its decision of the 29th of July 2024 in the case C-318/24PPU

> **110 Furthermore, it is recalled in paragraph 94 of the present judgment that, in accordance with the principle of sincere cooperation, the Member States respect each other and assist each other in the performance of the tasks arising from the Treaties (judgment of 25 July 2018, Generalstaatsanwaltschaft (Conditions of detention in Hungary), C-220/18 PPU, EU:C:2018:589, paragraph 109 and the case-law cited).**
>
> **111 In accordance with those provisions, the executing judicial authority and the issuing judicial authority may, respectively, request information or provide assurances concerning the specific and precise conditions in which the person concerned will be detained in the issuing Member State (judgment of 25 July 2018, Generalstaatsanwaltschaft (Conditions of detention in Hungary), C-220/18 PPU, EU:C:2018:589, paragraph 110).**
>
> **112 It follows from the considerations set out in paragraphs 107 to 112 of the present judgment that the executing judicial authority cannot conclude that there are substantial grounds for believing that, following his surrender to the issuing Member State, the person who is the subject of a European arrest warrant will run a real risk of being subjected to inhuman or degrading treatment, within the meaning of Article 4 of the Charter, without first having made a request for information to the issuing judicial authority pursuant to Article 15(2) of Framework Decision 2002/584.**

….

114 It should be borne in mind, in that regard, that the assurance provided by the competent authorities of the issuing Member State that the person concerned will not be subjected to inhuman or degrading treatment as a result of his specific and precise conditions of detention, irrespective of the prison in which he or she is detained in the issuing Member State, is a factor which the executing judicial authority cannot ignore. The breach of such an assurance, in so far as it is capable of binding its author, could be relied on against the latter before the courts of the issuing Member State (judgment of 25 July 2018, Generalstaatsanwaltschaft (Conditions of detention in Hungary), C-220/18 PPU, EU:C:2018:589, paragraph 111).

115 The Court has thus held that, where such an assurance has been given or, at the very least, approved by the issuing judicial authority, if necessary, after having requested the assistance of the central authority or one of the central authorities of the issuing Member State, the executing judicial authority, having regard to the mutual trust which must exist between the judicial authorities of the Member States, and on which the European arrest warrant system is based, must rely on it, at least in the absence of any specific evidence to suggest that the conditions of detention in a particular detention centre are contrary to Article 4 of the Charter (judgments of 25 July 2018, Generalstaatsanwaltschaft (Conditions of detention in Hungary), C-220/18 PPU, EU:C:2018:589, paragraph 112, and of 15 October 2019, Dorobantu, C-128/18, EU:C:2019:857, paragraph 68).

116 It follows from the foregoing considerations that the executing judicial authority cannot disregard the information provided by the issuing judicial authority solely on the basis of information which the issuing judicial authority itself has obtained from publicly available sources, without asking the latter, pursuant to Article 15(2) of Framework Decision 2002/584, for additional information and explanations.

…..

118 Finally, it must be pointed out that the mere failure to establish a 'precise plan for the execution of the sentence' or 'precise criteria for establishing a particular enforcement regime', referred to by the referring court in the wording of its seventh question, does not fall within the concept of 'inhuman or degrading treatment' within the meaning of Article 4 of the Charter.

119 Even if the establishment of such a plan or such criteria is required in the executing Member State, it must be borne in mind that, referring to the principle of mutual trust, the fundamental importance of which in EU law is apparent from the case-law cited in paragraph 36 of the present judgment, the Court has repeatedly held that the Member States may be required to presume that the other Member States have observed fundamental rights, with the result that it is not possible, inter alia, for them to require another Member State to provide a higher level of national protection of

fundamental rights than that provided by EU law (judgment of 15 October 2019, Dorobantu, C-128/18, EU:C:2019:857, paragraph 47 and the case-law cited).

120 Accordingly, the executing judicial authority cannot refuse to surrender the requested person on the sole ground that the issuing judicial authority has not communicated to it a 'precise plan for the execution of the sentence' or 'precise criteria for establishing a specific enforcement regime'.

121 As regards the referring court's reference to a 'particularly unique and delicate situation' of the requested person, which requires 'guarantees of non-discrimination', it should be noted that compliance with Article 4 of the Charter in the case of a person who is the subject of a European arrest warrant requires, in accordance with the case-law cited in paragraph 106 of the present judgment, a specific and precise assessment of the circumstances of the case.

122 Consequently, the answer to the seventh question is that Article 1(3) and Article 15(2) and (3) of Framework Decision 2002/584, read in the light of Article 4 of the Charter and the principle of mutual trust, must be interpreted as meaning that, when examining the conditions of detention in the issuing Member State, the executing judicial authority may not refuse to execute a European arrest warrant on the basis of information concerning the conditions of detention in the prisons of the issuing Member State which it has itself collected and in respect of which it has not requested additional information from the issuing judicial authority. The executing judicial authority may not apply a higher standard of detention conditions than that guaranteed in Article 4[6].

The Court also analysed the guarantees put forward by the Polish authorities in the light of the report of *the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT*) on its *ad hoc* visit to Poland from the 21st of March to the 1st of April 2022 published on the 22nd of February 2024.

Inter alia the report concludes the following:

> **The delegation heard no allegations of ill-treatment or verbal abuse of foreign nationals by staff at the centres visited. On the contrary, in Biała Podlaska and Białystok, many detainees spoke positively about staff and interactions with them, and the delegation observed that staff displayed a generally positive attitude vis-à-vis the detained foreign nationals.**

[6] This is an unofficial translation of the preliminary ruling of the CJEU since to date the original is found only in the French and Romanian languages.

The material conditions at the centres visited were generally acceptable, in terms of the general state of repair, the furnishing and equipment of the rooms and levels of hygiene.

There was, however, a near total lack of any constructive purposeful activities for adults in the centres visited except for some ad hoc, unstructured group events once or twice per month. The delegation noted staff efforts to provide activities for pre-school age children but those similarly lacked structure and were not offered daily.

Access to specialist medical care (including dental and gynaecological) was problematic in all the centres visited. For specialist consultations, foreigners were taken to an external hospital or to relevant specialists, but many complained of long delays in this respect.

As regards psychiatric and psychological care, the Committee is concerned about possible mental health issues remaining undetected and/or not being addressed adequately, mainly due to a lack of mental health care specialists.

As found during previous CPT visits, the issue of legal assistance was left almost entirely to various non-governmental organisations, whose representatives could visit the guarded centres and assist detained foreign nationals with their immigration and asylum procedures on a pro bono basis. The Committee reiterates its recommendation that the Polish authorities take steps to ensure that immigration detainees can effectively benefit from the services of a lawyer in all phases of the legal procedures.

Furthermore, the CPT expressed serious misgivings regarding the presence and use of restraint beds in detention facilities for foreigners and recommended that the Polish authorities put an immediate end to their use and remove them from all such facilities in the country.

To begin with, the CPT regrets to note yet again that, despite its long-standing previous recommendations, the official minimum standard of 3 m² of living space per prisoner (excluding sanitary facilities) has remained unchanged.

Further, the Committee regrets to note that the regime for remand prisoners has remained extremely impoverished despite the CPT's repeated recommendations on the subject. Indeed, the vast majority of remand prisoners still spent days and months on end in a state of idleness, with no meaningful activities, locked up in their cells for up to 23 hours per day.

The CPT also notes the lack of progress as regards medical examination of newly arrived prisoners. As during previous visits, the initial examination in the prisons visited was cursory and superficial, usually limited to a few general questions about the state of health and in most cases not including a full physical examination. Furthermore, due to the insufficient health-care

staffing levels and attendance patterns, newly arrived prisoners were sometimes medically examined with a significant delay.

Despite legislative amendments introduced several years ago concerning remand prisoners' contacts with the outside world, the practice remained the same as in the past, that is, newly arrived remand prisoners continued to be routinely subjected to restrictions on visits and telephone calls, frequently during their first month (but sometimes for longer, up to two months and exceptionally even three months) of their imprisonment.

The CPT is even more concerned by the persistence of the negative practice already observed during the 2019 ad hoc visit, namely that the aforementioned restrictions applied quasi systematically also to remand prisoners' contacts with their lawyers (whether in person or via telephone). The situation was particularly paradoxical (and somewhat absurd) in the case of remand prisoners who had requested to be granted free legal aid (and whose requests had been accepted) but who were in fact incapable of receiving such aid because of the impossibility of contacting their ex officio lawyer

The Court observes that the findings by the Committee are essentially in line with the replies supplied, in that the Polish authorities did not deny that the requested person would be detained in a prison cell of 3m2. The Report however maintains that prison conditions are generally acceptable, with no allegations of ill treatment, with the only concern, apart from the size of the prison cell is the fact that not sufficient time is given to the prisoner for physical activity and more needs to be done with regards to the provision of medical care and attention. These deficiencies, however, in this Court's opinion do not amount to a violation of the right against inhuman and degrading treatment as alleged by appellant. It is true that appellant is a male of 65 years of age, and suffers from a medical heart condition as results from the testimony of Dr. Philip Dingli tendered before the Court of Committal during the hearing of the 19th of February 2025, however from the said testimony it results that his heart condition can be managed in a prison environment and thus in view of the guarantees provided by the Polish authorities that his medical condition will be assessed and that he will be provided food and exercise accordingly, there does not seem to be a serious risk of ill-treatment in this regard.

The US Embassy Human rights Report for Poland regarding prison and detention centre conditions stated that:

Overall physical conditions in prisons and detention centers were not abusive.

Administration: There were no significant reports regarding prison or detention center conditions that raised human rights concerns.

Independent Monitoring: The government allowed on a regular basis independent monitoring of prison conditions and detention centers by local human rights groups, international organizations, and the NPM[7].

Thus, although there are recommendations from European and international institutions which still have to be implemented in Poland to address certain deficiencies, however, the conditions in the prisons do not pose a real risk to appellant of a breach of article 4 of the Charter and article 3 of the Convention upon surrender. The Court cannot, therefore, entertain this grievance without having factual and concrete evidence in the acts to support the allegation, the evidence brought forward consisting only in the arguments put forward by appellant both in her written pleadings and oral submissions, being third party findings and judicial pronunciations on the matter. In such cases of alleged breach, it is necessary for the requested person to demonstrate that there are **strong grounds** for believing that, if returned, he will face **a real risk** of being subjected to torture or to inhuman or degrading treatment or punishment. Evidence of such a real risk is not found in the acts. On the contrary although it is true that there are misgivings in certain areas with regards to the said prison conditions, however the reports are all in agreement that over-all there is no risk of ill-treatment and abuse even with regards to foreign nationals. The findings in these reports coupled with the assurances given by the Polish authorities cannot warrant a refusal by this Court to execute the EAW, since there is insufficient evidence to demonstrate, as already pointed out, that in this specific case appellant will face **a real risk** of being subjected to torture or to inhuman or degrading treatment or punishment. Consequently, this first grievance is being rejected.

Pre-trial detention of 30 days.

[7] https://pl.usembassy.gov/wp-content/uploads/sites/23/hrr.pdf

Appellant also considers that the 30-day pre-trial detention period which he may be subjected to upon surrender to the Polish authorities, with the possibility that this time-limit could be further extended, is also in violation of his fundamental human rights when considering that in Malta the maximum time-limit for detention prior to arraignment is 48 hours.

Now, for detention to be compatible with article 5 of the Convention it must be lawful and in accordance with a procedure prescribed by law, referring to domestic law in the country where the suspect is facing criminal investigations and proceedings. It has been held that "the list of exceptions to the right to liberty secured in Article 5 § 1 of the Convention is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim and purpose of that provision."

The Polish Code of Criminal Procedure defines detention on remand as one of the so-called "preventive measures" (*środki zapobiegawcze*). The relevant dispositions of the law are indicated in the judicial decision of the Regional Court of Legnica – II Criminal Deprtament of the 4th of December 2024 exhibited as Document 'Poland' by the Attorney General with his reply.

Article 249§1 sets out the general grounds for the imposition of preventive measures:

> *"1. Preventive measures may be imposed in order to ensure the proper conduct of proceedings and, exceptionally, to prevent an accused's committing another serious offence; they may be imposed only if the evidence shows a significant probability that the accused has committed an offence."*

Article 258 lists the grounds for detention on remand. It provides, in so far as relevant:

> *"1. Detention on remand may be imposed if:*
>
> *(1) there is a reasonable risk that an accused will abscond or go into hiding, in particular when his identity cannot be established or when he has no permanent abode [in Poland];*
>
> *(2) there is a reasonable risk that an accused will attempt to induce [witnesses or co-defendants] to give false testimony or to obstruct the proper course of proceedings by any other unlawful means;*
>
> *2. If an accused has been charged with a serious offence or an offence for the commission of which he may be liable to a statutory maximum sentence of at least 8 years' imprisonment, or if a court of first instance has sentenced him to at least 3 years'*

imprisonment, the need to continue detention to ensure the proper conduct of proceedings may be established by the likelihood that a severe penalty will be imposed."

The Code sets out the extent of the courts' discretion to continue a specific preventive measure. Article 257 and Article 259§1 reads:

"1. Detention on remand shall not be imposed if another preventive measure is sufficient."

"1. If there are no special reasons to the contrary, detention on remand shall be lifted, in particular, if depriving an accused of his liberty would:

(1) seriously jeopardise his life or health; or

(2) entail excessively harsh consequences for the accused or his family."

And Article 259§3 provides:

"Detention on remand shall not be imposed if an offence attracts a penalty of imprisonment not exceeding one year."

In the case *Ladent vs Poland* decided by the ECtHR (Fourth Section) rendered final on the 18th of June 2008 it was thus decided:

45. The Court reiterates that Article 5 of the Convention guarantees the fundamental right to liberty and security. That right is of primary importance in a "democratic society" within the meaning of the Convention (see *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, § 65, Series A no. 12, and *Winterwerp v. the Netherlands*, 24 October 1979, § 37, Series A no. 33). Its key purpose is to prevent arbitrary or unjustified deprivations of liberty (see *McKay v. the United Kingdom* [GC], no. 543/03, § 30, ECHR 2006-...).

46. All persons are entitled to the protection of that right, that is to say, not to be deprived, or to continue to be deprived, of their liberty (see *Weeks v. the United Kingdom*, 2 March 1987, § 40, Series A no. 114), save in accordance with the conditions specified in paragraph 1 of Article 5. The list of exceptions set out in Article 5 § 1 is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim of that provision, namely to ensure that no one is arbitrarily deprived of his or her liberty (see *Amuur v. France*, 25 June 1996, § 42, *Reports* 1996-III; *Labita v. Italy* [GC], no. 26772/95, § 170, ECHR 2000-IV; and *Assanidze v. Georgia* [GC], no. 71503/01, § 170, ECHR 2004-II).

47. The Court reiterates that the expressions "lawful" and "in accordance with a procedure prescribed by law" in Article 5 § 1 essentially refer back to national law and enshrine the obligation to conform to substantive and procedural rules thereof. Although it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law, under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention and the Court can and should review whether this law has been complied with (see, among many other authorities, *Benham v. the United Kingdom*, 10 June 1996, § 41, *Reports* 1996-III

and *Assanidze v. Georgia*, cited above, § 171). A period of detention is, in principle, "lawful" if it is based on a court order. Even flaws in the detention order do not necessarily render the underlying period of detention unlawful within the meaning of Article 5 § 1 (see, *Benham*, cited above, §§ 42-47; and *Ječius v. Lithuania*, no. 34578/97, § 68, ECHR 2000-IX).

48. Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness (see, among many other authorities, *Winterwerp*, cited above § 37; *Amuur*, cited above, § 50; and *Witold Litwa v. Poland*, no. 26629/95, § 78, ECHR 2000-III). It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1 and the notion of "arbitrariness" in Article 5 § 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention (see, *Saadi v. the United Kingdom* [GC], no. 13229/03, § 67, ECHR 2008-...).

It is undoubted that the pre-trial detention indicated in the decision of the 4th of December 2024 is in line with national law in Poland, and thus no comparison with national legislation in the Executing Member State in this regard can lead to a violation of article 5. Such a violation can only materialise if the pre-trial detention in the Issuing state, upon surrender, is unlawful or arbitrary in nature meaning that the said detention is contrary to law, unnecessary and unproportional, taking into account whether other measures short of deprivation of liberty could be applied in the circumstances. The detention of an individual is such a serious measure that it is justified only as a last resort where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. Such circumstances however can only be assessed once the investigation and prosecution occur and cannot be assessed at this stage of the proceedings with the pre-trial detention period indicated in the judicial decision ordering arrest of appellant being so far in line with the national law in Poland. Consequently, even this grievance is being denied.

Lack of independence of the judiciary in Poland

Appellant basis this grievance on the constitutional crisis which occurred in Poland in 2018 concerning the method of appointment of members of the judiciary, which in his opinion does not afford sufficient guarantees that he will receive a fair trial. The crisis around judicial appointments began in 2017 when the law changing the process for electing judicial members of the National Council of the Judiciary (NCJ) entered into force. The NCJ is a constitutional body, composed of 25 members, which safeguards the independence of courts and judges in Poland, with one of its roles being that of assessing and proposing candidates for all judicial appointments (including promotions of lower court judges to higher courts) to the President, similar to our Judicial Appointments Committee. Before 2018, 15 judicial members were elected by other judges, four were appointed by the lower house of the Polish Parliament, two by the Senate, one by the President, and the others were *ex officio* members (the First President of the Supreme Court, the President of the Supreme Administrative Court, and the Minister of Justice). The new law transferred the authority to appoint the 15 judicial members from judges to the parliament with the parliamentary majority thus being deciding all judicial appointments. The law also prematurely terminated the terms of all 15 incumbent judicial members of the NCJ. The reform was deemed to be unconstitutional, with a number of members of the judiciary themselves expressing concern with what was being perceived as an attack on the rule of law in the Country. This new law also introduced the prohibition which prevented Polish judges from verifying whether a judgment had been rendered by an independent court, and which aimed to dissuade or punish Polish judges for applying and upholding EU rule of law requirements, coined the 'muzzle law', with breaches to this provision of the law leading to disciplinary proceedings. The exclusive competence for this verification passed onto the newly created "Chamber for Extraordinary Control and Public Affairs." Also, extensive and far-reaching powers were given to the Disciplinary Chamber which could have an effect on the functioning of the judiciary.

Pursuant to these amendments in the law, the European Commission initiated infringement proceedings against Poland for failure to fulfil its obligations under article 268TFEU. The case was decided by the European Court of Justice, (Grand Chamber), by a judgement of the 5th of June 2023, (C-204-21). The ruling is based on

the following findings: (i) the Disciplinary Chamber does not satisfy the requirement of independence and impartiality; (ii) the disciplinary regime applicable to judges is incompatible with the guarantees enshrined in the right to effective judicial protection; (iii) the national provisions requiring judges to submit a declaration indicating any membership of an association, non-profit foundation, or political party, and the placement of such information online, violates the rights to protection of personal data and the right to a private life of those judges. It held also that the contested provisions of the Muzzle Act may be used to prevent Polish courts from assessing judicial independence and the independence of a judge under EU law, as well as to prevent the referral of questions to the CJEU for preliminary rulings and thus is not in compliance with Union guarantees of access to an independent and impartial court**.** Appellant relies on this ruling in order to substantiate his claim that he will suffer a breach of his rights as enshrined in article 6 of the Convention should he face proceedings before a Polish court.

The Court of Committal decided against this objection to the execution of the EAW on the following grounds:

> **The CJEU, in the cases Minister for Justice and Equality (Deficiencies in the System of Justice) held at paras 48-58 that a real risk of breach of the fundamental right to an independent tribunal and, therefore, of the essence of the fundamental right to a fair trial is capable of permitting the executing judicial authority to refrain, by way of exception, from giving effect to an EAW. It further laid out the two-step examination necessary to determine such a claim:**
>
> > **• The first step, being the systematic assessment, requires the Court to assess on the basis of material that is objective, reliable, specific and properly updated concerning the operation of the system of justice in the issuing Member State, whether there is a real risk, connected with a lack of independence of the courts of that Member State on account of systemic or generalised deficiencies there, of the fundamental right to a fair trial being breached.**
> >
> > **• The Second step, being the "specific assessment", is where the Court must assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that following the individual's surrender to the issuing Member State, the requested individual will run the risk of a breach of his fundamental human rights.**

In the case Minister for Justice and Equality (Tribunal établi par la loi dans l'État membre d'émission – II) the CJEU held that where the executing authority has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State, in particular as regards the procedure for the appointment of the members of the judiciary, that executing authority may refuse to surrender that person where, in the context where the Requested Person is wanted for the purposes of prosecution, the executing authority finds that in the particular circumstances of the case there are substantial grounds for believing that:

- **having regard inter alia to the information provided by the Requested Person relating to his or her personal situation;**
- **the nature of the offence for which the Requested Person is prosecuted;**
- **the factual context surrounding that EAW; and**
- **any other circumstance relevant to the assessment of the independence and impartiality of the panel of judges likely to be called upon to hear the proceedings in respect of the Requested Person, the Requested Person, if surrendered, runs a real risk of breach of that fundamental right.**

Finally, as has been held in the case Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission) although the right to be judged by a tribunal established by law includes the judicial appointment procedure, not every irregularity in the judicial appointment procedure can be regarded as constituting a breach of the fundamental human rights. Furthermore, the fact a national council of the judiciary, which is involved in the procedure for the appointment of judges is, for the most part, made up of members chosen by government cannot, in itself, give rise to any doubt as to the independence of the judges appointed at the end of that procedure. The fact that a body made up, for the most part, of members representing or chosen by government intervenes in the judicial appointment procedure in the issuing Member State is therefore not sufficient, in itself, to justify a decision of the executing judicial authority refusing to surrender the person concerned.

That from the documents submitted to this Court, although there is a general indication that in Poland there could be deficiencies in the process of the appointment of members of the judiciary, the Court has no specific and precise information about how, in the particular circumstances of this case, such deficiencies could give rise to a breach of the Requested Person's fundamental human rights as he is alleging. Furthermore, no specific or precise information has been submitted to the Court on how the charges indicated in the EAW could contribute towards a breach of the Requested Person's Fundamental Human rights. Therefore, applying the Minister for Justice and Equality (Deficiencies in the System of Justice) criteria mentioned above, although the first step could be seen as being satisfied

with the information provided, the Court has no evidence that could satisfy the specificity required by the second step as explained above.

Appellant maintains that it is impossible for him to prove that in his specific case such a violation could arise since there is no way he could *a priori* know who the presiding judge in his case will be, and the manner in which he was appointed to the Bench. He laments that although he asked the First Court to request supplementary information from the Issuing member state with regards to this issue, his request was denied thus leaving him unable to substantiate his complaint. In fact he had requested information with regard to the judges who signed the European Arrest Warrant and those who will preside over the case in view of the prevalent constitutional crisis in Poland with special reference on their independence and impartiality, with the First Court rejecting this request since it was of the opinion that such a constitutional crisis does not necessarily imply that there is defect in the impartiality of the court or of its members. It also decided that from the charges indicated in the EAW and from the circumstances of the requested person it did not feel the need to carry out further investigations into this claim.

The ECtHR has established in its case law a three-tier test when evaluating the meaning of "a tribunal established by law" within the context of article 6 of the Convention.

"….. The Court reiterated that the purpose of the requirement that the "tribunal" be "established by law" was to ensure "that the judicial organisation in a democratic society [did] not depend on the discretion of the executive, but that it [was] regulated by law emanating from Parliament" (ibid., § 214 with further references). The Court analysed the individual components of that concept and considered how they should be interpreted so as to best reflect its purpose and, ultimately, ensure that the protection it offered was truly effective.

217. As regards the notion of a "tribunal", in addition to the requirements stemming from the Court's settled case-law, it was also inherent in its very notion that a "tribunal" be composed of judges selected on the basis of merit – that is, judges who fulfilled the requirements of technical competence and moral integrity. The Court noted that the higher a tribunal was placed in the judicial hierarchy, the more demanding the applicable selection criteria should be (ibid., §§ 220-222).

218. As regards the term "established", the Court referred to the purpose of that requirement, which was to protect the judiciary against unlawful external influence, in particular from the executive, but also from the legislature or from

within the judiciary itself. In this connection, it found that the process of appointing judges necessarily constituted an inherent element of the concept "established by law" and that it called for strict scrutiny. Breaches of the law regulating the judicial appointment process might render the participation of the relevant judge in the examination of a case "irregular" (ibid., §§ 226-227).

219. As regards the phrase "by law", the Court clarified that the third component also meant a "tribunal established in accordance with the law". It observed that the relevant domestic law on judicial appointments should be couched in unequivocal terms, to the extent possible, so as not to allow arbitrary interferences in the appointment process (ibid., §§ 229-230).

220. Subsequently, the Court examined the interaction between the requirement that there be a "tribunal established by law" and the conditions of independence and impartiality. It noted that although the right to a "tribunal established by law" was a stand-alone right under Article 6 § 1 of the Convention, a very close interrelationship had been formulated in the Court's case-law between that specific right and the guarantees of "independence" and "impartiality". The institutional requirements of Article 6 § 1 shared the ordinary purpose of upholding the fundamental principles of the rule of law and the separation of powers. The Court found that the examination under the "tribunal established by law" requirement had to systematically enquire whether the alleged irregularity in a given case was of such gravity as to undermine the aforementioned fundamental principles and to compromise the independence of the court in question (ibid., §§ 231-234).

221. In order to assess whether the irregularities in a given judicial appointment procedure were of such gravity as to entail a violation of the right to a tribunal established by law, and whether the balance between the competing principles had been struck by State authorities, the Court developed a threshold test made up of three criteria, taken cumulatively (ibid., § 243).

222. In the first place, there must, in principle, be a manifest breach of the domestic law, in the sense that the breach must be objectively and genuinely identifiable. However, the absence of such a breach does not rule out the possibility of a violation of the right to a tribunal established by law, since a procedure that is seemingly in compliance with the domestic rules may nevertheless produce results that are incompatible with the object and purpose of that right. If this is the case, the Court must pursue its examination under the second and third limbs of the test set out below, as applicable, in order to determine whether the results of the application of the relevant domestic rules were compatible with the specific requirements of the right to a "tribunal established by law" within the meaning of the Convention (ibid., §§ 244-245).

223. Secondly, the breach in question must be assessed in the light of the object and purpose of the requirement of a "tribunal established by law", namely to ensure the ability of the judiciary to perform its duties free of undue interference and thereby to preserve the rule of law and the separation of powers. Accordingly, breaches of a purely technical nature that have no bearing on the legitimacy of the appointment process must be considered to fall below the relevant threshold. To the contrary, breaches that wholly disregard the most fundamental rules in the appointment or breaches that may otherwise

undermine the purpose and effect of the "established by law" requirement must be considered to be in violation of that requirement (ibid., § 246).

224. Thirdly, the review conducted by national courts, if any, as to the legal consequences – in terms of an individual's Convention rights – of a breach of a domestic rule on judicial appointments plays a significant role in determining whether such a breach amounted to a violation of the right to a "tribunal established by law", and thus forms part of the test itself. The assessment by the national courts of the legal effects of such a breach must be carried out on the basis of the relevant Convention case-law and the principles derived therefrom (ibid., §§ 248 and 250).

At the outset it should be pointed out that the present case does not raise an issue as to the lawful existence of the Criminal Court in Legnica having the competence to deal with the criminal proceedings at hand. Also, this Court does not have the competence to rule on or review the judicial appointment system in Poland. Neither is it being called upon to determine whether the relevant domestic law on judicial appointments had been contravened since this is also outside its remit. Now, the Court has taken judicial notice of the judges who issued the decision of the 4th of December 2024 and signed the European Arrest Warrant being Judges Jacek Seweryn and Bartlomiej Treter. Both judges have been appointed as members of the judiciary in Poland for years prior to the amendments introduced in 2017 and both have even shown their opposition to the said law, being signatories in 2021 to a petition calling upon the government and the supreme court to implement the CJEU rulings[8]. In fact, the CJEU itself has expressed its trust in thousands of Polish judges who remain largely independent.

Moreover, although appellant has objected to the decree of the Court of Committal wherein his request for supplementary information with regards to this issue was denied, however, he did not deem fit to request this Court to ask for such information at appellate stage. This Court, thus, as a court of review does not possess any evidence with regards to the specific case of the requested person. Consequently, the fact that there is in Poland an ongoing debate with regards to an alleged constitutional crisis concerning the appointment of members of the judiciary to the Bench does not

[8] https://ruleoflaw.pl/historic-appeal-of-2073-polish-judges-in-defense-of-eu-law/

automatically translate itself into a real and concrete risk of a violation to appellant's right to be tried before an independent and impartial tribunal established by law, and this in view of the fact, as already outlined, that in the present case it is not disputed that the court dealing with the case is a 'tribunal established by law', the grievance referring only to the judge who issued the EAW, and delivered the judicial decision of arrest, and the judge who will hear the case once the proceedings commence against them.

Today it seems that the Polish Government is addressing these deficiencies in the rule of law with a draft law in the pipeline introduced in 2023 intended to remedy the situation, so much so that on the 29th of May 2024 the Commission has decided to close the Article 7(1) TEU procedure for Poland.

> **The Commission considers that there is no longer a clear risk of a serious breach of the rule of law in Poland within the meaning of that provision. Poland has launched a series of legislative and non-legislative measures to address the concerns on independence of the justice system, it has recognised the primacy of EU law and is committed to implementing all the judgments of the Court of Justice of the European Union and the European Court of Human Rights related to rule of law including judicial independence[9].**

Moreover, apart from this new development in the rule of law crisis in Poland, the Court cannot ignore what was *inter alia* stated by the Court of Justice of the European Union (PRESS RELEASE No 32/22 Luxembourg, 22 February 2022 Judgment in Joined Cases C-562/22 PPU and C-563/21 PPU) in its ruling, "*Openbaar Ministerie (Tribunal established by law in the issuing Member State) Refusal to execute a European arrest warrant*":

> **"…. By contrast, the fact that the identity of the judges who will be called upon eventually to hear the case of the person concerned is not known at the time of the decision on surrender or, when their identity is known, that those judges were appointed on application of a body such as the KRS is not sufficient to refuse that surrender."**

In this scenario, when applying the two-tier test laid out by the CJEU as cited by the Court of Committal, this Court, taking into account the information relating to the

[9] https://ec.europa.eu/commission/presscorner/detail/en/mex_24_2986

personal situation of the person concerned, the nature of the offence for which that person is prosecuted, and the factual context surrounding that EAW, cannot reach a conclusion that there is a risk that appellant would suffer a breach of article 6 of the Convention should he be surrendered to the Polish authorities, even more so when it seems that the rule of law crisis in Poland has ceased to exist in view of the reforms today being undertaken by the Polish government, although certain issue still have to be ironed out as indicated in *the Joint Opinion of the Venice Commission and the Directorate General Human Rights and Rule of Law on European standards regulating the status of judges*, adopted by the Venice Commission at its 140th Plenary Session (Venice, 11-12 October 2024)[10]. Thus, this grievance is also being denied.

Lack of Polish arrest warrant

Appellant is attacking the validity of the EAW issued against him on the grounds that no Polish arrest warrant has been issued against him insisting that in terms of article 8(1)(c) of the FD there must be evidence *inter alia* of an enforceable judgment, an arrest warrant or any other enforceable judicial decision.

Article 1 of the FD 2002/584/HA clearly defines the EAW as "*a judicial decision issued by one Member State (issuing State) directed to judicial authorities of another Member State (executing State) to secure the arrest and surrender of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order*", with Member States bound to execute the said warrant based on the principles of mutual recognition.

The only requirements indicated by the FD for its validity are listed as being:

- Identity and nationality of the person requested.
- Designation of the judicial authority from which the EAW originates.
- An indication of the existence of enforceable rulings, arrest warrants or other judicial decisions from the issuing Member State.

[10] https://www.coe.int/en/web/venice-commission/-/CDL-AD(2024)029-e

- Details concerning the nature of the offence.
- Information concerning the offence such as the date, place and circumstances of the offence and the party's involvement with it.
- Information concerning the penalty or imposed sentence for the offence under the issuing Member State's law.

This means that an indication in the instrument itself of the judicial decision or arrest warrant suffices, with the principle of mutual recognition coming into play wherein Member states are placing their trust in their counter parts when being directed to proceed to the arrest of a requested person for the purpose of carrying out a criminal prosecution or executing a custodial sentence. Now, from an examination of the EAW on the basis of which these proceedings have been initiated, it is evident that the request made by the Issuing Member state is based on a judicial decision of the Regional Court of Legnica of the 4th of December 2024. A copy of this decision has been filed by the Attorney General together with his reply and marked as '*Doc Poland*'. Consequently, even this grievance is unfounded since there is no doubt that there is a valid judicial decision issued by the Polish Judicial authority for the arrest of appellant, which decision exhibited in the acts by the Attorney General. This grievance is also being denied.

The basis of the European Arrest Warrant

Appellant laments that it is not clear from the EAW issued against him whether he is being wanted for the purpose of a criminal prosecution, or simply for investigation purposes, in which latter case the EAW would be invalid, since in terms of article 1(1) and (2) of the FD, no such warrant may be issued solely for the purpose of carrying out an investigation, in which scenario other European Union instruments are available and should be adopted, like the European Investigation Order.

The Court of Committal decided this issue in the following manner:

> **"From an examination of the EAW document, the Court finds that Section "E" provides enough information to allow both the Court and the Requested Person to understand the reasons why he is wanted by the Polish Authorities and also the offences which where allegedly committed by the Requested**

Person. Section "C" also provides a clear indication of the maximum length of the custodial sentence which may be imposed. Furthermore, from the EAW document it clearly emerges that the Requested Person is wanted for the purposes of prosecution, as was also confirmed by the Polish Authorities in their reply to this Court dated the 24th February 2025."

This Court feels it has nothing further to add to this decision by the Court of Committal since as pointed out by the said Court, not only does the EAW itself indicate that criminal proceedings will be instituted against the requested person upon surrender, after he has been questioned by the Public Prosecutor, but this information is further confirmed by the Polish judicial authorities in their reply to the question put for supplementary information by the Court of Committal.

Now, criminal prosecutions or the execution of a custodial sentence or detention order for which such a warrant is issued are conducted in accordance with the rules of that Member State and cannot be assessed in the light of the national legislation of the Executing Member State. The Court has examined the Code of Procedure of Poland in this regard where *inter alia* the following dispositions of that law lay out the procedure to be followed from investigation stage up to the issue of the indictment:

Article 297. § 1*. The objectives of preparatory proceedings are as follows:*

1) to establish whether a prohibited act has been committed and whether it constitutes an offence, 2) to detect the perpetrator and, if necessary, to effect his capture,

3) to collect data, as provided in Articles 213 and 214.

4) to elucidate the circumstances of the case, including the extent of the damage,

5) to collect, secure and record evidence to the extent required.

§ 2. In the preparatory proceedings attempts shall also be made to elucidate circumstances favourable to the commission of the act.

Article 298 § 1. *The preparatory proceedings shall be conducted by the state prosecutors, and, within the scope provided by law, the Police. In the cases provided for in law, other agencies shall have the powers of the Police.*

§ 2. Actions in the preparatory proceedings provided in law shall be conducted by the court.

Article 299. § 1. *In the course of preparatory proceedings the injured and the suspect are parties thereto.*

***Article 303**. If there is good reason to suspect that an offence has been committed, an order on instituting an investigation or inquiry shall be issued, either or upon receiving a notice of an offence, describing the act in question and setting forth its legal classification.*

Article 309. § 1. An investigation shall be conducted in cases:

1) of crimes

2) of misdemeanours specified in Articles 152 through 154, Article 154 § 1, Article 164 § 1, Article 173 § 1, Article 174 § 1, Article 189 § 2, Article 207 § 3, Article 233 § 1 and 4, Articles 246, 247, 249, 250, 254 § 2, Article 258 § 3, and in Article 265 § 2 of the Penal Code.

3) of other misdemeanours if the jurisdiction is vested in the Voivodship Court,

4) if the suspect is an official of the Police, Office of State Protection, Border Guards or financial inquiry agencies, or

5) of misdemeanours not listed in subsections 2 through 4 if the state prosecutor so decides by reason of the significance or complexity of the case.

§ 2. An investigation should be completed within three months.

***Article 321. § 1.** If there are grounds to conclude the investigation or inquiry, the person conducting the proceedings notifies the suspect and the defence counsel of the date of final examination of the materials of the proceedings, advising them of their right to examine files at an earlier suitable date, set forth by the agency conducting the trial.*

***Article 322. § 1**. If the proceedings have failed to disclose grounds sufficient to justify the preparation of an indictment, and the conditions specified in Article 324 do not occur, the preparatory proceedings shall be discontinued, without the necessity of inspecting the materials of the proceedings and their conclusion.*

***Article 329. § 1**. Actions during the preparatory proceedings provided for in law shall be conducted in session by the court, having jurisdiction to examine the case in the first instance, unless otherwise provided by law.*

§ 2. The court conducts the action in a panel consisting of a single judge, and also when it considers the interlocutory appeals regarding actions in preparatory proceedings unless otherwise provided by law

***Article 330. § 1**. Revoking an order on discontinuance of preparatory proceedings or on refusal to institute it, the court shall indicate the reasons thereof, and, when necessary, also the circumstances which should be clarified or actions which should be conducted. These indications shall be binding on the state prosecutor.*

§ 2. If the state prosecutor still does not find grounds to bring an indictment, he again issues an order on the discontinuance of proceedings or a refusal to institute it. This order is subject to interlocutory appeal only to a superior state prosecutor. In the event of upholding the order appealed against, the injured party which invoked the rights

provided for in Article 306 § § 1 and 2, may bring an indictment set forth in Article 55 § 1 and he should be so instructed of this right.

§ 3. In the event that the injured party has brought an indictment, the president of the court transmits a copy of it to the state prosecutor summoning him, to deliver the files of the preparatory proceedings within 14 days.

***Article 331. § 1**. Within 14 days of the conclusion of the investigation or inquiry, or receiving an indictment prepared in summary proceedings, the state prosecutor shall file an indictment to the court or shall issue an order on the discontinuance or suspension of the preparatory proceedings, or on a supplementary investigation or inquiry.*

§ 2. If the accused has been in preliminary detention, the time-limit for the actions listed in § 1 shall be 7 days.

In the Order of the Court of Justice in Case C-463/15 PPU, Openbaar Ministerie v A[11]

> **'Conducting a criminal prosecution' includes the pre-trial stage of criminal proceedings. However, the purpose of the EAW is not to transfer persons merely for questioning them as suspects. For that purpose, other measures, such as a European Investigation Order (EIO), could be considered instead. In Section 2.5 other measures of judicial cooperation are briefly presented.**

Now, from the information provided and an examination of the law of criminal procedure existing in Poland, it is evident that the proceedings against appellant are in their pre-trial stage and thus he is not wanted solely for questioning as a suspect since the Polish authorities have made it clear that after he is questioned, he will be charged in court. It results from the supplementary information provided that the preparatory proceedings have already taken place since it has been indicated that appellant is wanted for the initiation of criminal proceedings. Thus, even this grievance is unfounded since the proceedings which will take place upon appellant's surrender to Poland fall clearly within the parameters outlined in article 1(1) of the FD. This grievance is also being denied.

Finally, although no specific grievance has been put forward by appellant, however in oral submissions made by the defence, it was argued that appellant has already been subjected to three separate investigations in the United States, Panama and Brussels and even exhibited the Brussel's decision before this Court. The Court of

[11] Order of the Court of Justice of 25 September 2015, A., C-463/15 PPU, ECLI:EU:C:2015:634

Committal entered into this matter and this Court sees no reason to depart from this decision wherein it was thus stated:

> **In addition to this, the Requested Person also submitted that the alleged facts which form the subject of this EAW have already been investigated by two other countries, one of which is a Member State, and both countries found that there was insufficient evidence to proceed with the prosecution against the person. To this end, the Requested Person submitted two decisions and email correspondence. The Court examined said documentation and found that:**
>
> > **• the first document submitted is an order by the United States District Court for the Southern District of Texas, Houston Division, dated the 16th May 2017 in the matter between MYADVERTISINGPAYS Ltd et al vs VX GATEWAY INC. et al. where that Court ordered that the matter between the parties is to be resolved by arbitration in Panama.**
> >
> > **• the second document is a decision awarded by the Eleventh Court of the Circuit of the Criminal of the First Judicial Circuit of Panama on the 30 July 2018 wherein the Court issued a "provisional dismissal order, which does not transit to res judicata and allows the reopening of the process"**
> >
> > **• the third document is composed of a set of two communications. One is an email from Morgan Bonneure to the Requested person's defence counsel stating that the prosecutor has decided to classify the file as soon as possible in the absence of sufficient charges. Furthermore, the Requested Person also submitted communication he received from Morgan Bonneure explaining that in the investigation following a complaint made by WISE to the CTIF (which is equivalent to the Malta Financial Intelligence Analysis Unit), the Brussels Public Prosecutor's Office declared that all charges against them have been dropped.**
>
> **That from the above documentation, it does not result that the allegations forming the subject matter of the present EAW have been in anyway dismissed by the mentioned countries. The decision taken by the Panama court, apar from referring to a commercial matter between the two mentioned companies, does not exclude the revival of that claim between them whilst the decision taken by the Brussels' authorities relate to an allegation made by WISE to CTF.**

Suffice it to say that the rule of double jeopardy relied upon by the Defence finds no application in this instance since this rule applies only where there is a prosecution against the subject person or where there is a judgment which has been pronounced on the same fact, which circumstances find no application in the present case. In fact,

even the decision issued by the Court in Panama after discharging appellant clearly states that:

> **"In view of the analysed scenario, and since it has not been possible to prove the punishable fact in a convincing and conclusive manner, as well as to establish the formulation of charges against same person because there is insufficiency of proof, what proceeds in law is to issue a provisional dismissal order, which does not transit to *res judicata* and allows the reopening of the process, in the event that there is necessary, based on what is stipulated in article 2208 numeral 1 of the Judicial Code.[12]"**

Consequently, the Court cannot uphold this line of Defence.

Nullity of the proceedings

Finally, appellant raises a fresh grievance before the Court which grievance was not put forward in his appeal application, insisting that the proceedings are null and void since this case and that instituted against his wife Celia Eileen Jean Dunlop were heard simultaneously without the Court of Committal ordering that the evidence heard in one case be considered as valid for the other case, and without either indicating in which case the evidence was being compiled.

To begin with, from an examination of the acts of the proceedings it is apparent that the Defence raised no objection before the Court of Committal as to the manner in which the proceedings were being conducted, raising a plea of nullity only at this late stage of the proceedings asking that proceedings start afresh, when the Court is bound with a time-limit of 60 days to conclude these extradition proceedings. Moreover, the charge sheet and the acts pursuant to arraignment exhibited by the Prosecution are all in their original with regards to appellant and those regarding his wife Celia Eileen Jean Dunlop such that the essential requisites for the proceedings to be instituted have been satisfied. The evidence found thereafter, and which was heard simultaneously, is that brought forward by the Defence itself. Thus, should the Court accede to this new grievance, the consequence would be that of expunging the evidence brought forward by appellant himself and not to annul the proceedings as a whole since, as

[12] Document AZ2 – folio 169

already pointed, out the acts presented by the Prosecution with regards to each of the requested persons are filed in their original in each case, and are valid.

Furthermore, even before this Court proceedings against appellant and his wife Celia Eileen Jean Dunlop were heard simultaneously with the Defence itself making submissions referring to both parties without asking the Court to hear the cases separately, thus acquiescing to the manner in which proceedings have been conducted from their initial stages, the cases being heard simultaneously for expedience's sake. Thus, this grievance is totally unfounded and is being rejected.

Consequently, for the above-mentioned reasons, the Court dismisses applicant's appeal requesting the reversal of the Committal Order, thus confirms the decision of the Court of Magistrates (Malta) as a Court of Committal of the 28th of February 2025 ordering the surrender of Timothy Alan Mackay to the Judicial Authorities of Poland. Orders that appellant Timothy Alan Mackay be kept in custody to await his return to the Judicial Authorities of Poland. The appellant is to be surrendered and returned to the Judicial Authorities of Poland in accordance with this decision and the provisions of regulation 35 of the Order.

Edwina Grima

Judge