MALTA

# QORTI TAL-MAGISTRATI (MALTA)
# BHALA QORTI RIMANDANTI

## MAGISTRAT
## AARON BUGEJA

Seduta tat-18 ta' Ottubru, 2013

Numru. 914/2013

**Il-Pulizija**
**vs.**
**David Abela**

Il-Qorti,

Rat il-Mandat t'Arrest Ewropew (MAE) mahrug mill-"GIP del Tribunale di Genova" (li jinsab a fol 8) kontra David Abela, ta' 35 sena, iben Tarcisio u Andreana nee' Frendo, imwieled H'Attard, Malta nhar is-16 ta' Lulju 1978 u residenti Angels, Triq it-Tin, Zurrieq, detentur tal-karta tal-identita 369478(M) (aktar l-isfel maghruf bhala "l-estradant") minn fejn jirrizulta li dawn l-Awtoritajiet Gudizzjarji Taljani talbu li l-istess estradant jigi mibghut minn Malta lejn l-Italja (pajjiz skedat ai termini tar-regolament 5 tal-Avviz Legali 320 tal-2004 [aktar l-isfel maghruf bhala "l-Ordni"]) sabiex iwiegeb ghar-reati ta' :

a. "aggravated smuggling of foreign-made tobaccos";

b. “false statements in an official document committed by a public official resulting from a mistake stemming from another person’s deceit”;
d. “smuggling of foreign made tobaccos”;
e. “criminal association aimed at smuggling foreign-made tobaccos with the role of promoter and organizer”.

Ir-reat “c” gie maqbuz peress li l-Awtoritajiet Gudizzjarji Taljani iddecidew li jhallu r-reat li kien ipotizzat taht l-ittra “c” barra mill-MAE fil-konfront ta’ dan l-estradant.

Rat l-allert mahrug skont is-Schengen Information System – SISII a fol 6 u l-Form A “Supplementary Information relating to an extradition” a fol 7;

Rat ic-Certifikat mahrug mill-Avukat Generali skont ir-regolament 7 tal-Ordni fejn jiccertifika li l-Giudice per le indagini preliminari fi hdan it-Tribunal ta’ Genova hu l-awtorita li hareg il-MAE kontra l-estradant ghandu l-funzjoni li johrog mandat t’arrest fl-Italja;

Rat il-verbal tas-seduta tat-18 ta’ Settembru 2013 mizmuma quddiem din il-Qorti diversament presjeduta minn fejn jirrizulta li giet kondotta l-“initial hearing” minn fejn gie certifikat li dik il-Qorti kienet sodisfatta li l-Persuna ta’ David Abela migjuba quddiemha kienet l-istess persuna li jirriferi ghaliha l-MAE u dan ai termini tar-regolament 10 tal-Ordni kif ukoll fejn jirrizulta li l-estradant ma kienx qieghed jaghti l-kunsens tieghu biex jintbaghat lura lejn il-pajjiz skont il-MAE skont il-meritu tal-kawza u dan ai termini tar-regolament 11 tal-Ordni.

Rat id-dokumenti kollha annessi mal-atti;

Rat il-verbal tas-seduta tal-11 t’Ottubru fejn id-difiza talbet provvediment ta’ din il-Qorti dwar it-terminu applikabbli li fih dil-Qorti ghandha taghlaq dawn il-proceduri u semghet it-trattazzjoni tal-partijiet dwar l-istess punt;

Rat il-provvediment taghha stess fejn gie deciz li t-terminu applikabbli kien dak stipulat fir-regolament 27A tal-Ordni;

Rat il-verbal tal-udjenza tal-14 t'Ottubru 2013 fejn il-Qorti ordnat il-prosegwiment tal-proceduri, din id-darba ai termini tar-regolament 12 tal-Ordni ossija l-"extradition hearing".

Semghet l-eccezzjonijiet sollevati mid-difiza ai termini tar-regolamenti 12 u 13 tal-Ordni nonche wkoll dawk applikabbli ghar-rigward tar-regolament 31.

L-eccezzjonijiet sollevati mid-difiza f'dan l-istadju jistghu jigu sintetizzati bil-mod li gej : -

1. ir-reat ipotizzat "a" - "aggravated smuggling of foreign-made tobaccos" u "d" - "smuggling of foreign made tobaccos" ma humiex reati li huma skedati taht l-iskeda 2 tal-Ordni u ma tistax issir estradizzjoni lil pajjiz skedat fejn ir-reat ipotizzat ma jkunx kopert bl-iskeda – u ghalhekk dawn ma humiex "extraditable offences" skont il-Ligi u qed jigu eskluz mill-Awtoritajiet Taljani;
2. ir-reat ipotizzat "b" hu definit fis-sens li ghandek ufficcjal pubbliku illi jwettaq falsita ideologika f`att pubbliku u l-istess ufficjal pubbliku dik il-falsita` ideologika wettaqha minhabba zball li nducieh fih haddiehor liema zball huwa fil-fatt l-ingann ta` haddiehor u dak huwa reat:
(i) ma jsibx sinonimu mieghu fil-kamp penali Malti allura ma hemmx il-kwistjoni tad-"double criminality";
(ii) ma jirrizultax illi jkombacja ma` xi reat indikat fit-tieni skeda tal-Ordni li titkellem fuq il-"forgery of administrative documents and trafficking therein" li mhux il-falz ideologiku izda huwa l-falz materjali.
3. Minn imkien ma jirrizulta jekk hemmx "an arrangement of speciality with the scheduled country" u allura hawn hekk hawn "a bar to extradition" fit-totalita taghha.
4. Ir-regolament 18(3)(d) hemm miktub illi jekk ir-reat huwa reat li m`huwiex punibbli bil-prigunerija jew b`xi forma ohra ta` detenzjoni ma tistax issir estradizzjoni fih. Fil-kaz tal-kuntrabandu il-piena inflitta hija dik tal-multa u ghalhekk ma tistax issir estradizzjoni ghal din ir-raguni.
5. Jekk il-Qorti hix sodisfatta illi huma sodisfatti dawk l-obbligi li jehtieg li jigu sodisfatti fit-termini tal-artiklu 18(4) tal-Ordni.

6. Ghar-rigward l-interpretazzjoni tar-regolament 59 - dawn l-ipotezi jekk humiex alternattivi jew kumulattivi.
7. Il-Form A ezibita mhix dokument awtentikat u ma ghandux indikat min hargu u allura mhux document validu f'dawn il-proceduri u ghalhekk ghandu jigi sfilzat u ma tistax issir estradizzjoni in bazi ghal tali dokument.
8. L-Uzu tat-terminu "accused" jew "akkuzat" fir-regolament 5 tal-Avviz Legali b'riferenza ghall-proceduri mehuda fil-pajjiz skedat jirrikjedu li l-estradant ma jkunx biss suspettat li kkommetta reat izda jehtiegu li huwa jkun gja gie formalment akkuzat quddiem l-awtoritajiet gudizzjarji kompetenti fil-pajjiz skedat. Minn dan il-MAE jirrizulta li dan huwa biss "ordinanza di custodia cautelare" u mhux akkuza formali kontra l-imputat.
9. L-informazzjoni moghtija hija minima u l-Qorti ma ghandhiex dettalji bizzejjed biex tkun tista taghmel apprezzament tajjeb tal-fatti li waslu ghall-hrug ta' dan il-MAE u l-eventwali proceduri quddiem l-Awtoritajiet Gudizzjarji fl-Italja b'mod li ma jassigurawx is-serhan il-mohh tal-Gudikant, ma jwaslux sal-grad ta' *prima faciae*, u fi kwalunkwe kaz l-ispazju provdut fil-kaxxi ma jipprekludix lill-Awtoritajiet Taljani milli jipprovdu aktar informazzjoni.

Il-Qorti semghet ukoll l-argumenti tal-Prosekuzzjoni li jikkontrastaw l-argumenti tad-difiza, u li wkoll jinsabu registrati fl-atti ta' dan il-kaz.

Il-Qorti sejra tghaddi biex tiddetermina dawn l-eccezzjonijiet bil-mod segwenti u skont l-ordni segwita mid-difiza.

Il-Qorti tixtieq taghmilha cara li hawnhekk si tratta ta' decizjoni dwar jekk l-imputat ghandux jigi mibghut l-Italja sabiex jghaddi proceduri penali hemmhekk. Dawn il-proceduri quddiem din il-Qorti ma jwaslux ghal dikjarazzjoni ta' kolpevolezza jew in-nuqqas taghha.

Barra minn hekk dawn huma proceduri partikolari hafna, sa certu punt *sui generis*, bazati fuq id-Deċizjoni Kwadru tal-Kunsill tat-13 ta' Ġunju, 2002 fuq il-mandat ta' arrest Ewropew u l-proċeduri ta' konsenja bejn Stati Membri magħmul f'Lussemburgu fit-13 ta' Ġunju, 2002, adottat

konformement mat-Titolu VI tat-Trattat, li għandu l-pattijiet tiegħu stipulati fl-arranġament relattiv u pubblikati fil-Gazzetta tal-Gvern li ġġib id-data ta' l-1 ta' Ġunju, 2004, kif emendat bid-Deċiżjoni Qafas tal-Kunsill 2009/299/ĠAI tas-26 ta Frar, 2009 (aktar l-isfel maghruf bhala l-"Arrangament") intizi sabiex jithaffef il-procediment ta' treggiegh ta' persuni li jkunu fit-territorju tal-Unjoni Ewropeja u li jkunu allegatament ikkommettew reati kriminali f'xi pajjiz rikjedent. Dawn il-proceduri huma soggetti ghall-principju baziku imsemmi fl-Artikolu 1 tad-Decizjoni Kwadru li jippreskrivi l-principju ta' rikonoxximent reciproku t'atti gudizzjarji u l-fiducja reciproka li Awtoritajiet Gudizzjarji ghandhom ikollhom fi hdan din l-Unjoni. Wiehed jifhem li dawn huma principji relattivament ricenti li ddahlu fl-ordinament guridiku Malti u Ewropew u ma kienux minghajr skossi u polemiki. Il-fatt hu li llum, l-Istat Malti ghazel li jkun parti minn din l-Unjoni u konsegwentement, ghazel, jew kellu jaghzel li jintroduci dan il-qafas regolatorju bhala parti mill-pakkett shih li din l-Unjoni timplika.

Naturalment dan ghandu l-konsegwenzi tieghu. Fosthom li r-regoli imsemmija fl-Ordni li huma bbazatati fuq l-Arrangament, jiddipartixxi wkoll minn certi principji ohra li kienu jezistu qabel fil-Kap 276 jew ahjar jigu introdotti certi proceduri sabiex il-konsenja ta' persuna minn Stat tal-Unjoni ghal iehor isir b'mod aktar celeri, anqas burokratiku u aktar spedit. Fi ftit kliem, fi hdan l-Unjoni Ewropeja, il-livell ta' zvilupp komuni fil-kamp tal-harsien tad-drittijiet tal-bniedem u l-izvilupp fil-ligi penali kemm sostantiva kif ukoll procedurali waslu sabiex l-istati membri ta' din l-Unjoni jafdaw aktar lil xulxin u lill-Awtoritajiet Gudizzjarji fi hdanhom.[1]

Dan ma jfissirx li l-Qrati Maltin ghandhom jaghlqu ghajnejhom ghal kollox u jsiru biss timbru ghal dak rikjest mill-Qrati Ewropej. Wara kollox ghalhekk hemm l-Ordni. Biss bla dubju, dan l-istess Ordni jiffacilita bil-kbir l-*iter* ghalbiex persuna f'Malta tkun tista tigi mibghuta f'pajjiz

[1] Ara d-diskors ta' Lord Hope of Craighead fil-kaz "Office of the King's Prosecutor, Brussels (Respondents) v. Armas" [2005] UKHL 67.

iehor tal-Unjoni, *inter alia* biex issegwi proceduri penali f'dak il-pajjiz.

## 1. L-argument – ir-reati "a" u "d" mhux skedati u mhux estradibbli

Huwa minnu li r-reati ir-reat ipotizzat "a" - "aggravated smuggling of foreign-made tobaccos" u "d" - "smuggling of foreign made tobaccos" ma humiex reati li huma skedati kif ittenni d-difiza. Jidher fil-fatt li l-Awtoritajiet Taljani ma setghux jinkluduhom fil-lista ghax dawn ma jezistux. Dan pero ma jfissirx li allura dawn ma jistghux ikunu reati estradibbli taht din l-Ordni. Ifisser li biex jigi determinat jekk dawn humiex reati ta' estradizzjoni il-Qorti ma tistax tqishom taht ir-regolament 59(2) tal-Ordni (in kwantu dan japplika ghal dawk ir-reati li, *inter alia*, jirrizultaw li huma skedati) izda l-istess Ordni jippreskrivi l-possibilita li l-Qorti tezamina jekk ir-reati de quo humiex estradibbli taht il-kumplament tas-sub-regolamenti (ossija kategoriji) tar-regolament 59.

Din l-interpretazzjoni issib ukoll konfort fl-interpretazzjoni moghtija mill-House of Lords (per Lord Bingham of Cornhill) fl-appell fil-kawza "Office of the King's Prosecutor, Brussels (Respondents) v. Armas"[2] fejn waqt li jikkummenta fuq section 65 tal-Extradition Act 2003 Ingliz (u fuq liema artikolu jidher li gie mudellat ir-regolament 59 tal-Ordni) jghid is-segwenti :-

11. It is evident that section 65 specifies five categories of case in which extradition may be requested or surrender sought. The list is cumulative, as shown by "also" in subsection (3), (4), (5) and (6). The categories are different, but a condition applicable to one category may also be applicable to another: for example, the condition that no part of the conduct should occur in the United Kingdom is applicable to each of the categories in subsection (2), (5) and (6). Only subsection (2) is express reference made to the European framework list, but there

[2] Ibid.

is nothing to suggest that the conduct referred to in subsections (3), (4), (5) and (6) may not constitute an offence within that list.

Il-Qorti ttenni li l-kelma “ukoll” fis-subregolament 3 tar-regolament 59 turi li din hija kategorija ohra ta klassifikazzjoni ta’ reati li jekk tkun soddisfatta tkun tista twassal ghal konkluzjoni li r-reat ipotizzat ikun suggett ghal estradizzjoni – u dan minghajr ma jkun mehtieg li tigi sodisfatta jew jigu sodisfatti l-kategoriji l-ohra kollha msemmija fir-regolament 59. Jekk kategorija minnhom tirrizulta sodisfatta allura r-reat de quo ikun estradibbli (salv naturalment l-ezami dwar il-“bars to extradition” skont ir-regolamenti 13 et seq).

Ghalhekk jekk ir-reat jew reati de quo mhux skedati ifisser li l-ezami dwar jekk ir-reati de quo humiex reati ta’ estradizzjoni jrid isir skont il-kategoriji l-ohra stabbiliti mir-regolament 59 (3), (4), (4A) u (5) tal-Ordni.

Skont ir-regolament 59(3) –

(3) L-imġieba tkun ukoll tikkostitwixxi reat ta’ estradizzjoni dwar il-pajjiż skedat jekk ikunu ġew sodisfatti dawn il-kondizzjonijiet li ġejjin:
(*a*) l-imġieba tiġri fil-pajjiż skedat;
(*b*) l-imġieba kienet tikkostitwixxi reat taħt il-liġi ta’ Malta li kieku din tkun ġrat f’Malta;
(*ċ*) l-imġieba tkun punibbli taħt il-liġi tal-pajjiż skedat bi priġunerija jew xi forma oħra ta’ detenzjoni għal żmien tnax-il xahar jew b’piena akbar (tiġi kif tiġi deskritta f’dik il-liġi).

Issa minn qari tal-MAE jirrizulta li r-reati ipotizzati “a” u “d” huma reati ta’ kuntrabandu aggravat ta’ TLE u kuntrabandu ta’ TLE. Skont l-istess mandat jidher li dan il-kuntrabandu sehh fit-territorju Taljan billi dawn is-sigaretti kienu qed jigu importati fl-Italja mill-Emirati Gharab f’containers li kienu mohbija b’taghbija ohra ta’

kopertura. Dan ifisser li skont l-istess MAE l-imgieba inkriminata sehhet (ukoll) fl-Italja (pajjiz skedat).[3]

Inoltre l-imgieba ta' kuntrabandu ta' sigaretti hija wkoll imgieba li "sostanzjalment" tikkostitwixxi reat taht il-Ligi Maltija[4] u ghal esposizzjoni simili hafna ghal dan il-kaz, ara l-konsiderazzjonijiet fil-kawza "Il-Pulizija vs George Cauchi" deciza mill-Qorti tal-Appell Kriminali.[5]

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[3] Ara wkoll ibid fis-silta fil-para 40 "The conduct must occur 'in' the category 1 territory if the condition which is set out in these paragraphs to be satisfied. But a purposive meaning must be given to the work 'conduct' in this context. It would impost a wholly artificial restriction on the extradition process if it were taken as meaning that all the conduct which resulted in the offence must have taken place exclusively within the category 1 territory. Actings elsewhere will be sufficient to constitute conduct in that territory so long as their intended effect was to bring about harm within that territory."

[4] Ara l-Artikolu 60 u 62 tal-Kapitolu 37 tal-Ligijiet ta' Malta.

[5] Ara per VDG nhar is-6 ta' Jannar 2004. Ara wkoll l-artikoli rilevanti fl-ordinament Taljan :

***Art. 291-bis.*** *Contrabbando di tabacchi lavorati esteri.*

1. Chiunque introduce, vende, trasporta, acquista o detiene nel territorio dello Stato un quantitativo di tabacco lavorato estero di contrabbando superiore a dieci chilogrammi convenzionali è punito con la multa di EURO cinque per ogni grammo convenzionale di prodotto, come definito dall'articolo 9 della *legge 7 marzo 1985, n. 76*, e con la reclusione da due a cinque anni.

2. I fatti previsti dal comma 1, quando hanno ad oggetto un quantitativo di tabacco lavorato estero fino a dieci chilogrammi convenzionali, sono puniti con la multa di lire diecimila per ogni grammo convenzionale di prodotto e comunque in misura non inferiore a lire 1 milione.

***Art. 291-ter.*** *Circostanze aggravanti del delitto di contrabbando di tabacchi lavorati esteri.*

1. Se i fatti previsti dall'articolo 291-*bis* sono commessi adoperando mezzi di trasporto appartenenti a persone estranee al reato, la pena è aumentata.

2. Nelle ipotesi previste dall'articolo 291-*bis*, si applica la multa di lire cinquantamila per ogni grammo convenzionale di prodotto e la reclusione da tre a sette anni, quando:

*a*) nel commettere il reato o nei comportamenti diretti ad assicurare il prezzo, il prodotto, il profitto o l'impunità del reato, il colpevole faccia uso delle armi o si accerti averle possedute nell'esecuzione del reato;

*b*) nel commettere il reato o immediatamente dopo l'autore è sorpreso insieme a due o più persone in condizioni tali da frapporre ostacolo agli organi di polizia;

*c*) il fatto è connesso con altro reato contro la fede pubblica o contro la pubblica amministrazione;

*d*) nel commettere il reato l'autore ha utilizzato mezzi di trasporto, che, rispetto alle caratteristiche omologate, presentano alterazioni o modifiche idonee ad ostacolare l'intervento degli organi di polizia ovvero a provocare pericolo per la pubblica incolumità;

*e*) nel commettere il reato l'autore ha utilizzato società di persone o di capitali ovvero si è avvalso di disponibilità finanziarie in qualsiasi modo costituite in Stati che non hanno ratificato la Convenzione sul riciclaggio, la ricerca, il sequestro e la confisca dei proventi di reato, fatta a

Apparti dan, jirrizulta mill-informazzjoni supplita fil-MAE[6] li l-piena erogabbli fil-kaz tar-reat ta' kuntrabandu aggravat ta' TLE huwa dak ta' prigunerija bejn tliet snin u seba' snin oltre l-multa ta' hamsa u ghoxrin euro ghal kull gramma konvenzjonali tal-prodott u dik applikabbli ghall-kuntrabandu ta' TLE hija dik ta' prigunerija bejn sentejn u hames snin oltre l-multa ta' hames euro ghal kull gramma konvenzjonali tal-prodott. Dawn il-pieni jissodisfaw il-vot tar-regolament 59(3)(c) tal-Ordni.

Fid-dawl ta' dawn il-konsiderazzjonijiet, ir-reati ta' kuntrabandu imsemmija fil-MAE "a" u "d" huma reati ta' estradizzjoni.

**2. Ir-reat ta' falsita ideologika kif kontemplat fil-"b" ma jsibx sinonimu fl-ordinament guridiku Malti u allura ma hemmx "double criminality" u ma jikkombacjax ma xi reat imsemmi fl-iskeda in kwantu r-reat ipotizzat mhux reat ta' "forgery" izda huwa falz ideologiku.**

A differenza tar-reat ta' kuntrabandu aggravat jew mhux, fit-tieni ipotezi ta' reat, l-Awtoritajiet Taljani inkludew dan ir-reat fil-lista tar-reati skedati. Hawnhekk it-tifsira ta' dan ir-reat fl-iskeda hija "forgery of administrative documents and trafficking therein". L-awtoritajiet Taljani talbu l-MAE in bazi ghall-artikoli 48, 479, 61 n 2 tal-Kodici Penali Taljan.

F'dan il-kaz, l-ezami jekk dan ir-reat hux estradibbli trid ukoll issir in bazi ghar-regolament 59. Ir-regolament 59(2)

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Strasburgo l'8 novembre 1990, ratificata e resa esecutiva ai sensi della *legge 9 agosto 1993, n. 328*, e che comunque non hanno stipulato e ratificato convenzioni di assistenza giudiziaria
con l'Italia aventi ad oggetto il delitto di contrabbando.
3. La circostanza attenuante prevista dall'articolo 62-*bis* del codice penale, se concorre con le
circostanze aggravanti di cui alle lettere *a*) e *d*) del comma 2 del presente articolo, non può essere ritenuta equivalente o prevalente rispetto a esse e la diminuzione di pena si opera sulla
quantità di pena risultante dall'aumento conseguente alle predette aggravanti.

[6] u l-kjarifika moghtija permezz tal-email prezentat mill-Prosekuzzjoni matul is-seduta tas-16 t'Ottubru in segwitu ghal ordni taht ir-regolament 13A tal-Ordni.

jipprovdi ghall-dik il-kategorija li ghandha x'taqsam mar-reati skedati. Il-kriterja huma dawn -

(2) L-imġieba tikkostitwixxi reat ta' estradizzjoni dwar pajjiż skedat jekk ikunu ġew sodisfatti dawn il-kondizzjonijiet:
(*a*) l-imgieba tiġri fil-pajjiż skedat u ebda ħaġa minnha ma tiġri f'Malta;
(*b*) ċertifikat maħruġ minn awtorità adatta tal-pajjiż skedat ikun juri li l-imġieba tkun kondotta skedata;
(*ċ*) iċ-ċertifikat ikun juri li l-imġieba tkun punibbli taħt il-liġi tal-pajjiż skedat bi priġunerija jew xi forma oħra ta' detenzjoni għal żmien tliet snin jew b'piena akbar.

Skont il-MAE jirrizulta li skont l-Awtoritajiet Taljani, il-post fejn sehhew l-allegati reati huwa "tra Malta, Emirati Arabi e Italia". Ma jispecifikawx liema reati gew kommessi fejn. Din il-Qorti tista tifhem li whud mir-reati gew kommessi *in toto* jew *in parte* fl-Italja – anke peress hemm uhud minnhom li jistghu ikunu ta' natura trans-nazzjonali. Izda ma tistax tghid serenament li f'dan il-kaz ta' dan ir-reat jekk parti minnu kienetx kommessa wkoll f'Malta, apparti li l-effetti tieghu setghu inhassew principalment fit-territorju Taljan. Del resto kif jghid Lore Hope of Craighead fil-kaz fuq citat fil-para 40:

It would be immaterial to a request for extradition to Belgium, for example, that the actings which had a harmful effect were all in France or in Germany. The situation would be different, of course, if some part of those actings occurred in the United Kingdom. But that is because of the qualification that section 65(2)(a) has introduced, which prevents cases where some of the conduct occurs in the United Kingdom from being an extradition offence under that subsection. The fact that it was thought necessary to insert this qualification is consistent with the existence of a general rule of the kind that I have described.

Fil-fehma tal-Qorti ghalhekk ir-regolament 59(2) ma jistax jigi invokat ghall-fini ta' determinazzjoni jekk dan ir-reat

hux estradibbli. Dan ifisser li l-Qorti trid tkun sodisfatta minn xi kategorija ohra imsemmija f'dan ir-regolament 59. B'mod partikolari ghalhekk irid jigi analizzat jekk jezistux l-estremi tad-"double criminality rule".

Id-disposizzjonijiet rilevanti tal-Kodici Penali Taljan huma s-segwenti : -

Art. 47
***- Errore di fatto -***
L'errore sul fatto che costituisce il reato esclude la punibilità dell'agente. Nondimeno, se si tratta di errore determinato da colpa, la punibilità non è esclusa, quando il fatto è preveduto dalla legge come delitto colposo.
L'errore sul fatto che costituisce un determinato reato non esclude la punibilità per un reato diverso.
L'errore su una legge diversa dalla legge penale esclude la punibilità, quando ha cagionato un errore sul fatto che costituisce reato.

Art. 48
***- Errore determinato dall'altrui inganno -***
Le disposizioni dell'articolo precedente si applicano anche se l'errore sul fatto che costituisce il reato è determinato dall'altrui inganno; ma, in tal caso, del fatto commesso dalla persona ingannata risponde chi l'ha determinata a commetterlo.

Art. 479
***- Falsità ideologica commessa dal pubblico ufficiale in atti pubblici -***
Il pubblico ufficiale che, ricevendo o formando un atto nell'esercizio delle sue funzioni, attesta falsamente che un fatto è stato da lui compiuto o è avvenuto alla sua presenza, o attesta come da lui ricevute dichiarazioni a lui non rese, ovvero omette o altera dichiarazioni da lui ricevute, o comunque attesta falsamente fatti dei quali l'atto è destinato a provare la verità, soggiace alle pene stabilite nell'articolo 476.

Art. 476

***- Falsità materiale commessa dal pubblico ufficiale in atti pubblici -***
Il pubblico ufficiale, che, nell'esercizio delle sue funzioni, forma, in tutto o in parte, un atto falso o altera un atto vero, è punito con la reclusione da uno a sei anni.
Se la falsità concerne un atto o parte di un atto, che faccia fede fino a querela di falso, la reclusione è da tre a dieci anni.

Art. 61
***- Circostanze aggravanti comuni -***
Aggravano il reato, quando non ne sono elementi costitutivi o circostanze aggravanti speciali, le circostanze seguenti:
1) l'avere agito per motivi abbietti o futili;
2) l'aver commesso il reato per eseguirne od occultarne un altro, ovvero per conseguire o assicurare a sè o ad altri il prodotto o il profitto o il prezzo ovvero la impunità di un altro reato;
3) l'avere, nei delitti colposi, agito nonostante la previsione dell'evento;
4) l'avere adoperato sevizie, o l'aver agito con crudeltà verso le persone;
5) l'avere profittato di circostanze di tempo, di luogo o di persona tali da ostacolare la pubblica o privata difesa;
6) l'avere il colpevole commesso il reato durante il tempo, in cui si è sottratto volontariamente alla esecuzione di un mandato o di un ordine di arresto o di cattura o di carcerazione, spedito per un precedente reato;
7) l'avere, nei delitti contro il patrimonio, o che comunque offendono il patrimonio, ovvero nei delitti determinati da motivi di lucro, cagionato alla persona offesa dal reato un danno patrimoniale di rilevante gravità;
8) l'avere aggravato o tentato di aggravare le conseguenze del delitto commesso;
9) l'avere commesso il fatto con abuso dei poteri, o con violazione dei doveri inerenti a una pubblica funzione o a un pubblico servizio, ovvero alla qualità di ministro di un culto;
10) l'avere commesso il fatto contro un pubblico ufficiale o una persona incaricata di un pubblico servizio, o rivestita della qualità di ministro del culto cattolico o di un culto

ammesso nello Stato, ovvero contro un agente diplomatico o consolare di uno Stato estero, nell'atto o a causa dell'adempimento delle funzioni o del servizio;
11) l'avere commesso il fatto con abuso di autorità o di relazioni domestiche, ovvero con abuso di relazioni d'ufficio, di prestazione di opera, di coabitazione, o di ospitalità.

Jidher ghalhekk li r-reat ipotizzat mill-Awtoritajiet Taljani huwa r-reat misjub fil-parti specjali ***- Falsità ideologica commessa dal pubblico ufficiale in atti pubblici –*** izda imputabbli lill-persuna li tkun ghamlet dikjarazzjoni qarrieqa lill-ufficjal pubbliku skont id-disposizzjoni misjuba fil-parti generali tal-Kodici Penali Taljan.

Hawnhekk ir-reat ipotizzat huwa dak tal-ufficjal pubbliku ezercenti l-funzjoni tieghu u li fil-mument li jkun qieghed jircievi jew huwa stess jifforma att jaghmel attestazzjoni falza fis-sens li jkun wettaq fatt jew li fatt ikun twettaq fil-presenza tieghu, jew li jiccertifika li jkun ircieva dikjarazzjonijiet li fil-fatt ma jkunux gew moghtija lilu jew jometti li jiccertifika jew jibdel dikjarazzjonijiet li fil-fatt ikun verament ircieva jew inkella jiccertifika b'mod qarrieqi fatti li ghal liema l-att ikun destinat li jipprova l-verita. F'cirkostanzi normali huwa dan l-ufficjal li jigi ritenut bhala l-awtur tar-reat. Ghalhekk l-ufficjal pubbliku ikun qieghed johloq il-falz in kwantu fil-waqt li jkun qieghed jircievi jew jifforma d-dokument huwa ikun qed jiffalsa d-dokument fis-sustanza tieghu cioe fil-kontenut ideali tieghu. Biss jekk l-ufficjal pubbliku jigi indott li jwettaq din il-bidla fil-kontenut ideali tad-dokument mhux ghaliex ikun irid hu intenzjonalment izda minhabba li jigi indott f'*error facti* minn persuna ohra li tkun qed tagixxi b'mod ingannevoli, allura r-responsabblita penali ghal dan ir-reat iggorha dik il-persuna li tinduci lill-ufficjal pubbliku jaghmel l-attestazzjoni jew certifikazzjoni li tkun. Hemmhekk allura l-*mens rea* punibbli mill-ligi tigi trasferita mill-ufficjal pubbliku (l-awtur tal-*actus reus* ) ghal dik il-persuna li tinducih ingannevolment li jattesta jew jiddikjara l-falz.

Hawnhekk il-Qorti tosserva li huwa veru li l-Kodici Kriminali ma jipprovdix zewgt artikoli identici ghal dawk in

disamina fil-Kodici Penali Taljan. Izda l-ordinament guridiku Malti jipprovdi ghar-reat kemm ta' falz materjali kif ukoll dak tal-falz ideologiku. Issa dan l-artikolu 479 tal-Kodici Penali Taljan jippreskrivi bhala falz ideologiku l-att tal-ufficjal pubbliku li waqt li jkun qed jifforma l-att fl-ezercizzju tal-funzjoni tieghu. "Jifforma" l-att ma jfissirx necessarjament li johloq falz materjali fejn id-dokument jigi ffalsifikat fl-essenza materali tieghu. L-ipotezi hawnhekk imsemmija tinkludi s-sitwazzjoni fejn l-ufficjal pubbliku fil-mument li jkun qieghed jimla dokument amministrattiv jigi indott jikteb u jnizzel fih informazzjoni falza li jkun ircieva jew qieghed jircievi minghand persuna li tkun ingannevolment tatu informazzjoni falza biex jinseriha f'dan id-dokument. Biss ghal fini ta' dan l-artikolu ir-responsabbilta penali ghal din id-dikjarazzjoni falza misjuba fid-dokument redatt mill-ufficjal pubbliku hija mixhuta fuq il-persuna li tkun qeghda taghti dik l-informazzjoni falza lill-ufficjal pubbliku.

L-artikoli tal-Kodici Kriminali Malti fosthom l-artikoli 167 u 183, jimplikaw fihom il-htiega li l-falsifikazzjoni li ssir minn persuna li ma tkunx necessarjament ufficjal pubbliku, billi hija stess tifformula l-falz fl-att jew skrittura li tkun – u ma tinqediex bl-awzilju ta' terza persuna li tkun ufficjal pubbliku. Biss dawn l-artikoli 48 u 479 tal-Kodici Penali Taljan flimkien jinkludu fihom il-kuncett tal-persuna li tkun volutament u ingannevolment tat informazzjoni falza lill-ufficjal pubbliku b'mod li allura d-dokument jattesta falsament fatti li dwarhom l-att huwa destinat li jipprova l-verita. Din hija l-essenza tad-dikjarazzjoni jew certifikazzjoni falza f'att pubbliku billi d-dikjarazzjoni falza tnigges dak id-dokument li bih suppost li l-persuna tipprova l-verita tal-kontenut tieghu.

Din l-ipotezi ta' persuna li ma tkunx ufficjal pubbliku li pero tkun fid-dmir li tiddikjara jew ticcertifika fatt (bhal min irid jaghmel dikjarazzjoni ghall-awtoritajiet doganali), b'abbuz tal-awtorita taghha taghmel dikjarazzjoni falza jew ticcertifika l-falz tissubentra fil-parametri tal-imgieba imsemmija fl-Artikolu 185(2) tal-Kodici Kriminali

**185.** (l) Bla ħsara tal-każijiet imsemmijin fl-artikoli ta' qabel ta' dan it-Titolu, jekk uffiċjal jew impjegat pubbliku illi, minħabba l-kariga jew l-impieg tiegħu, hu fid-dmir li jagħmel jew jagħti dikjarazzjoni jew ċertifikat, jagħmel jew jagħti dikjarazzjoni falza jew ċertifikat falz, jeħel, meta jinsab ħati, il-piena ta' priġunerija minn disa' xhur sa tliet snin.
(2) Meta l-falsifikazzjoni ssir minn xi persuna li mhix uffiċjal jew impjegat pubbliku b'abbuż ta' awtorità, il-piena tkun ta' priġunerija minn seba' xhur sa sentejn.

Minbarra dan hemm ir-reat ad hoc imsemmi fil-Kapitolu 37 tal-Ligijiet ta' Malta li fl-artikolu 62(m) jippreskrivi li huwa reat kontra dik l-Ordinanza kull min

jagħmel xi dikjarazzjoni jew jissottometti xi dokument jew informazzjoni li, bid-dehen tiegħu, tkun falza f'dettall sostanzjali, jew b'mod bla kont jagħmel dikjarazzjoni li tkun falza f'dettall sostanzjali, jew xjentement jew b'negliġenza jagħmel jew jagħti, jew ikun kaġun li ssir jew tingħata, xi dikjarazzjoni, dokument jew informazzjoni lill-Kummissarju li ma tkunx veru f'xi dettall materjali;

Mill-banda l-ohra, l-Artikolu 188 tal-Kodici Kriminali jippreskrivi li :

**188.** (1) Kull min, sabiex jikseb xi vantaġġ jew benefiċċju għalih innifsu jew għal ħaddieħor, f'xi dokument maħsub għal xi awtorità pubblika, xjentement jagħmel dikjarazzjoni jew stqarrija falza, jew jagħti tagħrif falz, jeħel, meta jinsab ħati, il-piena ta' priġunerija għal żmien ta' mhux iżjed minn sentejn jew multa:
Iżda ebda ħaġa f'dan l-artikolu ma tolqot l-applikabbiltà ta' xi liġi oħra li tipprovdi għal piena ogħla.
(2) Meta d-dokument imsemmi fis-subartikolu (1) ma jkunx wieħed intiż għal xi awtorità pubblika, il-piena għandha tkun dik ta' priġunerija li ma tkunx iżjed minn sena jew multa.

Dan l-Artikolu wkoll jippreskrivi fih dik l-imgieba ta' fejn persuna xjentement tiddikjara jew tistqarr il-falz jew taghti

taghrif falz f'xi dokument mahsub ghal awtorita pubblika biz-zieda pero li dan ikun irid isir bil-ghan ta' ksib ta' vantagg ghalih jew ghal haddiehor. Ghalkemm l-elementi ta' dan ir-reat ma humiex identici, fis-sustanza l-imgieba ta' persuna li tiddikjara l-falz f'dokument mahsub ghal awtorita pubblika huwa reat – anke jekk il-kwalifika tal-vantagg mhix misjuba fl-Artikoli 48 u 479 tal-Kodici Penali Taljan.

Il-kwistjoni dwar x'interpretazzjoni ghandha tinghata lir-rwol tal-Magistrat meta jigi biex jiddeciedi kif jiddetermina din l-imgieba sabiex jara jekk hemmx korrispondenza bejn ir-reat fil-pajjiz rikjedenti u l-pajjiz rikjest hija l-materja tad-dibattitu fil-kawza "Norris (Appellant) v Judgments - Government of the United States of America and others (Respondent) (Criminal Appeal from Her Majesty's High Court of Justice)"[7]. Hawnhekk gie mtenni, wara analizi dettaljata u anke storika tal-iter guridiku li fl-ahhar mill-ahhar il-"wider construction" fir-rigward tal-Ligi regolaneti l-estradizzjoni ghandha tipprevali. Din il-Qorti tabbraccja din it-tezi, mhux biss ghar-ragunijiet migjuba aktar l-isfel daqskemm ghaliex dan huwa wkoll fl-ispirtu tar-regim regolanti l-konsenja ta' persuni fi hdan l-Unjoni Ewropeja imnissel mill-Arrangament.

67. The magistrate's task, in short, was simply to examine the evidence produced by the requesting state to decide whether, according to English law, it would justify the accused's committal for trial for a listed offence. As Lord Diplock made plain in successive decisions of this House in *In re Nielsen* [1984] AC 606 and in *Government of the United States of America v McCaffery* [1984] 1 WLR 867, the conduct test was to be applied:

"[T]he magistrate is not concerned with what provision of foreign criminal law (if any) is stated in the warrant to be the offence which the person was suspected of having committed and in respect of which his arrest was ordered in the foreign state." (*In re Nielsen*, 624 F-G):

[7] http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080312/norris-4.htm

"[T]he test whether a person in respect of whom a warrant for his arrest had been issued in a foreign state for an offence alleged to have been committed in that state was liable to be surrendered as a fugitive criminal, was *not*: whether the offence specified in the foreign warrant of arrest as that for which it had been issued was substantially similar to a crime under English law falling within the list of offences described in Schedule 1 to the Extradition Act 1870, as currently amended (i.e., the so-called 'double criminality' test). The right test, as stated by the Divisional Court in the *Nielsen* case, was: whether the *conduct* of the accused, if it had been committed in England would have constituted a crime falling within one or more of the descriptions included in that list." (*McCaffery* p 869 F-G)

83. A month after the Divisional Court's judgment in the present case the House decided *Dabas v High Court of Justice in Madrid, Spain* [2007] 2 AC 31. This raised an issue under section 64(3)(c) of the Act on the basis that part of the conduct relied on by the respondent state in seeking the appellant's extradition for trial, for conspiracy leading to the Madrid train bombings in March 2004, occurred before the equivalent English conduct of conspiring to support terrorism became an offence in February 2001. Lord Hope of Craighead (with whose opinion on this issue each member of the Committee agreed) said (at p 52):

"47. It is not obvious from the narrative of the circumstances set out in the arrest warrant . . . that the date when the relevant conspiracy is alleged to have begun was as early as 'before the year 2000'. The essence of the allegation is that the appellant was involved in a conspiracy which led up to the train bombings in Madrid on 11 March 2004. Mention is made of the appellant's activities during an earlier period, but this part of the narrative appears to have been included simply as background.

48. In the light of this narrative I would have been willing to hold, had it been necessary to do so [it was in fact

unnecessary since four members of the Committee concluded that the appellant's conduct also constituted an extradition offence under the framework list provision], that throughout the period of the conduct which is said to constitute the offence in this case the requirement of double criminality was satisfied. A narrative of events prior in date to the conduct relied on will not be objectionable if it is included merely in order to set the scene . . . [I]t is the conduct for which extradition is sought, not any narrative that may be included in the Part 1 warrant simply by way of background, that must satisfy the test of double criminality."

Lord Hope then (at paras 53 and 54) expressly reaffirmed what he had said in *Cando Armas*: that "the judge need not examine the text of the foreign law in order to decide whether the conditions set out in section 64(3) are satisfied."

84. The final judgment requiring mention in this connection is that of Sedley LJ in the Divisional Court in *Edwards v Government of the United States of America* [2007] EWHC 1877 (Admin), [2007] All ER (D) 501 (Jul) which, in reliance principally upon para 48 of Lord Hope's speech in *Dabas*, disagreed with the Divisional Court's judgment in the present case—that "the analogue of the warrant is the request"—and continued:

"22. Here, as in *Dabas*, the question is what is 'the conduct' which has to amount to an extradition offence? Is it the conduct asserted in the indictment or the conduct recounted as giving rise to it? Consonantly with what Lord Hope said in terms in the last sentence at para 48 of *Dabas*, it seems to me that the policy and objects of the 2003 Act point clearly towards the former meaning. The Act limits the requisite documentation, albeit leaving it open to requesting states to add more. But if the evaluation of the request is not confined to the required materials, there is no apparent limit to what further documentation can be introduced, and a statutory process designed to be lean and schematic will become expansive and porous … .

24. I conclude that ‘the conduct’ referred to in section 137 is confined to the facts alleged in ‘the offence specified in the request', the phrase used in sections 70 and 78. In a normal US case such as the present one this will limit the inquiry into dual criminality to, on the one hand, the indictment and any document incorporated by reference into it and, on the other, the criminal law of England and Wales.”

85. Mr Norris unsurprisingly seeks to rely on *Edwards*; the respondent submits that it was wrongly decided. As Mr Perry QC for the respondent points out, one of its difficulties is that it would require courts to conduct the very inquiry into foreign law which, in both *Cando Armas* and *Dabas*, the House firmly rejected. In *Cando Armas*, moreover, Lord Bingham in terms approved the approach which was consistent with *Nielsen*—the very embodiment of the conduct test. It seems impossible to escape the conclusion that the Divisional Court in *Edwards* misunderstood para 48 of Lord Hope’s speech in *Dabas*: the distinction being drawn there was between mere narrative background and the main conduct for which extradition was sought. Lord Hope was not in that passage addressing or answering the question whether the conduct test or the offence test should apply under the 2003 Act, still less the question where to look for the description of the relevant conduct—whether, in other words, under Part 2 of the Act the analogue of the warrant is the request (as Auld LJ concluded) or “the indictment and any document incorporated by reference into it” (as Sedley LJ held).

86. So much for the existing case law bearing on the double criminality test under the 2003 Act. Taken as a whole it plainly favours the respondent. Is the language of section 137 nevertheless, as Mr Norris submits, consistent only with the construction adopted by the majority in *Aronson* of the broadly similar language used in the 1967 Act? At the very least, Mr Norris submits, there is ambiguity as to the meaning of section 137 and accordingly, as a criminal statute, it should bear the construction more favourable to the liberty of the

subject—the approach favoured by each member of the majority in *Aronson* towards the 1967 Act. Against this, however, there is telling authority the other way. La Forest J, sitting in the Supreme Court of Canada, noted in *United States of America v McVey* [1992] 3 SCR 475, 513:

"Consistent with the general principle that extradition laws should be liberally construed so as to achieve the purposes of the Treaty, a much less technical approach to extradition warrants and to common law warrants has been adopted …"

Similarly, in *In re Ismail* [1999] 1 AC 320, 326-327, Lord Steyn said that "a broad and generous construction" should be given to extradition statutes "intended to serve the purpose of bringing to justice those accused of serious crimes. There is a transnational interest in the achievement of this aim."

87. The language of section 137 is in our opinion consistent with either test. Whether the conduct consists solely of those acts or omissions necessary to establish the foreign offence, or the accused's conduct as it may have been more widely described in the request, both the foreign offence and the corresponding English offence would still be "constituted" by it (as required respectively by section 137(1)(a) and 137(2)(b)). Which construction, therefore, should it be given?

88. As noted in para 70 above, really nothing "startling" follows from adopting the wider construction. On the contrary, it accords entirely with the underlying rationale of the double criminality rule: that a person's liberty is not to be restricted as a consequence of offences not recognised as criminal by the requested state—the position of the notional co-accused contemplated in Lord Bridge's illustration and, indeed, the position of Mr Norris himself, as we would hold.

89. The wider construction furthermore avoids the need always to investigate the legal ingredients of the foreign offence, a problem long since identified as complicating

and delaying the extradition process—see, for example, besides the passages cited above from *Cando Armas* and *Dabas*, La Forest J's judgment in *McVey* (at p 528):

"[T]o require evidence of foreign law beyond the documents now supplied with the requisition could cripple the operation of the extradition proceedings. . . . Flying witnesses in to engage in abstruse debates about legal issues arising in a legal system with which the judge is unfamiliar is a certain recipe for delay and confusion to no useful purpose, particularly if one contemplates the joys of translation and the entirely different structure of foreign systems of law."

90. In addition, the wider construction would place the United Kingdom's extradition law on the same footing as the law in most of the rest of the common law world. The broad conduct approach—the examination of all the conduct on which the requesting state relies—is that almost universally followed. To take just two examples: the United Nations' "Model Treaty on Extradition", adopted by the General Assembly in 1991, by article 2 (b) stipulates that it shall not matter whether "under the laws of the Parties, the constituent elements of the offence differ, it being understood that the totality of the acts or omissions as presented by the requesting State shall be taken into account." Similarly, the 1997 Treaty between Australia and the Hong Kong Special Administrative Region provides by article 3(3):

"For the purposes of this Article, in determining whether an offence is an offence punishable under the laws of both Parties the totality of the acts or omissions alleged against the person whose surrender is sought shall be taken into account without reference to the elements of the offence prescribed by the law of the requesting Party."

91. The committee has reached the conclusion that the wider construction should prevail. In short, the conduct test should be applied consistently throughout the 2003 Act, the conduct relevant under Part 2 of the Act being that described in the documents constituting the request

(the equivalent of the arrest warrant under Part 1), ignoring in both cases mere narrative background but taking account of such allegations as are relevant to the description of the corresponding United Kingdom offence. Had Mr Norris's appeal failed on the first issue the extradition order on count 1 would have stood.

Fis-**sustanza** ghalhekk, ***l-imgieba*** ("conduct") imsemmija fil-MAE mill-Awtoritajiet Taljani kienet tikkostitwixxi reat taht il-Ligi ta' Malta kieku din tkun grat f'Malta minkejja li l-elementi tar-reati invokati ma humiex identici.

Minbarra dan jirrizulta li l-piena erogabbli mill-Kodici Penali Taljan, huwa dak ta bejn sena u sitt snin prigunerija u ghalhekk jissodisfa l-vot tar-regolament 59(3)(c) tal-Ordni.

Ghalhekk din il-Qorti issib li dan ir-reat huwa reat estradibbli skont l-Artikoli 12 u 59(3) tal-Ordni.

**3. Minn imkien ma jirrizulta jekk hemmx "an arrangement of speciality with the scheduled country" u allura hawn hekk hawn "a bar to extradition" fit-totalita taghha.**

Ir-regola dwar l-ispecjalita hija regolata bir-regolament 18 tal-Ordni. Dan ir-regolament jittrasponi l-Artikolu 27 u 28 tal-Arrangament. Fil-fatt minn qari tal-Arrangament jirrizulta li l-posizzjoni maqbula bejn l-Istati Membri hija dik li sakemm ma jkunx hemm dikjarazzjonijiet xort'ohra mill-Istati infushom li jidderogaw mir-regola tal-ispecjalita, din ir-regola tapplika. Fil-fatt fit-termini tan-notifika maghmula minn Malta lill-Unjoni Ewropja[8] jirrizulta li Malta ma ghamlitx notifika li permezz taghha idderogat minn tali regola tal-ispecjalita. Dan ifisser ghalhekk li din ir-regola tapplika fil-konfront ta' dan l-arrangament fir-rigward tal-istati membri tal-Unjoni Ewropeja skont l-istess Arrangament. Dan ifisser li r-regola tal-ispecjalita tapplika ghal Malta u tigi applikata minn Malta b'mod allura li l-

[8] http://register.consilium.europa.eu/pdf/en/04/st12/st12438.en04.pdf

arrangament tal-ispecjalita ezistenti bejn Malta u l-Italja huwa fil-fatt l-Arrangament innifsu.

**4. Peress li l-piena ghar-reat tal-kuntrabandu hija dik tal-multa ir-regolament 18(3)(d) tal-Ordni jipprekludi li ssir estradizzjoni**.

Minn qari tal-MAE kif ukoll mid-debita spjegazzjoni moghtija permezz tal-e-mail ezibita fl-udjenza tas-1 t'Ottubru 2013 mill-Prosekuzzjoni jirrizulta li l-pieni applikabbli ghar-reati kollha ipotizzati huma pieni ta' rekluzjoni u fil-kaz tar-reati ta' kuntrabandu tizdied il-piena tal-multa mal-piena tar-rekluzjoni. Din l-eccezzjoni hija ghalhekk infondata.

**5.Jekk il-Qorti hix sodisfatta illi huma sodisfatti dawk l-obbligi li jehtieg li jigu sodisfatti fit-termini tal-artiklu 18(4) tal-Ordni.**

Dawn l-obbligi wkoll huma riflessi fl-Arrangament u gew trasposti f'Malta permezz tal-Artikolu 18 tal-Ordni. Fil-fatt Malta ma dderogatx minn din ir-regola u allura tkun applikabbli fil-konfront tal-estradanti jekk javveraw il-kundizzjonijiet hemmhekk imsemmija.

**6. Jekk l-interpretazzjoni tar-regolament 59 - dawn l-ipotezi jekk humiex alternattivi jew kumulattivi.**

Din l-eccezzjoni diga giet trattata fil-paragrafu numru 1 aktar il-fuq.

**7. Il-Form A ezibita mhix dokument awtentikat u ma ghandux indikat min hargu u allura mhux dokument validu f'dawn il-proceduri u ghalhekk ghandu jigi sfilzat u ma tistax issir estradizzjoni in bazi ghal tali dokument.**

Taht l-Artikolu 6A dan id-dokument jista jkun prodott in sostenn ghall-allert mahrug taht l-Artikolu 26 tas-Sistema ta' Informazzjoni ta' Schengen minn awtorità ta' pajjiz skedat biex in bazi taghhom. Dan id-dokument johrog fil-forma li tidher u huwa dokument li huwa komuni ghall-pajjizi li jhadnu din is-Sistema. Fih informazzjoni li fl-ahhar mill-ahhar tirrizulta minn dokumenti ohrajn li ghandhom importanza magguri – fosthom il-MAE innifsu. Dan id-dokument ma kienx ikun bizzejjed bhala prova biex tittiehed l-azzjoni de quo. Il-Qorti mhix qed tistrieh fuqu ghall-evalwazzjoni tal-fatti li hija trid taghmel ghaliex il-mod kif inhu redatt ma joffrix il-garanziji minimi msemmija mir-regolament 73A. Hemmx dokumenti ohrajn li huma t'importanza akbar u li ttiehdu in konsiderazzjoni mill-Qorti ghall-finijiet tal-evalwazzjoni taghha ghaliex jissodisfaw ir-rekwizi tal-Ordni in materja ta' forma u sustanza rikjesta.

**8. It-terminu "akkuzat" fir-regolament 5 tal-Ordni tfisser li l-estradant ma jkunx biss suspettat li kkommetta reat izda jehtiegu li huwa jkun gja gie formalment akkuzat quddiem l-awtoritajiet gudizzjarji kompetenti fil-pajjiz skedat.**

Fuq dan il-punt il-Qorti taghmel riferenza ghal zewg punti li fil-fehma taghha huma importanti – (a) it-tifsira tal-kelma "akkuzat" fil-kuntest tal-Arrangament u tal-Ordni kif imfisser fir-Regolament 5(4)(a) u (b) il-kuntest innifsu tal-mod kif dan ir-regolament huwa redatt.

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

*The meaning of "accused" person*

It is common ground that mere suspicion that an individual has committed offences is insufficient to place him in the category of "accused" persons. It is also common ground that it is not enough that he is in the traditional phrase "wanted by the police to help them with their enquiries." Something more is required. What more is needed to make a suspect an "accused" person? There is no statutory definition. Given the divergent systems of law involved, and notably the differences between criminal procedures in the United Kingdom and in civil law jurisdictions, it is not surprising that the legislature has not attempted a definition. For the same reason it would be unwise for the House to attempt to define the word "accused" within the meaning of the Act of 1989. It is, however, possible to state in outline the approach to be adopted. The starting point is that "accused" in section 1 of the Act of 1989 is not a term of art. It is a question of fact in each case whether the person passes the threshold test of being an "accused" person. Next there is the reality that one is concerned with the contextual meaning of "accused" in a statute intended to serve the purpose of bringing to justice those accused of serious crimes. There is a transnational interest in the achievement of this aim. Extradition treaties, and extradition statutes, ought, therefore, to be accorded a broad and generous construction so far as the texts permits it in order to facilitate extradition: *Reg. v. Governor of Ashford, Ex parte Postlethwaite* [1988] A.C. 924, 946H-947D. That approach has been applied by the Privy Council to the meaning of "accused" in an extradition treaty: *Rey v. Government of Switzerland* [1998] 3 W.L.R. 1, 7B. It follows that it would be wrong to approach the problem of construction solely from the perspective of English criminal procedure, and in particular from the point of view of the formal acts of the laying of an information or the preferring an indictment. Moreover, it is important to note that in England a prosecution may also be commenced if a custody officer decides that there is sufficient evidence to charge an arrested person and then proceeds to charge him: section 37 (7) of the Police and Criminal Evidence Act 1984; and see generally as to the commencement of prosecutions

*Card, Cross and Jones, Criminal Law,* 13th ed., (1995) Chapter 4. Despite the fact that the prosecuting authorities and the court are not involved at that stage, the charging of an arrested person marks the beginning of a prosecution and the suspect becomes an "accused" person. And that is so even if the police continue to investigate afterwards.

It is not always easy for an English court to decide when in a civil law jurisdiction a suspect becomes an "accused" person. All one can say with confidence is that a purposive interpretation of "accused" ought to be adopted in order to accommodate the differences between legal systems. In other words, it is necessary for our courts to adopt a cosmopolitan approach to the question whether as a matter of substance rather than form the requirement of there being an "accused" person is satisfied. That such a broad approach to the interpretation of section 1 of the Act of 1989 is permissible is reinforced by the provisions of section 20. This provision deals with the reverse position of an extradition of a person "accused" in the United Kingdom and contemplates that "proceedings" against him may not be commenced ("begun") for six months after his return. This provides contextual support a correspondingly broad approach to "accused" in section 1. For my part I am satisfied that the Divisional Court in this case posed the right test by addressing the broad question whether the competent authorities in the foreign jurisdiction had taken a step which can fairly be described as the commencement of a prosecution. But in the light of the diversity of cases which may come before the courts it is right to emphasize that ultimately the question whether a person is "accused" within the meaning of section 1 of the Act of 1989 will require an intense focus on the particular facts of each case.

*The facts*

My Lords, I would reject as unrealistic the argument that the appellant is a mere suspect whose presence is required in Germany for the purposes of questioning. I

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

Din il-Qorti hija sodisfatta mill-fatt li Silvia Carpanini hija *giudice per le indagini preliminari* fit-Tribunal ta' Genova u hija sodisfatta wkoll li din hija awtorita kompetenti biex tohrog il-MAE. Dan fl-ahhar mill-ahhar iccertifikah l-Avukat Generali u huwa konklusiv. Dan il-MAE huwa mahrug fuq il-principji bazilari ta' "mutual trust" u "mutual recognition" li fuqhom huwa bazat l-Arrangament. Il-MAE jibda biex jghid li "chiedo che la persona appresso sia consegnata ai fini dell'esercizio dell'azione penale o dell'esecuzione di penao misure di sicurezza preventive di liberta'". Din il-Qorti ma ghandhiex ghalfejn tiddubita li

jekk ikun hemm il-konsenja tal-estradant huwa sejjer ikun qieghed jiffaccja proceduri penali quddiem it-Tribunal Taljan in segwitu ghal dan il-MAE ghaliex wara kollox ghal dan il-ghan qed tigi formalment mitluba l-konsenja tieghu u ghal ebda raguni ohra. Dan wara kollox johrog ukoll mid-definizjoni tal-MAE skont l-istess Arrangament li jghid li l-MAE jikkostitwixxi **decizjoni gudizzjarja** u huwa definit hekk : -

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

Il-Qorti hija sodisfatta li l-Awtoritajiet Taljani huma gwidati min dawn il-principji wkoll u ghalhekk iridu l-estradant sabiex fil-konfront tieghu jitkompla l-procediment penali ghar-reati imsemmija fil-MAE u li gew mibdija bil-MAE. F'dan is-sens tal-Arrangament u tal-Ordni il-Qorti qeghdha tqis li l-procediment penali kontra l-estradant sejrin jissuktaw u ghalhekk ghandu jitqies li huwa "akkuzat" ghall-fini ta' prosekuzzjoni li ser tissokta quddiem it-Tribunal Taljan, fil-kaz li jigi konsenjat lil dawk l-Awtoritajiet.

Minbarra dan, jinghad ukoll li l-kuntest ta' dan ir-Regolament juri kemm dan huwa s-sens li johrog mil-Ordni. Ir-Regolament 5(4) jghid li d-dikjarazzjoni hija wahda li :
(a)Il-persuna li dwarha jkun hareg il-mandat tkun akkuzata fil-pajjiz skedat bl-ghemil ta' reat imsemmi fil-mandat u,
(b)Il-mandat jinhareg bil-ghan tal-arrest u l-estradizzjoni tal-persuna lejn il-pajjiz skedat bil-ghan li jinbdew proceduri kontriha ghal dak ir-reat.

Minn qari ta' din id-disposizzjoni, u jekk l-interpretazzjoni tad-difiza hija korretta, kif jista jkun ikun hemm persuna diga akkuzata fil-pajjiz skedat meta l-mandat ikun inhareg precizament sabiex l-estradant ikun jista jmur lejn dak il-pajjiz biex jinbdew proceduri kontrih. Jekk huwa akkuzat fis-sens li trid id-difiza, allura l-proceduri jkunu diga

inbdew kontrih u allura t-tieni subinciz jigi kwazi superfluwu fit-tieni parti tieghu “bil-ghan li jinbdew proceduri kontriha ghal dak ir-reat”. Il-Qorti tqis li t-tifsira “akkuzat” ghandha tinghat tifsira “purposive” kif imsemmi aktar il-fuq. Ghalhekk din l-eccezzjoni mhix qed tigi milqugha.

**9. L-informazzjoni moghtija hija minima u l-Qorti ma ghandhiex dettalji bizzejjed biex tkun tista taghmel apprezzament tajjeb tal-fatti li waslu ghall-hrug ta’ dan il-MAE.**

Il-Qorti tqis li l-Ordni tidderoga mir-regola imsemmija fil-Kapitolu 276 dwar dan il-punt u ghalhekk ittenni li r-rwol taghha f’dan il-kaz huwa l-ezami li jrid isir ai termini tal-Ordni u mhux ezami dwar il-fatti ta’ dan il-kaz jew il-meritu tieghu.

Il-Qorti ghalhekk tqis li dan jezawrixxi l-istadju tal-ezami tal-“bars to extradition” u ma ssibx li hemm xi jzomm l-estradizzjoni f’dan il-kaz.

Ghaldaqstant il-Qorti qeghdha tordna li David Abela jinzamm taht kustodja fi stennija ghat-treggiegh lura lejn l-Italja u cioe l-pajjiz skedat minn fejn inhareg il-MAE u dan ai termini tar-regolament 13(5) u 24 tal-Ordni. Din l-ordni ghal-kustodja tal-estradant qeghdha ssir bil-kundizzjoni li l-estradizzjoni tal-estradant lejn l-Italja tkun soggetta dejjem ghal-“law of speciality” ossija in konnessjoni mar-reati addebitati lilu fil-MAE u msemmi fir-regolament 18 tal-Ordni.

Il-Qorti qeghdha, ai termini tar-regolament 25 tal-Ordni kif ukoll tal-Artikolu 16 tal-Kap 276 tinforma lill-estradant li :
(a) huwa mhux ser jigi mregga’ lura lejn l-Italja qabel ma jghaddu sebat ijiem mid-data ta’ din l-ordni ta’ kustodja;
(b) ghandu dritt li jinterponi appell quddiem il-Qorti tal-Appell Kriminali minn din l-Ordni;
(c) jekk jidhirlu li xi wiehed mid-disposizzjonijiet tal-Artikolu 10(1) u (2) tal-Kap 276 gie miksur jew li xi disposizzjoni tal-Kostituzzjoni ta’ Malta jew tal-Att dwar il-

Konvenzjoni Ewropeja hija, tkun giet jew x’aktarx tkun sejra tigi miksura dwar il-persuna taghha hekk li tkun gustifikata r-revoka, l-annullament jew il-modifika tal-ordni tal-kustodja tal-qorti, hija ghandha jedd titlob rimedju skont id-disposizzjonijiet tal-Artikolu 46 tal-istess Kostituzzjoni jew tal-Att dwar il-Konvenzjoni Ewropeja skont il-kaz.

**< Sentenza Finali >**

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