Court of Criminal Appeal

Hon. Madame Justice Dr. Edwina Grima LL.D.

Appeal Number: 9/2016

The Police

Inspector Mario Cuschieri

Vs

Angelo Frank Paul Spiteri

Today 17th February, 2016,

The Court,

Having seen the arraginment of the appellant Angelo Frank Paul Spiteri holder of Maltese Passport Number 11852050, and Maltese Identity Card Nr. 0265103L, brougth in front of the Court of Magistrates (Malta):

Wanted by the judicial authorities of Lithuania, a scheduled country in terms of Regulation 5 of Subsidiary Legislation 276.05, for the purpose of prosecution for the cirmes of swindling and forgery of administrative documents, which are listed as scheduled offences in terms of subsidiary legislation 276.05.

The Court was requested to proceed against Angelo Frank Paul Spiteri according to the provisions of the Extradition Act, Chapter 276 Laws of Malta and Subsidiary Legislation 276.05.

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 15th January, 2016, whereby the Court ordered the return of Angelo Frank Paul Spiteri to the Republic of Lithuania on the basis of the European Arrest Warrant issued against him and committed him to custody while awaiting his return to the Republic of Lithuania and this in terms of Regulations 13(5) and 24 of the Order.

The Order of Committal was made on condition that the present extradition of the Requested Person be subject to the law of speciality and thus in connection with those offences mentioned in the European Arrest Warrant issued against him deemed to be extraditable offences by this Court.

In terms of Regulation 25 of the Order as well as Article 16 of the Extradition Act, Chapter 276 of the Laws of Malta, this Court informed the Requested Person that : -

(a) He will not be returned to the Republic of Lithuania until after the expiration of seven days from the date of this order of committal and that,

(b) he may appeal 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 Angelo Frank Paul Spiteri, presented in the registry of this Court on the 21st January, 2016, whereby he requested this Court to **reverse** the Order of Committal handed down against him on the 15th January 2016 by the Court of Magistrates (Malta) sitting as a Court of Preliminary Inquiry (for purposes of the Extradition Act referred to as a Court of Committal) and consequently discharge him.

Having seen the acts of the proceedings.

Having seen the uptdated conduct sheet presented by the prosecution as requested by the Court.

Having seen the grounds of appeal as presented by appellant Angelo Frank Paul Spiteri:

Considers,

In pursuance of the Order of Committal delivered by the First Court on the 15th January 2016, and feeling aggrieved by the said decision ordering his surrender to the Requesting State being Lithuania to face several criminal charges relating to swindling and falsification amongst another charges, appellant has put forward an appeal to the said Committal Order and this for various grievances as outlined in detail in his appeal application.

Appellant's main objection to the decision delivered by the Court of Committal ordering his surrender to Lithuania lies in his contention that his pleas regarding a breach of his fundamental human rights as outlined in article 3 of the European Convention of Human Rights should the surrender take place, was completely ignored by the First Court, said Court having consequently blatantly failed to apply, as it was in duty bound to do, the guarantees outlined in Recital 13 of the Preamble to the Framework Decision of the 13th June 2002 on the European Arrest Warrant and the surrender procedures between Member States of the European Union. The outcry put forward by appellant in his appeal application is based on what he alleges as a crystal clear situation existing in the Lithuanian prisons of inhuman and degrading treatment outlined in various judgments delivered by the Court in Strasbourg finding a violation of article 3 of the Convention against Lithuania due to the situation in its prisons, and reports carried out by the Council of Europe Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment of 2014 and the report by the European Liberties Platform of 2015. Applicant further claims that the First Court was in duty bound even '*ex officio*' to carry out an investigation into the claim brought forward by him so as to ensure that he would not be surrendered to the Requesting State where a serious breach of his

human rights was clearly at risk and consequently violating Recital 13 as above-premised. Furthermore appellant contends that should the Court have any doubts as to the application of our law in the light of the Framework Decision and article 6 of the Treaty of the European Union recognising the rights, freedoms and principle as set out in the Charter of Fundamental Human Rights of the European Union of the 7 December 2000 as adapted at Strasbourg on the 12 December 2007, and this with particular reference to article 4 of the said Charter relating to inhuman and degrading treatment and the right not to be subjected thereto, the Court should in line with article 267 of the Treaty refer the matter to the European Court of Justice for a preliminary ruling.

In his second grievance to the decision of the Court of Committal, appellant laments that a violation of the law of procedure relating to the European arrest warrant was carried out in the extradition hearings consequently rendering null and void the entire proceedings. Appellant alleges that the procedure to be followed during the initial hearing was not strictly adhered to. In actual fact he laments that the procedure for his identification was not carried out by the Court during arraignment. That the decision delivered by the Court of Committal regarding the interpretation to be given to the phrase "initial hearing:" was incorrect and distorted since it could not be erroneously interpreted as covering the first three hearings dedicated entirely to establishing the correct identity of the accused being a procedure laid out in regulation 10 of Legal notice 320 of 2004. It is evident from the records, according to appellant, that the procedure as outlined in the said regulation 10 was not adhered to during the initial hearing of the 18th December 2015, and consequently the First Court had no license to validitate what was invalid *ab intio* by adhering to the said procedure during subsequent hearings. Consequently its interpretation of the phrase "initial hearing" as including the three sittings that were needed for compliance with the procedure as laid out in article 10 is manifestly against the spirit and word of the law.

In his third grievance, appellant then makes reference to the decision of the Court of Committal of the 6th January 2016 wherein it was decreed that the identity of the requested person had been ascertained according to law, and this without prejudice to his previous grievance. This is so, in his firm opinion, since it clearly results from the records with particular reference to the documentation presented by the Lithuanian authorities, that the requested person had two different places of birth (Malta and Australia) and two different nationalities (Australian and Maltese). This amounts also to a breach of Regulation 10 thus rendering the surrender procedures invalid.

The fourth grievance of appellant is the one which refers directly to the Order of Committal of the 15th January and from which order he filed his appeal. This refers to one of the bars to extradition/surrender put forward by him being the applicability of prescription to the charges proffered against him, lamenting the erroneous conclusion reached by the First Court that acts constituting the offence for which extradition was being requested did not fall within the jurisdiction of the Maltese criminal courts, being one of the requisites for this bar to be entertained and this as outlined in regulation 16 of Subsidiary Legislation 276.05, which regulation also lays down that only the statute bars of prescription of the executing state had to be entertained in such a situation. However appellant contends that this regulation cannot but be interpreted as meaning that only the period of prescription applicable in the Executing State had to apply to the offences faced by the requested person, since if the offence or offences are statute barred under the domestic law of the Issuing State the Issuing Authority would definitely not seek the surrender of a person.

Having laid out his grievances to the decision handed down by the Court of Committal ordering his surrender to the Requesting State being Lithuania, appellant finally requests this Court **to reverse** the Order of Committal handed down against him **on the 15th January 2016** by the Court of Magistrates sitting as a Court of Preliminary Inquiry and consequently discharge him.

Considers further,

That this Court cannot but note at the very outset of its considerations that the application put forward by appellant contains various grievances some of which did not even form part of the merits of the cause before the First Court. As outlined, appellant puts forward various arguments which in his opinion should lead this Court to proceed to his discharge. What is strange, however, is that finally his request is limited solely to a reversal of the decision of the 15th January 2016 and nothing more, although the *iter* of the proceedings contains various decisions delivered by the First Court affecting not only the validity of the proceedings but also touching the merits of the cause, such decisions not constituting interlocutory decrees as laid down in article 415(4) of the Criminal Code. Thus it would be appropriate to recapitulate the *iter* of the extradition proceedings since the Court of Committal's decision to surrender Spiteri to the Requesting State was in actual fact contained in various preliminary rulings of the said Court which culminated finally in its decision of the 15th January.

Angelo Frank Paul Spiteri is sought by the judicial authorities in Lithuania, a scheduled country in terms of Regulation 5 of Subsidiary Legislation 276.05, to answer to the offence of swindling as laid out in article 182(2) of the Lithuanian Criminal Code and the offence of forgery or possession of a forged document in terms of article 300(1) of the said Code. On the strength of the document submitted by the Lithuanian Authorities to the Maltese authorities, being the European Arrest Warrant and the document relating to the Schengen Information system (SISII), Spiteri was arraigned in Court on the 18th December 2015 requesting that the Court proceed with the surrender of the requested person to the Lithuanian authorities. From the records it results that during this hearing the identity of accused was not established, the Court proceeding forthwith to deal with a request for bail omitting to follow the procedures as laid down in article 10 of Subsidiary Legislation 276.05. As a result of this omission, in the subsequent hearing of the 29th December 2015, when the acts were then assigned to the Court of Magistrates as presided by Magistrate Aaron Bugeja, defence raised the plea of nullity of the proceedings, the

Court having failed to comply with the procedure laid out in the said article 10 and that consequently the identification of the requested person had not been proven, further also contesting the identity of the accused person since there existed a discrepancy in the particulars of the requested person as laid out in the European arrest warrant and those found in the SISII, the place of birth and nationality being different in the two documents. The Court, however, by means of the powers granted to it in terms of Regulation 13A of Legal Notice 320 of 2004, accepted the request put forward by the Prosecution for leave to acquire supplementary information from the Lithuanian Authorities in relation to the identification of the requested person. Said documentation, having been obtained by the Attorney General was filed in the records on the 5th January 2016.

By a **preliminary ruling of the 6th January 2016**, the Court of Committal denied the preliminary pleas of nullity put forward by defence. The Court held that although Regulation 10 of LS276.05 speaks of an "initial hearing" this does not necessarily refer to the first sitting since the Court had proceeded with dealing solely with the identification of the requested person and nothing more. It also decreed that on a balance of probabilities, being the threshold of proof dictated by law in such proceedings, and after having examined all the documents presented by the Prosecution, the Court was satisfied that the identity of the requested person had been established as being that of Angelo Frank Paul Spiteri, the accused. Having thus decreed, the First Court proceeded with the extradition hearing explaining to the requested person his rights at law and the contents of the warrant in terms of regulations 10 and 11. Being asked whether he was giving his consent to his surrender the accused replied in the negative, after having been given due time to consider the same.

Following compliance of the procedures as laid down by law, the Court proceeded with the extradition hearing during the sitting of the 8th January 2016, wherein another plea was raised by defence challenging the extraditable nature of the requested person, the European Arrest Warrant having been filed only in an informal copy not being duly authenticated by the Issuing State. Further to this plea,

defence also argued that Spiteri was not an "accused" person in terms of law and that there existed a conflict between the term as found in Regulation 5(1) and that found in Regulation 59(1) of Legal Notice 320 of 2004, triggering the Court to order the Prosecution to bring forward documents from the Lithuanian Authorities clarifying whether Spiteri had been or was going to be charged in a court of law upon his surrender. Furthermore defence also put forward exception to the fact that the provisions of Legal notice 320 of 2004 conflicted with the provisions relating to the general jurisdiction of the Maltese Courts as laid out in article 5(1) of the Criminal Code. Finally the bar to extradition was raised on the grounds that according to the defence the offences specified in the warrant were not extraditable offences.

By another **preliminary ruling of the 14th January 2016,** the Court of Committal denied all pleas. At this stage the defence put forward its bars to the extradition of the requested person one of the bars being that of prescription, upon which the Court requested further information from the Lithuanian authorities first of all in order to furnish information as to whether the extraditable offences were time-barred in terms of Lithuanian criminal law. This information was filed by the Attorney General upon receipt of the relevant document wherein the Lithuanian Authorities also confirmed that they are signatories to the European Convention on the Fundamental Human Rights and Liberties and that if prosecuted, convicted and sentenced to imprisonment, the requested person would serve his custodial sentence in Malta.

On the 15th January 2016, however, defence requested the Court of Committal to refer to the European Court of Justice in terms of article 267 of the Treaty for a preliminary ruling as to the interpretation of article 5(3) of the Framework Decision of 2002 and this in view of the fact that Legal notice 320 of 2004, failed to provide for a full and faithful implementation of the said article 5(3) of the Framework Decision, thus not being in line with European legislation on the matter having failed to transpose the said article of the Framework Decision into our law. This request however was also denied by the Court, on the ground that article 267 of the Treaty

specifically states that a request for a preliminary ruling is to be made when the interpretation and application of EU law is at issue. Thus once the request dealt with the failure of the legislator to implement a particular provision of the law (which in this case was left to the discretion of the Member States) this would not fall within the precinct of the said article 267. The Court then proceeded to deliver its Order of Committal on the same day, denying the bars to extradition put forward and ordering the surrender of Angelo Frank Spiteri as requested by the Lithuanian judicial authorities on the basis of the European Arrest Warrant issued against him and committed him to custody while awaiting his return to the Republic of Lithuania and this in terms of Regulations 13(5) and 24 of the Order. The Court informed Spiteri that in terms of Regulation 25 of the Order as well as Article 16 of the Extradition Act, Chapter 276 of the Laws of Malta, he will not be returned to the Republic of Lithuania until after the expiration of seven days from the date of the order of committal and that, (b) he may appeal to the Court of Criminal Appeal, and (c) if he is of the opinion 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 had 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.

Angelo Frank Paul Spiteri duly filed his appeal within the time limit granted to him by law requesting this Court solely to reverse the Order of Committal of the 15th January 2016. From this *iter* of the proceedings it is clear that although appellant has put forward various grievances in his appeal application which attack the various rulings and decisions given by the Court of Committal regarding the various objections raised by him to his surrender, however his request is limited to the reversal of the ruling of the 15th January 2016 relating to his committal to the Requesting state.

Article 419 of the Criminal Code specifically lays down *ad validitatem* the requisites necessary in terms of law of an application for appeal as follows:

"**Besides the indications common to judicial acts, the application shall, under pain of nullity, contain - (a) a brief statement of the facts; (b) the grounds of the appeal; (c) a demand that the judgment of the inferior court be reversed or varied.**

In this case, it is evident that the decisions of the First Court were various emanating not only from the final Order of Committal of the 15th January but also from preliminary rulings delivered during the *iter* of the proceedings, as outlined above. Appellant however does not demand the reversal of those decisions but solely that this Court revokes the Order of Committal of the 15th January which Order dealt solely with two bars for extradition being that of prescription and the rule of speciality, which latter bar was not contested by appellant in his appeal application.

Furthermore, the Court cannot but admonish appellant's severe stance taken against the First Court clearly accusing the said Court from ignoring his plea of an alleged violation of his human rights were he to be surrendered as requested, when it clearly emerges from the acts that at no point in time did the Court turn a blind eye to the multitude of pleas put forward by appellant and gave detailed and well-studied motivations for rejecting the same. The only instance where appellant brings forward the matter relating to this alleged violation, is in the request that the First Court refer the matter for a preliminary ruling to the European Court of Justice and this for the omission by the Maltese legislator to transpose article 5(3) of the Framework Decision into our legislation.

"The execution of the European arrest warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the following conditions:

(3) where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender **may** be subject to the condition that the person, after being heard, is returned to the

executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State."

It may be desumed from such a request that defence had in mind the alleged pitiful conditions found in Lithuanian penitentiaries, but from the minutes of the hearing it does not result that the matter regarding an alleged breach of human rights was ever formally raised. This Court therefore cannot understand the grievance being put forward by appellant regarding an alleged denial by the First Court to entertain the risk of a breach of his rights when it is clear that the matter was never directly brought forward by appellant and consequently was not dealt with by the Court. So much so that it is only at this stage of the proceedings that appellant brings forward various arguments making reference to decisions of the European Court of Human Rights, and various reports from the European Authorities attesting to the conditions in Lithuanian prisons, such evidence being absent during the hearings before the First Court. Even now at appellate stage, Spiteri did not deem it fit to resort to the judicial remedies provided by our law in instances where a serious fear of violation of human rights exists by referring the matter to the competent court being the Constitutional Court for redress as is his right under the Extradition Act wherein it is specifically stipulated in article 16 (rendered applicable to proceedings in a European arrest warrant by regulation 25 of LN 320/04) that:

"**Where a person is committed to custody under article 15, the court shall, besides informing him that he will not be returned until after the expiration of fifteen days from the date of its order of committal and that, except in the case of a committal to custody to await return under the provisions of article 15(5), he may appeal to the Court of Criminal Appeal, also inform him that, if he thinks that any of the provisions of article 10(1) and (2) 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.**"

Article 25(2) of the Subsidiary Legislation 340 of 2002 then specifies that:

(2) Article 16 of the relevant Act shall apply as if for the words "fifteen days" therein there were substituted the words "seven days".

Appellant's inaction furthermore, emerges also from the records of this appeal wherein although making various allegations with regards to the conditions in Lithuanian prisons which he describes as abysmal, he then fails to bring forward concrete evidence linked directly to his case to prove that this violation will actually take place should he be surrendered. This Court is therefore faced with a situation where although it is an established fact that the Lithuanian prisons face certain problems, however it is not possible to determine whether such conditions will be presented to appellant should he be detained in those prisons and whether these facts would constitute a breach of article 3 of the Convention as alleged. The Court has no way to find out, for example, in which prison appellant will in actual fact be detained, whether he will be granted bail upon his arraignment in the Requesting State, or if he has a physical or mental condition which exacerbates further the situation.

The only documentary evidence found in the acts (folio 86) in actual fact attest to the contrary indicating the guarantees provided by the judicial authorities in Lithuania that as in other European Member States, Lithuania is a party to the European Convention on the Protection of Human rights and Freedoms guaranteeing human rights both to the suspect, accused as well as convicted persons and that should a custodial sentence be handed down on the requested person subsequent to a potentially guilty verdict, the condemned person will be surrendered to serve time in his country of origin, thus removing any risk of a possible breach of human rights as alleged.

"In case the competent court of the Republic of Malta decides to surrender Angelo Frank Paul Spiteri to the Republic of Lithuania on the basis of the European Arrest warrant for the purpose of conducting criminal prosecution on the condition that after judgment is passed the person will have to be returned to the

executing state in order to serve the custodial sentence (guarantee which is provided for in article 5(3) of council framework decision of 13 June 2002 on the European arrest warrant and the surrender procedures between the member states) the prosecutor general's office of the republic of Lithuania hereby ensures that this condition will be fulfilled.

Besides, it should be noted that the Republic of Malta and the Republic off Lithuania have also ratified the European Convention of the 21 March 1983 on the transfer of sentenced persons."

Having premised this, the Court however cannot ignore this grievance brought forward by appellant although as already pointed out there is no evidence in the acts to support the allegation other than third party findings and judicial pronunciations on the matter. Although appellant makes reference to decisions taken by judicial authorities in other countries where doubts have been put forward regarding a surrender of a requested person to Lithuania due to the prison conditions present in the country however, other judicial authorities have taken a different stance. Foremost amongst which are the courts in the United Kingdom which have so far surrendered the requested persons and this after having heard evidence on the matter and even obtained information and assurances from the Lithuanian authorities. The most recent decision on the matter was delivered by the High Court of Justice (Queen's Bench division, Administrative Law) on the 6th May 2015 confirming a ruling delivered by the WESTMINSTER MAGISTRATES' COURT in the case (1) VLADIMIR ANTONOV (2) RAIMONDAS BARANAUSCAS vs The Prosecutor- General's Office of LITHUANIA[1].

[1] Vide also Arunas Alesksynas and others vs Minister of Justice, Republic of Lithuania – High Court of Justice Queen's Bench division Divisional Court – 24/02/2014 ; *Arvdas Klimas v. Prosecutors General Office of Lithuania* [2010] EWHC - 08/07/2010

One of the bars to extradition put forward by the requested persons was a risk of violation of article 3 relating to inhuman and degrading treatment on the basis that there were substantial grounds for believing that conditions in Lithuanian prisons, detention centres and police stations where defendants are detained pending trial or during trial are so poor, by virtue of overcrowding, lack of facilities or uncontrolled inmate violence, that extradition to Lithuania would result in a real risk of a breach of their Article 3 rights, as expounded by appellant in this case. This ground of appeal was rejected and the ruling by the Westminster Magistrates Court was confirmed wherein it found the following from the evidence brought before it:

"This court has spent much of its time considering the assurances given by the Lithuanian authorities regarding the prison(s) where the requested persons will be detained in the event that they will be denied bail. … There had been no caveat to the assurances given in March 2013 that all extraditees from the UK to Lithuania would be kept in Kaunas Prison or Kaunas Juvenile Centre. I am satisfied that the Lithuanian authorities have taken the criticisms and concerns raised in respect of the assurances very seriously. They have provided important clarification by way of letters to the CPS dated 31st October 2013 and 6th November 2013 from the Prosecutor General`s Office (signed by the Prosecutor General) and the Ministry of Justice (signed by the Vice Minister of Justice) respectively. These letters confirm unequivocally that all extraditees from the UK to Lithuania are currently being detained at the Kaunas Remand Prison and that future extraditees awaiting trail will also be kept in the Kaunas Remand Prison or Kaunas Juvenile Remand Prison. 307. It needs to be borne in mind that the Kaunas prisons are the prisons which Professor Rod Morgan has found to be currently Article 3 compliant for remand prisoners. No information has been provided to this court that prison conditions post-conviction are not Article 3 compliant.

Police Station Detention for Questioning : As previously mentioned, the Prosecutor in charge of this investigation, Mr Stankevicius gave a clear assurance to this court during the course of his evidence that neither RB and VA would be brought to or detained in a police station for questioning . I accept this assurance.

In the light of the assurances given, the other evidence received as well as the lengthy submissions made, in my view the requested persons have failed to overcome the high hurdle necessary to succeed in this challenge and accordingly the Article 3 challenge fails."

This decision was reached in view of the considerations made by the Court 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 R 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."**

The Court referred to two interesting judgments being **Saadi v Italy** (Application 37201/06) wherein the European Court of Human Rights in its judgment dated 28th 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. However 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. As pointed out it rests upon appellant to bring sufficient evidence to convince this court that he will be subjected to such a treatment and this in a concrete manner. As may be attested from the above decisions the Court investigated the circumstances which the requested person

appearing before it would be faced with upon his surrender to the Requesting state, and requested assurances from the Lithuanian authorities as to the places of detention, the possibilities of bail being granted amongst other issues. Such circumstances have not been placed before this court sufficient to establish that appellant is seriously risking inhuman treatment upon his surrender.

The Constitutional Court in a similar case involving the extradition of a Maltese national to California where an alleged breach of article 3 was raised stated the following:

"Extradition is accepted by the Convention organs as a legitimate means of enforcing criminal justice between states. There is no right not to be extradited. Usually issues arise, under the Convention, where it is alleged, as in the present case, that a breach of human rights will occur, if extradition is carried out. There is no general principle that a State cannot surrender an individual unless it is satisfied that all the conditions awaiting him in the receiving State are in full accord with each of the safeguards of the Convention. (see Soering case).

"The abhorrence of torture is also recognized in Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It states that "no State Party shall… extradite a person where there are substantial grounds for believing that he would be in danger of being subject to torture." This extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment prescribed by that Article.

"In order that an applicant succeeds in his application, he will have to advance rather strong arguments as to whether there is a real danger of such ill-treatment. The risk alleged must relate to a treatment which attains a certain minimum level of severity, taking into account all the circumstances, including the physical and mental effects, and where relevant the age, sex, and health of the victim (Soering Case). The risk of the ill-treatment alleged must be real and account will be taken of the assurances given by the authorities of the State requesting the extradition

(2274/93 France – 20/1/1994 – case involving extradition to face murder charges in Texas).

"As regards overcrowding, it results that this has always been a problem and not just in the last few years (page 161). Overcrowding as such, though it varies from time to time, cannot be considered as tantamount to torture, or to degrading or inhuman treatment, although it should not be acceptable." (emphasis added by this court). Now this is perfectly in line with the case law of the European Court of Human Rights, indeed even with what is stated in the judgments referred to by appellant himself, that is the Dougoz and Peers cases. Overcrowding ut sic does not amount to torture or inhuman or degrading treatment or punishment; if however that overcrowding is coupled with other factors, such as restrictions on movement for very long periods, inadequate ventilation or practically no ventilation at all, inability to sleep because of that overcrowding, inadequate sanitary facilities or food – than in that case overcrowding becomes a relevant factor" – Constitutional the Police vs Lewis Muscat 09/03/2007

On a final note regarding this grievance lodged by appellant, the Court reiterates that although appellant makes reference to European case law wherein a breach of article 3 has been established, special mention having been made of the case Mironovas vs Lithuania, it is evident that the Lithuanian authorities have since put in place several measures to combat prison over-crowding and poor detention conditions by first and foremost introducing the law on probation and parole and other non-custodial measures thus decreasing the problem of overpopulated prisons. Moreover, new prison facilities are to be built and even refurbishments in certain prison facilities have taken place and this under the scrutiny of the Council of Europe Committee for the Prevention of Torture and Inhuman and Degrading Treatment. Although it seems that not all standards have till the present day been met, however the situation has improved such as that there are even remedies to parties complaining of ill-treatment in state penitentiaries. The setting up of an office of the Ombudsman has also signified a further control on the situation, thus leading

this Court to the conclusion that the risk alleged by appellant has not been proven by facts presented to this court which show otherwise to the information that this Court has managed to garner from reports by the European authorities and case-law on the matter[2]. Suffice it to refer to the decision delivered by the ECHR on the matter:

"The Court reiterates that allegations of ill-treatment must be supported by appropriate evidence….According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake (see, among others, *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and43579/98, § 147, ECHR 2005-VII; *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 26, ECHR 2004-VII ….

Only a credible and reasonably detailed description of the allegedly degrading conditions of detention constitutes a prima facie case of ill-treatment and serves as a basis for giving notice of the complaint to the respondent Government." (emphasis added)

Even reference made by appellant to the Liam Campbell decision delivered by the Supreme Court in Ireland on the 16th January 2013, is not sufficient evidence in this regard. In fact Mr Justice Burgess said that the test to be applied was whether there were substantial grounds for believing extradition would result in real risk of exposure to human or degrading treatment or punishment. He stated that reports of human rights violations were not in themselves evidence that a person would be at risk, and that the determining factor was whether violations were systemic and the

[2] On 4 June 2014 the CPT published the Lithuanian Government's Response to the report on the 2012 visit which is a testimony to the fact that the Lithuanian authorites are seeking to implement the recommendations set out by the Committee although in truth much work has still to be done.

extent to which a particular individual could be said to be specifically vulnerable to them.

Having premised these legal considerations lying at the basis of article 3 of the ECHR and article 6 of the Treaty, it is evident that what has to be proven is that Spiteri faces a specific, personal and significant risk of torture or of inhuman or degrading treatment or punishment. There is no evidence in this case to prove that such risk exists, appellant making reference to such alleged breach in his appeal application and final submissions before this court to documentary reports and judgments finding that the penitentiary system in Lithuania suffers from problems which unfortunately are not uncommon in other penitentiary systems, the main issue in this case being a situation of overcrowding. Bearing in mind the reports carried out by European Institutions and cases which have been brought forward for an assessment of an alleged violation of article 3 with regard to detention in Lithuanian prisons, the Court is presented with a picture of a legal and judicial system where the necessary checks and balances are in place so as to ensure adequate redress where such abuses have occurred. Suffice it to point out that although appellant makes reference to the said reports and jurisprudence emanating from the Court in Strasbourg, however he presents no concrete evidence sufficient to convince this court that the circumstances (including the personal circumstances of appellant) are such that if he is sent to Lithuania he faces a **specific, personal and significant (that is substantial, real**) risk of torture or of being subjected to inhuman or degrading treatment or punishment as already stated. No evidence is put forward regarding the actual conditions of detention he may have to face, whether he would have to face pre-trial detention and in which facilities, the conditions of overcrowding he alleges, the freedom of movement afforded to inmates, the access to natural light and air, lack of ventilation amongst other factors. So although this Court opines that prison overcrowding is a form of inhuman treatment, the damage to human dignity being the basis of the violation, however appellant does not present sufficient evidence in the case to warrant this Court to uphold his grievance. Nor does appellant advance any strong argument as to the existence of a real danger of ill-treatment **in his regard** which in his view attains that level of severity which is

sanctioned by article 3 of the European Convention. A generic allegation is definitely not sufficient to warrant this Court to act counter to the principle of mutual recognition, which is the "cornerstone" of judicial co-operation and to its obligation in terms of the Framework Decision, to give effect to a European arrest warrant. Finally this Court cannot ignore the guarantees given by the Lithuania judicial authorities of their adherence to the European Convention on Human Rights and that should Spiteri be charged, convicted and imprisoned for the crimes he is being accused of, he will be returned to serve his custodial sentence in Malta, thus eradicating any fear that he will be subjected to any form of degrading and inhuman treatment in that country.

For the above reasons consequently, appellant's grievance that he will be subjected to some form of inhuman and degrading treatment should he be surrendered to the Requesting State is being rejected since there is not sufficient evidence in the acts to sustain the said allegation.

Considers further,

Appellant furthermore requests that in the circumstance wherein this Court is presented with doubts, as is the case, as to whether appellant will face a serious breach of his rights, that the Court refers the matter to the European Court of Justice for a preliminary ruling as to whether the application of our law is in line with the Framework Decision and article 6 of the Treaty of the European Union recognising the rights, freedoms and principle as set out in the Charter of Fundamental Human Rights of the European Union of the 7 December 2000 as adapted at Strasbourg on the 12 December 2007, and this with particular reference to article 4 of the said Charter relating to inhuman and degrading treatment and the right not to be subjected thereto.

"The purpose of the Framework Decision, as was apparent in particular from art.1(1) and (2) thereof and recitals (5) and (7) in preamble thereto, was to replace the multilateral system of extradition between Member States with a system of

surrender between judicial authorities of convicted or suspected persons for the purpose of enforcing judgments or of conducting prosecutions, that system of surrender being based on the princicple of mutual recognition."

Article 1(3) of the Said Framework Decision specifically states that:

"this Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union."

This procedure was transposed into our legislation by means of Legal Notice 320/2004 as subsequently amended by Legal notice 289/2005, and by Legal Notices 224 of 2006, and 275, 367, 390 and 396 of 2007, thus being adopted as subsidiary legislation under the authority of the Extradition Act (Chapter 276) which is often evoked as applicable in European Arrest Warrant proceedings. Our legislation, however, does not reproduce the terminology of the Framework Decision, but rather resorts to language which is clearly inspired by the traditional extradition system and the UK implementation of the EAW as well as common law traditions. Having said that, it is clearly evident that our law as transposed will always be applied with full respect to the fundamental rights and liberties of the individual and with adherence both to the Charter of Fundamental Human Rights of the EU and to article 6 of the Treaty of the European Union. In fact Article 1(3) of the Framework Decision expressly states that the decision was not to have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in art.6 EU and reflected in the Charter of Fundamental Rights of the European Union ("the Charter"), an obligation which moreover concerned all the Member States, in particular both the issuing and the executing Member States. Article 12 of the Framework Decision therefore had to be interpreted in conformity with article 4 of the Charter, which provided that everyone had the right to liberty and security of person.[3] Moreover, the Extradition Act itself in article 16, rendered

[3] [53]–[54] F v Premier ministre (C-168/13 PPU) EU:C:2013:358; [2014]

applicable to proceedings in a European arrest warrant by regulation 25 of LN 320/04, provides sufficient remedy to an aggrieved person should a surrender pose a risk of a violation of his rights and liberties, a procedure which as already mentioned above, appellant chose not to have recourse to. This leads this Court to a discretionary right not to refer the issue for a preliminary ruling as laid down in article 267 of the Treaty since a further judicial remedy is available to appellant as therein stated:

" **Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.**

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court."

Having consequently established that appellant had other remedies available to him under the Extradition Act, consequently it is not mandatory for this Court to refer the issue raised by appellant for a preliminary ruling to the European Court of Justice. Having further established that appellant has failed to prove an alleged breach of human rights through his surrender, the Court finds that it would be futile at this stage to accede to appellant's request (although such request is not formally brought forward in his demands in the appeal application) once it has been established that at this stage of the proceedings there is not sufficient evidence to warrant an interpretation by the European Court on the matter.

Considers,

That although appellant feels aggrieved by the decision of the First Court of the 6th January 2016 regarding the interpretation given by the Court of Committal of the phrase "initial hearing" and this upon its request that the proceedings were null since the procedures laid out in article 10 of LS276.05 were not complied with on arraignment, no request for a variation of such a ruling was entered into by appellant in his application, since as already indicated an appeal has been lodged

only with regard to the Order of Committal of the 15th January 2016 no mention being made of the various preliminary rulings delivered by the First Court throughout the entire proceedings. Suffice it to state however, that the decision of the First Court of the 6th January was legally and factually well founded since although our law makes mention of an "initial hearing", however it does not preclude the First Court from obtaining further information in order to establish the identity of the accused. Also there is no mention in the law that such an omission made by the Court upon arraignment would render all the proceedings null and void, if the Court in subsequent sittings and prior to embarking on the actual extradition hearing adheres to the requirements laid down by law.

In his fourth grievance, appellant laments that the decision reached by the First Court with regards to his identity as being the same as that of the requested person, such a decision having been reached in a ruling of the 6th January 2016, was erroneous although no appeal has been lodged by appellant from such a ruling. This Court deems that this grievance is also ill-founded since through the powers conferred onto it by Legal Notice 320 of 2004 as amended by Legal Notice 224 of 2006 wherein this additional power was introduced, the First Court excercised its right to obtain supplementary information from the Lithuanian Authorities with regards to issue of identity. Having obtained all the necessary information, and on a balance of probabilities, as laid out in regulation 10(3) of LN320 of 2004, as well as from the evidence garnered by the Court, the decision scrupulously reached that the requested person was the person of Angelo Frank Paul Spiteri, was well-founded and consequently the grievance brought forward by appellant with regard to the decision of the First Court of the 6th January 2016 is totally frivolous and unfounded and is therefore being rejected.

Considers further,

That the last grievance put forward by appellant refers directly to the Order of Committal of the 15th January 2016 from which his appeal has been lodged. This refers only to the issue of prescription of the criminal charges being brought against him, which bar to his surrender was rejected by the Court of Committal. Regulation

16 of SL276.05 faithfully reflects the Framework Decision in article 4(4) when it explains that:

"A person's return to a scheduled country is barred by reason of prescription if prosecution for the offence in respect of which extradition is requested is barred by prescription according to the law of Malta and the acts constituting the offence for which extradition is requested fall within the jurisdiction of the Maltese criminal courts."

Appellant contends that the exercise to be carried out by the Court with relation to this bar to surrender, is twofold. The law requires the Court to act on two assumptions, firstly that the offence, with which the requested person is being charged or about to be charged is time-barred under Maltese penal law and secondly that the conduct or acts that amount to an offence under our law would fall within the jurisdiction of the Maltese Court, thus advocating that the prescriptive period as indicated in our penal laws should apply and not those applicable under Lithuanian criminal law.

This Court however finds no reason to vary the decision reached by the First Court on the matter since it is evident that the statutory bars to the prosecution of the crimes are those applicable in the Issuing State, the acts constituting the offence not falling within the jurisdiction of the Maltese courts, the crimes having been allegedly committed in their entirety in Lithuania. The statutory bar at the end of the day being linked to the substantive part of criminal law, and constituting a defence in the country where it is prosecutable, leaves no room for interpretation since the wording of the law is very clear. A contrary interpretation, with all due respect to the defence, runs counter to the spirit and scope of the law. Had the interpretation been based on an assumption as alleged by appellant, the wording of the law would have been similar to that found in regulations 15 and 17 relating to the bar of double jeopardy and the age of the offender wherein the law clearly speaks of an assumption, such wording not reproduced in regulation 16. The jurisdiction of the Executing State, in this case Malta, for the criminal prosecution of a requested

person is a *sine qua non* condition laid down by law as a bar to surrender on the basis of prescription, such jurisdiction being completely inexistant.

The Court finds that the reasoning behind the decision of the First Court is legally correct and consequently rejects this grievance. Even if *gratia argomenti*, this Court were to uphold this grievance, it will still have to proceed with the surrender of the requested person, since it has been established by the First Court that the prescriptive period to the prosecution of the crimes attributed to appellant under our law is still running and consequently, since no grievance has been lodged to this part of the ruling, the Court has no option but to confirm such a decision thus meaning that even under our penal laws the crimes are still prosecutable and not time-barred.

For the above reasons, this Court dismisses the appeal, confirms the Order of Committal of the 15th January 2016, and orders that appellant be kept in custody to await his return to Lithuania to be dealt with in that country in respect of the offences mentioned in the European Arrest Warrant.

(ft) Edwina Grima

Judge

TRUE COPY

Franklin Calleja

Deputy Registrar