

Kopja Informali ta' Sentenza



MALTA

**QORTI CIVILI  
PRIM' AWLA  
(GURISDIZZJONI KOSTITUZZJONALI)**

**ONOR. IMHALLEF  
GEOFFREY VALENZIA**

Seduta tat-8 ta' Jannar, 2007

Rikors Numru. 48/2006/1

**In the Extradition Proceedings in the names:**

**The Police  
(Inspector Raymond Cutajar  
Inspector Raymond Aquilina)**

**v.**

**Lewis Muscat**

**Sitting of Monday, 8<sup>th</sup> day of January, 2007.**

**Case Number 1**

**Application Number : 48/06 GV**

**Doc 4-07**

**The Court:**

## **Introduction**

### **Referral**

This is a decision following a referral by the Court of Criminal Appeal. That Court, after seeing Articles 46(3) and 4(3) of the Constitution and of Cap. 319 respectively, as well as rule 5 of the Court Practice and Procedure Rules referred the following question to the First Hall of the Civil Court, that is to say, **whether in view of all the circumstances of the case and in particular of the physical and mental state of appellant, Article 3 of the Convention and Article 36(1) of the Constitution are likely to be contravened in relation to the said Lewis Muscat if he is extradited to the State of California and whether therefore the extradition should proceed in the event of his appeal to this Court being dismissed on other grounds.**

### **Respondent filed a reply wherein he stated that:**

In terms of the reference made by the Court of Criminal Appeal by means of a judgment delivered on the 31<sup>st</sup> August, 2006, this Honorable Court has been requested to address the question whether in view of all the circumstances of the case and in particular of the physical and mental state of the appellant, Article 3 of the European Convention On Human Rights and Article 36(1) of the Constitution are likely to be contravened in relation to the appellant if he is extradited to the State of California, and whether therefore the extradition should proceed in the event of his appeal of this Court being dismissed on other grounds.

It is the humble opinion of the respondent that the allegations raised by the appellant are frivolous and vexatious in view of the following:-

#### **1. The inapplicability of the Constitution and the European Convention Act in the current proceedings.**

The allegations raised by the appellant relate to the hypothetical potentially of torture, inhuman or degrading treatment which possibly could be inflicted upon him by the prison authorities in the State of California should he be extradited to the United States. The allegations raised therefore do not relate to any torture, inhuman or degrading treatment which has or is likely to be inflicted upon the appellant by the Maltese Authorities, officials or Maltese State.

Proceedings instituted by the appellant against the Maltese authorities, officials or State are therefore frivolous and vexatious simply because the Maltese Authorities, officials or State have inflicted and will be inflicting no harm or treatment upon the appellant, which would render the European Convention Act and the Constitution applicable.

Without prejudice to the above however, in terms of Article 10 of Chapter 276, the Maltese Authorities are prohibited from acceding to a request for the return of a person to a foreign country if:

- (a) the offence of which that person is accused or was convicted is an offence of a political nature;
- (b) the request for his return is in fact made for the purpose of prosecuting or punishing him on account of his race, place of origin, nationality, political opinion, colour or creed;
- (c) that should he be returned, he shall be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, place of origin, nationality, political opinion, colour or creed.

Had the appellant's concern relate to any of the above circumstances, the appellant would have had every right at law to proceed against the Maltese Authorities for breach of his fundamental rights as such breach would have been inflicted upon him by the Maltese Authorities. This would also fall within the dictates of Article 16 of Cap.

276. To the contrary, in the present case, no breach or likelihood of breach is being attributed to the Maltese Authorities, officials or State, rendering the proceedings instituted by the appellant against the respondent null and void.

## **2. The action is premature**

Without prejudice to the above, the action brought by the appellant against the respondent is also of its nature frivolous and vexatious in view of the fact that the current proceedings are based on the mere conjectures and hypothetical situations of what the applicant perceives (with no substantial evidence to found these perceptions) will be attributed to him by the American Authorities should the Maltese Government accede to the request for his return to the United States.

The appellant depicts himself as being a victim of a number of circumstances including:-

- (a) He is suicidal;
- (b) He has been a patient in a mental hospital;
- (c) He suffers from a weak heart and other medical conditions;
- (d) He suffers from communication problems; and
- (e) He is partially deaf.

In view of these misgivings, the appellant is depicting a situation wherein on being found guilty of the alleged convictions raised against him, the American Authorities will be detaining him in a mental detention centre, and on the basis of literature which he has downloaded from the internet relating to California State Prisons, he will become a victim of inhuman, degrading treatment or suffer torture if he was to be sent to one of the institutions which have received negative reviews according to the sites from which such literature has been downloaded.

This above forecast of events is in no way substantiated by any proof or evidence whatsoever, which could even

remotely deduce that the appellant's "fears" are correct, and therefore should be afforded protection at law.

To the contrary, from the proof which has been submitted so far, it transpires that:

(a) No evidence at this stage which show that the applicants suffers from mental illness. To the contrary he was gainfully employed as a truck driver (vide examination upon start of proceedings before Magistrate Court) until his arrest;

(b) No evidence at this stage as to which facility or correctional centre he will be sent once extradited and in the event that he is deemed to be mentally sick;

(c) The literature exhibited to substantiate applicants allegations do not constitute evidence according to law and are in terms of Maltese law irregular and inadmissible at best such literature constitute hearsay and moreover relate to the years 1999-2000. The only literature which relates to recent years is one dating to 2004 which however is one by an organization which cannot be seen as an authority, whilst the issues surrounding reliability of source and hence admissibility as evidence remain dominant considerations.

Hence at this stage it is submitted that the pleas are premature as the Court has no means to assess situations which are entirely hypothetical and based on conjectures. It should also be highlighted that this would be something for the US Courts to determine based on any findings (including if Muscat is one day deemed to be mentally sick!) brought to its cognizance. Indeed it is for the US Courts to determine such issues for the simple reason that it is before it that evidence relating to the particular institution will be produced and given due probative value.

The United States, although not a signatory or party to the European Convention, is definitely a democratic country and signatory to a numerous international instruments

which guarantee the protection afforded by the European Convention.

It thus follows that the current proceedings are delayed tactics rendering such pleas inadmissible.

### **3. No breach of Article 3**

In terms of Article 3 of the European Convention, no one shall be subjected to torture, inhuman or degrading treatment or punishment.

For there to be breach of Article 3, the risk of ill treatment must be "a real risk" and not just a "mere possibility". Reference in this respect is made to the judgment *Vilvarajah v. United Kingdom* (1991). There the five applicants were Sri Lankan Tamils who claimed to be at risk of ill-treatment contrary to Article 3 by state security forces in the conflict between the Sri Lankan Government and the Tamil liberation movement. The applicants were refused asylum by the defendant state and returned to their national state. The European Court held that their return was not a breach of Article 3. Earlier there had been considerable government violence against the Tamil movement, so that it might have been accepted that there would be a real risk that any member of the community would have been ill-treated upon his return. However the position had improved. Whereas there remained the possibility that the appellants, as Tamils, might be detained and ill-treated, this was not sufficient to establish a breach of Article 3.

In *R.v. Denmark* (1991), the Commission after referring to Amnesty International Reports concluded that it would not be inhuman treatment to deport an Iranian national to Iran on the basis only of the general situation there.

In terms of degrading treatment, the interpretation given by the European Court of Article 3 is that the conduct alleged to tantamount to degrading treatment should "grossly humiliate" the applicant (*The Greek Case* (1969)). It appears to require that there be an intention to humiliate

for there to be degrading treatment (Abdulaziz, Cabales and Balkandali v. UK (1985)).

In the reference made by the Honorable Court of Criminal Appeal, this Honorable Court has been requested to examine the allegations brought forward by the appellant in terms of breach in Article 3 in particular in view of physical and mental state of the appellant.

Of particular importance is the judgment in the names Bensaid v. UK (2001), whereby the European Court held that a schizophrenic suffering from psychotic illness does not face a sufficiently real risk after his return to Algeria, not being subject to compelling humanitarian considerations, once the necessary treatment is available in his country of origin.

*“The Court accepts the seriousness of the applicant’s medical condition. Having regard, however, to the high threshold set by Article 3, particularly where the case does not concern the direct responsibility of the Contracting State for the infliction of harm, the Court does not find that there is sufficient real risk that the applicant’s removal in these circumstances would be contrary to the standards of Article 3.”*

As has been highlighted above, the appellant has to date produced no evidence to substantiate the hypothetical situations which form the alleged breach of Article 3 of the European Convention. No proof has been produced which illustrates the “real risk” and the “gross humiliation” which in terms of the European Court’s dicta the appellant is expected to suffer if extradited in terms of the said Article 3. Similarly, no proof has been produced by the appellant which shows the actual “intention” of the US authorities “to humiliate” the appellant once extradited.

Finally, and without prejudice to the above, the United States Government, although under no obligation to do so, is presently preparing an assurance addressed to the Maltese Government wherein any fears or doubts as to

the treatment of the appellant in the event of his extradition taking place will be allayed and put to rest.

In view of the above, it is the humble opinion of the respondent that the applicant's request should not be upheld.

**The facts of the case are the following:**

Lewis Muscat, a Maltese citizen, is sought by the judicial authorities of the State of California in the United States of America to answer to eighteen charges of "lewd act upon a child under 14 using force/violence in violation of the California Penal Code section 288(b)(1)", one charge of possessing or controlling "obscene matter depicting person under 18 in violation of Penal Code section 311.11" and one count of distributing or exhibiting "lewd material to minor in violation of Penal Code section 288.2(a)"

**Provisional Warrant of Arrest in terms of Extradition Act Ch 276.**

On the strength of documents submitted, the Magistrates Court issued, on the 2 March 2006, a provisional arrest warrant against Muscat in terms of article 14 of the Extradition Act, Cap. 276. Lewis Muscat was arraigned before the Court of Committal on that same day (2/3/06), and the Minister's "Authority to Proceed" in terms of article 13 of the Act was issued on the 9 March 2006. The Authority to Proceed was issued only in respect of the eighteen counts of violation of section 288(b)(1) of the Penal Code of California.

On the 4 August 2006 the Court of Committal delivered its final decree on the extradition proceedings. The Court sanctioned the extradition and ordered that Lewis Muscat be kept in custody to await his return and his extradition to the United States of America.



Lewis Muscat filed an appeal before the Court of Criminal Appeal – on the 10 August 2006, requesting that Court “...to accede to and accept his appeal by canceling, revoking and reversing the decisions of the Court of Committal of the 10<sup>th</sup> May 2006 and 4<sup>th</sup> August 2006 by means of which the Court of Committal ordered that the appellant be kept in custody in order to await his return and his extradition to the United States of America, and consequently ordering that the appellant be discharged in accordance with article 18(4) of Chapter 276 of the Laws of Malta”.

The Court of Criminal Appeal decided without the slightest hesitation that the raising of the question by appellant of the possible violation of articles 6, 13 and 8 of the Convention (and possibly of the corresponding provisions of the Constitution, where applicable, that is Article 39) was merely frivolous. No serious argument or evidence had been brought forward by appellant which even remotely suggested that these provisions were likely to be contravened in relation to him if he were extradited to the United States to face charges in the State of California. The raising of the question, therefore, with regard to those provisions was declared to be merely frivolous in terms of article 46(3) of the Constitution and of Article 4(3) of Cap. 319.

The same, however, could not be said – that is that it was merely frivolous (or merely vexatious) – with regard to the question of the risk of appellant being subjected to inhuman or degrading treatment if extradited to the State of California. Some evidence had been produced and some arguments had been put forward which prevented the Court from branding the question as merely frivolous. Whether or not in effect there were “substantial grounds” for believing that Muscat would face “a real risk” of violation of Article 3 of the Convention (or of Article 36(1) of the Constitution) if extradited to the State of California was a matter into which the First Hall of the Civil Court (and possibly after it the Constitutional Court) would have to delve.

## **Considers**

### **Reply of Commissioner of Police**

#### **1. The inapplicability of the Constitution and the European Convention Act in the current proceedings.**

Respondent submitted that the allegations raised by the appellant do not relate to any torture, inhuman or degrading treatment which has or is likely to be inflicted upon the appellant by the Maltese Authorities, officials or Maltese State.

This Court is of the opinion that a decision by a Contracting State to extradite a fugitive may give rise to an issue under the Constitution and/or the European Convention on Human Rights and in this particular case, under Article 3. This fact has already been accepted by the Court of Criminal Appeal which referred the Constitutional question to this Court. In fact the Court in its judgment of the 31<sup>st</sup> August 2006 held that the safeguards of the Convention will apply in the case of extradition.

This Court refers to the case law of the European Court of Human Rights and particularly to the Soering case which, inter alia, held that :

“...the decision by a Contracting State to extradite a fugitive 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 extradited, faces a real risk of being subject to torture or to inhuman or degrading treatment or punishment in the requesting country...”

As regards respondent's assertion that the allegations raised by the appellant do not relate to any torture, inhuman or degrading treatment which is likely to be inflicted upon him by the Maltese Authorities, it is stated in the Soering case that:

“Any liability under the Convention is or may be incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.”

In such a case the Contracting State is held indirectly responsible for the imminent treatment in that other State.

## **2. The action is premature**

Respondent also submitted that the current proceedings are based on mere conjectures and hypothetical situations of what appellant perceives; there is no substantial evidence to found these perceptions (except for literature he has downloaded from the Internet) that he will be subjected to such treatment by the American Authorities should the Maltese Government accede to the request for his return to the United States. According to respondent, the Court, at this stage has no means to assess situations which are hypothetical and based on conjectures.

In this regard, this Court observes that Constitutional proceedings may be undertaken not only where the fundamental human rights are being violated or have been violated but even where such right is likely to be contravened in relation to him. (See Section 4(1) of Chapter 319 of the Laws of Malta).

Moreover the establishment of such responsibility inevitably involves an assessment of the conditions in the requesting country against the standards of Article 3 of the Convention; an exercise which this Court has to make.

## **3. As to the merits**

### **Appellant's submissions**

Applicant is contending that an eventual extradition to the U.S.A. would violate his fundamental right relating to the

general prohibition of torture and inhuman or degrading treatment.

He contends that he has submitted the best available evidence consisting not only of reports by NGOs but also the most recent reports of a specialized international body, that is, the Committee Against Torture, and specifically very recent local newspapers' reports addressing the emergency situation in California and citing what California's Governor expressly stated. Appellant states that in his case he has clearly proved a real risk of torture or any other cruel or inhuman or degrading treatment or punishment. He submits that the evidence produced by him (including documentary evidence) is reliable, objective and truthful.

Applicant made reference to documents (on pages 134 et seq Dok LM1 – LM5 of the Acts of the Extradition proceedings ) showing the severe ill-treatment which detainees (especially mental patients) in prisons and mental hospitals in the State of California succumb to. These consist of detailed reports by Amnesty International and Human Rights Watch. Moreover, two witnesses (David Busutill and Lara Bezzina) have testified the existence and incidence of ill-treatment, torture, cruelty and degrading treatment in the USA..

As regards the crime of torture, applicant made reference to the leniency with which the applicable law in California (Section 673 of the Penal Code) deals with torture and related crimes. It is only considered as a misdemeanor domestically and torture does not exist as a crime at federal level. With the possibility of mandatory transfers, the fact that the State of California recognizes torture as a crime (and punishes it very lightly) is immaterial since the applicant might be transferred to another state.

Applicant makes also particular emphasis on his personal circumstances. He states that in view of his personal circumstances, together with the particular nature of the crimes he is being charged with, there exists a clear and present danger, that if extradited, he will be subjected to

either torture or else inhuman and/or degrading treatment. Applicant mentions the fact that he is suicidal; that he has been a patient in a mental hospital; that he suffers from depression; that he has had a hemorrhage in his brain; that he is partially deaf; that he suffers from communication problems and finally that he is foreign.

As regards the assurances given by the State of California, applicant contends that these assurances simply substantiate his genuine concerns and points out that these assurances do not refer to the pre-trial stage. Moreover they contradict other public declarations by California's Governor where he stated that there was a growing emergency in state prisons and that this was creating a health risk and extreme peril for officers and inmates. Applicant therefore submits that the Governor cannot be believed no matter how many assurances he gives. No assurance has been given in case there is a transfer of inmates and there is no judicial scrutiny and lack of monitoring mechanisms to assess if the assurances have been honoured. Finally the mere existence and enactment of laws does not necessarily guarantee their respect and enforcement.

### **Respondent's submissions**

According to respondent for there to be a breach of Article 3, the risk of ill treatment has to be "real" and not just a "mere possibility" (*Vilvarajah v U.K.* 1991). In fact appellant has to date produced no evidence to substantiate the hypothetical situations which form the alleged breach of Article 3 of the Convention. No proof has been produced which illustrates the "real risk" and the "gross humiliation" which appellant is expected to suffer if extradited. Similarly no proof has been produced by appellant to show the actual "intention" of the US Authorities to "humiliate" him once he is extradited.

The US Government has given assurance to the Maltese Authorities wherein any fears or doubts as to the treatment of the appellant in the event of his extradition taking place will be allayed and put to rest.

For respondent appellant's allegations are unfounded, frivolous and vexatious as these allegations relate to hypothetical situations of torture, inhuman or degrading treatment (with no substantial evidence) which possibly could be inflicted on him by the prison authorities in the State of California.

As regards the physical and mental state of appellant respondent made reference to the evidence given by Dr. Spiteri who said that he found that appellant was lucid, calm and cooperative; suffered from mild depression and had normal mental capabilities. He added that appellant no longer thinks of self harm and no records of suicidal thoughts had been recorded recently.

Respondent submits moreover that no proof has been brought by the appellant as to which facility or correctional centre he will be sent to once extradited. The literature exhibited by appellant does not constitute evidence according to law and in terms of Maltese law, it is irregular and inadmissible since at best it constitutes hearsay. As far as Doc. LB (on page 31) is concerned the witness produced, Lara Bezzina, could not say whether the person who prepared the report had physically visited the institutions subject to criticism. Furthermore the report does not make reference to any specific prison, mental institution or correctional facilities in the State of California, and the witness confirmed that the information in the report was generic in character.

As regards the assurances given by the Governor of the State of California, respondent remarks that the United States is definitely a democratic country and signatory to numerous international instruments which guarantee the protection afforded by the European Convention.

## **Considers**

### **As to the law**

The basis of applicant's complaint relates to allegations made concerning a breach in terms of Article 3 of the European Convention on Human Rights (Chapter 319 of the Laws of Malta) and Article 36(1) of the Constitution. The applicant contends that an eventual extradition to the United States would violate his rights as protected by the above mentioned provisions of the law.

In terms of Article 3 of the European Convention, no one shall be subjected to torture or to inhuman or degrading treatment or punishment.

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 to the merits**

### **Evidence according to law**

Respondent claims that the literature exhibited by appellant does not constitute evidence according to law and in terms of Maltese law, it is irregular and inadmissible since at best it constitutes hearsay.

Nowadays more and more computer data is being exhibited in Court and asked to be used as any other evidence. However its probative value, like every other piece of evidence produced, has to be examined by the Court and given its proper weight. There are a number of ways how the value of such information can be established, for example, the reliability of the computer equipment, the manner in which the data was entered, the measures taken to ensure the accuracy of the data as entered, the reliability of the data itself etc.

Therefore, documents on the contents of which a party seeks to rely, whether as evidence of their truth or as original evidence, are subject to the rules as to proof of their contents. A statement contained in a computer-produced document may be accepted as evidence provided that the maker of the statement has personal knowledge of the facts in question or the original supplier of the information contained in the document must have had, or reasonably supposed to have had personal knowledge of the matters dealt with in the document. Not all digital evidence therefore has to be considered as hearsay as some can be accepted after a proper evaluation of their content.

### **Witnesses and Documents**



David Busutill and Lara Bezzina gave evidence on the existence and incidence of ill-treatment, torture, cruelty and degrading treatment in the USA.

Lara Bezzina, representing Amnesty International Malta, referred to the report – USA Amnesty International's Supplementary Briefing to the UN Committee against Torture. (Doc. LB. page 31 *et seq*). She said that this report explains various cases of torture in different US prisons, including California.

However witness could not give the Court any information as to whether the persons who prepared this report ever visited any of the institutions mentioned in the report, nor could she say who was the source or who drew up this report, except that it contained answers to questionnaires.

It is to be noted that in this report there are no specific prisons / institutions / correctional facilities indicated which can be traced down in California where appellant might be sent to. The report does not identify any particular institution nor are any details given about any particular case referring to California prisons. It is more of a general report.

The Court notes that the reference made in Doc. LB on page 74 is to treatment of women in prison and their vulnerability to sexual abuse. On page 76 the case refers to a mentally disturbed youth who committed suicide, whereas on page 78 there is referenced to a case on death row which is a different matter from that being treated here.

In this sense therefore such report cannot be the basis on which this Court can decide where in California detainees are being ill-treated. Witness had no personal knowledge of the facts she gave evidence on nor did she indicate who supplied the information contained in the document or if they had personal knowledge of the matters dealt with in the document.

David Busutill gave evidence and exhibited the document on page 102 of the Committee against Torture dated 25<sup>th</sup> July 2006 - a report following a session in May re the USA and particularly against torture and degrading treatment. Witness referred to point 13 of the Report: Subjects of concern and recommendations particularly as regards the absence of the federal crime of torture. Witness also referred to the fact that under California Penal Code Sec 673 – the maximum punishment for torture is for a misdemeanor.

Again, witness could not indicate any particular prison institution, correctional facility, mental facility or half way house where the ill-treatment occurred. In fact the report does not single out any particular facility in the State of California.

This document deals with the positive aspects and welcomes the State party's statement that all United States officials are prohibited from engaging in torture at all times and in all places, and that every act of torture within the meaning of the Convention is illegal under existing federal and/or state law, but the Committee against Torture is still concerned that torture is still not a federal crime consistent with article 1 of the Convention.

This concern of the Committee against Torture however does not mean that there is no rule of law in the United States or that the California Penal Code does not punish the unlawful use of any cruel, corporal or unusual punishment, even though it treats it as a misdemeanor.

Witness David Busutill also exhibited document on page 161 published by the Los Angeles Times of the 5<sup>th</sup> October 2006 and 7<sup>th</sup> October 2006 re the situation relating to human rights within the State of California.

Here reference is made in the document to overcrowding in the state's lockups which has reached crisis levels. Again no particular location has been indicated, and it seems that this article is basically an attack on the Governor's prison policy by his political opponents, the

Democratic lawmakers, in what was called a “political theatre”. The article also indicates that the Prison Law Office won numerous law suits challenging conditions inside state lockups. As regards the mandatory transfers referred to in the article, the proposals for such transfers have not been passed. (page 162) and appellant’s fears in this regard are just hypothetical and not really substantiated. 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 degrading or inhuman treatment, although it should not be acceptable.

Witness Busutill exhibited document on page 163 regarding the death of an inmate beaten to death by some inmates. This particular case concerned the first inmate slaying in two decades, out of a prison population of 172,000.

As regards the documents referred to by appellant during the extradition proceedings (LB 1 – LB 5 page 134 et seq) the Court of Criminal Appeal had already taken cognizance of these documents and it considered that the evidence produced was not frivolous but it decided that it was up to this Court to see whether there were substantial grounds for believing that appellant would face a “real risk” of violation of article 3 of the Convention if extradited to California.

This Court has examined these documents which deal in particular with U.S. Prisons and Offenders with Mental Illness. As it will be shown later in this judgment, appellant cannot be considered as a mental case, even though he is suffering from a mild depression in view of the present circumstances.

Moreover the number of cases referred to in the document, do not describe the particular ways prisons are meting out their inhumane and degrading punishments. Of these prisons there are hundreds in the United States. What is presented in the document is the response to a

questionnaire and there is no way one can verify the veracity of the allegations. The Court has still to be convinced who the parties are, and their accusations have still to be tested in a Court of Law.

For the purpose of determining whether there are substantial grounds for believing that a person would be in danger of being subjected to torture or inhuman and degrading treatment this Court has to take into account all relevant considerations including, the existence in the State concerned of a consistent pattern of gross, flagrant, or mass violations of human rights. This has not been the case in these proceedings.

### **Personal Circumstances**

Appellant mentions that in view of his particular personal circumstances, together with the particular nature of the crimes he is being charged with, there exists a clear and present danger, that if extradited, he will be subjected to either torture or else inhuman and/or degrading treatment.

Dr. Joseph Spiteri, Consultant psychiatrist, under whose care appellant has been since March 2006, testified that he found Lewis Muscat to be lucid, calm and cooperative. His behavior in hospital was good and he understood what was being asked of him and he came across as mildly depressed. Dr. Spiteri administered a Hamilton Depression rating scale, and Muscat scored 12, which is indicative of only mild depressive symptoms. Usually moderate depression falls within 18 and 26. Muscat is on anti depressants which is a common medication, available worldwide. From a psychiatric point of view there is nothing which prevents him from boarding a plane. He is well oriented both with time, place and person and there is no cognitive deficit whatsoever. Muscat is partially deaf in the sense that you have to raise your voice when you speak to him. As regards the brain hemorrhage which Muscat suffered from, this is not connected to his mental capabilities. In fact he has normal mental capabilities, like any ordinary man and is fit to stand trial. At present he is not actively suicidal.

The Court examined the allegations made by appellant and the evidence of the consultant psychiatrist and feels that there is nothing which should stand in the way of having appellant extradited to the U.S. Prior to his arrest in Malta, appellant was gainfully employed as a truck driver and had no problems with his employer. Naturally, in view of the particular moment in his life, and in view of the charges that have been made against him, appellant is bound to feel the pressure health wise. It must be noted that appellant lived in the U.S.A for many years until he became a fugitive on facing criminal proceedings. The alleged crimes contravened the laws of the state where he resided and he has now to answer to the charges in the community where he lived.

### **Assurances.**

Respondent exhibited in Court Document AG drawn up by the Office of the Governor of the State of California dated 19<sup>th</sup> September 2006, containing *inter alia* a declaration by the said Governor of his obligations emanating from his being bound and having subscribed to the Eighth Amendment of the United States Constitution and Article 1, Section 17 of the Constitution of California, both of which prohibit cruel and unusual punishment of prisoners in the State of California.

In this declaration it is stated that:

*"If an inmate believes that he has been subjected to illegal treatment, the inmate may seek relief from both federal and state courts, either through a petition for habeas corpus or through a civil rights lawsuit.... The inmate may also apply to the courts to have a court appointed attorney. There are also several highly regarded prison advocacy groups in California that ensure that inmates' rights are safeguarded.*

*In addition, the California Office of the Inspector General is an independent watchdog agency that safeguards the integrity of the state's correctional system by rigorously*

*investigating and auditing the California Department of Corrections and Rehabilitation to uncover criminal conduct, administrative wrongdoing, poor management practices, waste, fraud, and other abuses by staff, supervisors and management.*

*I am confident that Mr. Muscat's rights will be protected should he be found guilty of the pending charges and thereafter committed to a correctional institution in California".*

As regards these assurances applicant contends these do not refer to the pre-trial stage. Moreover they contradict other public declarations by California's Governor.

A state has to take into account the assurances which are given by the authorities of the State requesting the extradition. In this case the Governor of California has given his assurance that Mr. Muscat's rights will be protected should he be found guilty of the pending charges and thereafter committed to a correctional institution in California. This assurance applies also to the pre-trial stage and in his assurance the Governor mentioned actions which are available to appellant in case his rights are not protected. Mention is made of the relief from the federal and state courts, through a petition for habeas corpus or through a civil rights lawsuit. Appellant can apply to the courts to have a court appointed attorney. There are also several prison advocacy groups that ensure that inmates' rights are safeguarded as well as there is the California Office of the Inspector General -an independent watchdog of the state's correctional system. It is true that the mere existence and enactment of laws does not necessarily guarantee their respect and enforcement but this can be said of all legal systems and of all institutions.

## **Conclusion**

The Court therefore concludes that in view of all that has been considered appellant did not prove that there exists in the State of California - where it is intended that he will

be extradited - a consistent pattern of gross, flagrant, or mass violations of human rights. Neither did the appellant indicate which institutions or prisons in California ill-treat or torture detainees.

In the documents exhibited, even though there are misgivings and subjects of concern as regards the US legal system, there is no doubt about the democratic character of the legal system which respects the rule of law and which affords procedural safeguards. The machinery of justice to which the appellant will be subjected to in the United States is not in itself arbitrary or unreasonable.

The United States, although, not a signatory to the European Convention, is signatory to numerous international instruments which guarantee the protection afforded by the European Convention.

Appellant did not advance any strong argument as to the existence of a real danger of ill-treatment in his regard. Appellant did not indicate any risk relating to ill-treatment which in his view attains that level of severity which is sanctioned by article 3 of the European Convention.

Therefore the Court finds that it has not been established that the treatment to which the applicant will be exposed, and the risk of his exposure to it, is so serious as to constitute torture or inhuman or degrading treatment or punishment contrary to Article 3 of the said Convention.

### **Decision**

The Court therefore,  
with regard to the question referred to it by the Court of Criminal Appeal  
whether in view of all the circumstances of the case and in particular of the physical and mental state of appellant, Article 3 of the Convention and Article 36(1) of the Constitution are likely to be contravened in relation to the said Lewis Muscat if he is extradited to the State of California,

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decides that the extradition can proceed,  
in the event of his appeal to the Criminal Court of Appeal  
being dismissed on other grounds.

**< Sentenza Finali >**

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