MALTA

# QORTI KOSTITUZZJONALI

**S.T.O. PRIM IMHALLEF**
**VINCENT DE GAETANO**

**ONOR. IMHALLEF**
**JOSEPH D. CAMILLERI**

**ONOR. IMHALLEF**
**ALBERT J. MAGRI**

Seduta tad-9 ta' Marzu, 2007

Appell Civili Numru. 48/2006/1

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

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

**v.**

**Lewis Muscat**

**The Court:**

**<u>Preliminary</u>**

**1.** This is an appeal from a judgment delivered on the 8 January 2007 by the First Hall of the Civil Court (in its Constitutional and "Conventional" Jurisdiction). The facts which gave rise to this case are briefly the following:

a. 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)". On the strength of documents submitted to her, Magistrate Dr Consuelo Scerri-Herrera 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 Extradition 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.

b. By decision delivered on the 4 August 2006, the Court of Committal 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. That Court further informed Muscat that he cannot be extradited before the lapse of fifteen days from its order and that he could appeal from the decision allowing the extradition to the Court of Criminal Appeal. It also informed him that if he felt that any of the provisions of articles 10(1) and (2) of the Act have been contravened or that any provision of the Constitution of Malta or of the European Convention Act 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 corresponding provision of the European Convention Act, Cap. 319, as the case may be.

c. Muscat appealed to the Court of Criminal Appeal. Before that Court he pleaded, among other things, that should his extradition to the United States of America, and in particular to the State of California, be proceeded with, various provisions of the Constitution and of the European Convention on Human Rights guaranteeing his fundamental human rights would be violated.

d. The Court of Criminal Appeal, by a preliminary decision delivered on the 31 August 2006, dismissed a number of pleas of possible violation of fundamental human rights – that is with reference to Articles 6, 13 and 8 of the Convention (and of the corresponding provisions of the Constitution, where applicable, that is Article 39) – as being merely frivolous. That Court, however, for the reasons given in its decision, said that it could not dismiss as merely frivolous the question of the risk of appellant being subjected to inhuman or degrading treatment if extradited to the State of California. That Court continued as follows:

"Some evidence has been produced and some arguments have been put forward which prevent this Court from branding the question as merely frivolous. Whether or not in effect there are "substantial grounds" for believing that Muscat will 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 is a matter into which the First Hall of the Civil Court (and possibly after it the Constitutional Court) will have to delve. The Court, therefore, having seen 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 refers 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**."

e. The First Hall of the Civil Court considered the question thus referred to it, and on the 8 January of this year ruled that "…it has not been established that the treatment to which the applicant (Muscat) 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." It further concluded, with reference to the question referred to it, that should his appeal before the Court of Criminal Appeal be dismissed on other grounds, "the extradition can proceed".

**The judgment of the first Court**

**2.** The relevant parts of the judgment of the first Court are the following:

"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).

"Respondent[1] claims that the literature exhibited by appellant does not constitutes 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 date as entered, the reliability of the data itself etc.

[1] That is the Commissioner of Police.

“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.

“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 25th 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 5th October 2006 and 7th 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.

“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.

"Respondent exhibited in Court Document AG drawn up by the Office of the Governor of the State of California dated 19th 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.

"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.

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

**The appeal**

**3.** Appellant Muscat, in his application of appeal, lists several grievances against the judgment of the 8 January 2007. These grievances can be summarised – not without some difficulty in view of the rather incoherent and overlapping way in which arguments are sometimes presented in the said application – as follows: (i) the first Court "erroneously concluded that a consistent pattern of gross, flagrant or mass violations of human rights is a *sine qua non* for the appellant's claims to be successful, when this is clearly not the case under international law"; (ii) that Court also failed to take account of the other limb of the provisions under examination, namely the prohibition against other cruel, inhuman or degrading treatment or punishment; (iii) that the first Court summarily dismissed the question of overcrowding by saying that it cannot be considered as tantamount to torture or to degrading or inhuman treatment, and in this respect he makes reference to the decisions of the European Court of Human Rights in the **Dougoz**[2] and **Peers**[3] cases, both against Greece; (iv) that the first Court erred when it expected him to indicate the specific name and location of the penitentiary to which he was going or of the penitentiary where torture is practised; (v) that generally speaking the first Court did not properly evaluate the evidence presented by him, in that he contends that he has presented sufficient evidence to show that there is a clear and present danger that, if extradited, he will be subjected to either torture or else inhuman and/or

[2] **Dougoz v. Greece** 6 March 2001.
[3] **Peers v. Greece** 12 April 2001.

degrading treatment; (vi) that Californian legislation is incompatible with international law in that it deals with torture as a mere misdemeanour rather then a felony, while no crime of torture exists at a Federal level; (vii) that Governor Scwarzenegger's assurances[4] contrast sharply with his own declarations that there is a crisis in the penitentiary system of California, and that therefore those assurances are not sufficient to ensure compliance with Article 3 of the Convention; (viii) that the first Court ignored "other important precedents, case-law and international jurisprudence substantiating the appellant's grievances".

**Court's assessment**

**4.** This court has carefully examined all the documents and evidence submitted by appellant and by the Commissioner of Police. The question of the parameters of the inquiry and assessment that a court must make when faced with a claim that deportation would result in a breach of Article 3 of the Convention has recently been dealt with by this Court in its judgment of the 19 February 2007 in the case **Luiza Merujian Zakarian et v. The Minister of Home Affairs et**. Although that case dealt with deportation, the principles are equally applicable, in a general way, to extradition. In that judgment of the 19 February 2007, to which reference is being made as far as the case-law of the ECHR is concerned in order to avoid unnecessary repetition, this Court noted in particular that:

**"… it must be shown not merely that in the country to which a person is going to be sent the political situation is unsettled, or that there is violence or even political violence to which that person, like other persons, might be subjected; what must be shown, even if at least on a balance of probabilities, is that the applicant faces a specific, personal and significant risk of such ill-treatment which would, in its severity or extent (or because of the personal circumstances of the same said applicant) amount to**

[4] See document AG1 at fol. 17 and 18.

**torture or to inhuman or degrading treatment or punishment."**

**5.** In connection with extradition in particular, it has been stated that:
**"There is no right [under the Convention] not to be extradited. Principally issues arise under the Convention regarding the detention pending extradition and regarding allegations of breaches of human rights which will occur in the receiving State if the extradition is carried out. Where on proposed extradition an applicant faces a real risk of treatment contrary to Art. 3 in the receiving State, the responsibility of the expelling State is engaged and a violation arises. The principle was established in *Soering v. United Kingdom* [July 7, 1989], where conditions on death row in Virginia were found to expose the applicant, facing two charges of capital murder, to the real risk of inhuman and degrading treatment. The risk must relate to a treatment which reaches 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…The way in which the extradition is enforced, even if involving the use of tranquillizers, has not yet been found to go beyond the inevitable trauma involved in the legitimate enforcement of an extradition decision. The Court has emphasised that the prohibition contained in Article 3 is absolute. Therefore, if there is a real risk of such prohibited treatment in the receiving State, no principle of the international enforcement of justice would justify implementing the extradition. 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 extradition to those of the State requested."** [5]

[5] Reid, K. ***A Practitioner's Guide to the European Convention on Human Rights*** 2nd ed. Sweet & Maxwell (London) 2004, pp. 299-230, paras. IIB-147 – IIB-148, emphasis added.

**6.** This Court is of the view that the First Hall of the Civil Court made a substantially correct evaluation of the evidence submitted to it. All the evidence submitted – including documents submitted before the Court of Criminal Appeal and which were also considered by the first Court – even when these documents are taken at face value (that is without going into the question of how they were drawn up and whether those who drew them up had first hand knowledge of the facts recounted) does not convince this Court on a balance of probabilities, that if appellant were to be extradited to the United States he faces a specific, personal and significant risk of torture or of inhuman or degrading treatment or punishment. What the evidence discloses is that the penitentiary system of the State of California (including those penitentiaries where mentally ill patients are detained) suffers from problems which are not uncommon even on this side of the Atlantic – overcrowding, shortage of staff and the occasional aberrant or outright illegal behaviour of members of the prison staff. This is counterbalanced, at least as far as penitentiaries within the United States are concerned[6], by a highly sophisticated judicial system, at both State and Federal level, which can grant adequate remedies to prevent abuses of human rights even in prison and provide adequate redress where such abuses have occurred, as well as by numerous watch-dog organisations geared to ensuring the proper treatment of prisoners and to defending their rights. In short, the first court was perfectly correct in stating that the evidence does not disclose in the State of California "the existence…of a consistent pattern of gross, flagrant or mass violations of human rights". However, as appellant quite rightly points out in his first grievance, this expression – "consistent pattern of gross, flagrant or mass violations of human rights" – is unfortunately too generic an expression to be used in examining a case like appellant's. To engage the liability of a State signatory to the European Convention in terms of Article 3 (and in case of Malta also in terms of Article 36(1) of the

[6] The position appears to be quite different with regards to Guantanamo and military prisons outside the territory of the United States – to which a substantial part of the report, Dok. LB (fol. 34), is dedicated; see in particular fol. 34 to 66.

Constitution) it is not necessary to show any pattern of behaviour in violation of Article 3 or violation on a grand or mass scale – it is sufficient if the evidence convinces this court that the circumstances (including the personal circumstances of appellant) are such that if Muscat is sent to California (or to some neighbouring State of the US for that matter) 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. This Court is not so convinced and this for three reasons. The first reason is that, as has already been mentioned, if extradited, appellant will be transferred to a State with a highly sophisticated and effective legal system which can under normal circumstances guarantee that his fundamental human rights will be respected, and no evidence has been adduced to suggest that the said legal system is generally ineffective. Secondly no evidence has been produced to suggest that the documented incidents of ill-treatment in Californian jails are the result of this ill-treatment being, deliberately or *de facto*, institutionalised. Thirdly, this Court, like the first Court before it, must necessarily take due account of the assurances given by the Governor of the State of California, in the document exhibited at fol. 17-18 of the record, and in particular of the second paragraph and the beginning of the third paragraph of that document which read as follows: *"It is my understanding that Mr Muscat has challenged his extradition back to California on the basis that serving a prison term in California would violate his human rights under European Law. As Governor of the State of California, I am bound by and subscribe to the Eighth Amendment of the United States Constitution and Article I, Section 17 of the Constitution of California, both of which prohibit cruel and unusual punishment of prisoners in the State of California. Every inmate in a California state prison is protected by the state and federal Constitutions, and by federal and state laws that not only prohibit cruel and unusual punishment, but provide for the inmates' health and welfare."* For these reasons, the second, fourth, seventh and eight grievances (summarised above, para. **3**) and, as the limited extent explained above, the first grievance, are being dismissed.

**7.** Even the third grievance – regarding the interpretation given by the first Court to the question of overcrowding – is unfounded. In its judgment the first Court did not say, as appellant seems to be implying, that overcrowding is not a relevant consideration when considering whether a person faces a specific, personal and significant risk of torture or of inhuman or degrading treatment or punishment. What that Court stated was:

**"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. In the **Dougoz** case the ECHR had this to say on the question of overcrowding:
**"46. The Court considers that conditions of detention may sometimes amount to inhuman or degrading treatment. In the "Greek case" (applications nos. 3321/67, 3322/67, 3323/67 and 3344/67, Commission's report of 5 November 1969, Yearbook 12) the Commission reached this conclusion regarding overcrowding and inadequate facilities for heating, sanitation, sleeping arrangements, food, recreation and contact with the outside world. When assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as**

**of specific allegations made by the applicant. In the present case, although the Court has not conducted an on-site visit, it notes that the applicant's allegations are corroborated by the conclusions of the CPT report of 29 November 1994 regarding the police headquarters in Alexandras Avenue. In its report the CPT stressed that the cellular accommodation and detention regime in that place were quite unsuitable for a period in excess of a few days, the occupancy levels being grossly excessive and the sanitary facilities appalling. Although the CPT had not visited the Drapetsona detention centre at that time, the Court notes that the Government had described the conditions in Alexandras as being the same as at Drapetsona, and the applicant himself conceded that the former were slightly better with natural light, air in the cells and adequate hot water.**

**"1. Furthermore, the Court does not lose sight of the fact that in 1997 the CPT visited both the Alexandras police headquarters and the Drapetsona detention centre and felt it necessary to renew its visit to both places in 1999. The applicant was detained in the interim, from July 1997 to December 1998.**

**"2. In the light of the above, the Court considers that the conditions of detention of the applicant at the Alexandras police headquarters and the Drapetsona detention centre, in particular the serious overcrowding and absence of sleeping facilities, combined with the inordinate length of the period during which he was detained in such conditions, amounted to degrading treatment contrary to Article 3."**

And in the **Peers** case it observed:
**"3. Nevertheless, the Court recalls that the applicant had to spend at least part of the evening and the entire night in his cell. Although the cell was designed for one person, the applicant had to share it with another inmate. This is one aspect in which the applicant's situation differed from the situation**

**reviewed by the CPT in its 1994 report. Sharing the cell with another inmate meant that, for the best part of the period when the cell door was locked, the applicant was confined to his bed. Moreover, there was no ventilation in the cell, there being no opening other than a peephole in the door. The Court also notes that, during their visit to Koridallos, the delegates found that the cells in the segregation unit were exceedingly hot, although it was only June, a month when temperatures do not normally reach their peak in Greece. It is true that the delegates' visit took place in the afternoon, when the applicant would not normally be locked up in his cell. However, the Court recalls that the applicant was placed in the segregation unit during a period of the year when temperatures have the tendency to rise considerably in Greece, even in the evening and often at night. This was confirmed by Mr Papadimitriou, an inmate who shared the cell with the applicant and who testified that the latter was significantly physically affected by the heat and the lack of ventilation in the cell.**

**"4. The Court also recalls that in the evening and at night when the cell door was locked the applicant had to use the Asian-type toilet in his cell. The toilet was not separated from the rest of the cell by a screen and the applicant was not the cell's only occupant.**

**"5. In the light of the foregoing, the Court considers that in the present case there is no evidence that there was a positive intention of humiliating or debasing the applicant. However, the Court notes that, although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3 (see *V. v. the United Kingdom* [GC], no. 24888/94, § 71, ECHR 1999-IX).**

**"6. Indeed, in the present case, the fact remains that the competent authorities took no steps to improve the objectively unacceptable conditions of the**

**applicant's detention. In the Court's view, this omission denotes lack of respect for the applicant. The Court takes into account, in particular, that, for at least two months, the applicant had to spend a considerable part of each 24-hour period practically confined to his bed in a cell with no ventilation and no window, which would at times become unbearably hot. He also had to use the toilet in the presence of another inmate and be present while the toilet was being used by his cell-mate. The Court is not convinced by the Government's allegation that these conditions did not affect the applicant in a manner incompatible with Article 3. On the contrary, the Court is of the opinion that the prison conditions complained of diminished the applicant's human dignity and aroused in him feelings of anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical or moral resistance. In sum, the Court considers that the conditions of the applicant's detention in the segregation unit of the Delta wing of Koridallos Prison amounted to degrading treatment within the meaning of Article 3 of the Convention.**

**"There has thus been a breach of this provision."**

**8.** In the instant case there is nothing to suggest that, if appellant were to be extradited, there is a real or significant possibility that he will end up in situations anywhere similar to those described above. Indeed, even if one were to take the document at fol. 161 of the records – the article by Jennifer Warren of the L.A. Times – at face value, it is clear that measures are being taken to remedy the situation, with lawyers poised to defend inmates' rights if involuntary (that is mandatory), as opposed to voluntary, transfers to other jails are effected by the authorities. This grievance is therefore also being dismissed.

**9.** As to the fifth grievance, this has in part been dealt with in para. 6. However in his appeal application under this grievance appellant puts in issue his "personal

circumstances", notably his physical and mental problems, and the fact that, as a foreigner, the extradition is even more likely to affect him negatively. This Court must first make it clear that it is in no way convinced that Muscat suffers from any mental illness or physical disability which cannot be adequately handled in any ordinary penitentiary – in other words, it would be quite surprised if because of the depression (now under control) which assailed him as soon as he realised that he was going to be extradited, he were to be sent to a mental institution. His "personal circumstances" in this respect do not add anything substantial to the equation of whether or not there is a significant risk of his being subjected to treatment proscribed by Article 3. The fact that Muscat would be a "foreigner" in a Californian jail likewise cannot be given much weight – otherwise most extraditions would not take place. Finally there is the question of his being held in remand, or eventually, if convicted, being incarcerated in connection with child abuse offences. It is trite knowledge that persons accused or convicted of certain offences run a higher risk of being picked upon by other inmates and of having a harder time than those accused or convicted of other offences. Again, however, this does not add much to the equation, as this court is convinced that should Muscat's extradition be proceeded with, he will not be the first, last or only person in a Californian jail charged with similar offences out of a prison population running into six figures. There is nothing in the evidence to suggest that this category of prisoners are not adequately looked after in Californian jails. This grievance, therefore, is also being dismissed.

**10.** Finally, the Court does not consider appellant's sixth grievance as being well founded. The fact that California considers torture a misdemeanour and not a felony, and that there is no Federal crime of torture in the US does not in any way raise the likelihood that appellant, if extradited to California, will be subjected to torture or other inhuman or degrading treatment or punishment, even in the hypothesis posited by appellant – a hypothesis which this Court is not called to rule upon – that the absence of such a Federal offence is in breach of the international

obligations undertaken by the US. This grievance is actually frivolous.

## Decision

**11.** For these reasons, the Court dismisses the appeal and confirms the judgment of the first Court. All costs, of both first and second instance, are to be borne by appellant. The Court further orders that a copy of this judgment be forthwith transmitted by the Registrar, Civil Courts and Tribunals, to the Registrar, Criminal Courts and Tribunals who is to bring it to the attention of the Court of Criminal Appeal.

**< Sentenza Finali >**

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