



Bundesverfassungsgericht

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Successful constitutional complaints against surrender to Romania for the purposes of criminal prosecution and the execution of a custodial sentence

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Order of 1 December 2020

[2 BvR 1845/18](#), [2 BvR 2100/18](#)

In an order published today, the Second Senate of the Federal Constitutional Court held that the surrender to Romania for the purposes of criminal prosecution, or of the execution of a sentence, that was considered to be permissible by the ordinary courts violates the complainants' fundamental right under Art. 4 of the Charter of Fundamental Rights of the European Union.

The ordinary courts failed to recognise the significance and scope of the fundamental right under Art. 4 of the Charter, which is relevant here, and thus did not have sufficient regard to the duty to investigate arising therefrom. The courts did not sufficiently assess and clarify whether there is a specific risk that the complainants will be subject to inhuman or degrading detention conditions in Romania once they are surrendered.

Facts of the case:

In the first case, a European arrest warrant for the purpose of executing a custodial sentence of five years for attempted murder in Romania was issued against complainant no. 1, a Romanian national. The Berlin Higher Regional Court (*Kammergericht*) ordered detention pending extradition. In the course of the proceedings, the Romanian authorities informed the Berlin Public Prosecutor General's Office that complainant no. 1 would initially be detained – for a quarantine period of 21 days – in a shared prison cell with at least 3 m² of personal space. The subsequent imprisonment would, in all likelihood, be executed in closed detention where the complainant would also be detained in multi-occupancy prison accommodation with a personal space of 3 m². The Romanian authorities stated that all cells in this prison are equipped with toilets, sinks and showers. Each has natural light from a window, artificial white neon light as well as a table, chairs and clothes hooks. Cold drinking water is available anytime; hot water is available three times a week in accordance with a bathing schedule set out by the prison administration. All rooms are disinfected regularly. After one fifth of the sentence is served, the convicted person will be reassessed. If he is transferred to an open detention regime, he will be provided with 2 m² of non-shared personal space. These prison cells are equipped with toilets, sinks, shelves and mirrors. Five of eight prison units also have showers. There is sufficient light, natural air supply, and the rooms are disinfected on a regular basis. In semi-open detention, the doors are open during daytime and prisoners may move about unaccompanied within the prison building and prison yard. After the evening roll call at 7 p.m., there is time for individual leisure activities within the cells until lights out at 10 p.m.

The Berlin Higher Regional Court declared the extradition of complainant no. 1 to be permissible. It stated that the conditions in (semi-)open detention were not relevant given that it is unclear whether he would ever be transferred. The court also stated that the review of detention conditions in prisons where the complainant might later be detained falls solely to the courts of the requested Member State. The court further stated that the detention conditions during the quarantine and in closed detention are in line with the minimum requirements under Art. 4 of the Charter and Art. 3 of the European Convention on Human Rights given that a minimum of 3 m² of cell space per prisoner is provided.

In the second case, a European arrest warrant for the purpose of conducting a criminal prosecution for the aiding and abetting of illegal immigration and illegal stay was issued by a Romanian court against complainant no. 2, an Iraqi national. The Celle Higher Regional Court ordered detention pending extradition. The Celle Public Prosecutor General's Office requested information from the Romanian authorities on the detention conditions to be expected with regard to remand detention and the execution of a potential custodial sentence. The Office also requested that guarantees be provided with respect to detention conditions for all types of detention (closed, semi-open and open) satisfying the requirements under Art. 3 of the Convention. The Romanian authorities informed the Public Prosecutor General's Office that complainant no. 2's remand detention would be executed in a detention centre where he will have at least 4.15 m² of personal space including bed and furniture. The rooms can be aired and heated. Detainees have access to running water and sanitary facilities and are allowed to take walks outside within the limits set out in statutory provisions. It was as yet

unclear in which prison complainant no.2 would be detained in case of a final conviction. In a second letter, the Public Prosecutor General's Office again asked the Romanian authorities to provide guarantees in respect of making at least 3 m² of personal space available to the complainant following a conviction.

The Higher Regional Court declared the extradition of complainant no. 2 to be permissible, without awaiting the reply of the Romanian authorities to the second request made by the Public Prosecutor General's Office. The court stated that a real risk of detention conditions violating human rights could be ruled out in the specific case. It further stated, that in view of the mutual trust between Member States, the judicial authorities of the requested Member State were not obliged to also review the detention conditions in prisons where the complainant might be detained later on.

The complainants assert a violation of their fundamental rights under Art. 1, Art. 2(1), Art. 2(2) second sentence, Art. 19(4) and Art. 101(1) second sentence of the Basic Law (*Grundgesetz – GG*).

Key considerations of the Senate:

The constitutional complaints are admissible and well-founded. The challenged decisions violate the complainants' fundamental rights under Art. 4 of the Charter.

1. The matter at issue in the initial proceedings concerns an area fully determined under EU law. Therefore, the fundamental rights of the Basic Law are not applicable as the direct standard of review. It is the EU fundamental rights, as they are stipulated in particular in the Charter of Fundamental Rights of the European Union, that are relevant here. When interpreting the EU fundamental rights, it is necessary to draw on both the human rights guaranteed by the European Convention on Human Rights and specified by the European Court of Human Rights, and the fundamental rights as reflected in common constitutional traditions and shaped by the constitutional and supreme courts of the Member States.

2. According to the established case-law of the Court of Justice of the European Union, the court dealing with a surrender request in surrender proceedings initiated by the issuance of a European arrest warrant must assess whether the person to be surrendered is in specific risk of inhuman or degrading treatment within the meaning of Art. 4 of the Charter. This must be assessed *ex officio* by the competent (ordinary) court in two steps.

The first step relates to the general detention situation; in this first stage, the court is required to assess on the basis of objective, reliable, precise, and properly updated information whether there are systemic or general deficiencies with regard to detention conditions in the prisons of the issuing Member State.

The second step relates to the situation of the person concerned; in this second stage, the court must diligently assess whether the specific circumstances include reasons, confirmed by facts, to assume that the person subject to surrender will be at a real risk of inhuman or degrading treatment within the meaning of Art. 4 of the Charter following their surrender to the issuing Member State given the conditions of their detention. This requires an up-to-date and thorough assessment of the situation and must be based on an overall evaluation of the relevant detention conditions that are to be expected in the specific case.

According to the case-law of the Court of Justice of the European Union and the European Court of Human Rights, with regard to the space available to a prisoner in multi-occupancy accommodation, it must be distinguished whether this space is below 3 m², between 3 m² and 4 m² or above 4 m² when conducting the required overall evaluation of detention conditions.

Where the personal space in a shared cell is below 3 m², there is a strong presumption of a violation of Art. 4 of the Charter or Art. 3 of the Convention respectively.

Where a prisoner in a shared cell has between 3 m² and 4 m² of personal space, there may be a violation of Art. 4 of the Charter or Art. 3 of the Convention respectively if there are also other deficiencies in the detention conditions, such as lack of access to fresh air and daylight, bad ventilation, room temperature that is too high or too low, lack of privacy with respect to toilets or bad sanitary or hygienic conditions.

Where more than 4 m² of personal space are provided in a shared cell, the other aspects of the detention conditions remain relevant to the necessary overall evaluation.

3. The two-step assessment imposes a duty to investigate on the court dealing with the surrender request. According to the case-law of the Court of Justice of the European Union, Art. 4 of the Charter entails a duty to verify, by obtaining supplementary information, in the specific case whether the fundamental right under Art. 4 of the Charter of the person to be surrendered is respected.

The court must ask the issuing Member State to promptly provide all necessary, supplementary information pertaining to the conditions under which the person concerned will be detained. The issuing Member State must provide this information within the time limit set by the requested Member State. Where it cannot be ruled out within reasonable (*angemessen*) time that there might be such risk of inhuman or degrading treatment, the court must decide whether the transfer proceedings are to be terminated.

4. These standards applied by the Court of Justice of the European Union when interpreting Art. 4 of the Charter are in line with Art. 1(1) GG both with regard to the minimum requirements for detention conditions in the requesting state and with regard to the duty to investigate related thereto incumbent upon the court dealing with the transfer request. In the context at hand, it is thus not necessary to draw on Art. 79(3) GG in conjunction with Art. 1(1) GG to limit the precedence of application of EU law through a review on the basis of constitutional identity.

5. According to these standards, the challenged decisions do not withstand constitutional review given that they failed to recognise the significance and scope of the fundamental right under Art. 4 of the Charter and did not have sufficient regard to the duty to investigate arising therefrom.

a) The Berlin Higher Regional Court, in the second stage of the assessment, only conducted an insufficient overall evaluation of the relevant detention conditions.

It is insufficient for the necessary overall evaluation of detention conditions to merely cite the communicated minimum share of cell space of 3 m² per person, given that the personal space available to a prisoner is a significant, but not the sole factor to take into consideration. Where the personal space in multi-occupancy prison accommodation is 3 m² or between 3 m² and 4 m² respectively, degrading or inhuman detention conditions within the meaning of Art. 4 of the Charter may still arise if there are additional deficient detention conditions apart from the lack of space. Based on its duty to investigate, the Berlin Higher Regional Court should have requested supplementary information on the other detention conditions from the Romanian authorities. Moreover, the court was wrong to limit its assessment to the first two detention regimes (quarantine and closed detention). When conducting the required overall evaluation of detention conditions, the Berlin Higher Regional Court should have considered that long-term detention in a shared cell with only 2 m² of personal space following a sufficiently probable transfer to semi-open detention is incompatible with Art. 4 of the Charter.

b) The Celle Higher Regional Court also failed to satisfy its duty to investigate under Art. 4 of the Charter at the second stage of the assessment.

Because of the questionable detention conditions, the Public Prosecutor General's Office had requested supplementary information from the Romanian authorities and asked them to provide a guarantee in respect of the execution of the sentence in case of a conviction of complainant no. 2. The Romanian authorities had not yet replied to the second request for information sent by the Public Prosecutor General's Office. Therefore, the Higher Regional Court should have set a specific time limit for the Romanian authorities to provide the requested supplementary information, and have deferred the decision on the permissibility of the surrender until reception of the reply. If it had not received a reply within reasonable time, the Higher Regional Court would have had to decide on the termination of the surrender proceedings.
