FCC: EU Charter is Review Standard for Poor Prison Conditions

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eucrim
European Law Forum: Prevention • Investigation • Prosecution

News

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Published in
2020, Vol. 15(4) eucrim pp 293 – 294
ISSN: 1862-6947
https://eucrim.eu

On 1 December 2020, the German Federal Constitutional Court (FCC) backed two constitutional complaints against surrender from Germany to Romania. The FCC found that the ordinary courts failed to sufficiently assess and clarify whether there is a specific risk of inhuman and degrading treatment due to the detention conditions in Romania once the complainants have been surrendered. Therefore, the courts deciding on the surrender upon receipt of EAWs from Romania failed to recognise the significance and scope of the fundamental right not to receive inhuman treatment under Art. 4 of the EU Charter of Fundamental Rights (CFR) and disregarded their duty to investigate (Bundesverfassungsgericht, decision of 1 December 2020, 2 BvR 1845/18, 2 BvR 2100/18; a press release in English is also provided).

Facts of the case(s):

In the first case, the Higher Regional Court of Berlin was satisfied with the information given by the Romanian authorities that the defendant – a Romanian national sentenced to five years of imprisonment for attempted murder – would have a minimum of 3m² of cell space; whether he would subsequently be transferred to semi-open detention with 2m² of non-shared personal space was deemed irrelevant.

In the second case, the Higher Regional Court of Celle/Lower Saxony ordered the surrender of an Iraqi national who was prosecuted for aiding and abetting illegal immigration in Romania. The Romanian judicial authorities informed only the German counterpart about the prison conditions in remand detention. The court in Celle ignored a pending request from the Public Prosecutor General's Office to provide guarantees in respect of the defendant's detention following conviction and decided that surrender was admissible. It argued that a real risk of detention conditions violating human rights could be ruled out in the specific case. It further held that a review of the conditions in prisons in which the individual might be detained at a later point in time is not necessary due to the principle of mutual trust between the EU Member States.

Findings of the FCC:

The FCC reminded both Higher Regional Courts that they have to apply the two-step procedure established by the CJEU in *Aranyosi and Căldăraru ex officio* (→ eucrim 1/2016, 16) if they assess possible infringements of Art. 4 CFR in cases of alleged, insufficient detention conditions: (1) identification of whether there are systemic or general deficiencies with regard to detention conditions in the issuing Member State; (2) diligent assessment of whether the requested person would be at a real risk of inhuman or degrading treatment within the meaning of Art. 4 CFR after his surrender to the issuing State.

The FCC calls to mind the differentiated case law of the CJEU and ECtHR regarding the space available for prisoners and the required overall evaluation of detention conditions by the executing judicial authority.

Addressing the Higher Regional Court of Berlin, the FCC clarified that it must not only take into account the personal space in prison cells (3m²) in the case at hand but also other factors that may be deficient and may fail to comply with Art. 4 CFR. In addition, the fact that the Berlin court could not negate probable later detention in a shared cell (with only 2m²) may also be incompatible with Art. 4 CFR.

The FCC reproached the Higher Regional Court of Celle, because the court had to set a specific time limit for the Romanian authorities to provide the requested supplementary information on the detention conditions after conviction and defer any decision on the admissibility of the surrender until receipt of that reply. If it had not received a reply within a reasonable time, the Celle court would have had to decide on the termination of the surrender proceedings.

Put in focus:

Two aspects make the FCC's decision of 1 December 2020 remarkable:

Firstly, the FCC accepts for the first time in relation to European criminal law that the fundamental rights of the German constitution (the Basic Law – *Grundgesetz*) are not the yardstick for examination but instead the fundamental rights of the European Union (here: Art. 4 CFR). It argues that 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. In this, the deciding Second Senate of the FCC aligns itself with a judgment of the First Senate ruling in 2019 in relation to the right to be forgotten in the area of data protection law, namely that the domestic application of legislation that has been fully harmonised by EU law must be reviewed in the light of EU fundamental rights.

The Second Senate, however, clarified, as follows: "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."

Secondly, the FCC stated that, in the present context, it is not necessary to limit the precedence of application of EU law through a review on the basis of constitutional identity, because the standards applied by the CJEU when interpreting Art. 4 CFR are in line with Art. 1 of the Basic Law (the right to human dignity) when minimum requirements of detention conditions are assessed. Initial comments classify this statement as a turning point when juxtaposed with the strong "identity review" judgment handed down in December 2015 (→ eucrim 1/2016, 17). The FCC now seems to accept the concept of fundamental rights protection as established by the CJEU in *Arranyosi and Căldăraru* and calls on the German ordinary courts to take this approach to heart.

In sum, one could conclude that the present FCC ruling now strikes a more conciliatory tone in the longstanding battle for sovereignty when interpreting fundamental rights in Europe. It is much more "integration-friendly" than previous FCC rulings. The relationship between the judges in Karlsruhe and their colleagues in Luxembourg had cooled noticeably after the FCC's decision in May 2020, which declared a CJEU ruling on the Public Sector Purchase Programme (PSPP) of the European Central Bank "*ultra vires*" and thus not applicable in Germany. Advocate General *Tanchev* bashed this *ultra vires* approach in a recent opinion that actually deals with the independence of the appointment procedure of judges to the Polish Supreme Court (Case C-824/18). According to the AG, the FCC's *ultra vires* approach undermined the rule of law in the EU, which is a *conditio sine qua non* to integration. Whether the relationship between the FCC and the CJEU will now be redefined remains to be seen.

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The project is co-financed by the Union Anti-Fraud Programme (UAFP), managed by the European Anti-Fraud Office (OLAF).

Co-funded by the European Union