

Federal Constitutional Court Calls for German Courts to Consult CJEU on Detention Conditions



News

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German courts are still struggling with the problem as to the extent to which persons can be surrendered if detention conditions in another EU country risk violating the ban on inhuman and degrading treatment in accordance with Art. 3 ECHR.

This question was also the subject of a constitutional complaint before the Federal Constitutional Court (FCC) by a person sought via European Arrest Warrant. He was to be surrendered to Romania because he was suspected of having committed property and document fraud offences. The Higher Regional Court of Hamburg had initially held surrender admissible and dismissed the objection that the suspect may face detention conditions in Romania that are not in line with the ECHR. It mainly referred to the CJEU's judgment of 5 April 2016 in the *Aranyosi/Căldăraru* case and argued that the required test of a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State cannot be affirmed. It further argued that, although it is true that the personal space in prison cells is below what is required by the ECtHR, the size of the space is only an indicator. German courts should make an "overall assessment" of the detention conditions and consider the "functioning of criminal justice" that would be impeded if Germany refused extradition and the offender went unpunished. This would result in "safe havens" if persons could no longer be surrendered to certain EU Member States.

The FCC was expected to take up the case in order to further refine its approach to the "identity review" of the European Arrest Warrant as set out in its leading [decision of 15 December 2015](#) and further developed in an [order of 6 September 2016](#).

In its decision of 19 December 2017, the FCC did not, however, rule on the substantial issues of the case but instead blamed the Higher Regional Court for not having made a reference for a preliminary ruling to the CJEU. This failure is considered a violation of the right to one's lawful judge (Art. 101 para. 1 sentence 2 of the Basic Law (*Grundgesetz*)).

The FCC mainly argued that it cannot be discerned from the case law of the CJEU (in particular in *Aranyosi/Căldăraru*) which specific minimum standards derive from Art. 4 CFR in relation to detention conditions and what determines the applicable review of detention conditions under European Union law. Hence, the case law of the CJEU is incomplete, and it is up to the judges in Luxembourg to further develop the law.

Moreover, the FCC observed that the Higher Regional Court of Hamburg had assessed the case law of the ECtHR on Art. 3 ECHR selectively. The FCC also considered it a mistake that the Higher Regional Court

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referred to the functioning of criminal justice (“no safe havens”) as an argument in favour of surrender, since it the European courts must clarify whether this issue plays a role within the framework of absolute guarantees, e.g., Art. 4 CFR and Art. 3 ECHR respectively.

The order of the FCC in the present case can be retrieved [here](#). A press release is available in [German](#) and [English](#).

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