German Court: Surrender of Catalan Leader Puigdemont Possible But No Serious Flight Risk

eucrim
European Law Forum: Prevention • Investigation • Prosecution

News

Thomas Wahl

The surrender of *Carles Puigdemont*, who promoted the independence of Catalonia from Spain, became a matter for German authorities. On 25 March 2018, while returning to Belgium from a trip to Finland, *Puigdemont* was apprehended north of Germany, near the border to Denmark, by the German police on the basis of a European Arrest Warrant that had been reissued against him two days earlier.

AUTHOR

Thomas Wahl

Senior Researcher
Max Planck Institute for the Study of Crime, Security and Law

ISSN: 1862-6947
https://eucrim.eu

The EAW was first based on the criminal offence of "rebellion." Spanish authorities argued that Puigdemont insisted on carrying out a referendum on independence despite warnings of violent confrontations with the Spanish Federal Police. In fact, violent confrontations occurred in several Catalan cities between people who wished to vote and the Spanish police.

Secondly, Spanish authorities sought surrender for "corruption" in the form of embezzlement of public funds. This accusation was, in essence, based on the fact that a budget law had been enacted by the parliament of Catalonia obliging the Catalan government to supply public funds for the referendum on the political future of Catalonia.

The Prosecutor General at the Higher Regional Court of Schleswig applied for ordering extradition detention against *Puigdemont*. On 5 April 2018, the first senate of the Court only partially endorsed the Prosecutor General's application. Although it ordered extradition detention, it immediately stayed the arrest warrant's execution and set out certain conditions vis-à-vis *Puigdemont*. *Puigdemont* was released on bail (set at €75,000) and must report to police once a week. The full text of the decision is available here (German only). A press release is available in English and in German.

The first senate of the Higher Regional Court for the State of Schleswig-Holstein argued that this decision was justified, since a surrender based on the most severe offence of "rebellion" (for which Spanish law provides imprisonment up to 30 years) would *ab initio* not be granted. This does not hold true for the accusation of "corruption" in the sense of "embezzlement" of public funds.

In its reasoning, the Higher Regional Court, by way of a preliminary remark, first states the all German authorities involved acted lawfully; in particular was the German police obliged to apprehend the person sought on the basis of a valid EAW.The Higher Regional Court further set out that – according to German law – extradition detention can only be ordered if it does not appear *ab initio* that extradition will not be granted (Sec. 15(2) of the German Act on International Cooperation in Criminal Mattes [AICCM] – *Gesetz über die Internationale Rechtshilfe in Strafsachen*).

In this context, the Higher Regional Court had to deal with the decisive question of whether the requirement of double criminality was fulfilled for the accusation of "rebellion". Since the accusation does not fall under the list of categories of offences defined in Art. 2(2) FD EAW for which double criminality does not need to be established (Sec. 81 No. 4 AICCM), the Higher Regional Court had to apply Sec. 3(1) AICCM. This provision stipulates that extradition shall not be granted unless the offence is an unlawful act under German law or unless *mutatis mutandis* the offence would also constitute an offence under German law. The latter – the German law uses the notion of "*sinngemäße Umstellung des Sachverhalts*" – means that a recharacterization or reorganization of the facts must "*mutatis mutandis*" match a provision of German criminal law.

Hence, the Higher Regional Court stated that the given facts must be conceived as if the prime minister of a German federal state intends to lead its state into independence from the federation and organizes a referendum on independence for which the citizens of his state are entitled to vote. Furthermore, it must be assumed that the German prime minister knew that the Federal Constitutional Court considered the planned referendum unconstitutional, and it must have been anticipated pursuant to police warnings that confrontations may occur between voters and police forces on the election day.

Given, the Higher Regional Court held that Puigdemont's behaviour may fall under the German criminal offense of high treason (Sec. 81 of the German Criminal Code), but the elements of crime of this provision are not fulfilled. This provision necessitates that a person undertakes, by force or through threat of force, to undermine the continued existence of the Federal Republic of Germany or to change the constitutional order based on the Basic Law of the Federal Republic of Germany.

The Higher Regional Court pointed out that the element of "force" (*Gewalt*) could not be affirmed. Its interpretation was set out by a fundamental decision of the Federal Court of Justice (*Bundesgerichtshof*) in 1983. As a result, to assume "force," it does not suffice that an actor threatens with or applies force in order to make a constitutional institution behave in a desired way. Instead, it is necessary that the force that is being applied against others puts so much pressure on the constitutional institution that this pressure is suitable to bend the institution's opposing will. This was not the case with *Puigdemont* because the acts of violence – according to their nature, scope, and effect – were not capable of putting so much pressure on the Spanish government that it would have considered itself forced "to surrender to the demands of the perpetrators of the violence."

As regards the accusation of "corruption," according to Art. 432, 252 of the Spanish Criminal Code, the Higher Regional Court held that it is, in principle, correct that double criminality does not need to be established, since "corruption" falls within the categories of offences under Art. 2(2) FD EAW (see above). However, "the ticking of the box of corruption in the EAW form" must be plausible. In this context, the Higher Regional Court demanded further information from the Spanish judicial authorities, since an embezzlement of public funds can only be assumed if the costs for the referendum were actually paid by the Spanish state's budget and the person sought initiated this. The EAW lacked information in this regard. Therefore, extradition for the offense of "corruption" is not excluded *ab initio*.

In conclusion, the Higher Regional Court for the State of Schleswig-Holstein decided that there was indeed a danger that *Mr. Puigdemont* may avoid the extradition proceedings or the execution of the extradition, but this danger did not necessitate the ordering of extradition detention. The danger is greatly reduced because surrender for the accusation of "rebellion" is inadmissible. Therefore, less intrusive means to safeguard the extradition proceedings could be applied in the case at issue, such as the release on bail.

In a subsequent decision of 22 May 2018, the first Senate of the Higher Regional Court rebuffed a new application by the Prosecutor General to give effect to the warrant for extradition detention. The Court held that the submitted information is still insufficient to affirm a danger of *Puigdemont* avoiding the extradition

proceedings. It is now up to the Prosecutor General to file an official application to the Court to decide on the admissibility of surrender. For the full decision, see here. A press release is available in English and in German.

First commentaries on the decision of 5 April 2018 put forward that the Higher Regional Court should have examined further criminal offenses in the German Criminal Code that could have triggered criminal responsibility for *Puigdemont's* conduct. Furthermore, it was criticized that the Higher Regional Court cannot open a backdoor by denying the surrender of "embezzlement of public funds." Whether the referendum was paid by private purse or whether public funds were used can only be assessed by the Spanish authorities. Yet others argued that, in a single legal area governed by the principles of mutual trust and mutual recognition, the executing state is only entitled to examine whether a similar criminal offence exists *in abstracto*. Therefore, the Higher Regional Court had to file a reference for a preliminary ruling to the ECJ in order to clarify the yardsticks for the double criminality requirement.

About eucrim

eucrim is the leading journal which regularly informs about current developments in European criminal and "criministrative" law.
All news items are freely accessible at: https://eucrim.eu/news/
Stay informed by emailing to eucrim-subscribe@csl.mpg.de to receive alerts for new releases of issues.
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