

Decision of the Karlsruhe Higher Regional Court, 10 March 2023 - 301 OAus 1/23

1. Since 1 May 2021, the TRADE AND COOPERATION AGREEMENT (=TCA) between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, has finally entered into force, and applies to extradition requests between the United Kingdom and Europe.

2. After the prosecuted person raised objections against his extradition from Germany to the United Kingdom with regard to the prison conditions in the UK and a possible violation of Art. 3 para. 1 ECHR (prohibition of torture), the German Karlsruhe Higher Regional Court ordered further investigation about the prison condition in the UK. The court requested from the UK government binding guarantees that human rights of the prosecuted person will be respected under international law pursuant to Art. 604 paras. a) and c) TCA in conjunction with Art. 30 para. 1 sentence 2 IRG. The corresponding declarations by the United Kingdom were insufficient, the German Karlsruhe Higher Court declared that the extradition of the prosecuted person is currently inadmissible.

3. The TCA-extradition warrant was revoked. The immediate release of the prosecuted person which was in the prison of Freiburg i. Br., Germany was ordered.

Facts:

The defendant was taken into extradition custody at Freiburg Prison on 28 December 2022, initially on the basis of a provisional extradition custody order of 2 January 2023 and later on the basis of an extradition custody order of 19 January 2023.

The background to this was a TCA arrest warrant (=Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community on the one hand and the United Kingdom of Great Britain and Northern Ireland on the other) issued by the District Court of Westminster on 21 September 2022, which stated that a national arrest warrant had been issued against the defendant by the District Court of Westminster on 16 September 2022 on two counts of conspiracy to supply a Class A controlled drug and four counts of conspiracy to conceal, convert, transfer or remove criminal property under section 1(1) of the Criminal Law Act 1977.

By counsel's brief dated 13 January 2023, the defendant sought a declaration that his extradition to the United Kingdom was inadmissible. In support of this, objections were raised with regard to the specific conditions of detention to be expected of the prosecuted person in the United Kingdom. The prosecuted person was threatened with inhumane accommodation in English prisons and thus with a violation of Art. 3 ECHR, Art. 1 German Basic Law due to the chronic overcrowding of the prison system, staff shortage and massive problems of violence in the prison facilities in the United Kingdom.

The conditions of imprisonment in this case also depend on the respective prison and occupancy density. In some cases, prison sentences are served in Victorian-era prisons that still do not meet minimum requirements for ventilation, light and space. In addition, a large proportion of prisons were massively overcrowded, and a further proportion were run by private providers with the intention of making a profit (in particular by the security company G4S).

In its decision of 19 January 2023, the Senate stated that, before a final decision on the application for admissibility could be made, further factual information would be required with regard to the objections raised by the prosecuted person and the Senate's ex officio duty to clarify the situation with regard to the prison situation in the United Kingdom and Northern Ireland to be specifically expected of the prosecuted person after his extradition, as well as a guarantee announced in the arrest warrant pursuant to Art. 604 a) TCA further clarification of the facts through the collection of guarantees binding under international law pursuant to Art. 604 para. a) and c) TCA in conjunction with § 30 para. 1 sentence 2 IRG is required.

In doing so, the Senate pointed out that the factual clarification with regard to the CPT report of 07 July 2021 cited by the legal counsel (cf. "Report to the United Kingdom Government on the periodic visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 8 to 21 June 2021" of 07 July 2022), in which overcrowding and partly inadequate general conditions of detention in British prisons are identified, is necessary, even if the report of the CPT Committee dates back more than one and a half years and the United Kingdom has already made improvements in some points (cf. the response of the United Kingdom from May 2022: "Response of the United Kingdom Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its periodic visit to the United Kingdom from 8 to 21 June 2021").

In order to justify the necessary clarification of the facts - despite the improvements shown in the United Kingdom's response from May 2022 - the Senate points out that the overcrowding of prisons in England and Wales continues (on 25 November 2022, the British Ministry of Justice [NOMS] determined an overcrowding rate of 106.5%, i.e. 82,176 prisoners with 77,753 prison places, cf. World Prison Brief data at <https://www.prisonstudies.org/country/united-kingdom-england-wales> (accessed on 18 January 2023)).

Then, in the decision of 19 January 2023, the Senate states the following on the required clarification of the facts:

In accordance with the authoritative case-law of the German Federal Constitutional Court (see, for example, BVerfG, order of 04 December 2019 - 2 BvR 1258/19 -, juris), according to which, when determining the indispensable degree of protection of fundamental rights, at least the indispensable guarantees of the ECHR and the case-law of the ECHR - this is an expression of the Basic Law's friendliness towards international law (see BVerfGE .111, 307 et seq, 128, 326 et seq.; see also ECtHR judgment of 20.10.2016, Mursic v. Croatia; 7334/13; ECJ judgment of 15 October 2019 C-128/18, Dorobantu) - the occupation of a prison cell by several prisoners in a cell sizes of less than 3 m² per prisoner is only possible in rare exceptional cases

and between 3 m² and 4 m² only under special conditions. In this respect, a general assurance by the state of destination that is binding under international law does not release the court deciding on the admissibility of an extradition from the obligation to make its own risk prognosis in order to be able to assess the situation in the state of destination and thus the resilience of an assurance (cf. BVerfG, Order of 30 October 2019, 2 BvR 828/19).

Only after providing the requested guarantees and answering the questions set out below is the Senate in a position to draw up its own risk prognosis in order to be able to assess the resilience of the assurances of the authorities of the United Kingdom (cf. German Federal Constitutional Court, Sustaining Chamber Order of 8 December 2021 - 2 BvR 1282/21 -, juris mwN and Interim Order of 25 November 2021 - 2 BvR 2110/21 – with further notes).

In this respect, the Karlsruhe Public Prosecutor General's Office is requested,

to contact the judicial authorities of the United Kingdom to provide the following supplementary guarantees and notifications pursuant to Art. 604 (a) and (c) TCA:

(1) Guarantee that the physical accommodation and other conditions of detention relating specifically to the prosecuted person in all detention facilities receiving the prosecuted person comply with the European minimum standards throughout the period of his detention and that the prosecuted person is not threatened there with inhuman or degrading treatment within the meaning of Art. 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (cf. in this regard European Court of Human Rights, Judgment of 20.10.2016, 7334/13, *Muric v. Croatia*, id. Judgment of 14.02.2017 - 14249/07, *Lazar/Romania* and Judgment of 30.01.2020 - 9671/15, *J.M.B. and others v. France* -, juris).

(2) Notification of the prison or prisons in which the prosecuted person will be held in the case of his extradition during quarantine, during pre-trial detention and, in the case of a final conviction, during the period of execution of the sentence?

(3) Information on the specific conditions of detention to be expected by the prosecuted person in all these detention centres mentioned under (2):

- How many square metres of floor space are available per person in single or multiple occupancy of the prison cell?
- With how many persons will the prison cell be occupied at most?
- Does the prison cell have a separate toilet and a washbasin?
- Is the prison cell adequately lit, ventilated and provided with heating?
- Is the prisoner allowed to walk around the yard once a day for at least one hour?
- Are there employment and/or recreational opportunities for the prisoner?
- Does the prisoner have access to medical care?

(4) Guarantee that the sentence or measure imposed will be reviewed - at the request of the prosecuted person, but at the latest after 20 years - and/or that the application of acts of

clemency to which the person is entitled under the national law or legal practice of the issuing state will be encouraged, with the aim of non-execution of the sentence.

The Karlsruhe General Public Prosecutor's Office is requested to obtain a corresponding statement from the judicial authorities of the United Kingdom with a deadline of 1 March 2023, 12.00 am, set for the submission (section 30 (1) sentence 2 IRG).

On 27 February 2023, the Karlsruhe Public Prosecutor's Office sent a message from IP Manchester stating that the requested feedback to the Karlsruhe Higher Regional Court was being processed and that an enquiry about the status had been sent

By letter of 28 February 2023, the Karlsruhe Public Prosecutor's Office requested that the deadline set by decision of 19 January 2023 for the submission of the required statement by the judicial authorities of the United Kingdom be extended by three weeks until 22 March 2023.

In a letter from his legal counsel dated 28.02.2023, the prosecuted person opposes an extension of the deadline by three weeks. The reason given is that the proceedings are not being conducted with the necessary urgency by the United Kingdom, and the request has already been made more than five weeks ago. The further detention violates the principle of proportionality (Art. 597, 613 para. 1 TCA). The detainee had been in custody since 29 December 2022, which was particularly burdensome for him as a non-EU citizen and due to his lack of language skills, especially as his fiancée was seriously ill.

By e-mail from IP Manchester received by the Karlsruhe Public Prosecutor's Office on 01 March 2023 before 11.00 am, answers from the judicial authorities of the United Kingdom to questions 1-3 of 1 March 2023 were submitted in English, with the announcement that the German translation would be submitted by 02 March 2023, and to the answer to question 1 in the English original of 27 February 2023 and in German translation.

The letters are worded as follows:

UNDERTAKING TO SURRENDER (...) FROM GERMANY TO THE UNITED KINGDOM.

I write in relation to the above named person and the application of the Honourable Court for an undertaking from the UK Government regarding the surrender of Mr (...). Where a sentence of life imprisonment (whether mandatory or discretionary) is imposed, the sentencing judge determines what part of the sentence must be served in prison before the offender can be considered for early release on parole; this period is known as the minimum term of imprisonment. Any person convicted on an indictment has the right to apply for a review of this minimum prison sentence by the Court of Appeal.

The offender must serve the appropriate minimum term of imprisonment corresponding to the penalty element of the sentence. After the expiry of this custodial sentence, the offender enters the "risk element" of the sentence. He may only be held if he continues to pose a risk to the general public. An independent parole board conducts a review of the prisoner's sentence once the punishment element of the sentence has expired, and a judge chairs this board. An oral hearing may be held on the continuation of imprisonment. The parole board shall decide whether it is necessary for the protection of the general public to 'continue the detention of

the prisoner. At this hearing the prisoner has the right to be present, to be legally represented and to call and question witnesses. The Parole Board may order the prisoner's release. Should the Parole Board decide that the prisoner should not be released, another detention review hearing will be held within 2 years, and periodically thereafter. All life prisoners are released on parole, which remains in force for the rest of their lives. Parole may be revoked at any time if necessary for public protection. In any case, including cases where a life sentence or a minimum sentence of more than twenty years has been imposed, the prisoner may seek exceptional or hardship release under section 30 of the Crime (Sentences) Act 1997 and/or release under the Royal Prerogative of Mercy. England and Wales also operate a Tariff Expired Removal Scheme, a statutory provision which allows foreign offenders serving indeterminate sentences to be removed from the UK once the tariff (minimum sentence period) has been served. If a prisoner serving an indeterminate sentence is subject to a removal order, the Secretary of State for Justice can order their removal from the UK without consulting the Parole Board. Once removed from the UK, the offender is not subject to further detention in his own country and cannot legally return to the UK.

Yours sincerely,

On behalf of the Minister"

"Re: UK Prison Circumstances - European Arrest Warrant (EAW) - (...) Thank you for your request for further information in relation to the European Arrest Warrant (EAW) for (...) (Date of Birth: * and prison conditions in England and Wales.

You have asked for guarantees about how Mr will be imprisoned.

The EAW for Mr (...) was issued by Westminster Magistrates' Court and it is likely that a trial would take place at a nearby court in the area. Mr (...) is remanded into custody he would be held in a reception prison associated with that court. It is usual practice to make efforts to accommodate suspects close to the location of their trial. It cannot be discounted entirely, however, that operational requirements, or the behaviour of the individual, may necessitate transfer to another prison. There is always a possibility that an individual may be located outside the geographical region in which they are being tried. The main focus of a reception prison is to provide an efficient service to the courts and effectively manage remand prisoners and those with a very short time to serve. Reception prisons are the first stage at which a prisoner enters the custodial estate. Reception prisons will accommodate prisoners safely and decently, meeting their initial needs and preparing those who receive a custodial sentence for onward transfer.

Ensuring that prisons have sufficient capacity to manage that requirement is a crucial part of the Government's effort to create a more effective justice system. We are delivering 20,000 additional, modern prison places, the largest prison-build programme in a century, ensuring the right conditions are in place to rehabilitate prisoners, helping to cut crime and protect the public. New prison accommodation being delivered under the Government's prison expansion programme will meet the standard set by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, that all prisoners in multi-occupancy cells are afforded a minimum of four square metres of living space. Some cells in older prisons - Victorian prisons, for example - may fall short of these recommended minimum standards. In

such cases, other alleviating factors are found. These factors include, in particular, the fact that prisoners are able to spend a considerable amount of time each day outside their cells (in workshops, classes or other activities). On 22 April 2022, H M Prison & Probation Service published a revised framework for the certification of prisoner accommodation. Cells are only shared where a Prison Group Director has assessed them to be decent and of an adequate size and condition. In addition, they must have adequate lighting, heating, ventilation and fittings, have 24-hour access to water and sanitation, and allow prisoners to communicate at any time with a prison officer. These standards ensure that prisoners are accommodated safely even when two prisoners are held in a cell originally designed for one. All prisons have systems in place for the day-to-day management of regime delivery. This ensures that regimes are safe, decent, secure, resilient and sustainable. If you require any further information or assurances in relation to this matter, please do not hesitate to contact me.

Yours sincerely,

Director General of Operations"

In its decision of 1 March 2023, the Senate determined that further clarification of the facts was necessary. The deadline set in the decision of 19 January 2023 for 1 March 2023, 12:00 pm, for the submission of the documents required pursuant to Art. 613 para. 2 in connection with Art. 604 para. a). Art. 604 par. a) and c) TCA, was extended to 10 March 2023, 12:00 am, at the request of the General Public Prosecutor's Office in Karlsruhe of 28 February 2023.

In doing so, the Senate stated the following:

With the documents submitted on 01 March 2023, the judicial authorities of the United Kingdom and Northern Ireland have only partially answered the questions of the Senate from the decision of 19 January 2023. On this basis, it cannot - yet - be assumed with sufficient certainty that the prosecuted person will receive humane prison conditions in the case of his extradition to the United Kingdom (cf. on this BVerfG decisions of 01 December 2020, 2 BvR 1845/18 and of 02 February 2021, 2 BvR 156/21, both printed in juris), since the guarantee requested by the Senate under No. 1 was not given and the questions of the Senate under Nos. 2 and 3 were not answered in a sufficiently concrete manner. The guarantee announced in the TCA warrant of 21 September 2022 on page 9 under h) (which the Senate requested under number (4)) was also not sufficiently given. On this basis, the Senate cannot examine the reliability of the information provided.

The setting of a deadline for supplementing the extradition documents pursuant to Art. 615, Art. 613 para. 2, Art. 604 paras. a and c) in conjunction with Art. 597 TCA and Art. 30 (1) IRG, it was necessary to issue an order on the application of the Karlsruhe Public Prosecutor's Office of 28 February 2023 - in particular after the timely receipt of the above-mentioned statements of the judicial authorities of the United Kingdom (which, however, still believe a European Arrest Warrant has been issued and have so far evidently been of the opinion that general statements on the prison conditions in the United Kingdom are sufficient and therefore do not answer in detail the specific questions of the Senate from the order of 19 January 2023) - under strict consideration of the claim to freedom and the interests of the prosecuted person as well as under consideration of the time limit provision under Art. 615 in conjunction with Art. 613 Para. 2 T. Art. 613 para. 2 TCA, to be extended by 9 days to 10:03.2023, 12:00 am. According to the

information received by the Senate before the expiry of the deadline, it is currently - still - to be assumed that the judicial authorities of the United Kingdom, who are seeking the extradition of the prosecuted person on suspicion of the charge of conspiracy to supply a class A controlled drug on two counts, punishable by a maximum sentence of life imprisonment, and conspiracy to conceal, (1) of the Criminal Law Act of the United Kingdom 1977 (including five kilograms of cocaine and money laundering in respect of £330,000). 000 pounds sterling), still adhere to their formal extradition request and will therefore seek to submit the additional information and guarantees required under Art. 613 (2) in conjunction with 604 (a) and (c) TCA by the Senate in its decision of 19 January 2023, also within a short period of time.

Even under strict consideration of the requirement of the principle of urgency in detention matters, which also applies in extradition proceedings, and the prosecuted person's right to freedom, the extension of the time limit for submission by 9 days is appropriate and necessary in the overall assessment with regard to the documents submitted by IP Manchester of 1 March 2023. In doing so, the Senate did not disregard the prosecuted person's understandable objection that he is currently suffering particularly from imprisonment in a country that is foreign to him, also because his partner is seriously ill. In order to give sufficient weight to the requirement of expediting proceedings in detention matters and to the prosecuted person's claim to freedom and also to give the detained prosecuted person a clear perspective, as well as taking into account the provisions in Art. 597, 613 para. 2 and 615 TCA, the Senate limited the extension of the time limit to only 9 days. (...)

The judicial authorities of the United Kingdom shall be informed, with reference to Art. 615 para. 4, Art. 613 para. 2, Art: 604 para. a and c) in conjunction with. Art. 597 TCA, that if the necessary additional information requested in the decision of 19 January 2023 is not received by the deadline of 10 March 2023, 12:00 am - as regards the guarantees requested in points 1 and 4 as well as the specific answers to the questions in point 2 (i.e. the names of the specific prisons or prisons in which the detainee is held) - the judicial authorities will be obliged to provide the information requested in the decision of 19 January 2023. (i.e. the names of the specific detention centre or detention centres in which the prosecuted person is likely to be held in the event of his extradition during quarantine, during pre-trial detention and, in the event of a final conviction, during the period of imprisonment) and all the questions posed under point 3) - the Senate will decide on the release of the prosecuted person. In this context, the Senate is aware that the extension of the deadline for the submission of the information requested pursuant to Article 613 para. 2 of the TCA is extremely short. With regard to the period of time that has elapsed since 19 January 2023, the time limit provisions in Art. 615 and 613 para. 2 TCA, the principle of urgency in detention matters and the prosecuted person's claim to freedom, a longer deadline would, however, be disproportionate in the overall assessment.

In a letter dated 6 March 2023, the legal counsel submitted a statement on the decision of 1 March 2023, further substantiating his objections to the prison conditions, inter alia, as follows:

"The statement from HM Prison & Probation Service dated 1 March 2023 advises that it is likely that the prosecuted person's trial will take place in the vicinity of Westminster Magistrates' Court and consequently that he would be accommodated in a prison located in the vicinity.

This assurance is too unspecific and cannot be considered a guarantee within the meaning of Art. 604(c) TCA.

The London area includes HMP Wandsworth, which is one of the most overcrowded prisons in England and Wales. The official capacity of detention places at Wandsworth is 950 (Certified Normal Accommodation = CNA), in fact it is occupied by 1,521 prisoners, which corresponds to an overcrowding of 160%.¹

Should this prison actually be considered for as accommodation for the prosecuted, any assurances are unlikely to be realisable in practice."

By e-mail of 10 March 2023, 12:18 am, the Karlsruhe General Public Prosecutor's Office stated that the Federal Criminal Police Office had just informed them by telephone that no further statements had been received from the authorities of the United Kingdom. The Public Prosecutor General's Office has also not received any further information.

Reasons:

1.

The extradition proves to be inadmissible at this stage already because the judicial authorities of the United Kingdom and Northern Ireland have not complied with the request made by the Senate pursuant to Article 604 a) and c) in conjunction with Article 613 (2) TCA in conjunction with § 30 IRG in the decisions of 19 January 2023 and 1 March 2023 - giving detailed reasons on their relevance for the decision on the basis of the case-law of the ECHR and the German Federal Constitutional Court - have not answered comprehensively (cf. on this Riegel in: Schomburg/Lagodny, internationale Rechtshilfe in Strafsachen, 6th ed. 2020, § 30 marginal no. 21 and EuAuslÜbk Art. 13 marginal no. 1-4).

Since there are valid reasons to assume that there is a real risk to the protection of the fundamental rights of the prosecuted person if he were to be extradited to the United Kingdom and Northern Ireland without corresponding guarantees and notifications on the conditions of detention, the Senate could demand additional guarantees for the treatment of the prosecuted person after the surrender pursuant to Art. 604 c.) TCA before deciding on the execution of the TCA arrest warrant.

The judicial authorities of the United Kingdom and Northern Ireland have - despite the extension of the deadline - not yet provided a guarantee in response to the Senate's justified requests of 19 January 2023 and 01 March 2023 that the accommodation and other conditions of

¹See <https://howardleague.org/prisons/wandsworth/> (Abruf am 2. März 2023); Report on an independent review of progress at HMP Wandsworth by *HM Chief Inspector of Prisons* 19–22 June 2022: <https://www.justiceinspectorates.gov.uk/hmiprisoners/wp-content/uploads/sites/4/2022/07/Wandsworth-IRP-web-2022.pdf> (Access on 2 March 2023).

detention relating to the prosecuted person in all detention facilities receiving the prosecuted person comply with the European minimum standards during the entire period of his or her detention and that the prosecuted person is not subjected to inhuman or degrading treatment within the meaning of Article 3 of the TCA. in the sense of Art. 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (cf. in this regard European Court of Human Rights, Judgment of 20 October 2016, 7334/13, *Muršić v. Croatia*; id. Judgment of 14 February 2017 - 14249/07, *Lazarl Romania* and Judgment of 30 January 2020 - 9671/15, *J.M.B. and others v. France -*, juris). In view of the fact that no corresponding guarantee was provided in response to the enquiries of 19 January 2023 and no declaration was received in response to the further enquiry of 1 March 2023, there could not be expected that such a declaration would be provided within the time limits set out in Art. 615 TCA paras. 3 and 4 in conjunction with Art. 6-13 para. 2 TCA.

2.

Moreover, the extradition is currently inadmissible because the judicial authorities of the United Kingdom and Northern Ireland have not complied with the time limits set out in the Senate decision of 19 January 2023 pursuant to Art. 604 c.) in conjunction with Art. 613 para. 2 TCA setting a deadline of more than seven weeks in total, and have also not specifically answered the questions on the specific prison conditions to be expected of the prosecuted person after his extradition in the United Kingdom and Northern Ireland in a prison that is likely to receive him. Since, according to the prosecuted person's substantiated objections to the current conditions of detention in the United Kingdom and Northern Ireland, as well as the Senate's clarification of the facts, according to which the overcrowding in prisons identified in the above-mentioned CPT report of 07 July 2021 still persists in 2023 (despite improvements made) (according to the information of the Ministry of Justice of the United Kingdom and Northern Ireland in "World Prison Brief data", there is an over-occupancy in several prisons in the United Kingdom and Northern Ireland on 27 January 2023). 2023, there is an [over]-occupancy of the prisons of 107.5%, cf. <https://www.prisonstudies.org/country/united-kingdom-england-wales> accessed on 10 March 2023), it cannot currently be assumed with sufficient certainty that the prosecuted person would receive humane conditions of detention there in the case of his extradition to the United Kingdom and Northern Ireland (cf. German Federal Constitutional Court decisions of 01 December 2020, 2 BvR 1845/18 and of 02 February 2021, 2 BvR .156/21, both reprinted in juris), thus the extradition proves to be inadmissible at present. The inadmissibility of the extradition follows from Art. 604 c) TCA, § 73 IRG in conjunction with Art. 3 ECHR.

III.

The declaration of the inadmissibility of the extradition requires the release of the persecuted person.

IV.

The decision on costs follows from §77 IRG in conjunction with § 467 (1) German Code of Criminal Procedure.

On the other hand, there is no obligation to pay compensation under the Act on Compensation for Criminal Prosecution Measures for custody pending extradition, because a

corresponding application of this Act to custody pending extradition is excluded in principle (BGHSt 32, 221 et seq.) and - as can be seen from the above - there is no case in which authorities of the Federal Republic of Germany would be responsible for unjustified prosecution under German law (OLG Hamm StraFO 1997, 93 et seq.; BVerfG decision of 5 June 1992, 2 BvR 1403/91; Senate decision of 27 February 2003, 1 AK 29/02).