FEDERAL CONSTITUTIONAL COURT

– 2 BvR 424/17 –

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaint

of Mr D(…),

– authorised representatives: Rechtsanwälte Dr. Gerhard Strate and Dr. Ole-Steffen Lucke, Holstenwall 7, 20355 Hamburg –

against a) the order of the Hanseatic Higher Regional Court (*Hanseatisches Oberlandesgericht*) of 19 January 2017 – Ausl 81/16 –,

b) the order of the Hanseatic Higher Regional Court of 3 January 2017 – 1 Ausl 81/16 –,

the Federal Constitutional Court – Second Senate –

with the participation of Justices

President Voßkuhle,

Huber,

Hermanns,

Müller,

Kessal-Wulf,

König,

Maidowski

held on 19 December 2017:

1. **The orders of the Hanseatic Higher Regional Court of 3 January 2017 – Ausl 81/16 – and of 19 January 2017 – Ausl 81/16 – violate the complainant's fundamental right under Article 101(1) second sentence of the Basic Law (*Grundgesetz* – GG); they are reversed.**

2. The matter is remanded to the Hanseatic Higher Regional Court.

3. […]

R e a s o n s:

A.

I.

The constitutional complaint concerns the extradition of the complainant, a Romanian national, to Romania for the purposes of criminal prosecution. The complainant challenges the extradition in view of Romanian prison conditions. 1

1. Based on a national arrest warrant issued on 1 July 2015 (no. 13/UP) by a court in the city of Constanta (Romania) on suspicion of document fraud and other fraud-related offences in three cases, a European arrest warrant was issued against the complainant. Until 24 September 2017, the complainant served a prison sentence in the prison of Hamburg-Billwerder for criminal offences committed in the Federal Republic of Germany. Since then, he is being kept there in extradition detention (*Auslieferungshaft*). 2

2. On 12 September 2016, the Hanseatic Higher Regional Court (*Hanseatisches Oberlandesgericht*) issued an extradition arrest warrant (*Auslieferungshaftbefehl*) against the complainant. On 19 September 2016, the Hamburg Public Prosecutor General's Office (*Generalstaatsanwaltschaft*) requested that the extradition be declared permissible and stated that there was no intention to raise objections based on impediments to granting the application (*Bewilligungshindernisse*) (§ 83b of the Act on International Cooperation in Criminal Matters, *Gesetz über die internationale Rechtshilfe in Strafsachen* – IRG). By order of 30 September 2016, the presiding judge of the [...] competent criminal division (*Strafsenat*) of the Higher Regional Court requested that the Public Prosecutor General's Office obtain information from the Romanian authorities regarding the conditions that the complainant would face while awaiting trial in remand detention (*Untersuchungshaft*) and while serving a possible prison sentence (*Strafhaft*). […] 3

3. By submission of 4 October 2016, following an inquiry by the Hamburg Public Prosecutor General's Office […], the Romanian authorities referred to the Romanian framework relating to minimum standards for the treatment of prisoners. According to these provisions, detention conditions in Romania must satisfy the guarantee of human dignity and comply with minimum standards regarding sanitation and hygiene. […] The authorities submitted that each cell needs to provide at least 4 m² of space for every prisoner in closed or high-security detention, and at least 6 m³ of air for every prisoner in semi-open or open detention. 4

4. Upon further request, the Romanian authorities stated on 25 October 2016 that the complainant would initially be kept in a prison facility for quarantine and monitor- 5

ing for a 21-day period, as required under Romanian law. The initial detention facility of Bucharest Rahova had 24 quarantine rooms with individual space of at least 3 m².

The Romanian authorities submitted that after the end of the quarantine period, the warrant for remand detention would be executed in the prison of Poarta Alba. Cells in this prison were equipped with individual beds, mattresses and bedding, furniture for storing personal belongings and eating. According to the authorities, the prisoners were also granted the right to take walks in the outdoor area [of the prison facility] and to participate in various activities. 6

In the event that a prison sentence was imposed, the defendant would serve the sentence in a prison facility close to his place of residence. […] The authorities provided an assurance that prisoners would be guaranteed at least 3 m^2 of personal space (including bed and furniture) in case the sentence was served full time in closed detention, and 2 m^2 in case the sentence was served in semi-open or open detention. 7

5. By order of 18 November 2016 and with reference to the case-law of the Court of Justice of the European Union (ECJ) and the European Court of Human Rights (ECtHR), the Higher Regional Court asked the Public Prosecutor General's Office to obtain explicit assurances that the space available to the complainant within the prison cell would not, at any time, fall below the absolute minimum of 3 m², excluding furniture. 8

6. […] 9

7. By communication of 1 December 2016, the Federal Ministry of Justice and Consumer Protection (*Bundesministerium der Justiz und für Verbraucherschutz*) informed the *Land* departments of Justice (*Landesjustizverwaltungen*) about discussions that had been held in Romania regarding the issue of inadequate detention conditions […]. In the context of these discussions, it was established that Romanian prison facilities were significantly overcrowded […]. […] There were four detention regimes in the Romanian prison system: two strict and two more lenient regimes. A technical committee, rather than law enforcement authorities, decided which detention regime convicted persons are admitted to. The ministry communication stated that under the strict regimes, cell doors were generally locked day and night, as these regimes were governed by high security standards. The prisoners held there were only allowed outside their cells for about three hours per day. Under the lenient regimes, prisoners were allowed to move freely during the day. Under the open regime, cell doors also remained open at night. At the beginning of detention, prisoners must be quarantined for 21 days. After a fifth of the sentence has been served, the competent technical committee reviews whether the detention regime to which the respective prisoner is subjected should be changed. […] 10

From a Romanian perspective, providing assurances in individual cases with respect to confinement in a specific prison facility is thus difficult. Setting aside the 11

statutory competence of the technical committee would require legislative reforms that were only possible in the medium term. […]

[…] 12

8. […] 13

9. With the challenged order of 3 January 2017, the Higher Regional Court declared permissible the complainant's extradition to Romania. In its reasoning, the court in particular argued that there were no impediments to extradition. The court held that, taking account of the guarantees of § 73 first and second sentence IRG in conjunction with Art. 4 of the Charter of Fundamental Rights of the European Union (CFR), this also applied specifically with regard to detention conditions in Romania. 14

[Excerpt from Press Release No. 3/2018 of 11 January 2018]

[The Higher Regional Court] submitted, in particular, that the Member States were obliged under the ECJ's case-law to execute a European arrest warrant, and that exceptions to this rule were limited to extraordinary circumstances. In applying the twofold test established by the ECJ, the Higher Regional Court held that while there were indeed strong indications of systemic deficiencies of detention conditions in the Romanian prison system, the second element of the test was not met as the complainant did not face a "real risk" of inhuman or degrading treatment. According to the Higher Regional Court, the Romanian authorities had provided an assurance that the complainant would be guaranteed at least 3 m^2 of personal space (including furniture) in case the sentence was served full time in closed detention, and 2 m^2 in case the sentence was served in semi-open or open detention. With regard to the functioning of the criminal justice system within the European Union, the Higher Regional Court cautioned that the crimes committed in Romania would go unpunished if the Federal Republic of Germany were to refuse extradition; moreover, this could lead to the creation of a "safe haven" in Germany. Regardless of the judgments handed down by the ECtHR against Romania for violations of Art. 3 of the European Convention on Human Rights (ECHR), the Higher Regional Court chose to conduct an "overall assessment" of the detention conditions prevailing in Romania and considered the personal space available inside the prison cell as a significant indicative factor. Based thereon, the Higher Regional Court reached the following conclusions: since 2014, detention conditions in Romania improved significantly, even though prison overcrowding remains at alarmingly high levels and the minimum of personal space assured by Romanian authorities – at least the individual space granted under a semi-open or open detention regime – still falls short of the standards established by the ECtHR in relation to living space available to prisoners. According to the Higher Regional Court, it should, however, also be considered that the insufficient space available within the prison cell were considerably mitigated by the rather generous allocation of out-of-cell time. The Higher Regional Court added that Romanian prison facilities had by now established the necessary infrastructure to allow prisoners free movement; that opportunities for prison leave, admission of visitors, washing of pri-

vate laundry and purchase of personal items have been strengthened; and, moreover, that better facilities are provided for heating, as well as for sanitation and hygiene.

[End of Excerpt]

[…] 15-20

10. […] The Higher Regional Court did not receive until 10 January 2017 the full statement by the Romanian Ministry of Justice dated 15 December 2016, which previously had only been furnished incompletely, and a statement by the Romanian Ministry of the Interior dated 13 December 2016 . In these statements, the Romanian authorities informed the court that it was “highly likely” that the complainant would be admitted to closed detention and detained in the prison of Tulcea. Prisoners there were granted personal space “including bed and other furniture” of 3 m² in the closed regime and of 2 m² in the open regime. […] 21

11. Following this, the complainant (represented by a lawyer) requested that a new decision be rendered on the permissibility of extradition pursuant to § 33(2) IRG. […] He argued that the conditions envisaged for his detention fell far short of the minimum standards applicable to individual cell space according to the ECtHR’s case-law. […] 22

12. Having received a statement by the Public Prosecutor General’s Office, the Higher Regional Court, by the challenged order of 19 January 2017, decided that the competent criminal division would not render a new decision on permissibility. […] 23

[…] 24

13. The Public Prosecutor General’s Office then approved the complainant’s extradition, to be executed upon completion of his prison sentence [in Germany]. 25

II.

1. With his constitutional complaint of 24 February 2017, the complainant (represented by a lawyer) challenges the orders of the Higher Regional Court of 3 and 19 January 2017 and claims a violation of Art. 1(1) of the Basic Law (*Grundgesetz* – GG). 26

[…] 27

He contends that the prison conditions set out in the “assurances” provided by the Romanian authorities violated the guarantee of human dignity – with respect to both the situation in remand detention and in prison […]. 28

[…] 29-30

2. By order of 18 August 2017, as a procedural safeguard, the Second Chamber of the Second Senate of the Federal Constitutional Court issued a preliminary injunction based on a weighing of consequences [comparing the consequences of issuing the preliminary injunction with those of non-issuance], staying the surrender of the com- 31

plainant to the Romanian authorities until a decision on the constitutional complaint has been rendered, but for no longer than six months (cf. § 93d(2) first sentence, § 32(1) of the Federal Constitutional Court Act, *Bundesverfassungsgerichtsgesetz* – BVerfGG).

3. […] 32-33

B.

The constitutional complaint is admissible. In particular, it satisfies the requirements of substantiation derived from § 23(1) second sentence first half sentence and § 92 BVerfGG – including in respect of the stricter requirements of admissibility applicable to an identity review of acts determined by European Union law (*Identitätskontrolle*). In this regard, it must be substantiated in detail to what extent the guarantee of human dignity protected by Art. 1(1) GG is violated in the individual case (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 140, 317 <341 and 342 para. 50>). Referring to decisions of the ECtHR and the ECJ, the complainant thoroughly discusses the case-law of the Federal Constitutional Court regarding space available in prison cells and substantiates that, and on what basis, it appears possible that the specific conditions envisaged for his detention in the receiving Member State violate the guarantee of human dignity. 34

C.

The constitutional complaint is well-founded. 35

The challenged decisions violate the complainant's right to his lawful judge (Art. 101(1) second sentence GG), a right equivalent to fundamental rights. The complainant did not expressly assert such particular violation; yet this does not preclude the Federal Constitutional Court from extending its review to this constitutional guarantee in otherwise admissible constitutional complaint proceedings (cf. BVerfGE 6, 376 <385>; 17, 252 <258>; 54, 117 <124>; 58, 163 <167>; 71, 202 <204>). 36

I.

1. In the event that doubts arise regarding the application or interpretation of European Union law, regular courts must, first of all, refer the relevant questions to the ECJ. The ECJ is the lawful judge within the meaning of Art. 101(1) second sentence GG in these cases (cf. BVerfGE 73, 339 <366 and 367>; 82, 159 <192>; 126, 286 <315>; 128, 157 <186 and 187>; 129, 78 <105>; 135, 155 <230 para. 177>; established case-law). If the conditions set out in Art. 267(3) of the Treaty on the Functioning of the European Union (TFEU) are met, national courts are required to refer their questions to the ECJ *ex officio* (cf. BVerfGE 82, 159 <192 and 193>; 128, 157 <187>; 129, 78 <105>; 135, 155 <230 and 231 para. 177>; established case-law). Where a German court fails to comply with its duty to refer a matter for a preliminary ruling or where it makes a request for a preliminary ruling regarding matters for which the ECJ lacks jurisdiction (cf. BVerfGE 133, 277 <316 para. 91>), the right to one's lawful 37

judge guaranteed to the person seeking legal protection in the initial proceedings may be violated (cf. BVerfGE 73, 339 <366 et seq.>; 126, 286 <315>; 135, 155 <231 para. 177>).

a) According to the ECJ's case-law (ECJ, Judgment of 6 October 1982, C.I.L.F.I.T., C-283/81, ECR 1982, pp. 3415 et seq. para. 21), a national court against whose decisions no judicial remedy is available must comply with its duty of referral where a question of European Union law is raised in proceedings before it, unless the court has established that the issue is not decisive, that the provision of European Union law in question has already been interpreted by the ECJ or that the correct application of European Union law is so obvious as to leave no scope for reasonable doubts (cf. BVerfGE 82, 159 <193>; 128, 157 <187>; 129, 78 <105 and 106>; 135, 155 <231 para. 178>; 140, 317 <376 para. 125>). 38

b) Yet the Federal Constitutional Court only intervenes in relation to interpreting and applying provisions governing the allocation of jurisdiction between courts if the relevant provisions are interpreted and applied in a manner that no longer appears comprehensible and is therefore considered manifestly untenable when critically appraising the Basic Law's central notions (cf. BVerfGE 29, 198 <207>; 82, 159 <194>; 126, 286 <315>; 135, 155 <231 para. 179>). […] 39

2. These principles also apply to the allocation of jurisdiction under European Union law in Art. 267(3) TFEU. Therefore, failure to comply with the duty of referral under European Union law does not always amount to a violation of Art. 101(1) second sentence GG (cf. BVerfGE 29, 198 <207>; 82, 159 <194>; 126, 286 <315>; 135, 155 <231 and 232 para. 180>). The Federal Constitutional Court limits its review to whether the allocation of jurisdiction set out in Art. 267(3) TFEU is interpreted and applied in a manner that does not seem comprehensible when critically appraising the Basic Law's central notions and would therefore be considered manifestly untenable (cf. BVerfGE 126, 286 <315>; 128, 157 <187>; 129, 78 <106>; 135, 155 <232 para. 180>). This limited review by the Federal Constitutional Court grants the regular courts a margin of appreciation and assessment when interpreting and applying European Union law. This margin corresponds to the margin afforded to courts when applying ordinary law provisions within the German legal order. The Federal Constitutional Court only ensures that the limits of this margin are observed (cf. BVerfGE 126, 286 <316> with further references). It does not serve as a "supreme court for review of referrals" ("*oberstes Vorlagenkontrollgericht*") (cf. BVerfGE 126, 286 <316>; 135, 155 <232 para. 180>). 40

a) The duty of referral under Art. 267(3) TFEU is applied in a manifestly untenable manner where – in the view of the relevant court – an issue of European law is decisive in proceedings before a court against whose decisions no judicial remedy is available, yet the court does not even consider a referral despite having doubts how to correctly resolve the decisive issue and thereby develops European Union law on its own authority (fundamental disregard of the duty of referral; cf. BVerfGE 82, 159 41

<195>; 126, 286 <316>; 128, 157 <187>; 129, 78 <106>; 135, 155 <232 para. 181>). This applies all the more if the court does not sufficiently research the relevant (substantive) European Union law. In those cases, it generally disregards the conditions of the duty of referral (cf. Chamber Decisions of the Federal Constitutional Court, *Kammerentscheidungen des Bundesverfassungsgerichts* – BVerfGK 8, 401 <405>; 11, 189 <199>; 13, 303 <308>; 17, 108 <112>; Order of the Second Chamber of the Second Senate of 6 October 2017 – 2 BvR 987/16 –, juris, para. 7). This also holds true if the court fails to analyse case-law of the ECJ that is obviously applicable. […]

b) The same goes for cases where a court against whose decisions no judicial remedy is available reaches a conclusion that deliberately deviates from the ECJ's case-law on decisive issues but still chooses not to request a (new) preliminary ruling (deliberate deviation without referral; cf. BVerfGE 82, 159 <195>; 126, 286 <316 and 317>; 128, 157 <187 and 188>; 129, 78 <106>; 135, 155 <232 para. 182>). 42

c) Conversely, if the decisive issue of European Union law is yet to be addressed in the case-law of the ECJ, if it seems possible that the existing case-law does not address the decisive issue exhaustively or if a further development of the ECJ's case-law does not just appear a remote possibility (incomplete case-law), Art. 101(1) second sentence GG is violated where the court against whose decisions no judicial remedy is available untenably exceeds the margin of assessment necessarily afforded to it (cf. BVerfGE 82, 159 <195 and 196>; 126, 286 <317>; 128, 157 <188>; 129, 78 <106 and 107>; 135, 155 <232 and 233 para. 183>). This applies, in any case, if the regular courts arbitrarily assume the existence of an "acte clair" or an "acte éclairé". In this respect, it is incumbent upon the court to sufficiently research the relevant substantive European Union law. Where case-law of the ECJ is applicable to the case at hand, it must be analysed and reflected in the decision rendered by the court (cf. BVerfGE 82, 159 <196>; 128, 157 <189>; 135, 155 <233 para. 184>). On this basis, when applying and interpreting the relevant substantive European Union law (cf. BVerfGE 135, 155 <233 para. 184>), the regular court must reach the reasonable conclusion that the applicable legal standards are either clear from the outset ("acte clair") or clarified beyond reasonable doubts in the case-law of the ECJ ("acte éclairé"; cf. BVerfGE 129, 78 <107>; 135, 155 <233 para. 184>). In case the issue has not yet been fully resolved, Art. 267(3) TFEU is certainly applied in an untenable manner if the regular court concludes that the legal situation is clear from the outset or clarified beyond reasonable doubts, without providing objective reasons supporting its conclusion (cf. BVerfGE 82, 159 <196>; 135, 155 <233 para. 185>). 43

II.

The conditions for referral to the ECJ were met (1.). In light of the fact that the case-law of the ECJ has not yet fully resolved the decisive issue in the matter at hand (2.), the Higher Regional Court exceeded its margin of assessment in a manner untenable under constitutional law by refraining from requesting a preliminary ruling (3.), thus violating the right to one's lawful judge, a right equivalent to fundamental rights. 44

1. The conditions for requesting a preliminary ruling before the ECJ were met. 45

a) Pursuant to Art. 51 CFR, the Member States are bound by the fundamental rights laid down in the Charter when implementing European Union law. Questions on its content and scope may, or must, be referred to the Court of Justice of the European Union (cf. Karpenstein, in: Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, Art. 267 AEUV para. 22 <May 2013>). This is the case in extradition proceedings, determined by European Union law, that fall within the scope of the Framework Decision on the European arrest warrant (cf. BVerfGE 140, 317 <343 para. 52>). 46

b) The Higher Regional Court is a court bound by the duty of referral within the meaning of Art. 267(3) TFEU, given that no judicial remedy under domestic law is available against its decisions in extradition proceedings. 47

c) In view of deficient prison conditions in the receiving Member State, the scope of protection of the fundamental rights of the European Union, most notably Art. 4 CFR, in extradition proceedings based on a European arrest warrant as determined by European Union law as well as the question of what exceptions from the duty to comply with an extradition request derive from the fundamental rights of the European Union are furthermore decisive for the proceedings at hand. In particular, it needs to be clarified to what extent it is required that Art. 4 CFR be interpreted in light of the ECtHR's case-law (cf. Art. 52(3) CFR) and if – as was apparently presumed by the Higher Regional Court – the review of whether detention conditions are compatible with the fundamental rights of the European Union requires an overall assessment that gives consideration to all the aspects drawn on by the Higher Regional Court. 48

d) As the issue at hand has not yet been fully resolved by the ECJ (on this see 2 below), no exceptions from the Higher Regional Court's duty of referral under European Union law are ascertainable; such exceptions would apply, for instance, if the decisive issue had already been interpreted by the ECJ or if the correct application of European Union law were so obvious as to leave no scope for reasonable doubts (cf. ECJ, Judgment of 6 October 1982, C.I.L.F.I.T., C-283/81, ECR 1982, pp. 3415 et seq. para. 21). […] 49

2. The ECJ has not yet fully resolved the decisive issue in the matter at hand. In its judgment of 5 April 2016, the ECJ did indeed establish that executing a European arrest warrant must not result in inhuman or degrading treatment of the person concerned in the receiving Member State. It also held that, in case there are indications of systemic deficiencies in the detention regime of the receiving state, it is necessary that the executing judicial authority make a further assessment of whether there are substantial grounds to believe that in the event of surrender the person concerned will be exposed to the real risk of inhuman and degrading treatment in the relevant Member State (ECJ, Judgment of 5 April 2016, Aranyosi and Ca?lda?raru, C-404/15 and C-659/15 PPU, EU:C:2016:198, paras. 88 et seq.). If the existence of such a risk cannot be discounted within a reasonable time period after requesting additional information from the receiving state and ordering the suspension of the extradition, the 50

executing judicial authority must decide whether the procedure of surrender should be brought to an end (ECJ, Judgment of 5 April 2016, Aranyosi and Ca?lda?raru, C-404/15 and C-659/15 PPU, EU:C:2016:198, paras. 103 and 104).

The ECJ has not yet clarified, however, the decisive issue determining the outcome of the present case: namely, which minimum requirements relating to detention conditions derive from Art. 4 CFR, and which standards apply to the review of detention conditions in accordance with the fundamental rights of the European Union. In view of Art. 52(3) CFR and its purpose to prevent a divergence between the guarantees of the Charter of Fundamental Rights and the European Convention on Human Rights, it should indeed be presumed that the ECtHR's case-law on Art. 3 ECHR needs to be taken into account when determining the scope of the guarantee of Art. 4 CFR. However, the ECJ has not drawn on this case-law in its entirety, neither in its judgment in Joined Cases Aranyosi and Ca?lda?raru nor in earlier decisions […]. 51

3. The Higher Regional Court untenably exceeded its margin of assessment in relation to its duty of referral, and thereby violated the complainant's right to his lawful judge (Art. 101(1) second sentence GG). The court did not provide objective reasons for why it concluded that the legal situation with respect to the guarantee afforded by Art. 4 CFR relating to specific detention conditions were clear from the outset or clarified beyond reasonable doubts. The Higher Regional Court assessed independently the standards of review deriving from fundamental rights under the Basic Law, European Union law and the ECHR, without establishing a connection to the specific requirements deriving from Art. 4 CFR. In this respect, it failed to substantiate whether and in how far the minimum requirements deriving from Art. 4 CFR are either fully clarified in the case-law of the ECJ or are so manifestly clear that clarification by the ECJ would be unnecessary. 52

a) The Higher Regional Court did base its review on the twofold test established by the ECJ. As regards the first element of the test, it assessed whether there are systemic deficiencies in the detention regime of the receiving state and affirmed that this is the case in the Romanian prison system. In assessing the real risk of inhuman or degrading treatment in accordance with Art. 4 CFR, as required under the second element of the test, it even acknowledged that the assurances provided by Romania in the complainant's case fall short of the minimum requirements of personal space set out by the ECtHR with regard to guaranteeing prisoners detention conditions compatible with human rights pursuant to Art. 3 ECHR. Nevertheless, it concluded that the deficient prison conditions did not constitute a relevant risk of inhuman and degrading treatment under European Union law, because while it considered the case-law of the ECtHR, it added further considerations, by way of an "overall assessment", which it believed capable of disproving the risk of inhuman or degrading treatment in the complainant's case. However, the ECtHR's case-law is not clear in this regard. 53

b) According to the case-law of the ECtHR, in particular its decision of 20 October 54

2016 (Muršić v. Croatia, no. 7334/13), failure to provide at least 3 m² of personal space per prisoner in a multi-occupancy cell gives rise to the strong presumption that Art. 3 ECHR is violated. This presumption would normally only be rebutted where reductions in the required minimum personal space were short, occasional and minor; they were accompanied by sufficient freedom of movement outside the cell and out-of-cell activities; and the prisoner was held in an appropriate facility where no other aggravating conditions exist (cf. ECtHR Muršić v. Croatia, Judgment of 20 October 2016, no. 7334/13, §§ 124, 132-138). There are strong indications that these three conditions must be fulfilled cumulatively in order to compensate the lack of personal space if that area fell below 3 m² (cf. ECtHR Muršić v. Croatia, Judgment of 20 October 2016, no. 7334/13, § 138), especially since it appears that the standard may have been even stricter before the Grand Chamber consolidated the ECtHR's case-law in the Muršić decision. Prior to this decision, the ECtHR presumed that Art. 3 ECHR was violated if prisoners had at their disposal less than 3 m² of floor space (cf. ECtHR, Ananyev et al. v. Russia, Judgment of 10 January 2012, nos. 42525/07 and 60800/08 [pilot judgment], §§ 145, 148). In its older case-law, it regularly neither recognised that there were a possibility of compensating the presumed violation by other factors nor that an "overall assessment" of detention conditions were even viable in case the personal space per prisoner amounted to only 2 m²

The Higher Regional Court failed to assess whether the 2 m² of personal space, which would be allocated to the complainant in a multi-occupancy cell if he were to serve his sentence in semi-open or open detention, could still be considered a minor (or, for that matter, short and occasional) reduction of personal space, despite the fact that this would fall significantly short of the required 3 m². However, such an assessment would have been required, since only such a minor reduction could have been compensated by the above-mentioned factors with certainty, according to the more recent case-law of the ECtHR (cf. in this regard ECtHR, Muršić v. Croatia, Judgment of 20 October 2016, no. 7334/13, §§ 130 et seq. including a summary of its case-law). 55

Furthermore, the Higher Regional Court included factors such as improved heating systems as well as better sanitary facilities and hygiene conditions in its overall assessment: while these have indeed been regarded as compensatory factors by the ECtHR, it remains unclear whether they would suffice, in light of the recent case-law, to rebut the strong presumption that the restricted personal space resulted in a violation of the ECHR (cf. ECtHR, Muršić v. Croatia, Judgment of 20 October 2016, no. 7334/13, § 138). If there are deficiencies in this regard, this may result in the presumption of a violation of Art. 3 ECHR even if a prisoner has at its disposal personal space of slightly more than 3 m² (cf. ECtHR, Muršić v. Croatia, Judgment of 20 October 2016, no. 7334/13, § 139). 56

By submitting that the Romanian prison system has strengthened opportunities for prison leave, the admission of visitors, the washing of private laundry and the purchase of personal items, the Higher Regional Court relied on considerations that, to 57

date, have not been expressly referred to in the case-law of the ECtHR for the purpose of rebutting the presumed violation of Art. 3 ECHR that follows from the provision of insufficient living space to prisoners.

c) Moreover, the Higher Regional Court draws on considerations beyond the ECtHR's case-law, such as the maintenance of intergovernmental mutual legal assistance, the functioning of the criminal justice system within the European Union as well as the principles of mutual recognition and mutual trust, the potential impunity for suspects resulting from non-extradition and the creation of a "safe haven" as decisive issues for the assessment of whether the complainant faces a real risk of being exposed to inhuman or degrading treatment in Romania pursuant to Art. 4 CFR or Art. 3 ECHR. While some of these considerations have indeed been referred to in the case-law of the ECJ, specifically in relation to the interpretation of Member State obligations arising under the Framework Decision on the European arrest warrant, the question of whether these considerations are equally relevant for determining the scope of the absolute guarantees set out under Art. 4 CFR or Art. 3 ECHR respectively (cf. ECJ, Judgment of 5 April 2016, Aranyosi and Ca?lda?raru, C-404/15 and C-659/15 PPU, EU:C:2016:198, paras. 85 and 86, with reference to Art. 15(2) ECHR) has, however, not yet been resolved in the case-law of the ECJ or the ECtHR. 58

4. Given that a violation of Art. 101(1) second sentence GG has been established in the present proceedings, it is not required to determine whether the challenged decisions also violate the guarantee of human dignity under Art. 1(1) GG. 59

D.

1. Pursuant to § 95(1) first sentence BVerfGG, it is declared that the orders of the Higher Regional Court of 3 January 2017 – Ausl 81/16 – and of 19 January 2017 – Ausl 81/16 – violate the complainant's fundamental right under Article 101(1) second sentence GG. The orders are thus reserved pursuant to § 95(2) BVerfGG; the matter is remanded to the Higher Regional Court. 60

2. […] 61

Voßkuhle	Huber	Hermanns
Müller	Kessal-Wulf	König
	Maidowski	

Bundesverfassungsgericht, Beschluss des Zweiten Senats vom 19. Dezember 2017 - 2 BvR 424/17

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