

## **18 July: The German Federal Constitutional Court Revokes National Law on the European Arrest Warrant**

(German Constitutional Court) The German Constitutional Court has declared the European Arrest Warrant Act void upon the challenge of the German national Mamoun Darkanlzanli who was facing an extradition request from Spain based on al-Qaida terrorist charges. The Court held that the European Arrest Warrant Act is contrary to Art.16 (2) of the Constitution because the legislator did not comply with the constitutional requirements of the relevant provision when implementing the Framework Decision on the European Arrest Warrant. Furthermore, the European Arrest Warrant Act is contrary to Art.19 (4) of the Constitution because there is no possibility to contest the decision to extradite. As long as the legislature does not adopt a new law implementing Art. 16 (2) (2) of the Constitution, the extradition of a German citizen to a European Union Member State is not possible.

Art.16 (2) (1) of the Constitution protects German citizens from extradition. This protection was an absolute protection until the amendment of the Constitution in 2000 based on the idea that a citizen should not be removed from the German jurisdiction against his will in recognition of the special relationship he has with his own jurisdiction. Every citizen should be protected from the uncertainty of being judged in a system that is foreign to him. However, after the constitutional amendments in 2000 this protection can be limited in certain cases according to Art.16 (2) (2) of the Constitution. This constitutional provision was inserted in order to make the cooperation with other member states of the EU and international courts possible. Art.16 (2) (2) of the Constitution allows the extradition of a German citizen only where legal principles are safeguarded. Therefore, the legislator can not deviate from the ban on extradition of German nationals in an unlimited manner. The constitutional provision does not only imply that the principle of proportionality and other legal principles must be respected. In allowing extradition, the legislator must make sure that the requesting state has fulfilled these constitutional requirements, but can also react to factors that may interrupt the general trust in proceedings in another Member State despite the principle of mutual recognition in the EU.

The European Arrest Warrant Act does not fulfill this standard, but encroaches upon the freedom from extradition in a disproportionate manner. The Legislature had to ensure that the encroachment upon the scope of protection provided by Art.16 (2) of the Constitution is considerate, but failed to balance the interest in borderless justice in Europe with the protection of German nationals from extradition. The ban on extradition aims at the protection of the principles of legal certainty and public confidence in one's own legal system with regard to Germans who are affected by extradition. Persons entitled to enjoy the fundamental right in question must be able to rely on the fact that their behavior is not subsequently qualified as illegal where it complies with the law in

force at the respective point of time. The confidence in one's own legal system is especially protected when the act on which the request for extradition is based has a significant domestic connecting factor. A German citizen who commits a criminal offence in his or her own legal area does not need to fear extradition to another state power. The domestic connecting factor also exists where substantial parts of the offence have been carried out in the national territory. However, whoever commits a criminal offence within another legal system must reckon with being held responsible there. A person can not commit an offence in whole or in part on the territory of another member state and then flee to his own jurisdiction for protection; likewise, one can not fully appeal to the ban on extradition of German citizens where the crime committed has a cross border dimension and is sufficiently serious. The legislature does not comply with this standard because it does not create the possibility of refusing the extradition of Germans in cases with a significant domestic connecting factor although the Framework Decision permits the executing judicial authorities to refuse to execute the European Arrest Warrant if it relates to offences committed within the territory of the requested member state.

Furthermore, the European Arrest Warrant has a gap of protection with regard to the possibility of refusing extradition due to criminal proceedings that have been instituted in the same matter in Germany or due to the dismissal or refusal of carrying out criminal proceedings in the domestic country. In this respect, the legislature should have examined the respective legal provisions of the Criminal Procedure Code to find out whether decisions of the Public Prosecutor's Office to refrain from criminal prosecution must be subjected to judicial review with regard to a possible extradition. Moreover, extradition should not be permitted when there are serious grounds to suspect that if extradited, the requested person would suffer discrimination on the basis of religion or on other grounds. Finally, the legislator must ensure that the requested person can not be extradited for crimes which were not punishable under German law at the time they were committed (principle of non-retroactivity). The deficiencies of the European Arrest Warrant Act are not compensated by the fact that the legal Act provides the possibility of serving one's sentence imposed abroad in a home state prison because this measure of protection of the state's own citizens concerns only the prison service and not the criminal prosecution.

The European Arrest Warrant Act also infringes Art.19 (4) of the Constitution which guarantees recourse to a court by excluding the possibility to contest the decision regarding the extradition to a European Union Member State. The authority responsible for granting extradition has discretion when taking a decision on extradition. It does not merely decide on the foreign-policy and the general-policy aspects of the request for extradition but has to take into account the criminal prosecution in the home state of the affected person. Thus, such a decision should be based on the weighing up of facts and circumstances and serves to protect the fundamental rights of the prosecuted person, and, therefore, it may not be removed from judicial review.