"European Arrest Warrant Act case"

HEADNOTES:

Judgment of the Second Senate of 18 July 2005

– 2 BvR 2236/04 –

1. With its ban on expatriation and extradition, the fundamental right enshrined in Article 16 of the Basic Law guarantees the citizens' special association to the legal system that is established by them. It is commensurate with the citizen's relation to a free democratic polity that the citizen may, in principle, not be excluded from this association.

2. The cooperation that is put into practice in the "Third Pillar" of the European Union in the shape of limited mutual recognition is a way of preserving national identity and statehood in a single European judicial area, which is considerate in terms of subsidiarity (Article 23.1 of the Basic Law).

3. When adopting the Act implementing the Framework Decision on the European arrest warrant, the legislature was obliged to implement the objective of the Framework Decision in such a way that the restriction of the fundamental right to freedom from extradition is proportionate. In particular, the legislature, apart from respecting the essence of the fundamental right guaranteed by Article 16.2 of the Basic Law, has to see to it that the encroachment upon the scope of protection provided by it is considerate. In doing so, the legislature has to take into account that the ban on extradition is precisely supposed to protect, inter alia, the principles of legal certainty and protection of public confidence as regards Germans who are affected by extradition.

4. The confidence of the prosecuted person in his or her own legal system is protected in a particular manner by Article 16.2 of the Basic Law precisely where the act on which the request for extradition is based shows a significant connecting factor to a foreign country.

Judgment of the Second Senate of 18 July 2005
on the basis of the oral hearing of 13 and 14 April 2005

– 2 BvR 2236/04 –

in the proceedings on the constitutional complaint
of the German and Syrian citizen D. …,

- authorised representatives:

1. Lawyer ...,
2. Lawyer ...,
3. Prof. Dr. ... –

against the decision of the judicial authority of the Free and Hanseatic City of
a) Hamburg on an application for a grant [of extradition] of 24 November 2004 – 9351 E - S 6 - 26.4 –,
b) the order of the Hamburg Hanseatic Higher Regional Court (Hanseatisches Oberlandesgericht) of 23 November 2004 – Ausl 28/03 – and the [complainant's] application for a temporary injunction.

RULING:

The Act to Implement the Framework Decision on the European Arrest Warrant and the Surrender Procedures between the Member States of the European Union (European Arrest Warrant Act (Gesetz zur Umsetzung des Rahmenbeschlusses über den Europäischen Haftbefehl und die Übergabeverfahren zwischen den Mitgliedstaaten der Europäischen Union, Europäisches Haftbefehlsgesetz – EuHbG)) of 21 July 2004 (Federal Law Gazette (Bundesgesetzblatt –BGBl) I p. 1748) violates Article 2 subsection 1 in conjunction with Article 20 subsection 3, Article 16 subsection 2 and Article 19 subsection 4 of the Basic Law (Grundgesetz – GG) and is void.

The order of the Hamburg Hanseatic Higher Regional Court of 23 November 2004 – Ausl 28/03 – violates the complainant's fundamental right under Article 16 subsection 2 of the Basic Law. The order is overturned. The matter is referred back to the Hamburg Hanseatic Higher Regional Court.

The decision of the judicial authority of the Free and Hanseatic City of Hamburg on an application for a grant [of extradition] of 24 November 2004 – 9351 E - S 6 - 26.4 – violates the complainant's fundamental rights under Article 16 subsection 2 and Article 19 subsection 4 of the Basic Law. The decision on an application for a grant [of extradition] is overturned.

The Federal Republic of Germany is ordered to reimburse the complainant the expenses necessarily incurred by him in the temporary injunction proceedings and in the constitutional complaint proceedings.

GROUNDS:

A. – I.

1

1. a) The complainant has German and Syrian citizenship. He is supposed to be extradited to the Kingdom of Spain for prosecution and has been in custody pending extradition since 15 October 2004. A "European arrest warrant" was issued against the complainant by the Central Court of Investigation in Criminal Matters (*Juzgado Central de Instrucción*) No. 5 of the *Audiencia Nacional* in Madrid on 16 September 2004. The complainant is charged with participation in a criminal association and with terrorism. He is alleged to have supported the terrorist Al-Qaeda network in financial matters and as concerns the contact between its members as a key figure in the European

part of the network. In the European arrest warrant, these charges are based on detailed descriptions of visits to Spain that the complainant had made and of meetings and telephone calls with suspected criminals.

2

In the opinion of the Spanish investigation authorities, the complainant's acts possibly constitute the crime of membership in a terrorist organisation under Article 515.2 and Article 516.2 of the Spanish Criminal Code, whose statutory range of punishment permits prison terms of up to 20 years.

3

b) At first, the Kingdom of Spain requested the complainant's extradition on the basis of an international arrest warrant issued on 19 September 2003. In a letter of 9 January 2004, the Federal Ministry of Justice informed the Hamburg judicial authority that the complainant's extradition was out of the question in view of his German citizenship. The Hamburg Department of Public Prosecution informed the Spanish authorities about this through the Federal Criminal Police Office (*Bundeskriminalamt*) and informed them at the same time that the Spanish findings had been used in German preliminary investigation proceedings against the complainant.

4

c) On 14 September 2004 – after the entry into force of the Act to Implement the Framework Decision on the European Arrest Warrant and the Surrender Procedures between the Member States of the European Union (*Gesetz zur Umsetzung des Rahmenbeschlusses über den Europäischen Haftbefehl und die Übergabeverfahren zwischen den Mitgliedstaaten der Europäischen Union*) of 21 July 2004 (European Arrest Warrant Act, *Europäisches Haftbefehlsgesetz – EuHbG*, Federal Law Gazette I p. 1748) – the Hamburg prosecution authorities were informed by the Federal Criminal Police Office that the arrest notice issued for the complainant in the Schengen Information System for the purposes of his extradition to Spain, which has the same status as a European arrest warrant, was upheld. Thereupon, extradition proceedings were resumed. Upon an inquiry, the Public Prosecutor General (*Generalbundesanwalt*) replied in a letter of 1 October 2004 that the complainant was under investigation on suspicion of membership in a terrorist organisation pursuant to § 129.a.1 of the German Criminal Code (*Strafgesetzbuch – StGB*) and on suspicion of money laundering pursuant to § 261 of the Criminal Code. The investigations had not been brought to a close yet; they mainly concerned the period of time from 1993 to 2001. Because there was no evidence to indicate activities in this respect after the year 2001, no investigations were carried out on suspicion of membership in, or support of, a foreign terrorist organisation pursuant to § 129.b of the Criminal Code, offences which have been punishable since 30 August 2002.

5

d) On the basis of this information, the judicial authority of the Free and Hanseatic City of Hamburg stated on 14 October 2004, in agreement with the Federal Ministry of Justice, that the authorisation to refuse extradition set out in § 83.b.1 of the Law on International Judicial Assistance in Criminal Matters (*Gesetz über die internationale Rechtshilfe in Strafsachen – IRG*) (Federal Law Gazette I 1982 p. 2071) would not be made use of. The provision regulates bars to extradition and permits the authority that grants extradition to refuse a request for extradition *inter alia* if criminal proceedings against the prosecuted person have been instituted for the same act in the requested state or if proceedings have been halted or the institution of such proceedings has been denied.

6

2. a) On 15 October 2004, the Hamburg Hanseatic Higher Regional Court (*Hanseatisches Oberlandesgericht*) issued an arrest warrant against the complainant and ordered his provisional arrest. The court stated that the complainant was charged of having been active in Spain, Germany and Great Britain since 1997 as one of the key figures of the Al-Qaeda terrorist network in the logistic and financial support of this organisation. The complainant was said to have*, inter alia*, taken part in the purchase of a ship for Osama bin Laden. According to the Court, he had also dealt with the management of the ship, in particular with the transmission of documents and the payment of invoices, and had been bin Laden's permanent interlocutor and assistant in Germany. Apart from this, he was alleged to have travelled to Kosovo at the end of the year 2000 on behalf of the network with the objective of taking an ambulance there to conceal other intentions.

7

b) By order of 5 November 2004, the Higher Regional Court ordered the provisional arrest to continue as arrest pending extradition. At the same time, the application to halt extradition proceedings and to obtain a decision on the constitutionality of the European Arrest Warrant Act from the Federal Constitutional Court (*Bundesverfassungsgericht – BVerfG*) was rejected.

8

The court held that a request for extradition existed that had been made by the Spanish authorities on 16 September 2004 in the shape of a European arrest warrant. The request for extradition did not have defects of form that resulted in its invalidity.

9

The court further held that bars to extradition were also not apparent. Pursuant to § 81 no. 4 of the Law on International Judicial Assistance in Criminal Matters, double criminality was not to be verified where the act on which the request was based violated, pursuant to the law of the requesting state, a criminal provision that was associated with the groups of offences referred to in Article 2.2 of the Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States of 13 June 2002 (Official Journal L 190 of 18 July 2002, pp. 1 et seq.). This requirement was satisfied here because the offences in question were participation in a criminal organisation and terrorism. Punishability pursuant to German law was therefore not relevant here. A declaration made by the Spanish authorities to the effect that the complainant could, after having been sentenced, serve the term of imprisonment in Germany if desired (see § 80.1 of the Law on International Judicial Assistance in Criminal Matters), had been received. Apart from this, the judicial authority of the Free and Hanseatic City of Hamburg had stated in agreement with the Federal Ministry of Justice that the authorisation to refuse extradition pursuant to § 83.b.1 of the Law on International Judicial Assistance in Criminal Matters would not be made use of.

10

The court stated that the extradition did not violate the ban on retroactivity set out in Article 103.2 of the Basic Law. The complainant was not supposed to be punished by a German court on account of an act that had not been determined by law before it had been committed. Instead, he was supposed to be surrendered to a Member State of the European Union whose criminal provisions he

was alleged to have violated abroad at a point in time when the act was punishable there pursuant to the law of the requesting state.

11

The court further stated that a judicial referral to the Federal Constitutional Court pursuant to Article 100.1 of the Basic Law was out of the question because the German European Arrest Warrant Act was not unconstitutional. It had been adopted in a regular legislative procedure. In this context, it was irrelevant that the Act had implemented a Council Framework Decision. After the [corresponding] amendment of the Basic Law had taken place, the extradition of Germans was admissible pursuant to Article 16.2 sentence 2 of the Basic Law in conjunction with an implementing statute.

12

The court finally stated that the extradition to Spain did not "impose" a foreign legal system on the complainant; instead, he was only answerable pursuant to the Spanish law that had been valid at the material time before a Spanish court that would have had jurisdiction over him if he had been arrested in Spain before returning to Germany.

13

The court stated that the waiver of the requirement of double criminality was no violation of the rule of law in the meaning of Article 16.2 sentence 2 of the Basic Law. The suppression of terrorist organisations through the punishment of members and supporters of such organisations by due process of law before the ordinary courts of EU Member States seemed necessary in all these states in the interest of an effective protection of the general public.

14

According to the court, there were no grounds to suspect a violation of the principle of *nulla poena sine lege* because for an extradition, it was not sufficient that the act with which the person prosecuted was charged formed part of one of the groups of offences that are referred to in the Framework Decision. The act on which the request was based also had to violate a criminal provision of the law of the requesting state.

15

c) By order of 23 November 2004, which is challenged here, the Higher Regional Court declared the complainant's extradition admissible. Adjective and substantive requirements for extradition were satisfied, there were no bars to extradition. The Higher Regional Court complemented the grounds of its order of 5 November 2004 by stating that the complainant's return to Germany for the execution of the sentence was also not in violation of the *ordre public*. § 80.1 of the Law on International Judicial Assistance in Criminal Matters, which provided for a prison sentence imposed abroad to be served in the sentenced person's home state, did not encroach upon the complainant's rights in a manner that was detrimental to him. The complainant's reasoning to the contrary was based on the premise, which was not shared by the court, that a German's transfer to a foreign country was inadmissible.

16

The court further stated that the impunity of the complainant's behaviour in Germany at the material time, taken together with his German citizenship, did not result in his being safe from – foreign –prosecution as long as he did not leave the Federal Republic of Germany. A German could also be extradited to a Member State of the European Union if he or she had committed a criminal offence outside Germany and was alleged to have thereby incurred a penalty under the law of the requesting state.

17

3. The judicial authority of the Free and Hanseatic City of Hamburg granted extradition on 24 November 2004. The grant was made contingent on the condition that after the imposition of a final and unappealable prison sentence or other sanction, the complainant would be offered to be returned to Germany for the execution of the sentence.

II.

18

By order of 24 November 2004, the Second Senate of the Federal Constitutional Court, on the complainant's application, issued a temporary injunction by which the complainant's surrender to the authorities of the Kingdom of Spain, which had been scheduled for the same day, was suspended for six months at most, pending the decision on the constitutional complaint (*Europäische Grundrechte-Zeitschrift – EuGRZ* 2004, p. 667).

19

The temporary injunction was repeated by order of 28 April 2005 for another three months, at most until a decision on the constitutional complaint.

III.

20

By his constitutional complaint, the complainant challenges the order of the Higher Regional Court that declared his extradition admissible, and furthermore, the decision of the judicial authority of the Free and Hanseatic City of Hamburg on an application for a grant of extradition. He asserts the violation of his rights under Article 2.1, Article 3.1, Article 16.2 and Article 19.4 of the Basic Law and of Article 103.2 of the Basic Law.

21

1. a) The complainant puts forward that the European Arrest Warrant Act and the Framework Decision lack democratic legitimisation. The German parliament had not been entitled to decide that criminal punishment is imposed on German citizens for behaviour that is exempt from punishment pursuant to German law. The proviso that the rule of law must be upheld that is set out in Article 16.2 sentence 2 of the Basic Law, which is relevant in this context, is not respected.

22

The complainant asserts that laws are adopted by Parliament and not enacted by representatives of the government. In fact, the Framework Decision in the area of the "Third Pillar" of the European

Union results in serious encroachments upon fundamental civil liberties. The waiver of the verification of double criminality is tantamount to the factual validity of foreign substantive criminal law within the domestic territory.

23

b) The complainant further argues the waiver of the verification of double criminality conflicts with the ban on retroactivity under Article 103.2 of the Basic Law. The corresponding regulation in the European Arrest Warrant Act can therefore only apply for the future, i.e. for cases in which the citizen has had an opportunity to adjust his or her behaviour to the fact that the impunity of his or her behaviour in Germany will not protect him or her in the European judicial area. What is decisive according to the complainant is that he behaved in a manner that exempted him from punishment in his home state and that he could not have prepared for the fact that his home state would at a later point in time deprive him of the protection awarded by the predictability of state punishment.

24

The complainant further asserts that a waiver of [the requirement of] double criminality is constitutionally acceptable only if the act constituting the offence has taken place in the requesting state because this corresponds to the principle that it is the laws of the place of residence that must be abided by. According to the complainant, all cases are doubtful in which circumstances that do not specify the act constituting the offence, or that have not occurred on the territory of the requesting state, are the connecting factor to the requesting state's jurisdiction. The principle of the rule of law therefore demands that in the course of the verification of admissibility [of the request for extradition], it is examined whether the prosecuted person is, in the European arrest warrant, charged with behaviour that a state governed by the rule of law may, for understandable reasons, make a punishable offence.

25

c) The complainant puts forward that in the present case no behaviour is specified whose punishability is obvious. If everyday acts performed by the complainant, or the journey to Kosovo in an ambulance, are supposed to have been guided by ulterior motives, such motives must be expounded.

26

d) The complainant asserts that the planned return gives rise to two constitutional problems. On the one hand, the execution of a Spanish sentence in Germany violates the *ordre public* if the offence is not punishable in Germany. This problem has already been noticed in the legislative procedure, but has not been taken sufficient account of. On the other hand, pursuant to the Implementation Act, the extradition of a German is already admissible where return has been offered by the requesting state. According to the complainant, this regulation falls short of the Framework Decision, which provides in its Article 5 no. 3 that the prosecuted person after the imposition of the sanction "is returned to the executing Member State". The right to being returned is a right of the complainant that is supposed to facilitate the acceptance of the European arrest warrant to those EU Member States that have problems concerning the extradition of their own citizens. The right to return is a legal claim of the prosecuted person which arises from the precept of rehabilitation. According to the complainant, the Federal Republic of Germany cannot be free to decide whether it accepts an offer made by the requesting state to return an offender because then, the protection of German

citizens intended by § 80.1 of the Law on International Judicial Assistance in Criminal Matters would not be achieved.

27

2. The complainant puts forward that also the decision on the application for a grant of extradition is constitutionally objectionable. After its amendment by the European Arrest Warrant Act, the Law on International Judicial Assistance in Criminal Matters now explicitly provides discretionary grounds for which the extradition of a German may be refused. As the extradition of Germans is committed to the principles of the rule of law, one of which is the guarantee of recourse to the courts, the unappealability of the decision on the application for a grant of extradition requires review by the Federal Constitutional Court. With § 74.b of the Law on International Judicial Assistance in Criminal Matters, the legislature has incorporated a provision into the law on extradition which explicitly rules out an appeal against the decision on the application for a grant of extradition.

28

The complainant states that the decision on the application for a grant of extradition merely consists of the remark that the possibility of refusing to grant extradition in view of the complainant's German citizenship is not made use of. According to the complainant, the considerations on which this exercise of discretion relies are not apparent. The grant merely contains the statement that sufficient account has been taken of the idea of rehabilitation by the fact that Spain has offered to return the complainant to Germany for the execution of his sentence after a possible conviction. According to the complainant, the relevant criteria for the judicial authority's decision should not have been allowed to remain unknown. It would have had to be considered, for instance, that the Spanish authorities' findings had been used in the Public Prosecutor General's preliminary investigation, and that they had not provided any indication to punishable conduct of the complainant in Germany; it also would have had to be considered which security interests spoke in favour of the grant of extradition and which ones against it, and whether the complainant's interest in rehabilitation could be taken account of also if the Spanish offer to return the complainant was not accepted by Germany for legal reasons.

29

The complainant further states that the amendment of the Law on International Judicial Assistance in Criminal Matters has changed the legal nature of the decision on an application for a grant of extradition. According to the complainant, it no longer merely consists of a verbal note to the requesting state but is addressed to the prosecuted person him or herself. This follows from the obligation of giving reasons for decisions on applications for a grant of extradition that allow extradition as well as for decisions that refuse extradition (§ 79 of the Law on International Judicial Assistance in Criminal Matters). Apart from this, the prosecuted person is to be notified of the decision on the application for a grant of extradition. In the old legal situation, such notification had not been provided.

30

The complainant finally states that the unappealability of a decision on an application for a grant of extradition infringes the guarantee of recourse to the courts under Article 19.4 of the Basic Law. Pursuant to the Law on International Judicial Assistance in Criminal Matters, the decision on an application for a grant of extradition is a sovereign act that is removed from the jurisdiction of the

courts. The prosecuted person, however, has a right to the authority's exercising its discretion without any mistakes. The Federal Constitutional Court's case-law to date on the voidability of a decision on an application for a grant of extradition is to be reviewed because since the amendment of the Law on International Judicial Assistance in Criminal Matters, the authority that grants extradition is no longer allowed to use general-policy and foreign-policy interests as guidelines.

IV.

31

1. The Federal Government gave its opinion in written statements by its authorised representative, Prof. Dr. Johannes Masing (a), and by Prof. Dr. Martin Böse, the expert appointed by the Federal Government (b).

32

a) The Federal Government takes the view that the constitutional complaint is inadmissible (1), and in the alternative, that it is unfounded. The opinion relies on the assumption that mandatory standards from legal instruments of the Treaty on European Union take precedence over national law, also over national fundamental rights. To the extent that Article 16.2 of the Basic Law is applicable, the new law on extradition is in harmony with its standards (2). There are no constitutional objections against the drafting of the decision on an application for a grant of extradition as a sovereign act that is removed from the jurisdiction of the courts (3). In the event that the Federal Constitutional Court has doubts concerning the compatibility of the challenged decisions with the German fundamental rights, a referral to the Court of Justice of the European Communities for a preliminary ruling is a possibility (4).

33

(1) According to the Federal Government, the constitutional complaint is inadmissible because it does not sufficiently substantiate the violation of [the complainant's] own rights and the applicability and violation of German fundamental rights. Apart from this, the principle of subsidiarity has not been adhered to.

34

The Federal Government further argues that the exclusion of the voidability of the decision on the application for a grant of extradition pursuant to § 74.b of the Law on International Judicial Assistance in Criminal Matters does not adversely affect the complainant. Anticipating the grant of extradition, which had not yet been pronounced, the Higher Regional Court already had, alternatively, examined the arguments put forward by the complainant. It had explicitly stated that the announced grant of extradition showed no recognisably wrong use of discretion. The grant that had been pronounced later had not added any new considerations so that the complainant had preventively obtained legal protection in this matter before the Higher Regional Court.

35

According to the Federal Government, the challenged decisions are legal instruments that are largely based on mandatory European law, which takes precedence over German law, and are therefore not to be reviewed against the standard of the German fundamental rights with the current stage of integration reached. For the Member States of the European Union, Framework Decisions

are binding as concerns the objective to be achieved. Under European law, they are to be implemented by the Member States without any curtailment irrespective of the national legal system. A national proviso of constitutionality does not exist in this respect.

36

To the extent that the application of the German fundamental rights is not excluded already because of the precedence of application [of European law], it has not been put forward in a sufficiently substantiated manner that they have been violated. The constitutional complaint is also not admissible in view of insufficient fundamental rights protection on the European level. The requirements that are placed on the substantiation of constitutional complaints which allege that a legal instrument of European institutions and bodies transgresses the limits of the sovereign rights conferred on them (*ausbrechender Rechtsakt*) have not been satisfied.

37

(2) The Federal Government further states that in principle, Article 16.2 of the Basic Law is only applicable to the extent that European Union law leaves the Member States margins for drafting. The extradition of German citizens under the same conditions as the extradition of citizens of other Member States of the European Union, with a mutual recognition of arrest warrants, cannot, as a principle, be called into question by Article 16.2 of the Basic Law in the first place. This precedence does not conflict with the history of amendment of Article 16.2 of the Basic Law and with the constitution-amending legislature's understanding. At the time [of the amendment], the legal situation under constitutional law was not supposed to be reflected, but to be amended. The participation in a more flexible European regime of extradition law was supposed to be opened, while at the same time elementary precepts were adhered to. As a binding regulation with an effect which is essentially that of a Directive, the Framework Decision adopted in June 2002 goes beyond the legal situation existing to date and, to the extent that it demands extradition also of a state's own citizens, supersedes Article 16.2 of the Basic Law already as a standard of review.

38

As concerns the drafting of the grounds for optional non-execution of the European arrest warrant pursuant to Article 4 of the Framework Decision on the European arrest warrant, Article 16.2 of the Basic Law is, in principle, applied. Possible measures, however, can only take effect to the extent that they do not undercut the Framework Decision's regulatory concept and their implementation is free from discrimination. A privileged connection to German citizenship is ruled out because the Framework Decision establishes a regime that abolishes the distinction between different citizenships and "differences in status that are related to the national state and the individual" are replaced by "legal standards that are related to European law and factual criteria".

39

The protection of German citizens from extradition can be restricted by a formal Act of Parliament. The European Arrest Warrant Act is such an Act. Pursuant to this Act, extradition can only be ordered if the "principles of the rule of law" are adhered to. It results from the wording as well as from the objective of the relevant provision in the constitution that these principles cannot be equated with the nationally applicable requirements that result from the Basic Law's principle of the rule of law. On the other hand, the provision makes reference to more than a minimum standard under public international law. Instead, it establishes a reference to a "constitutional tradition that connects Europe and North America" with the core standards of due process in criminal

proceedings that results from this tradition. The legislature can assume that these standards are complied with in the European Union and its Member States because they are already a prerequisite for Union membership. In the individual case, a prosecuted person can invoke the *ordre public* in § 73 sentence 2 of the Law on International Judicial Assistance in Criminal Matters, which corresponds to the all-European *ordre public* under Article 6 of the Treaty on European Union.

40

(3) According to the Federal Government, the unappealability of the decision on the application for a grant of extradition does not constitute a denial of legal protection for the complainant because the Higher Regional Court examined the aspects adduced by the complainant, as an alternative, in the context of the admissibility proceedings. Apart from this, in the present case, § 74.b of the Law on International Judicial Assistance in Criminal Matters is also not constitutionally objectionable on the merits. Because no rights can be derived from substantive guarantees of fundamental rights as concerns the considerations for granting extradition set out in § 83.b of the Law on International Judicial Assistance in Criminal Matters, there are no constitutional objections against the German legislature's decision to draft the decision on the application for a grant of extradition also in the future in such a way that it is a sovereign act which is removed from the jurisdiction of the courts. Moreover, it does not follow from Article 16.2 of the Basic Law or from other fundamental rights that in the case of concurrent jurisdiction of several states, a citizen is entitled to a trial before a German criminal court.

41

(4) The Federal Government further states that to the extent that the Federal Constitutional court has doubts concerning the compatibility of the challenged decisions with the German fundamental rights, a referral to the Court of Justice of the European Communities for a preliminary ruling must be considered. In principle, the Court of Justice is competent to interpret Framework Decisions. Pursuant to Article 35.1 of the Treaty on European Union, the Court of Justice has jurisdiction to give preliminary rulings on questions raised by the Member States to the extent that the Member States have made a declaration of acceptance [of the Court of Justice's jurisdiction to give preliminary rulings]. The Federal Republic of Germany has made such declaration; the Act Concerning the Invocation of the Jurisdiction of the Court of Justice of the European Communities for Preliminary Rulings in the Area of Police Cooperation and Judicial Cooperation in Criminal Matters Pursuant to Article 35 of the Treaty on European Union (*Gesetz betreffend die Anrufung des Gerichtshofs der Europäischen Gemeinschaften im Wege des Vorabentscheidungsverfahrens auf dem Gebiet der polizeilichen Zusammenarbeit und der justiziellen Zusammenarbeit in Strafsachen nach Artikel 35 des EU-Vertrages vom 6. August 1998* (EuGH-Gesetz – ECJ Act) (Federal Law Gazette I p. 2035)) made the jurisdiction of the Court of Justice binding also on the national level. Differently from what is prescribed in Article 35.3 of the Treaty on European Union, the German legal system also safeguards the duty on the part of the last-instance court to refer questions to the Court of Justice for a preliminary ruling and thus safeguards the sole right of the Court of Justice to interpret such legal instruments and to declare them void. Pursuant to the regulation in Article 234.3 of the Treaty establishing the European Community, this obliges all German courts whose decisions cannot be challenged by appeals to refer questions for a preliminary ruling. The harmonisation of the preliminary ruling under European Union Law with European Community law permits to apply the standards that are applicable pursuant to Article 234.3 of the Treaty establishing the European Community to the proceedings pursuant to Article 35.1 of the Treaty on European Union.

42

b) The supplementary opinion by the expert appointed by the Federal Government contains statements on the constitutional issues that are raised in the context of the constitutional complaint in connection with the principle of double criminality.

43

The expert opinion states that the waiver of the verification of double criminality is no grievance for the complainant. In the view generally held, the facts on which the request is based are to be rearranged in such a way that a connecting factor to the requested state is established.

44

The waiver of the verification of double criminality in the individual case as regards the groups of offences mentioned in Article 2.2 of the Framework Decision on the European arrest warrant, which is set out in § 81 no. 4 of the Law on International Judicial Assistance in Criminal Matters, does not infringe the principle of *nulla poena*. Extradition does not fall under the scope of application of Article 103.2 of the Basic Law because extradition does not constitute a disapproving reaction of state sovereignty to punishable conduct.

45

The waiver of the verification of double criminality in the individual case does not establish or extend punishability pursuant to Spanish law. The requirement of double criminality can only protect the prosecuted person from extradition but not from prosecution by the foreign state. The expert opinion further argues that the subject of protection of public confidence is not substantive impunity but “factual” security from prosecution based on the procedural situation. In the view generally held, Article 103.2 of the Basic Law does not, however, apply to the law of criminal procedure.

46

According to the expert opinion, the predictability of state punishment is not restricted. The waiver of the verification of double criminality pursuant to Article 2.2 of the Framework Decision on the European arrest warrant essentially relates to groups of offences in which the harmonisation of substantive criminal law is far advanced, which means that as a general rule, double criminality exists. This applies above all in the areas of offences that are relevant in the complainant’s case, i.e. participation in a criminal organisation and terrorism. To determine the content of the first group of offences mentioned, the Joint Action of 21 December 1998 adopted by the Council on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union can be consulted. The content of the term “terrorism” follows from the Council Framework Decision of 13 June 2002 on combating terrorism.

47

The expert opinion further states that the integration of foreign criminal organisations in the scope of application of the respective national constituent elements of an offence has thus been traced out by European Union law. The complainant could not have confidence that the support of a terrorist organisation that had taken place from Germany could not be prosecuted in other EU Member States. This applies all the more against the backdrop that such behaviour had been punishable already before the introduction of § 129.b of the German Criminal Code. The standards that are contained in the Joint Action of 21 December 1998 on making it a criminal offence to participate in

a criminal organisation in the Member States of the European Union not only bind the legislature but also the administration of justice. There is, in fact, a duty to interpret German criminal law in conformity with European law. § 129 and § 129.a of the Criminal Code had to be interpreted in such a way that before the legal "clarification" by § 129.b of the Criminal Code, they had also covered the support of a criminal organisation in foreign states in the EU.

48

According to the expert opinion, the fact that Spanish criminal law is applied to the complainant's behaviour is not due to the implementation of the Framework Decision on the European arrest warrant by the German legislature but is based on the Spanish law regulating the application of criminal sanctions. The question to what extent Spain is permitted to extend its punitive power to acts committed on German territory does not concern the principle of *nulla poena* but the limits under public international law of the extension of national punitive power.

49

The waiver of the verification of double criminality in the individual case does also not infringe the general principle of the rule of law. The requested state does not conduct its own criminal proceedings but supports prosecution by another state through extradition. With extradition, the requested state abandons its own "*ius puniendi*" in favour of the requesting state and surrenders the prosecuted person to foreign prosecution.

50

In principle, the binding effect of the fundamental rights on the state bodies also applies as concerns extraditions. However, the standard of review is to be reduced due to the conflicting constitutional interest of respect for international law (*Völkerrechtsfreundlichkeit*). Extradition due to an act that is not punishable under German law is therefore not unconstitutional *ipso jure*.

51

Additionally, the requirement of double criminality ceases to apply to areas of offences in which – as is the case in the areas that are relevant here – the harmonisation of substantive criminal law is so far advanced that as a general rule, double criminality exists. Apart from this, the function of the principle of double criminality is not to protect fundamental rights; instead, it serves to safeguard state interests.

52

By making reference to the list of groups of offences contained in Article 2.2 of the Framework Decision on the European arrest warrant, § 81 no. 4 of the Law on International Judicial Assistance in Criminal Matters also does not infringe the general principle of certainty under the rule of law. As a legal instrument of the European Union, the Framework Decision cannot be reviewed against the standard of the Basic Law; if necessary, a question can be referred to the Court of Justice of the European Communities for a preliminary ruling.

53

2. a) In its written opinion, the Free and Hanseatic City of Hamburg at first took the view that the constitutional complaints were unfounded. The challenged decision on the application for a grant of

extradition and the challenged order of the Higher Regional Court stood up to constitutional review just as the amendments of the Law on International Judicial Assistance in Criminal Matters on which the decisions were based.

54

The Free and Hanseatic City of Hamburg further stated that as regards the challenge of a violation of the ban on retroactivity pursuant to Article 103.2 of the Basic Law, there was not even an encroachment upon the scope of protection. The complainant was not supposed to be sentenced by a German court for an act whose punishability had not been legally determined before it had been committed. Instead, he was supposed to be extradited to a Member State of the European Union pursuant to whose law applicable at the material time he was alleged to have committed a criminal offence. The alleged retroactivity therefore did not concern the punishability of his behaviour but only the modification of the conditions for extradition that had entered into force with the European Arrest Warrant Act.

55

For this reason, an infringement of the principle of *nulla poena* could also not be established. In the specific case, the act on which the request for extradition was based was punishable pursuant to the law of the requesting state – Spain –; in this context, the question whether a mere abstract recourse to the groups of offences mentioned in Article 2.2 of the Framework Decision on the European arrest warrant was sufficient was irrelevant.

56

The Free and Hanseatic City of Hamburg argued that the provisions of the Law on International Judicial Assistance in Criminal Matters on which the challenged decisions were based were compatible with Article 16.2 of the Basic Law. The constitution-amending legislature had explicitly stated that in the relations with the other EU Member States, it had to be assumed that the "principles of the rule of law" were adhered to. In the case of requests for extradition from these states, the adherence of such principles had, in principle, to be trusted in. Notwithstanding that, neither the element of double criminality nor the voidability of the decision on the application for a grant of extradition is an inalienable rule-of-law principle of the Basic Law.

57

The Free and Hanseatic City of Hamburg further stated that the exclusion of the voidability of the decision on the application for a grant of extradition in § 74.b of the Law on International Judicial Assistance in Criminal Matters did not change the legal situation and was therefore constitutional, just as it had been in the past. The grant of extradition was part of putting into concrete terms the concept of the "Federal Government's unlimited discretion in foreign-policy matters", which exclusively concerns the relation between the Federal Republic of Germany and the state that requests judicial assistance. Rights of the person affected were not impaired. The complainant was not entitled to not being extradited if the conditions of admissibility were met; to the extent that fundamental rights were affected, the corresponding measures were covered by the Higher Regional Court's decision on admissibility. The European Arrest Warrant Act had not changed anything about the concept of extradition proceedings. The case groups specified in § 83.b of the Law on International Judicial Assistance in Criminal Matters, which contain bars to extradition, exclusively pursued foreign-policy objectives. This also applied to § 83.b no. 1 of the Law on International Judicial Assistance in Criminal Matters, which did not serve to protect German citizens from

extradition. According to the structure of the Law, the aspects concerning protection were to be taken into account already in the admissibility proceedings pursuant to § 80 of the Law on International Judicial Assistance in Criminal Matters. Because in the present case, double criminality exists, a return of the complainant does at least not fail because of this element.

58

b) In a written pleading of 12 April 2005, the Free and Hanseatic City of Hamburg informed [the Federal Constitutional Court] that it did not uphold its original opinion.

59

The Free and Hanseatic City of Hamburg argued that the fundamental problem which consisted in the fact that extradition ultimately subjected the complainant to foreign prosecution for an act that had not been punishable pursuant to domestic law, or in any case had not yet been punishable when it had been committed could, in view of the guarantees of Article 103.2 of the Basic Law, not be solved in conformity with the constitution. The Free and Hanseatic City of Hamburg further argued that in this context, it was of decisive importance that the contributions to offences with which the complainant was charged and which were relevant under criminal law not only occurred before the date of entry into force of the European Arrest Warrant Act and of § 129.b of the Criminal Code, but also before the insertion of Article 16.2 sentence 2 in the Basic Law.

V.

60

On 13 and 14 April 2005, the Federal Constitutional Court conducted an oral hearing in which the parties explained and deepened their legal viewpoints. The Court heard the professors Dr. Helmut Fuchs, Dr. Kay Hailbronner and Dr. Thomas Weigend; it heard Prof. Dr. Jürgen Grunwald und Dr. Martin Wasmeier from the European Commission, Dr. Christine Hügel, Director of Public Prosecution, and Dr. Martin Nothhelfer, Senior Public Prosecutor, from the Karlsruhe Department of Public Prosecution, Harald Kruse, Senior Public Prosecutor, from the Koblenz Department of Public Prosecution, apart from representatives of the German Federal Bar (*Bundesrechtsanwaltskammer*) and of the German Lawyers' Association (*Deutscher Anwaltverein*) as persons competent to furnish information (§ 27.a of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz – BVerfGG*)).

B.

61

The admissible constitutional complaint is well-founded.

62

The European Arrest Warrant Act infringes fundamental rights and is unconstitutional as concerns substantive law (I.). The Act is void (II.). The legal basis of the challenged decisions is unconstitutional; they are therefore overturned (III.).

I.

63

The European Arrest Warrant Act infringes Article 16.2 sentence 1 of the Basic Law because the legislature has not complied with the prerequisites of the qualified proviso of legality under Article 16.2 sentence 2 of the Basic Law when implementing the Framework Decision on the European arrest warrant. (1.). By excluding recourse to the courts against the grant of extradition to a Member State of the European Union, the European Arrest Warrant Act infringes Article 19.4 of the Basic Law (2.).

64

1. German citizens are protected from extradition by the fundamental right under Article 16.2 (a). Pursuant to the second sentence of this provision, the protection can, however, be restricted by law in specific cases (b). As regards the restriction, the legislature is subject to constitutional commitments. These commitments result from the fact that there is a proviso of legality and from the special extent of protection provided by the fundamental right and from the principle of proportionality. When pursuing public interests, the constitution-restricting legislature is obliged to preserve the extent of protection provided by the fundamental right as far as possible; the constitution-restricting legislature may therefore restrict it only in compliance with the principle of proportionality and is to observe other constitutional commitments, such as the guarantee of legal protection under Article 19.4 of the Basic Law (c). The European Arrest Warrant Act does not comply with these constitutional requirements also with a view to the Framework Decision on the European arrest warrant (d).

65

a) With the sentence “No German may be extradited to a foreign country” (Article 16.2 sentence 1 of the Basic Law), the Basic Law guaranteed, until its amendment by the Act of 29 November 2000, unrestricted protection for a German from transfer to a foreign state power. Extradition as a traditional institute of international cooperation of states in criminal matters is characterised as an encroachment upon fundamental rights by the fact that a person is removed by force from the sphere of the domestic jurisdiction and transferred to a foreign jurisdiction (see Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 10, 136 (139)) for criminal proceedings that have been instituted there to be brought to a close or a sentence imposed there to be executed (see BVerfGE 29, 183 (192)).

66

Exactly like the ban on expatriation that is connected with it (Article 16.1 of the Basic Law), the ban on extradition (Article 16.2 sentence 1 of the Basic Law) is not only an expression of the responsibility that the state claims for its own citizens, but both bans are guaranteed as liberty rights. The purpose of the liberty right to protection from extradition is not to remove the person affected from a just and lawful sentence (BVerfGE 29, 183 (193)). Instead, its purpose is to ensure that citizens are not removed against their will from the legal system with which they are familiar. To the extent that they reside in the state territory, all citizens are supposed to be protected from the insecurities connected with being sentenced in a legal system that is unknown to them under circumstances that are inscrutable to them (see BVerfGE 29, 183 (193); see also von Martitz, *Internationale Rechtshilfe in Strafsachen*, vol. I p. 1888; Mettgenberg, *Ein Deutscher darf nicht ausgeliefert werden!*, 1925, pp. 6 et seq.; pp. 35 et seq.; Baier, *Die Auslieferung von Bürgern der Europäischen Union an Staaten innerhalb und außerhalb der EU*, *Goltdammer’s Archiv für Strafrecht – GA* 2001, p. 427 (434 et seq.)).

67

With its ban on expatriation and extradition, the fundamental right enshrined in Article 16 of the Basic Law guarantees the citizens' special association to the legal system that is established by them. The citizenship is the legal prerequisite for an equal civic status, which on the one hand establishes equal duties, but on the other hand, and above all, establishes the rights whose guarantee legitimises public authority in a democracy. The civic rights and duties that are connected with the possession of citizenship for every individual are at the same time constituent bases of the entire polity. It is commensurate with the citizen's relation to a free democratic polity that the citizen may, in principle, not be excluded from this association. The citizens' confidence in their secured residence in the territory of the state to which they have a constitutionally guaranteed connection in the shape of the citizenship is also acknowledged by public international law. States are under an obligation under international law to receive their own citizens, i.e. to permit their entry into the state territory and their residence there (see Verdross/Simma, *Universelles Völkerrecht*, 3rd ed., 1984, *§ 1202* with further references; detailed account by Hailbronner, in: id./Renner, *Staatsangehörigkeitsrecht*, 3rd ed., 2001, Introduction E, marginal nos. 113 et seq.). The right to enter the state territory correlates to the right of the states to extradite foreigners from their state territory.

68

The fundamental right that guarantees the citizenship and the right to remain in one's own legal system ranks highly. The manner in which it is drafted is based, *inter alia*, on experience from recent German history in which, immediately after the coup d'état in 1933, the National Socialist dictatorship gradually excluded and expelled, in accordance with the letter of the law, particularly the Germans of Jewish faith or Jewish origin from the protection provided by the German citizenship and by their being part of the German people by devaluing citizenship as an institution and replacing it by a new "national status" for citizens entitled to this status (see § 2 of the Reich Act on Citizenship (*Reichsbürgergesetz*) of 15 September 1935, Reich Law Gazette (*Reichsgesetzblatt – RGBl*) I p. 1146; see Grawert, *Staatsvolk und Staatsangehörigkeit*, in: Isensee/Kirchhof (eds.), *Handbuch des Staatsrechts*, vol. II, 3rd ed., 2004, *§ 16.1*, marginal no. 44). However, behind the guarantee provided by Article 16 of the Basic Law there is also the conviction, shared all over Europe since the French Revolution, that citizens can enjoy their legal status in politics and under civil law only where their status is secured by law (see Randelzhofer, in: Maunz/Dürig, *Grundgesetz Kommentar*, *Article 16.1,* marginal no. 2).

69

To ensure that the ban on extradition does not give a state's own citizens carte blanche for criminal action abroad, and to live up to the state's responsibility for their action which goes with the state's promise to protect them, the Federal Republic of Germany's punitive power extends, in principle, also to offences committed abroad (see §§ 5 et seq. of the Criminal Code and § 1 of the Code of Crimes against International Law (*Völkerstrafgesetzbuch – VStGB*)), so that, as a general rule, it is possible to prosecute offences committed by Germans abroad.

70

b) The encroachment upon the scope of protection of Article 16.2 sentence 1 of the Basic Law is justified exclusively under the prerequisites set out in Article 16.2 sentence 2 of the Basic Law. Since the entry into force of Article 1 of the 47th Act to Amend the Basic Law (*47. Gesetz zur Änderung des Grundgesetzes*) of 29 November 2000 (Federal Law Gazette I p. 1633), the Basic

Law permits, under certain conditions, the extradition of a German citizen to a Member State of the European Union or to an international court of justice. To this extent, it also opens the national legal system to European law and to public international law and to international cooperation in the shape of a controlled commitment in order to promote respect of international organisations that preserve peace and liberty and respect of public international law to promote the growing together of the European peoples in a European Union (Article 23.1 of the Basic Law).

71

aa) The opening up of such permission to encroach upon the fundamental right to freedom from extradition, which had before been unrestrictedly guaranteed to Germans, has not established unconstitutional constitutional law. An amendment of the Basic Law would be inadmissible if it transgressed the bounds of Article 79.3 of the Basic Law. The extradition of Germans does not infringe the principles laid down in Article 1 und Article 20 of the Basic Law, in any case if the commitments to constitutional law are complied with. An extradition of Germans that abides by the principles of the rule of law neither violates their human dignity nor infringes the principles of state structure laid down in Article 20 of the Basic Law (see already BVerfGE 4, 299 (303-304); 29, 183 (193)).

72

bb) The extradition also of a state's own citizens corresponds to a general development that takes place on the supra-national level and in public international law, against which the Basic Law, with its respect for international law, does not establish insurmountable hurdles. As a member of the United Nations, the Federal Republic of Germany is, pursuant to chapter VII of its Charter, in principle obliged to comply with the resolutions of the United Nations Security Council and to implement them (see Frowein/Krisch, in: Simma (ed.), *The Charter of the United Nations*, 2nd ed., 2002, vol. 1, p. 701 (708-709), marginal nos. 21 et seq.). Security Council Resolutions 827 and 955, which established, on an ad hoc basis, the International Criminal Tribunals for the former Yugoslavia and Rwanda in The Hague and Arusha, provide for the extradition of a state's own citizens because as a general rule, only this makes the intended international prosecution of presumed war criminals possible (see the Act on Cooperation with the International Criminal Tribunal for the Former Yugoslavia (*Gesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof für das ehemalige Jugoslawien*) of 10 April 1995, Federal Law Gazette I p. 485, and the Act on Cooperation with the International Criminal Tribunal for Rwanda (*Gesetz für die Zusammenarbeit mit dem Internationalen Strafgerichtshof für Ruanda*) of 4 May 1998, Federal Law Gazette I p. 843; see in this context Uhle, *Auslieferung und Grundgesetz – Anmerkungen zu Artikel 16 II GG*, *Neue Juristische Wochenschrift – NJW* 2001, p. 1889 (1890)).

73

The statute of the permanent International Criminal Court in The Hague under the law of international agreements (see Act on the Rome Statute of the International Criminal Court (*Gesetz zum Römischen Statut des Internationalen Strafgerichtshofs*) of 17 July 1998 – ICC Statute Act, Federal Law Gazette 2000 II p. 1393, entered into force on 1 July 2002, in its version promulgated on 28 February 2003, Federal Law Gazette 2003 II p. 293) took recourse to these two models in this respect, with the important proviso, however, that international jurisdiction is only established on a subsidiary basis. The States Parties to the Statute have *ipso jure* the possibility to prevent extradition of their own citizens by adequate national prosecution (as regards the principle of complementary jurisdiction, see Article 1 and Article 17 of the Statute and Article 1 § 1.1 of the Act of 21 June 2002 on the Implementation of the Rome Statute of the International Criminal Court of

17 July 1998 (*Gesetz vom 21. Juni 2002 zur Ausführung des Römischen Statuts des Internationalen Strafgerichtshofs vom 17. Juli 1998*), Federal Law Gazette I p. 2144). The responsibility for the punishment of certain offences is thus divided by a coordinated assignment of competences. Aware of its special responsibility, and also of the historical reasons for it, the Federal Republic of Germany, as a member of the international community of states, integrates in the process of evolution of an international system of criminal justice for crimes against humanity, which began with the trials of war criminals before the tribunals of Nuremberg and Tokyo after the Second World War (on the prosecution of genocide, see the Order of the Fourth Chamber of the First Senate of the Federal Constitutional Court of 12 December 2000 – 2 BvR 1290/99 –, *Neue Juristische Wochenschrift* 2001, pp. 1848 et seq.).

74

As a Member State of the European Union, Germany has entered into further obligations. By ratifying the treaties of Amsterdam and of Nice, the Federal Republic of Germany has undertaken to take part in establishing and developing the "area of freedom, security and justice". The Member States' cooperation takes place within the – intergovernmental – "Third Pillar" of the law of the European Union. In this context, Article 31.1 letter b of the Treaty on European Union also provides to facilitate extradition between Member States. In doing so, the European Union pursues the objective to combine the process of growing together and of opening the borders for persons, goods, services and capital with better cooperation of law enforcement services. This is supposed to be ensured by a further judiciarisation of the relations between the Member States, i.e., *inter alia*, by the Member State governments' waiver of their political discretion that is customary in the states' conventional legal relations, which exists in particular in the law on extradition – in Germany precisely in the context of the decision on the application on a grant of extradition.

75

cc) The possibility of restricting the ban on the extradition of Germans, whose validity had been absolute to date, also does not result in the legal system that is established by the Basic Law losing the core elements of statehood (*Entstaatlichung*), a development that, due to the inalienable principles of Article 20 of the Basic Law, would be removed from the constitution-amending legislature's freedom of disposition (see BVerfGE 89, 155 (182 et seq.)). In particular, the institute of citizenship is neither abandoned nor substantially devalued or replaced by citizenship of the European Union so that its importance for the principle of democracy does not have to be discussed here. Notwithstanding its importance in other respects (see BVerfGE 89, 155 (184)), the citizenship of the Union is a derived status which complements national citizenship (Article 17.1 sentence 2 of the Treaty establishing the European Community); this is upheld also in Article I-10.1 sentence 2 of the Treaty establishing a Constitution for Europe where it lays down that citizenship of the Union shall be additional to national citizenship and shall not replace it. Correspondingly, the ban under European Community law on discrimination on grounds of citizenship is not laid down comprehensively but, in line with the principle of conferral, only for the objectives set out in the Treaty, in particular in the context of the fundamental liberties. This at the same time contributes to the Member States being able to preserve their own national identities (Article 6.3 of the Treaty on European Union), which find their expression in their respective fundamental political and constitutional structures (see Hilf/Schorkopf, in: Grabitz/Hilf (eds.), *Recht der Europäischen Union, Art. 6 EU,* marginal nos. 78 et seq. and *Article I-5.1 of the Treaty establishing a Constitution for Europe*).

76

Due to the area-specific restriction of the European ban on discrimination on grounds of Member State citizenship, a loss of the core elements of statehood, which would be inadmissible pursuant to the regulations of the Basic Law, cannot be established in this context as concerns the extradition of German citizens to other Member States. Not only do tasks of substantial importance remain with the state; the restriction of the ban on extradition is also not tantamount to the waiver of a state task that is essential in its own right.

77

In particular with a view to the principle of subsidiarity, (Article 23.1 of the Basic Law), the cooperation that is put into practice in the “Third Pillar” of the European Union in the shape of limited mutual recognition, which does not provide for a general harmonisation of the Member States’ systems of criminal law, is a way of preserving national identity and statehood in a single European judicial area.

78

c) The legislature cannot unrestrictedly depart from the ban on the extradition of Germans. aa) As a qualified proviso of legality, Article 16.2 sentence 2 of the Basic Law permits the extradition of Germans only “as long as the rule of law is upheld”. Such prerequisite for an extradition not merely repeats the validity of the principle of the rule of law, which is not open to restrictions of fundamental rights anyhow, and in particular of the principle of proportionality. It rather constitutes an expectation referring to the requesting Member State and to the international court in terms of structural correspondence, as has also been set out in Article 23.1 of the Basic Law. When permitting the extradition of Germans, the legislature must examine in this context whether the prerequisites of the rule of law are complied with by the requesting authorities.

79

In this context, the legislature must verify when restricting fundamental rights that the observance of rule-of-law principles by the authority that claims punitive power over a German is guaranteed. Here, it will have to be taken into account that every Member State of the European Union is to observe the principles set out in Article 6.1 of the Treaty on European Union, and thus also the principle of proportionality and that therefore, a basis for mutual confidence exists. This, however, does not release the legislature from reacting, in cases in which such confidence in the general conditions of procedure in a Member State has been profoundly shaken, and from doing so irrespective of proceedings pursuant to 7 of the Treaty on European Union.

80

The particular bar mentioned in Article 16.2 sentence 2 of the Basic Law does not, however, replace the limits of the constitution that exist for every law that restricts fundamental rights. In turn, the law that restricts fundamental rights must comply with all commitments to constitutional law, may not tolerate conflicts with other provisions of the constitution and must implement the encroachment in a considerate manner, complying with the precept of proportionality.

81

bb) The legislature was obliged in any case to use the latitude as concerns incorporation into national law that the Framework Decision leaves the Member States in a manner that is considerate with the fundamental rights. The fact that the responsibility for ensuring that incorporation is in

conformity with the constitution is particularly high in comparison with the incorporation of European Community directives into national law also results from the circumstance that the measures in question are from the European Union's "Third Pillar". The Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States is an act of secondary Union legislation that legally implements the objective established by the Treaty on European Union. Pursuant to Article 34.2 letter b, the Treaty on European Union is binding as regards the "result to be achieved". It is true that as concerns its concept, the approach to action under European Union law is modelled after the directive under supranational Community law; in several aspects, however, it differs from this source of secondary law. A Framework Decision does not entail direct effect (Article 34.1 letter b of the Treaty on European Union); its national validity still depends on its being incorporated into national law by the Member States. By incorporating the exclusion of direct applicability into the Treaty on European Union, the Member States wanted to prevent in particular that the case-law of the Court of Justice of the European Communities on the direct applicability of directives is interpreted in such a way that it also covers Framework Decisions (on the so-called "vertical direct effect" of directives see Court of Justice of the European Communities, Joint Cases C-6/90 and C-9/90, European Court Reports 1991 page I-5357 marginal no. 11 – *Francovich and others*; Case C-62/00, European Court Reports 2002, I-6325 marginal no. 25 – *Marks & Spencer*; summary in Borchardt, *Die rechtlichen Grundlagen der Europäischen Union*, 2nd ed., 2002, marginal nos. 341 et seq.).

82

As a form of action of European Union law, the Framework Decision is situated outside the supranational decision-making structure of Community law (on the difference on European Union law and Community law, see BVerfGE 89, 155 (196)). In spite of the advanced state of integration, European Union law is still a partial legal system that is deliberately assigned to public international law. This means that a Framework Decision must be adopted unanimously by the Council, it requires incorporation into national law by the Member States, and incorporation is not enforceable before a court. The European Parliament, autonomous source of legitimisation of European law, is merely consulted during the lawmaking process (see Article 39.1 of the Treaty on European Union), which, in the area of the "Third Pillar", meets the requirements of the principle of democracy because the Member States' legislative bodies retain the political power of drafting in the context of implementation, if necessary also by denying implementation.

83

cc) Pursuant to Article 4 no. 7 letters a und b of the Framework Decision on the European arrest warrant, the execution of the European arrest warrant can be refused where it relates to offences that are regarded by the law of the executing Member State as having been committed in whole or in part on the territory of the executing Member State or in a place treated as such or which have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.

84

These provisions admit for a restriction of extradition by national law. When adopting the Act implementing the Framework Decision on the European arrest warrant, the legislature was obliged to implement the objective of the Framework Decision in such a way that the restriction of the fundamental right to freedom from extradition is proportionate. In particular, the legislature, apart from respecting the essence of the fundamental right guaranteed by Article 16.2 of the Basic Law, has to see to it that the encroachment upon the scope of protection provided by it is considerate. In

doing so, the legislature has to take into account that the ban on extradition is precisely supposed to protect, *inter alia*, the principles of legal certainty and protection of public confidence as regards Germans who are affected by extradition. The reliability of the legal system is an essential prerequisite for freedom, i.e. for a person's self-determination over his or her own concept of life and its implementation. In this respect, already the principle of the rule of law requires that persons who are entitled to enjoy the fundamental right in question must be in a position to rely on their behaviour not being subsequently qualified as illegal where it complies with the law in force at the respective point in time (on the time aspect of the application of legal provisions, see BVerfGE 45, 142 (167-168); 63, 343 (357)).

85

The prosecuted person's confidence in his or her own legal system is especially protected by Article 16.2 of the Basic Law in conjunction with the principle of the rule of law where the act on which the request for extradition is based has been committed in whole or in part on German territory, aboard German vessels or aircraft or in places that are under German sovereign power. Charges of criminal acts with such a significant domestic connecting factor are, in principle, to be investigated in the domestic territory by German investigation authorities if those suspected of the criminal act are German citizens.

86

A significant domestic connecting factor exists in any case if essential parts of the place where the criminal act was committed and of the place where the result of the act occurred are located on German state territory. In such a combination of circumstances, the state's responsibility for the integrity of its legal system and the prosecuted person's fundamental-rights claims come together in such a way that as a general rule, the result is a bar on extradition. Whoever, as a German, commits a criminal offence in his or her own judicial area need, in principle, not fear extradition to another state power. If this were different, such a restriction of the protection from extradition would already come close to affecting the essence of the fundamental right. For the prosecuted person, transfer to another Member State's legal system, even though it has been brought closer by European integration, not only means discrimination under procedural law, which can consist in language obstacles, cultural differences and different procedural law and possibilities of defence. Such transfer ultimately ties the prosecuted person to a substantive criminal law in respect of which no democratic means had existed for him or her to participate in its creation, which he or she – unlike German criminal law – does not need to know and which in many cases due to a lack of familiarity with the respective national context, does not permit him or her as a layperson a sufficiently secure comparative evaluation.

87

The result of the assessment is different where a significant connecting factor to a foreign country exists as regards the alleged offence. Whoever acts within another legal system must reckon with his or her being held responsible there as well. As a general rule, this will be the case if the act constituting the offence has been committed entirely or in essential parts in the territory of another European Union Member State and if the result has occurred there. The fact that after committing an offence, the prosecuted person will possibly succeed in fleeing to his or her home state is not of decisive importance in this context. A significant connecting factor to a foreign country must also, and especially, be assumed in cases where the offence has a typical cross-border dimension from the outset and shows a corresponding gravity, as is the case with international terrorism or

organised trafficking in drugs or human beings; all those who become part of such criminal structures cannot fully rely on their citizenship providing them protection from extradition.

88

Whereas in cases such as the ones outlined here, the result of the examination of proportionality is as a general rule predictable, specific weighing of the individual case is required if the act has been committed entirely or partly in Germany but the result has occurred abroad. What must be weighed and correlated in such cases are the gravity of the alleged offence and the possibilities of effective prosecution on the one hand and the prosecuted person's interests that are protected by fundamental rights on the other hand, taking into account the objectives connected with the creation of a single European judicial area.

89

To the extent that the legislature does not make use of the latitude provided to it by Article 4 no. 7 letter a of the Framework Decision on the European arrest warrant by specifying constituent elements of offences, it has to ensure through its programme of legal examination that the authorities that implement the Act will engage in a specific weighing of the conflicting legal positions. The requirements placed on the constitution-amending legislature by Article 20 und Article 1 of the Basic Law are not met already by Article 16.2 sentence 2 of the Basic Law demanding, in an abstract and general manner, that the requesting state's legal system adhere to the principles of the rule of law, and by the German implementing act establishing a corresponding concordance of minimum rule-of-law standards. As regards the extradition of persons, in particular of a state's own citizens, the Basic Law demands in each individual case a specific examination of whether the prosecuted person's corresponding rights are guaranteed. Such examination is necessary precisely because other states' sovereign punitive power is not, in principle, bound by the principle of territoriality and, pursuant to classical concepts under international law, is limited, apart from the requirement of a minimum connection of the alleged offence to the punishing state, by the fact that it is left to all other states' discretion whether they provide judicial assistance in criminal matters (see *Maierhöfer, Weltrechtsprinzip und Immunität: das Völkerstrafrecht vor den Haager Richtern: Besprechung des Urteils des IGH vom 14. Februar 2002 (Demokratische Republik Kongo gegen Belgien), Europäische Grundrechte-Zeitschrift – EuGRZ* 2003, pp. 545 et seq.). In this respect, the Framework Decision has merely shifted the pattern of a political decision, which is not subject to judicial review, towards a judicial weighing in which due account is to be taken of the Framework Decision's objectives of simplification.

90

d) The European Arrest Warrant Act does not meet these constitutional requirements. The manner of achieving the Framework Decision's objectives that the law has chosen encroaches upon the freedom from extradition under Article 16.2 of the Basic Law in a disproportionate manner.

91

aa) When implementing the Framework Decision, the legislature has failed to take sufficient account of the especially protected interests of German citizens. In this respect, § 80 of the Law on International Judicial Assistance in Criminal Matters distinguishes between Germans who are supposed to be extradited to a Member State of the European Union and non-Germans only by making use of the possibility, provided in Article 5.3 of the Framework Decision on the European arrest warrant, of making extradition of a state's own citizens subject to conditions regarding the

persons being returned to serve the sentence passed against them. Pursuant to § 80 of the Law on International Judicial Assistance in Criminal Matters, extradition of a German for prosecution is only admissible where the requesting Member State offers to return the German after the imposition of the unappealable custodial sentence or other sanction at the person's request to the area of applicability of the Law on International Judicial Assistance in Criminal Matters.

92

Beyond this, protection from extradition is only granted to the extent that is applicable also to foreigners. Consequently, extradition is inadmissible in particular where serious grounds exist to suspect that in case of their extradition, the prosecuted persons will be persecuted or punished on account of their race, their religion, their citizenship, their forming part of a specific social group or their political creeds or that their situation would be rendered more difficult for one of these reasons (§ 6.2 of the Law on International Judicial Assistance in Criminal Matters). This protective provision also applies in case of extradition on account of a European arrest warrant (§ 82 of the Law on International Judicial Assistance in Criminal Matters).

93

Moreover, § 9 no. 1 of the Law on International Judicial Assistance in Criminal Matters prohibits extradition on account of offences for which German jurisdiction has been established if a court or a public authority in the area of application of this Act has, on account of the offence, passed a judgment or a decision against the prosecuted person or refuses to open main proceedings (§ 204 of the German Code of Criminal Procedure (*Strafprozessordnung – StPO*)), has dismissed an application to prefer public charges (§ 174 of the Code of Criminal Procedure), has halted proceedings upon the imposition of conditions and instructions (§ 153.a of the Code of Criminal Procedure) or, finally, has halted proceedings pursuant to § 45, § 47 of the Juvenile Court Act (*Jugendgerichtsgesetz – JGG*). As a result of this provision, the ban on double punishment, which, in principle, only applies in the domestic territory, also covers extradition for the purpose of further prosecution. At the same time, however, protection from extradition, which is prescribed by the constitution, is complied with for those cases in which a German had been answerable before a German court, with corresponding decisions that concluded the proceedings, already before the decision on extradition. Where, however, the request for extradition is made before such conclusion of proceedings, or where no corresponding proceedings are instituted in Germany at all, there is, pursuant to the Law on International Judicial Assistance in Criminal Matters, valid in the version of the European Arrest Warrant Act, nothing that stands in the way of extraditing a German who is charged with an offence that has a significant domestic connecting factor. From the perspective of persons entitled to enjoy the fundamental right in question, there is a gap in legal protection in this context.

94

bb) A particular effect of encroachment upon fundamental rights is created where the citizens are supposed to be held responsible by other Member States for remote effects of their action in Germany that they could not easily have expected, or where they are confronted with prosecution claims by individual Member States that are extensive both as concerns their subject matter and the prosecuted persons themselves. Such effect of encroachment is even increased where the act alleged by the state requesting extradition is not punishable pursuant to German law.

95

The legislature could have chosen an implementation that shows a higher consideration in respect of the fundamental right concerned without infringing the binding objectives of the Framework Decision because the Framework Decision contains possibilities for exceptions that permit the Federal Republic of Germany to take account of the fundamental-rights requirements that follow from Article 16.2 of the Basic Law. Article 4 no. 7 of the Framework Decision on the European arrest warrant permits the executing judicial authorities of the Member States to refuse to execute the [European] arrest warrant where it relates, on the one hand, to offences which are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such (Article 4 no. 7 letter a of the Framework Decision on the European arrest warrant) or where, on the other hand, the arrest warrant relates to offences that have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory (Article 4 no. 7 letter b of the Framework Decision on the European arrest warrant). In any case as regards offences with a significant domestic connecting factor within the meaning that has been set out, the legislature had to create the possibility, as regards the constituent elements of offences, and the legal obligation of refusing the extradition of Germans.

96

Moreover, the legislature was called upon to decide upon enhancing the legal position of Germans over and above the regulations in § 9 of the Law on International Judicial Assistance in Criminal Matters. The Framework Decision permits to refuse extradition where the person who is the subject of the European arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based (Article 4 no. 2 of the Framework Decision on the European arrest warrant) or where the judicial authorities have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings (Article 4 no. 3 of the Framework Decision on the European arrest warrant). In this respect, the preliminary investigation by the public prosecutor has an additional function, namely that of protecting individual rights, which would have had to be taken into account when the Framework Decision was incorporated into national law. In this context, the legislature should have examined the provisions of the Code of Criminal Procedure to verify whether decisions by the Public Prosecutor's Office to refrain from criminal prosecution must be subject to judicial review regarding a possible extradition. Also by doing so, it can be ensured already before a decision on extradition is issued that a German who has not left the territory of the Federal Republic of Germany and who, according to German law, has not committed a criminal offence is not extradited.

97

cc) The European Arrest Warrant Act's infringement of the fundamental right to protection from extradition and of the principles of the rule of law that are applicable in this context would have been avoided by exhausting the margins afforded by the framework legislation when incorporating it into national law. The legislature was not entitled to refrain in this context from exhausting the latitude afforded to it, not even taking into account the legislature's freedom of drafting. The legislature not correctly performed the weighing, which it is called upon to conduct by Article 16.2 of the Basic Law in connection with the principle of the rule of law, between the European interest in cross-border prosecution and the claim to protection that follows from the rights that stem from a person's status as a German. The legislature has already failed to see the mandate for weighing that follows from the special proviso of legality of Article 16.2 of the Basic Law; in any case, it factually has not carried it out by providing a sufficient extent of protection from extradition.

98

If the German legislature wants to restrict the protection of Germans from extradition in a constitutional manner on the basis of Article 16.2 sentence 2 of the Basic Law, it must, by providing constituent elements of offences that are determined in accordance with the rule of law, put the executing authority at least in a position to weigh the citizen's confidence in the German legal system, which is protected in this respect, in the individual case according to these constitutional principles. The judge's general commitment to fundamental rights in conjunction with the principle of proportionality (Article 1.3 of the Basic Law) does not come up to these requirements placed on a law that restricts fundamental rights.

99

dd) If the distinction between an alleged offence with a domestic connecting factor and one with a significant connecting factor to a foreign country, which is necessary under constitutional law, were upheld, a conflict with the special ban on retroactivity pursuant to Article 103.2 of the Basic Law would be ruled out from the outset so that the importance of this Article to combinations of circumstances such as the one that exists here need not be finally determined. The principle according to which an offence may only be punished if punishability was legally determined before the offence was committed is a special guarantee under the rule of law of the confidence in the reliability of the legal system, which is to provide clear orientation on what is punishable and what is not. Without such reliable orientation, individual freedom cannot develop: Whoever must expect an unpredictable retroactive amendment of criminal-law provisions will no longer be able to exercise his or her freedom of action with the necessary security und will lose his or her position as an autonomous individual in one of the areas that are most sensitive as concerns fundamental rights. Admittedly, the ban on retroactivity only applies to amendments of substantive criminal law and not to those of procedural law, of which the law on extradition is also regarded as a part (see Higher Regional Court (*Oberlandesgericht*) Braunschweig, Order of 3 November 2004 – Ausl. 5/04 –, *Neue Zeitschrift für Strafrecht, Rechtsprechungs-Report – NStZ-RR* 2005, p. 18 (19); BVerfGE 109, 13 (37)). If however a German, who up to now enjoyed absolute protection from extradition, is answerable in a Member State of the European Union for acts that do not show a significant connecting factor to a foreign country and were not punishable in Germany when they were committed, this could be tantamount to a retroactive amendment of substantive law.

100

ee) The deficiencies of the legal regulation that have been shown are also not sufficiently compensated by the fact that pursuant to § 80.1 of the Law on International Judicial Assistance in Criminal Matters, extradition of a German for prosecution is only admissible when it is ensured that the Member State requesting extradition will offer to return the prosecuted person at his or her request to Germany for execution after the imposition of an unappealable custodial sentence or other sanction. It is true that the execution of a sentence in the domestic territory is, in principle, a protective measure for a state's own citizens, but it only concerns execution and not prosecution.

101

Apart from this, the legislature will have to examine whether the bar on admissibility that is constituted by the lack of a guarantee by the state requesting extradition to offer the requested state the prosecuted person's return for execution is an adequate measure. According to the legislature's intention, the requirement of [the prosecuted person's] return is supposed to comply with the principle of rehabilitation. The legislature, however, has admitted already in the legislative process that there could be individual cases in which the return of a person to be extradited could fail due to a lack of criminal liability on the part of the prosecuted person in Germany (see *Bundestag*

document (*Bundestagsdrucksache – BTDrucks*) 15/1718, p. 16). The mere promise of return is inadequate in this context because it does not tell anything about whether the possibility of serving the custodial sentence in Germany exists.

102

2. The lack of voidability of the decision on the application for a grant of extradition in proceedings concerning extradition to a Member State of the European Union pursuant to the eighth part of the Law on International Judicial Assistance in Criminal Matters (see §§ 78 et seq. of the Law on International Judicial Assistance in Criminal Matters) infringes Article 19.4 of the Basic Law. Admittedly, legal practice and legal literature have up to now rejected the possibility of recourse to the courts to void the decision on the application for a grant of extradition in extradition proceedings because its foreign-policy and general-policy aspects belong to the core area of executive power. This can, however, no longer apply if the decision on the application for a grant of extradition puts the legal restriction of a fundamental right in concrete terms.

103

a) Article 19.4 of the Basic Law guarantees a fundamental right to effective legal protection provided by the courts from acts of public authority (aa) to the extent that they encroach upon the rights of the person affected (bb).

104

aa) Article 19.4 of the Basic Law contains a fundamental right to effective judicial protection from acts of public authority that is as complete as possible (see BVerfGE 8, 274 (326); 67, 43 (58); 96, 27 (39); 104, 220 (231); established case-law). The guarantee provided by the Basic Law comprises access to the courts, the examination of the relief sought in formal proceedings and the binding decision of the court (see BVerfGE 107, 395 (401)). The citizen has a substantial claim to judicial review that is as effective as possible (see BVerfGE 40, 272 (275); 93, 1 (13); established case-law).

105

An integral part of the guarantee of effective legal protection is above all that the judge has sufficient authority to review as concerns the factual and legal aspects of a dispute so that he or she can remedy a violation of the law. The precept of effective legal protection does, however, not exclude that, depending on the type of measure that is to be examined, the concession of scope for drafting, discretion and assessment can result in differences regarding the completeness of judicial review (see BVerfGE 61, 82 (111); 84, 34 (53 et seq.)).

106

bb) The prerequisite of the guarantee of recourse to the courts is that the person affected is entitled to a legal position; the violation of mere interests is not sufficient (see BVerfGE 31, 33 (39 et seq.); 83, 182 (194)). Such legal position can be established by another fundamental right or from a guarantee that is equivalent to a fundamental right, but also by law, with the legislature determining the conditions under which a citizen is entitled to a right and the content that the right has (see BVerfGE 78, 214 (226); 83, 182 (195)).

107

These principles also apply where an Act leaves a measure to the competent authority's discretion. Where the Act's regulations on decision-making enjoin the authority to take into account also legally protected interests of the person affected when exercising its discretion, the guarantee of legal protection under Article 19.4 of the Basic Law applies. Where, on the contrary, the legal provision does not protect any legal interests of the person affected, the discretionary decision need not be voidable by him or her in court proceedings; in the intermediate zone, an interpretation that gives prevalence to the fundamental rights merits preference (see BVerfGE 96, 100 (114-115) with further references).

108

As concerns the grant of extradition in the classical extradition proceedings, the Federal Constitutional Court has so far left it open in its case-law whether the decision on the application for a grant of extradition can be challenged by a constitutional complaint; it has however, assumed that there is, in any case, only a limited possibility of review (see BVerfGE 63, 215 (226); Order of the Second Senate of the Federal Constitutional Court (Preliminary Review Committee – *Vorprüfungsausschuss*) of 16 March 1983 – 2 BvR 429/83 –, *Europäische Grundrechte-Zeitschrift* 1983, pp. 262-263; from the nonconstitutional courts' more recent case-law, see Berlin Higher Administrative Court (*Oberverwaltungsgericht – OVG*), Order of 26 March 2001 – 2 S 2/01 –, Decisions of the Higher Administrative Court (*Entscheidungen des Oberverwaltungsgerichts* – OVGE) 23, 232 = *Neue Zeitschrift für Verwaltungsrecht – NVwZ* 2002, p. 114 on the one hand and the Order of the Berlin Administrative Court (*Verwaltungsgericht – VG*) of 12 April 2005 – VG 34 A 98.04 – on the other hand). In a decision on the parallel problem of the transfer of prisoners, the Second Senate of the Federal Constitutional Court has regarded the non-voidability of the executive power's decision as compatible with Article 19.4 of the Basic Law because the decision had not affected legal interests of the person affected (see BVerfGE 96, 100 et seq.).

109

cc) The grant of extradition is the executive power's decision of granting a foreign state's request to extradite a wanted person. In the Federal Republic of Germany, the competence for granting extradition lies with the Federal Government and is exercised by the Federal Ministry of Justice in agreement with the German Foreign Office. The Federation has partly delegated the exercise of its competences regarding the decision on incoming requests to the *Länder* (states) on the basis of § 74.2 of the Law on International Judicial Assistance in Criminal Matters; the *Länder*, in turn, can delegate their competences to the subordinate authorities (see the agreement of 28 April 2004, which entered into force on 1 May 2004, between the Federal Government and the *Länder* governments on the competences in the relations of mutual judicial assistance in criminal matters, Federal Bulletin (*Bundesanzeiger*) 2004, p. 1, 1494). This regulation expresses that extraditions are to be classified as part of relations with foreign states, for which the Federation has exclusive competence pursuant to Article 32.1 of the Basic Law (see BVerfGE 96, 100 (117)).

110

The division of German extradition proceedings into proceedings that review the admissibility of extradition and proceedings on the grant of extradition, which has historical reasons, has up to now resulted in a distinction concerning the functions of the two stages of proceedings and the prosecuted person's possibilities of legal protection that are connected with them. Under the conventional divided system, the admissibility proceedings have served, and still serve, the prosecuted person's preventive legal protection whereas the proceedings on the grant of extradition are intended to make it possible to take foreign-policy and general-policy aspects into account. In

practice, it was therefore not possible to challenge the decision on the application on a grant of extradition before a court; moreover, this possibility was rejected in most of the legal literature (see Vogler, *Auslieferungsrecht und Grundgesetz*, 1970, pp. 306 et seq. with further references; id., in: Grützner/Pötz, *Internationaler Rechtshilfeverkehr in Strafsachen*, 2nd ed. 2004, *§ 12,* marginal nos. 20 et seq.; moreover BVerfGE 63, 215 (226)).

111

b) The European Arrest Warrant Act has extended the proceedings on the grant of extradition in case of extraditions to Member States of the European Union by elements of discretion (aa), which serve the protection of the prosecuted person and which are therefore subject to the guarantee of legal protection (bb). Effective legal protection mandatorily requires that the extradition documents that are presented are complete (cc).

112

aa) The amendment of Article 16.2 of the Basic Law and the entry into force of the European Arrest Warrant Act have profoundly changed the legal framework conditions of extraditions to Member States of the European Union. What applies now is essentially that admissible requests for extradition or transit by Member States of the European Union can only be refused to the extent provided in the eighth part of the Law on International Judicial Assistance in Criminal Matters (see § 79 sentence 1 of the Law on International Judicial Assistance in Criminal Matters). This basic rule, in principle, abolishes the broad discretion that the classical law on extradition put at the requested state's disposal, and proceedings are judiciarised beyond the ties that arise from treaties, as has been intended by the underlying European Framework Decision. Now, the request for extradition can only be refused on the grounds that are explicitly specified in the national law; the grounds, for their part, must comply with the Framework Decision's aims and objectives.

113

The European Arrest Warrant Act tries to take account of the citizen's interests that are protected by fundamental rights by partly incorporating the grounds for which the execution of the European arrest warrant may be refused that are provided in the Framework Decision (see Article 4 of the Framework Decision on the European arrest warrant). Here, the Framework Decision has afforded the Member States of the European Union a margin for incorporating the grounds for non-execution that are listed in Article 4 of the Framework Decision into national law as mandatory or optional bars to extradition and for putting them into concrete terms there. When implementing Article 4, the German legislature has essentially opted for a discretionary solution (see § 83.b of the Law on International Judicial Assistance in Criminal Matters: "The grant of extradition can be refused, where […]") while making it a part of the proceedings on the grant of extradition. All in all, § 83.b of the Law on International Judicial Assistance in Criminal Matters mentions five different combinations of facts that can justify the refusal of a request for extradition. The explanatory memorandum of § 83.b of the Law on International Judicial Assistance in Criminal Matters states that the decision on whether bars to extradition exist is taken by the authority that grants extradition on a case-to-case basis in duty-bound discretion with a broad margin that is also open to foreign-policy reasons. The authority that grants extradition can remove bars to extradition by imposing conditions so that due account can be taken of all circumstances of the individual case (*Bundestag* document 15/1718, p. 15).

114

bb) What the fact that the procedure for granting extradition is complemented by specified grounds for refusing the grant gives rise to is that, in the case of extraditions to a Member State of the European Union, the authority responsible for granting extradition no longer merely decides on unspecified foreign-policy and general-policy aspects of the request for extradition but has to enter into a process of weighing the subject of which is in particular criminal prosecution [of the person affected] in his or her home state. Consequently, the competent German authorities are, on the one hand, afforded a margin of assessment and discretion while, on the other hand, there is also an obligation, which is based on constitutional law, to protect German citizens. Such judiciarisation of the grant of extradition to a Member State of the European Union already complies with the prerequisites of Article 19.4 of the Basic Law. The decision on the grant of extradition, which is to be taken on the basis of the weighing of facts and circumstances, serves to protect the prosecuted person's fundamental rights and may not be removed from judicial review. The examination of whether the offence on which the request for extradition is based is punishable by custodial life sentence or other sanction involving life-time deprivation of liberty under the law of the requesting Member State or whether such sentence or sanction had been imposed on the prosecuted person and a review of the execution of the sentence or sanction imposed does not take place on request or *ex officio* after 20 years at the latest (§ 83.b no. 4 of the Law on International Judicial Assistance in Criminal Matters) is not a question of freedom of assessment under foreign-policy aspects but one that very significantly affects the protection of the prosecuted person's fundamental rights and even the guarantee of his or her human dignity. To the extent that the legislature is constitutionally obliged to regulate other elements that are to be taken into account in a decision on extradition, Article 19.4 of the Basic Law also requests that the decision on extradition is subject to judicial review in this respect.

115

The obligation to give reasons for the decision (see § 79 sentence 2 of the Law on International Judicial Assistance in Criminal Matters) shows that also the legislature has recognised the importance of the decision on the application for the grant of extradition as regards the individual rights of the person affected. This provision, which had not been contained in the Law on International Judicial Assistance in Criminal Matters before the entry into force of the European Arrest Warrant Act, has only been drafted in the course of the legislative procedure in such a way that not only the requesting state – as had been originally intended – but also the prosecuted person is provided with a reasoning. The provision contains an obligation to notify the prosecuted person of the reasoned decision on the application for a grant of extradition, so that other criteria are fulfilled according to which the grant can be classified as a classical administrative act (see § 41.1 of the Administrative Procedure Act (*Verwaltungsverfahrensgesetz – VwVfG*)), which is subject to review by the judiciary.

116

cc) Part of the required efficiency of legal protection is also that the extradition documents or a European arrest warrant, which is equivalent to them, permit judicial review that is appropriate for the fundamental rights affected. It is incompatible with this requirement that § 83.a of the Law on International Judicial Assistance in Criminal Matters makes reference to the extradition documents and specifies minimum information that must be provided in the European arrest warrant but – unlike § 10 of the Law on International Judicial Assistance in Criminal Matters with regard to the conventional extradition proceedings – does not make the completeness of such information a *conditio sine qua non* for the decision on the admissibility of the application for the grant of extradition. Already in the short period of time after the entry into force of the European Arrest Warrant Act, the result of the fact that § 83.a.1 of the Law on International Judicial Assistance in

Criminal Matters was drafted as a directory provision (*Soll-Vorschrift*) has been that in concrete extradition proceedings, the completeness of the extradition documents has been regarded as dispensable for the admissibility of a request, with reference being made to the wording of the Act (see Stuttgart Higher Regional Court, Order of 7 September 2004 – 3 Ausl. 80/04 –, *Neue Juristische Wochenschrift* 2004, p. 3437 (3438); see also Seitz, loc. cit., p. 546 (548)). The deviation from the mandatory wording of § 10 of the Law on International Judicial Assistance in Criminal Matters can also not be justified by arguing that the term "*Sollen*" (should) as a general rule generates a legal commitment but does permit to deviate from such commitment under special circumstances. For an effective protection of the fundamental right enshrined in Article 16.2 of the Basic Law, the legislature would have to clarify in this case when such circumstances exist.

II.

117

The European Arrest Warrant Act is void (§ 95.3 sentence 2 of the Federal Constitutional Court Act; an interpretation in conformity with the constitution or a ruling that establishes the Act's partial voidness are excluded because the German legislature must be in a position to decide again, in normative freedom and taking into account the constitutional standards, about the exercise of the qualified legal proviso in Article 16.2 sentence 2 of the Basic Law (1.). As long as the legislature does not adopt a new Act implementing Article 16.2 sentence 2 of the Basic Law, the extradition of a German citizen to a Member State of the European Union is inadmissible (2.).

118

1. The constitutional prerequisites placed on the extradition of Germans and the principles of legal clarity and legal certainty require that the Act implementing Article 16.2 sentence 2 of the Basic Law is understandable by itself and that it sufficiently predetermines the decisions on applications for the grant of extradition. The expression in concrete terms, which is called for by the constitution, must manifest itself in the text of the statute; this cannot be achieved by interpreting the European Arrest Warrant Act in conformity with the constitution or by establishing its partial voidness.

119

The legislature will have to revise the grounds for the inadmissibility of the extradition of Germans and will draft the case-by-case decision on extradition in such a way that it is an act of application of the law which is based on weighing. Admittedly, primary Union law raises the question of the homogeneity of the Member States' structures in Article 6 of the Treaty on European Union. The mere existence of this provision, of a mechanism for imposing sanctions that secures the structural principles (Article 7 of the Treaty on European Union) and the existence of an all-European standard of human rights protection established by the European Convention for the Protection of Human Rights and Fundamental Freedoms do not, however, justify the assumption that the rule-of-law structures are synchronised between the Member States of the European Union as regards substantive law and that a corresponding examination at the national level on a case-by-case basis is therefore superfluous. In this respect, putting into effect a strict principle of mutual recognition, and the extensive statement of mutual confidence among the states that is connected with it, cannot restrict the constitutional guarantee of the fundamental rights (in this context, see also *Europäischer Gerichtshof für Menschenrechte, – Waite und Kennedy*, *Neue Juristische Wochenschrift* 1999, p. 1173 (1175); – Matthews, *Neue Juristische Wochenschrift* 1999, p. 3107 (3108)).

120

Moreover, amendments are necessary as regards the drafting of the decision on the grant of extradition and concerning the decision's relation to admissibility. The exclusion of the voidability of the decision on the application for the grant of extradition (§ 74.b of the Law on International Judicial Assistance in Criminal Matters) is a central provision of the Act, which is representative for the overall concept of the two-stage German proceedings of extradition. It was the legislature's declared intent to maintain the existing structure of the German law on extradition when incorporating the Framework Decision. The fact that the procedure for granting extradition is complemented by further discretion-bound elements results in a qualitative change of the grant, which must be combined with a possibility of seeking recourse in court.

121

If the decision on the application for the grant of extradition is voidable at least as concerns the extradition of Germans, the legislature must again take a decision of principle on the concept of extradition to Member States of the European Union, which could possibly also result in an amendment of the law on extradition as concerns non-European Union states. What must be clarified, for instance, is the question of recourse to the courts because for challenging administrative acts, there is, in principle, recourse to the administrative courts (§ 40.1 sentence 1 of the Rules of Procedure of the Administrative Courts (*Verwaltungsgerichtsordnung – VwGO*)) unless the legislature explicitly determines the jurisdiction, as is the case in the classical extradition proceedings with the [Higher Regional Court's] sole jurisdiction pursuant to § 13 of the Law on International Judicial Assistance in Criminal Matters.

122

Moreover, if the decision on the application of a grant of extradition were voidable, there would possibly no longer be a reason for having resort to preventive legal protection provided by admissibility proceedings. The legislature could therefore arrive at the conclusion of reorganising extradition proceedings in such a way that they become a conventional administrative procedure with subsequent recourse to the courts.

123

The partial waiver of the principle of double criminality (§ 81 no. 4 of the Law on International Judicial Assistance in Criminal Matters) is also a central decision of principle by the legislature, which is, however, predetermined by the Framework Decision. It can remain undecided whether it is compatible with the required level of fundamental-rights protection not to make a Member State's decision that an act is not punishable the basis of the mechanism of mutual recognition, but instead the decision in favour of punishability. Because as concerns cases with a domestic connecting factor, this in any case is not decisive because the legislature can incorporate the Framework Decision into national law pursuant to the constitutional guidelines.

124

2. As long as the legislature does not adopt a new Act implementing Article 16.2 sentence 2 of the Basic Law, the extradition of a German citizen to a Member State of the European Union is not possible. Extraditions can, however, be performed on the basis of the Law on International Judicial Assistance in Criminal Matters in the version that was valid before the entry into force of the European Arrest Warrant Act.

III.

125

The order of the Higher Regional Court (1.) and the Free and Hanseatic City of Hamburg's decision on the application of a grant of extradition (2.) are based on an unconstitutional law and are therefore overturned (§ 95.3 sentence 2 of the Federal Constitutional Court Act).

126

1. The order of the Hanseatic Higher Regional Court of 23 November 2004 has been issued on the basis of an unconstitutional law and cannot be upheld for this reason alone.

127

2. Also the decision on the application of a grant of extradition is based on unconstitutional law and is overturned already for this reason.

128

Apart from this, the authority that granted extradition has exercised the discretion to which it is entitled in an erroneous manner. It has failed to recognise that a grant of extradition of a German citizen is subject to special constitutional standards that must be part of the process of weighing when the bars on extradition pursuant to § 83.b of the Law on International Judicial Assistance in Criminal Matters and the question of return pursuant to § 80.1 of the Law on International Judicial Assistance in Criminal Matters are examined. It has, admittedly, made the grant contingent on the condition that the Spanish authorities will offer the return of the person affected after the imposition of a sentence, it has, however, not dealt with the question whether such an aid to execution is admissible under German law at all. Apart from this, the grant states that the Public Prosecutor General has no objections against the complainant's extradition in view of the German preliminary investigation by the public prosecutor. In his letter, the Public Prosecutor General merely summarised the state of the investigations against the complainant and pointed out that the investigations pursuant to § 129.a of the Criminal Code had not been brought to a close yet.

129

The protection of German citizens requires that when a decision on the grant of an application for extradition is made, the fact that a national preliminary investigation by the public prosecutor has been instituted is taken into account in any case. Here, criminal investigations in Germany with a corresponding domestic connecting factor of the alleged act constituting the offence will as a general rule result in the existence of a bar to extradition; in this respect, the granting authority's discretion is significantly limited, and detailed reasons stating why a request for extradition is granted after all are required. The mere possibility of extradition to a Member State of the European Union is not an option of legal policy the decision about which may only follow considerations of expediency or effectiveness of the administration of criminal justice.

C.

130

The Federal Republic of Germany is ordered to reimburse the complainant the expenses necessarily incurred by him in the temporary injunction proceedings and in the constitutional complaint proceedings pursuant to § 34.a.2 of the Federal Constitutional Court Act. In the present case, the obligation to bear the expenses lies solely with the Federation. Admittedly, it was the Free and Hanseatic City of Hamburg that granted extradition, in doing so, however, it exercised a competence of the Federation in the context of the transfer of competences between federal bodies (*Organleihe*). In the present case, the decision on the application for a grant of extradition was taken in agreement with the competent authorities of the Federation.

131

The decision on the application for the grant of extradition and the decision on the admissibility of the application decisively rely on the provisions that have been incorporated into the law regarding extradition by the European Arrest Warrant Act, for which the federal legislature is responsible.

Judges: Hassemer, Jentsch, Broß, Osterloh, Di Fabio, Mellinghoff, Lübbe-Wolff, Gerhardt

Dissenting opinion

of Judge Broß

on the judgment of the Second Senate of 18 July 2005

– 2 BvR 2236/04 –

132

I am only able to agree with the decision of the Senate majority to the extent that the European Arrest Warrant Act is declared void, but not as regards essential parts of the grounds, and above all, not in view of the fact that it regards extradition of German citizens as admissible, without any substantive restriction, in case of offences with a significant connecting factor to a foreign country.

133

The European Arrest Warrant Act is not only unconstitutional on account of the legislature's failure when incorporating the Framework Decision into national law; it is void already because it violates the limits on integration that are set out in Article 23.1 sentence 1 of the Basic Law. This is because the Basic Law opens up the national legal system to European Community law and European Union law only to the extent that the prerequisites established by Article 23.1 sentence 1 of the Basic Law, namely those of the principle of subsidiarity, have been complied with. The legislature must take this into account when incorporating the Framework Decision into national law. Already this is not the case.

134

1. The principle of subsidiarity has not only a European dimension and importance under Union and Community law (Article 2.2 of the Treaty on European Union; Article 5.2 of the Treaty establishing the European Community) but at the same time also a national one.

135

The mandate of integration under Article 23.1 sentence 1 of the Basic Law is designed to create a European Union which comes up to democratic, rule-of-law, social and federative principles, which is committed to the principle of subsidiarity and which guarantees a protection of fundamental rights which is essentially equivalent to that of the Basic Law. The structure-securing proviso (*Struktursicherungsklausel*) that is expressed therein (see official explanatory memorandum, *Bundestag* document 12/6000, p. 20; Streinz, in: Sachs (ed.), *GG*, 3rd ed., 2003, *Art. 23,* marginal no. 15) has domestic legal effect. It constitutionally obliges the bodies competent to participate in sovereign decisions relating to European integration, in particular the Federal Government, the German *Bundestag* and the *Bundesrat*, but ultimately also all other agencies that perform tasks of public authority, to participate in the development of a Union that must comply with the structural principles mentioned (see Pernice, in: Dreier (ed.), *GG, Art. 23,* marginal no. 47).

136

The competent federal bodies' political discretion of drafting is placed under a proviso that at the same time leads the way in a positive manner and sets limits in a negative manner (see Rojahn, in: von Münch/Kunig (eds.), *GG*, 5th ed., 2001, *Art. 23,* marginal no. 17). Article 23.1 sentence 1 of the Basic Law is therefore not only the rule of conduct and the standard of behaviour for the conduct of the representatives of the German government in the European Council but is at the same time also the rule of assessment and the standard of judgment as concerns the control of the competence to participate in sovereign decisions relating to European integration (*Integrationsgewalt*) in case of review by the constitutional court (see Rojahn, in: von Münch/Kunig (eds.), loc. cit., *Art. 23,* marginal no. 19). This especially applies to the Article's function of setting limits (see Streinz, in: Sachs (ed.), loc. cit., *Art. 23,* marginal no. 38; Rojahn, in: von Münch/Kunig (ed.), loc. cit., *Art. 23,* marginal no. 19). It is true that as a proviso of commitment to the constitution (*Verfassungsbindungsklausel*), the provision unfolds its importance mainly as concerns the delegation of sovereign rights; it applies, however, to all types of participation in the European Union, also, above all, in the context of the "Third Pillar" (see Streinz, in: Sachs (ed.), loc. cit., *Art. 23,* marginal nos. 15, 56, 73 and 82; Geiger, *Juristenzeitung – JZ* 1996, p. 1093 (1095-1096); Winkelmann, *Deutsches Verwaltungsblatt – DVBl* 1993, pp. 1128 et seq.; Rojahn, in: von Münch/Kunig (eds.), loc. cit., *Art. 23*, marginal no. 25.a).

137

Moreover, Article 23.1 sentence 1 of the Basic Law establishes a constitutional obligation [to comply with the principle of subsidiarity] (*Verfassungspflicht*) for all German authorities that are authorised to participate in the development of the European Union (see BVerfGE 89, 155 (210-211)), which is justiciable, just like the [constitutional] obligation to participate [in the process of European integration] (*Mitwirkungsgebot*) (see Pernice, in: Dreier, (ed.), loc. cit., *Art. 23,* marginal no. 49; Streinz, in: Sachs (ed.), loc. cit., *Art. 23*, marginal no. 40). However, the principle of subsidiarity is complied with only where due account of it is taken by the legislature and also by the executive power when applying the law in concrete individual cases.

138

2. The principle of subsidiarity, which is laid down as a rule in Article 23.1 sentence 1 of the Basic Law, directs the allocation of competences and tasks, with a principal preference for the lower level. The smaller social unit, which as such is closer to the citizens, is supposed to take precedence (see, as a fundamental source, Isensee, *Subsidiaritätsprinzip und Verfassungsrech*t, 2nd ed., 2001, pp.

223 et seq.; Rojahn, in: von Münch/Kunig (eds.), loc. cit., *Art. 23*, marginal no. 30). The larger unit takes over only where the smaller one, which is closer to the citizens, is not, or less effectively, able to perform the respective task (see Pernice, in: Dreier (ed.), loc. cit., *Art. 23*, marginal no. 71; Rojahn, in: von Münch/Kunig (eds.), loc. cit., *Art. 23*, marginal no. 30).

139

Thus, the principle of subsidiarity is at the same time geared towards protecting the individual's autonomy; it serves to organisationally safeguard a maximum of freedom and autonomy and apart from this, it takes due account of the fact that each individual depends on the community. It protects the Member States' competences and guarantees the right to self-determination and the freedom of each individual.

140

3. On this basis, the extradition of German citizens for prosecution can actually only be a possibility where a realisation of the state's claim to prosecution fails for factual reasons that are plausible on the merits and that, apart from this, have been sufficiently substantiated in the particular case. Only to this extent may the legislature transform the Framework Decision on the European arrest warrant into national law.

141

The need for the prosecution of German citizens abroad, which obviously is implicitly assumed by the Senate majority in derogation of what has just been stated, does not exist, as a consequence of the active principle of personality (see § 7.2 no. 1 of the Criminal Code) in conjunction with the principle of agency in criminal justice. Instead, these principles ensure that as a general rule, there can be no gaps in punishability and that Germans who have committed offences abroad can also be prosecuted in the domestic territory. This is something that also the Senate majority must concede (see B.I.1.a).

142

Apart from this, the oral hearing has not shown that the legal means at the prosecuting authorities' disposal are insufficient or not sufficiently effective, and this has also not become apparent otherwise. Under the Basic Law, the extradition of German citizens is therefore only a possibility if a realisation of the state's claim to prosecution in the domestic territory were doomed to fail for factual reasons, for instance due to the unavailability of witnesses or on account of other special difficulties as regards the taking of evidence in the particular case. Only this would exhaust the capability of the German judiciary and open the way for the duty to be performed on the next level, i.e. by the Member States of the European Union.

143

4. In comparison, the Senate majority's view, which rightly postulates a duty of protection that is derived from citizenship but withdraws such duty immediately as regards the main area of application of the European Arrest Warrant Act – offences with a significant connecting factor to a foreign country – and thus makes the large-scale extradition of German citizens possible in the first place, is not convincing. Also the justiciability of the grant of extradition alone does not provide sufficient protection. Rather, the confidence of the prosecuted person in his or her own legal system is protected in a particular manner by Article 16.2 of the Basic Law in conjunction with the

principle of the rule of law and also by the principle of subsidiarity (Article 23.1 sentence 1 of the Basic Law) precisely where the act on which the request for extradition is based shows a significant connecting factor to a foreign country. It is above all in such cases that the state's duty to protect and the principle of subsidiarity must prove their worth, not only in the case of offences with a significant domestic connecting factor, as is the Senate majority's view.

144

Instead of breathing life into the constitution's mandate to protect, the Senate gives the citizens a stone for bread. At the same time, the Senate violates the presumption of innocence, which is rooted in the principle of the rule of law, by apodictically stating that all those who become part of criminal structures cannot fully rely on their citizenship providing them protection from extradition (see B.I.1.c) cc)). Whether this is the case has, however, neither been established at the point in time of extradition, nor is it examined at all. Instead, the persons affected are to be deemed innocent unless the contrary is proved.

145

As a particular manifestation of the principle of the rule of law (Article 20.3 of the Basic Law), the presumption of innocence protects the person charged with an offence from all disadvantages that are equivalent to a verdict of guilty or a sentence but have not been preceded by proceedings intended to ascertain the person's guilt that have been conducted under the rule of law and in compliance with the code of procedure (see BVerfGE 74, 358 (371); 82, 106 (115)). Above all, it prohibits measures whose effect is tantamount to a sentence to be taken against a person charged with an offence without any legal evidence of guilt under the code of procedure and to treat him or her as guilty in the proceedings. Moreover, the presumption of innocence requires guilt having been established finally and unappealably before the person sentenced may generally be referred to as guilty in legal relations (see BVerfGE 19, 342 (347); 35, 311 (320); 74, 358 (371)). Because only main proceedings put the judge in a position to form an opinion on the question of guilt. Only main proceedings create the procedural prerequisites for ascertaining guilt in the first place and to refute the presumption of innocence where appropriate (see BVerfGE 74, 358 (373)).

146

The Senate majority anticipates such ascertainment in a manner that is contrary to the rule of law by treating the prosecuted persons as guilty in the context of the extradition proceedings, thus at the same time evading the constitutional obligation to extend the duties to protect that follow from citizenship also to the case group of offences with a significant connecting factor to a foreign country that it has created.

147

5. As a result of the annulment of the European Arrest Warrant Act, the deputies of the German *Bundestag*, who are not bound by orders and instructions and subject only to their conscience (see Article 38.1 sentence 2 of the Basic Law), will now have the opportunity to comply, in complete normative freedom, with their constitutional obligation (see BVerfGE 89, 155 (210-210)) and to take account of the requirements of the principle of subsidiarity (Article 23.1 sentence 1 of the Basic Law). The legislature is to incorporate the Framework Decision into national law – should it still decide to do so in the first place – not only in such a way that the restriction of the fundamental right to freedom from extradition is proportionate – which actually is a mere matter of course that

would not have required to be mentioned –; rather, it also is to comply with the principle of subsidiarity (Article 23.1 sentence 1 of the Basic Law) in the manner that has been stated here.

148

6. The Federal Constitutional Court must examine already *ex officio* violations of the principle of subsidiarity by nonconstitutional law under the aspect of the infringement of higher-ranking law (Article 20.3 of the Basic Law). Notwithstanding this, the principle of subsidiarity applies not only to laws but also to individual rights. In this context, the close factual connection with Article 38 of the Basic Law must be seen. This provision excludes for the area of application of Article 23 of the Basic Law that the legitimisation of public authority and the influence on the exercise of public authority that have been effected by elections are devalued or factually bound and predetermined by shifting the tasks and competences of the German *Bundestag* in such a way that the principle of democracy is violated (see BVerfGE 89, 155 (172)).

149

Accordingly, the right of each German under Article 38 of the Basic Law to effective participation in the exercise of public authority can be violated where the exercise of the competences of the German *Bundestag* is so comprehensively transferred to a body of the European Union that is made up by its governments, or where the exercise of public authority is factually predetermined by such body, that the minimum requirements of democratic legitimisation of the sovereign power that faces the citizen, which are inalienable pursuant to Article 20.1 and 20.2 of the Basic Law in conjunction with Article 79.3 of the Basic Law, are no longer complied with (see BVerfGE 89, 155 (172)). The German *Bundestag* must therefore retain tasks and competences of substantial weight (see BVerfGE 89, 155 (186)). To ensure this is also one of the primary tasks of the principle of subsidiarity. By its nature, it protects the individual; such protection can be claimed by means of the constitutional complaint (see Article 2.1 of the Basic Law in conjunction with Article 23.1 sentence 1 of the Basic Law).

150

7. At the same time, the principle of subsidiarity (Article 23.1 sentence 1 of the Basic Law) results in the legislature's obligation, which has however hardly been taken notice of so far, to plausibly substantiate a legislative project's "integration value added" in the area of the "Third Pillar" of the European Union. What requires justification is above all the following: the fact that, and if necessary to what extent, a task that has been made the subject of regulation – here, the extradition of Germans for prosecution to Member States of the European Union – exceeds the capability of the Federal and the *Länder* judiciary and can only be effectively dealt with on the level of the European Union – by means of extradition – (on this, see Pernice, in: Dreier (ed.), loc. cit., *Art. 23*, marginal no. 73; Rojahn, in: von Münch/Kunig (eds.), loc. cit., *Art. 23*, marginal no. 33).

151

In this respect, the legislature's explanations concerning the European Arrest Warrant Act, should the necessity arise for it to be enacted again, will require critical examination and monitoring. According to the opinion advanced here, the "integration value added" can only be stated successfully in a legally viable manner if the legislature restricts the extradition of German citizens for prosecution strictly to those combinations of circumstances in which prosecution in the domestic territory factually fails in the individual case for substantiated reasons beyond the restrictions rightly provided by the Senate majority.

152

8. By such an implementation of the Framework Decision, which takes the principle of subsidiarity into account, the legislature does not contradict requirements under European law. Article 4 nos. 2 and 3 of the Framework Decision explicitly permit to refuse extradition where prosecution by the "executing Member State" takes place for the same act on which the European arrest warrant is based (Article 4 no. 2 of the Framework Decision on the European arrest warrant) or where the investigating authorities have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings (Article 4 no. 3 of the Framework Decision on the European arrest warrant). This has also been established by the Senate majority (see B.I.1.d) bb)). Apart from this, it has rightly stressed the authorisation of the legislative bodies of the Member States to also refuse the incorporation of the Framework Decision into national law if necessary (see B.I.1.c) bb)).

153

9. It is all the more surprising that the Senate majority considers it admissible to provide, in case of offences with a significant connecting factor to a foreign country, in spite of the duties to protect that have been stipulated with reference to citizenship, and misjudging the meaning and scope not only of the principle of subsidiarity (Article 23.1 sentence 1 of the Basic Law) but also of the principle of proportionality (Article 20.3 of the Basic Law), the possibility of extraditing German citizens without any substantive restriction. Such a procedure, which counteracts the presumption of innocence and with that, a mainstay of the principle of the rule of law (Article 20.3 of the Basic Law), remains incomprehensible.

154

Nevertheless, the legislature is not prevented from not making use of the legal opinion criticised here and to use the room for manoeuvre that is at its disposal in the interest of the citizens who are entrusted to it and who are to be deemed innocent, and with that, unrestrictedly worthy of protection, by the legislature unless the contrary is proved.

Judge: Broß

Dissenting opinion

of Judge Lübbe-Wolff

on the judgment of the Second Senate of 18 July 2005

– 2 BvR 2236/04 –

155

I share the Senate majority's opinion that when enacting the European Arrest Warrant Act, the German legislature has not taken sufficient account of the fundamental rights of persons potentially affected by it, but I cannot agree with large parts of the grounds (1.-5.) and with the dictum on the legal consequences (6.). The European Arrest Warrant Act's deficiencies under constitutional law do not justify the nullification of the entire Act.

156

1. The basis of the – restricted – ban on the extradition of Germans is Article 16.2 sentence 1 of the Basic Law. The attempt to anchor it in higher spheres (of natural law, as it were), deeper (historical) ones and broader ones (under natural law), leads astray.

157

a) The principle that a state does not extradite its own citizens can neither be derived from the nature of "the citizen's relation to a free democratic polity", nor is there a "conviction, shared all over Europe since the French Revolution" that supports it. This principle does not apply, *inter alia*, in states of the Anglo-Saxon legal sphere to which we owe freedom and democracy (on this, see already BVerfGE 4, 299 (303-304); for further comparative-law information see Masing, in: Dreier, *GG*, vol. 1, 2nd ed., 2004, marginal no. 37 on Article 16 of the Basic Law). Unlike the ban on the deprivation of German citizenship (Article 16.1 sentence 1 of the Basic Law), the principle of the non-extradition of Germans, which is enshrined in Article 16.2 of the Basic Law, is not based on the experience of National Socialist injustice. It can be found already in the Weimar Constitution (Article 112.3 of the Weimar Constitution (*Weimarer Reichsverfassung* – WRV)) and can be traced back to a tradition that is considerably older (see Masing, ibid., marginal no. 8, with further references). Finally, it also cannot be maintained that the citizens' confidence in their secured residence in their home state is protected by international law in the respect that is of interest here. The states' obligation under international law to receive their own citizens to which the Senate makes reference does not have a trace of a content that would ban or restrict the extradition of a state's own citizens.

158

The protection of Germans from extradition on the basis of a fundamental right ranks highly not because the roots of the fundamental right are the extraconstitutional or preconstitutional factual laws or obligations and the special responsibilities that arise from history which have been mentioned but because it has been specifically formulated in Article 16.2 of the Basic Law and because the protected interest carries weight in real life. The fact that the Senate, however, substantiates the weight of the encroachment that extradition constitutes by aspects that are only supposed to apply to the fundamental right under Article 16.2 of the Basic Law is likely to give rise to misunderstandings as concerns the fundamental-rights position of non-Germans. Extradition and the imprisonment connected with it encroach upon fundamental rights not only where Germans are affected. Also foreigners can be affected with equal severity as concerns their rights under Article 2.1 of the Basic Law and Article 2.2 sentence 2 of the Basic Law, and they can be worthy of protection, after the weighing of other interests, if they have been living in Germany for a long time or have even been born and raised here (see the regulation under nonconstitutional law in § 80.3 of the Law on International Judicial Assistance in Criminal Matters, which does not move in a sphere that is irrelevant as concerns fundamental rights).

159

b) If one refrains from loading the ban on the extradition of a state's own citizens with a significance that is not stipulated in the constitution, the thought that the incorporation of Article 16.2 sentence 2 into the Basic Law could have exceeded the limits of a possible constitutional amendment that are embodied in Article 79.3 of the Basic Law is remote. If one intends to seriously ascertain in this context whether the constitution-amending legislature brings about "the legal system that is established by the Basic Law losing the core elements of statehood" or has created an

inadmissible cause for that, such a statement can, in any case, not be substantiated by explanations about the significance of the citizenship of the Union and about the scope of the ban on discrimination on grounds of citizenship under Community law (Article 12.1 of the Treaty establishing the European Community).

160

It goes without saying that the area of applicability of the ban on discrimination on grounds of citizenship is restricted (see the wording of Article 12.1 of the Treaty establishing the European Community) and must remain restricted if it is not supposed to result in the abolition of Member State citizenships and thus in the abolition of the Member States. This, however, has nothing to do with the question whether the fact that Article 16.2 sentence 2 of the Basic Law makes it possible to extradite German citizens infringes Article 79.3 of the Basic Law because it brings about an inadmissible loss of the core elements of statehood. If the Treaty establishing the European Community contained a ban on discrimination that deprived the Member States' citizenships of their substance, *this,* not Article 16.2 sentence 2 of the Basic Law, would constitute a problem of loss of the core elements of statehood. Moreover, the information that following the principle of conferral, the ban on discrimination only applies to specific objectives set out in the Treaty deviates, in a manner that is hard to understand, from the wording of Article 12.1 of the Treaty establishing the European Community, which requires interpretation. Federal Constitutional Court judgments should not be used to send dark signals, which have no connection to the case at hand, to the Court of Justice of the European Communities, which recently applied this provision somewhat extensively (see ECJ, Judgment of 15 March 2005 – C-209/03 –, *Europäische Zeitschrift für Wirtschaftsrecht – EuZW* 2005, pp. 276 et seq.).

161

2. The statement that "in particular with a view to the principle of subsidiarity (Article 23.1 of the Basic Law)", the "cooperation" that is put into practice in the "Third Pillar" of the European Union "in the shape of limited mutual recognition, which does not provide for a general harmonisation of the Member States' systems of criminal law, is a way of preserving national identity and statehood in a single European judicial area", is also a vague signal. To the extent that this signal intends to object a general harmonisation of the Member States' systems of criminal justice, it is superfluous if only because no one intends a *general* harmonisation of the Member States' systems of criminal justice; under applicable law, it is ruled out not only for reasons of subsidiarity but already because the Treaty on European Union (Articles 29, 34 of the Treaty on European Union) does not provide a basis of competence for that.

162

Objections must be raised, however, to the extent that additionally, it is implied that the approach of mutual recognition of arrest warrants, waiving the requirement of double criminality, is preferable for reasons of subsidiarity and must therefore also under European Union law (Article 2.2 of the Treaty on European Union) compulsorily be preferred to solutions that ensure double criminality by means of the substantive harmonisation of criminal law. Apart from the fact that none of these alternatives, which were discussed in the oral hearing, refers to the system of the European arrest warrant under European Union law: in my opinion, such provisos for the choice between alternative *contents* of regulations, which are identical as regards their function, cannot be inferred from the principle of subsidiarity, which is a flexible rule for assigning *competences*. Instructions under constitutional law and under European Union law as regards competences and contents – instructions concerning the competence for specific subjects of regulation and instructions

concerning the admissibility of specific contents of regulations – must be distinguished as clearly as possible, even if this can pose difficulties in borderline cases (see already the dissenting opinion on BVerfGE 111, 226, pp. 278-279). If the principle of subsidiarity is assigned control also over the choice between alternatives for regulations as regards contents that may affect, with varying degrees of intensity, the fundamental rights of persons affected, this can, *inter alia*, result in the aspect of consideration towards competences superseding the aspect of consideration towards the fundamental rights.

163

3. I cannot go along with part of the course and of the results of the examination of proportionality that the Senate has performed.

164

a) Whether the provisions of the European Arrest Warrant Act take sufficient account of the principle of proportionality as regards Article 16.2 of the Basic Law and other fundamental rights that are potentially affected in the case of extraditions is a constitutional question; the standard for the answer to this question is not provided by the Framework Decision on the European arrest warrant but by the Basic Law. The answer therefore does not depend on the latitude for refusing extraditions that the Framework Decision on the European arrest warrant leaves to the German legislature. Correspondingly, the German legislature is also not obliged to make use of the grounds for optional refusal [to execute the European arrest warrant] provided in the Framework Decision solely because encroachments upon fundamental rights that are caused by extradition can be avoided in this way. What is decisive instead is a weighing of the interests of effective prosecution, which are pursued by the Framework Decision and its incorporation into national law on the one hand and of the interests of possible witnesses and victims on the other hand.

165

The grounds for refusing extradition provided in Article 4 nos. 7.a und 7.b of the Framework Decision on the European arrest warrant have a specific relation to the weighing of these interests. They ensure that the prosecuted person must only be extradited on account of an alleged offence which is not punishable under the law of the requested Member State if the offence is alleged to have been committed in the requesting Member State, i.e. where it is punishable (otherwise, either no. 7.a or no. 7.b is applicable), and that the prosecuted person does not have to be extradited where the offence has a domestic connecting factor of the kind that on grounds of effective prosecution, extradition is possibly not required at all (no. 7.a). Due to this specific relation to the central questions of weighing and of protection of public confidence that are raised in connection with extraditions on the basis of European arrest warrants, the legislature had to make use of the possibilities provided by Article 4 nos. 7.a and 7.b of the Framework Decision on the European arrest warrant.

166

b) I regard as incorrect the view that apart from this, the European Arrest Warrant Act shows a constitutionally problematic gap in protection also as regards the possibility of refusing extradition where the person who is the subject of the European arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based (Article 4 no. 2 of the Framework Decision on the European arrest warrant) or where the judicial authorities have decided either not to prosecute for the offence on which the European arrest

warrant is based or to halt proceedings (Article 4 no. 3 of the Framework Decision on the European arrest warrant). Admittedly, the German legislature has made use in substantive law of these possibilities provided by the Framework Decision (§ 83.b nos. 1 and 2 of the Law on International Judicial Assistance in Criminal Matters), but has not granted an enforceable claim to correct exercise of discretion in this respect or as regards the other grounds for refusing extradition provided in § 83.b of the Law on International Judicial Assistance in Criminal Matters. Moreover, the legislature is reproached of not having taken into account the function of protecting individual rights that the preliminary investigation by the public prosecutor has in this context. This means that here, the Senate obviously misses an influence, secured by the law, of the person affected on the institution of a preliminary investigation by the public prosecutor because an enforceable claim to discretion being exercised in conformity with the fundamental rights as concerns the refusal of extradition is rendered worthless unless at the same time legal influence is granted also on the prerequisites of the grounds for refusing extradition that concern the constituent elements of offences. In the Senate's view, the legislature must therefore also review, *inter alia*, the provisions of the Code of Criminal Procedure to find out whether decisions by the public prosecutor to refrain from prosecution must be subject to review by the judiciary regarding extradition.

167

I do not have the vision that proceedings to enforce one's own prosecution are constitutionally required. The "criminal proceedings" whose institution, refusal or halt constitute grounds for refusing extradition pursuant to § 83.b nos. 1 or. 2 of the Law on International Judicial Assistance in Criminal Matters also comprise investigation proceedings by the public prosecutor. Who, in the context of investigation proceedings by the public prosecutor, regards possibilities of influence by the person potentially affected by extradition as constitutionally required, can – and must, to be consistent – interpret this term, in any case for the purposes of the law on extradition, in conformity with the constitution in a correspondingly broad sense, which also comprises the examination of the initial suspicion and possible so-called preliminary investigations (see Beulke, *Strafprozessrecht*, 8th ed., 2005, p. 179, with further references). Pursuant to § 160.1 of the Code of Criminal Procedure, such proceedings are triggered off by a criminal information, which means that it can also be initiated through self-accusation reported to the police. Irrespective of how the proceedings evolve – whether the institution of investigation proceedings in the narrower sense is refused, whether the proceedings are continued or halted, whether charges are preferred or the preferment of charges is dispensed with, for instance, pursuant to § 154.b of the Code of Criminal Procedure – in any case there is either a ground for refusal pursuant to § 83.b no. 1 of the Law on International Judicial Assistance in Criminal Matters (pending proceedings) or a ground for refusal pursuant to § 83.b no. 2 of the Law on International Judicial Assistance in Criminal Matters (refused or halted proceedings) exists. The problem of insufficient possibilities on the part of the person affected of influencing the prerequisites of the grounds for refusal as regards the constituent elements of the offence pursuant to § 83.b nos. 1 and 2 of the Law on International Judicial Assistance in Criminal Matters (Article 4 nos. 2 and 3 of the Framework Decision on the European arrest warrant) could therefore be solved by an interpretation in conformity with the constitution if the problem really were a constitutional one.

168

The Senate does not substantiate, however, why, apart from the legislative implementation of the grounds for refusal under Article 4 no. 7 of the Framework Decision on the European arrest warrant, which is unanimously regarded as necessary including the corresponding legal protection, separate claims to the use of the grounds for refusal under § 83.b nos. 1 and 2 of the Law on International Judicial Assistance in Criminal Matters, which also enjoy legal protection, are

supposed to be necessary at all in order to ensure the proportionality of extradition. For this, it would have had to be clarified to what extent extraditions can be disproportionate also in cases in which the grounds of Article 4 no. 7 of the Framework Decision on the European arrest warrant do not apply. Because a constitutional obligation to make use of latitude that is left by the Framework Decision cannot follow from the mere existence of such latitude (see a).

169

The interchangeability of the grounds for refusal in the opposite direction (Recommendation for a resolution and report of the Committee on Legal Affairs, *Bundestag* document 15/2677, p. 5) fails because the grounds for refusal under § 83.b nos. 1 and 2 of the Law on International Judicial Assistance in Criminal Matters cannot be interpreted and applied as extensively as one likes without coming into conflict with the objectives of the Framework Decision; for reasons of space, this aspect will not be dealt with in detail here.

170

c) The statement that the question of the return of the person affected for the execution of a possible custodial sentence “must be part of the process of weighing” and that the legislature is to *examine* whether “the bar on admissibility that is constituted by the lack of a guarantee by the state requesting extradition to offer the requested state the prosecuted person’s return for execution is an adequate measure”, the Senate evades answering the decisive constitutional question.

171

What is the issue here is the proportionality of the encroachment upon a fundamental right that extradition constitutes. The encroachment is considerably mitigated where the person affected only has to get over with criminal proceedings abroad and does not have to serve the sentence there, which is possibly of many years’ duration. On the other hand, not a single aspect of effective prosecution in the European judicial area for the time being that could be contrary to the return [of the person affected] after his or her being sentenced. In order to attain the Framework Decision’s justified objectives, which also carry weight from the constitutional perspective, it is unimportant in which state a person convicted serves his or her sentence. With regard to the groups of persons who enjoy particular protection (see 1.) it must thus be deemed a compulsory prerequisite of extradition that the possibility of the person’s return for execution exists and that it will also be made use of later on.

172

In the case of lack of double criminality, the Law on International Judicial Assistance in Criminal Matters does not, however, provide the possibility of a sentence passed abroad being served in the domestic territory (§ 49.1 no. 3 of the Law on International Judicial Assistance in Criminal Matters).

173

Where the question whether promises to return a prosecuted person which cannot be made use of for this reason meet fundamental-rights requirements is discussed as a problem, it must be clarified whether a solution under nonconstitutional law that is different from that under § 49.1 no. 3 of the Law on International Judicial Assistance in Criminal Matters would be constitutionally admissible at all. The question that must be answered is therefore whether the Basic Law permits the execution

in the domestic territory of a sentence that has been imposed on an extradited person abroad after the person's return where the act on which the sentence is based is not a punishable offence under German law.

174

The answer must be positive. To the extent that the Basic Law, particularly Article 103.2 of the Basic Law, does not stand in the way of extradition in spite of the lack of double criminality, it can consequently also not stand in the way of the encroachment upon the fundamental right in question being mitigated by making it possible to execute the foreign sentence in Germany.

175

4. The Senate regards the proviso of the rule of law being upheld (Article 16.2 sentence 2 of the Basic Law) as an assignment of tasks to the legislature in the sense that it is directly incumbent on the legislature itself to establish "that the observance of rule-of-law principles by the authority that claims punitive power over a German is guaranteed".

176

To the extent that thus, the legislature is supposed to be authorised to make general declarations, which are binding to public authorities and nonconstitutional courts when assessing individual cases, as concerns the question whether rule-of-law principles are upheld in the EC Member State, objection must be made. Pursuant to the principle of the separation of powers (Article 20.3 of the Basic Law), the binding subsumption of facts under legal concepts is, in principle, not incumbent upon the legislature but upon the executive and the legislative powers. The equality-securing force of the law, the protection of legal language from the degeneration that results from its being used for symbolic purposes in politics, and thus also the capability of functioning of democracy depends on this distribution of tasks, which, in view of Article 79.3 of the Basic Law, even the constitution-amending legislature (see Article 16.a.2 sentence 2 and 16.a.3 sentence 1 of the Basic Law) may only shift very selectively, if at all.

177

5. The complainant has argued that the legal basis of his extradition showed an unconstitutional democratic deficit. His fundamental rights could only be encroached upon on the basis of an Act adopted by Parliament. The German parliament had not been in a position to freely decide on the provisions of the European Arrest Warrant Act, which set out that extradition is possible irrespective of double criminality because it had been bound by the Framework Decision on the European arrest warrant, which had been enacted by government representatives alone.

178

As regards this argument, the Senate states that the fact that the European Parliament is merely consulted when European Framework Decisions are adopted is commensurate with the requirements of the principle of democracy because the Member States' legislative bodies retain the political power of drafting in the context of implementation, if necessary also by denying implementation. This is not an answer to the complainant's objection but a description of the problem, with the only particular feature that the problem is not regarded as being one. Where the belief is held that democratic legitimisation must be sought in the freedom of Parliament to infringe European Union law, something is going a bad way.

179

Not *because of* the finding that the Senate makes but in spite of it are there good reasons for not drawing the conclusion from the weak role of the parliaments in the tiered lawmaking process that is at issue now that the European Arrest Warrant Act, or even already the law approving the Treaty of Amsterdam, by which the legal institute of the Framework Decision took the place of the former "Joint Action" (Article K.3.2.b of the Treaty on European Union, old version), are unconstitutional because they infringe the principle of democracy. According to the standards that have been developed in the Maastricht decision (BVerfGE 89, 155 (181 et seq.)), no unconstitutional democratic deficit exists here. Article 79.3 of the Basic Law, as the constitutional limit of European integration, has rightly been applied with care in this decision because the meaning of this provision is to exclude our country relapsing into dictatorship and barbarism, and nothing serves this aim with higher probability than Germany's integration into the European Union.

180

Not least for this reason, also the reliability of the Federal Constitutional Court's case-law in this area is of particular importance. Unpredictable u-turns are out of the question even if the example of the Framework Decision on the European arrest warrant makes democratic deficits of lawmaking more conspicuous, deficits that the European multilevel system shows not only as regards the Framework Decisions but also in several other areas. When dealing with the complainant's objections, it would therefore have been necessary to specify the future-oriented standards of the Maastricht decision instead of resorting to a justification that makes the problem stand out by negating it.

181

Already the Maastricht decision has done justice to the European integration's experimental nature, to its character of a process and to the tension between openness towards integration and limits of integration that is embodied in Article 79.3 of the Basic Law by not only reviewing the compatibility of the law approving the [Maastricht] Treaty, which was under review at that time, with Article 79.3 of the Basic Law, but by demanding for the future that the democratic bases of the Union be built up in step with integration (BVerfGE 89, 155 (186)). In fact, the subsequent development has in many areas resulted in progress as regards democratisation. However, the democratisation of decision-making processes is still lagging behind the unionisation of decision-making competences at a considerable distance (for further details see Maurer, *Parlamentarische Demokratie in der Europäischen Union*, 2002, pp. 120 et seq. (134), with further references). Therefore the question had to be answered whether the build-up of the democratic bases can be regarded as being sufficiently "in step" where beside the unionisation of decision-making competences democratisation progresses also in some areas but at the same time more and more need to catch up arises. In this context, deficiencies that result in the necessity of catching up at higher speed cannot necessarily be assigned to the level of the Union and can also not necessarily be compensated on that level. Especially where lawmaking on the European level requires unanimity in the Council, as is the case with the Framework Decisions (see Article 34.2 sentence 2 letter b in conjunction with Article 23.1 sentence 2 of the Treaty on European Union), the pending development towards a better democratic foundation can and must take place on a national level in law and practice also by increasing the parliamentary influence on the voting behaviour of the government representatives in the Council.

182

6. I cannot discern a justification for the declaration of nullity of the European Arrest Warrant Act. The Act is unconstitutional to the extent that it does not contain regulations that make it possible to safeguard the proportionality of extradition and to guarantee such safeguard through sufficient legal protection as regards special groups of persons and the groups of cases that concern them. In order to rule out infringements of the constitution that are based on such unconstitutionality, it is sufficient to state that until the entry into force of a regulation that is in conformity with the constitution, Germans, and non-Germans who are worthy of protection (see 1.) may not be extradited to the extent that the offences in question are among those with regard to which extradition can be refused pursuant to Article 4 no. 7.a or no. 7.b of the Framework Decision on the European arrest warrant (see 3.a) and to the extent that a return in order to serve a possible sentence fails under applicable law for lack of mutual criminality (see 3.c). In order to specify the group of non-Germans worthy of protection as regards extradition, the delimitation performed by the legislature itself in conformity with the constitution in § 80.3 of the Law on International Judicial Assistance in Criminal Matters could be relied on. A dictum on the legal consequences with these contents would also not give rise to the problem of insufficient legal protection, which also in the opinion of the Senate does not exist at any rate beyond these groups of persons and cases so that even a declaration of nullity of § 74.b of the Law on International Judicial Assistance in Criminal Matters (unappealability of the decision granting extradition) is unnecessary.

183

In contrast to this, the declaration of nullity of the European Arrest Warrant Act also eliminates the nonconstitutional bases of extradition on account of European arrest warrants also to the extent that they concern cases with regard to which the Senate itself has not in any way criticised the law as being constitutionally problematic. The declaration of nullity of the European Arrest Warrant Act, for instance, rules out for the time being also the extradition on account of a European arrest warrant of foreigners who are only staying in Germany for a short time and even the extradition of citizens of the requesting state for alleged offences that they have exclusively committed in the requesting state although pursuant to the principles established by the Senate, there are no objections whatsoever against the European Arrest Warrant Act to the extent that it concerns such cases. By declaring a law void that could be applied in a constitutionally unobjectionable manner in many of the cases in which it is applied, the Senate forces the Federal Republic of Germany to infringe European Union law, which could have been avoided without infringing the constitution.

184

On the basis of a more restricted dictum on the legal consequences, which would have been called for in my view, the new Higher Regional Court decision which is due now need not necessarily be in favour of the complainant. In the challenged decision, the Court has not established whether the offence with which the complainant is charged in the arrest warrant of 19 September 2003 has been committed in Spain and whether double criminality exists with respect to it. It has therefore not yet been clarified whether the complainant’s case actually falls within one of the groups of cases for which the regulations of the European Arrest Warrant Act are insufficient according to what has been explained above.

Judge: Lübbe-Wolff

Dissenting opinion

of Judge Gerhardt

on the judgment of the Second Senate of 18 July 2005

– 2 BvR 2236/04 –

185

I cannot agree with the judgment. The constitutional complaint would have had to be rejected as unfounded. The declaration of nullity of the European Arrest Warrant Act is not in harmony with the precept under constitutional and European Union law of avoiding violations of the Treaty on European Union wherever possible. The Senate contradicts the case-law of the Court of Justice of the European Communities.

I.

186

The ban on extradition, which is laid down in Article 16.2 of the Basic Law, is, on the one hand, supposed to prevent German public authority from enforcing other states' claims to punishment that do not have an equivalent in the valuations of the German legal system (1.). On the other hand, the prosecuted person is supposed to be spared the added, possibly serious, difficulties that are connected with proceedings abroad (2.). Both objectives of protection are achieved by interpreting and applying the European Arrest Warrant Act in conformity with the constitution with account being taken of European Union law. The same applies *mutatis mutandis* to compliance with the guarantee of legal protection (3.).

187

1. Already the concern about becoming, as a German, with the support of national authorities, the victim of far-reaching criminal legislation of another Member State of the European Union that deviates from the valuations of the national legal system is not justified.

188

In harmony with the Framework Decision on the European arrest warrant, the preconditions of extradition for prosecution pursuant to the European Arrest Warrant Act are punishability of the alleged offence in the issuing Member State by a custodial sentence for a maximum period of at least twelve months and double criminality. Something different only applies where the offence is punishable under the law of the requesting state by a custodial sentence for a maximum period of at least three years and violates a criminal provision that belongs to one of the groups of offences specified in Article 2.2 of the Framework Decision (§ 81 no. 4 in conjunction with § 3.1 of the Law on International Judicial Assistance in Criminal Matters, Article 2.4, Article 4 no. 1 of the Framework Decision on the European arrest warrant). As concerns these groups of offences, it can be assumed, to the extent that they have not been, or are being, harmonised anyway (on computer-related crime, see e.g. Articles 5 et seq. of the Council Framework Decision of 24 February 2005 on attacks against information systems, Official Journal L 69 of 16 March 2005 p. 67*),* that the conviction that they constitute punishable wrongdoing is shared all over Europe. Should a Member State draft its criminal law in such a way that it gives rise to doubts about whether certain acts belong to the groups of offences under Article 2.2 of the Framework Decision on the European arrest warrant because the Member State interprets a group of offences extensively or makes acts that belong to a group of offences but are subordinate punishable by unreasonable custodial sentences that open up the possibility of applying Article 2.2 of the Framework Decision on the

European arrest warrant, the Court of Justice is to decide upon referral by the competent court, pursuant to Article 35.1 of the Treaty on European Union in conjunction with § 1 of the Act Concerning the Invocation of the Jurisdiction of the Court of Justice of the European Communities for Preliminary Rulings in the Area of Police Cooperation and Judicial Cooperation in Criminal Matters Pursuant to Article 35 of the Treaty on European Union. The same applies *mutatis mutandis* to the opposite case where the Federal Republic of Germany does not want to classify certain acts under a group of offences, which is rather an unlikely case.

189

European Union law is also open to a legal development that permits to prevent extraditions where a Member State imposes disproportionate punishment on offences that, in principle, admit extradition. Pursuant to Article 1.3 of the Framework Decision on the European arrest warrant, the Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union; correspondingly, judicial assistance is inadmissible pursuant to § 73 sentence 2 of the Law on International Judicial Assistance in Criminal Matters where it would contradict the principles contained in Article 6 of the Treaty on European Union. One of these principles is the rule of law, which comprises the principle of proportionality (Article 6.1 of the Treaty on European Union). Moreover, this principle is based on the Convention for the Protection of Human Rights and Fundamental Freedoms, which is binding on the European Union and its Member States. Pursuant to Article 6.3 of the Treaty on European Union, the Union shall also respect the national identities of its Member States. Already this implies the Member States' duty to mutual respect. In its judgment of 16 June 2005 (Case C-105/03 – *Pupino*), the Court of Justice of the European Communities has emphasised that the principle of the Member States' loyal cooperation in the area of police and judicial cooperation in criminal matters also, and particularly, applies as regards the implementation of Framework Decisions (marginal no. 42). If these aspects are brought together against the backdrop of an ever closer union among the peoples (Article 1.2 of the Treaty on European Union) it follows with sufficient certainty that the Court of Justice – notwithstanding the Member States' principal punitive power, the lack of general harmonisation of criminal law and the lack of further development of the details of judicial cooperation – can, and must, counteract the Europe-wide enforcement of a Member State's excessive criminal legislation by means of the European arrest warrant. Precisely for the sake of the effectiveness of this legal instrument, the European Judicial Community cannot support individual Member States' resorting to criminal sanctions in an imbalanced and one-sided manner by means of extraditions to them.

190

I very much regret that the Senate refuses to make a positive contribution to European solutions in this respect. In particular by alleging an intrinsic connection of the ban on extradition and citizenship as a status, and by using the topos of the confidence in the reliability of one's own legal system, which has remained undefined, it one-sidedly emphasises the national perspective instead of achieving a balance between the bonds of national law and that of European law. The fact that it deals with the *Pupino* judgment of the Court of Justice of the European Communities neither as far as concepts are concerned nor by discussing possible consequences, does not further the law.

191

2. The European Arrest Warrant Act provides sufficient possibilities of refusing surrender to the requesting state in cases in which the burden resulting from criminal proceedings abroad for the

prosecuted person is out of all proportion to the advantages that can be put forward in favour of prosecution in the requesting state.

192

Due to the far-reaching claim of applicability of German criminal law (§§ 3 to 7 of the Criminal Code) and due to its completeness of penalisation, hardly any cases are conceivable in practice in which the public prosecutor would not have to take action against a German on account of an offence due to which his or her extradition is intended (§ 152.2 of the Code of Criminal Procedure). The grant of the application for extradition can be refused because preliminary investigations have been instituted pursuant to § 83.b nos. 1 and 2 of the Law on International Judicial Assistance in Criminal Matters, irrespective of the outcome of the preliminary investigation (see also § 9 of the Law on International Judicial Assistance in Criminal Matters). An explicit incorporation of Article 4 no. 7 of the Framework Decision on the European arrest warrant was therefore not required (as concerns Article 4 no. 7 letter a of the Framework Decision on the European arrest warrant, see the explicit statement in the report of the Committee on Legal Affairs, *Bundestag* document 15/2677 p. 5; for letter b, this follows from § 7.2 no. 1 of the Criminal Code). Admittedly, these regulations do not cover cases in which a preliminary investigation may not be instituted although, in principle, extraditability exists (see § 344 of the Criminal Code), but there is no need for a regulation in this respect. If the act – as in the case that is to be decided here – cannot be prosecuted in the Federal Republic of Germany because it was not punishable in the domestic territory when it was committed, this follows from the fact that this circumstance does not benefit the prosecuted person in accordance with the principles of the general law on extradition and also not pursuant to the constitutional limits of retroactive law. What other combinations of circumstances could come into consideration is not apparent, and should they exist they can be solved in the manner described in the following.

193

Consequently, the problem does not consist, as the Senate thinks, in the lack of a sufficient legal basis for refusing extraditions in particular in cases with an exclusive or predominant domestic connecting factor but in the fact that the examination of proportionality, which is constitutionally required, is not explicitly mentioned in the Act (as concerns its basic discussion in the legislative process, see *Bundestag* document 15/1718 pp. 28 and 30). It is, however, not constitutionally required to mention it.

194

The content of protection and of the normative structure of Article 16.2 of the Basic Law having been clarified by the Federal Constitutional Court in such a way that the extradition of Germans is only admissible with the proviso of a weighing in accordance with the principle of proportionality to the extent that the Framework Decision permits to refuse extradition, it goes without saying at any rate that the courts and public authorities comply with this constitutional precept. There are not the slightest grounds for concern that the public prosecutors competent to prefer public charges and the departments of public prosecution competent for granting applications for extradition do not make use of the latitude accorded to them by § 154.b of the Code of Criminal Procedure and, respectively, by § 83.b of the Law on International Judicial Assistance in Criminal Matters in the manner that is required directly by the constitution. In its order of 12 April 2005 – 2 BvR 1027/02 – on the seizure of data carriers, the Senate itself has not considered it necessary to call for particular legal provisions to enforce the principle of proportionality.

195

It can also be assumed that the Higher Regional Courts conduct the review required by Article 16.2 of the Basic Law when deciding upon the admissibility of extradition. The Higher Regional Courts are also not prevented from doing so by § 73 sentence 2 of the Law on International Judicial Assistance in Criminal Matters, which sets forth that extradition pursuant to a European arrest warrant is inadmissible where it contradicts the principles of Article 6 of the Treaty on European Union. To infer from this provision that it stands in the way of a constitutionally required examination of proportionality in any case ignores the hierarchy of legal provisions. Considerations of proportionality that are constitutionally required must be performed irrespective of whether they are explicitly mentioned in the text of the law (on this, see BVerfGE 61, 126 (134-135) and most recently the order of the First Senate of the Federal Constitutional Court of 24 May 2005 – 1 BvR 1072/01 –). An argument against the Higher Regional Courts' competence to examine and decide can also not be derived from the manner in which the bars to extradition are drafted in law. In particular, the consideration that the fact of the lack of the required examination of a custodial life sentence in the requesting state being classified as a ground for optional refusal of the grant (§ 83b no. 4 of the Law on International Judicial Assistance in Criminal Matters) excludes that the court declares an extradition inadmissible in view of BVerfGE 45, 187 (245-246) is not convincing.

196

A legal regulation would be required at most where, without value guidelines, the examination of proportionality would have no structure and thus would not meet the principles of sufficient predictability of state intervention. This, however, is not the case. It is obvious that apart from circumstances of [the prosecuted person's] personal way of life – here, the circumstances that are important for Article 6 of the Basic Law and Article 8 of the European Convention on Human Rights must be given particular attention – and apart from the question whether [the person's] return to Germany to serve his or her sentence can be put into practice, the strength of the alleged offence's domestic connecting factor will be of vital importance but cannot always be decisive (e.g. if a German has committed a serious offence against a citizen of the European Union but all essential evidence is only available in the victim's home state). The decisive aspects for individual weighing in cases in which the connecting factor of the offence does not anticipate the result of the examination of proportionality result from the thing's own nature and have been correctly defined by the Senate. It must be added that the fear, which has also been evoked in these proceedings, of forum shopping – that may even be agreed with German authorities – to the detriment of the prosecuted person can be countered by the courts not only under the aspect of proportionality but also pursuant to § 73 sentence 2 of the Law on International Judicial Assistance in Criminal Matters in conjunction with Article 6 of the Treaty on European Union where it constitutes an abuse of the surrender procedure.

197

The instruction to the legislature to enact a new regulation is not only superfluous, incompatible with the principles of good lawmaking and an unnecessary burden on the legislative bodies. The declaration of nullity of the European Arrest Warrant Act also infringes the precept under European Union law to attain the objectives pursued by the Framework Decision as far as possible (ECJ, Judgment of 16 June 2005, loc. cit., marginal nos. 43, 47). This precept, however, manifests itself here as a precept of maintaining the statutory provision that runs parallel to the Federal Constitutional Court's domestic task of preserving the legislature's intent as far as possible in case of constitutional deficiencies.

198

3. Article 19.4 of the Basic Law requires that before extradition, a court examines compliance with the principle of proportionality. In the context of their decision on the admissibility of extradition, the Higher Regional Courts are obliged to do so. There is no gap in legal protection.

199

In its interpretation required by Article 16.2 of the Basic Law, the European Arrest Warrant Act provides the following structure for decisions: If there are grounds for doing so in the individual case, the prosecuting authorities, if necessary after consulting the prosecuting authorities of the requesting state and Eurojust, must assess the concrete aspects of effective prosecution and the prosecuted person's interests that are protected by fundamental rights – the latter as guidelines for assessment *under substantive law*. If they come to the conclusion that they want to grant the application for extradition, they must inform the Higher Regional Court of their considerations in such a way that it can examine whether the principle of proportionality, now in the shape of the *individual right* of the person affected to ward off unlawful extradition, has been complied with. In doing so, the court must, in principle – irrespective of its power to autonomously and comprehensively examine the legal prerequisites of extradition – accept the prosecuting authorities' evaluations and assessments that refer to prosecution and base its decision on them. On the one hand, this "division of labour" follows the legislative decision in favour of the unappealability of the decision that grants the application for extradition (§ 74.b of the Law on International Judicial Assistance in Criminal Matters) and takes up its rationale of leaving considerations and assessments as concerns the expediency of national or transnational prosecution in the hands of the executive power. On the other hand, it secures the prosecuted person's effective legal protection to the extent that is due to him or her and does justice to the European surrender procedure's concern of speeding up procedures.

200

As opposed to this, the Senate is guided exclusively by the idea that the legal protection required must be provided by judicial review of the decision on the application for the grant of extradition or by an equivalent reorganisation of extradition proceedings. In addition, the Senate constructs, with arguments that are based on nonconstitutional law, and whose viability will not be investigated here, an individual-rights component of the competent authority's discretion to refuse the application for the grant of extradition, which results in the unconstitutionality of the explicitly provided unappealability of the decision on the application for the grant of extradition, and from the possibilities of drafting that are open to the legislature according to this idea, the Senate draws the conclusion that the European Arrest Warrant Act is void in its entirety. This interpretation of the law, which is directed against the legislature, cannot be justified and contradicts the precept of maintaining the statutory provision, which relies on constitutional law and European Union law. The Senate's view, which is per se untenable, that the regulation under § 83.a of the Law on International Judicial Assistance in Criminal Matters on the extradition documents violates Article 19.4 of the Basic Law because pursuant to the wording of the provision, they merely should (*sollen*), not must (*müssen*), contain the required information, illustrates how little the Senate regards itself as being bound by the conventional principles of interpretation in the present context.

II.

201

Also from its own perspective, the Senate would not have been allowed to declare the European Arrest Warrant Act void in its entirety. It already does not ask itself the question to what extent it is at all justified to declare an Act that regulates government encroachment [upon fundamental rights] void in its entirety, following a constitutional complaint, due to the lack of certain regulations instead of merely stating its inapplicability under specific circumstances. If this question had been answered in the affirmative, the further question should have been asked whether this also applies where it can be foreseen with certainty that the provisions which are regarded as missing will ultimately not play a role in the original case. If, apart from this, the Senate is of the opinion that partial voidness is out of the question it should have upheld the European Arrest Warrant Act by means of a transitory regulation with provisos for its application in conformity with the constitution until the adoption of a new Act. The Federal Republic of Germany has undertaken to incorporate the Framework Decision on the European arrest warrant, which was adopted unanimously in the Council and which is binding as regards the objective to be attained, into national law until the end of the year 2003. Notwithstanding the fact that the Treaty on European Union does not provide infringement proceedings in this respect, continued non-incorporation infringes the obligations of the Federal Republic of Germany to the Union and the requirement of consideration and solidarity in its relation to the other Member States. This infringement is all the more serious because pursuant to national constitutional law, the unconstitutionality of an Act indeed does not forcibly result in its being declared void. The Basic Law's commitment to Germany's integration into a unified Europe, which the Senate has strongly emphasised several times recently, and the obligation under European Union law to interpret Framework Decisions in conformity with European Community law (ECJ, Judgment of 16 June 2005, loc. cit., marginal no. 43) compel to create at least a legal situation that is as close as possible to European Union law by means of the continued application, albeit reduced factually and modified in conformity with the constitution for a transitional period.

III.

202

When drafting the new regulation, the legislature will have to consider whether, in view of the fact that the participation of the Federal Republic of Germany in the Framework Decision on the European arrest warrant is constitutionally based on Article 23 of the Basic Law and that this Article has largely divested extradition proceedings within the European Union of their international-law and foreign-policy elements, it is (still) justified in this context to assign the Federation administrative competence on the basis of Article 32 of the Basic Law (§ 74 of the Law on International Judicial Assistance in Criminal Matters). Here, the question at issue is not whether the European Arrest Warrant Act required approval by the *Bundesrat* but whether it is possible at all to deviate from Articles 83 et seq. of the Basic Law when drafting the executive competence. In the present proceedings, the question – which had not been discussed with the parties – does also in my view not require decision because an unconstitutionality of the European Arrest Warrant Act which would possibly have resulted from it would not have called its continued application for a transitional period into question.

Judge: Gerhardt