



IN THE NAME OF THE PEOPLE

**In the proceedings
on
the constitutional complaint**

[...]

- authorised
representatives:

1. Rechtsanwalt Maik Elster,
Markt 23, 07743 Jena,
2. Rechtsanwalt Sven Richwin,
Oranienstraße 166, 10999 Berlin -

against the Order of the Berlin Higher Regional Court
of 27 June 2024 - 4 OAus 2/24 - 151 AuslA 195/23 -

the First Chamber of the Second Senate of the Federal Constitutional Court, with the participation of

Vice-President König,
and Justices Frank,
Wöckel

unanimously decided on 24 January 2025:

1. To the extent that the Order of the Berlin Higher Regional Court of 27 June 2024 - 4 OAus 2/24 - 151 AuslA 195/23 - declared the complainant's surrender to the Hungarian legal authorities to be permissible, it violates the complainant's fundamental right under Art. 4 of the Charter of Fundamental Rights of the European Union.
2. The *Land* Berlin must reimburse the complainant for their necessary expenses.

3. For the purposes of determining the legal representation fees, the monetary value of the matter in dispute is fixed at EUR 15,000 (in words: fifteen thousand euros).

R e a s o n s :

The constitutional complaint concerns the decision on the permissibility of the complainant's surrender to the Hungarian authorities, which was based on a European Arrest Warrant.

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I.

[Facts of the case, abridged version based on Press Release No. 13/2025 of 6 February 2025]

Hungarian authorities charged the complainant with being a member of a criminal organisation and, together with other persons, attacking far-right sympathisers, or persons considered as such, in Budapest in February 2023. The complainant was arrested in Berlin in December 2023, on the basis of, inter alia, a European Arrest Warrant issued at the request of the Hungarian authorities.

The complainant asserted that there were obstacles to extradition. In particular, the complainant cited declarations in lieu of oath made by persons who had been detained in Hungarian prisons as well as reports by the European Committee for the Prevention of Torture and by the non-governmental organisation Hungarian Helsinki Committee. Additionally, the complainant asserted that it was necessary to take their non-binary identity into account. On 1 March 2024, the Berlin Higher Regional Court (*Kammergericht Berlin*) ordered the complainant's arrest for extradition purposes. It did not hold the complainant's extradition to be impermissible from the outset. According to the court, no different conclusion was warranted in view of the general detention conditions in Hungary, nor based on the specific detention conditions of one prisoner to whom the complainant referred in their submission – the Hungarian authorities had not given the German authorities any assurances affording special protection to this prisoner, who had been arrested and detained in Hungary. However, the Berlin Higher Regional Court did consider Hungary's current policies to be gender-, homo- and transphobic. It further stated that equality measures which Hungary had once successfully implemented in support of homosexual and trans people were being rolled back in a discriminatory manner. The Berlin Higher Regional Court thus held that additional information and assurances had to be sought from the Hungarian authorities. The Berlin chief public prosecution office (*Generalstaatsanwaltschaft Berlin*) subsequently contacted the Hungarian legal authorities requesting, among other things, an assurance that, if extradited, the complainant would be detained in a prison that complies

with the requirements arising from the European Convention on Human Rights and the European Prison Rules. The Berlin chief public prosecution office also requested information on whether there have been assaults on detainees who identify as non-binary and whether any protective measures have been put in place in Hungarian prisons in this respect.

By note verbale of 29 April 2024, the Hungarian Ministry of Justice provided a written guarantee given by the Hungarian national prison authority. The written guarantee specified that the Convention, the United Nations Recommendations on Minimum Rules for the Treatment of Prisoners and the Recommendations of the Council of Europe on European Prison Rules constitute guiding principles to which Hungary, as a Member State of the European Union, has committed and which have gradually been integrated in the way the Hungarian judicial authorities exercise their tasks. According to the written guarantee, there have been no known violent assaults or other attacks that are linked to gender identity.

The Berlin chief public prosecution office thereafter requested that the complainant's surrender to Hungary be declared permissible. The complainant objected to this, arguing that the evident obstacles to extradition could only be eliminated if the Hungarian legal authorities made an assurance that was specific to this case and binding under international law. According to the complainant, the executing judicial authority could not simply rely on a general assurance in the case at hand as there were specific indications that the detention conditions in several Hungarian prisons violate the prohibition of torture and inhuman or degrading treatment or punishment under Art. 4 of the Charter.

By order of 27 June 2024, the Berlin Higher Regional Court declared the complainant's extradition to be permissible.

The Higher Regional Court found that there were no discernible obstacles to extradition and, in particular, that the detention conditions in Hungary did not pose an obstacle in this respect. According to the Higher Regional Court, it was unobjectionable that the written guarantee provided by note verbale of 29 April 2024 only described the general legal situation and the detention conditions in Hungarian prisons, without expressly guaranteeing, in a manner binding under international law, that the complainant would be detained under conditions complying with human rights requirements. The court held that there were no specific indications that the detention conditions in Hungarian prisons violated the Convention.

Despite the Hungarian Helsinki Committee providing evidence of attacks on non-binary, homosexual or transsexual persons in Hungarian prisons, the Higher Regional Court found that the fact that the complainant identified as non-binary also posed no obstacle to extradition. It based this finding on the Hungarian authorities' statement that a risk assessment is undertaken in all Hungarian prisons with respect to any kind of threat which may exist

based on sexual orientation, gender identity, the detained person's political views or origin, or any other risk factor and that a risk management system ensures that the best measures are chosen to address any such risk. The Higher Regional Court further stated that the complainant's prison registration documents will include information on the written guarantee and that the Hungarian prison authorities will therefore conduct a particularly thorough risk assessment, taking account of the fact that the complainant identifies as non-binary.

The complainant's surrender to the Hungarian authorities was initiated in the night of 27 to 28 June 2024. On 28 June 2024 at 6:50 a.m., German authorities handed the complainant over to Austrian authorities for transit. Upon the complainant's application for preliminary injunction lodged at around 7:38 a.m., the Federal Constitutional Court issued a preliminary injunction at 10:50 a.m. which provisionally prohibited the complainant's surrender to Hungarian authorities. Additionally, the Berlin chief public prosecution office was instructed to take suitable measures to prevent the complainant's surrender to Hungarian authorities and to bring about the complainant's return to the Federal Republic of Germany. Only at 11:47 a.m. did the Berlin chief prosecution office inform the Federal Constitutional Court that the complainant had already been handed over to Hungarian authorities by Austrian authorities as of 10:00 a.m.

On 23 July 2024, the complainant requested the Berlin Higher Regional Court to decide anew on the permissibility of the extradition and asserted a violation of the right to be heard (*Anhörungsrüge*). By order of 9 August 2024, the Berlin Higher Regional Court found the complainant's application to be inadmissible. It based its decision, inter alia, on the argument that the surrender had already been completed and that any disadvantage could thus no longer be remedied.

In their constitutional complaint, the complainant challenges the order issued by the Berlin Higher Regional Court on 27 June 2024, declaring the complainant's extradition to be permissible.

End of abridged version]

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II.

1. In their constitutional complaint, the complainant asserts a violation of their fundamental rights and rights equivalent to fundamental rights under Art. 1(1), Art. 2(1), Art. 2(2) second sentence, Art. 16(2), Art. 19(4), Art. 101(1) second sentence and Art. 103(1) of the Basic Law as well as Art. 4 of the Charter of Fundamental Rights of the European Union.

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III.

The Chamber admits the constitutional complaint for decision, given that doing so is appropriate to enforce the complainant's fundamental rights (§ 93a(2) letter b of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG)). The constitutional issues determining the outcome of the constitutional complaint have already been settled by the Federal Constitutional Court. For the most part, the constitutional complaint is admissible and, to the extent specified in the operative part of this decision, it is also evidently well-founded (cf. § 93c(1) first sentence of the Federal Constitutional Court Act). 51

1. a) To the extent that the complainant asserts a violation of Art. 4 of the Charter, the constitutional complaint is admissible. 52

aa) The complainant continues to have a recognised legal interest in bringing a constitutional complaint. 53

(1) Even after the measure addressed by a constitutional complaint has come to an end, the legal interest remains if there would otherwise be no opportunity to clarify a fundamentally important question of constitutional law and the alleged interference with fundamental rights appears particularly severe, or if there is reason to fear some repetition of the challenged measure, or if the measure that has been revoked or has become moot continues to adversely affect the complainants (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 33, 247 <257 f.>; 69, 161 <168>; 81, 138 <140>; 139, 245 <263 f. para. 53>; 146, 294 <309 para. 24>). Additionally, lest the level of fundamental rights protection be unreasonably reduced, the legal interest is assumed to remain if fundamental rights have been interfered with in a particularly severe and consequential manner, and the direct burden caused by the challenged act of public authority unfolds its exhaustive effect so rapidly as to make it hardly possible to obtain a decision in regular proceedings before the Federal Constitutional Court (cf. BVerfGE 81, 138 <140 f.>; 110, 77 <85 f.>; 117, 244 <268>; 146, 294 <309 para. 24>). 54

(2) Based on this standard, the complainant continues to have a recognised legal interest. Given that the surrender has already taken place, the challenged order is now moot. However, the surrender to Hungary declared permissible by the Berlin Higher Regional Court constitutes a severe interference with fundamental rights that is still ongoing. This is because the complainant is currently being detained in a Hungarian prison. Additionally, due to the specific operative timeframe within which the surrender took place, the challenged order had already unfolded its full effect and became moot, rendering it effectively impossible for the complainant to obtain a decision from the Federal Constitutional Court on a constitutional complaint against the decision of the Berlin Higher Regional Court. 55

bb) The admissibility of the constitutional complaint is also not precluded by the principle of subsidiarity. 56

(1) The principle of subsidiarity as derived from § 90(2) first sentence of the Federal Constitutional Court Act requires that, before lodging a constitutional complaint, complainants first exhaust not only all legal remedies in the strict sense but all available procedural possibilities for achieving a correction of the alleged violation of the Constitution or preventing an infringement of fundamental rights (cf. BVerfGE 68, 384 <388 f.>; 77, 381 <401>; 81, 97 <102>; 140, 229 <232 f. para. 10>). The principle of subsidiarity serves to ensure that proceedings are, first and foremost, brought before the ordinary courts, and that complaints have already been thoroughly examined before they proceed to the Federal Constitutional Court (cf. BVerfGE 4, 193 <198>; 16, 124 <127>; 51, 386 <396>; 72, 39 <43>). Before reaching its decision, the Federal Constitutional Court is to be provided with, among other things, the lower courts' examination of the relevant facts and points of law (cf. BVerfGE 8, 222 <227>; 9, 3 <7>; 72, 39 <43>; 140, 229 <232 f. para. 10>). 57

(2) Based on these standards, the constitutional complaint meets the principle of subsidiarity. 58

(a) In the present case, it is irrelevant whether the principle of subsidiarity provides that, should the affected person intend to seek constitutional protection, they must announce this intention if the surrender procedure is to be suspended because of that. This, in turn, would allow for ordinary legal protection to remain possible – a possibility that, according to the Berlin Higher Regional Court, no longer exists once the surrender has taken place. Whether the principle of subsidiarity gives rise to such an announcement requirement is irrelevant here because, in the night of 27 to 28 June 2024, the complainant's legal representative, based on their own account, expressed their intention to seek legal protection before the Federal Constitutional Court whilst talking on the phone to a police officer involved in the procedures at Dresden prison, who referred them to the possibility of contacting the chief public prosecution office during its operating hours. The Ministry of the Land Berlin for Justice and Consumer Protection (*Senatsverwaltung für Justiz und Verbraucherschutz des Landes Berlin*) did not contest this factual account; it only asserted that the police did not report of such intention having been announced. The complainant was not required to already announce this intention in their legal representative's phone call with the chief public prosecution office on the afternoon of 27 June 2024, given that, at that point, they had not even yet had the opportunity to take note of the challenged decision. 59

(b) The admissibility of the constitutional complaint is also not precluded by the fact that legal protection must generally first be sought before the ordinary courts. With regard to an ex-post examination of deportation detention, the Federal Constitutional Court ruled 60

that the principle of subsidiarity of a constitutional complaint requires that judicial review first be conducted by the competent ordinary courts and that referring complainants solely to the possibility of seeking constitutional legal protection is not permissible 'if procedural law allows for ordinary legal protection to be sought' (BVerfGE 104, 220 <231, 236>). In the present case, however, the Act on International Mutual Assistance in Criminal Matters (*Gesetz über die internationale Rechtshilfe in Strafsachen* – IRG) does not provide for the possibility of seeking further legal protection from the ordinary courts. Additionally, prior to lodging their constitutional complaint against the challenged decision, the complainant did seek ordinary legal protection by way of their submission of 23 July 2024, in which they unsuccessfully requested the Berlin Higher Regional Court to decide anew on the permissibility of the extradition and in which they asserted a violation of the right to be heard.

b) In terms of the other fundamental rights and rights equivalent to fundamental rights whose violation the complainant asserts, the constitutional complaint fails to meet the requirements under § 23(1) second sentence and § 92 of the Federal Constitutional Court Act. 61

2. To the extent that the constitutional complaint is admissible, it is also manifestly well-founded within the meaning of § 93c(1) first sentence of the Federal Constitutional Court Act. The challenged decision violates the complainant's fundamental right under Art. 4 of the Charter. 62

a) aa) Surrender procedures that fall within the scope of application of the Framework Decision on the European Arrest Warrant are fully determined by EU law (cf. BVerfGE 140, 317 <343 para. 52>; 147, 364 <382 para. 46>; 156, 182 <197 para. 35> – Romania II). It follows that the subject matter of the constitutional complaint must generally be reviewed based on the standard of the fundamental rights under the Charter (cf. BVerfGE 152, 216 <233 ff. paras. 42 ff.> – Right to be forgotten II; 156, 182 <197 para. 36>; 158, 1 <30 para. 56> – Ecotoxicity data). 63

bb) Under the European framework on mutual legal assistance, EU Member States are bound by the principle of mutual recognition and its prerequisite, the principle of mutual trust between Member States. 64

(1) The Member State receiving the surrender request must, generally, trust that the Member State which issued the request (hereinafter: issuing Member State) complies with EU law (cf. CJEU, Minister for Justice and Equality <Deficiencies in the system of justice>, 25 July 2018, C-216/18 PPU, EU:C:2018:586, para. 36; Generalstaatsanwaltschaft <Conditions of detention in Hungary>, 25 July 2018, C-220/18 PPU, EU:C:2018:589, para. 49; Dorobantu, 15 October 2019, C-128/18, EU:C:2019:857, para. 46), including the rule of law principle and the protection of fundamental rights (cf. BVerfGE 109, 13 <35 f.>; 109, 38 <61>; 140, 317 <349 para. 68>). Generally, the court dealing with the surrender request is required to presume that the Member State seeking the surrender observes the rights under the Charter 65

(cf. CJEU, Minister for Justice and Equality <Deficiencies in the system of justice>, 25 July 2018, C-216/18 PPU, EU:C:2018:586, para. 37; Generalstaatsanwaltschaft <Conditions of detention in Hungary>, 25 July 2018, C-220/18 PPU, EU:C:2018:589, para. 50; Dorobantu, 15 October 2019, C-128/18, EU:C:2019:857, para. 47). However, the Court of Justice of the European Union also established that the principles of mutual trust and recognition between Member States may be restricted 'in exceptional circumstances'. This certainly is the case if there is a risk that the surrender would lead to the affected person being treated in an inhuman or degrading manner within the meaning of Art. 4 of the Charter (cf. CJEU, Aranyosi and Căldăraru, 5 April 2016, C-404/15 and C-659/15 PPU, EU:C:2016:198, paras. 84 and 104; Minister for Justice and Equality <Deficiencies in the system of justice>, 25 July 2018, C-216/18 PPU, EU:C:2018:586, para. 44; Generalstaatsanwaltschaft <Conditions of detention in Hungary>, 25 July 2018, C-220/18 PPU, EU:C:2018:589, para. 57; Dorobantu, 15 October 2019, C-128/18, EU:C:2019:857, para. 50; BVerfGE 156, 182 <200 f. paras. 43 f.>).

(2) A two-tier review must be carried out to determine whether there are 'exceptional circumstances' that preclude the affected person's surrender to the issuing Member State. The first step requires the court dealing with the surrender request to examine the general detention standards in the issuing Member State based on data that is objective, reliable, precise and properly updated, so as to assess whether there are specific indications of a real risk for detainees in this Member State being treated in an inhuman or degrading manner. Specific indications of systemically or generally deficient conditions of detention in the issuing Member State may, inter alia, be obtained from decisions rendered by international courts, courts of the issuing Member State or courts of other Member States as well as from decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the United Nations (cf. CJEU, Aranyosi and Căldăraru, 5 April 2016, C-404/15 and C-659/15 PPU, EU:C:2016:198, para. 89; Generalstaatsanwaltschaft <Conditions of detention in Hungary>, 25 July 2018, C-220/18 PPU, EU:C:2018:589, para. 60; Dorobantu, 15 October 2019, C-128/18, EU:C:2019:857, para. 52; BVerfGE 156, 182 <201 f. para. 45>).

The second step requires the court to examine whether the affected individual's specific circumstances give rise to substantial grounds to believe that, following the surrender to the issuing Member State, this individual will be exposed to a real risk of inhuman or degrading treatment within the meaning of Art. 4 of the Charter due to the detention conditions in that Member State (cf. CJEU, Judgment of 5 April 2016, Aranyosi and Căldăraru, C-404/15 and C-659/15 PPU, EU:C:2016:198, paras. 92 and 94; Minister for Justice and Equality <Deficiencies in the system of justice>, 25 July 2018, C-216/18 PPU, EU:C:2018:586, para. 44; Generalstaatsanwaltschaft <Conditions of detention in Hungary>, 25 July 2018, C-220/18 PPU, EU:C:2018:589, para. 61; Dorobantu, 15 October 2019, C-128/18,

EU:C:2019:857, para. 55). This requires an up to date and detailed examination of the situation as it stood at the time of the decision (cf. CJEU, *Dorobantu*, 15 October 2019, C-128/18, EU:C:2019:857, para. 57 with reference to ECtHR, *Romeo Castaño v. Belgium*, 9 July 2019, 8351/17, § 86). Given that the prohibition of inhuman or degrading treatment is absolute, the court's review of detention conditions may not be limited to obvious inadequacies, but must be based on an overall assessment of the relevant physical conditions of detention (cf. CJEU, *Dorobantu*, 15 October 2019, C-128/18, EU:C:2019:857, paras. 61 f.; BVerfGE 156, 182 <202 para. 46>).

(3) This two-tier review process requires that the court dealing with the surrender request clarify the factual circumstances relevant to the specific case. Art. 4 of the Charter gives rise to an obligation to examine the individual case and seek additional information to clarify whether the affected person's fundamental right under Art. 4 of the Charter is respected in case of surrender (cf. BVerfGE 156, 182 <205 ff. paras. 52 ff.> with further references). The first step requires the court to base its review on objective, reliable, specific and properly updated information on the detention conditions prevailing in the issuing Member State – information that can serve as evidence for systemic or generalised deficiencies affecting certain groups of people or certain places of detention (CJEU, *Generalstaatsanwaltschaft <Conditions of detention in Hungary>*, 25 July 2018, C-220/18 PPU, EU:C:2018:589, para. 60; *Dorobantu*, 15 October 2019, C-128/18, EU:C:2019:857, para. 52). The second step requires the court to thoroughly examine whether the affected individual's specific circumstances give rise to substantial grounds to believe that, if surrendered to the issuing Member State, this individual will be exposed to a real risk of inhuman or degrading treatment within the meaning of Art. 4 of the Charter due to the detention conditions in that Member State; to conduct this thorough examination, the court must, within the time limits set out in Art. 17 of the Framework Decision on the European Arrest Warrant, request the issuing Member State to provide, as a matter of urgency, all necessary supplementary information on the conditions in which it is envisaged that the person concerned will be detained in this Member State (cf. CJEU, *Generalstaatsanwaltschaft <Conditions of detention in Hungary>*, 25 July 2018, C-220/18 PPU, EU:C:2018:589, para. 63; *Dorobantu*, 15 October 2019, C-128/18, EU:C:2019:857, para. 57 with reference to ECtHR, *Romeo Castaño v. Belgium*, 9 July 2019, 8351/17, § 86, as well as paras. 63 and 67).

The additional information that the court must request is a prerequisite to ensure a sufficient factual basis for the court's assessment of whether an individual faces a risk of inhuman or degrading treatment (cf. ECtHR, *Romeo Castaño v. Belgium*, Judgment of 9 July 2019, no. 8351/17, §§ 83 ff., §§ 89 ff.). Therefore, the court dealing with the surrender request must postpone its decision on whether the surrender is permissible until it obtains the supplementary information that allows it to discount the existence of such a risk (cf. CJEU, *Aranyosi and Căldăraru*, 5 April 2016, C-404/15 and C-659/15 PPU, EU:C:2016:198,

para. 104). If that risk cannot be excluded within a reasonable time, the court must decide whether to discontinue the surrender procedure (cf. CJEU, Aranyosi and Căldăraru, 5 April 2016, C-404/15 and C-659/15 PPU, EU:C:2016:198, para. 104).

Where the issuing Member State gave an assurance that the person concerned will not suffer inhuman or degrading treatment, irrespective of the prison in which they are detained in the issuing Member State, the court dealing with the surrender request must rely on that assurance, at least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of Art. 4 of the Charter (cf. CJEU, Generalstaatsanwaltschaft <Conditions of detention in Hungary>, 25 July 2018, C-220/18 PPU, EU:C:2018:589, para. 112; Dorobantu, 15 October 2019, C-128/18, EU:C:2019:857, para. 68; cf. also ECtHR, Othman <Abu Qatada> v. the United Kingdom, 17 January 2012, 8139/09, §§ 187 ff.). An assurance given by the issuing Member State does not, however, relieve the court from the obligation to first make its own risk prognosis in order to evaluate the reliability of the assurance (cf. ECtHR, Othman <Abu Qatada> v. the United Kingdom, Judgment of 17 January 2012, no. 8139/09, §§ 187 ff.). Only in exceptional circumstances and based on specific indications, may the court find that, notwithstanding an assurance to the contrary by the issuing Member State, the conditions under which the affected individual would be detained in that state give rise to a real risk of this individual being subjected to inhuman or degrading treatment within the meaning of Art. 4 of the Charter (cf. CJEU, Dorobantu, 15 October 2019, C-128/18, EU:C:2019:857, para. 69).

b) Based on these standards, the Berlin Higher Regional Court's decision of 27 June 2024, which declared the extradition permissible, does not satisfy constitutional requirements. The Berlin Higher Regional Court failed to satisfy its obligation under Art. 4 of the Charter to fully clarify the factual circumstances relevant to the surrender. It is true that the Berlin Higher Regional Court sought clarification on the detention conditions by requesting assurances in this respect. But the Berlin Higher Regional Court contented itself with the very general assurance given by the Hungarian authorities, despite further clarification being apparently warranted in light of the complainant's detailed and substantiated submission, which in particular made reference to NGO reports and the declarations by persons formerly detained in Hungarian prisons.

aa) The Berlin Higher Regional Court failed to sufficiently clarify the detention conditions that were to await the complainant.

(1) Given the complainant's detailed submissions, the Berlin Higher Regional Court had sufficient indications of systemic or generalised deficiencies in detention conditions. The complainant pointed to ordinary case-law in Germany and Italy, declarations in lieu of oath made by persons formerly detained in Hungarian prisons as well as reports by the Hungar-

ian Helsinki Committee. Among other things, the complainant pointed to increasing overcrowding in Hungarian prisons, poor hygiene conditions, lack of access to warm water, chronic bedbug issues, insufficient food quantity and quality, extreme temperatures in winter and summer, poor lighting and ventilation in detention cells, violent attacks against detainees by other detainees or by prison staff, and a lack of legal remedies. Systematic overcrowding does not automatically mean that the minimum standard under EU law would not be met in case of surrender. Experience, however, shows that apart from a lack of space, which in and of itself may be an obstacle to extradition, significant overcrowding may also involve ensuing issues (e.g. on access to healthcare for detainees, cf. Federal Constitutional Court, Order of the Second Chamber of the Second Senate of 4 December 2019 - 2 BvR 1258/19 and others -, para. 64).

(2) It is true that the Celle Higher Regional Court, referenced by the Berlin Higher Regional Court, found that there no longer were any specific indications of detention standards in a specific Hungarian prison violating Art. 4 of the Charter, and that persons sought, indeed, seemed to be guaranteed a cell space of more than 3 m² each in any Hungarian prison (cf. Celle Higher Regional Court, Order of 21 July 2021 - 2 AR <Ausl> 40/21 -, para. 32). The Celle Higher Regional Court based its decision on the Hungarian government ordering immediate measures in 2020 to combat the abuse of compensation claims due to prison overcrowding – measures that reportedly were consistently implemented and led to an average decrease in prison occupancy rates from 112% to 96%. Additionally, the Celle Higher Regional Court inferred from the report released by the European Committee for the Prevention of Torture on 17 March 2020 that the detention standards in those prisons which its staff visited from 20 to 29 November 2018 had significantly improved overall compared to 2013 (cf. Celle Higher Regional Court, Order of 21 July 2021 - 2 AR <Ausl> 40/21 -, paras. 28 f.). The Berlin Higher Regional Court also referred to a decision by the Brandenburg Higher Regional Court which, too, had cited the decision by the Celle Higher Regional Court. However, the Brandenburg Higher Regional Court only examined whether § 15(2) of the Act on International Mutual Assistance in Criminal Matters made the surrender impermissible from the outset and found that, in the case before it, the objections raised by the person sought did not warrant a change in assessment (cf. Brandenburg Higher Regional Court, Order of 27 September 2023 - 2 OAus 18/23 <S> -, para. 10). 74

The Berlin Higher Regional Court, however, had before it evidence that contradicted the findings made by these other ordinary courts and that, in part, was more recent, in particular, the declarations in lieu of oath made by persons who had been detained in Hungarian prisons, as well as up to date reports by the Hungarian Helsinki Committee. The Berlin Higher Regional Court nevertheless chose to base its decision on the older decision of the Celle Higher Regional Court without sufficiently considering the more recent evidence. In terms of its obligation to clarify the factual circumstances relevant to the specific case, the Berlin Higher Regional Court merely noted that there were no grounds in the complainant's 75

submission to infer an impossibility for any Hungarian prison to comply with Convention standards when detaining someone who has been guaranteed such standards.

(3) The assurance given by the Hungarian authorities are not suitable to automatically 76
exclude any risk of treatment violating Art. 4 of the Charter. The Hungarian authorities only
make general reference to the applicable legal framework, pointing to a 2013 law; they
do not provide information as to the current actual detention standards or a specific assur-
ance as to the complainant's treatment. While the Berlin Higher Regional Court considers
the declarations made by persons formerly detained in Hungarian prisons to be irrelevant
on grounds of no assurance having been given in their respect, it holds the Hungarian au-
thorities' general assurance on detention conditions to be sufficient, even if this assurance
does not specifically refer to the complainant. This in itself appears contradictory, as the
complainant correctly points out. Additionally, at the time of its decision, the Berlin Higher
Regional Court had before it the Budapest chief public prosecution office's note verbale of
20 June 2024 and thus had already been informed as to which prison the Hungarian au-
thorities had designated for the complainant's detention on remand. In this respect, the
next logical step would have been to seek further clarification on the detention standards
in that particular prison. Moreover, guarantees given by the issuing state do not relieve the
competent court in the state receiving the request from the obligation to first make its own
prognosis of current risks in order to assess the situation and evaluate the reliability of the
assurance given by the issuing state. The challenged decision failed to conduct an exami-
nation that is sufficient in this respect (cf. Federal Constitutional Court, Order of the Second
Chamber of the Second Senate of 4 December 2019 - 2 BvR 1258/19 and others -, para. 66).

Similarly, the Hungarian authorities' assurance that German consular officers and diplo- 77
mats may access the prison to gain insights on detention standards and visit the complain-
ant does not relieve the Berlin Higher Regional Court from the obligation to conduct its
own risk prognosis in terms of what detention conditions to anticipate. Moreover, it is un-
clear why the Higher Regional Court takes the Hungarian authorities' assurance as to Ger-
man consular officers inspecting the detention conditions to mean that 'the overall deten-
tion conditions' – not just hygiene standards, food quality and quantity but also the com-
plainant's arraignment before a Hungarian court – would be in conformity with the Euro-
pean ordre public.

(4) To the extent that the Berlin Higher Regional Court holds that the complainant could 78
seek legal protection before the Hungarian courts in case of a violation of the detention
standards set out in the Hungarian authorities' assurance, the Higher Regional Court fails
to engage with the case-law of both the Federal Constitutional Court and the Court of Jus-
tice of the European Union, according to which the possibility of ex-post legal protection
does not automatically make a surrender permissible when there is a risk of inhuman de-
tention conditions (cf. Federal Constitutional Court, Order of the Second Chamber of the

Second Senate of 16 August 2028 - 2 BvR 237/18 -, para. 29; CJEU, Generalstaatsanwaltschaft <Conditions of detention in Hungary>, 25 July 2018, C-220/18 PPU, EU:C:2018:589, para. 75).

bb) Neither the information provided by the Hungarian authorities nor the complainant's detailed submissions give grounds to automatically assume, like the Berlin Higher Regional Court did, that the protection of the complainant, who identifies as non-binary, was sufficiently guaranteed. 79

The Berlin Higher Regional Court appears to assume that a risk assessment would be undertaken 'with respect to any kind of threat that may exist (due to sexual orientation, gender identity, the detained person's political views or origin or due to any other reason)', yet this degree of specificity cannot be inferred from the written guarantee given by the Hungarian national prison authority. The written guarantee merely states that the prison would pay increased attention in preventing possible atrocities during detention, transport, employment and reintegration if the risk assessment points to a high likelihood of the convicted individual being 'exposed and vulnerable in the prison community'. The Berlin Higher Regional Court seems to consider that, even in the complainant's special circumstances, the system in place for preventing risks for detainees in Hungarian prisons suffices in light of the constitutional prohibition on general or particular discrimination that the written guarantee referred to together with the discrimination prohibition and obligation to prevent discrimination included in the Code of Ethics in Detention Matters. Yet, such finding cannot be convincing for the mere reason that, as submitted by the complainant, the Berlin Higher Regional Court itself had, in its detention order, assumed that current policies by the Hungarian government had to be considered gender-, homo- and transphobic and that equality measures which Hungary had once successfully implemented in support of homosexual and trans people were being rolled back in a discriminatory manner. Additionally, the Berlin Higher Regional Court had before it a recent report by the Hungarian Helsinki Committee, released on 27 May 2024, according to which lesbian, gay, bisexual, transsexual, intersexual and queer detainees in Hungarian prisons were at risk of discrimination in the form of verbal or physical harassment by other detainees or prison staff. 80

The Berlin Higher Regional Court is of the view that the written guarantee would be apparent from the complainant's prison registration documents and that this would ensure a particularly thorough risk assessment, taking account of the complainant's non-binary identity. But the Hungarian authorities' written guarantee merely states that 'information on written guarantees [...] is (manually or electronically) added to prisoners' registration documents'. There is no indication in the submitted documents of the detainees' gender identity being registered at all. In fact, the Hungarian authorities stated precisely that the detainees' gender identity was not being registered. If attacks on detainees due to their gender identity are not registered as such, it is unclear how discrimination due to gender 81

identity is to be effectively targeted. In their submission of 20 June 2024, the complainant expressly brought this to the attention of the Berlin Higher Regional Court, which did not engage with the matter further. By failing to consider how the complainant was to be protected against discrimination, the Berlin Higher Regional Court also fails to clarify whether and how any protection measures, such as isolating the complainant from their fellow inmates over a prolonged period of time, could be particularly burdensome for the complainant; clarification would have required the Berlin Higher Regional Court to request further information in this respect.

IV.

The Order of the Berlin Higher Regional Court of 27 June 2024 violates the complainant's fundamental right under Art. 4 of the Charter. However, reversing the order and remanding the matter to the Berlin Higher Regional Court is no longer an option, given that the surrender procedure has already been completed. 82

V.

The decision on the reimbursement of the necessary expenses is based on § 34a(2) of the Federal Constitutional Court Act. 83

The monetary value of the matter in dispute (*Gegenstandswert*) has been fixed based on § 37(2) second sentence and § 14(1) of the Act on the Remuneration of Lawyers (*Rechtsanwaltsvergütungsgesetz* – RVG) in conjunction with the principles governing how to determine the monetary value of a matter at issue in constitutional proceedings (cf. BVerfGE 79, 365 <366 ff.>). 84

König

Frank

Wöckel