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Enhancing the Rights of Defendants and Detainees with Intellectual and/or Psychosocial Disabilities: EU Cross-Border Transfers, Detention and Alternatives

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Transfers of Detainees with Intellectual and/or Psychosocial Disabilities: The 2022 Decision of the German Federal Constitutional Court and its Implications

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1.1. Constitutional complaint against an extradition to Sweden

- Person concerned (PC) is of Afghan nationality.
- PC was sentenced in March 2018 to a detention measure („psychiatric care”) in Sweden.
- In April 2019, PC made use of a leave for travelling to Germany.
- European Arrest Warrant issued by the Swedish Public Prosecutor's Office.

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1.1. Constitutional complaint against an extradition to Sweden

- Placement in a general psychiatric clinic in Germany due to a crisis.
- PC was arrested and placed in detention pending extradition.
- Paranoid schizophrenia exacerbated in prison.
- The person concerned was then again placed in a (general) psychiatric clinic.
- In the meantime, the family had been granted a visa and residence permission for Germany.
- The Higher Regional Court declared the extradition to Sweden admissible under the condition that PC may not be deported to Afghanistan.

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1.2. Decision of the Federal Constitutional Court

- The Higher Regional Court violated its obligation to refer the case to the CJEU.

- The CJEU would have to decide
  - whether the executing judicial authority is obliged to investigate and evaluate
  - whether the surrender of a person with disabilities to the issuing member state would result in the concrete danger of a (further) severe deterioration of their health

    → difference to the pending Italian case C-699/21 where this danger was already confirmed by an expert statement

    and

  - whether, in case of a respective danger, an impediment to the surrender of the person has to be accepted.

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1.3. Consequences of the Federal Constitutional Court's decision

- The case was not referred to the CJEU.
- Instead (probably), the judicial authorities will now make use of FD 2008/909/JHA.
  - This had been recommended by the lawyer long ago.
  - It would have been required by means of rehabilitation (family coming to Germany, psychiatric care was helpful in Germany etc.).

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2. Other examples

Higher Regional Court Brandenburg , 20th January 2021 – 1 AR 27/20 (S)

- There are few court decisions on transfer; regularly, the PC objects to the transfer.

- A typical line of argument in transfer cases:
  - PC cannot follow up with therapy requirements in Germany due to a lack of German language skills.
  - PC should be transferred (to Poland).
  - It is assumed that the PC will face no integration problems (in Poland).
  - The question of whether the PC will receive adequate therapy (in Poland) is not raised.

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3. Conclusion

- Rehabilitation and therapy are only used as arguments if it fits purposes pursued by judicial authorities.
- The lack of therapy and rehabilitation for foreign nationals with poor German language skills is due to the disregard of recommendations for foreign national prisoners and detainees, e.g. CM/Rec (2012)12.

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THANK YOU

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