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German Criminal Code (Strafgesetzbuch, StGB) Section 129a(1), subparagraph 1, Section 129b(1)

On participation in the terrorist organisation 'Islamic State' as a member through activities in the area under its control (continuation of Federal Court of Justice (Bundesgerichtshof, BGH), order of 22 March 2018 - StB 32/17).

BGH, order of 15 May 2019 - AK 22/19



FEDERAL COURT OF JUSTICE

ORDER

AK 22/19 of 15 May 2019
in the criminal proceedings against....

alias:.....

for membership in a foreign terrorist organisation inter alia

ECLI:DE:BGH:2019:150519BAK22.19.0

After hearing the accused and her defence lawyer, the 3rd Criminal Chamber of the Federal Court of Justice, in accordance with Sections 121 and 122 of the German Code of Criminal Procedure (Strafprozeßordnung, StPO), ordered as follows on 15 May 2019:

The remand detention must be continued. Any further review of the remand detention required will be carried out by the Federal Court of Justice in three months' time.

Until this time, the review of the remand detention is referred to Düsseldorf Higher Regional Court.

Reasons:

I.

1. On 17 October 2018, the accused was arrested on the basis of an arrest warrant issued by the investigating judge of the Federal Court of Justice (4 BGs 204/18) on 15 October 2018 and has been in uninterrupted remand detention since this time.

2. The subject of the arrest warrant is the charge that, from March 2015 to May 2016 in Syria and Iraq, the accused participated as a member in a foreign organisation ('Islamic State' [IS]) whose aims or activity were directed at the commission of murder under specific aggravating circumstances (Section 211 StGB), murder (Section 212 StGB) or war crimes (Sections 8, 9, 10, 11 or 12 of the Code of Crimes against International Law (Völkerstrafgesetzbuch, VStGB) and, acting jointly, during this period in mid-2015 in the context of the events surrounding the civil war in Iraq, appropriated a significant amount of property belonging to the enemy side contrary to international law, without this having been necessitated by the demands of the armed conflict, punishable under Section 129a(1), subparagraph 1, the first to third sentences of Section 129b(1) StGB, the third scenario of Section 9(1) VStGB, Section 25(2), Section 52 StGB. The accused travelled from Germany to the area affected by the Syrian and Iraqi civil war and joined IS there. In conscious and wilful cooperation with her husband by Islamic ritual, D., she accepted a residential property from the organisation whose owner or other entitled party had fled or been expelled.

3. By indictment of 3 April 2019, the Federal Prosecutor General on 5 April 2019 charged the accused with participation in a foreign terrorist organisation as a member in concomitance with war crimes against property and other rights before Düsseldorf Higher Regional Court. At the same time, pursuant to the second scenario of subparagraph 1 of Section 154(1) StPO, he decided not to prosecute any other possible acts committed as a member that did not simultaneously constitute an offence under a criminal provision other than Section 129a(1), subparagraph 1 and the first sentence of Section 129b(1) StGB and that, taken in their entirety, are part of the same cumulative series of offences as the indicted offence.

4. By order of 11 April 2019, Düsseldorf Higher Regional Court ruled that it was necessary to continue the remand detention.

II.

5. The conditions for ordering remand detention and its continuation exceeding a period of six months have been met.

6. The subject of the review of the remand detention is the executed and submitted arrest warrant issued by the investigating judge of the Federal Court of Justice on 15 October 2018, subject to the proviso that the indictment of 3 April 2019 relates only to the charge of participation in a foreign terrorist organisation as a member in concomitance with war crimes against property and other rights. Additional acts committed as a member of IS listed in the arrest warrant that do not infringe other criminal laws and that would be combined by the *Organisationsdelikt* [organisational offence] to form one remaining single act constituting an offence and, taken in their entirety, would be joined as a separate offence under substantive law (Section 53 StGB) to the indicted act of participation punishable separately under the third scenario of Section 9(1) VStGB (in relation to cumulative offences, see BGH, orders of 9 July 2015 - 3 StR 537/14, BGHSt 60, 308, 311 and 312, 319 and 320; of 20 December 2016 - 3 StR 355/16, BGHR StGB Section 129a cumulative offences 6; of 8 November 2017 - AK 54/17, NStZ-RR 2018, 42, 43), are no longer – once public charges have been preferred – subject to the Federal Prosecutor General's tendency to prosecute (see also BGH, order of 6 December 2017 - AK 63/17, NStZ-RR 2018, 53, 54). They still have significance, however, specifically in relation to the assessment of the membership as such and the anticipated penalty to be taken into account during the review of the grounds for detention.

7. There is a compelling suspicion that the accused participated in a foreign terrorist organisation as a member in concomitance with war crimes against property and other rights.

8. According to the current status of the investigations, the following facts can be assumed with regard to a compelling suspicion:

9. IS an organisation with a militant, fundamentalist Islamic orientation, which originally set itself the target of founding a 'theocracy' based on its ideology and covering the territory of modern-day Iraq and the historical region 'ash-Sham' – the modern-day states of Syria, Lebanon and Jordan, as well as Palestine – to be governed by Sharia, and to this end of overthrowing the Shiite-dominated government of Iraq and the regime of the Syrian president Bashar al-Assad. It was and is prepared to countenance civilian casualties in its continued fight, since it sees anyone who opposes its claims as an 'enemy of Islam'. The organisation sees killing such 'enemies' or intimidating them by acts of violence as a legitimate instrument in their fight.

10. The organisation, which changed its name from 'Islamic State of Iraq and Greater Syria' (ISIG) to 'Islamic State' (IS) on proclamation of the 'caliphate' on 29 June 2014, thereby distancing itself from its self-imposed territorial limitation, has been led by Abu Bakr al-Baghdadi since 2010. On proclamation of the caliphate, the spokesperson of IS declared al-Baghdadi the 'caliph', to whom Muslims worldwide owed obedience. His subordinates include a deputy and 'ministers', being the individuals responsible for certain areas, such as a 'war minister' and a 'propaganda minister'. The leadership also includes advisory 'Shura councils'. Publications are produced in the media department 'Al-Furqan' and distributed via the 'al-I'tisam' media office, which has its own Twitter channel and internet forum for this purpose. The organisation's symbol, which is also used by the

combat units, is the 'seal of the prophet', a white oval with the inscription 'Allah - Rasul - Muhammad' on a black background, with the Islamic statement of faith written above it. The now more than several thousand fighters are subordinate to the 'war minister' and divided into local combat units, each with their own commander.

11. The organisation divided the areas it occupied into governorates and set up a secret service apparatus, the purpose of these measures being to create totalitarian state structures. Members of the Iraqi and Syrian armies and of opposition groups hostile to IS, foreign journalists, employees of non-governmental organisations and civilians who question IS's claim to power are faced with imprisonment, torture and execution. Several recordings of particularly gruesome killings were published by IS for the purposes of intimidation. In addition, IS continues to massacre parts of the civilian population and carry out terror attacks outside its sphere of influence. For instance, it has also claimed responsibility for attacks in Europe, such as Paris, Brussels and Berlin.

12. In 2014, IS managed to occupy around a third of the state territory of Iraq. On 10 June 2014, it gained control over the major city of Mosul, which was its central seat of power in Iraq until the US-supported offensive by the Iraqi army at the end of 2016. Since 2015, the organisation has gradually been driven back with some success. For instance the recapturing of Mosul, which began on 16 October 2016 and was completed at the start of June 2017. On 27 August 2017, IS was driven from its last northern Iraqi stronghold in Tal Afar.

13. The accused is of Muslim faith. She became radicalised no later than the end of 2014 and decided, in accordance with her Islamic beliefs, to travel from Germany to Syria and into Iraq, in order to join IS there and take part in the fight against the Assad regime and help to expand a religious-fundamentalist Islamic state according to Sharia rules. For this purpose, as early as January 2015 she married D., who was residing in Turkey and had already been active in Syria previously as a fighter for IS, from Germany via Skype, in accordance with Islamic ritual. On 5 February 2015, the accused travelled by plane to Istanbul, together with her son Y. from a previous marriage, who at that time was eight years old. There, they met D. Together with D., they reached Syria via the Turkish border city of Gaziantep on 19 March 2015, with the help of traffickers paid by IS.

14. At no later than this time, the accused joined IS; she identified with its ideology, actions and aims and submitted to the will of the organisation in agreement with those who were accountable for it. The accused, her son and D. were taken to Mosul in a minibus, where IS registered the family. The accused and her son were housed in a 'women's house', while D. received ideological training from the organisation. In June 2015, the family moved into a home in Mosul provided by the organisation. While D. was active as a fighter for the organisation, the accused managed the shared household. IS paid her and her husband under Islamic law a monthly 'wage' of around 250 dollars.

15. In August 2015, the family moved to Tal Afar. There, they took possession of a house with a garden, which was under the management of IS and had been occupied by Shiite military personnel. This house had been left behind by the legal owners or other entitled parties when they had fled from or been expelled by IS troops. The organisation allocated the property to the accused and D., who were aware of the circumstances mentioned above. It was also important to them, as members of the organisation, to hereby strengthen the organisation's claim to power and prevent the area being recaptured by enemy military forces. D. sometimes kept his weapons in the house. Here, too, the accused was responsible for managing the household.

16. When D. was killed in mid-December 2015 during guard duty at the border with Syria, the accused returned to Mosul. After D.'s death, IS paid the accused a one-off sum of 1 000 dollars. In May 2016, she moved with her son to Raqqa (Syria). With the intention of leaving the organisation, they both travelled from there to Turkey at the end of October 2016 with the assistance of fighters in the Free Syrian Army and using the services of a trafficker.

17. The compelling suspicion in respect of the non-European terrorist organisation 'Islamic State' is based in particular on expert opinions from the experts Dr S. and Dr K. and on assessment reports from the Federal Criminal Police Office.

18. The compelling suspicion in respect of the membership of the accused in IS and the seizure of the house allocated to her and D. by the organisation is especially apparent from the numerous comments made by the accused herself: when she was questioned by the Federal Criminal Police Office on 13 July 2018 in Ankara (Turkey), in the main hearing of 18 December 2017 before the criminal division in Kilis (Turkey), to a reporter from the BILD newspaper in summer 2018, during an interview by video call for an ARD report broadcast on 17 September 2018 and in several emails sent to the police headquarters K. and the Federal Foreign Office, which she wrote during the period from May 2017 to September 2018 with a view to an envisaged return to Germany. In view of the fact that she was previously instructed regarding her rights as a defendant, the use of the statements she made to the police authorities does not raise any concerns. To the extent that the accused, during her questioning by the Federal Criminal Police Office, admitted not to be integrated into IS but merely to live in the area under its control, or words to that effect (case file volume I p. 484: 'Actually not [identified], I thought we live here now ...'), this cannot be reconciled with other statements she made herself on various occasions in accordance with the file as it stands. In addition, the investigations uncovered further evidence, in particular relating to the radicalisation of the accused and her ideological connection to IS, specifically the witness statement of her ex-husband Sb. before the investigating judge and the findings from her Facebook profile. For more information on the expected furnishing of evidence, reference is made to the essential outcome of the investigations presented in detail in the indictment of 3 April 2019.

19. From a legal perspective, it follows from all of the above that the accused is highly likely to have committed the offence of participation in a foreign terrorist organisation as a member in concomitance with war crimes against property and other rights in accordance with Section 129a(1), subparagraph 1, the first to third sentences of Section 129b(1) StGB, the third scenario of Section 9(1) VStGB, and Sections 25(2) and 52 StGB.

20. There is a compelling suspicion that the accused participated in a foreign terrorist organisation as a member (Section 129a(1), subparagraph 1, the first sentence of Section 129b(1) StGB). She participated in IS as a member within the meaning of Section 129a(1) StGB, in the version in force at the time of the offence. The extent to which the new version of Sections 129 and 129a StGB that came into effect on 22 July 2017 (see Federal Law Gazette (BGBl.) I pp. 2440 and 2441) lowered the requirements regarding this variant of the offence (see in this regard BGH, order of 22 March 2018 - StB 32/17, NStZ-RR 2018, 206, 207) is not relevant here in light of Section 2(1) and (3) StGB.

21. The following is true, in any case, in respect of the old version of Section 129a(1) StGB:

22. Participation as a member generally requires the offender to be integrated into the organisation,

based on the unanimous will of both parties and over a certain period of time, to be subject to its will and to actively engage in promoting its aims (cf. BGH, order of 14 April 2010 - StB 5/10, NJW 2010, 3042, 3044).

23. Membership requires a certain formal integration of the offender into the organisation. It can only be considered if the offender supports the organisation from the inside, not just from the outside. It does not necessitate a formal declaration of joining or organised involvement in the life of the organisation on the part of the offender. However, the offender must occupy a position within the organisation that identifies him or her as belonging to the circle of members and distinguishes him or her from non-members. For this, merely acting for the organisation is insufficient, even if it is particularly intensive, since an outsider does not become a member of an organisation merely by supporting it. Subordination and activity that are based on the will of only one party are also insufficient, even if the party in question strives to support the organisation and its criminal aims. By its nature, membership involves a relationship that cannot routinely be imposed on the organisation, but is dependent on its consent. Participation as a member therefore does not apply if acts of support are not based on a mutual desire for continuous involvement in the life of the organisation (cf. BGH, judgment of 14 August 2009 - 3 StR 552/08, BGHSt 54, 69, 113 and 114; orders of 13 September 2011 - StB 12/11, NStZ-RR 2011, 372 and 373; of 7 September 2017 - AK 42/17, NStZ-RR 2018, 10, 11).

24. An act of support by the member may involve directly contributing to the implementation of the organisation's aims; it may also be aimed at merely creating or maintaining the basis for the organisation's activities. Supporting the development, cohesion or activity of the organisation is therefore sufficient (cf. LK/Krauß, StGB, 12th edition, Section 129 paragraph 106; also BGH, order of 22 October 1979 - StB 52/79, BGHSt 29, 114, 123; judgment of 11 June 1980 - 3 StR 9/80, BGHSt 29, 288, 291; order of 14 July 2016 - 3 StR 23/16, BGHR StGB Section 129 a(1) participation as a member 1). This can include, for example, behaviour of appropriate significance that supports the organisation or is otherwise typical of the organisation (cf. BGH, order of 22 March 2018 - StB 32/17, NStZ-RR 2018, 206, 207; MüKoStGB/Schäfer, 3rd edition, Section 129 paragraph 82). In contrast with this, in cases of a mere formal or passive membership that is insignificant to the functioning of the organisation, there is in principle no active deed committed as a member (cf. BGH, orders of 22 October 1979 - StB 52/79, loc. cit., p. 121; of 30 March 2001 - StB 4 and 5/01, BGHSt 46, 349, 356; LK/Krauß loc. cit., paragraph 107).

25. On the basis of the facts of the case with which the accused is charged, the accused was not only a passive member of IS, but, as such, actively supported its aims:

26. She was accepted into the organisation of IS by mutual agreement. She travelled of her own accord from Germany to the area affected by the Iraqi and Syrian civil wars in order to – indirectly – take part in the fight against the Assad regime and help to expand the religious-fundamentalist state according to Sharia rules. The declared destination of her journey, from the start, was the organisation 'IS' ('ISIG'). She identified with its ideology, actions and aims. On the journey, she married the IS fighter D. in Turkey in accordance with Islamic ritual. The smuggling of them both and the accused's son to Syria was financed by the organisation. Later, in Iraq, the family was formally registered by IS. They lived exclusively in cities controlled by the organisation. The accused shared in cash payments that were paid by seemingly official organisational units of IS and were intended not only for her husband in accordance with Islamic ritual, but for her too. She understood these

payments as 'a kind of monthly wage', including for the activities for which she was responsible. Furthermore, the organisation provided the accused and D. with successive residences; she was also housed temporarily in a 'women's house' during D.'s training. All of this clearly went beyond merely living in the 'caliphate' (see in this regard BGH, order of 22 March 2018 - StB 32/17, NStZ-RR 2018, 206, 207).

27. The accused was therefore not merely a passive member; instead, she carried out considerable activities typical of the organisation for the purposes of the organisation. The seizure of the residential property allocated by IS, which is the subject of the review of the remand detention and which was the result of the accused's membership, is an act of active support. It was in the interests of IS that two members of the organisation, one of whom was a fighter, acquired the house in violation of the law of war and thus – especially in terms of weaponry – strengthened the area under its effective control. In addition, the management of the household must in this case be considered behaviour of a lasting nature that is typical of the organisation. It clearly also served the purpose of maintaining D.'s combat readiness, corresponded to the understanding of gender roles propagandised by IS and was specifically remunerated on account of its significance to this organisation. On the basis of the file as it stands, the accused fulfilled not only the 'domestic duties' that arose from living together with her husband in accordance with Islamic ritual (see in this regard BGH, order of 22 March 2018 - StB 32/17, NStZ-RR 2018, 206, 207), but in doing so also performed services for IS. The fact that she mainly performed domestic activities does not preclude her from having participated as a member (cf. BGH, orders of 28 June 2018 - StB 10/18, NStZ 2018, 598, 599, and StB 11/18, NStZ-RR 2018, 369, 371).

28. In addition, there is a compelling suspicion that the accused committed a war crime against property and other rights in accordance with the third scenario of Section 9(1) VStGB in conjunction with Section 25(2) StGB, Section 2 VStGB. On the basis of the facts with which the accused is charged, all of the elements of the offence have been fulfilled:

29. Acting together with D., the accused appropriated the plot of land containing the house and garden, in which Iraqi Shiite military personnel had lived and which had been left behind by the owners or other entitled parties when the IS troops approached. The seizure of the property was aimed at depriving the entitled parties of it on a lasting basis, without their consent. In respect of the appropriation, it is not relevant that the property had previously been under the control of IS. This appropriation was also of considerable scope. The plot of land containing the house and garden was also the property of the opposing side in a conflict and was under the control of her own side, IS; the latter must be deemed as an enemy in relation to the civilian population, particularly in relation to the Iraqi state and its military. Finally, the seizure had the required functional connection to the armed conflict for the offence to have been realised, was not justified under international law and also did not even come close to being necessitated by the demands of the armed conflict (see, in respect of all of the above, specifically Senate order of 4 April 2019 - AK 12/19).

30. The war crime against property and other rights is in concomitance (Section 52 StGB, Section 2 VStGB) with participation in a foreign terrorist organisation as a member.

31. German criminal law is applicable. This follows from the second and fourth scenarios of the second sentence of Section 129b(1) StGB (see in this regard BGH, order of 6 October 2016 - AK 52/16, juris paragraphs 33 et seq.) in respect of the participation in a foreign terrorist organisation as

a member and from the first sentence of Section 1 VStGB in respect of the war crimes against property and other rights.

32. The authorisation for criminal prosecution required under the second and third sentences of Section 129b(1) StGB has been given with regard to IS.

33. In addition to the compelling suspicion, the other general conditions for ordering and enforcing the remand detention have been met.

34. The grounds for arrest of a flight risk under Section 112(2), subparagraph 2 StPO and of serious crime under Section 112(3) StPO exist.

35. It is currently more likely that the accused, were she to be released, would evade the criminal proceedings than submit to them.

36. In the event of her conviction, she can expect a severe prison sentence. Both of the crimes that she is highly likely to have committed in concomitance are subject to prison terms of one to ten years (Section 129a(1) StGB, Section 9(1) VStGB). As part of the sentencing, the Higher Regional Court can also take into account acts of participation as a member on the part of the accused of which it is certain, which are not punishable under other criminal provisions and the prosecution of which has not been pursued by the Federal Prosecutor General in accordance with the second alternative of Section 154(1), subparagraph 1 StPO, provided that it establishes the acts in accordance with the code of procedure (see case-law; cf. for instance BGH, order of 18 March 2015 - 2 StR 54/15, BGHR StGB Section 46(2) prior history 33; also Schäfer/Sander/van Gemmeren, *Praxis der Strafzumessung*, 6th edition, paragraphs 662, 666 with further references). IS, to which the accused is suspected of belonging for more than a year, is a particularly dangerous terrorist organisation, which is also characterised by exceptionally vicious acts against its opponents.

37. There are no circumstances apparent that would prevent flight and be capable of counteracting the temptation to abscond arising from the expected punishment. On the contrary: Before travelling to Syria and Iraq, the accused turned her back on her family and has no stable social connections in Germany. From February 2015, she spent more than three and a half years abroad, so she might reasonably still have contacts there.

38. There is a compelling suspicion that the accused committed a crime under Section 129a(1), Section 129b(1) StGB. Therefore, even if this provision is interpreted in the restrictive manner required (see Meyer-Goßner/Schmitt, StPO, 62nd edition, Section 112 paragraph 37 with further references), the conditions of Section 112(3) StPO are additionally met. The above circumstances are all the more reason to fear that the punishment of the crime could be jeopardised without the continued detention of the accused.

39. A suspension of execution of the warrant of arrest (Section 116 StPO), which is also possible within the context of Section 112(3) StPO when interpreted in conformity with the constitution, is not likely to be effective in the present circumstances.

40. The continued enforcement of the remand detention is not disproportionate to the importance of the case or to the anticipated penalty in the event of conviction (the first sentence of Section 120(1)

StPO).

41. The specific conditions for the continuation of the remand detention for a period exceeding six months (Section 121(1) StPO) have also been met. The scope and particular complexity of the investigations mean that a judgment has not yet been possible and justify the continued enforcement of the remand detention:

42. Following the arrest of the accused on her return to Germany on 17 October 2018 and the searching of her person, the exhibits that were found during this process were evaluated, in particular a USB memory stick. This contains video, audio, image and text files in German, Turkish and English, amounting to 14.6 gigabytes in total. It was secured for forensic purposes. By the start of 2019, the previously processed data that were of relevance to the proceedings (including numerous text files, 266 Turkish and four English audio files and 17 video files in English) had been assessed by experts in Islamic sciences, likewise several individual written texts and the accused's Facebook profile.

43. By the end of January 2019, the accused's personal relationships had also been investigated. After unsuccessful attempts had been made, prior to 10 January 2019, to find out details of the criminal proceedings conducted against the accused in Turkey from the Federal Criminal Police Office liaison officers there, Turkey was formally requested to provide legal assistance on 18 January 2019. A response has not yet been received.

44. Moreover, by the end of January 2019, investigations had been carried out into further possible witnesses, in particular those who were expected to be able to offer information on the radicalisation of the accused or her life in Syria and Iraq. Furthermore, members of the accused's family were investigated as potential witnesses. On 19 February 2019, the investigating judge of the Federal Court of Justice questioned her ex-husband.

45. Based on the status of the investigations described, the Federal Prosecutor General issued the indictment on 3 April 2019, which was received by Düsseldorf Higher Regional Court on 5 April 2019. For reasons of expedition, he did not wait to receive a response to the request for legal assistance from Turkey. On 8 April 2019, the presiding judge of the criminal chamber of Düsseldorf Higher Regional Court responsible for the case ordered the service of the indictment and a three-week period for the accused to submit comments.

46. The investigative and intermediate proceedings have thus so far been conducted in a manner satisfying the requirement for expediency.

S.

G.

B.