

LIMITATION OF THE DEFENDANT'S RIGHT TO FREEDOM DURING CRIMINAL PROCEEDINGS. APPLICATION OF THE MEASURE OF JUDICIAL REVIEW

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Abstract

The defendant's right to freedom may be limited during criminal proceedings, in preliminary chamber procedure and during the trial by the judicial bodies who may order judicial review for the defendant. Judicial review may be ordered if there is evidence or probable cause leading to a reasonable suspicion that a person committed an offence, if the measure is necessary in order to ensure a proper conducting of criminal proceedings, to prevent the defendant from avoiding the criminal investigation or trial or to prevent the commission of another offence and if it is proportional to the seriousness of the charges brought against the person such measure is taken for.

The aim of this paper is to analyse the proceedings of ordering the judicial review and the guarantees issued for assuring the defendant's right to freedom and to show the way this measure is ordered by the judicial bodies in specific cases. The paper will also highlight the new rules set by the Constitutional Court and the Supreme Court of Justice on judicial review.

Key words: judicial review measure, right to freedom, hearing of the defendant, proper conducting of criminal proceedings

The defendant's right to freedom during criminal proceedings may be subject to certain limitations, up to deprivation of liberty, if this ensures the proper conduct of criminal proceedings, prevents defendant's absconding from prosecution or trial or prevents another crime to be committed. Given that the right to liberty is a fundamental right of the individual, and guaranteeing the right to defence is one of the basic principles of criminal proceedings, restricting the right to freedom can only occur in cases and under strict conditions provided for by law, subject to a proportionality between the seriousness of the offence committed and importance of limiting the defendant's freedom. Judicial review is a non-custodial preventive measure, which consists of a sum of obligations imposed on the defendant, for a limited period of time, the fulfilment of which is checked constantly throughout the measure duration by police and can lead to more stringent preventive measures. Applicable law on this matter consists of Articles 202-208 and 211-215, respectively, of the Code of Criminal Procedure governing the conditions that must be fulfilled for taking the measure of judicial review, judicial review content, proceedings of applying, maintaining, extending and challenging the judicial review measure.

Judicial review is a preventative measure that can be taken separately from the other preventive measures provided by the Code of Criminal Procedure, as there is no interdependence between preventive measures. However, in many cases it follows provisional detention or house arrest, being ordered after a certain period of time when the person concerned was deprived of liberty. They are also quite numerous cases where judicial review is ordered by the judge as an alternative to provisional detention measure proposed by the prosecutor during criminal proceedings.

From this perspective, judicial review appears to be closely linked to a person's right to freedom, representing an alternative to preventive deprivation of liberty by provisional detention or house arrest. The judicial review measure, under the current regulation, exceeds however the question of limiting the defendant's right to move to a particular territorial area, and imposition of such an obligation is not absolutely necessary.

MATERIAL AND METHOD

In preparing this paper, we firstly considered the legal regulation contained in the Criminal Procedure Code, which entered into force on

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February 1, 2014, and the Constitutional Court's Decision 712 of December 4, 2014, which led to the amendment of the Criminal Procedure Code. We also considered judicial practice in this matter of prosecutor's office and courts, especially those in Iasi, by examining how legal provisions are interpreted and applied in everyday life.

RESULTS AND DISCUSSIONS

Preventive measure of judicial review may be ordered both during proceedings, preliminary chamber and trial, either as single preventative measure or after custody, provisional detention or house arrest.

Regardless of the stage of criminal proceedings, in order to take the preventive measure of judicial review several conditions expressly provided for by the legislator in order to avoid arbitrariness in taking a measure affecting a fundamental human right must be cumulatively fulfilled, namely:

1. There is evidence or reasonable indication of the reasonable suspicion that a person has committed a crime. Legal wording of this condition was often criticized on the grounds of using the phrase "reasonable suspicion", which is considered too lenient. In reality, the evidence condition is the one necessary to initiate criminal proceedings, if we refer to taking the measure during prosecution, and for indictment, if we refer to the Pre-Trial Chamber or trial court, as the measure of judicial review may only be taken against the defendant. That being so, sufficient evidence needs to be submitted, showing not only that an offence has been committed, but also that the defendant committed the said offence. With regard to the offence, law does not impose any additional condition or limitation, and the judicial review measure can be taken regardless of the nature of the offence, as long as all necessity and proportionality conditions are met.

2. There must be no case in which initiation of criminal proceedings or its exercise is prevented, nor any of the cases provided for by Article 16 (1) of the Criminal Procedure Code. It is worth mentioning that existence of such a case is considered upon taking the measure, as one of these cases might further occur. Thus, subsequent to disposition of judicial review, the injured party may reconcile with the defendant or withdraw their complaint, evidence submitted may indicate a case of non-punishment or non-liability about the existence of which there was no information known initially, situations in which legality of ordering judicial review cannot be challenged. A special case is that of a defendant who is a minor

aged between 14 and 16, for whom Article 113 par. 2 of the Criminal Code provides that is criminally liable only if it is proved that he/she committed the act with discernment. Would it be possible to take the measure of judicial review if the case file does not contain a psychiatric report indicating presence or lack of discernment? The answer seems negative at a first glance, since, if a psychiatric report was not submitted, the defendant is presumed as lacking discernment, a situation in which there is a case of those contemplated in Article 16. On the other hand, judicial review is not a measure sanctioning the act committed, but a preventive one, designed to prevent occurrence of situations that would compromise the smooth conduct of criminal proceeding or achieving its purpose. Looking from this perspective, we think it is possible to take the measure of judicial review against a minor defendant even before having conducted a psychiatric exam or submitted the psychiatric report, if taking the measure is necessary and proportionate, and ordering and conducting the psychiatric exam will occur as soon as possible.

3. The need to impose judicial review must ensure the proper conduct of criminal proceedings, prevent the defendant from absconding or committing another crime. Judicial bodies entitled by law to order the measure are required at the time of ordering the judicial review measure to show why it is necessary to take the measure or, in other words, how could the defendant, if the measure of judicial review is not taken, prevent the proper conduct of criminal proceedings or evade criminal liability or where does the risk of committing another offence derive from. Proving the necessity of the measure should start, in our opinion, from the obligations that will be imposed on the defendant during the measure. If we analyse this condition in light of the obligation automatically imposed by law, we find that the measure of judicial review is justified mainly by the need of keeping the defendant at the disposition of judicial authorities, so that they can hear, face, expertise them whenever necessary for a fair settlement of the case and in addition, to prevent the defendant from evading legal proceedings that are or will be conducted against them. In judicial practice, these are the reasons generally justifying taking the measure of judicial review subsequent to provisional detention or house arrest, after a time period in which the person was preventively deprived of liberty. There are other reasons that require taking the measure of judicial review, such as the need to prevent the defendant from coming into contact with other people like witnesses, the injured person or other defendants, the need to

prevent the defendant from exercising the profession or occupation that they used to commit the offence, from returning to the family home or from going to certain places, public gatherings or events. In our opinion, making a connection between the obligations to be imposed and the need to take the measure is likely to remove stereotypical motivations and show exactly what is the reason for which the preventive measure of judicial review is necessary in a particular case.

4. A proportionality report must exist between the judicial review measure and seriousness of the accusation brought against the defendant subject to the measure. This condition should be considered, in our opinion, by comparing the actual content of judicial review to be ordered to the seriousness of the offence committed by the defendant. It is true that in many cases seriousness of the fact results from the legal classification of that fact and the punishment prescribed by law. There are also cases where seriousness of the offence is reflected not by the penalty provided by law for the offence committed, but by the actual circumstances in which the offence was committed, manner of commission or relations between subjects prior to offence. Let us take the example of a threat. Pursuant to Article 206 Criminal Code, the offence of threatening someone with a crime or an prejudicial act against them or of another person, if it is liable to produce a state of fear, is punishable by imprisonment from 3 months to one year or by a fine, and penalty imposed may not exceed the penalty imposed for the offence subject of the threat. As it can be seen, the penalty limits are fairly low, placing the crime of threat among the less serious ones, so that, in principle, application of a preventive measure, be it non-custodial, appears to be excessive. But when, against the background of a previous conflicting state translated in repeated aggression, the defendant, former spouse, domestic partner or friend of the person injured, a person known to display violent behaviour, addresses the former death threats, after having followed the injured party especially to threat him/her, while the injured party had taken measures to prevent a meeting with the defendant, the requirement of proportionality between judicial review proposed and seriousness of the charge against the defendant is fully satisfied.

Taking the measure of judicial review is decided by the judicial body that leads the proceedings stage of the pending case or by the prosecutor during criminal proceedings, by the judge in the preliminary chamber and by the court during trial. Exceptionally, during prosecution, the measure of judicial review can also be ordered by

the justice of peace, where, having to settle a proposal for provisional arrest or house arrest of the defendant, it finds that achieving the purpose for which arrest was requested is also possible by taking a non-custodial preventive measure. After taking the measure in such a case, the justice of peace loses its right to rule on that measure, and the prosecutor is the one who has the right to order during the prosecution on revocation or termination by law of the judicial review measure or change of judicial review content.

During criminal proceedings, the prosecutor will order summoning of the defendant who is free or bringing the defendant under arrest, and then will proceed immediately to bring to inform the defendant, in a language which they understand, of the crime they are charged with and reasons for taking the measure of judicial review. Pursuant to Article 212 para. 3 Criminal Procedure Code, the judicial review measure may be taken only after hearing the defendant, in the presence of the lawyer chosen or appointed *ex officio*. The legislator's wording, which does not expressly provide that the hearing is conducted by the prosecutor, gave rise to different interpretations, and there are people who believe that the hearing requirement is met when the hearing was conducted by the criminal investigation bodies at the disclosure of the quality of defendant. As far as this paper is concerned, we believe that the hearing must be conducted by the prosecutor, since this is the judicial body ordering on restriction of the right to liberty, and the hearing must consider the actual or personal circumstances imposing the measure of judicial review, as it is no longer only a matter of accounting the facts. In addition, during direct hearing of the defendant by the prosecutor, the defendant can prepare a proper defence, knowing exactly what are the reasons for which the prosecutor considers it necessary to take the measure of judicial review, and even justify an impossibility to comply with certain obligations from those that might be imposed so as to no longer be necessary to further request changes to judicial review. In a criminal case, for example, the defendant under judicial review who may not leave the country told the prosecutor that they must travel to Belgium to solve their social and tax situation, namely to take the necessary steps and submit annual tax returns and to obtain unemployment benefits, as they lived and worked legally in that country in the period before having committed the offence. The defendant submitted several supporting documents, namely an employment contract, unemployment-related documents, certificate for enrolment as a job seeker, lease contract of main residence. In such a

situation, if there are no other data showing that the defendant would evade legal proceedings, imposing the obligation not to leave the country is not adequate, as it would limit the defendant's right to achieve a legitimate interest (the right to obtain unemployment benefits), depriving the defendant of income necessary for living or income that would enable them to compensate for damage caused by the offence or payment of legal costs. The obligation to hear the defendant prior to ordering judicial review by the prosecutor, a hearing separate from the one conducted after initiation of criminal proceedings, results, in our opinion, even from the wording of the legal text which makes explicit reference to the defendant's hearing in the text dealing with the measure of judicial review, as well as from the marginal title of Article 212 - "Application of the measure of judicial review by the prosecutor". The sanction applied in case of failing to hear the defendant by the prosecutor is relative nullity, so that the defendant must show which is the injury they suffered as a result of not being heard, as this is not presumed by law. Legal assistance to the defendant during the hearing is mandatory, regardless of whether they are in custody or not, under the penalty of absolute nullity. Under these circumstances, if the prosecutor had not heard the defendant before ordering judicial review and the latter was heard by the criminal investigation bodies at the disclosure of the status of defendant, without ensuring the presence of a legal counsellor, as at that time there was no case of mandatory legal representation, taking the measure of judicial review appears to be illegal and is sanctioned by absolute nullity under Article 281 para. 1 letter f) Criminal Procedure Code.

The prosecutor takes the measure of judicial review by a reasoned order, communicated to the defendant, and communication date is the date judicial review begins to operate.

Where the defendant is under detention, the measure of judicial review will operate from the time of expiry of detention, an aspect resulting from the wording of the text, which does not provide neither for the possibility of replacing detention by the measure of judicial review, nor by taking the measure of judicial review with the obligation to immediately release the detained defendant (Jderu C., Udroi M. (eds.), 2015, *Codul de procedură penală. Comentariu pe articole*, C.H. Beck Publishing House, Bucharest, p. 608).

During preliminary chamber and trial, the preliminary chamber judge or court before which the case is pending may order, by a court resolution, the measure of judicial review against the defendant, at the reasoned request of the

prosecutor or ex officio. The preliminary chamber judge or court will order summoning of the defendant and proceed to hear the defendant if the latter is present at the time set, in the mandatory presence of the defendant's lawyer and the prosecutor. The measure of judicial review is ordered by a court resolution, which is communicated to the defendant.

The order or court resolution imposing the measure taken must show the reasons that justify the preventive measure of judicial review against the defendant, which are obligations that the defendant will have to comply with and why were they imposed. In this respect, the ECHR ruled that, to assess proportionality of the obligation not to leave the country, it is essential that, on the one hand, the authorities provide reasons for taking such a measure and, on the other hand, the measure is accompanied by effective procedural safeguards by which authorities examine whether the measure is necessary to be maintained and prevent arbitrary (ECHR, Partial inadmissibility decision of June 7, 2011 in Case Cășuneanu v. Romania, par. 53-54, Udroi M., 2014, *Procedură penală. Partea generală. Noul Cod de procedură penală*, Ed. C.H. Beck Publishing House, Bucharest, p. 537).

During judicial review, the defendant must meet the following obligations:

a) report to the prosecuting authority, the preliminary chamber judge or the court, whenever required to do so. Reporting obligation aims to bring before the judicial body competent in solving the case where the measure against the defendant was taken, as bringing before other prosecution bodies cannot be subject to obligations in a preventive measure ordered in another case (Volonciu N., Uzlău A.S. *et al*, 2014, *Noul cod de procedură penală comentat*, Hamangiu Publishing House, Bucharest, p. 458)

b) immediately inform the judicial body that ordered the measure where the case is pending about any change of residence. The defendant is not limited in any way from changing the house, residence or domicile, but is only required to notify any change of residence in order for the judicial bodies to know where they can find them, if the defendant must be heard, faced or participate in certain acts part of the proceedings.

c) report to the police entrusted with their monitoring by the judicial body that ordered the measure, according to the monitoring schedule drawn up by the police or whenever required to do so. Pursuant to Article 82 3 of Law 253/2013 on execution of penalties, educational measures and other non-custodial measures ordered by judicial bodies during the criminal trial, the monitoring schedule, namely days, hours, frequency of the

defendant's obligation to report to the police entrusted with their monitoring, is set by the police, without the intervention of the judicial body that ordered the measure.

The judicial body that ordered the measure may order the defendant to comply with one or more of the following obligations during the judicial review:

a) not to exceed certain territorial limits, fixed by the judicial body, without their prior approval;

b) not to travel to certain places established by the judicial body or to move only in places established by them;

c) to bear a permanent electronic surveillance system;

d) not to return to the family home, not to approach the injured person or their family members, other participants in the crime, witnesses or experts or other persons appointed by the judicial body and not to communicate with them directly or indirectly, by any means;

e) not to exercise their profession, craft or not to carry out the activity during the exercise of which they committed the fact under investigation;

f) to regularly communicate relevant information about their means of subsistence;

g) to comply with control measures, care or medical treatment, particularly for rehabilitation purposes;

h) not to participate in sports or cultural events or other public gatherings;

i) not to drive vehicles established by the judicial body;

j) not to hold, use or bear arms;

k) not to issue checks.

The judicial body must state expressly in the document ordering the measure of judicial review which are the obligations that the defendant must observe for its duration, respectively, if applicable, which are the places that they may not go to or people with whom they are not allowed to get in touch. While the places where the defendant is not entitled to travel can be generically indicated (bars, restaurants, clubs, discos), without being necessary to specify Restaurant X or Bar Y, in relation to the injured parties or witnesses with whom they are forbidden to get in touch, their full names must be specifically shown. Also, the wording of the order or court resolution must specify that, in case of a breach of their obligations in bad faith, the judicial review measure may be replaced by house arrest or provisional detention. Inserting these obligations is necessary in order for the defendant to know exactly their obligations and the sanction that can be applied in case of non-compliance.

Monitoring the observance of the defendant's obligations during judicial review is performed by the institution, body or authority specially appointed by the judicial body that ordered the measure under the law. In most cases, observance of the obligations imposed is checked by police.

If the defendant has been imposed a ban from leaving the country or a certain locality, a copy of the prosecutor's order or, where appropriate, court resolution is communicated on the day of issue of the order or resolution to the defendant, to the police unit in whose jurisdiction they live, as well as to that in whose jurisdiction the defendant is banned from going, to the public inhabitant registration service, Romanian Border Police and the General Inspectorate for Immigration, for persons who are not Romanian citizens, in order to ensure compliance by the defendant of the obligations imposed. Competent bodies must alert border crossings point about the defendant. If the judicial body has imposed the defendant an obligation not to return to the family home, not to approach the injured person or their family members, a copy of the prosecutor's order or, where appropriate, court resolution is also communicated to the injured party.

The institution, body or authority in charge of monitoring periodically checks the defendant's compliance with the said obligations and, if they find violations thereof, they shall immediately notify the prosecutor during prosecution, the preliminary chamber judge during preliminary chamber proceedings or the court during trial.

If, during judicial review, the defendant violates in bad faith their obligations or there is a reasonable suspicion that they committed with intent a new crime for which criminal proceedings against them were ordered, the justice of peace, the preliminary chamber judge or the court, at the prosecutor's request or ex officio, may order to replace this measure with house arrest or provisional detention under the conditions provided by law. It is noteworthy that the law does not require replacement of the non-custodial preventive measure with a custodial measure, leaving judicial bodies the opportunity to appreciate, *in concreto*, if the defendant's deprivation of liberty is necessary, even if they have not complied with the obligations imposed.

The measure of judicial review may be ordered in any of the trial stages for 60 days. Initially, the Criminal Procedure Code did not provide for a time limit for taking the measure, which could be taken by judicial bodies for an indefinite period of time, but, in less than one year after its entry into force, it was amended in this

respect, as a result of the acceptance by the Constitutional Court of an exception of unconstitutionality by Decision 712 of December 4, 2014. In reasoning its decision, the court stated that interference generated by the institution of judicial review concerns fundamental rights, namely the right to personal freedom, the right to move freely, the right to intimacy, family and private life, freedom of assembly, labour and social protection of labour and economic freedom and, although it is appropriate *in abstracto* to the legitimate purpose pursued, non-discriminatory and necessary in a democratic society to protect the values of the rule of law, it is not proportionate to the cause that generated it. In this regard, the Court held that the regulation of judicial review measure did not ensure a fair balance between public interest and individual interest, since the measure may be imposed for an indefinite period. As a result, the Court held that while the provisions of Articles 211-215 and Article 241 of the Criminal Procedure Code did not provide for any period for which the measure of judicial review could be ordered, nor a maximum duration of such measure, it can not be considered that the measure of judicial review would have an exceptional and temporary character, so that the entire regulation of judicial review is unconstitutional. Following the acceptance of the exception by the Government Emergency Ordinance 82 of December 15, 2014, the Criminal Procedure Code was amended, providing that judicial review measure can be taken for a period not exceeding 60 days, regardless of the stage of the pending case. It was also provided that, during prosecution, the duration of the measure of judicial review cannot exceed one year, if the penalty prescribed by law is a fine or imprisonment not exceeding 5 years or 2 years, if the punishment provided by law is imprisonment for life of imprisonment exceeding 5 years, and during trial, the overall duration of judicial review may not exceed a reasonable time and, in all cases, it may not exceed 5 years from indictment. Legal regulation was thus put in agreement with constitutional exigencies, which allowed achieving a balance between the need of taking the measure of judicial review to ensure smooth operation of the criminal trial and a person's right not to be

deprived of or restrained in their fundamental rights, even though their guilt has not been established by a final judgement.

CONCLUSIONS

Current regulation of the measure of judicial review meets the requirements of justice to have a handy tool that can ensure the proper conduct of criminal cases, to prevent the defendant from absconding and to prevent commission of other offences, without depriving the defendant of their liberty. Judicial review constitutes, alongside judicial bail, a preventive measure the usefulness of which could be observed in practice, being reflected by the insignificant number of cases where the replacement of judicial review with a custodial measure as a result of default by the defendant was requested and ordered.

With few exceptions, which were highlighted in this paper, judicial practice in the field of judicial review is unitary, and statutory provisions are correctly applied and interpreted. What can be criticized most often is insufficient motivation of the necessity to take the measure of judicial review, especially in those situations where judicial review is ordered during prosecution, after having rejected the proposal of provisional arrest made by the police or prosecutor. Concerned about the reasons for not requiring a preventive custodial measure, prosecutors and justice of peace alike omit to specify why it is necessary to establish judicial review and impose certain obligations on the defendant, and the measure of judicial review is ordered rather automatically.

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