A Review of the Right to Freedom and Safety. Understanding the Reasonable Suspicion

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Abstract: The most common violations found by the Court were those associated with the violation of Article 5, paragraph 3, namely a lack of relevant and sufficient reasons for detention during the criminal proceedings. Another problem that arises in the cases against Moldova detention without reasonable suspicion. The existence of a reasonable suspicion that the person committed the crime stipulated in the criminal law is a „sine qua non" of her arrest and detention.

Keywords: legislation, jurisprudence, deprivation of liberty, arrest warrant

1. Introduction

An essential requirement for the application of coercive custodial measures is the existence of reasonable suspicion that an offense was committed and that it was committed by the suspect.

In light of the provisions of the European Convention on Human Rights, the right to freedom and personal safety and the reasonable suspicion in that context may be characterized by a common inability to consider all the features and elements in a particular case. That is why the study aims to review and to research the content of the concept and the relevant case-law of the ECtHR.

In order to achieve the proposed goal, various methods of scientific research were applied: comparative, deductive, inductive, systematization, analysis, and synthesis. As a scientific and legal normative support were used the works of academia from the Republic of Moldova, Romania, and other states. Also, the study was focused on a thorough analysis of the legal framework of Moldova.

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2. The Court and the system of rights and freedoms

As author V. Rotaru considers, though the reasonable suspicion is a logical and obvious requirement, and that nevertheless it is expressly formulated, sometimes (when it is "very necessary"), some representatives of the law enforcement bodies seem to forget that such a requirement exists (Rotaru, 2012), and that is the cause of the violation findings by the ECtHR, not just in our country.

Judicial and prosecution practices in this respect have revealed that often the issue of the existence or absence of a "reasonable suspicion" at the time of the application/extension of the arrest is not considered as a fundamental element of the lawfulness of the deprivation of liberty. Judges and prosecutors focus their attention rather on the reasons for justifying arrest (irrespective of the persistence of this attitude) than on whether "reasonable suspicion" persists in a certain case.

The European Court noted that the persistence of a "reasonable suspicion" is a *sine qua non* condition of legality for the entire period of arrest, and once it has disappeared, regardless of the procedural stage, it automatically leads to the obligation to review the preventive arrest measure applied (for example McKay v. United Kingdom [GC], § 40; Oral and Atabay v. Turkey, § 41) (Grosu & others, 2014). In other words, both the justification of the arrest and the existence of "reasonable suspicion" are valid for the entire duration of the arrest, which leads to the obligation to review their presence over reasonable periods (Aquilina v. Malta, § 52).

Despite that, the concept of "reasonable suspicion" has been included in criminal law only as a standard to be met at the initiation of criminal prosecution. Accordingly, although there is an obligation in the light of the Convention for the judge to examine this matter with the decision to apply/extend the arrest, Criminal Procedure Code is particularly concerned with the arrest procedure. The judge is not required by the CPC to do so when applying/extending arrest. This situation has also generated a series of European Court judgments against the Republic of Moldova, explaining that "reasonable suspicion" actually means a concept embodied in the guarantees of the lawfulness of deprivation of liberty.

The European Court has made it clear that: "reasonable suspicion" means that an offense has been committed, it involves the existence of facts or information that would convince an objective observer that the person concerned has committed the offense. However, what can be considered as "reasonable" will depend on all the circumstances of the particular case (Erdagöz v. Turkey, § 51, Fox, Campbell, and

Hartley v. United Kingdom, § 32) (Grosu & others, 2014). The facts outlining a suspicion could not be at the same level as those necessary to justify a conviction or formulating the accusation in the further stages of the criminal prosecution process (Brogan and Others v. United Kingdom, § 53, and Murray v. United Kingdom, § 55) (Grosu & others, 2014).

The reluctance of the judicial practice to involve the issue of "reasonable suspicion" at the time of arrest is explained that it is difficult to draw a clear line between the substance of the allegations and the issues of preventive measures where the merits of the case cannot be examined. For this reason, a judge applying the arrest will rather refrain from ruling on the absence or presence of reasonable suspicion, in order to avoid speculation that he or she is ruling on the substance of the accusations brought, or even in order avoid risks of interfering with the presumption of innocence.

The author M. Macovei believes that by stipulating the necessary presence of reasonable grounds to suppose that a person deprived of his liberty has committed an offense, article 5 (1) (c) guarantees the merits of this measure and its non-arbitrary character. A suspicion must always be genuine. In Murray v. United Kingdom, the Court emphasized that if the sincerity and weight of suspicion constituted the indispensable elements of its reasonableness, that suspicion could not be regarded as reasonable unless it was based on facts or information that would establish an objective connection between the suspect and the alleged offense. Therefore, should there be evidence of actions, documents or forensic data that would directly involve the subject. Consequently, no deprivation of liberty can be based on impressions, intuition, or simple association of ideas or prejudices (ethnic, religious or other), irrespective of their value, as an indication of a person's participation in the commission of an offense. This does not mean that only one piece of evidence could be sufficient to justify a conviction or even a simple indictment (Macovei, 2003).

The same author argues that when examining Brogan v. United Kingdom and Murray v. United Kingdom, the subject of interrogation during detention authorized by article 5 (1) (c) merely confirms or denies the existing suspicions of the arrested person, suspicions which at that early stage of the process couldn't normally serve as evidence. However, the author continues and argues that the suspicion must be somewhat grounded. The mere fact that a person has committed an offense - or something similar - in the past is not sufficient to establish the existence of a reasonable suspicion, a fact well-known by the judges in Strasbourg

in Fox, Campbell and Hartley v. The United Kingdom (Macovei, 2003). This judgment refers to petitioners who had already been convicted for terrorist acts, but the judges in Strasbourg, even though admitted that their past could to some extent reinforce the suspicions of terrorist offenses, established that it had constituted an exclusive basis for the suspicions justifying their deprivation of liberty. However, it is essential, according to M. Macovei, that the suspicions should be based on the actual behavior of the person concerned.

We fully support the opinion that the mere assertion of the authorities that there was reliable but confidential information - the argument put forward by the government in the Fox case - was not a sufficient basis for admitting that suspicion was reasonable, since that information had not been communicated to the court empowered to examine the contested legality of the deprivation of liberty.

The jurisprudence of the ECtHR says that the suspicion was reasonable in the case of K-F v. Germany, that concerned petitioners detained for rent frauds after the owner of the room had told the police that they intended not to honor their tenants' obligations and that the investigation revealed that the address indicated by those concerned was merely a mailbox, and that one of the petitioners had already been the subject of scammerry. In the case of Punzelt v. Czech Republic, the Court considered reasonable suspicions with regards to the petitioner: he issued two unsecured checks as collateral in the negotiations for the purchase of two major stores. In Lukanov v. Bulgaria, the Strasbourg judges stressed that no fact or information was at the basis of the thesis that the petitioner had been tempted to gain advantages for himself or for others from his participation in the award of public funds to other countries; a vague reference to certain “transactions” had clearly been considered by the Commission to be insufficient for the existence of suspicions of such an illicit purpose. However, the main issue is that most accusations against the petitioner did not constitute a criminal offense under Bulgarian law. In this case, the absence of the criminal act prohibition according to the law was obvious, but the Court considered it useful to point out that under certain circumstances it is sometimes difficult to ascertain whether the facts known or not reasonably may be regarded as falling under a provision specified by the criminal law, which prohibits the incriminated behavior.

It is, therefore, necessary to be able to demonstrate not only the connection between the person deprived of his liberty and the events suspected of having constituted a crime, but also a sufficient basis which would make it possible to conclude that the events mentioned are correlated with the alleged offense. This

demonstration may prove to be problematic in the presence of a new or rare offense, and any unusual interpretation of a specific ban may lead to the conclusion that the suspicion was unreasonable. Although the suspect's reasonable suspicion criterion does not extend to predictable offenses, deprivation of liberty based on this ground must be directed at specific and concrete offenses and the condition that there exist reasonable grounds for believing that there is a need to prevent a suspect from committing an offense, that should imply capacity to demonstrate the same level of suspicion to avoid breach of Article 5 (1) (c). It would, therefore, be necessary to have an objective and sufficient test in order to establish a connection between the person's behavior and the likelihood of committing a crime: the authorities should not, therefore, rely on vague prejudices or fears (Macovei, 2003).

The problems identified, especially in the case of the Republic of Moldova, in connection with reasonable suspicion can be described by reference to the following relevant examples (Grosu & others, 2014):

1. In Musuc, the lack of reasonable suspicion stemmed from suspicions that have arrised from a theory of accusation that was exposed by a chronological description of the events without reference to evidence. In fact, there was an omission to prove one of the basic elements of the constitutive content of the offense imputed to the applicant, namely the purchase of the goods at a significantly lower price.

2. In the case of Stepuleac, the reasonable suspicions were not confirmed because there was lack of verification of the substantive nature of the offense complaint, which only had a reference to the name of the arrested.

3. In the Cebotari case, there were parallel criminal and civil proceedings and a double appreciation of some of the same events through civil and criminal liability. These facts, besides the illegal nature of the arrest, in the absence of reasonable suspicion, led to the conclusion of existence and consequently an arbitrary arrest.

4. In the Leva case, the basic element for the detention of the person (an eyewitness pointed to the person that he had committed the offense) was not evidence based either during detention or after, during proceedings at the investigating judge. A general lack of any statements of any witness was found.

5. In the case of Brega, the video evidence and the court's findings, and later the administrative arrest was based on false accusations. All of the above situations could not satisfy an objective observer, but they still satisfied the judges who

applied the arrest without reflecting the reasonable suspicion element and that the person in custody had committed an act liable of criminal liability.

An important point to be made in the context of compatibility testing resides in the case-law, which has revealed positive elements during arrest proceedings. This would provide objectivity to the study. Although some issues with regard to the application of Article 5 were claimed by the complainants, the case law of the European Court in cases against the Republic of Moldova revealed that in some circumstances these complaints are ill-founded and enforcement practices are in line with Convention standards. For example, in the case of Haritonov, the applicant alleged, inter alia, a series of violations regarding the lawfulness of his arrest, in matters related to the exceeding term of detention and the length of the examination of his appeal at the Court of Appeal. The European Court rejected these complaints as unfounded because the Court of Appeal directly found that the applicant's rights had been violated and ordered his release. It has been specified that the release of the illegally detained person is a remedy, and Article 5 (in particular § 5) does not expressly guarantee the right to financial compensation. The plaintiff, in this case, did not address the claim for compensation under the 1545 law and in that part, the complaints were considered inadmissible for matters of non-exhaustion.

In that regard, it is relevant cite the quotation that "a decision or measure in favor of an applicant is in principle insufficient to deprive him of his victim status unless the national authorities expressly or in substance, and subsequently offered compensation for the violation of the Convention (see, for example, Ilascu and others v. Moldova and Russia (dec.) [GC], no 48787/99, 04 July 2001) (Grosu & others, 2014). Although Article 5 § 5 requires the existence of an enforceable right to compensation for detention in cases of violation of Article 5, it does not guarantee an absolute right to compensation in all circumstances (Kustila and Oksio v. Finland, No 10443/02, 13 January 2004) (Grosu & others, 2014). In the present case, the Court of Appeal expressly acknowledged the violation of Article 5 § 1 of the Convention as regards the unlawful detention of the applicant between 7 and 9 January 2007 and ordered immediate release.

The applicant's release was therefore ordered as a form of remedy, despite the fact that the reasons for his detention were still considered by the Court of Appeal to be relevant and sufficient. In view of the above, the Court is convinced that the prompt release of the applicant in circumstances where he should otherwise have been held in detention, together with the express recognition by the Court of

Appeal of the unlawfulness of the detention, granted the applicant satisfaction that deprives him of victim status. As regards to the prompt examination of the appeal, the European Court noted in particular that in Sarban (§§ 118-124), when a similar problem was examined by the Court, the violation of Article 5 § 4 was found in respect of the delay of twenty-one days. In that case, the Court attached particular importance to the applicant's poor health and the absence of medical care in the detention facility.

Since there are no similar circumstances in the present case and because the delay was considerably shorter, the Court considered that it is possible to distinguish it from the Sarban case. Although it would be desirable for the Court of Appeal to act more promptly, the Court is open to accepting that, in the specific circumstances of the case, the provisions of Article 5 § 4 have not been violated.

Another relevant case concerns the assessment of the existence or lack of reasonable suspicion, where the European Court stated that the applicant Ignatenco was detained on the basis of "operative investigation information", and further noted that this "information" was confirmed in the criminal complaint, which would have been sufficient to justify the applicant's arrest under national law. In that regard, the Court referred to Labita v. Italy [MC], no. 26772/95, § 59, ECHR 2000-IV, and O'Hara v. United Kingdom, no. 37555/97, ECHR 2001-X, where it found that the information provided by the informatory in a police investigation in order to identify the applicant as one of a series of people suspected of involvement in a specific event was sufficient to raise a reasonable suspicion that the applicant had committed an offense (Grosu & others, 2014).

Given the importance and severity of the preventive arrest measures, it has been a permanent concern for the legislator, and that is why many amendments to the Criminal Procedure Code have, among other things, sought to establish new procedural safeguards to ensure that the rights and freedoms of the person suspected of committing a crime will not be violated or limited. The essential transformations of national law in the area of preventive arrest aimed primarily at harmonizing domestic criminal procedural provisions with the requirements of the European Convention on Human Rights and the principles of a European process developed in the Strasbourg court jurisprudence. In this context, the amendments to the General Part of the Criminal Procedure Code (Dreptmd, 2016) are of a particular importance.

3. Conclusion

Considering the above, it is clear that successive changes to the Criminal Procedure Code, especially in the matters of preventive arrest, are the direct consequence of the need to correlate domestic legislation with the requirements and standards of the Convention. Although changes brought to the abovementioned laws have not been fully reforming, at least a first step has been taken or attempted to bring the Criminal Procedure Code in line with the European standards. Thus, we consider that, in present, national provisions, are much more demanding than the old regulations, and seek to ensure the protection of the individual against abuses of the authorities and the approximation of the system of national law with other systems, of the signatory states of the Convention. In this context, the already existing initiative of the domestic courts which embraces the form of accepting the ECtHR jurisprudence as a genuine source of law within the domestic legal system is important, as being the only way to ensure that the interpretation of the national provisions is in the spirit of the provisions of the Convention.

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