ACROSS
www.across-journal.com
ISSN 2602-1463
Vol. 8 (4) 2024 Law and Litigation in the EU and the Candidate States

Recourse against Decisions to Apply or Extend Pre-Trial Detention

Iurie ODAGIU[1], Ghennadi EPURE[2]

[1]"Dunarea de Jos" University of Galati (Romania)
ORCID: 0000-0002-2474-5299
[2]Prosecutor in the Anti-Corruption Prosecutor's Office,
PhD candidate
ORCID: https://orcid.org/0000-0002-8165-5054

Abstract
According to Article 5 of the European Convention on Human Rights, "everyone deprived of his liberty by arrest or detention shall have the right to take proceedings before a court so that the court may decide within a short time on the lawfulness of his detention and order his release if his detention is not lawful." Thus, national authorities must exercise the utmost diligence to ensure that the defendant's right to an effective remedy is respected in the procedure for applying or replacing pre-trial detention or house arrest against the defendant. To respect all the guarantees provided for by law, the national regulatory framework must be predictable and explicit release if the detention is unlawful. Thus, national authorities must exercise the utmost diligence to ensure that the defendant's right to an effective remedy is respected in the procedure for applying or replacing pre-trial detention or house arrest against the defendant. To respect all the guarantees provided by law, the national regulatory framework must be predictable and explicit.

Keywords: recourse, preventive measure, preventive arrest, house arrest, order

Introduction

In contrast to Article 5(3) of the European Convention on Human Rights, which is applicable to the deprivation of liberty process, Article 5(4) provides that "Everyone who is deprived of his liberty by arrest or detention shall have the right to appeal to a court of law for a decision on the lawfulness of his detention within a short time and for his release if his detention is unlawful" [1], obliges us to ensure that the entire deprivation of liberty mechanism is judicial in nature.

The right to an effective remedy is a judicial guarantee, and the rule of law comes to provide a second level of jurisdiction for the examination of applications for release from detention, and these guarantees are the same as before the first court.

The judicial practice of the European Court of Human Rights has observed and values respect for the principle of equality of arms and adversarial proceedings between the prosecutor and the detainee in the process of examining appeals against decisions to apply or extend custodial pre-trial measures [2].

In general, the right to challenge detention implies respect for fundamental rights, notably the right to a defence [3], to have sufficient time to lodge an appeal, and the law enforcement authorities must exercise the utmost diligence to ensure this right.

ISSN 2602-1463
Vol. 8 (4) 2024 Law and Litigation in the EU and the Candidate States

These fundamental guarantees, enshrined in the European Convention on Human Rights, are part of the right to a fair trial within the meaning of Article 6 of the Convention, which itself includes the right to a reasoned judgment.

An additional function of a reasoned decision is to prove to the parties that they have been heard. Moreover, a reasoned decision gives a party the possibility to appeal against it, as well as the possibility for the decision to be reviewed by an appeal court. Only by adopting a reasoned decision can there be public scrutiny of the administration of justice (see Suominen v. Finland, no. 37801/97, § 37, 1 July 2003).

Even if Article 5 of the Convention does not require a judge considering an appeal against detention to refer to every argument contained in the appellant's statements, the safeguards of this Article would be rendered meaningless if the judge, relying on national law and practice, could treat as irrelevant or disregard specific facts relied on by the detainee capable of casting doubt on the existence of the essential conditions for the 'lawfulness', within the meaning of the Convention, of the deprivation of liberty." (Nikolova v. Bulgaria (GC), no.31195/96, § 61, ECHR 1999-II). In this context, „the arguments for and against release must not be 'general and abstract'„ (Smirnova v. Russia, nos. 46133/99 and 48183/99, § 63, ECHR 2003-IX (extracts)) [4].

Similarly, the practice of the European Court has stressed and emphasised in its judgments the need to respect the right of the defence party to have access to the material, to the evidence which is invoked to justify detention, so that the lawyer has an effective opportunity to formulate an adequate appeal.

In this regard, in Lamy v. Belgium, in paragraph 29 of the judgment, the Court held: „[...] the Court observes that, during the first thirty days of custody, the applicant's lawyer was, in accordance with the law as judicially interpreted, unable to inspect anything in the file and, in particular, the reports made by the examining magistrate and the Verviers police. This applied in particular on the occasion of the applicant's first appearance before the Council Chamber, which had to rule on the confirmation of the arrest warrant [...].

The plaintiff's counsel had no opportunity to effectively challenge the statements or views that the prosecution based on these documents.

Access to these documents was essential for the applicant at this crucial stage of the proceedings when the court had to decide whether to remand him in custody or release him. Such access would, in particular, have enabled Mr Lamy's lawyer to address the Court on the statements and attitude of the co-defendants [...]. In the Court's view, it was therefore essential to examine the documents in question in order to effectively challenge the legality of the arrest warrant.

The assessment of the need for pre-trial detention and the subsequent assessment of guilt are too closely linked for access to documents to be denied in the first case, while the law requires it in the second.

While the Crown Counsel was familiar with the entire file, the procedure did not allow the applicant to properly challenge the grounds invoked to justify pre-trial detention. Having failed to ensure equality of arms, the procedure was not truly adversarial" [5].

The European Court therefore found in this case that there had been a violation of Article 5 para. 4 of the Convention.

With regard to the essential purpose of the appeal lodged by the parties, „the Court recalls that persons arrested or detained are entitled to a review which takes account of the

ISSN 2602-1463
Vol. 8 (4) 2024 Law and Litigation in the EU and the Candidate States

procedural and substantive conditions which are essential to the 'lawfulness', within the meaning of the Convention, of their deprivation of liberty. This means that the competent court must examine not only compliance with the procedural requirements laid down in [domestic law] but also the reasonableness of the suspicion underlying the arrest and the legitimacy of the purpose of the arrest and subsequent detention" [6].

With regard to the procedure provided for by national law, the parties may, under Article 311 of the Code of Criminal Procedure, appeal against decisions to apply, extend or revoke custodial pre-trial detention measures. Thus, the legislator in this section has provided that „An appeal against the decision of the investigating judge on the application or non-application of pre-trial detention or house arrest, on the extension or refusal to extend its duration, on provisional release or refusal of provisional release shall be lodged by the prosecutor, the accused, his defence counsel, his legal representative with the court which adopted the decision or through the administration of the place of detention, within 3 days from the date of adoption of the decision. For the arrested person, the period of 3 days shall start to run from the date of delivery of the copy of the judgment" [7].

In accordance with the procedure, the court which adopted the decision, on receipt of the appeal within 24 hours, shall send it, together with certified copies of the documents which were examined for the adoption of the contested decision, to the court of appeal, appointing a date for the decision of the appeal and informing the prosecutor and the defence counsel thereof.

In the given sense, the appeal shall be decided in accordance with the provisions of Articles 308-310 of the Code of Criminal Procedure, which procedural rules shall be applied accordingly. Thus, with reference to the notification of the accused person to the court hearing, it is incumbent on the prosecutor, under Article 308 para. (4) of the Code of Criminal Procedure, but at the appeal stage, the legislator has provided that the court shall inform only the prosecutor and the lawyer of the date and time of the hearing, without specifying how the arrested defendant is to be informed. Respectively the provisions of Art. 311 para. (3) of the Code of Criminal Procedure are evasive and need to be supplemented by including the phrase „...the prosecutor, the lawyer and the arrested defendant".

Moreover, this rule raises doubts as to its clarity and predictability, given that Article 308(2) of the EC Treaty provides for the following. (4) of the Code of Criminal Procedure, the legislator has provided that the prosecutor shall ensure the participation of the accused in the trial. By natural reasoning, the status of the accused as a detained person can only be granted at the stage of the application of the preventive measure. On the basis of the interpretation of the law, it is presumed that the prosecutor is obliged to ensure the presence of the accused only at the examination of the request for the application of the preventive measure and only at the examination of the appeal against the decision to apply or not to apply it. In other cases, where the request for the extension of the preventive measure or for the revocation or replacement of the preventive measure is being considered, the court has the sole responsibility.

At the opening of the hearing in the court of appeal, the president of the hearing shall announce which appeal is to be examined, shall specify whether the persons present at the hearing are clear about their rights and obligations, shall announce the panel of judges, and shall specify whether there are no steps to be taken in connection with the resolution of the given appeal. Then the appellant, if he/she attends the hearing, argues his/her appeal, the other persons present at the hearing are heard.

ISSN 2602-1463
Vol. 8 (4) 2024 Law and Litigation in the EU and the Candidate States

It should be noted that the parties are to comment on the conclusion issued by the investigating judge, the arguments of the parties should only refer to the existence or non-existence of reasonable suspicion, the risks on which the court focused, the proportionality of the preventive measure in relation to the circumstances of the case, etc., without going into the merits of the case.

Moreover, the Supreme Court of Justice on this dimension noted that „The purpose of hearing the suspect (accused) is to give him the opportunity to present his defence position and does not require the court of appeal to take a statement in accordance with the procedure regulated in the first instance, but is limited to a brief description of his allegations in the decision adopted by the court of appeal" [8].

In view of the powers of the Board of Appeal under Article 312(2) of the EC Treaty, the Court of First Instance may (5) of the Code of Criminal Procedure, the investigating judge is not entitled to rule on a possible new application for the remand in custody of the accused until it has ruled on the contested decision.

If, after the appeal has been lodged with the court of appeal, the criminal proceedings have been completed and the criminal case has been referred by the public prosecutor to the court for trial, the procedure for examining the appeal shall be completed and all other requests, complaints and applications lodged after the case has been referred to the court for trial, pursuant to Article 297(2) of the Code of Criminal Procedure, shall be deemed to have been lodged with the court of appeal. (4) of the Code of Criminal Procedure, shall be sent to the court hearing the case.

The appellate court shall carry out judicial review only on the basis of the materials submitted to the investigating judge. Following the judicial review, the court of appeal shall take one of the following decisions: dismiss the appeal; allow the appeal by:

(a) annulment of the pre-trial measure ordered by the investigating judge or annulment of the extension of its duration and, where appropriate, the release of the person from custody;

(b) the application of the preventive measure in question which has been rejected by the investigating judge, with the release of the arrest warrant or the application of another preventive measure, at the discretion of the court of appeal, but not more severe than that requested in the prosecutor's application, or the extension of the duration of the measure in question.

It should be noted that Article 5 of the Convention does not require the court examining the appeal against detention to refer to every argument put forward in the applicant's submissions. At the same time, his guarantees will be rendered meaningless if the court, relying on national law and practice, treats as irrelevant or negligent the specific facts alleged by the detainee which are capable of casting doubt on the existence of the essential conditions for the lawfulness of the deprivation of liberty within the meaning of the Convention. In this context, the arguments for and against release must not be general and abstract.

At the same time, according to Article 196 para. (2) of the Code of Criminal Procedure, the legislator has provided for the procedure for appealing against the decisions applying or extending the preventive measure, referring in particular to preventive measures given within the jurisdiction of the investigating judge or, as the case may be, the court, stipulating that „the decision of the investigating judge or the court on the application, extension or replacement of

ISSN 2602-1463
Vol. 8 (4) 2024 Law and Litigation in the EU and the Candidate States

the preventive measure may be appealed to the superior court and, in the case of the Supreme Court of Justice, the appeal shall be examined by three other judges of the Supreme Court of Justice" [7].

Another issue to be explained in this chapter relates to the Court of Appeal's belated consideration of the appeal against the decision to extend the preventive measure - pre-trial detention - for a further 30 days in respect of the defendant.

It is well known that, in such a case, the decision extending the remand in custody is usually appealed against within three days by the defence, either by the lawyer or by the defendant himself. The request for appeal shall be registered in the registry of the court which issued the decision. Thus, in accordance with Article 311 para. (3) of the Code of Criminal Procedure, „The court that adopted the decision, upon receipt of the appeal, within 24 hours, shall send it, attaching certified copies of the documents that were examined for the adoption of the contested decision, to the court of appeal, appointing the date for the decision of the appeal and informing the prosecutor and the defender thereof. The appellate court, having received the appeal, shall request from the prosecutor and the defence party certified copies of the documents confirming or denying the necessity of applying the preventive measure in question or of extending its duration..." [7].

The speed with which the appeal must be examined is part of the guarantees provided for in Article 6 of the European Convention on Human Rights - the right to a fair trial.

In the case, the European Court held that "[...] Article 5 § 4, by guaranteeing detained persons a right to initiate proceedings to challenge the lawfulness of their deprivation of liberty, also proclaims their right, following the initiation of such proceedings, to a prompt judicial determination of the lawfulness of their detention and to order their release if the detention is found to be unlawful [...]. The question of whether the person's right under Article 5 § 4 has been respected must be determined in the light of the circumstances of each case [...]. The Court considers that the period of 21 days which elapsed before the courts examined the applicant's habeas corpus application of 13 January 2005 does not meet the requirement of a prompt judgment within the meaning of Article 5 § 4 of the Convention [...].It notes that the courts had to decide on administrative matters, such as the joinder of cases and the formation of a new composition of the court to rule on the joined cases, as well as to examine the challenge of a judge. However, such considerations should not have taken precedence over a review of the legality of the applicant's detention, given the importance of the matter in question for the applicant" [9].

In practice, the 24-hour time limit within which the court must send the appeal with the annexed materials is sometimes not respected. This is due to the heavy workload faced by the court, the limited staff (court assistants or court clerks) and other objective or subjective factors. With the date and time of the hearing fixed approximately 7-8 days after the appeal has been lodged by the defence, the hearing may not take place for various reasons (including the parties' request for postponement), which may result in the time limit for the examination of the appeal being postponed.

Thus, the time limit given may be extended up to 15-20 days, and the prosecutor, not being bound by this time limit, applies for an extension of the remand period by a further 30 days in compliance with the legal requirements, based on evidence demonstrating the need for the extension.

ISSN 2602-1463
Vol. 8 (4) 2024 Law and Litigation in the EU and the Candidate States

Accordingly, pending examination of this application, the Court of Appeal shall rule on the above-mentioned appeal, which may adopt a decision replacing the preventive measure - pre-trial detention - with house arrest for a period of 20 days, with the term of pre-trial detention included in the term of house arrest. In this respect, for the reason of the belated examination of this appeal, the parties find themselves in the situation where the prosecutor, although having applied for the extension of the preventive detention, has in the meantime received the decision of the Court of Appeal changing the preventive measure to house arrest.

In such circumstances, the defence is entitled to request, during the examination of the application for extension of the preventive measure, the revocation of the measure, on the grounds that the prosecutor did not respect the five-day time limit provided for in Article 308(2) of the Criminal Code. (3) of the Code of Criminal Procedure, to submit a request for the extension of the preventive measure - house arrest, applied in the meantime by the Court of Appeal. However, the correct procedural position, in this case, would be for the prosecutor to submit, at the hearing of the application for extension of the preventive measure, under applications and requests, an application to substantiate (amend) the initial application with a request for extension of house arrest, on the grounds of the Court of Appeal's decision.

In support of the request to specify (amend) the application, the prosecutor must point out that, in the view of the ECtHR, the concept of arrest also includes house arrest, which is essentially a similar measure in terms of procedure and constitutes the isolation of the person from society, and that the evidence attached to the application for an extension of pre-trial detention is current and reasonable for house arrest.

By way of example, by the decision of the Chisinau Court (Ciocana office) of 11 March 2023, the girl V. C., the preventive measure, preventive arrest, was ordered for a period of 20 days, with detention in Penitentiary No. 13 Chisinau. On 14 March 2023, both the prosecutor and the lawyer appealed the decision to the Chisinau Court of Appeal, which for unknown reasons called a hearing for 23 March 2023.

It should be noted that, on 22 March 2023, the prosecutor had already submitted a request for an extension of the preventive measure against V. C. [10]

12] We consider that the nine-day period between the date of deprivation of liberty and the date of the appeal hearing is excessive and directly infringes the right to a fair trial, in particular the right of the parties to have their appeal heard within a short time, to which we referred above.

In judicial practice, some judgments on the application or extension of custodial preventive measures are challenged by the prosecution under Article 313 of the Code of Criminal Procedure on the grounds that the investigating judge applies a more lenient preventive measure than that requested by the prosecutor.

In the following case, the investigating judge of the Ciocana Court of Chisinau, on 7 November 2022, partially admitted the prosecutor's request, extending the preventive measure in the form of house arrest for 30 days [10].

According to the factual circumstances, C.R., being involved in the transportation of illicit money laundered, was detained in flagrante delicto with the sum of 2.4 million lei.

In the reasoning of the decision, the court focused mainly on the following aspects: „[...] the court ruled that, at this stage of the criminal proceedings, the need to arrest the accused is maintained because there are reasonable grounds to assume that, being at liberty, he could

ISSN 2602-1463
Vol. 8 (4) 2024 Law and Litigation in the EU and the Candidate States

hinder the establishment of the truth in the criminal proceedings or could commit new offences and another preventive measure would not achieve the desired effect.

At the same time, according to Article 188 para. (2) of the CPC of the Republic of Moldova, house arrest shall be applied to the accused, who is convicted on the basis of the decision of the investigating judge or the court in the manner provided for in Articles 185 and 186, under the conditions that allow the application of the preventive measure in the form of arrest, but his total isolation is not rational in relation to his age, health, family status or other circumstances.

Thus, taking into account the personality of the defendant - who has a stable place to live, has a minor child and an elderly dependent, is employed, has no criminal record, the criminal proceedings have progressed and the risks of preventing the establishment of the truth in the criminal proceedings have been reduced - it is concluded that it is reasonable to apply to the defendant the preventive measure in the form of house arrest with the establishment of obligations oriented to ensure the conduct of the criminal proceedings in an objective manner" [11].

The prosecutor did not agree with this conclusion and challenged it on appeal, pointing out in his appeal the following points which, in his opinion, the court did not take into account.

According to the state prosecutor, the court erred in its assessment of the factual and legal circumstances, making a superficial analysis of the evidence presented by the prosecutor, a subjective assessment of the evidence and a selective analysis of the evidence presented. [12].

At the same time, in the grounds of the appeal, the prosecutor argued that the court had disregarded some of the evidence submitted by the prosecutor and which demonstrated the alleged risks, and that those risks were valid evidence that the application of a preventive measure milder than pre-trial detention was justified in the light of the alleged and proven risks, is not justified on the grounds of the nature of the offence committed and the influence which he may have on other participants in the commission of the offences, including coordinating and instructing them once certain details of the criminal activity under investigation have become known to him [13].

Concerning the allegations made by the prosecution above, we believe that the investigating judge correctly objected to the findings of the investigating judge in the motivating part of his judgment. [14].

In conclusion, in this segment, it is necessary to point out that even if house arrest is also a preventive measure depriving of liberty, it does not provide the necessary guarantees to ensure that the accused does not communicate with persons who have procedural status on the criminal case, as well as with other persons to be heard on the underlying case, by various technical methods (telephone or other means of communication via the Internet). Only the preventive measure in the form of pre-trial detention is compatible with the conduct of the accused which must be ensured by the law enforcement authorities.

Finally, the court, when considering the application or extension of the preventive measure, must take into account the complexity of the criminal case, the seriousness of the offence and the risk of pressure being exerted on accomplices, as well as other witnesses who have not yet been heard on the known circumstances, to testify on his behalf, or in the event of his being at liberty, knowing what prosecution action is to be taken, would take all steps to destroy the evidence not yet provided by the prosecution.

ACROSS
www.across-journal.com
ISSN 2602-1463
Vol. 8 (4) 2024 Law and Litigation in the EU and the Candidate States

References

1. *Convention for the Protection of Human Rights and Fundamental Freedoms*, concluded in Rome on 4 November 1950. Ratified by Decision of the Parliament of the Republic of Moldova No 1298 of 24.07.1997. In: Monitorul Oficial no. 54-55 of 21.08.1997.1.
2. *Case of Toth v. Austria, Application No. 11894/85, ECtHR Judgment of 12 December 1991, § 84, Strasbourg, [cited 04.07.2023]. Available: https://hudoc.echr.coe.int/eng?i=001-164773.*
3. *Case of Feraru v. Moldova, Application No. 55792/08, ECtHR Judgment of 24.01.2012, § 65 [cited 24.07.2022]. Available: https://hudoc.echr.coe.int/eng?i=001-124567.*
4. *Case of Smirnova v. Russian Federation, Application No. 46133/99 and No. 48183/99, ECtHR Judgment of 24.07.2003, final on 24.10.2003, Strasbourg, [cited 26.06.2022]. Available: https://hudoc.echr.coe.int/?i=001-61262.*
5. *Case of Lamy v. Belgium, Application No. 10444/83, ECtHR Judgment of 30 March 1989, Strasbourg [cited 04.07.2023]. Available: https://hudoc.echr.coe.int/eng?i=001-57514.*
6. *Case of Schops v. Belgium, Application No. 25116/94, ECtHR Judgment of 13 February 2001, § 44 Strasbourg, [cited 04.07.2022]. Available: https://hudoc.echr.coe.int/eng?i=001-59210.*
7. *Criminal Procedure Code of the Republic of Moldova No 122 of 14.03.2003. In: Official Gazette No 248-251 of 05.11.2003.*
8. *Decision of the Plenum of the Supreme Court of Justice on the application by courts of certain provisions of the criminal procedure legislation on pre-trial detention and house arrest No 01 of 15.04.2013 [cited 29.06.2023]. Available: https://jurisprudenta.csj.md/search_hot_expl.php?id=48.*
9. *Case of Sarban v. Republic of Moldova, Application No. 3456/05, ECtHR judgment of 04.10.2005, final on 04.01.2006 § 95-96, Strasbourg, [cited 26.06.2023]. Available: https://hudoc.echr.coe.int/eng?i=001-112623.*
10. Judgment of the Chisinau Court (Ciocana seat) of 15.02.2023. Case no. 17-40/2023.
11. Judgment of the Court of Chisinau, Ciocana seat of 11 March 2023. Case no. 165/23.
12. THEODORU Gr. Gr., CHIȘ I.-P. *Treatise on criminal procedural law. 4th edition. Bucharest: Editura Hamangiu, 2020. 1171 p. ISBN 978-606-27-1671-4.*
13. Cernomoreț S., Nastas A**.** *Comparative Analysis of Cybercrime in the Criminal Law System*, Monografie, ADJURIS – International Academic Publisher, Bucharest, Paris, Calgary 2023, p.21, ISBN 978-606-95862-1-1
14. Nastas A**.** Specifics of Human Trafficking Crime Investigation, Monografie, ADJURIS – International Academic Publisher, Bucharest, Paris, Calgary 2024, p.87, ISBN 978-606-95862-4-2