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SAFETY MEASURE OF MEDICAL HOSPITALIZATION REQUIREMENTS IMPOSED BY THE PRINCIPLES OF JUDICIAL COOPERATION

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Abstract

The aim of this paper is to highlights the requirements that are imposed by the rules of European judicial cooperation in criminal matters, assumed *both by Romania and other European Union Member States*, *in the matter of the transfer of sentenced persons* with reference to a specific case.

The foreigners who are deprived of their liberty as a result of their commission of a criminal offence in a Member State of EU can be transferred to their own countries in order to further the ends of justice and the social rehabilitation of sentenced persons. The mechanism of the transfer of these sentenced persons is based on a high level of confidence between Member States and presupposes that the decisions to be recognised and enforced will always be taken in compliance with the principles of legality, subsidiarity and proportionality. Considering this confidence, the executing state will have to respect the legal nature and duration of punishment or safety measure *as they result from conviction. Otherwise, we are dealing with an impairment of* the principle of mutual recognition *and immediate execution of judicial decisions.*

Keywords:

judicial cooperation, principle of mutual recognition, safety measure, medical hospitalization, transfer of sentenced person, continuation of sentence

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The circumstances of the case

By criminal sentence no. 532 from November 10, 2010, Court Deta granted the application formulated by patient D.G.'s wife and ordered the replacement of the safety measure of medical hospitalization with the measure of obligation to medical treatment. The Court said that compared to the legal-medical examination findings which showed a favourable evolution in the psychiatric pathology of the patient and to the support of the family, the objective pursued by establishing the safety measure of hospitalization can be achieved by asking the patient to undergo ambulatory psychiatric care.

In fact, it was noted that D.G. was acquitted by the Criminal Court in Rome by criminal sentence no. 2211/2006, which became final on November 10, 2006, regarding the offence of attempted murder, resistance to an official and illegal carrying of weapons, because after performing a psychiatric expertise – he had been diagnosed with "delusional disorder" and it had been established that he acted without discernment. However, the security measure of internment in a judicial psychiatric hospital for a minimum of 5 years was taken according to article 222 of the Italian Criminal Code. In 2008, the Ministry of Justice of the Italian Republic requested the transfer of D.G. to Romania to continue the execution of security internment in a psychiatric hospital, calling for the execution of the measure applied. In this respect, by means of the statement made under the right conferred by article 3 paragraph 3 of the Convention on the Transfer of Sentenced Persons in Strasbourg, the Italian authorities ruled out the procedure of amending the penalty provided by art. 9 paragraph 1 letter b) of the Convention. By sentence no. 55 of March 10, 2009 the Court of Criminal Appeals Bucharest granted the request of the Italian authorities, admitted criminal sentence no. 2211/2006 of the Criminal Court in Rome and ordered his transfer to a specialized medical unit in Romania to continue the execution of the safety measure. The sentence became final on January 13, 2010.

Court Deta, informed by the request to replace the safety measure of patient D.G.'s medical hospitalization, said that by implementing the safety measure for a pre-set period of time, the patient's right to liberty established by article 23 of the Constitution and article 5 of the European Convention on Human Rights and then the access to justice and to a fair trial brought under regulation by article 21 of the Constitution and Article 6 of the European Convention on Human Rights had been violated. For the motivation of this assessment, the court noted that the security measure of hospitalization care provided by article 114 of the Penal Code was a measure which deprived D.G. of liberty, falling into the cases provided in Article 5 of the European Convention on Human Rights, a fact also reflected in the provisions of article 5 paragraphs 3 and 4 of the Criminal Procedure Code. That being so, the court

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decided, after the European Court of Human Rights (case Winterwerp v. the Netherlands, case Luberti v. Italy, case Herczegfalvy v. Austria), that in taking such measures all the fundamental and special guarantees regarding the procedure applicable in respect to the deprivation of liberty must be respected, being essential for the person concerned to have access to the court, to be able to request to be examined by a physician designated by him, according to article 432 paragraph 2 of the Criminal Procedure Code to request the service of a committee specialized in the interment of mentally deranged persons, to be heard in the presence of his lawyer, of the prosecutor and of any legal representative in case he/she was a person without legal competence or with limited legal competence. As a result, as long as a person deprived of liberty is granted the right to review the legality of his detention by a court, the same right must be granted to the person against whom the measure of hospitalization for medical treatment is taken. Otherwise, we would be faced with the situation in which the competent court refuses to review the grounds of the petitioner's internment, and therefore it would deprive him of his right to check the legality of his hospitalization by a court under Article 5 paragraph 4 of the Convention.

Also, the court noted that according to the European Court jurisprudence, a person could not be considered "insane" and could not suffer a deprivation of liberty unless at least the following three conditions were met: first, his alienation must have been established in a probative way, secondly, the disorder must have a character or a magnitude that would justify the hospitalization; thirdly, the hospitalization could not be legally extended without the persistence of this disorder (Winterwerp v. the Netherlands and Johnson v. United Kingdom of Great Britain). Starting from this last condition, the court held that as long as the forensic psychiatric report said that the hospitalization was no longer justified, an extension of it or a refusal to check its validity would be illegal, in violation of article 23 of the Romanian Constitution as well as of Article 5 paragraph 1 of the European Convention on Human Rights.

Based on these arguments, the court found they have the legal right to determine whether or not the measure of hospitalization was to be maintained and rule the replacement of this measure with another measure of safety provided by the Romanian legislation, even if the five-year period indicated by the Criminal Court in Rome sentence had not expired. The Prosecutor's Office filed an appeal against the Court's sentence, arguing that the court misapplied the law, namely the provisions of article 434 of the Criminal Procedure Code, when it held that they had the right to check whether or not the safety measurement of hospitalization should be maintained although it was ordered for a pre-set period of time. The criticism of the prosecutor's office regarding the decision of the court had been assessed as pleadable by the Timis Court, which by criminal decision no. 9 of January, 5 2011, admitted prosecutor's office appeal, quashed (dissolved) the decision of higher court, and by rejudging on the

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substance, rejected the application formulated by the wife of D.G. and maintained the security measure of hospital care.

The commentary of the law case

The interpretation and enforcement of law by the two instances mentioned above gives us the opportunity to highlight the requirements that are imposed by the rules of European judicial cooperation in criminal matters, assumed both by Romania and other European Union Member States, in the matter of the transfer of sentenced persons and of the way the judge's decisions given in another Member State are applied.

According to article 145 of Law no. 302/2004 on judicial cooperation in criminal matters, if the Romanian state chooses to continue the execution of the sentence imposed in the sentencing State, the state must respect *the type and duration of the penalty* provided in the sentence. The same rule is contained in article 10 paragraph 1 of the Convention on the Transfer of Sentenced Persons in Strasbourg, according to which in case of continued enforcement, the enforcement state is related to the *legal nature and duration of punishment* as they result from conviction.

We emphasize here that the safety measures are assimilated in international judicial cooperation in criminal matters to punishments. In this sense, article 2 paragraph 1 letter k) of Law no. 302/2004 provides that the sentence is any sentence or detention order imposed as a result of committing a crime.

According to the Convention on the Transfer of Sentenced Persons provisions (article 9 paragraph 1) and Law no. 302/2004 (article 144 paragraph 1), the executing State authorities have the obligation to choose, when judging an application for transfer of sentenced persons, between the continuation of sentence and the change of sentence, replacing the penalty imposed in the issuing State with a penalty provided by the law of the enforcement state. Moreover, the executing State authorities are required to notify the issuing State, before transferring the convicted person, which of the two procedures will be followed.

In the case under review, the Court of Appeal Bucharest chose, after taking note of the request of the Italian authorities which ruled out the variant of changing the punishment, to continue implement the security measure imposed by the Criminal Court in Rome, so called D.G. was transferred to Romania. In these circumstances, the Romanian state had the obligation to ensure the enforcement of the security measure of internment of patient D.G. since his transfer in Romania until the expiry of the five-year term established by the Italian court, by observing the type of safety measure and its duration.

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This requirement was not observed by criminal sentence pronounced by Court Deta. Conversely, although the only competent judicial authority to rule on the transfer of sentenced persons in Romania are the Courts of Appeal, *Court Deta replaced these authorities, noted that the provisions of the Italian law and the sentence given by the Criminal Court in Rome did not comply with ECHR jurisprudence and reassessed the safety measure applied by this court*. Proceeding in this way, Court Deta not only made a decision contrary to law, but also undermined the principle of mutual recognition of judicial decisions that constitutes according to the conclusions of the European Council (Tampere, 15th-16th of October 1999), the ground of judicial cooperation within the European Union. As set out explicitly in the preamble of the Framework Decision 2008/909/JHA of the Council of the European Union of November 27, 2008 (regarding the application of the principle of mutual recognition of the judge's decision in criminal matters imposing depriving of liberty sentences or measures for their enforcement in the Union), the recognition by the state of implementation of the decisions taken by the issuing State is based on mutual confidence in the legal systems of the other Member States. Looking from this perspective, we must stress that if the Court of Appeal Bucharest had agreed with Court Deta, then the acknowledgment of the decision and therefore the transfer of the sentenced person to Romania would not have been possible, because the Italian authorities had ruled out the modification of sentence alternative.

Regarding the violation of the patient's right to a fair trial, called by Court Deta in the motivation of the need to change the type and duration of the safety measure, it should be noted that this issue was examined by *res judicata* by the Court of Appeal Bucharest when the decision made by the Criminal Court in Rome was acknowledged because respecting the right to a fair trial under Article 6 of the European Convention is a condition that must be fulfilled for the recognition of a decision made by an authority of a Member State. Also, there is not any evidence of violation of the right of the patient to have access to a court able to investigate the validity and desirability of maintaining the security measure of hospital care, for in accordance with the provisions of article 137 of Law no. 302/2004 and of article 13 of the Convention on persons convicted, the transferred person is allowed to exercise the extraordinary ways of appeal for the abolition or modification of the final decision before the courts of the issuing State, even after his transfer to the State of enforcement.

As a result, the security measure of hospital care could have been changed in terms of duration or legal nature, but only through extraordinary means of appeal before the Italian courts, followed by Romanian authorities putting an end to the execution of the safety measures as soon as the Italian authorities had allowed for such a way of appeal. As long as the patient or his representative didn't obtain any change of the security measure from the Italian court, the Romanian state was obliged to continue the execution of the hospitalization measure until the expiry of five years mentioned in the decision

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of the Criminal Court in Rome, and at the end of this period of time, to inform the Italian government that the security measure was enforced, as required by the provisions of article 148 paragraph 1 letter a) of Law no. 302/2004.

References:

Convention on the Transfer of Sentenced Persons in Strasbourg;

Framework Decision 2008/909/JHA of the Council of the European Union of November 27, 2008, regarding the application of the principle of mutual recognition of the judge's decision in criminal matters imposing depriving of liberty sentences or measures for their enforcement in the Union;

Law no. 302/2004 on judicial cooperation in criminal matters;

Deta Courthouse, criminal sentence no. 532 from November 10, 2010, unpublished;

Timis Courthouse, criminal decision no. 9 of January 5, 2011, unpublished;

Court of Criminal Appeals Bucharest, criminal sentence no. 55 of March 10, 2009, unpublished.

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