

Decision no.361

of 7 May 2015

**concerning the exception of unconstitutionality of the provisions of Articles
218 to 222 and Article 241 (11) (a) of the Code of Criminal Procedure**

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Summary

I. As grounds of the exception of unconstitutionality, it was claimed that the impugned legal texts, by not setting the maximum duration of the house arrest in the preliminary chamber proceedings and in the pleadings at first instance, are contrary to the constitutional provisions on the right of the parties to a fair trial, individual freedom, free movement, personal, family and private life, right to education, access to culture, and restriction on the exercise of certain rights and freedoms.

II. With respect to those complaints, the Court held the following:

Although Article 343 of the Code of Criminal Procedure establishes that the duration of the preliminary chamber procedure is of no more than 60 days of the date of registration of the case to the court, whereas, pursuant to Article 347 (1) of the same Code, the public prosecutor and the defendant can formulate appeal against the settlement of requests and exceptions, as well as against the solutions provided for in Article 346 (3) to (5), ordered by the preliminary chamber judge, and bearing in mind that the High Court of Cassation and Justice, by Decision no. 5 of 8 December 2014 concerning an appeal in the interest of the law, ruled that the appeal covered by Article 347 of the Code of Criminal Procedure establishes the suspensive effect thereof, as the appeal lodged in due time suspends the enforcement [in accordance with Article 4251 (4) of the Code of Criminal Procedure, upon settlement of the

appeal, the provisions of Article 416 of the Code of Criminal Procedure shall apply as appropriate], the preliminary chamber procedure may be prolonged beyond the period laid down by law. Therefore, the suspension of the initiation of proceedings by appeal results in prolongation of the procedural phase of the preliminary chamber until resolution of the appeal brought under Article 347 of the Code of Criminal Procedure and until the order appealed against becomes final, and, in consequence, it is extended also the duration of the measure of the house arrest as regards the author of the exception of unconstitutionality.

The Court recalled that, by Decision no. 650 of 11 November 2014, published in the Official Gazette of Romania, Part I, no. 30 of 14 January 2015, paragraph 20, it held that, in view of the nature/substance, effects, duration, means of enforcement and intensity, both pre-trial detention and the precautionary measure of house arrest envisage a major interference with the right to individual liberty. Therefore, both pre-trial detainees and persons placed under house arrest find themselves in a form of deprivation of liberty, since, both in the case of the house arrest and in the case of pre-trial detention, the defendant, throughout the duration of measures, must be located in a designated place.

The Court found that house arrest is an intrusive measure that may also affect other rights and fundamental freedoms, i.e. the free movement [Article 221 (1) and (2) (a) and (b) of the Code of Criminal Procedure], the personal, family and private life [Article 221 (9) and (10) of the Code of Criminal Procedure], the right to education and work and to social protection of labour [Article 221 (6) of the Code of Criminal Procedure], regulated in Article 26, Article 32, Article 25 and Article 41 of the Constitution. The previously listed fundamental rights, in view of their nature, are not absolute and may be subject to reasonable limitations, but, the criminal

procedural rules in question relate to a restriction on the exercise of rights, in which case the Court deemed relevant Article 53 of the Basic Law.

The Court held that the house arrest measure interference concerns fundamental rights, namely the right to individual liberty, free movement, personal, family and private life, right to education and work and of social protection of labour, it is regulated by law, namely Articles 218 to 222 of the Code of Criminal Procedure, it has a legitimate aim, i.e. conduct of criminal investigations, as it is a judicial measure applicable during prosecution, preliminary chamber proceedings and proceedings at first instance, it is necessary, as it is suitable *in abstracto* to the legitimate aim pursued, it is non-discriminatory and it is necessary in a democratic society for the protection of the values of the rule of law.

However, the interference examined is not proportionate to the cause which engendered it, so the Court held that, by establishing the measure of house arrest, during preliminary chamber proceedings and pleadings at first instance, without setting the time limits for which it may be ordered and its maximum duration, the legislature has not ensured the fair balance between the public interest and the individual interest, as this measure may be ordered for an unlimited period of time. The principle of proportionality as governed in the particular case of Article 53 of the Constitution presupposes the exceptional nature of the restriction on the exercise of fundamental rights or freedoms, which necessarily involves also their temporary nature. Since public authorities may resort to the restriction on the exercise of certain rights in the absence of other solutions, in order to safeguard basic values of the democratic State, it is logical that this measure must cease as soon as the cause which engendered it ceases.

In relation to the constitutional provisions referred to, the Court found unconstitutional the rules of criminal procedure of Article 222 entitled “Duration of the house arrest”, given that they neither regulate the time limits for which they may be ordered, nor the maximum duration of the measure during preliminary chamber proceedings and pleadings at first instance, where the judicial bodies can order the house arrest measure for unlimited periods of time, consequently restricting, for durations unlimited in time, the exercise of the relevant fundamental rights and freedoms.

The Court recalled the Judgement of 28 March 2000 in the case *Baranowski v. Poland* (§ 56), in which the European Court of Human Rights stated that the practice whereby, due to a legislative gap, a person is detained for an indefinite period, is in contradiction with the principle of certainty of legal relations.

The Court also observed that a different constitutional court, namely the Constitutional Court of the Russian Federation, ruling by Judgement no. 27 — II of 6 December 2011 on the failure to set forth in the Code of criminal procedure the time limits for which house arrest can be ordered, as well as the procedure for determining and extending that measure, stated, *inter alia*, that “House arrest is a measure restricting the rights of the person, involving isolation, which obliges the legislature to establish by law a period which is consistent with the principles of justice and equity, to preclude arbitrary and disproportionate restrictions to freedom.”

With regard to the effects of this Decision, the Court has held that the repair of the regulatory failure identified by this Decision until its publication in the Official Gazette of Romania determines the removal of the defect of

unconstitutionality and the preservation in the active fund of the legislation of the provisions of Article 222 of the Code of Criminal Procedure, together with corrections made in line with this Decision.

III. For all of those reasons, the Court upheld the exception of unconstitutionality and declared unconstitutional the provisions of Article 222 of the Code of Criminal Procedure.