

ROLE AND PRACTICAL ATTITUDES IN ISSUE OF THE PROVISIONAL PROTECTION ORDER

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Abstract

We have learned to shape solutions through the jurisprudence of the European Court of Human Rights or the European Court of Justice in Luxembourg on what, until not long ago, we were treating an eternal lamentation as a real problem but without a concrete solution have set or reached important standards in the segment of violence against minors and women but have also provided an adequate degree of protection for professionals directly involved in verifying domestic violence complaints. However, with the entry into force of Law no. 174/2018 regarding the modification and completion of the Law no. 217/2003 on the prevention and combating of domestic violence, the role of the police officer in the exercise of his duties in preventing and limiting domestic violence is strengthened by defining and enumerating the means by which he has the right to obtain evidence by stating his obligations and prohibitions may have immediate application in the content of the provisional protection order but also by regulating the way of its confirmation by administrative resolution issued by the prosecutor. The objectives of the present study, however, concern how this legislative measure is to be reflected in the organizational procedures necessary for the implementation in practice of police, prosecutor's offices and courts, all set in a framework that will procedurally support the efforts to investigate and conclude, in a way that effectively contributes to the diminution or elimination of an imminent risk.

Keywords: temporary protection order, domestic violence, imminent risk, victim.

JEL Classification: K14, K36

1. Actuality

We must recognize that the case-law of the European Court of Human Rights has been more mobilizing (through measures taken in fairness and imposing as a consequence of the state damages for moral damages and not only) than the policies of the Council of Europe, although proved to be broad effectiveness, indicating concrete and relevant measures to prevent and combat forms of violence against women. We have found out from the many cases that most of the European Court's motives and conclusions include references such as:

- „.... the manner in which the applicant's complaints were dealt with by the state authorities did not provide adequate protection against her husband's acts of violence, so it was violated, art. 3 of the Convention. At the same time, the Court notes that although it appreciates the legislative steps taken in Romania despite the adoption by the Government of a national law and strategy for the prevention and combating of domestic violence, the general lack of reaction of the judiciary and the impunity enjoyed by the aggressors indicates that there was no adequate commitment to take appropriate measures in relation to domestic violence”³. Under those circumstances, by the judgment, the State was ordered to pay the applicant EUR 9 800 title of moral injury.

- „.... has been violated art. 3 of the Convention⁴ as procedural, finding that the manner in which the investigation was conducted did not allow the applicant to benefit from the effective protection provided in Art. 3”. Moreover, it is emphasized that „although the legislative framework provided for cooperation between the different authorities as well as extrajudicial measures to identify and ensure the pursuit of acts of domestic violence, and although the medical certificate

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³ Case B against Romania (application No 49645/09) - European Court of Human Rights judgment of 23 May 2017.

⁴ European Convention on Human Rights - Article 3: „No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.

provided evidence in support of the applicant's claims, it appeared that steps had been taken to this end"⁵.

- article 3 of the European Convention on Human Rights has been violated because „the investigation into allegations of abuse lasted too long and was marked by other serious deficiencies" is retained in a case concerning the proceedings initiated by a son against the father for domestic violence"⁶. Taking note of the state of play of the events, the Court acknowledged that the applicant „must have suffered moral damages which can not be compensated by the mere finding of an infringement", for which reason he decided to award the applicant EUR 10.000 title to compensation for non-pecuniary damage.

It is worth mentioning that our country was not the only one in terms of ineffectiveness regarding the decision to apply immediately protection measures that would contribute to a certain amount of time necessary to diminish an imminent risk found. All jurisprudence demonstrates that such motivations are also encountered in judgments that concern not only Romania, but also other states that violence against children and women may be the result of events still present, which have their roots in the unequal historical relations of power promoted at one time between women and men. We thus exemplify some of these findings:

- „domestic violence can primarily affect women, and general and discriminatory judicial passivity can create a climate conducive to domestic violence"⁷;

- violation of art. 2 (the right to life) of the Convention, and stated in particular that, „although the authorities had been informed of the real and serious threat to the life of the applicant's mother and, despite its continuing complaints about threats and harassment, they had not taken the measures they had taken they were reasonably available to prevent being killed by her husband"⁸;

- „having acted promptly on the complainant's complaint, the Italian authorities made the complaint ineffective, creating a situation of impunity that favored the recurrence of acts of violence"⁹.

However, the above-mentioned represent the conclusions of an actuality seen from the point of view of the victims of violence manifested in different forms in the family environment, with the emphasis on failing to conduct an effective official investigation in situations where such a person formulates a complaint based on ill-treatment. But, on the other hand, police officers could not act as long as there was no regulated procedure to allow them to act immediately in the exercise of their duties, to obtain evidence, including by finding their own senses of the situation on-the-spot, use recordings or photos, regardless of where they come from, without the consent of individuals or documents, including those in the electronic environment, mobile telephony, etc.

In order for this addition to police officers to manage domestic violence cases and issue of the interim protection order to produce the expected effect, so as not to be again in the presence of a law that is silent when it is to be applied for the purpose, not only a series of organizational measures, joint regulations of the Minister of Home Affairs, Minister of Labor and Social Justice, but also of the Minister of Justice, so as to ensure a corroboration of the attributions of each professional segment involved.

2. Regulation of the enforcement procedure for the provisional injunction not materialized by a court order

It is easy to say that through the Order of the Minister of Internal Affairs and of the Minister of Labor and Social Justice no. 2578 of 18 December 2018 on how to deal with cases of

⁵ Case B against Romania (application no. 49645/09) - May 23, 2017.

⁶ Case D.M.D. against Romania (application no. 23022/13) - Judgment of the European Court of Human Rights of 3 October 2017.

⁷ Case H.D. against Turkey (application no. 26291/05) - Judgment of the European Court of Human Rights of 13 November 2014.

⁸ Civek case against Turkey (application no. 55354/11) - Judgment of the European Court of Human Rights of 23 February 2016.

⁹ Talpis case against Italy (application no. 41237/14) - Judgment of the European Court of Human Rights of 2 March 2017.

domestic violence by police officers¹⁰, the content of the forms to be filled in by police officers has been regulated in more detail, in practice the standard documents, the content of which partially defines the procedure for issuing the protection order provisional but above all enforcement.

We appreciate that it would have been more useful to the representatives of the Romanian police to define some notions of novelty detached from the text of Law no. 174/2018, such as „finding through their own senses” or the limits of the right „to enter the home or residence of any individual, without its consent and at the headquarters of any legal person, without the consent of its legal representative” or „to use the force and means adequately, in an appropriate and proportionate manner”.

Finding the truth for a fair resolution of any referral is the guiding principle of the provisional order procedure, which is to be followed by the police officer who must implement both a measure that supports the fulfillment of the positive obligation of the state to ensure the protection of potential victims of domestic violence and the respect of safeguards associated with the rights of potential aggressors when it is necessary to apply immediately the protective measures available. Thus, the „temporary evacuation of the aggressor from the common dwelling, whether he is the owner of the property right”, by reference to the manner in which the risk is assessed in the light of the answers given by the victim who is in a state of subjective offense and appreciation at that time the critic of the policeman's findings based on his own senses, once again sets us to wait for the judgments of some European courts to explain or „cover” us, when these aspects should have been foreseen.

Definitely, the State regardless of who it is represented is not acceptable to try to protect a constitutional right to do so to the detriment of another constitutionally protected right. In fact, we try to draw attention to those situations that may result in the conclusion of the procedure in all its ways of attacking and challenging, in the sense of affecting the alleged aggressor's right in such a way that the initial advantage achieved is without serious support, damage to police image or police officer's career.

For these reasons, the emphasis for a serious cooperation of the three ministries involved must be set at a normative level in which proportionality and complementarity should establish the precise procedural framework for action so as to differentiate between strictly organizational and procedural measures, effective management by defining in part each possible direct assessment or action of the policeman. Practically, let us not neglect the fact that, from the point of view of how to exercise the powers of the policeman, the final purpose of regulating the interim proceedings is to guarantee the full effectiveness of the future confirmation of its maintenance by the Prosecutor's Office attached to the competent court in whose radius territorial jurisdiction was issued, respectively, of the forthcoming ruling of the competent court if it came to such a situation.

3. The administrative resolution of the prosecutor versus the motivation of ordering the termination of the provisional protection order

Confirmation of the provisional protection order once issued shall be done within 48 hours from the time of issuance at the level of the prosecutor's office attached to the territorial jurisdiction by applying the original copy of an administrative resolution by the prosecutor.

However, if the prosecutor considers that the retention of the protective measures is no longer justified, he may proceed reasonably by ordering the cessation of the remedies. With regard to this clarification in the legal act contained in Article 22⁷, paragraphs 4-5 of the Law no. 217/2003, we do not understand how, within 48 hours from the issue of the provisional order, the prosecutor who has to solve the case may, in the context of only the same documents on which the decision was made and the policeman, such a measure would be necessary. More specifically, except in the cases covered by the investigation in terms of committing acts falling under the provisions of art. 199 of Law no. 286/2009 on the Criminal Code, the prosecutor can be placed in a situation where

¹⁰ Published in the Official Gazette no. 1110 of December 28, 2018.

he has to guarantee, in accordance with the provisions of the relevant legislation¹¹, that he „learned the truth”, limiting himself to the deed described on the basis of unspecified evidence (finding by his own senses) administered in a completed risk assessment form based on statements made at the critical time of the victim regarding the person of the aggressor.

The examination of the appeal against the interim protection order shall be made by the competent court, as a matter of urgency, no later than the expiry date for which it was issued, namely the 120 hours starting from the moment issue of the provisional protection order.

4. Conclusions

Definitely, the interim protection order is a welcome measure, a long-needed measure that establishes an effective guarantee of victim protection. At the same time, however, there is a need for a normative framework to help the policeman by defining and consequently ensuring a legal and fair assessment of the situation so that the measures taken will reflect a fair balance through the proportionality and complementarity of the rules laying down the stages procedural rules in a differentiated way from strictly organizational measures. Achieving balance in the assessment of a risk implies a corroboration of all the rights of the individuals involved by reference to a certain state of affairs encountered on the ground, as well as the protection of a constitutional right to the detriment of another constitutionally protected right. In fact, we try to draw attention to those cases that may conclude in the sense of damaging the image of the police, the policeman's career or even the State.

In this respect, we appreciate that this completion of the police's powers regarding the issue of the interim protection order must not bring us in the presence of a normative act that regulates by silence and which is the result of a collaboration meant to involve in continuity all three ministries, not just two of them, the role of the justice ministry in improving the regulatory framework is essential. A legal interference in the right to intimate, family and private life, the right to inviolability of domicile or the confidentiality of correspondence may legitimately aim at protecting the victims of domestic violence provided that it proves to be appropriate and useful to the purpose, and on this segment in and through jurisprudence can be counted and prevented.

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4. Law no. 286/2009 on the Criminal Code, published in the Official Gazette, Part I no. 510 of July 24, 2009, as amended.
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¹¹ Code of Criminal Procedure - Law no. 135/2010.