THE INVIOLABILITY OF THE PERSON

Tudor Osoianu*,

tosoianu@gmail.com

Dinu Ostavciuc**

ostavciucdi@gmail.com

Abstract: *The research in reference is dedicated to the inviolability of the person as a principle of the criminal process and as a legal guarantee of personal security, which obliges adequate protection. On the other hand, the freedom of the person represents one of the greatest social values. The person can be deprived of liberty only in exceptional cases, based on grounds strictly regulated by law. No one should be arbitrarily deprived of this freedom. The arrest of the person must be ordered as an ultima ratio. The main rule is to search the person at liberty, and the presumption is always in favor of release. The authors research, in this sense, the jurisprudence of the Republic of Moldova and that of the ECHR, they come up with practical recommendations and proposals for ferenda law, trying to align and correspond the internal norms to the standards imposed by art. 5 of the ECHR.*

Keywords: *inviolability, person, deprivation, freedom, arrest, penal trial.*

Introduction

The inviolability of the person is a legal guarantee of the personal security and freedom of each individual. This is expressed by giving the person a real opportunity to dispose of himself, to determine his place of residence at his own discretion, not to be under constant guard and surveillance.

In addition, the inviolability of the person consists in preventing, suppressing and punishing the violation of his physical and mental integrity and individual freedom. The restriction of the person's right to personal integrity is carried out within the criminal process, in order to create the necessary conditions for the conduct of the criminal investigation and the imposition of a fair punishment on the guilty.

*** University professor, PhD, Academy „Ștefan cel Mare" of the Ministry of Internal Affairs of the Republic of Moldova.**

**** Rector of the Academy „Ștefan cel Mare" of the Ministry of Internal Affairs of the Republic of Moldova, PhD., associate professor, university lecturer, University „Dunărea de Jos" from Galați, Romania.**

Discussion and results

„The consecration of the freedom of the person, as a fundamental right, requires its guarantee, through a strict regulation of the cases and conditions in which this fundamental right can be violated."[1]

„By individual freedom it is necessary to understand the physical freedom of the person, his right to be able to behave and move freely, not to be held in slavery or in any other servitude, not to be detained, arrested or imprisoned except in cases and according to the forms expressly provided by the Constitution and laws."[2]

This aspect was also retained by the Constitutional Court, which noted that, *„By guaranteeing the „right to liberty", Article 5 § 1 of the Convention envisages the physical liberty of the person (*Creangă v. Romania *[MC], February 23, 2012, § 84).*[3]

„The safety of the person means the set of guarantees that protect the person in situations where the public authorities, in the application of the Constitution and the laws, take certain measures that concern individual freedom, guarantees that ensure that these measures are not illegal."[4] „Safety could mean that no one needs fear that they will be subjected to arbitrary encroachments on their freedom."[5]

Individual freedom is one of the fundamental values protected by the European Convention on Human Rights, requiring, due to its importance, a rigorous control by the ECHR regarding any measure that could affect this value.

In the ECHR case, *Bozano v. France*, the European Court held that: *„The main issue to be determined is whether the disputed detention was „lawful", including whether it was in accordance with a procedure prescribed by law". The Convention here refers essentially to national law and establishes the need to apply its rules, but it also requires that any measure depriving the individual of his liberty must be compatible with the purpose of Article 5 (art. 5), namely to protect the individual from arbitrariness (see, as the most recent authority, the Ashingdane judgment*

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[1] Ioan, Griga, *Procedural Criminal Law, General Part, Theory, Jurisprudence and Practical Applications*, Bucharest, Published by Oscar Printn, 2004, p. 57.

[2] Ioan, Muraru, *Constitutional law and the political institutions*, Bucharest, Pro Arcadia, 1993, p. 248.

[3] Decision No. 15 of 28.05.2020 *regarding the exception of unconstitutionality of article 191 paragraph (2) of the Code of Criminal Procedure (provisional release under judicial control [2])* (point 47).

[4] Ioan, Muraru, *Constitutional law and the political institutions*, Bucharest, Pro Arcadia, 1993, p. 249.

[5] Gheorghiță, Mateuț, *The criminal procedures. General part*, Bucharest, Universul Juridic, 2019, p. 85.

of 28 May 1985, Series A no. 93, p. 21, § 44). What is at stake here is not only the „right to liberty" but also the "right to security of person".[6]

„A person is deprived of liberty by ordering the measure of detention, administrative management at the police headquarters, by the execution of the warrant of bringing by coercion, by ordering preventive arrest, house arrest, provisional arrest with a view to extradition or issuing the European arrest warrant, ordering the measure of safety of temporary medical hospitalization, etc.; likewise, on the basis of a final court decision, there is a deprivation of liberty in the case of the execution of the main sentence of imprisonment or life imprisonment or the educational measure of internment in an educational center or in a detention center."[7]

The individual's right to liberty and security is regulated in several international instruments. According to art. 3 of the Universal Declaration of Human Rights: „*Every human being has the right to life, liberty and security of his person*". Moreover, in accordance with the provisions of art. 9 of the same international act, „*No one shall be arbitrarily arrested, detained or exiled*".

The inviolability of the person is also proclaimed in the *International Covenant on Civil and Political Rights,* adopted on December 16, 1966 in New York. *Every individual has the right to freedom and security of his person. No one can be arrested or detained arbitrarily. No one can be deprived of his freedom except for legal reasons and in accordance with the procedure provided by law* (art. 9 paragraph (1)). This fundamental right is specifically protected by other international documents.[8]

In accordance with art. 5 paragraph 1 of the ECHR: „*Everyone has the right to freedom and security. No one can be deprived of his freedom except in the cases expressly stipulated in the law*", and namely:

a) if he is legally detained on the basis of a conviction pronounced by a competent Court;

b) if he became the subject of a legal arrest or detention for disobeying a decision issued in accordance with the law by a Court or in order to guarantee the execution of an obligation provided by law;

c) under the conditions in which he was arrested or detained, with a view to his being brought before a competent judicial authority, when there are good reasons resulting from the need to prevent him from committing a crime or fleeing after committing it;

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[6] ECHR Judgment, *Bozano v. France*, of 18.12.1986 (§ 54). Available: https://hudoc.echr.coe.int/eng?i=001-57448 [accessed: 02.10.2022].

[7] Mihail Udroiu, *Synthesis of Criminal Procedure, General Part*, 2nd ed., Volume I, Bucharest, C.H. Beck, 2021, p. 62.

[8] *Final Act of the Conference on Security and Cooperation in Europe* (Helsinki, 1975; The final document of the Vienna Meeting of the representatives of the States participating in the Conference for Security and Cooperation in Europe (1989) and so on.

d) when it comes to the legal detention of a minor, decided for his education under supervision or for the purpose of bringing him before a competent authority;

e) when we can talk about the legal detention of a person susceptible to transmitting a contagious disease, of an insane person, an alcoholic, a drug addict or a vagabond;

f) when we can talk about the legal arrest or detention of a person, to prevent him from entering the territory of a state or against whom an expulsion or extradition procedure is being carried out.

*"(...) in general, Article 5 § 1 of the European Convention contains an exhaustive list of permissible grounds for deprivation of liberty, provided for in letters (a)-(f), and no deprivation of liberty shall be lawful unless it falls within one of these reasons (*e.g. *see* M. v. Germany*,* December *17, 2009, § 86;* Creangă v. Romania *[MC], February 23, 2012, § 120;* Del Río Prada v. Spain *[MC], October 21, 2013, § 125)".*[9]

In the ECHR case, *Guzzardi v. Italy*[10]*,* the Court recalls that in proclaiming the „right to liberty", paragraph 1 of Article 5 (art. 5-1) is contemplating the physical liberty of the person; its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. As was pointed out by those appearing before the Court, the paragraph is not concerned with mere restrictions on liberty of movement; such restrictions are governed by Article 2 of Protocol No. 4 (P4-2) which has not been ratified by Italy. In order to determine whether someone has been „deprived of his liberty" within the meaning of Article 5 (art. 5), the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question (see the Engel and others judgment of 8 June 1976, Series A no. 22, p. 24, par. 58-59)".

In the ECHR case, *Creangă v. Romania*[11], the Court found: „(...), in cases examined by the Commission, the purpose of the presence of individuals at police stations, or the fact that the parties concerned had not asked to be able to leave, were considered to be decisive factors. Thus, children who had spent two hours at a police station in order to be questioned without being locked up were not found to have been deprived of their liberty (see X v. Germany, no. 8819/79, Commission decision of

[9] Decision of the Constitutional Court of the Republic of Moldova no. 27 of 30.10.2018 *regarding the control of the constitutionality of some provisions of Article 185 of the Code of Criminal Procedure (preventive arrest if the person has not admitted his guilt in committing the imputed act)* (point 91).

[10] ECHR case *Guzzardi v. Italy*, of 06.11.1980 (§ 92). Available: https://hudoc.echr.coe.int/eng?i=001-57498.

[11] ECHR Judgment *Creangă v. Romania*, of 23.02.2012 (§ 93). Available: https://hudoc.echr.coe.int/eng?i=001-109226.

19 March 1981); nor was an applicant who had been taken to a police station for humanitarian reasons, but who was free to walk about on the premises and did not ask to leave (see Gueant v. Switzerland (dec.), no. 24722/94, Commission decision of 10 April 1995). Likewise, the Commission attached decisive weight to the fact that an applicant had never intended to leave the courtroom where he was taking part in a hearing (see E.G. v. Austria, no. 22715/93, Commission decision of 15 May 1996). The case-law has evolved since then as the purpose of measures by the authorities' depriving applicants of their liberty no longer appears decisive for the Court's assessment of whether there has in fact been a deprivation of liberty. To date, the Court has taken this into account only at a later stage of its analysis, when examining the compatibility of the measure with Article 5 § 1 of the Convention (see Osypenko v. Ukraine, no. 4634/04, §§ 51-65, 9 November 2010; Salayev v. Azerbaijan, no. 40900/05, §§ 41-42, 9 November 2010; Iliya Stefanov v. Bulgaria, no. 65755/01, § 71, 22 May 2008; and Soare and Others v. Romania, no. 24329/02, § 234, 22 February 2011)."

Personal freedom is part of fundamental human rights. Individual freedom is widely enshrined in numerous provisions that the Constitution includes in art. 25. Thus, the Constitution recognizes as legal the restriction of the inviolability of the person in the cases provided by law. From the constitutional text we derive the following:

1) Individual freedom and security of the person are inviolable;

2) The search, detention or arrest of a person is allowed only in the cases and within the procedure regulated by law;

3) The detention of the detained person must not exceed 72 hours;

4) The arrest of the person must not exceed 30 days, and in total - 12 months;

5) The arrest and extension of the arrest is made only on the basis of a court order and can be contested by appeal in the hierarchically superior court;

6) The person subject to detention or arrest must be immediately informed of the grounds and reasons for the application of these coercive measures;

7) The accusation of the person is made known in the shortest possible time;

8) The reasons for detention or arrest are made known to the person subject to these measures only in the presence of a lawyer, chosen by the person or appointed *ex officio*;

9) The detained or arrested person should be released immediately in cases where the reasons for the measures applied have disappeared.

Regarding the observance of the term of deprivation of liberty, the European Court, in the case of *Assenov and Others v. Bulgaria*[12], mentions that, *„(...) it falls in the first place to the national judicial authorities to ensure that the pre-trial detention of an accused person does not exceed a reasonable time. To this end, they must examine all the circumstances arguing for and against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set these out in their decisions on the applications for release (...)".*

„In order for a deprivation of liberty to be in accordance with the principle of legality and to exclude the abusive application of this coercive measure contrary to the provisions of the Convention, states have a positive obligation to establish in their domestic legislation rules regarding the conditions and grounds for the application of arrest, as well as other guarantees for persons who are subject to these measures that limit the right to freedom. In this context, the right not to be arrested and detained in the absence of the cases and conditions provided by the national legislation clearly and precisely represents a legal guarantee against arbitrary state interference in individual freedom, and one of the states' obligations also involves the exercise of a certain control of compliance with national law in a specific case"[13].

„In addition to the principle of legality, Article 5 § 1 of the Convention enshrines the protection of the person against arbitrariness. If the illegal nature of a deprivation of liberty implies its lack of conformity with domestic law, then the notion of „arbitrary" extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful under domestic law, being at the same time arbitrary and therefore contrary to the Convention (Creangă v. Romania [MC], no. 29226/03, § 84, 23 February 2012)".[14]

Recognizing the social significance in the fight against criminality, as well as in the light of constitutionality, the criminal procedural law comes to

[12] ECHR Judgment, *Assenov and Others v. Bulgaria*, of 28.10.1998 (§ 154). Available: https://hudoc.echr.coe.int/eng?i=001-58261 [accessed: 15.08.2022].

[13] Ministry of Justice of the Republic of Moldova, Government Agent, *Study regarding the observance of Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms by the Republic of Moldova*, Chişinău, 2018, p. 2. Available: https://www.justice.gov.md/public/files/agent_guvernamental/A5_MDA.pdf [accessed: 15.08.2022].

[14] Ministry of Justice of the Republic of Moldova, Government Agent, *Study regarding the observance of Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms by the Republic of Moldova*, Chişinău, 2018, p. 2. Available: https://www.justice.gov.md/public/files/agent_guvernamental/A5_MDA.pdf [accessed: 15.08.2022].

guarantee the inviolability of the person, concretely regulating the grounds and reasons for his restriction.

In order to protect individuals from illegal prosecution or conviction, as well as any other unreasonable restriction of their rights and freedoms, the inviolability of the person has been proclaimed as a fundamental principle of the criminal process.

The principle of the inviolability of the person, enshrined in art. 11 of the Code of Criminal Procedure, establishes the general conditions regarding the freedom and safety of the person, as follows:

1. No person may be detained on suspicion of committing a crime or arrested without the conditions and legal grounds indicated in the Code of Criminal Procedure;

2. No one may be deprived of liberty, arrested, forcibly committed to a medical institution or sent to a special educational institution except based on a warrant or a court order. The respective decisions of the court must be thorough and reasoned;

3. The person cannot be detained for more than 72 hours until the court issues an arrest warrant;

4. Procedural actions that affect the inviolability of the person (for example, search, physical examination) can be carried out without the consent of the person or his legal representative only under the conditions and grounds provided for in the Code of Criminal Procedure;

5. The person deprived of liberty (detained or arrested) must be kept in conditions that exclude threats to his life and health, implicitly those that could affect the capacity of the person in question to make decisions and express his position;

6. Any person illegally detained, kept in detention longer than the period provided for by the Code of Criminal Procedure or deprived of liberty in any other way, as well as illegally placed in a medical institution or illegally sent to a special educational institution, must be released immediately by the court, prosecutor or criminal prosecution body, implicitly also by other representatives of the bodies in which this person is detained (for example, employees of temporary detention centers).

At the same time, persons deprived of liberty, pursuant to art. 11 of the Code of Criminal Procedure are provided with specific guarantees. These persons are immediately notified about:

1) The rights and grounds for detention or arrest;

2) The circumstances of the deed, for which they were detained or arrested;

3) The legal classification of the criminal act of which it is suspected or accused;

The aspects indicated above are brought to the attention of the person in the language he understands, in the presence of a chosen defender or a lawyer who provides legal assistance guaranteed by the state. These guarantees are implicitly regulated so that the person can challenge the legality of his possession.

In the ECHR case, X v. the United Kingdom[15], the Court held that, "*(...) the need for the applicant to be apprised of the reasons for his recall necessarily followed in any event from paragraph 4 of Article 5 (art. 5-4): anyone entitled (...) to take proceedings to have the lawfulness of his detention speedily decided cannot make effective use of that right unless he is promptly and adequately informed of the facts and legal authority relied on to deprive him of his liberty (...).*"

In the case *Fox, Campbell and Hartley v. the United Kingdom[16],* the Court noted that, "(...) any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness (...). Whilst this information must be conveyed "promptly" (in French: "dans le plus court délai") (...), it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features."

At the same time, according to art. 11 paragraph (9) of the Code of Criminal Procedure, "*During the criminal process, no one can be physically or mentally mistreated, and any actions and methods that create danger to human life and health, even with his consent, are prohibited, as well as to the environment. The detained, preventively arrested person cannot be subjected to violence, threats or methods that would affect his ability to make decisions and express his opinions*."

Thus, the principle of the inviolability of the person establishes the limits of restricting the freedom of the suspect and the accused during the criminal process. Restrictions are allowed for a strictly defined period, after which a person must be released. The most important guarantee of the inviolability of the person in the criminal process is the provision of the right to restrict only the freedom of the court. Only for the short-term detention of a suspect, the law does not require a court order. This principle also ensures adequate conditions for keeping a person in places of detention. Failure to comply with this principle contradicts the Constitution and international legal acts in the field of human rights and freedoms.

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[15] ECHR Judgment, *X v. the United Kingdom*, of 05.11.1981 (§ 66). Available: https://hudoc.echr.coe.int/eng?i=001-57602 [accessed: 14.10.2022].

[16] ECHR Judgment, *Fox, Campbell and Hartley v. the United Kingdom*, of 30.08.1990 (§ 40). Available: https://hudoc.echr.coe.int/eng?i=001-57721 [accessed: 14.10.2022].

In addition, the Code of Criminal Procedure regulates in detail the procedural order of the person's detention, the term of detention, the application of preventive detention, etc., being a guarantee of the limitation of individual freedom in the criminal process only under the conditions of the law. The application of preventive detention, as it was mentioned before, is exclusively the competence of the court, which determines the appropriateness of this measure based on the multilateral verification of the materials of the criminal file.

The court or the prosecuting body is obliged to immediately release any person detained illegitimately.

According to art. 78 of the previous Code, preventive arrest was authorized by the prosecutor. Later, the arrest was made possible based on a warrant issued by the prosecutor. The legislator through Laws of the Republic of Moldova no. 1579-XIV of February 27, 1998 and no. 95-XIV of July 16, 1998, starting from April 30, 1998, sent from the prosecutor's office to the courts the examination of the measures regarding the application of the preventive measure - the arrest, the issuance of the arrest warrant and the extension of the detention period. The introduction of judicial control over this preventive measure results in a broader defense of the freedom and safety of the person.[17]

Therefore, from the moment of the adoption of the Constitution and until the introduction of these amendments in the Republic of Moldova, there have been serious violations of the human right to freedom and personal safety.

In the ECHR case, Pantea v. Romania, *"The Court notes firstly that in the instant case the prosecutor at the Bihor County Court intervened initially at the investigation stage, examining whether it was necessary to charge the applicant, directing that criminal proceedings should be opened against him and taking the decision to place him in pre-trial detention. He subsequently acted as a prosecuting authority, formally charging the applicant and drawing up the indictment on which the latter was committed for trial in the Bihor County Court. However, he did not act as prosecuting counsel before this court, although this would have been possible, since no provision in the Law on the Administration of Justice would have specifically forbidden him from so doing. Accordingly, it is appropriate to consider whether, in the circumstances of the case, he*

[17] Decision of the Plenum of the Supreme Court of Justice no. 29 of 09. 11. 1998 with the changes introduced by the Decision of the Plenary of the SCJ no. 17 of 22. 04. 2002 *about the application by the courts of some provisions of the criminal procedure legislation regarding preventive detention //* Collection of Decisions of the Supreme Court of Justice (May 1974 – July 2002), p. 388.

provided the guarantees of independence and impartiality inherent in the concept of "officer" within the meaning of Article 5 § 3."[18]

"*Considering the above, the Court concludes that the prosecutor who ordered the preventive arrest of the applicant was not a "magistrate", in the sense of Article 5 paragraph 3 of the Convention, therefore, it must be verified whether the legality of the measure of preventive arrest was subject to judicial control and whether he intervened "immediately" ("aussitot"), in the sense of the same provision of the Convention*."[19]

To understand the legal (constitutional) concept of individual freedom, one must start from the fact that individual freedom (like all human freedoms) is not, cannot and must not be absolute. This means that individual freedom is to be realized in the coordinates imposed by the constitutional order or, more broadly, by the legal order, implicitly the criminal procedural order.

"*The Court also reiterates that where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that the law at issue be sufficiently precise to allow the person – with appropriate advice if need be – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see the Steel and Others v. the United Kingdom, 23 September 1998, § 54 Reports of Judgments and Decisions 1998 VII, and Holomiov v. Moldova, no. 30649/05, § 126, 7 November 2006).*"[20]

"Violation of the legal order entitles the public authorities to intervention and oppression, which implies, if necessary, depending on the seriousness of the violations, some measures that directly concern the freedom of the person, such as, for example, conducting searches, detention, arrest, etc."[21]

"*Naturally, when adopting the decision regarding the application of the arrest, the national courts must apply the standards imposed by the European Convention: legality of detention; existence of a reasonable suspicion; presence of a risk; the proportionality of the application of the preventive measure and, finally, the possibility of applying alternative*

[18] ECHR Judgment, *Pantea v. Romania*, of 03.06.2003 (§ 237). Available: https://hudoc.echr.coe.int/eng?i=001-122720 [accessed: 05.10.2022].

[19] ECHR Decision, *Pantea v. Romania*, of 03.06.2003 (§ 237).

[20] ECHR Judgment, *Leva v. Moldova*, of 15.12.2009 (§ 51). Available: https://hudoc.echr.coe.int/eng?i=001-144486 [accessed: 21.05.2022].

[21] Ion, Creangă, *Individual liberty and security of the person - the most expressive human rights*. In: The Ombudsman review, nr. 1–3, 2001, p. 16.

measures for detention (see the DCC no. 3 of 23 February 2016, §§ 62 and 63)."[22]

In the ECHR case, Buzadji v. the Republic of Moldova[23], the Court noted that, *"In Storck v. Germany (no. 61603/00, § 75, ECHR 2005-V) the Court held that the right to liberty is too important in a "democratic society" within the meaning of the Convention for a person to lose the benefit of the protection of the Convention for the sole reason that he gives himself up to be taken into detention. Detention might violate Article 5 even though the person concerned might have agreed to it (see De Wilde, Ooms and Versyp v. Belgium, 18 June 1971, § 65, Series A no. 12).*" Respectively, even if the person agrees that preventive arrest or house arrest could be applied to him, the European Court condemns this aspirant by the fact that he does not provide the person with effective guarantees of the right to freedom and safety.

In the following, we will refer to the procedural-criminal rules that specifically regulate the deprivation of liberty of the person, which we will analyze through the prism of their correspondence to international standards and constitutional norms.

In accordance with Art. 165 paragraph (1) of the Code of Criminal Procedure, "*Deprivation of a person's liberty, for a short period of time, but not more than 72 hours, constitutes detention*." This procedural norm corresponds to the constitutional rigors. As far as ECHR jurisprudence is concerned, it does not establish a specific term for detention. At the same time, the Moldovan cases examined by the European Court regarding art. 5 of the ECHR, denotes that the Court did not expose itself to the detention period. The determination of this term remains at the discretion of the states. In divers legislations, retention is provided for differently. For example, in Romania detention cannot exceed 24 hours. "The French regulation sets the initial term of detention at 24 hours with the admission of its simple extension by another 24 hours and with the existence for special cases of more extensive extensions, such as the field of crimes against the state, where the extension can go up to 6 days in normal conditions and after 12 days if a state of emergency has been declared."[24]

However, the European Court tells us about detention as deprivation of liberty for a very short period of time. For example, in the ECHR case, Foka v. Turkey[25], the Court "*(...) Even if it is not excluded that Article 5 § 1 may*

[22] Decision of the Constitutional Court of the Republic of Moldova no. 27 of 30.10.2018 (point 75).

[23] ECHR Judgment, *Buzadji v. the Republic of Moldova*, of 05.07.2016 (§ 107). Available: https://hudoc.echr.coe.int/eng?i=001-164928.

[24] Nicolae, Volonciu, *Treaty on criminal procedure, General part*, Volume I, Paidea, Bucharest. 1996, p. 413.

[25] ECHR Judgment, *Foka v. Turkey*, of 24.06.2008 (§ 75). Available: https://hudoc.echr.coe.int/eng?i=001-87175.

apply to deprivations of liberty of a very short length (see X v. Germany, no. 8819/79, Commission decision of 19 March 1981, Decisions and Reports (DR) 24, pp. 158, 161) (...)." Also, in that case, the ECHR notes that, "*(...) the Convention organs' case-law shows that this provision was considered not applicable in cases where the applicants' stay in a police station lasted only few hours and did not go beyond the time strictly necessary to accomplish certain formalities (see, for instance, Guenat v. Switzerland, no. 24722/94, Commission decision of 10 April 1995, Decisions and Reports (DR) 81, pp. 130, 134, and X v. Germany, decision cited above).*"

Also, the detention period of up to 72 hours must be calculated from the moment the person is detained *de facto* and not *de iure*.

"*De facto* detention - is a criminal procedural action undertaken by a Police employee, which consists in the physical deprivation of liberty of the person suspected or accused of committing a crime, until the arrest report is drawn up, a period that cannot exceed 3 hours. Persons for whom a final prison sentence has been pronounced or for whom an arrest warrant has been issued may be detained *de facto*. Detention by law - is a criminal procedural action carried out by the criminal prosecution body which is manifested by drawing up the minutes of detention."[26]

The Code of Criminal Procedure establishes the circle of persons in respect of whom the withholding may be applied. Thus, in accordance with the provisions of art. 165 paragraph (2) of the Code of Criminal Procedure, "*There may be subject to detention:*

1) persons suspected of committing a crime for which the law provides for a prison sentence of more than one year if there is a reasonable suspicion that the person has committed this crime;

2) the accused, the defendant who violates the conditions of the non-custodial preventive measures taken against him, as well as the protection ordinance in the case of family violence, if the crime is punishable by imprisonment;

3) convicts in respect of whom, decisions have been adopted canceling the conviction with conditional suspension of the execution of the sentence or canceling the conditional release from the sentence before the term;

4) the persons in respect of whom the decision of acquittal was annulled and the decision to sentence to imprisonment was adopted, as well as the persons who evade the execution of the sentence to imprisonment;

[26] Point 1) Chapter V, Annex no. 1 to the Order of the head of the General Police Inspectorate no. 129 of 27.04.2020, *Regarding the approval of the Standard Operating Procedures regarding the detention, escort, transportation and placement of the detained person in the Police Detention Center*.

5) people who commit an audience crime;

6) the persons to be charged, if the whereabouts of the person is not known or if he did not appear without good reason and did not inform the body that summoned him about the impossibility of his appearance;

7) persons subject to extradition."

The list of mentioned persons is an exhaustive one. At the same time, the criminal procedural law establishes the procedural acts based on which detention can take place, namely: minutes, ordinance and the judgment of the court. The respective acts and the cases of their preparation are regulated in art. 165 paragraph (3) of the Code of Criminal Procedure.

From the analysis of art. 165 paragraph (2) of the Code of Criminal Procedure we understand that this criminal procedural norm establishes, in addition to the persons in respect of whom detention can be applied, concrete conditions regarding the application of this coercive procedural measure.

The first condition, established in art. 165 paragraph (2) point 1) of the Code of Criminal Procedure and in art. 166 paragraph (1) of the Code of Criminal Procedure, is that the crime for which the person is suspected must have a criminal penalty of imprisonment of more than one year. If the person is suspected of committing a crime for which the criminal law establishes the penalty of up to one year in prison, a fine, unpaid community service or other categories of main penalties, this person cannot be detained under the terms of the criminal procedural law.

The second condition, established by the same rules, is the existence of a reasonable suspicion that the person has committed the crime. According to art. 6 point 4/3) of the Code of Criminal Procedure, "*reasonable uncertainty – suspicion resulting from the existence of facts and/or information that would convince an objective observer that a crime attributable to a certain person/persons has been committed or is being prepared to be committed and that there are no other facts and/or information that remove the criminal nature of the fact or prove the person's non-involvement*." At the same time, the jurisprudence of the European Court, in several cases, points to reasonable suspicion, which is similar to the notion in our domestic law.

For example, in the ECHR case, Stepuleac v. Moldova[27], *"The Court reiterates that "the 'reasonableness' of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in Article 5 § 1 (c) of the Convention. Having a 'reasonable suspicion' presupposes the existence of*

[27] ECHR Judgment, *Stepuleac v. Moldova*, of 06.11.2007 (§ 68). Available: https://hudoc.echr.coe.int/eng?i=001-112790 [accessed: 13.04.2022].

facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as 'reasonable' will however depend upon all the circumstances. While special circumstances may affect the extent to which the authorities can disclose information, even "the exigencies of dealing with terrorist crime cannot justify stretching the notion of 'reasonableness' to the point where the essence of the safeguard secured by Article 5 § 1 is impaired" (...)." The same aspects were also observed in the case of Leva v. Moldova.[28]

In practical terms, when judicial bodies are to establish "reasonable suspicion", they must take into account a complex of information and evidence. For example, the criminal investigation body notified by the investigative bodies must analyze the content of the notification in relation to the investigative documents (hearing of the victim, witnesses, technical-scientific or medico-legal findings, etc.).

Sometimes only the victim's complaint is sufficient when the reasonable suspicion and circumstances of the case emerge from its content (for example, the victim declares the fact of the crime and its author). In other words, there must be sufficient and concrete evidence or information regarding the act, firstly, and the alleged perpetrator, secondly. At the same time, the criminal prosecution body must establish the non-existence of circumstances that exclude criminal prosecution or that remove the criminal character of the deed.

The identity of the perpetrator is not required to start the criminal investigation, but when it is decided to apply detention, his identity is mandatory, unless the person is detained for a period that cannot exceed 6 hours, in order to establish his identity (art. 166 paragraph (5/1) of the Code of Criminal Procedure).

The jurisprudence of the Strasbourg Court comes in support of the invoked desiderata. For example, in the case of *Ignatenco v. Moldova*, "*The Court observes that the applicant was arrested on the basis of "operative information", (...). The Court also notes that this "operational information" was confirmed by S.F.'s criminal complaint, which would be sufficient to justify the applicant's arrest under national law*." In other words, there was operative information, which, according to its content, corroborated with the content of the complaint submitted by the victim.

In the ECHR case, Labita v. Italy[29], the Court noted that, *"While a suspect may validly be detained at the beginning of proceedings on the basis of statements by pentiti, such statements necessarily become less*

[28] ECHR Judgment, *Leva v. Moldova*, of 15.12.2009 (§ 50). Available: https://hudoc.echr.coe.int/eng?i=001-144486 [accessed: 21.05.2022].

[29] ECHR Judgment, *Labita v. Italy*, of 06.04.2000 (§ 159). Available: https://hudoc.echr.coe.int/eng?i=001-58559 [accessed: 06.10.2022].

relevant with the passage of time, especially where no further evidence is uncovered during the course of the investigation." The analysis of the respective case shows that the suspect can also be detained based on information or statements of informants. However, that information will have no force unless it is corroborated and supported by other evidence.

In some specific cases (for example, those of a terrorist nature), the Court took into account only operational information, i.e., information obtained from informants. In the ECHR case, O' Hora v. the United Kingdom[30], the Court held that, "*(...) The intelligence derived from four informants who had proved reliable in the past and had provided information leading to seizures of explosives or firearms and to prosecutions. None of the informants had a criminal record. The information given by these four informants was consistent, in that all gave the same names as being involved, and independent, in that none was aware of the existence of the others and each gave the information at separate meetings with police officers.*" The analysis of the respective case shows that, even in complicated cases, such as those of a terrorist nature, the European Court supported the Government's position regarding the application of the detention of four suspects only based on operative information. However, the Court correctly retained and analyzed the content of this information and its corroboration with other operational information received from other informants, which according to the content were the same. In addition, the informants did not know each other nor were they aware of the existence of the information given by others. Thus, both the domestic judicial bodies and the Court took into account all these circumstances and that they could not be fabricated or the information could not be wrong, coming from different sources with the same content.

It should be noted that, for the application of the coercion measure of detention, there must be grounds and reasons, not just the reasonable suspicion of the commission of the crime. Thus, the criminal procedural law, through the prism of art. 166, specifically establishes the grounds for the application of withholding, namely:[31]

1) if he was caught in flagrant offense, in other words, the crime was discovered at the time of its commission or the crime whose perpetrator, immediately after its commission, is followed by the victim, by eyewitnesses or other persons or is caught close to the place of commission of the crime with weapons, tools or any other objects that would give grounds to suppose him a participant in the crime (art. 513 of the Code of Criminal Procedure).

[30] ECHR Judgment, *O' Hora v. the United Kingdom*, of 16.10.2001 (§ 10, 21, 32, 40). Available: https://hudoc.echr.coe.int/eng?i=001-59721 [accessed: 06.10.2022].

[31] Art. 166 paragraph (1) points 1)-5) of the Code of Criminal Procedure of the Republic of Moldova.

This ground will be proven through various procedural actions, such as: on-site research, victim or witness statements, objects lifting, etc.;

2) if the eyewitness, including the victim, directly indicates that this particular person committed the crime. The statements of the victim and/or the witness prove this basis, who will point directly to the person who committed the crime, that is, will declare the identity of the perpetrator or his particular signs by which he can be recognized. In the latter case, the criminal investigation body, in addition to the hearing, will also perform the presentation for recognition (this ground for detention will be applied only if the witness and/or victim will recognize the perpetrator).

In the case *Stepuleac v. Moldova*[32], the Court held that, "*More disturbingly, it follows from the statements of the two alleged victims that one of the complaints was fabricated and the investigating authority did not verify with him whether he had indeed made that complaint, while the other was the result of the direct influence of officer O., the same person who registered the first complaint against the applicant (see paragraph 7 above; see also Sultan Öner and Others v. Turkey, no. 73792/01, §§ 121-123, 17 October 2006). This renders both complaints irrelevant for the purposes of determining the existence of a reasonable suspicion that the applicant had committed a crime, while no other reason for his arrest was cited (...).*"

In the ECHR case, Leva v. Moldova[33], "*The Court notes that under Article 166 of the Code of Criminal Procedure a person suspected of a crime could be arrested only if certain requirements were met, in particular when there are grounds for arrest. One of the grounds for arrest is "if an eyewitness, including the victim, points directly at him as having committed the crime" (...). The arresting officer relied only on that ground in the minutes of the applicants' arrest (...). However, as later established by the investigating judge, no such witness statements had been included in the case file at the hearing of 8 November 2004 (...).*"

3) if obvious traces of the crime are discovered on the person's body or clothes, at their residence or in their transport unit. The respective basis will be applied if the traces of the crime will be detected following the on-site investigation, body or home search, collection of objects and documents, physical examination or examination of the objects detected and seized, technical-scientific or medico-legal findings, expertise, hearings;

4) if traces left by this person are discovered at the crime scene. The respective theme will be proven through on-site research, technical-

[32] ECHR Judgment, *Stepuleac v. Moldova*, of 06.11.2007 (§ 77).
[33] ECHR Judgment, *Leva v. Moldova*, of 15.12.2009 (§ 52).

scientific or medico-legal findings, expertise, hearings, presentation for recognition of objects and documents;

5) if he tried to hide or his identity could not be ascertained. The basis given will be proven through hearings, including of law enforcement officers (for example, investigative officers), searches, collection of documents and records, presentation for recognition, information from local public authorities or those provided by the Public Services Agency.

In the ECHR case, Becciev v. Moldova[34], the Court held that, "*The danger of an accused's absconding cannot be gauged solely on the basis of the severity of the sentence risked. It must be assessed with reference to a number of other relevant factors, which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify detention pending trial (Yağcı and Sargın v. Turkey). The risk of absconding has to be assessed in light of the factors relating to the person's character, his morals, home, occupation, assets, family ties and all kinds of links with the country in which he is prosecuted. The expectation of heavy sentence and the weight of evidence may be relevant but is not as such decisive and the possibility of obtaining guarantees may have to be used to offset any risk (Neumeister v. Austria, judgment of 27 June 1968, Series A no. 8, § 10).*

1) It will prevent the truth from being discovered. In the respective case, the criminal investigation body and the prosecutor must have sufficient information regarding this ground, including the statements of the victim or the injured party, the witnesses, the risk that he will hide the evidence or destroy it, etc.

In the ECHR case, Becciev v. Moldova[35], the Court held that, *"The danger of the accused's hindering the proper conduct of the proceedings cannot be relied upon in abstracto, it has to be supported by factual evidence (Trzaska v. Poland, no. 25792/94, § 65, 11 July 2000)*."

"The person's refusal to disclose to the prosecution the names of witnesses or the location of evidence that could prove his innocence cannot be invoked as a reason for arrest. This not only cannot constitute grounds for arresting a person, but also represents a violation of an accused's right to remain silent, guaranteed by Article 6 of the ECHR (Decision *Turcan and Turcan v. Moldova*, 23 October 2007, § 51)."[36]

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[34] ECHR Judgment, *Becciev v. Moldova*, of 04.10.2005 (§ 58). Available: https://hudoc.echr.coe.int/eng?i=001-112622 [accessed: 14.07.2022].

[35] ECHR Judgment, *Becciev v. Moldova*, of 04.10.2005 (§ 59).

[36] Decision of the Plenum of the Supreme Court of Justice of the Republic of Moldova no. 01 of 15.04.2015 *on the application by the courts of some provisions of the criminal procedure legislation regarding preventive arrest and house arrest* (point 9).

In the ECHR case, Cebotari v. Moldova[37], "*(...) The Court stresses in this connection that in the absence of a reasonable suspicion arrest or detention of an individual must never be imposed for the purpose of making him confess or testify against others or to elicit facts or information which may serve to ground a reasonable suspicion against him*."

"Invoking the risk of obstructing the proper course of justice can only take place in the initial phase of the proceedings (Judgment *Jarzynski v. Poland*, 4 October 2005, § 43), because witnesses can be heard and relevant material evidence can be collected. The judges will check for each one if this argument is invoked for the arrest, for what reason the evidence was not accumulated until the application was filed and how convincing these reasons are."[38]

2) Will commit other crimes. The criminal investigation body and the prosecutor will take into account the presence of criminal antecedents and other information deriving from statements, special investigative measures and others.

In the ECHR case, Clooth v. Belgium[39], "*The Court considers that the seriousness of the charge may lead the judicial authorities to place and leave a suspect in preventive detention in order to prevent any attempt to commit further crimes. It is however necessary, among other conditions, that the danger be plausible and the measure appropriate, in the light of the circumstances of the case and in particular the past history and personality of the person concerned. In the present case, the offenses which gave rise to the applicant's previous convictions were not comparable, either in nature or degree of gravity, with the charges preferred against him in the contested proceedings (...)*."

Thus, in the ECHR case, Labita v. Italy[40], the Court determined that, "*(...), detention ceases to be justified (...) "on the day on which the charge is determined" (...), "some delay in carrying out a decision to release a detainee is often inevitable, although it must be kept to a minimum" (see the Giulia Manzoni judgment cited above, p. 1191, § 25 in fine). For example, there may be situations in which the execution date of a court decision or the prosecutor's decision to release the suspect, the accused or the defendant occurs at night. Respectively, in this case, the prison workers*

[37] ECHR Judgment, *Cebotari v. Moldova*, of 13.11.2007 (§ 48). Available: https://hudoc.echr.coe.int/eng?i=001-112794 [accessed: 14.07.2022].

[38] Decision of the Plenum of the Supreme Court of Justice of the Republic of Moldova no. 01 of 15.04.2015 *on the application by the courts of some provisions of the criminal procedure legislation regarding preventive arrest and house arrest* (point 9).

[39] ECHR Judgment, *Clooth v. Belgium*, of 12.12.1992 (§ 50). Available: https://hudoc.echr.coe.int/eng?i=001-57699 [accessed: 14.07.2022].

[40] ECHR Judgment, *Labita v. Italy*, of 06.04.2000 (§ 171). Available: https://hudoc.echr.coe.int/eng?i=001-58559 [accessed: 06.08.2022].

may not release him immediately, because the respective confirmations are required from the responsible persons, who may be absent at that time in the interest of work. The Court admits such situations, only it indicates that the respective term must be reduced to a minimum."

In the case *Calmanovici v. Romania*[41], "*The Court notes that the parties agree that the judgment of September 20, 2005 ordering the applicant's parole became final and executory on September 26, 2005, at midnight. The Court recalls that, in examining the period of execution of a release decision, it did not ignore periods such as evening and night in other cases where the conditions required for the applicant's release were met at a time when the prison employee responsible for certain operations necessary in this goal was absent due to his work schedule (see Labita, cited above, §§ 24 and 172, and Rashid versus Bulgaria, no. 47905/99, §§ 31-32 and 79-80, 18 January 2007). (...) the notification of the penitentiary regarding the final nature of the decision, had to be carried out by the court of first instance, by a clerk or a delegated judge until closing time, the Court nevertheless considers that, even if such a delay can be considered unavoidable, it was up to the authorities to exercise particular diligence on 27 September 2005 to minimize the time needed to release the applicant, who had already spent another night in prison.*"

From the analysis of ECHR jurisprudence, we find that, when the person must be released, for various reasons, but this fact cannot take place during certain periods of time (for example, during the night or outside working hours), or for bureaucratic reasons (confirmation of the act of release of the person - the prosecutor's order or the conclusion of the investigating judge, or even an acquittal or conviction without deprivation of liberty), the person is detained until the impediments disappear and immediately released. Those obstacles must be reduced to a minimum. For example, if the release time is at night and the responsible person is absent, when the last one comes to work, the person will be immediately released.

In accordance with art. 166 paragraph (6) of the Code of Criminal Procedure, "*The term provided for in paragraph (5) flows from the moment of deprivation of the person's liberty. In that term is included the time for carrying out the procedural actions immediately following the moment of depriving the person of his liberty until the preparation of the report of detention, in the situation where the person was effectively constrained in his freedom of movement during the execution of these measures.*" For example, in the situation where the criminal investigation body searches the person who is alleged to have committed the crime and there are stolen goods, the term of the search must be included in the term

[41] ECHR Judgment, *Calmanovici v. Romania*, of 01.07.2008 (§ 77). Available: https://hudoc.echr.coe.int/eng?i=001-87195 [accessed: 06.08.2022].

of detention, because the person's right to leave the home or to move freely has been restricted. At the moment when the search lasted 5 hours, and after that the person was escorted to the headquarters of the criminal investigation body and was detained by law (preparation of the minutes of detention), we consider that this is a violation of the inviolability of the person and art. 5 of the ECHR. Or, the respective report must be drawn up within 3 hours of the *de facto* deprivation of liberty.

According to art. 166 paragraph (7) of the Code of Criminal Procedure, "*The person detained under the conditions of this article must be brought as soon as possible, from the moment of detention, before the investigating judge to be examined the question of the arrest or, as the case may be, of his release.*" This procedural norm corresponds to the rigors of art. 5 § 3 of the ECHR.

In the ECHR case, Labita v. Italy[42], the Court "*reiterates that the list of exceptions to the right to liberty secured in Article 5 § 1 is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim of that provision, namely to ensure that no one is arbitrarily deprived of his or her liberty (see, among other authorities, the Giulia Manzoni v. Italy judgment of 1 July 1997, Reports 1997-IV, p. 1191, § 25, and the Quinn v. France judgment of 22 March 1995, Series A no. 311, pp. 17-18, § 42).*"

In the case Pantea v. Romania[43], *"The Court reiterates that Article 5 § 3 of the Convention requires that judicial review take place rapidly, the promptness in each case having to be assessed according to its special features (see De Jong, Baljet and Van den Brink, cited above, pp. 24-25, §§ 51-52). However, the scope of flexibility in interpreting and applying the notion of promptness is very limited (see Brogan and Others v. the United Kingdom, judgment of 29 November 1988, Series A no. 145-B, pp. 33-34, § 62), as prompt judicial review of detention is also an important safeguard against ill-treatment of the individual (see Aksoy, cited above, p. 2282, § 76)."*

Art. 166 paragraph (7) of the Code of Criminal Procedure, also regulates the fact that, "*The prosecutor, until the expiration of the term provided for in art. 308 paragraph (12), will issue an order for the release of the detained person or, as the case may be, will submit the arrest motion to the investigating judge.*" The release of the detained person takes place in the cases provided for in art. 174 paragraph (1) of the Code of Criminal Procedure, namely:

1) credible reasons to suspect that the detained person committed the crime were not confirmed;

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[42] ECHR Judgment, *Labita v. Italy*, of 06.04.2000 (§ 170).

[43] ECHR Judgment, *Pantea v. Romania*, of 03.06.2003 (§ 240). Available: https://hudoc.echr.coe.int/eng?i=001-65679 [18.09.2022].

2) there are no grounds to continue depriving the person of his liberty;
3) the criminal investigation body found an essential violation of the law when the person was detained;
4) the retention period has expired;
5) the court did not authorize the preventive arrest of the person.

In the ECHR case, *Cristina Boicenco v. Moldova*[44], the Court "*reiterates that the illegal detention of a person represents a total denial of the fundamental guarantees provided for in Article 5 of the Convention and an extremely serious violation of this provision. Failure to record data such as date and time of arrest, place of detention, name of detained person and reasons for detention, as well as the identity of the official responsible person, is a violation of the requirements regarding the legality of detention and the very purpose of Article 5 of the Convention (Kurt v. Turquie, decision of 25 May 1998, § 125, and Çakıcı v. Turquie [GC], no. 23657/94, §§ 104 and 105, ECHR 1999-IV).*"

A first guarantee regulated in domestic legislation is the one provided for in art. 167 paragraph (2) of the Code of Criminal Procedure, in other words, "*The reasons for the immediate detention are made known to the detained person only in the presence of an elected defender or a duty lawyer who provides emergency legal assistance*." This norm corresponds to art. 5 § 2 of the ECHR.

In the ECHR case, Khlaifia and Others v. Italy[45], the Court held that, "*Paragraph 2 of Article 5 lays down an elementary safeguard: any person who has been arrested should know why he is being deprived of his liberty. This provision is an integral part of the scheme of protection afforded by Article 5: any person who has been arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his deprivation of liberty, so as to be able to apply to a court to challenge its lawfulness in accordance with paragraph 4 (...).*"

The detained person must be informed of the reasons for his deprivation of liberty immediately, i.e., in the shortest possible time. In the case Fox, Campbell and Hartley v. the United Kingdom[46], the Court noted that, "(...) *this information must be conveyed "promptly" (in French: "dans le plus court délai").*"

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[44] ECHR Judgment, *Cristina Boicenco v. Moldova*, of 27.11.2011 (§ 43). Available: https://hudoc.echr.coe.int/eng?i=001-124080 [accessed: 16.09.2022].

[45] ECHR Judgment, *Khlaifia and Others v. Italy*, of 15.12.2016 (§ 115). Available: https://hudoc.echr.coe.int/fre?i=001-170054 [accessed: 17.09.2022].

[46] ECHR Judgment, *Fox, Campbell and Hartley v. the United Kingdom*, of 30.08.1990 (§ 40). Available: https://hudoc.echr.coe.int/eng?i=001-57721 [accessed: 14.10.2022].

There are situations when the detained person, for various objective reasons (for example, mental development, or limited exercise capacity, etc.), does not understand the reasons for the detention or limitation of his rights. In such situations, the judicial bodies must inform the lawyers, legal representatives or other persons about them.

In the ECHR case, Z.H. v. Hungary[47], the European Court found that, "*(...) if the condition of a person with intellectual disability is not given due consideration in this process, it cannot be said that he was provided with the requisite information enabling him to make effective and intelligent use of the right ensured by Article 5 § 4 to challenge the lawfulness of detention unless a lawyer or another authorized person was informed in his stead (see X. v. the United Kingdom, no. 6998/75, Commission's report of 16 July 1980, § 111, Series B no. 41).*"

Art. 167 of the Code of Criminal Procedure also grants other guarantees for detained persons, namely [48]:

- *The criminal investigation body is obliged to ensure conditions for the confidential meeting between the detained person and his defense counsel until the first hearing*. That provision guarantees the effective right to defense;

- *In the case of the detention of the minor, the person carrying out the criminal investigation is obliged to communicate immediately this to the prosecutor and the parents of the minor or the persons who replace them*. This provision grants additional guarantees to the minor deprived of liberty, as the parents must know about the circumstances of the act, the location of the minor and other circumstances, implicitly in order to get involved as soon as possible in the process as a legal representative to defend the interests of the minor;

- *The detained person will be heard in accordance with the provisions of art. 103 and 104, if he agrees to be heard*. In the ECHR case, Samoilă and Cionca v. Romania[49], the Court held that, "*A hearing is required for persons detained under the conditions set out in Article 5 § 1 c) (Kampanis versus Greece, decision of 13 July 1995, Series A no. 318-B, p. 45, § 47). In particular, a process involving an appeal against detention or its extension must guarantee equality of arms between the parties, the prosecutor and the prisoner (Nikolova versus Bulgaria [GC], no. 31195/96, § 58, ECHR 1999-II and Włoch versus Poland, no. 27785/95, § 126, ECHR 2000-XI).*";

[47] ECHR Judgment, *Z.H. v. Hungary*, of 08.11.2012 (§ 41). Available: https://hudoc.echr.coe.int/fre?i=001-114276 [accessed: 14.10.2022].

[48] Art. 167 paragraphs (2/1)-(6) of the Code of Criminal Procedure.

[49] ECHR Judgment, *Samoilă and Cionca v. Romania*, of 04.03.2008 (§ 68). Available: https://hudoc.echr.coe.int/eng?i=001-85326 [accessed: 14.10.2022].

- *The person who carries out the detention has the right to subject the detained person to a physical search under the conditions of art. 130 of the Code of Criminal Procedure*. At the time of detention, the respective search is not authorized. In the same way, the search of persons in the home where the search is carried out is also not authorized. In the other cases, unless the person gives consent, unforced by anyone, the body search will be authorized;

- *If during the apprehension the presence of injuries or bodily injuries of the detained person is established, the person carrying out the criminal investigation will immediately inform the prosecutor, who will immediately order the performance of a medico-legal examination or, as the case may be, a medico-legal expertise in order to determine the origin and nature of the injuries or lesions*. This provision provides guarantees regarding the inadmissibility of torture, which derives from the content of art. 11 paragraph (9) of the Code of Criminal Procedure.

After the arrest of the person, it will be decided whether it is the case of the application of coercive procedural measures depriving of liberty or the release of the detained person. If it is decided to apply the arrest, the prosecutor, having the grounds indicated in art. 176 of the Code of Criminal Procedure, will issue an ordinance pursuant to art. 177 of the Code of Criminal Procedure, and then will submit a reasoned application to the investigating judge (art. 308 of the Code of Criminal Procedure).

"Although, from a procedural point of view, detention is different from preventive arrest, according to ECHR jurisprudence, both criminal detention is a deprivation of liberty (see decision *Străisteanu and Others v. Moldova*, April 7, 2009, §§85-88, or Lazoroski v. Macedonia, October 8, 2009, §44), as well as preventive arrest or house arrest (see the decision Mancini v. Italy, no. 44955/98, §17; or Nikolova v. Bulgaria (no. 2), no. 40896/98, §§60 and 74, 30 September 2004). Thus, the guarantees established against an illegal deprivation of liberty are equally attributed to both procedural coercion actions."[50]

As for the content and procedure of examining the approach regarding the application of preventive detention, we have previously explained[51], therefore we will not refer here.

In the ECHR case, Brogan and Others v. the United Kingdom[52], the Court held that, "*(...) whether an "arrest" or "detention" can be regarded*

[50] Tudor, Osoianu, Mihaela, Vidaicu,. *Rights of Suspects in Police Detention: A Research Conclusion*, Chisinau, Cartier Juridic, 2015, p. 30.

[51] Tudor,Osoianu, Dinu, Ostavciuc, *The judicial control of criminal proceedings*, Chisinău, Military Book, 2021, p. 108-119.

[52] ECHR Judgment, *Brogan and Others v. the United Kingdom*, of 29.11.1988 (§ 65). Available: https://hudoc.echr.coe.int/eng?i=001-57450 [accessed: 15.09.2022].

as "lawful" has to be determined in the light not only of domestic law, but also of the text of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 paragraph 1 (art. 5-1) (see notably the above-mentioned Weeks judgment, Series A no. 114, p. 28, paragraph 57). By virtue of paragraph 4 of Article 5 (art. 5-4), arrested or detained persons are entitled to a review bearing upon the procedural and substantive conditions which are essential for the "lawfulness", in the sense of the Convention, of their deprivation of liberty."

"*Generalizing the jurisprudence of the European Court in the matter, in Decision no. 3 of February 23, 2016, the Constitutional Court established that there are grounds for depriving the person suspected of committing a crime of the risks: 1) his evasion of the trial; 2) affecting the performance of justice; 3) commission of other crimes; 4) production of public disorders. These reasons must not be combined, the existence of a single reason being sufficient for the application of preventive detention. Risks must be demonstrated by evidence based on facts (§§ 73, 93, 94).*"[53]

Regarding the stated risks, we note that they correspond to the grounds for applying the detention; therefore, they will not be repeated. The exception is only the last risk – the production of public disorders.

"The fact that there are suspicions that a person has committed a serious crime does not automatically mean that he must be arrested. The European Court has accepted that, due to the particular gravity and society's reaction to the resonance of this crime, certain crimes can generate public disorder, which could justify preventive arrest.

However, this risk must be imminent and can only be invoked in exceptional circumstances, only for a certain period of time and only if evidence has been presented to prove that releasing the person will disturb public order. The invocation of the risk that the release of the person will cause public disorder is only valid during the period of the risk of social disturbances (see decision Tiron v. Romania, 7 April 2009, § 41-42; decision Letellier v. France, 26 June 1991, § 51). The risk that the person's release will cause public disorder should not depend solely on the nature of the offense of which the person is accused. Therefore, in each specific case, the prosecutor must present evidence regarding the risk of public disorder, its nature, extent and duration. The judge must take into account the scale of the disorder and the obligation of the authorities to ensure public order. The

[53] Decision of the Constitutional Court of the Republic of Moldova no. 15 of 28. 05.2020 *regarding the exception of unconstitutionality of article 191 paragraph (2) of the Code of Criminal Procedure (provisional release under judicial control [2])* (point 50).

mere fact that a small part of society insists on arrest should not automatically lead to the arrest of the person."[54]

"*The arrest of the person must be ordered as an ultima ratio. In its jurisprudence, the Court established that the investigation of the person in a state of freedom is a rule.* ***The presumption is always in favor of release*** **(pro freedom)** (and so on)."[55]

Therefore, the arrest of a person is not a rule, but an exception and only in the cases and conditions regulated by the criminal procedural law. Jurisprudence "explicitly enshrines the *rule that criminal trials must, in principle, be conducted with the suspect or the accused in a state of freedom* – normal aspect, since freedom is the natural state of any person, and the suspect and the accused benefit, during the criminal trial, from the presumption of innocence."[56]

The conclusion of the investigating judge regarding the application of the arrest must be motivated. In the ECHR case, Mihuţă v. Romania[57], the Court notifies that, "*after the case was sent to court, the decisions ordering the continuation of the applicant's detention were either insufficiently reasoned or lacked any reason at all (...). Therefore, these judgments could not be considered compatible with the requirements of an effective judicial review of the legality of the detention in question*."

"Courts, when adopting a reasoned decision, must be aware of the fact that by doing so they demonstrate to the parties of the trial that they have been heard. Furthermore, a reasoned decision gives the parties the possibility of contesting it, as well as the possibility of reforming the decision by the court of appeal, or, by pronouncing a reasoned decision, the public examination of the administration of justice is ensured. The reasons relied on by the courts in their decisions regarding placing the suspect/accused in custody or extending the arrest cannot be limited to paraphrasing the grounds provided by the Code of Criminal Procedure, without explaining how they are applied in the specific case. The conclusion that does not refer to the materials that support the judge's conclusion and in which the arguments of the defense pleading against the arrest are not contested is not a reasoned conclusion of arrest (see decision Feraru v. Moldova, 24 January

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[54] Decision of the Plenum of the Supreme Court of Justice of the Republic of Moldova no. 01 of 15.04.2015 *on the application by the courts of some provisions of the criminal procedure legislation regarding preventive arrest and house arrest* (point 11).

[55] Decision of the Constitutional Court of the Republic of Moldova no. 15 of 28. 05.2020 *regarding the exception of unconstitutionality of article 191 paragraph (2) of the Code of Criminal Procedure (provisional release under judicial control [2])* (point 52).

[56] Bogdan, Micu, Radu, Slăvoiu, Andrei, Zarafiu, *The criminal procedure*, Bucharest, Hamangiu. 2022, p. 25.

[57] ECHR Judgment, *Mihuţă v. Romania*, of 31.03.2009 (§ 43). Available: https://hudoc.echr.coe.int/eng?i=001-91923 [accessed: 03.10.2022].

2012, §§ 59-66). The justification for taking preventive measures must be done in such a way that it does not leave the target person or a third party to understand that the judge is certain of the guilt of the person who is still in the process of the trial."[58]

The arrested person, in accordance with the requirements of art. 5 paragraph 4 of the ECHR, benefits from an effective appeal before the court. In the case, *Mihuță v. Romania*[59], the Court holds that, "*although the applicant exercised the remedy indicated by the trial court (see paragraphs 9 and 14 above), the county court did not examine his pleas regarding the illegality of his pre-trial detention. However, such an examination was all the more necessary since the court that ordered the maintenance of the measure did not give reasons for its decisions and did not examine the applicant's arguments regarding the lack of justification for such a measure (Svipsta cited above, §§ 130-134, and vice versa, Van Thuil cited above).*"

The inviolability of the person guarantees not only the deprivation of liberty of the person (detention or arrest), but also the restriction of liberty (for example, hospitalization of the person into medical institutions for expertise).

In the ECHR case, De Tommaso v. Italy[60], the Court mentioned that: "*(...) The difference between deprivation and restriction of liberty is one of degree or intensity, and not one of nature or substance (see Guzzardi, cited above, §§ 92-93; Nada v. Switzerland [GC], no. 10593/08, § 225, ECHR 2012; Austin and Others v. the United Kingdom [GC], nos. 39692/09, 40713/09 and 41008/09, § 57, ECHR 2012; Stanev v. Bulgaria [GC], no. 36760/06, § 115, ECHR 2012; and Medvedyev and Others v. France [GC], no. 3394/03, § 73, ECHR 2010) (...).*"

In the ECHR case, Storck v. Germany[61], the Court notifies that, "*it is undisputed that the applicant was placed in a locked ward there. She was under the continuous supervision and control of the clinic personnel and was not free to leave it during her entire stay there of approximately twenty months. When the applicant attempted to escape it had been necessary to shackle her in order to keep her in the clinic. On the one occasion she managed to escape, she had had to be brought back by the police. She was also unable to maintain regular social contact with the*

[58] Decision of the Plenum of the Supreme Court of Justice of the Republic of Moldova no. 01 of 15.04.2015 *on the application by the courts of some provisions of the criminal procedure legislation regarding preventive arrest and house arrest* (point 32).

[59] ECHR Judgment, *Mihuță v. Romania*, of 31.03.2009 (§ 44).

[60] ECHR Judgment, *De Tommaso v. Italy*, of 23.02.2017 (§ 80). Available: https://hudoc.echr.coe.int/eng?i=001-171805 [accessed: 02.10.2022].

[61] ECHR Judgment, *Storck v. Germany* of 16.06.2005 (§ 73). Available: https://hudoc.echr.coe.int/eng?i=001-69374 [accessed: 02.10.2022].

outside world. Objectively, she must therefore be considered to have been deprived of her liberty."

"*However, the notion of deprivation of liberty within the meaning of Article 5 § 1 does not only include the objective element of the detention of a person in a certain restricted space for a not inconsiderable period of time. A person can be considered to have been deprived of liberty only if, as an additional subjective element, he did not validly consent to the detention in question (see, mutatis mutandis, H.M. v. Switzerland, cited above, § 46).*"[62]

Hospitalization of the person is another sensitive subject of procedure, which can affect the right to private life and freedom by virtue of art. 5 and 8 of the ECHR.

A regrettable case on this aspect for the Republic of Moldova is the David v. Moldova case of 27.11.2007,[63] the Court reiterates the fact that if a person initially agreed to his admission to a psychiatric institution for the performance of expertise, nothing prevents him from later refusing and leaving that institution, so that the continuous detention of the applicant from the moment he expressed his intention to leave the hospital constitutes a "deprivation of liberty", thus interference with the right to liberty. The person expressing the consent is from the start released from a forced hospitalization, having the right to leave the medical institution at any time and no one has the right to prevent this will as long as a conclusion regarding the forced hospitalization has not been issued in respect of him.

During the criminal investigation, the investigating judge, authorized by law to order forced internment, issues the court decision. This desideratum is regulated in art. 41 point 4) of the Code of Criminal Procedure - The investigating judge ensures judicial control during the criminal investigation by ordering the person's hospitalization into the medical institution.

At the same time, in accordance with the provisions of art. 301 paragraph (3) of the Code of Criminal Procedure, "*..., hospitalization of the person in a medical institution for the performance of the judicial expertise, ... it is done with the authorization of the investigating judge*."

Analyzing the stated provisions, we find that when, during the criminal investigation, there is a need to carry out a judicial expertise in the hospital, and the suspect (accused) refuses to be hospitalized in order to assess and examine him, the investigating judge issues a reasoned decision for forced hospitalization for the purpose stated.

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[62] ECHR Judgment, *Storck v. Germany*, of 16.06.2005 (§ 74).

[63] ECHR Judgment, *David v. Moldova*. Available: http://hudoc.echr.coe.int/eng?i=001-127751 [accessed: 01.11.2021].

In the following we will refer to the admission procedure, the grounds and reasons for forced admission, the powers of the criminal investigation body and the prosecutor in cases where there is a need to admit the person to the medical institution, as well as the procedure for examining the approach regarding the forced admission of the person to the healthcare institution.

Thus, according to the provisions of art. 152 paragraph (1) of the Code of Criminal Procedure, "*If for the performance of the medico-legal or psychiatric expertise there is a need for long-term supervision, the suspect, the accused, the defendant can be hospitalized in a medical institution. This is recorded in the ordinance or conclusion by which the judicial expertise was ordered.*"

Therefore, at the criminal investigation stage, if for the performance of the judicial expertise (medico-legal or psychiatric) forensic doctors or psychiatrists need more time to supervise the suspect or the accused, in order to finally make objective conclusions on the object of the expertise, the criminal prosecution body is obliged to indicate this fact in the ordinance ordering the expertise.

In other words, the law dictates the fact that when the criminal investigation body orders the medico-legal or psychiatric expertise, it will expose, in the same ordinance, the forced hospitalization of the person into the medical institution.

We consider that the stated aspects do not correspond to the principle of the inviolability of the person, because at the stage of issuing the order determining the expertise, the criminal prosecution body cannot know how much time a judicial expert needs to carry out an expertise or another. Respectively, the determination of the time for carrying out the medico-legal or psychiatric expertise is decided by the expert and not by the criminal investigation body. Thus, the disposition of expertise that does not require hospitalization (outpatient) or that requires this hospitalization (inpatient) is dictated by medical and not legal judgment.

Based on the above, we are of the opinion that when the criminal investigation body finds the grounds provided in art. 142 paragraph (1) of the Code of Criminal Procedure, it will issue the order for the disposition of the judicial expertise. If long-term surveillance of the suspect or the accused is necessary for the performance of medico-legal or psychiatric expertise, the criminal investigation body will issue another order determining forced hospitalization in the medical institution.

This ordinance will be issued in accordance with the provisions of art. 255 of the Code of Criminal Procedure. In addition to the conditions mentioned in art. 255 of the Code of Criminal Procedure, the order for the forced internment of the suspect or the accused must include, mandatorily,

the reasons for the internment, the behavior of the person during the procedural actions (for example during the hearing), the analysis of the medical documents of the suspect or the accused (for example, the medical card, which mentions the fact of the treatment of a psychiatric illness), the mention of the suspect or the accused in the records of the narcologist or psychiatrist, the analysis of the statements of other participants in the trial (for example, the statements of the victim or witnesses from which the inappropriate behavior of the suspect, the accused results) and other aspects related to the case.

Similarly, all the mentioned aspects must be analyzed in relation to the circumstances of committing the illegal act. It is very important for the criminal investigation body to request from the expert institution the information regarding the need for long-term surveillance of the suspect or the accused. If the prosecuting body will not request that information, at least it will be obliged to hear the judicial expert to determine the appropriateness of internment. On the other hand, after all, this decision has a medical tone, and respectively, only doctors can communicate about the duration of medical investigations. This information must be reflected in the internment order and analyzed together with the other evidence. Only in this way, can the criminal investigation body justify its order and determine the forced internment of the suspect or the accused.

In the case Filip v. Romania of 14.12.2006,[64] it was found that the applicant was admitted to a psychiatric institution for a period of 88 days. In this Judgment the ECHR reiterates the fact that one of the elements necessary for the "legality" of detention in the sense of art. 5 of the ECHR is the lack of arbitrariness. Deprivation of liberty is such a serious measure that it is only justified when less severe measures have been analyzed and considered insufficient to protect the personal or public interest that requires detention, in our case transposed by internment. The plaintiff being hospitalized for an indefinite period based on the decision of the prosecutor's office taken without the opinion of an expert doctor having been obtained beforehand. The prosecutor's office only ordered an expert examination one month after his admission, after receiving the complaint of the applicant who criticized the legality of the security measure on the grounds that such an examination had not been ordered either before or after his admission, which had already been 80 days. The Court estimates that the prior evaluation by a psychiatrist was indispensable, taking into account in particular the fact that the applicant had no history of mental disorders. In any case, it was not an emergency hospitalization, plus the doctor's request regarding the need to extend the hospitalization period was

[64] ECHR Judgment, *Filip v. Romania*, of 14.12.2006. Available: http://hudoc.echr.coe.int/eng?i=001-123269 [accessed: 20.10.21].

missing, thus limiting the plaintiff's right without a legal basis, his hospitalization being arbitrary and illegal. (§§ 59-60)

Conclusions

In order to obtain the expected results, it is necessary to take into account all the circumstances of the case, the reasons and the purpose of the crime, data regarding the illnesses that the person suffered, the previous behavior but also the behavior of the person during the trial,[65] all this as a whole will elucidate the complete picture of the suspect/accused's personality for making the correct decision regarding the need for internment.

In support of the mentioned idea comes the analysis of the text "*there is a need for supervision*" stipulated in art. 152 paragraph (1) of the Code of Criminal Procedure. Thus, the question arises - when does this need arise and who actually makes the decision in this regard? It is natural, as we mentioned before, that the need for supervision is decided only by doctors and by no means by criminal prosecution bodies. By the way of explanation, from the moment when the doctors will inform the criminal investigation body about the need for hospitalization, only then will be established the presence of the factual basis for the forced hospitalization of the person in the medical institution.

In order not to leave room for ambiguous interpretations, we consider it necessary that art. 152 paragraph (1) of the Code of the Criminal Procedure to be amended and completed in such a way as to provide for the issuance of the reasoned order for the forced admission of the person in the medical institution, other than the order for the disposition of judicial expertise.

The ECHR emphasized in the case of H.L. v. Great Britain,[66] the absence of procedural rules regarding the detention of the incapacitated person, in contrast to the multitude of guarantees that apply in ordinary cases. As a result of the lack of procedural rules, medical staff assumed full control over the liberty and treatment of a vulnerable individual based on clinical assumptions alone, and although the Court did not question their good faith or failure to act in favor of the claimant, the purpose of the existence of guarantees is to protect individuals against professional errors and omissions. The absence of these rules of procedure led, in the opinion of the Court, to the arbitrarily taking of the measure, and therefore to the violation of art. 5 of the ECHR.

The analysis of internal procedural rules shows that they mostly correspond not only to international acts, but also to the provisions of Directive 2013/48/EU of the European Parliament and of the Council of

[65] Poalelungi Mihai, *Guide for judges in criminal cases*. Chisinau. 2013, p. 1024.

[66] ECHR Judgment, *H.L. v. Great Britain*, of 05.01.2005. Available: http://hudoc.echr.coe.int/eng?i=001-185580 [accessed: 24.10.2020].

October 22, 2013 regarding the right to have access to a lawyer in criminal proceedings and European Arrest Warrant procedures, as well as the right for a third party to be informed following deprivation of liberty and the right to communicate with third parties and consular authorities during deprivation of liberty. With reference to the provisions of art. 166 paragraph (1) point 3) of the Code of Criminal Procedure, we consider that its text contains a legal tautology, for which reason we propose to exclude the text "*or in his transport unit*", because the domicile of the person is indicated. Moreover, according to art. 6 point 11) of the Code of Criminal Procedure, as well as the jurisprudence of the Constitutional Court and ECHR, the transport unit (car) is considered domicile.

At the same time, art. 166 paragraph (3) of the Code of Criminal Procedure also establishes other reasonable grounds, which assume that the suspect: *Will avoid prosecution*. The ground in question must be proven. Many times, the criminal investigation body or the prosecutor formally indicates this basis, that is, illusory. The law requires the motivation of procedural documents (for example, art. 308 paragraph (6) of the Code of Criminal Procedure, establishes that, "*The prosecutor is obliged to justify the reasonable suspicion and the grounds for applying preventive arrest. Omission of such an obligation constitutes grounds for rejection of the approach*"), including by proving the grounds, and otherwise the law also provides for procedural sanctions. Data or documents proving that the person will evade criminal prosecution will serve as an argument for this reason (for example, purchase of plane tickets, booking hotels abroad, presence of real estate or business, etc.). At the same time, the severity of the sanction can justify the application of this ground.[67]

The basic rule established by the criminal procedural rules is that detention is applied only if criminal prosecution is initiated (art. 55 paragraph (4), art. 165, art. 166, art. 274 paragraph (1), art. 279 of the Code of Criminal Procedure). There is only one exception to the general rule, provided for in art. 166 paragraph (4) of the Code of Criminal Procedure, which consists in the fact that detention can be applied until the crime is registered. This rule applies only to the mature person (who has reached the age of 18 at the time of committing the criminal act). This exceptional rule regulates that the registration of this crime, of which the adult person is suspected, must take place immediately, but no later than 3 hours from the moment when the adult person is brought to the criminal prosecution body. Otherwise, the adult person will be released, except when the person has

[67] Other arguments are indicated and explained in point 8) of the Plenary Decision of the Supreme Court of Justice of the Republic of Moldova no. 01 of 15.04.2015 *on the application by the courts of some provisions of the criminal procedure legislation regarding preventive arrest and house arrest*.

been detained by the masters of ships and aircraft in their capacity as ascertaining authorities (handover of the detained person takes place when the ship has docked or the aircraft has landed).

Analysis of art. 166 paragraph (4) of the Code of Criminal Procedure denotes that the detention of the mature person takes place in cases of flagrant offence. However, according to us, that norm should be amended and supplemented, so that the word *"mature"* should be excluded. Therefore, when a person will commit a criminal act and will be caught red-handed, having the legal grounds for detention, the competent judicial bodies can apply this coercive measure also regarding the minor, who will be the subject of the given crime. Alternatively, the current rule lacks the criminal investigation body and the prosecutor to detain minors until the crime is registered (in *flagrante delicto*), even if they have committed serious, particularly serious or exceptionally serious crimes (for example, a murder). In addition, having committed a crime in *flagrante delicto*, the criminal investigation body is obliged to carry out procedural actions in order to administer the evidence, including body search, hearing and others (including those with the participation of the minor).

The term of detention of the minor – subject of the crime (14-18 years, depending on the seriousness of the committed act) cannot exceed 24 hours from the moment of his deprivation of liberty (*de facto* detention).

An important aspect is that, when the grounds for detaining the person have expired, he must be released immediately, without waiting for the maximum limit for this coercive measure to expire. For example, the person being caught red-handed is detained by the criminal investigation body, having several grounds, including the complaint and statements of the victim. More than 36 hours after the apprehension, the victim withdraws his complaint under art. 275 point 6), 276 of the Code of Criminal Procedure. The person must be released immediately without waiting for the 72-hour period to expire. Another example is when, after the arrest, it is found that the elements of the criminal offense do not exist, or there is a definitive decision regarding the act for which the person is detained, etc. Precisely from these situations, the criminal procedural law has established that, "*The period of detention must not be longer than what is strictly necessary for his holding*." (art. 166 paragraph (5) of the Code of Criminal Procedure).

Problems can arise when the lapse of grounds takes place outside working hours, or there is an order of the prosecutor to release the detained person, which must be immediately implemented, but the person is in detention, where there is a certain work regime, and a simple employee cannot make decisions. The question arises: how do we proceed in these cases? The answer to the question was found in ECHR jurisprudence.

Art. 166 paragraph (7) of the Code of Criminal Procedure establishes that the prosecutor can release the person until the expiration of the term provided for in art. 308 paragraph (12). We propose to amend and supplement the respective rule, as it is not clear which rules are being considered. On the other hand, art. 308 of the Code of Criminal Procedure contains only 10 paragraphs. We also consider that the legislator may have had in mind art. 308 paragraph (3) of the Code of Criminal Procedure, in other words, the deadline for submitting the request regarding the application of preventive detention. However, it is imperative to amend and complete the text "art. 308 paragraph (12)".

It should be noted that the person cannot be detained repeatedly for the same reasons (art. 174 paragraph (2) of the Code of Criminal Procedure). We propose to amend and supplement this procedural rule, because, in our opinion, it can be interpreted ambiguously. Alternatively, the released person can be detained for the same reasons (mentioned in art. 166 of the Code of Criminal Procedure), but for the reasonable suspicion of committing another crime, other than the one for which he was detained and subsequently released. Thus, the legislative intervention in art. 174 paragraph (2) of the Code of Criminal Procedure is imposed, as it regulates not only the same grounds, but also for the same deed.

Art. 167 of the Code of Criminal Procedure regulates the procedure of detaining the person. According to art. 167 paragraph (1) of the Code of Criminal Procedure, "*For each case of detention of a person suspected of committing a crime, the criminal investigation body, within up to 3 hours from the moment of deprivation of liberty, prepares a minutes of detention, indicating the grounds, reasons, place, the year, month, day and time of detention, the physical condition of the detained person, complaints regarding his health, what he is wearing (description of clothing), explanations, objections, requests of the detained person, the request to have access to a medical examination, including on his own account, the act committed by the person in question, the results of the body search of the detained person, as well as the date and time of the preparation of the report. The minutes are brought to the attention of the detained person, at the same time they are given written information about the rights provided for in art. 64, including the right to remain silent, not to testify against himself, to give explanations that are included in the minutes, to benefit from the assistance of a defense attorney and to make statements in his presence, fact that is mentioned in the minutes. The arrest report is signed by the person who drew it up and by the arrested person who is immediately given a copy of it. Within up to 3 hours after the arrest, the person who drew up the minutes presents to the prosecutor a written communication about the arrest.*" According to us, criminal procedural

legislation provides sufficient guarantees for detained persons. However, we are of the opinion that the detained person should not only be given a copy of the information regarding his rights, but that these rights must be explained concretely to the detained person in an accessible and understandable language. Therefore, we propose to amend and complete art. 167 paragraph (1) of the Code of Criminal Procedure, so that according to the text "*at the same time, he is given written information about the rights provided for in art. 64*", should be introduced the following text "*and these rights are explained to him in an accessible and understandable language*".

In practice, there are cases when the criminal prosecution body does not indicate in the report the grounds for detention, limiting itself only to the fact that the person is suspected of the crime for which he is detained. This fact is inadmissible, otherwise the minutes can be canceled and the detention will be considered illegal.

Compulsorily, the minutes regarding the person's detention must include all the data indicated in art. 167 paragraph (1) of the Code of Criminal Procedure, implicitly the place, year, month, day and time of (*de facto*) detention, date, time, year and place of drawing up the minutes, etc.

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