PARTICULAR ASPECTS RELATING TO THE RIGHT TO PRIVATE AND FAMILY LIFE OF PERSONS DEPRIVED OF THEIR LIBERTY IN THE LIGHT OF ART. 8 ECHR

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Abstract

Basically, the scope of art. 8 ECHR is to protect individuals against arbitrary interference of public authorities with their private and family life. The need to comply with this desideratum may require certain positive obligations on a State to ensure effective respect for the rights protected by art. 8.

These obligations may involve the adoption of specific measures, including the provision of effective and accessible means of protecting the right to private life.

Such measures, in turn, may include both the adoption of a regulatory framework for judicial and enforcement mechanisms to protect the rights of individuals and the implementation, where appropriate, of such measures in different circumstances.

This paper aims to address the compatibility of existing provisions in national law on the participation of persons deprived of their liberty in tragic family events, such as funerals of close relatives, with the provisions of the ECHR and the case-law of the Court of Strasbourg from the perspective of the observance of the right to private and family life

Keywords: *art. 8 ECHR, private and family life, remand in custody, rights of persons deprived of their liberty, criminal proceedings.*

1. Introduction

The topic of this study falls within the scope of the fundamental human rights, with focus on analysing the right to respect for private and family life for persons in detention, in the light of art. 8 ECHR. The study focuses on a vulnerable category – people deprived of their liberty following final convictions or under remand in custody measure – and how their legal status (defendant/deprived of liberty/convicted) affects the exercise of key rights such as maintaining family relationships and attending special family events.

The importance of this research derives both from its theoretical implications – in clarifying the boundaries between the rights that can be restricted in detention and those that must be guaranteed to persons deprived of their liberty – and from a practical perspective, given the recurrent difficulties encountered in the application of the ECHR standards at national level. The study aims to identify the relevant European standards in this area and to comparatively analyse how they are transposed into national legislation and case-law.

The methodology used is a mixed, doctrinal and jurisprudential one, consisting of a systematic analysis of ECHR case-law, the relevant domestic regulations (in particular Law no. 254/2013 regulating the execution of preventive measures and custodial sentences, the Code of Criminal Procedure - CPP, regulations and orders), as well as the judgements of the relevant national courts in cases involving the application of art. 8 ECHR in the prison environment. Considerations of comparative law are also taken into account, where case-law developed in other European countries can contribute to a better understanding of the margin of appreciation of States.

As far as the state of knowledge in this area is concerned, the specialised literature contains relevant contributions on the application of fundamental rights in detention, but detailed analysis of the right to private and family life, in connection with specific situations such as participation in family events, remains relatively fragmentary. Furthermore, issues relating to the distinction between the regime applicable to persons remanded in custody and that applicable to sentenced persons are often insufficiently discussed in the legal literature, despite the direct impact on the exercise of the rights protected by art. 8 ECHR. Therefore, the scope of this study is to contribute to the coverage of this area by providing an integrated and up-to-date analysis of the issues related to some of the rights of persons deprived of their liberty.

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2. Theoretical and practical issues arising from the analysis of art. 8 ECHR

The right to respect for private and family life, provided for by art. 8 ECHR, is one of the fundamental guarantees of the European legal order in the field of human rights. This right applies to all natural persons, whether or not they are deprived of their liberty.

Interference by a public authority with the exercise of this right shall not be permitted except in cases where such interference is prescribed by law and is necessary in a democratic society in the interests of national security, public safety, the economic well-being of the country, for the prevention of disorder or crime, for the protection of public order, for the protection of health or morals or for the protection of the rights and freedoms of others.

Far from being an absolute right, it may be subject to limitations, but only to the extent that the interference is prescribed by law, pursues a legitimate aim and is necessary in a democratic society. The applicability of this right in the prison environment raises a number of conceptual and practical difficulties arising from the structural tension between the specific nature of detention – which unavoidably entails a restriction of individual liberty – and the requirements of respect for the dignity and identity of the individual, including in the context of deprivation of liberty. However, for people deprived of their liberty, maintaining family relationships becomes essential, both for their personal psychological balance and for the perspective of social reintegration.

ECtHR has consistently reiterated in its case-law that detention does not lead to a total withdrawal of the exercise of the rights guaranteed by the Convention. Persons deprived of their liberty continue to benefit from the protection conferred by art. 8 ECHR, and any restriction of the rights guaranteed by this article must be subject to a strict proportionality test. The right to private and family life covers a wide range of dimensions, from the right to personal identity, dignity and emotional life, to the protection of family relationships, mail and communications, sexual life, but also religious or philosophical beliefs.

In the light of detention, these dimensions may be affected by a range of administrative, disciplinary or security measures, the effects of which need to be analysed according to the specific circumstances of each case. The Court has developed a comprehensive case-law on, for example, the refusal of prison authorities to allow intimate visits or direct contact with family members, surveillance of telephone calls, or limited access to means of communication[1].

It should be noted that the notion of „family" in art. 8 refers to relationships based on marriage and also to other „family ties" where the parties live together without being married or where factual circumstances have shown that the relationship has been sufficiently constant[2].

An essential part of the right of a person deprived of liberty to respect for family life consists in helping the person in question to maintain contact with close persons with whom he/she has family ties[3]. The possibilities for a person deprived of liberty to visit a family member in a medical clinic[4] or to attend the latter's funeral[5] fall under the scope of the same right.

3. ECtHR case-law against Romania

In *Case Kanalas v. Romania*[6], on 21.03.2014, the plaintiff requested permission from the administration of Oradea Penitentiary to attend the funeral of his mother, which was to take place on 24.03.2014, at 12 p.m.

On 24.03.2014, at 09.00 a.m., the Reward Committee, pursuant to art. 98 para. (1) letter e) and art. 99 para. (1) letter e) of Law no. 254/2013, rejected the applicant's request. The reasons for the rejection were linked to: the length, the nature of the sentence and the execution regime (12 years and 6 months imprisonment for attempted aggravated murder, high-security prison), but also the fact that the prisoner had already received a reward during the same month.

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[1] *Case Ciupercescu v. Romania* (no. 3) (app. no. 41995/14 and no. 50276/15), 07.01.2020, para. 105, available at *https://hudoc.echr.coe.int*.

[2] *Case Paradiso and Campanelli v. Italy* (MC), 2017, item 140, Guide on art. 8 ECHR.

[3] *Case Chaldayev v. Russia* (app. no. 33172/16), para. 59, available at *https://hudoc.echr.coe.int*.

[4] *Case Ulemek v. Croatia* (app. no. 21613/16), 31.10.2019, para. 152 *et seq.*, available at *https://hudoc.echr.coe.int*.

[5] *Case Schemkamper v. France* (app. no 75833/01), 10.10.2005, para. 31, available at *https://hudoc.echr.coe.int*.

[6] *Case Kanalas v. Romania*, (app. no. 20323/14), 06.12.2016, available at *http://hudoc.echr.coe.int/eng?i=001-176053*, last consulted on 31.03.2021, 11.01 a.m.

The Court recalled that an interference with private life does not violate the Convention if it is „prescribed by law", has at least a „legitimate aim" within the meaning of art. 8 para. 2 ECHR and may be regarded as „necessary in a democratic society".

As regards the applicant's situation, it noted that the interference in question was prescribed by law [art. 98 para. (1) and art. 99 para. (1) of Law no. 254/2013] and pursued a legitimate aim within the meaning of art. 8 para. 2 ECHR – namely the protection of public order and public security and the prevention of criminal offences[7]. Instead, the Court held that the prison administration did not examine the possibility of appointing an escort to transfer the applicant to the place of the funeral, emphasizing that temporary release measures can contribute to the social reintegration of a prisoner, even if he has been convicted of violent crimes. Therefore, the refusal of the authorities **was not** „necessary in a democratic society", art. 8 ECHR being violated.

In *Case Gosav and others v. Romania*[8], plaintiffs were in detention, serving sentences, when the deaths of close family members (father, mother) occurred.

Their requests to attend funerals were rejected by the administrations of the places of detention for a variety of reasons. In case of the first plaintiff, the prison authorities justified the refusal on grounds of (i) far-off parole date, (ii) the fact that he was undergoing continuous psychiatric treatment and (iii) the lack of financial means, and in the case of the second plaintiff (i) incomplete documentation (death certificate) and (ii) lack of information on financial means. Finally, the following were pleaded in case of the third applicant (i) the nature of the offense (rape) and (ii) the length of the sentence, whereas in the case of the last applicant the fact that he had been sanctioned one year previously.

The Court found a violation of art. 8 ECHR as the interference with the applicants' family life was not justified and proportionate. The Court held that the national authorities did not carry out a factual analysis of the applicants' requests, nor did they examine each request in particular. The authorities did not allow the plaintiffs to correct or clarify the requests, although this would have been possible and reasonable, and the excessive formalism led to disproportionate interference. Moreover, the alternative of escorting them to funerals was not seriously considered in any case, while in the case of one of the convicted men, the refusal of the authorities was communicated to him after the funeral had taken place, which completely nullified any possible remedy.

The Court also held that a potential complaint to the custody supervisory judge, under the conditions and within the limits of Law no. 254/2013, was not an effective remedy and therefore concluded that the applicants had no remedy (against the prison administration's refusal) within the meaning of art. 35 § 1 ECHR.

In *Case Timiș and others v. Romania*[9], applicants Timis Gheorghe, Otvoș Robert, Negru Vasile and Lupu Salvador were in detention when the deaths of close relatives (mother, father) occurred. They submitted requests to the prison administration for temporary release from prison in order to attend funerals. As clearly resulted from the documents communicated to the Court by the National Penitentiary Administration, the prison's 'reward committee' rejected the applicants' requests. The reasons given by the commission concerned (i) the length of the sentence and the nature of the offense (aggravated murder), (ii) criminal record, (iii) the low number of family visits during the year, (iv) the far-off parole date, (v) the lack of indication of the date and time of funeral, financial resources and itinerary to be followed to attend the funeral, or (vi) unrevoked disciplinary sanctions.

Similar to the reference judgment in *Case Kanalas v. Romania* (no. 20323/14, 06.12.2016), the Court found a violation in relation to issues similar to those contemplated by this case. In particular, the Court criticized the national authorities for failing to strike a balance between the existing interests, namely the applicant's right to respect for his family life on the one hand and the maintenance of public order and security and the prevention of criminal offences, on the other. Furthermore, The Court found that the prison administration did not examine at all the possibility of using an escort to transfer the applicant to the place where the funeral was to take place.

The Court therefore found a violation of art. 8 ECHR and recalled that, although the right to be granted temporary release from prison is not guaranteed as such by the Convention, the reasons given by the national authorities for refusing the applicants' requests for temporary release from prison in order to attend the funeral

[7] Having regard in particular to the seriousness of the offense committed, it appeared to have been intended to prevent the applicant from taking advantage of his release from prison to commit crimes or to disturb public order or public safety.

[8] *Case Gosav and others v. Romania* (app. no. 52526/17 and other 3), available at *http://hudoc.echr.coe.int*.

[9] *Case Timiș and others v. Romania* (app. no. 54903/17 and other 3), available at *http://hudoc.echr.coe.int*.

of close relatives are not sufficient to demonstrate that the interference at issue was „necessary in a democratic society".

An analysis of the ECtHR case-law shows that the right of persons deprived of their liberty to benefit from the possibility to leave the place of detention is not guaranteed as such by the Convention. Nevertheless, the refusal of a prisoner's request to attend the funeral of a close family member represents an interference with the right to respect for private and family life within the meaning of art. 8 ECHR[10]. The authorities of a State may, however, manifest such a refusal where the latter interference is prescribed by law, pursues one of the legitimate aims set out in art. 8 § 2 ECHR and is necessary in a democratic society, i.e. proportionate to the aim pursued.

The Court has held that, in such situations, the positive obligations of the State imply the existence of an effective mechanism through which the detainee (convicted or remanded in custody) can request and obtain, under certain conditions, participation in family events, and the automatic refusal, not based on an individualized analysis, is contrary to the requirements of art. 8 even if there is a margin of discretion for the State, since it is limited in relation to the seriousness of the interference and the need to protect the emotional life of the person in detention.

This last requirement is essential and requires a proportionality analysis taking into account: (i) the seriousness of the reason claimed (e.g. death of a parent or child), (ii) the real security risks involved in the movement of the detainee, (iii) the possibility of organizing the escort in a reasonable manner, (iv) the previous conduct of the detainee (including possible disciplinary sanctions) and (v) the degree of emotional and psychological damage that would be caused if the detainee did not participate.

The Court has repeatedly emphasized the need for States not to treat these requests in an automatic or formalistic manner, but to have an effective and flexible legal mechanism in place which allows for an individualized assessment of the circumstances. The absence of such a mechanism – either because the legislation does not provide for the procedure or because the authorities apply it rigidly – may lead to a breach of the state's positive obligations.

In addition, refusal to attend the funeral of a close relative must be considered in the light of the profound emotional impact of such an event. The Court has expressly recognized that the inability to say goodbye to a loved one can cause intense psychological distress, including affecting the process of social reintegration and respect for human dignity.

4. Analysis of the legal provisions applicable to persons serving custodial sentences or to persons remanded in custody

Law no. 254/2013 regulates the execution of punishments and measures of deprivation of liberty ordered by judicial bodies during criminal proceedings. Art. 98 para. (1) letters e)-g) lists, among the rewards that may be granted to convicted persons who have shown good conduct, the *„temporary release from prison"*. According to art. 99 para. (1) letter e) of Law no. 254/2013 the temporary release from prison may be granted, under the conditions of art. 98, *i.e.*, as a reward for good conduct in detention by a special commission within the prison, for the participation of the convicted person in the funeral of a husband, wife, child, parent, brother or sister, or grandparent, for no more than 5 days, to all convicted persons except those serving a custodial sentence in high-security prison.

According to the Regulation of 2016 for the application of Law no. 254/2013[11] „*temporary release from prison*" is a reward granted to prisoners who are consistently positive, hard-working and actively participate in educational, cultural, therapeutic, psychological counselling and social work, schooling and vocational training activities.

The following aspects shall also be taken into account when verifying whether the conditions for granting the reward are met: the nature of the crime committed; the length of the sentence; the execution regime; the number and type of rewards previously granted; the period served, in relation to the length of the sentence still to be served before the parole commission review; the criminal history; membership in organized crime groups; the conduct on return to the penitentiary from a previously granted leave from the penitentiary; pre-arrest behaviour and how the prisoner is known in the community; the prisoner's personal file will be taken into

[10] *Case G.T. v. Greece* (app. no 37830/16), 13.12.2022, para. 68, available at *https://hudoc.echr.coe.int*.
[11] Published in the Official Gazette of Romania no. 271/11.04.2016, art. 213.

account in particular; maintaining links with family members, persons with whom they have established family-like relationships, and the community; suspicion of possession, consumption or trafficking of prohibited objects and substances.

The prisoner's request to leave the penitentiary in the case referred to in art. 99 para. (1) letter e) of the Law shall be accompanied by a copy of the death certificate, provided free of charge by the prison administration, as well as by the indication of the place where the prisoner is to go, the route to be followed and the financial means available to him/her for the period of the temporary release from prison. The prison administration shall be bound to request information from the competent authority concerning the alleged death.

As regards persons remanded in custody, they cannot be granted *„temporary release from prison*[12]*"*, as unequivocally follows from the provisions of art. 110 para. (1) letter e) of the Law no. 254/2013. According to this article, in case of persons remanded in custody, provisions IX of Title III (Rewards, misconduct and disciplinary sanctions), in so far as they do not conflict with the provisions of this title, shall apply accordingly, with the exception of the temporary release from prison provided for in art. 98 para. (1) letters e)-g).

In other words, according to the Law no. 254/2013 regulating the execution of punishments and deprivation of liberty measures, the defendants remanded in custody cannot leave the detention and remand centre to attend tragic family events. Neither the Code of Criminal Procedure nor the Regulation on the Organization and Functioning of Detention and Remand Centres[13] contains any provisions contradicting this conclusion.

A brief analysis of national legislation shows that:

(i) Law no. 254/2013 regulates temporary release from prison exclusively for convicted persons, in the form of a reward; defendants remanded in custody cannot benefit from this possibility, thus establishing a different treatment between the two categories of persons deprived of their liberty;

(ii) The Code of Criminal Procedure (Law no. 135/2010) does not provide for a specific procedural route for temporary release from the remand centre for humanitarian purposes;

(iii) The regulations issued in application of the execution law do not contain rules on the temporary release from the place of detention of persons remanded in custody, even in exceptional circumstances.

After Romania was sanctioned by the ECtHR, the national legislator did not fulfil its obligation to amend the legislation in accordance with the obligations undertaken at the international level and with the principles arising from the case-law analysed above.

The national legal provisions in force appear to disregard art. 14 ECHR, which protects persons in similar situations from being subject to unjustifiable different treatment in order to enjoy their rights and freedoms under the Convention. Such a difference of treatment is discriminatory if it is not objectively and reasonably justified, in other words, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim pursued.

In our opinion, there is no reason for such discriminatory treatment between convicted persons and persons remanded in custody, the situation being similar to that found by the Court in its judgment of 23.06.2015 in *Case Costel Gaciu v. Romania*[14] (app. no. 39633/10), when ECtHR found a violation of art. 14 in conjunction with art. 8 ECHR.

By way of comparison, until the publication of CCR dec. no. 222/2015[15], the right to intimate relationships was not granted to persons remanded in custody, nor was temporary release from the detention centre. The Court, admitting the unconstitutionality exception, found that the provisions of art. 69 para. 1 letter b) of the Law no. 254/2013 (relating to the exception to the right to intimate relationships for persons remanded in custody) are unconstitutional holding that *the situation of persons remanded in custody and persons sentenced to custodial sentences is not different. During the execution of remand in custody measures and final custodial sentences, the persons thus detained are, from the perspective of the right to intimate visits, in objectively similar legal situations, so that the different legal treatment established by the Law no. 254/2013 is not based on a legitimate and reasonable justification.*

[12] Reward provided for by art. 98 para. (1) letter e)-g) of the Law no. 254/2013.

[13] Published in the Official Gazette of Romania no. 212/08.03.2018.

[14] *Case Costel Gaciu v. Romania* (app. no. 39633/10), 23.09.2015, para. 52 *et seq.*, available at *https://ier.gov.ro*.

[15] Published in the Official Gazette of Romania no. 380/02.06.2015.

It should be noted that Recommendation Rec(2006)2-rev of the Committee of Ministers to member States on the European Prison Rules[16] which applies, according to art. 10.1 of its content, both to persons remanded in custody by a judicial authority and to persons deprived of their liberty following a conviction, especially, Rule nr. 24.7 *„Whenever circumstances allow, the prisoner should be authorised to leave prison either under escort or alone in order to visit a sick relative, attend a funeral or for other humanitarian reasons.*"

It can therefore be unreservedly maintained that the relevant national rules infringe the provisions of art. 16 of the Constitution of Romania according to which *„Citizens are equal before the law and public authorities, without any privilege or discrimination"* and of art. 24 *„The public authorities shall respect and protect the intimate, family and private life".*

5. National case-law aspects

There is one case where, by the application filed with the dockets of the Court of Appeal of Cluj on 15.05.2023, defendant LPI, remanded in custody in Gherla Penitentiary, requested temporary release from the remand centre in order to attend his mother's funeral, claiming art. 8 ECHR.

The court held that the defendant has been on remand since 26.07.2021, *i.e.*, for more than 1 year and 9 months, being accused of committing drug offenses, and at the date of the application the case was at the appeal stage, the first instance having pronounced a judgment sentencing the defendant to execution in detention.

The court, by final judgment[17], under art. 8 and 14 ECHR, art. 12 of the Universal Declaration of Human Rights in connection with art. 16, art. 20, art. 21 and art. 26 of the Constitution of Romania **admitted the application filed by defendant LPI**, currently on remand in Gherla Penitentiary, to attend his mother's funeral on 17.05.2023 from 11:00 until the end of the ceremony, namely 16:00 at the latest.

It was also ordered that, during the entire journey from Gherla Penitentiary to the funeral and back, the defendant should be accompanied by police officers from the Police Inspectorate of Cluj County or from Gherla Penitentiary, who would take the measures deemed necessary.

In order to pronounce the judgment, the court took into account the provisions of art. 21 of the Constitution of Romania according to which *every person is entitled to bring cases before the courts for the defence of his legitimate rights, liberties and interests. The exercise of this right shall not be restricted by any law.*

By referring to art. 203 para. (6) CPP, it held that, in the course of the trial, until the final judgment in the case, the court is competent to rule on the right to liberty, the right to privacy (given that the preventive measures entail restrictions/limitations to this right) and other fundamental rights and freedoms of the defendants arising from the restrictions and limitations inherent in the preventive measures. As a result, an application for the authorization to leave the place where the remand in custody measure is being executed (in this case Gherla Penitentiary), for a specific period of time, is related to the execution of the remand in custody measure, essentially concerning the fundamental rights and freedoms of the person during the trial, in the configuration indicated above (right to private life/family life).

By referring to ECtHR case-law developed in *Case Costel Gagiu v. Romania*, the court held that the existence of a situation of inequality between persons already convicted, who are allowed to leave the place of detention and persons under preventive measures cannot be tolerated in the context of the need to comply with the treaties and conventions to which Romania is a party and that, in accordance with the provisions of art. 20 para. (2) of the Constitution of Romania „where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence".

In the light of the above, the court found that state interference in family life is prescribed by law, its purpose is to protect public order and public safety and to ensure the smooth conduct of the criminal proceedings, but it is not necessary in a democratic society given the dangerousness of the defendant, the stage of the proceedings in the case (the defendant having been sentenced to imprisonment at first instance) and the context in which the defendant is to be escorted to the place where the funeral is to take place, in which there is no indication that the defendant's presence would be likely to pose any risk to public order.

[16] Adopted by the Committee of Ministers on 11.01.2006, available at *https://rm.coe.int*.
[17] CA Cluj, Case no. 5520/117/2021/a17, preliminary criminal ruling no. 182/16.05.2023.

The Court also noted that the fact of not giving the defendant the permission to participate in the funeral given that domestic legislation does not provide any grounds for persons remanded in custody to be considered in a different situation from those convicted by a final judgment in the event of the death of their close relatives, in circumstances in which there is no obvious real and present danger to public order, a danger of resumption of criminal activity or of hindering the establishment of the truth or of evading prosecution, is equivalent to unjustified discrimination, which must be avoided.

In another case[18], filed with the same dockets of the Court of Appeal of Cluj, the court admitted the appeal filed by the Public Prosecutor, Public Prosecutor's Office attached to the HCCJ, DIICOT – Cluj Territorial Service, against preliminary criminal ruling no. 92/21.04. 2023 of the Tribunal of Cluj, which it dismissed in its entirety and, by delivering a new judgment, **rejected as inadmissible the application of defendants BS and BBS** for temporary release from prison to attend the funeral of a close family member.

In order to pronounce the judgment, the court held that, by preliminary criminal ruling no. 92/21.04.2023 of the Tribunal of Cluj, the plea of lack of general jurisdiction of the courts of law raised by the representative of the Public Prosecutor was rejected, and, on the basis of art. 8 and 14 ECHR, art. 12 of the Universal Declaration of Human Rights in conjunction with art. 16 para. (1), art. 20, art. 21 and art. 26 of the Romanian Constitution and art. 203 para. (6) CPP, the applications filed by defendants BS and BBS, remanded in custody in Gherla Penitentiary, were admitted, and permission was granted for them to participate, under escort, in the funeral of the deceased[19]. The same operative part established that the judgment is enforceable as regards the admission of the application to participate in the funeral and that this disposition must be enforced.

The court of judicial control held that the Tribunal pronounced an unlawful decision because the law does not provide for a jurisdiction to analyse such a request made by the defendants, which cannot be included in the provisions of art. 203 para. (6) CPP, *„in the course of the trial, the court shall rule on preventive measures by substantiated decision",* since they concern the taking, maintenance, revocation, replacement of the preventive measure or the finding that the preventive measure has ceased by law, and not the ordering of measures relating to the execution of the preventive measure.

Since defendants BS and BBS did not request the revocation or replacement of their remand in custody measure in order to be able to attend the funeral of their stepfather and father-in-law, but only a measure relating to the execution of their remand in custody, their request exceeds the jurisdiction of the court and should have been rejected as inadmissible, as requested by the Public Prosecutor.

At the same time, the court of judicial control found that the decision of the court of first instance (the Tribunal) on the granting of temporary release from prison was wrong, given that it did not fall within any of the situations expressly provided by law in art. 550 CPP, since it was neither a final judgment, nor a case in which the law provides that a judgment, even if not final, is enforceable.

Summarizing the aspects of non-uniform practice, the legal issue arising from the legislator's inability to rule in accordance with the principles deriving from the ECtHR case-law is the following: can the court hearing a criminal case directly analyse a application filed by the defendants to participate in tragic family events?

The question is legitimate since, in case of convicted persons, the jurisdiction to settle such an application lies with the special committee within the prison and has the legal nature of a reward for good conduct in detention.

If the application is rejected, the person deprived of liberty may resort to the custody supervisory judge, in accordance with art. 56 para. (2) of the Law no. 254/2013 „the convicted persons may file a complaint with the custody supervisory judge against the measures concerning the exercise of the rights provided for by this law, taken by the prison administration, within 10 days as of the date on which they became aware of the measure taken".

Finally, the convicted person and the prison administration may file appeal against the decision of the custody supervisory judge with the court with jurisdiction over the place of the prison, within 5 days as of the date of the communication of the decision[20].

[18] CA Cluj, Case no. 5408/117/2022/a4, crim. dec. no. 102/03.05.2023.
[19] Stepfather, respectively defendants' father-in-law.
[20] Art. 56 para. (9) of the Law no. 254/2013.

In our opinion, the applications filed directly with the courts are inadmissible and the decisions to uphold such applications infringe the rules on the functional jurisdiction of the courts and the principle of the legality of criminal proceedings.

In a broad sense, jurisdiction is „the scope of the tasks that each category of judicial bodies has to perform, according to the law, in criminal proceedings[21]*"*. Judicial bodies shall be bound to carry out their judicial functions only in accordance with their functional jurisdiction, the latter rule designating „*the categories of activities that a judicial body may carry out[22]"*.

The rules of criminal procedure regulate the conduct of the criminal trial and other judicial proceedings in connection with a criminal case and are enacted in compliance with the principle of legality enshrined in art. 2 CPP, according to which *„The criminal trial shall be conducted in accordance with the provisions of the law".*

The provisions of art. 4 of the Law no. 304/2022 on judicial organization are in the same respect: „the jurisdiction of judicial bodies and judicial procedure shall be established by law*".* According to this principle, criminal proceedings must be conducted, at all stages, in compliance with the law, and disregard of the legal provisions governing its course shall be sanctioned according to the regime of nullity. In particular, the procedural provisions governing the functional jurisdiction of the courts are mandatory rules, the infringement of which shall be subject to the sanction of absolute nullity.

In deciding on the merits of the applications filed by the defendants remanded in custody, the courts have applied their own procedure, which is not provided for by law, and have made impermissible additions to it. In other words, the courts have '*legislated*', by interfering within the jurisdiction of the legislature, which alone can regulate the way in which such a legal situation is to be resolved. Furthermore, they have opened procedural remedies not provided for in the rules of criminal procedure, which exceed the functional jurisdiction of the courts, and have made enforceable certain provisions of judgments where the rules of criminal procedure did not confer such an enforceability on them.

It is true that according to art. 21 of the Romanian Constitution, free access to justice cannot be limited in any way, and every person is entitled to bring cases before the courts for the defence of his legitimate rights, liberties and interests and the exercise of this right shall not be restricted by any law.

Nevertheless, the right of access to a court is not an absolute right, and the competent authorities may impose certain limitations on the exercise of this right, provided that these limitations are provided for by law, pursue a legitimate aim, are necessary in a democratic society and the restriction is proportionate to the aim pursued (*Case Ashingdane v. UK, Case Golder v. UK*).

We consider that, the only procedure regulated by law by which persons deprived of their liberty (regardless of whether they are convicted or remanded in custody during the trial) can leave the place of detention is the one provided for by the provisions of the Law no. 254/2013, analysed above, which implies addressing the request to the special commission within the penitentiary[23] or remand centre[24] and, in the event of an unfavourable response, the filing of a complaint with the custody supervisory judge, and then of the appeal with the court with jurisdiction over the place of the prison.

To judge otherwise would be to admit that the courts can apply, as they have in fact done, a differentiated legal treatment between convicted persons serving a prison sentence in prison – and for whom the procedure before the special commission is applied – and persons remanded in custody during the trial – who can resort directly to the court, which is unacceptable.

A difference in treatment is discriminatory if it is not objectively and reasonably justified, in other words, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim pursued. ECtHR has established that a person remanded in custody may claim to be in a situation comparable to that of a convicted person, in so far as aspects of family life are raised[25].

In our opinion, even remanded detainees can and must follow this procedure, even though art. 110 para. (1) letter e) of the Law no. 254/2013 excludes them from the possibility to benefit from the „temporary *release from prison*".

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[21] I. Neagu, M. Damaschin, *Tratat de procedură penală. Partea generală* (Treaty on criminal procedure. General Part), Universul Juridic Publishing House, Bucharest, 2014, p. 336.

[22] B. Micu, R. Slăvoiu, A. Zarafiu, *Procedură penală* (Criminal Procedure), 2nd ed., Hamagiu Publishing House, Bucharest, 2024, p. 96.

[23] Established according to art. 99 of the Law no. 254/2013.

[24] Established according to art. 110, art. 99 of the Law no. 254/2013.

[25] *Case Laduna v. Slovakia* (app. no. 31827/02), 13.12.2011, para. 58, available at *https://hudoc.echr.coe.int*.

We take into account that, by means of Law no. 30 of 18 May 1994, published in Official Journal no. 135 of May 31, 1994, Romania ratified the European Convention for the Protection of Human Rights (ECHR), as well as its additional protocols no. 1, 4, 6, 7, 9, 10.

In this way, according to art. 11 and 20 of the Constitution, the Convention and its additional protocols have become an integral part of domestic law, taking precedence over it, in other words, the ECHR and its additional protocols have become a source of mandatory and priority domestic law, which, at national level, has as an immediate consequence the application of the Convention and protocols by the Romanian courts, and at international level the acceptance of the control provided by the ECtHR with regard to national court decisions.

This means that, if the remand prisoner's request to have his right to family life respected is rejected by the remand committee, the custody supervisory judge or the court has the possibility to directly apply the ECHR provisions and the principles derived from the ECtHR case-law and to examine the legal situation of the person deprived of liberty on the merits, by reference to the latter and to the criteria laid down in the implementing law and national regulations.

It should also be noted that the custody supervisory judge/court is not obliged to admit the application filed by the person deprived of liberty, but to make a particular examination of the situation of the person deprived of liberty, weighing up the right to respect for the detainee's family life on the one hand, and the need for public safety or to prevent the commission of new crimes, on the other hand.

ECtHR ruled in the same respect in *Case Guimon v. France*[26] where it was held that there was no violation of art. 8 ECHR in the light of the refusal to allow the applicant to leave the prison under escort to go to the funeral home to pay homage to her father's remains, as the authorities had carried out a balanced analysis between the detainee's right to respect for her family life and public safety, preventing disturbances and the commission of new crimes.

6. Latest amendments of national legislation

GD no. 850/2023[27] amended Regulation of 2016 implementing Law no. 254/2013 and introduced a new article – art. 214^1 the marginal title of which is „Presentation of the prisoner at the funeral of a spouse, child, parent, brother or sister or grandparent".

According to the Explanatory Note[28], the introduction of art. 214^1 in the Regulation, aimed to remedy the issues found by ECtHR in *Cases Bragadireanu v. Romania* and *Kanalas v. Romania*, which found violations of the rights set out in art. 3 and 8 ECHR in the context of not being granted the possibility to leave the place of detention to attend the funeral of a close relative.

Thus, in the situation of prisoners under high security regime or prisoners for whom the special commission or, as the case may be, the General Director of the National Penitentiary Administration rejects the proposal to grant the reward with temporary release from prison for the case provided for in art. 99 para. (1) letter e) of the Law, the Director of the Penitentiary shall analyse the possibility of presenting the prisoner, regardless of the regime of execution of the sentence to which he/she is assigned, at the place where the funeral is taking place.

For this purpose, the Director of the prison shall consider (i) the category to which the prisoner belongs; (ii) the duration of the mission and the time remaining until the funeral takes place; (iii) the distance to the destination; and (iv) other reasons that may jeopardize the safe execution of the mission.

We express our doubts as to whether this legislative amendment will lead to the elimination of the non-conformities identified by the ECtHR with regard to national legislation, by establishing a regulation that is practically running in parallel with the procedure before the custody supervisory judge. The legislator does not establish whether the prison director examines ex officio the possibility of presenting the prisoner at the place of funeral or at the request of the commission or of the detainees, what is the legal nature of the administrative act he draws up, whether it can be appealed separately, in the ordinary procedure, or to the custody supervisory judge, etc. In addition, it does not clarify the legal situation of remanded in custody serving the measure in detention and remand centres.

[26] *Case Guimon v. France* (app. no 48798/14), 11.04.2019, para. 50-52, available at *https://hudoc.echr.coe.int*.

[27] Published in the Official Gazette of Romania no. 849/20.09.2023.

[28] Available at *https://gov.ro/ro/guvernul/procesullegislativ/note-de-fundamentare/nota-de-fundamentare-hg-nr-850-14-09-2023&page=142#null*.

All this at a time when the ECHR held that a possible complaint to the custody supervisory judge, under the conditions and within the limits of the Law no. 254/2013, was not an effective remedy and therefore concluded that the applicants had no remedy against the prison administration's refusal within the meaning of art. 35 §1 ECHR[29].

7. Conclusions

Beyond the conclusions presented in the study, we consider that the legislator has to intervene in order to establish a clear, predictable, coherent and unitary legislative mechanism, which would allow the temporary release of persons deprived of their liberty from detention for the purpose of attending exceptional family events (under escort, under strict conditions).

A swift judicial procedure with clear deadlines and the possibility to appeal against the refusal of the administration of the place of detention is mandatory.

Nevertheless, awaiting a legislative reform, art, 8 ECHR must be applied as a matter of priority by the national courts, on the basis of art. 20 para. (2) of the Constitution because respect for family life is not a privilege but an essential component of human dignity.

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[29] *Case Gosav and others v. Romania*, previously cited.