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ABOUT THE (in)ADMISSIBILITY OF THE PRESIDING JUDGE'S ORDER PROMOTED BY THE PATIENTS WITH INCURABLE DISEASES WITH THE PURPOSE OF INSURING SUBSIDIZED MEDICAL TREATMENT FOR THEMSELVES

Georgeta-Bianca SPÎRCHEZ[1]

Abstract: *The presiding judge's order is that special procedure that we have to observe in cases where the prompt action of justice is needed, being, therefore, a very useful proceeding means, that might be used, in practice, by people for whom the passing of time necessary for following all the bureaucratic procedures and observing all the proceeding discipline of common law is vital, this because their life is subject to a real and imminent risk. We are referring, specifically, to those patients with incurable diseases, oncological, for whom the appropriate efficient medical treatments are extremely expensive and who, beyond the difficult fight with the disease, must fight the "system", from which they do not get favorable, rapid responses as they were supposed to, so to not come to a tragic ending. Within this analysis context, we are interested in following the manner in which the courts invested with presiding judge's order exercised in circumstances like this, have assessed the fulfilment of the special conditions of admissibility for this procedural tool.*

Key words: *presiding judge's order, right to life, provisional measures*

1. Introductory considerations regarding the presiding judge's order. Scope. The compatibility of the procedure for the presiding judge's order with the contentious administrative matters procedure

According to art. 997, paragraph 1 of the Civil Procedure Code "the court, establishing that the common opinion is in favor of the plaintiff, can order provisional measures in pressing cases, in order to maintain a right which may be prejudiced by delay, in order to prevent imminent damage that is also irreparable, as well as in order to remove any obstacles which may arise along with the occasion of an enforcement".

Thus, on the basis of the text cited, in the legal doctrine-Boroi and Stancu (2015, p.805) there have been retained, alongside the general conditions required for the

[1] *Transilvania* University of Braşov, Law faculty, georgeta-bianca.spirchez@unitbv.ro

exercise of the civil action, three special conditions of admissibility of the request for a presiding judge's order: urgency, temporary/provisional nature of the measure requested in this manner and lack of prejudgment of the substance matter by the measure ordered by the court within the respective special procedure.

With regard to the scope of this special procedure, it is pointed out- Boroi,and Stancu (2015, p.814) that, in principle, one can make use of this legal instrument in relation to any kind of litigation, regardless if a request has also been filed with regard to the substance matter of the right, as long as there are no regulations providing other special procedures for ordering the urgent measure.

Of course, in relation to formulating the count/counts inferred to judgement via presiding judge's order, the court shall appraise the admissibility, being also subject to compliance with the provisions of art. 997 paragraph 5 of the Civil Procedure Code according to which "via presiding judge's order, no measure can be ruled which would resolve the litigation in substance, nor any measures the enforcement of which would no longer make possible re-establishing the state of affairs."

Starting from these latter legal considerations, it is assessed (Leș, 2015), on the basis of the application of the case law established in the matter, that "an obligation to act cannot be ruled by a presiding judge's order except for cases that strive to cease abusive acts, because only in this manner the transient nature of the measures taken can be maintained".

Within this regulatory context, the study herein proposes to examine, punctually, the issue of using, in practice, the presiding judge's order, by the patients with incurable diseases, oncological diseases, for which the adequate medical treatments, efficient treatments, are extremely expensive and who, beyond the arduous battle with the disease, must also handle a battle with the "system", from which they do not receive favorable answers, without delay, such as it should be the case in order to reach a tragic end. For these patients, the use of the legal instrument of the presiding judge's order can be a viable solution, as the condition of urgency is fully met, this being because their life is subject to a real and imminent risk, time thus being principal in performing the therapeutic conduct in good conditions. We estimate that such presiding judge's orders justify their admissibility, even with respect to the interpretation that obligations to act cannot be ordered by means thereof, because, the large majority of cases strive to eliminate an abusive attitude of the state authorities, attitude that can affect a legitimate right.

The main count of such presiding judge's orders usually concerns the coercion of defendants, state authorities, such as The National Health Insurance Fund, The County Health Insurance Fund respectively, the National Drug Agency or the Ministry of Health, depending on the case, to provide the plaintiff with the treatment prescribed by the attending physician, subsidized in proportion of 100%, until the resolution of the action initiated with regard to the substance matter of the right. Although, in many of the cases consulted, such authorities understand to invoke the substantive procedural exception of lack of standing to bring proceedings, I have noticed that the courts tend to reject such exception, considering, with regard to the special legislation, that they are the authorities involved in the process of elaborating the list of drugs that those insured in

the social health insurance system benefit from. Moreover, especially relevant in assessing their abusive conduct, the following case law accounts have drawn our attention, for the reasons of Decision no. 140/25.09.2019 of the Galați Court of Appeal: "Instead of coordinating their efforts for accelerating formalities for re-evaluation of the drugs, without justifying any objective impediment thereto, the responsible defendant authorities attempt to abscond themselves from liability, declining jurisdiction one in favor of the other [...] which once again points out the lack of involvement and the disregard towards the insured citizen"

Considering that to a very large extent, such cases are administrative court matters, in order to correctly outline the scope of the presiding judge's order, another law issue arises - that of the compatibility of this procedural measure with the subject matter of the administrative courts.

In this regard, in order to remove the idea of inadmissibility, *de plano*, of the presiding judge's order, substantiated on this law issue, first must be taken into consideration the general applicability of the Civil Procedure Code, formulated by art. 2 of the Civil Procedure Code which states: "(1) The provisions of the Code herein constitute the common law procedure in civil matters. (2) Also, the provisions of the code herein are applicable in other matters as well, to the extent to which the laws regulating them do not include provisions to the contrary".

With regard to explaining that which must be understood by civil matter, we shall take into consideration the comments made alongside this text of law- Ciobanu and Nicolae (2016, p.7), as follows: "In the sense of the Code, civil matter refers, of course, to any private law relation, regardless of the nature, object, origin or capacity of the parties, professionals or non-professionals. Therefore, it is not only about the civil law *lato sensu*, meaning private law in general. As common law, the New Code also applies in the subject matter of public law, because, as it is known, there are no courts, within the courts of law system or outside this system, that resolve only public law litigations and, as already shown, nor are there distinct procedure codes, applicable to such litigations. At this time, there can be, at most, specialized sections or panels and some derogatory procedural guidelines".

At the same time, also relevant within the same area of analysis, are the provisions of art. 28, paragraph 1 of Law no. 554/2004 of the contentious administrative matters according to which: „the provisions of the law herein are to supplemented by the provisions of the Civil Code and by those of The Civil Procedure Code, to the extent to which they are not incompatible with the specific nature of the power relations between public authorities, on one hand, and the parties wronged in terms of legitimate rights or interests, on the other hand.".

In relation to all aspects previously stated, considering that we cannot find in the special law - that of the contentious administrative matters, derogatory provisions that prohibit the application of this special procedure in administrative court litigations, or on the contrary, that provide other special procedures to be followed for situations in which the court's assistance is required in ordering urgent measures, it leads to the conclusion that requests for presiding judge's orders can be formulated in matters of administrative contentious as well, as long as the special admissibility conditions are

met, stated in art. 997 of the Civil Procedure Code. For that matter, this seems to also be interpretation of our courts (Decision no. 140/2019 of the Galati Court of Appeal).

Upon researching the legal practice, outlined around resolving cases that constitute the object of our research, we find it useful to set forth below the reasoning of magistrates charged with judging such presiding judge's orders. The cases selected are of recent dates, each with its own particularities, offering a few judicious reference points, in our opinion, in examining the special conditions for admissibility of requests for presiding judge's order.

2. The condition of urgency in relation to the protected value - a person's life

In examining this special admissibility condition for the president's judge's order, on an introductory basis, we find especially relevant the statements in a case decision (Decision no. 573/2019 of the Bucharest Court of Appeal), in relation to the particularities of the presiding judge's order formulated in the circumstances researched by us. Thus, "in case the value endangered is in fact a person's life [...] the limits of assessing the «urgent case» are essentially broader, being sufficient the reasonable assumption that in the absence of the requested measure, a danger situation may arise, even without submitting evidence in proof beyond any doubt of this fact."

Before relating several instances of urgent measures requested to be ruled, via a presiding judge's order, we find it appropriate to refer to the main regulations that legitimate the right to life and to interpretations developed in relation thereto, that are of interest to the subject matter of the study herein.

In this regard, we shall first relate to our constitutional provisions, namely to art. 22 of our fundamental law, according to which "the right to life, as well as the right to an individual's physical and psychological integrity are guaranteed." (par. 1). In order to guarantee this right, the aspects suggestively expressed in the specialized literature are to be noted (Ionescu, 2016, p.83): "the essence of the constitutional provisions included in art. 22 of the Fundamental law is not a liberation, in the legal sense, from the constituent power, but rather the obligations part in the state's charge from the tacit social contract concluded thereby with each of its citizen, clauses from which other persons on its territory benefit as well, via democratic and humanist extension."

Therefore, in configuring the legal relation right-correlative obligation, the obligation in the charge of the state must be outlined in order to ensure the materialization of this right. Within this analysis register, of course, the correlation shall also be done with international documents to which Romania is a party (such as the European Convention on Human Rights), as well as with the established case law of the European Contentious Court. The right to life constitutes the object of regulation in art. 2 of the European Convention on Human Rights, thus: "1.The right to life of any person is protected by law. […]".

As an example, in terms of case law, we shall refer to several conclusions of the European Court of Human Rights in the case of *Panaitescu against Romania.* We shall first indicate the fact that, in this case pending before the European Court, the plaintiff complained of the fact that the Romanian state authorities refused to enforce court decisions concerning the provision, free of charge, of oncologic medical treatment.

Summarizing the circumstances of the case, the internal procedural background was set by the plaintiff informing the Court of Appeal in Oradea by means of an action based on civil liability against CNAS, in which he requested that the CNAS be ordered to provide him, free of charge, with the oncologic medical treatment prescribed by his attending physician, action which was admitted. In the substantiation of this decision, the defense of CNAS, according to which the plaintiff cannot be provided with the oncologic treatment requested free of charge because the chemotherapy drug was not included in the list of drugs for patients treated in ambulatory care and, therefore, could not be subsidized by the Sole National Fund for Health Insurances, was rejected. In order to deliver this decision, the court justified that any list of drugs can be changed at any time, otherwise the use of any new drug with beneficial effects would be impossible because of administrative obstacles, any delay therein having repercussions on the population's health. The decision delivered in lower court was confirmed in the remedy at law by the High Court of Cassation and Justice, but the state authorities filed an appeal against enforcement thereof, justifying that the requested drug could not be provided free of charge because they did not have the right to buy or sell drugs, the relationship with the pharmacies being one of collaboration, not of subordination. This appeal against enforcement was also rejected, but the obligation became devoid of purpose as a result of the plaintiff's death.

As a result of the above-mentioned aspects, in terms of conclusion, we note the following significant reference points outlined by the European court:

- in order to guarantee the right to life, the signatory states of the European Convention on Human Rights are charged with positive obligations - such as taking all measures required so that the guaranties for insuring the right to life are effective and useful, otherwise such authorities shall be held liable for any omissions on their part which are included in the health policy;

- in engaging their liability, the European Court shall assess the actions, and the omissions respectively, of the state authorities, taking into consideration the criterion of due diligence, thus investigating if those who had competency in the matter resorted in due time to all reasonable medical measures possible, so that the life of individuals is not subject to a risk which could have been avoided.

Reflecting on this case, the Romanian doctrine (Selejan-Guțan, 2012) suggested even the jurisdictional solution of a pilot decision, as more and more cases will arise having at their basis this "major structural issue of human rights in Romania".

Coming back to the national case law, we noticed that the Romanian courts consider the condition of urgency as having been met, as the prevention of the imminent risk of degradation of the patient's state of health is subject to discussion, in this regard, the evidentiary substantiation being performed on the basis of the medical documents submitted in the case file. At the same time, in the case decisions consulted (for example Decision no. 140/2019 of the Galați Court of Appeal), it has been noted that "the lack of funds necessary for covering the costs associated with subsidizing the therapy required is not in accordance with the principle of proportionality between the public interest and the legitimate personal interest", the patients being forced to also bear the financial burden of the prescribed treatment, given that the state authorities

cannot provide proof of "substantive, objective and absolute impossibility of carrying out and finalizing the administrative procedures with timeliness." In the decision cited above, the court also pointed out the fact that "instead of coordinating their efforts to expedite the formalities for re-evaluating the drugs, without justification with regard to any objective obstacle, the defendant authorities responsible attempt to abscond themselves from liability, declining jurisdiction one in favor of the other."

3. The condition of the temporary nature of the measure requested via presiding judge's order

Essential to the presiding judge's order is the temporary, provisional nature of the measure requested, that is, ordering a measure for a limited period of time.

The temporary nature of the measure ordered results either from the nature thereof, or from the contents of the decision in which its duration is indicated, being accepted that, in principle, it produces effects until the resolution in substance of the litigation, even if, in the decision ruled, no mention in this regard is made- Boroi and Stancu,(2015, p.807). Subject to the latter aspect, art. 997 paragraph 2 of the Civil Procedure Code establishes that, if the decision does not include any mention of its duration and the actual circumstances considered at the time of ruling thereof have not changed, the measures ruled shall produce effects until the resolution in substance of the litigation.

This condition also results from the manner in which the counts of presiding judge's orders are formulated. Practically, the majority of requests filed before the courts claim the compelling of authorities, with responsibilities in the field, to ensure the treatment imposed by their medical condition, subsidized 100%, meaning without any other personal contribution, until the resolution of the prior complaint constituting the object of a substantive case file (Decision no. 5/2020 of the Cluj Court of Appeal) or, more specifically, refer to a limited time interval, which constitutes the duration of the therapeutic treatment plan prescribed by the attending physician (Decision no. 573/2019 of the Bucharest Court of Appeal).

In this manner, it is not targeted a measure that is permanent in nature or that produces continuous effects, otherwise the lack of indication of a time limit generating, without a doubt, a resolution of inadmissibility.

4. The condition of not prejudicing the substance matter. Case law assessments in relation to the existence or non-existence of semblance of right

In ensuring this special admissibility condition of the presiding judge's order, in essence, the court is called on to assess if the semblance of right exists in favor of the plaintiff patients, under the aspect of protecting the right to life by granting the requested medical treatment. In this regard, by the Decision of the Cluj Court of Appeal no. 5/2020, it has been noted that the medical written documents submitted on file support the fact that the plaintiff has been prescribed a certain oncologic treatment by the attending physician, taking into consideration the fact that in the first instance when the patient was subjected to this treatment, an improvement of the symptomatology was recorded.

Additionally, it was also taken into consideration the prohibitive price of such a treatment and the proof of lack of possibility to pay it from personal financial resources, as well as the administrative correspondence, long-term correspondence, between the plaintiff and the authorities with responsibilities in the field, from which it can be deducted clearly that such institutions were aware in detail of the plaintiff's medical situation, fact capable of supporting, at least in terms of semblance, the fact that the measure required via presiding judge's order is righteous.

Other arguments in favor of not prejudicing the cause refer to the fact that, by ruling in favor within such presiding judge's orders, there is no danger of resolution in substance, nor of the impossibility of re-establishing the state of affairs, as the court is not called upon to rule in the sense of compelling to extend the instances for administering the drug, so that an undetermined number of patients would benefit from such a measure, nor is it established any definitive right of the plaintiff (Decision no. 573/2019 of the Bucharest Court of Appeal).

Without a doubt, of all the special conditions of admissibility, this latter one proves to be one that is difficult to support, therefore it is not surprising that a non-unitary practice is forming in this regard. In order to underline this fact, we shall also make short references to court resolutions rejecting presiding judge's orders promoted for the purpose examined by us.

Thus, by Decision no. 1027/2019 of the Bucharest Court of Appeal, the resolution was one of rejection, in the reasoning being stated that there is no semblance of right of the plaintiff to the provision of the oncologic medical treatment, under the conditions requested thereby, as the therapeutic indication of the drug is not provided in the medical protocols for the disease the plaintiff was suffering from and the expansion of the indication was not requested by the holder of the authorization for placement on the market of the drug in question.

Moreover, the court charged with this case considered that it cannot substitute itself in the place of specialized institutions with regard to the scope of use of a drug, in order to vouch for the use thereof by the plaintiff, by means of admitting her action, outside all established medical tests within medical and pharmaceutical research.

5. Conclusions

As noted suggestively in the specialized literature (Cristea, 2013), analysis, in such cases, exceed the strict scope of law, constituting an "example of implicit debate on humanity and civilization, or, more accurately, about the desire of manifestation thereof in interpersonal relationships, so that the bureaucratic immobility of state authorities does not constitute a future obstacle in the path of exercising the right to life."

As a result of the research carried out, we consider that all defenses of the Romanian state authorities - related to the lack of existence of a regulatory framework or medical protocols, cannot justify an exoneration of positive obligations in their charge, according to international documents, signifying, rather, an invocation of own fault, in the absence of practical actions. In this context, it is even more imperative the admittance of such presiding judge's orders, as sanction for the lack of action of authorities, which

represents an infringement of positive obligations falling on the State to ensure adequate protection of the right to life of its citizen.

In such cases, in which time proves to be critical in terms of efficiency of the treatment and the life expectancy is diminished as time passes, in the absence of the necessary treatment, if the clinical benefits for the patient are undeniable, we consider that the condition susceptible to interpretations is also met - that of not prejudicing the substance matter, by means of the fact that the semblance of right is in favor of the patients.

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