# THE LACK OF IMPARTIALITY OF THE JUDGE WHO ISSUED A SEARCH WARRANT TO ISSUE A NEW WARRANT FOR THE SAME LOCATION AND ON THE SAME GROUNDS

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**ABSTRACT**: *The article is set to determine whether or not a judge that has previously issued a ruling restraining fundamental rights and liberties can issue another one in the same circumstances. The article analyses the incompatibility of the judge, the sanctions that are imposed if such an incompatibility exists, and possible remedies to the situation.*

**KEYWORDS:** *Incompatibility; restriction; fundamental rights; search warrant*
**JELCODE**: *K14, K38*

## 1. INTRODUCTION

The restriction of fundamental rights and freedoms is, under certain conditions, necessary to ensure the safeguarding of the interests of society as a whole. However, such restrictions are subject to strict conditions, in order to remove any arbitrary intervention of the State in the protected rights. Respecting the limits imposed by the need to protect fundamental rights is imperative to ensure the continuity of democratic values (Chiriţă, 2007) of a society.

In these conditions, a ruling issued by the judge of rights and freedoms, which objectively determines a restriction of fundamental human rights, must be governed both by the standards imposed through the national legislation as well as by the standards arising from the application and interpretation of the European Convention on Human Rights.

Article 8 of the Convention establishes a series of conditions that must be met for an interference to be considered legitimate. Paragraph 2 states that any interference needs to be in" accordance *with the law"* and*" necessary in a democratic society, in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*".

The issue being discussed in the current article is whether or not a judge that has previously issued a ruling restraining fundamental rights and liberties can issue another one in the same circumstances.

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## 2. PREMISES

The problem arose from a situation encountered in the jurisprudence. The defendant was indicted on May 12, 2020 by the Prosecutor's Office attached to the Oradea Court for committing the crime of non-compliance with the weapons and ammunition regime, as incriminated by art. 342 para. (1) Penal Code.

During the criminal investigation phase, on the 2nd of April 2020, the judge of rights and liberties from the Oradea Court - criminal section issued decision no. 7/2020 and the search warrant no. 7/2020 by which the search of the home of the defendant was ordered to be carried out at a building located at the administrative no. 99, in a town situated in Bihor County, belonging to the defendant`s father. On the same day, the criminal investigation officers went to the address indicated in the warrant to carry out the search.

Arriving there, they noticed that the administrative numbers assigned to the buildings had been renumbered. The officers drafted a minute that concluded that building no. 99 belonged to another person. They also concluded that after renumbering objective was situated at no 109.

On the 3rd of April the prosecutor drafted and submitted to the Court a proposal to issue a new search warrant. The proposal was literally identical to the first one, the only difference being the number of the house.

The Court, ruling in a panel formed by the same judge that had ruled the day before on the first proposal, approved a new search and issued ruling no. 8 of 2020 and the search warrant no. 8/2020 on the same day. The search was approved at the buildings located at no. 109 belonging to the father of the defendant.

When the search was carried out, the criminal investigation officers identified and recovered a lethal weapon inscribed BRNO 22 LONG RIFLE, without a magazine and without a cartridge on the barrel.

## 3. ARGUMENTS

In relation to the factual situation previously exposed, we argue that the judge was incompatible when issuing the second warrant on the same grounds and in respect to the same domicile.

The case of incompatibility is provided for by art. 64 para. (1) lett. f) Criminal Procedure Code respectively "there is a reasonable suspicion that the impartiality of the judge is affected".

In the criminal procedure doctrine, it has been shown that the judge of rights and liberties is incompatible to be the judge in the preliminary chamber or the sitting judge, but for instance if he has authorized the preventive measure of arrest against the defendant, he can subsequently rule over the request of prolonging the arrest. It has been also showed that if the judge ruled over a request of prolonging the arrest, he can rule over another similar request subsequently (Udroiu, 2021). The ECtHR also recalled (TESLYA v. UKRAINE, 2021) that the mere fact that the same judge exercised the same function in the same criminal proceedings is insufficient to show that there was an objective lack of impartiality (Teslya v. Ukraine, 2020).

Although these considerations are true, we argue that the judge is in a situation of incompatibility. In contrast to the situation in which the judge rules over the subsequent

request of prolonging the arrest, that by hypothesis is formulated after the first one expired, and on different considerations, including a time gap, in the proposed situation the judge ruled essentially on the same request, the very next day.

It cannot be argued that the judge could re-evaluate in a proper manner the new request, without prejudice to the defendant, and that his opinion was not formed the day before. The reiteration of the same request should be the classic example of pre-ruling.

The European Court of Human Rights showed (see KYPRIANOU v. CYPRUS, 2005) that it is of fundamental importance in a democratic society that the courts inspire confidence in the public and above all, as far as criminal proceedings are concerned, in the accused. To that end Article 6 requires a tribunal falling within its scope to be impartial. Impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways. The Court has thus distinguished between a subjective approach, that is endeavouring to ascertain the personal conviction or interest of a given judge in a particular case, and an objective approach, that is determining whether he or she offered sufficient guarantees to exclude any legitimate doubt in this respect. As to the second test, when applied to a body sitting as a bench, it means determining whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to its impartiality. In this respect even appearances may be of some importance. When it is being decided whether in a given case there is a legitimate reason to fear that a particular body lacks impartiality, the standpoint of those claiming that it is not impartial is important but not decisive. What is decisive is whether the fear can be held to be objectively justified.

One of the components of the right to a fair trial, guaranteed by art. 6 para. 1 of the European Convention on Human Rights, represents the independence and impartiality of the court. As has been observed in the practice of the ECHR, impartiality consists in the absence of any prejudice or preconceived idea regarding the solution to be pronounced in the process. Or it is clear that ruling over a new request to issue a search warrant the day after the same judge approved an identical request, does not meet the conditions of impartiality required by law as the court knew the moment it received the request what ruling it will adopt. As professor Pop stated in such situations the judge is committed by reference to his previous opinion (Pop, 2019).

## 4. CONSEQUENCES

The judge invested with the second request to issue a search warrant had the obligation to refrain from resolving it, considering the fact that the previous day he had ruled in the same case, regarding the same request. From the moment of ruling on the first request to issue a search warrant, the judge became incompatible to resolve an identical request in the same case, regardless of the reason for which a second request was made. Given the fact that in this case the reasons entered in the prosecutor's request were identical, including regarding the nature of the building where the search was to be ordered (the defendant's domicile), the judge had to know that there was a serious lack of impartiality, and therefore had to recuse himself.

In the doctrine there is a vivid debate on the sanction that needs to be imposed, in respect to the qualification of nullity. On one hand, it was shown that this would be an absolute one, but on the other hand, it was argued that the nullity is a relative one, at least

by referring to the argument that the judicial body can subsequently decide whether or not to maintain the acts performed. Such an option does not exist in the case of absolute nullity (Mateuț, 2021).

As far as we are concerned, although the prevailing opinion seems to be that of relative nullity, we consider that we are in the presence of absolute nullity. The incompatibility should be sanctioned in this case by reference to the provisions of art. 281 para. (1) letter a), a situation in which we consider that in the preliminary chamber procedure it will be possible to establish the absolute nullity of the decision authorizing the second search, this being pronounced by an incompatible judge. The argument relating to the possibility of maintaining some of the acts performed is not valid because it refers to the situation in which the issue is solved within the pending procedure, in case of abstention or recusal. If the procedure is finished (such is the case in this circumstance), we think that the procedural act should be sanctioned with absolute nullity on the grounds of art. 281 para. (1) letter a).

On the other hand, even if we would consider the sanction to be relative nullity, we appreciate that it operates in respect to the injury consisting in the violation of the right to private life provided by art. 8 ECHR and the right to a fair trial provided by art. 6 of the ECHR, as well as the principle of the legality of the administration of probation, as long as the administration of evidence was carried out illegally by violating fundamental rights as a result of entering the home and carrying out an illegal search procedure and administering evidence illegally obtained in order to prove the defendant's guilt.

Furthermore, pursuant to art. 102 para. (2) and (3) it is necessary to exclude the evidence obtained on the basis of the ruling affected by absolute nullity. According to the jurisprudence of the Romanian Constitutional Court, "*the legal exclusion of evidence obtained illegally in the criminal process, in the absence of their physical removal from the criminal files established at the level of the courts, is insufficient for an effective guarantee of the presumption of innocence of the defendant and the right to his fair trial*" (Decision no. 22 of 2018, 2018).

The Court showed that "*physical exclusion implies the removal of evidence and evidentiary procedures from the file. The nullity of the act by which the administration of an evidence was ordered or authorized or by which it was administered determines the exclusion of the evidence"*, and the court must order alongside the legal exclusion of the evidence their physical exclusion from the case file because "*only the exclusion which implies the assignment of a double dimensions of the meaning of the notion of "exclusion of evidence*" *- respectively the legal dimension and that of physical elimination -, is capable of guaranteeing, in an effective manner, the fundamental rights, ensuring, at the same time, the criticized text an increased level of clarity, precision and predictability". "Only under these conditions, the institution of the exclusion of evidence can achieve its purpose, that of protecting both the judge and the parties from forming of legal reasoning and from the pronouncement of solutions influenced, directly or indirectly, by potential information or conclusions arising as a result of the empirical examination or re-examination, by the judge, of the evidence declared null"* (Decision no. 22 of 2018, 2018). In the light of these arguments all evidence retrieved must be physically excluded.

Also given these arguments, the search procedure as well as the procedural documents drawn up as a result of the search carried out, namely: minutes of execution of the search, photo plates and optical supports are struck by absolute nullity given the fact that the nullity

of the ruling also affects the subsequent documents drawn up, as they cannot be legally drawn up without the prior proper approval of the judge of rights and freedoms.

## 5. CONCLUSIONS

In conclusion we argue that a judge that has previously issued a ruling restraining fundamental rights and liberties cannot issue another one in respect to the same circumstances, as he becomes incompatible. The sanctions that are imposed if such a ruling is issued are the absolute nullity on one hand and the subsequent physically exclusion of any evidence gathered as a result of the void act.

The remedy is for the judge to state that the incompatibility exists and to issue a declaration of abstention, as in this secret stage the defendant is not a part of the proceedings. The Romanian Criminal Procedure Code offers sufficient remedies so that the national law can be considered compatible with the provisions of the European Convention on Human Rights.

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