

**ANALYSIS OF COMPLIANCE WITH ART.14 PARAGRAPH 1 OF
GOVERNMENT EMERGENCY ORDINANCE NO. 40/1999 ON THE
PROTECTION OF TENANTS, WITH ART.1 OF ADDITIONAL PROTOCOL.
1 TO EUROPEAN CONVENTION ON HUMAN RIGHTS**

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The measure of renewing the lease, provided by Article 14 paragraph 1 of Ordinance nr.40/1999 is in accordance with Art. 1 of the Additional Protocol 1 to the European Convention of Human Rights as an interference with legal character, which pursues a legitimate aim, according to the mutual interest and meets the conditions of accessibility and predictability, while maintaining a reasonable relationship of proportionality between the means used to targeted aim.

The aspect criticized by the ECHR was not the protection measure itself, but the flawed implementation of the guarantees offered to the owners.

The adoption by Romania of the laws of repossession of property taken in the period 1945-1989, required measures to protect tenants.

In this context, on 08.04.1999 the Government Emergency Ordinance nr.40 (the nr.40/1999 GEO) was adopted. It regards the protection of tenants and rent setting for spaces intended as housing, published in MO no.148/1999, which ordered the extension by law, for a period of 5 years, of the leases pending execution (Article 1, the initial ordinance).

Also, the situation of the tenants who occupied the property being returned to former owners was regulated, also of those properties that were used by schools, by social and cultural establishments or public institutions and those areas occupied by buildings for housing purposes privatized after January 1, 1990, along with the companies they held the property as residential, office apartment, dormitories for workers (Article 2.6 of the ordinance).

Along with the measures regarding extending, respectively ending the leases, by the art. 14 of O.U.G. nr.40/1999, the legislature has regulated other protective measures, namely the renewal of the lease, for a period fixed by the ordinance. Under this legal text, "(1) *On expiry of the lease the tenant has the right to renew the contract for the same period, unless the parties change the lease during the lease agreement.*

(2) *The owner may refuse to renew the lease only for the following reasons:*

a) *accommodation is required to meet its housing needs, the spouse's, parents' or children's of either of them, only if they have Romanian citizenship and they reside in Romania;*

b) *premises to be sold are under this Ordinance of Emergency;*

c) *the tenant has not paid rent for at least 3 months subsequent to the execution of the lease;*

d) *in the cases of art.13 points. f)-i).*

(3) The owner is obliged to notify the refusal to renew the lease to the tenant with at least one year before its expiry, in the situations described in par. (2). a) and b). In the cases referred to in para. (2). c) and d) the notification is made at least 60 days before the contract expires.

(4) Several successive renewals are allowed.

(5) The renter is obliged to leave within 30 days after the expiry of contract, if rental was not renewed. The renter is obliged to pay the full rent and all charges for services and maintenance for the period in which he/she occupied the house. "

It is noted that under these provisions, the tenant is "entitled" to renew the contract, while the owner can not refuse to renew only to cases explicitly and exhaustively laid down in Art. 14 paragraph 2 from the Ordinance and with prior notice to the tenant in the terms established by the legislature (art. 14 para. 3).

The measure covered by Article. 14 raised the issue of its compliance with art.1 of the Additional Protocol. 1 to the European Convention on Human Rights (the Protocol. 1), which states that: *"(1) Any natural or legal person is entitled to respect for his property. No one shall be deprived of his possessions except in the public interest and as provided by law and general principles of international law; (2)The foregoing provisions shall not affect the right of states to adopt laws as it deems necessary to control the use of property in accordance with the general interest or to secure payment of taxes or other contributions or penalties"*

In a first view it was held that tenants maintained in the restored old buildings, pursuant to Art.14 para. 1 in the Ordinance (after the expiry of the lease) without the consent of the owners for a considerable time and for a rent fixed and capped by the legislature, equals to an interference in the right of the property of the owners, as protected by internal laws and Art .1 of Protocol 1.

It was also shown that interference with property rights of the owner is set by law and pursues a legitimate aim, namely, protection of tenants whose housing situation was not yet resolved, but the owner obligations are disproportionate to the legitimate aim, the owners having the obligation to support an excessive burden, fact which constitutes a violation of Art.1 of Protocol 1 of the Convention.

Another argument in support of this view was the European Court jurisprudence, which, in the cases of Radovici against Romania and Arsenova and Stanescu against Romania, concluded that restrictions imposed on the use of real estate by GEO no. 40/1999, are the result of faulty measures and shortcomings of the Order.

In another opinion, that we rally to, was held that the provisions of art.14 paragraph 1 of Government Emergency Ordinance no. 40/1999 are not in contradiction with Art.1 of the Additional Protocol.1 to the Convention.

It was argued that the renewal of the lease contract, in the art. 14 paragraph 1 of Government Emergency Ordinance no. 40/1999, is certainly an interference with the rights of the owner to have his goods respected within the meaning of art.1 of Protocol. 1. This interference, however, pursues a legitimate aim, according to the general interest, namely the protection of tenants and the gradual transition from a system of leases of state-controlled housing to a freely negotiated system (the case Cleja and Mihalcea against Romania).

Moreover, the European Court of Human Rights has consistently argued that the measures adopted by the national legislature by GEO no. 40/1999 - designed, first, to review the rent increase and, secondly, to extend the validity of leases, except under exceptional circumstances expressly and restrictively named - pursuing an aim of general interest, that tenants should be protected in a situation characterized by lack of housing at low cost. (Case Burza against Romania, case Rodovici and Stanescu against Romania).

As such, this interference has a legal character, pursuing a legitimate aim.

At the same time, it was held that the rule of law in question meets the accessibility and predictability required by ECHR case law. As stated by the Constitutional Court in analyzing the constitutionality of Art. 14 of Ordinance no. 40/1999, the temporary protection of tenants is

achieved through various legal means, such as extension of leases, ensuring stability of the housing rights by giving the tenant the right to renew leases for the future, etc.. (Nr.512 decisions / 2006 nr.1286/2008 of the Constitutional Court) .

Therefore, the right to renew was provided by the legislature ever since the entry into force of Government Emergency Ordinance no. 40/1999, and the conditions and terms of renewal, as well as the cases in which the renewal can be refused have been expressly and exhaustively listed in the Order. Therefore, the renewal of the lease, under Art.14 paragraph 1 of Government Emergency Ordinance no. 40/1999 was sufficiently accurate, accessible and foreseeable to the owners.

In addition, it was considered that the regulation in question is kept as a reasonable relationship of proportionality between the means used and the target aimed, such as to ensure that "balance" to be maintained between the demands of the community interest and the necessity to protect the fundamental rights of the individual.

It is true that the ECHR has sentenced Romania through a series of decisions for the alleged breach of art.1 of Protocol. 1 when the application of Emergency Ordinance no. 40/1999 was made, but the Court analysis of the the concrete situations did not cover the compliance with art. 14, para.1 of O.U.G. no. Article 40/1999. 1 of the Protocol, but the manner of implementation of the guarantees offered to owners.

Thus, **in the case Rodovici and Stanescu against Romania**, the ECHR held that *"the applicants were deprived of a clear opportunity to receive a rent (paragraph 82)" and that "nothing in the file allows to believe that the occupants of applicants' houses deserved the particularly strengthened protection, even more since - according to the applicants, unchallenged by the Government - they seriously deteriorated their homes and behaved in a way that made the living together in the building impossible, fact leading to different circumstances, according to the new procedures of eviction initiated by the applicants, the evacuation of two of the apartments of the building (paragraph 87)"*.

The ECHR concluded that *"the restrictions suffered by the applicants on their property use and property in itself, in particular the impossibility in which they were, for many years to force the occupants to pay rent because of the faulty provisions and the flaws noted in the emergency legislation on buildings, have not facilitated a balance between protection of the individual rights to respect his property and general interest requirements.*

Of course, the Romanian state had to inherit from the communist period an acute shortage of rental housing at a reasonable price and had, therefore, to arbitrate on matters of high complexity and sensitivity from a social point of view, matters that required the reconciliation of the antagonistic interests of owners and tenants. He had to protect the ownership of the first, on the one hand, and respect the social rights of the others, on the other. However, the legitimate interests of the community in such a case require an equitable distribution of social and financial burden implied by the transformation and reform of the buildings in the country. This task can not, as is the case, to rely on a particular social group, regardless of the importance they have the interests of another group or community as a whole (paragraph 88).

Even taking into account the wide discretion left to the states in terms of Article 1 previously quoted, the Court considers that to penalize owners who have failed to comply with the form prescribed by the Government Emergency Ordinance imposing a so hard obligation on them that is to keep the tenants in their property for five years without a concrete and real possibility to collect a rent, made to pull on them a particular task and likely to stop the right balance between the interests at stake (paragraph 89)."

So, the "fair balance" has been broken due to "the inability of the applicants, for many years, to force the occupants to pay rent because of inadequate legislation. The balance of proportionality was not maintained because the applicants have been imposed an exaggerated burden, that is the obligation to keep tenants in their property for 5 years without any concrete and real possibility to collect a rent.

ECHR found in **Case Arsenovici against Romania** too, the same excessive burden imposed on the owners, provided that the tenant refused to end leases and has not paid rent

In **Case Burzo against Romania**, the ECHR held that article 13 and 14 of Ordinance no. 40/1999, concerning the extension and renewal of the leases, the legislature expressly and restrictively provided, some exceptional circumstances that allowed owners not to extend the lease agreements, including consecutive three months delay in payment of rent by the tenant.

The Court, without condemning these measures within the parameters tolerated by the State, considered that the right balance between defending the individual in respect of his property and the requirements of general interest was not kept because of faulty implementation of guarantees at the disposal of the owner (the national courts have held that the complainant must initiate other condemnation procedures to obtain other tenants to pay rent),

Thus, the ECHR held that *" it must be examined whether the system devised by the authorities ,the implementation in this case of the procedures provided by GEO no. 40/1999 to ensure protection of the owner of its right of ownership has kept a balance between interests and did not lead to arbitrary or unpredictable results. The Court notes first that the Emergency Ordinance no. 40/1999 required the extension of legal principle of leases which had been subject to the law no. 17/1994, such as the lease of the family B, which resulted in maintaining the former tenants of the state in apartments on Articles 13 and 14 of Ordinance no. 40/1999, the legislature has provided expressly and restrictively, some exceptional circumstances that allowed owners to not extend the lease of which benefited the occupants of their apartment (paragraph 62).*

The Court notes that in particular the lack of maintenance and regular repairs and lack of financial resources to invest in maintaining the good condition of the building, that house, which was in good condition in November 1997, was no longer fit for housing. Referring to the provisions of art.31 of Law no. 114/1996 which specifies the criteria to be followed in calculating rent, the Court considers that there may therefore doubt that the amount of rent above that represented about 1% of net average monthly wage in the economy, could have allowed even cover the costs of maintenance and repair and taxes due for the apartment in question, without talking of getting any profit (paragraph 65).

The Court considers that, despite the margin of appreciation recognized by the defendant State, the restrictions suffered by the claimant from using his apartment for several years, the combination of relevant provisions relating to the extension of lease agreements and in particular from the failure in practice of the guarantees made by the authorities to the owner, can not be deemed to have been foreseen and that they respected the right balance between defending the individual right of respect for his property and the requirements of general interest (paragraph 67)"

Similar situations were noted by the ECHR and the causes **Spanoche vs. Romania, and Popescu and Toader vs. România**¹⁰, where the *"plaintiffs have suffered restrictions on their use of real estate property and have been unable to compel the occupants to pay a rent because of bad provisions and identified gaps in emergency legislation on housing."*

Court held that *"there is no established case law that allows not respecting of such regulations "* and held that *"the fact of penalizing owners who failed to comply with the formal conditions prescribed by the Government Emergency Ordinance imposing an obligation so difficult like the one to keep tenants in their property for a long time without any concrete and real possibility to collect the rent, made a particular excessive task to pull on them likely to stop the right balance between the interests at stake. "*

From the analysis of these decisions is clear that what the ECHR has criticized, reported to the GEO nr.40/1999 was how poor was the implementation of the guarantees offered to owners, not the measure of protection of the tenants.

In conclusion, we believe that the renewal of the lease, stated by the provisions of Art.14 paragraph 1 of O.U.G. no. 40/1999, is consistent with art. 1 of Protocol 1 and is not a burden on owners forced to conclude such contracts.

REFERENCES:

1. Government Emergency Ordinance nr.40 of 08/04/1999 on the protection of tenants and rent setting for spaces intended as housing, published in MO no.148/1999;
2. Law no. 30 of 18.05.1994, on the ratification of the Convention on Human Rights and Fundamental Freedoms and the additional protocols to this Convention;
3. European Court of Human Rights Decision of 08.02.2008 in Case Arsenova against Romania, unpublished;
4. European Court of Human Rights Decision of 02.11.2006 in Case Radovici and Stanescu against Romania, unpublished;
5. European Court of Human Rights Decision of 08.02.2007 in Case Cleja and Mihalcea against Romania, unpublished
6. European Court of Human Rights Decision of 04.03.2008 in Case Burzo against Romania, unpublished
7. Decision nr.512 of 06/10/2005 the Constitutional Court on the plea of unconstitutionality of provisions of art.14 para. (3) and Art.22 para. (2) and (3) of Government Emergency Ordinance no. 40/1999 on the protection of tenants and rent setting for housing spaces intended as published in MO nr.1085 of 02/12/2005;
8. Decision nr.1286 of 02.12.2008 of the Constitutional Court, on the plea of unconstitutionality of provisions of art.12 and Art.14 of Government Emergency Ordinance no. 40/1999 on the protection of tenants and rent setting for housing spaces intended as published in MONr.96 of 18.02.2009;
9. European Court of Human Rights Decision of 26.07.2007 in Case Spanoche against Romania, unpublished;
10. European Court of Human Rights Decision of 08.02.2008 in Case Popescu and Toader against Romania, published in MO nr.618 of 22/08/2008.