TECHNIUM
SOCIAL SCIENCES JOURNAL

Vol. 20, 2021

A new decade for social changes

www.techniumscience.com

ISSN 2668-7798

9 772668 779000

Where can a person be "Home" arrested?

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Abstract. The provisions of criminal proceedings do not clearly define what is meant by "domicile" when they provide for the possibility of a defendant being arrested at home during criminal proceedings. The lack of such a definition can have major practical implications, especially when the defendant is not the owner of the building where his arrest is ordered, and his owner does not agree with the measure, which can pose the problem of being restricted by a state action, the property right of the person, as his fundamental and constitutional right.

Keywords. real estate, housing, detention, residence, agreement, minor

The meaning of the term "home"

According to art. 126 of Law no. 254 of July 19, 2013 on the execution of sentences and custodial measures ordered by the judiciary during criminal proceedings, the building in which the house arrest is executed means the defendant's residence, room, outbuilding or fenced place belonging to them.

According to the explanatory dictionary of the Romanian language, a house means a house, a building in which someone lives or can live, a room means a room, a space inside a building, an outbuilding means an accessory room of a house, such as it would be a bathroom, a kitchen, a storage room, a pantry or a storage room, and by the fenced place belonging to them is meant the yard or garden of a house, the land around a house.

Although the text of the law refers to the defendant's residence, this does not only mean the dwelling belonging to the defendant as property, but also that used by him permanently, regardless of whether he has his domicile legally established by declaration to the institutions of evidence of the population or if they live without legal forms. At the same time, it does not matter if he lives alone or with other people in the house where he lives temporarily.

The notion of domicile in the sense of the criminal law is also given by art. 157 para. 2 of the C.p.p. which regulates the cases and conditions in which the home search may be approved, namely at a house or any space delimited in any way that belongs or is used by a natural person.

Depending on the form of the dwelling, a person may be placed under house arrest either in a studio or in an apartment building, in which case he or she may not leave the studio or apartment, either in a house or apartment or fenced garden villa, in which case he is not allowed to leave the yard, either in a non-family or student dormitory or in an accommodation unit, in

which case he is not allowed to leave the room, or in any other space delimited such as a caravan, a container, etc.

The law does not impose the condition that the domicile be identifiable by an exact address or by registration in the books of cadastre and real estate advertising.

Depending on the material possibilities of each individual investigated, some of the participants in a crime may be placed under house arrest in a studio apartment while others may be placed under house arrest in a spacious villa with garden spread over an area of several thousand meters.

Although at first sight the measure may seem unfair, it should be noted that the essence of house arrest is depriving the person of freedom of movement, and not the rest of the living conditions, specific to each person, restriction specific to the measure of pre-trial detention.

If there is no problem in the situation where the person under investigation is the owner of the dwelling and actually lives at that address, the question arises whether the judicial organ can order this preventive measure if the person under investigation is permanently, but without legal forms, in a certain dwelling, the property of another person, and the owner no longer consents to the person under investigation living in that place for various reasons (he wants to move alone or with his family to that place, he wants to rent the house for profit, he wants to escape because the person under investigation is being prosecuted for committing crimes or because the person under investigation, taking advantage of the fact that he has been placed under house arrest and has a valid reason for not being able to leave, no longer complies with the terms of the lease, including rent payment, etc.).

We consider that the judicial organ proposing to take the measure of house arrest has the obligation that before notifying the judge or the court, to establish clearly whether the person in question has a domicile within the meaning of the criminal procedural law (it is possible that he has a home in the property, but to live on the streets) and if the homeowner consents to the person continuing to live in his or her home.

Although the law does not provide for such a condition, we consider that the property right of another person who has nothing to do with the crime committed and who must be allowed to dispose of his property as he wishes cannot be infringed.

In this sense, Article 44 of the Romanian Constitution protects the right of private property of persons, the content and limits of this right being established by law. According to Article 555 of the Civil Code, private property is the right of the owner to own, use and dispose of an asset exclusively, absolutely and perpetually, within the limits established by law.

The fact that the criminal procedural law governing the institution of house arrest does not provide for a limitation of the right to private property in this respect results that, in the absence of a title (it can also be a verbal agreement), the defendant cannot be placed under house arrest. a home that does not belong to him, although at one point he lived permanently in that home.

Thus, the fact that a person lives in a rented apartment, and shortly after committing the lease expires, without the landlord agreeing to its extension, must be tantamount to the non-existence of a dwelling where he resides. and lead to the impossibility of taking or continuing the execution of the house arrest, in which case the judicial organ must reorient itself towards another preventive measure, except for the fact that the defendant proves that he has another home.

Legal title under which a person can live in a "home"

In practice, several situations may arise, which we will analyze each one from the perspective of house arrest.

A first situation concerns the case in which the defendant owns a house and there is no contract concluded with another person having as object the respective house. In this case, there is no impediment to placing him at home in the personal property home.

It is possible that the defendant owns several dwellings, free from any contractual obligations, in which case he has the obligation to indicate to the judicial organ, during the first hearing, the address where he actually lives, this being the one where he will be placed under house arrest.

A second situation concerns the case where the defendant owns a dwelling, but which is the subject of a lease, in which case, until the termination of the contractual relationship, he will not be able to be placed under house arrest in that dwelling.

If he does not have another home to live in temporarily, he will not be able to be placed under house arrest. (for example: the defendant sails at sea for longer periods of time, and during the absence from home he rents the house for profit; he returns to his place of residence and stays in line for short periods until the next departure, to the best of his knowledge, if during this period the defendant commits a crime that requires a preventive measure, the judicial organ will not be able to place him under house arrest in the house of his property).

A third situation concerns the case in which the defendant does not own any house in the property, but has a stable domicile. In this case, the defendant may be placed under house arrest.

The situation becomes more delicate if, with the consent of the owner of a property, for various reasons, the defendant has formally established his domicile at his home (for example: in exchange for a sum of money or as simple help) and declares liar to the judicial organ that he actually resides at the home address.

The question arises as to whether the owner of the property may be compelled to house him during house arrest without his will. To answer this question, we need to look at the legal consequences of taking a person into space.

According to article 27 of the Emergency Ordinance no. 97/2005 on the records, domicile, residence and identity documents of Romanian citizens, republished, the domicile of the natural person is where he declares that he has his main residence.

Proof of the domicile address in front of the officials in charge of the registration is made, in the absence of a residential title, by the written declaration of the host, natural or legal person, of reception in the space.

The declaration of reception in space may be given in front of the worker within the community public service for the registration of persons, the public security policeman, the notary public or the official of the diplomatic mission or consular office of Romania.

The domicile address is registered in the identity document which, in addition to the domicile address, proves the identity, the Romanian citizenship and, as the case may be, the residence address.

The consent of the person who took another person into the space is presumed until the expiration of the validity of the identity document which, depending on the age of the person at the date of issue, may be 4 years, 7 years, 10 years or with unlimited validity for persons of 55 years old.

On the occasion of the request for change of identity card, which may be determined for example by the expiration of its validity, theft, loss, damage or destruction, a new declaration of takeover is required from the owner, in which case the homeowner may refuse to he still agreed.

Taking a person into space is equivalent to giving up for free the use of a building or part of it, the owner's consent being presumed, as we have shown, until the change of identity card.

Specifically, the taking in space takes the form of a loan agreement, concluded for a determined or even indefinite period, a unilateral legal act that gives rise to obligations only on the part of the lessor.

Although the law does not concern the manner of revoking the agreement to enter into space, but only the possibility of annulment of the act if the documents on the basis of which the domicile was established were found to be false, we appreciate that, starting from the legal nature of legal act This agreement may be terminated unilaterally in any of the forms in which it was given, or to the Community Public Service Romania.

The situation presented concerns the case in which the defendant does not actually live at the domicile address registered in the identity document, but invokes the respective dwelling before the judicial bodies as the one where he actually resides, in order to be placed under house arrest in that location.

In such a situation, the issue of eviction of the person is not raised, but of the opposition on the part of the owner, so that the defendant listed with his domicile at his address will be placed in his home.

Ideally, the judiciary should check the address where the defendant actually resides, but there are situations in which, for example, the criminal investigation organ notifies the judge of his rights and freedoms with the proposal to take the measure of pre-trial detention, and the judge rejects. the proposal is made and orders the milder measure of house arrest. In this case, most likely the criminal investigation bodies did not check the address where the defendant actually lives, but only took note of his statement that he lives at the address in the identity document, and the judge of rights and freedoms does not have neither the necessary time nor the means to verify on the occasion of the trial of the proposal of preventive arrest where the actual defendant resides, following to take in his turn the address indicated by the defendant.

In the above situation, the defendant will be placed under house arrest at the address in the identity card, although the owner of the property does not agree or in other words does not "agree" anymore, because the defendant has obtained his consent to live at that address. on the occasion of taking up space.

The solution for the owner is to revoke the space agreement and to notify the supervisory bodies responsible for verifying compliance with the defendant's obligations in this regard, which will notify the prosecutor and who in turn will assess whether it is necessary to make a proposal to replace the measure of house arrest.

Thus, according to articles 130 and 131 of Law no. 254 of 19 July 2013 on the execution of sentences and custodial measures ordered by the judiciary during criminal proceedings, if the supervisory organ finds that the decision ordering the house arrest cannot be enforced (or not may continue to be enforced), shall proceed to a reasoned notification which shall be forwarded immediately to the prosecutor during the criminal investigation, the pre-trial judge, the pre-trial procedure or the court, during the trial.

In order to draw up the notification, the supervisory organ carries out checks on the factual situation and hears the defendant, if possible, or any other person.

If the judge of rights and liberties, the pre-trial chamber judge or the court admits the proposal and replaces the measure, but the defendant still does not leave the domicile, the owner will be able to notify the police in connection with the crime of home invasion and / or to address the court of trial with an eviction action, according to the provisions of the civil procedural law, the court decision being enforced by the bailiff. The landlord can claim damages from the

defendant who continues to abusively occupy the home until his or her actual eviction, in accordance with the provisions of civil law.

The same is the case if the defendant actually lived at his home address, and during the house arrest, the owner decides that he no longer agrees for the defendant to live at that address.

In addition to the domicile, the natural person may also have a residence and which is where the natural person declares that he has a secondary residence, other than the domicile. According to the mentioned emergency ordinance, the natural persons can have a single domicile and / or a single residence, no matter how many dwellings they have, in which case they are to declare to the competent bodies at which they establish their domicile and residence.

The mention regarding the establishment of the residence is noted at the request of the person who lives for a period longer than 15 days at the address where he has the secondary residence. The mention of the establishment of the residence is granted for the requested period, but which may not exceed one year and which is strictly valid for as long as the person actually resides at the address declared as the residence. At the end of this period, the person has the possibility to request the registration of a new mention regarding the establishment of the residence. The same documents are required for the registration of the residence address in the identity card as for the registration of the domicile address, among which the declaration of the owner of taking the space.

Except for the period of validity of the address of residence which is shorter, the other particulars relating to the domicile address shall remain valid.

Another situation concerns the case where the defendant lives permanently in a dwelling, based on a lease, concluded for a certain period. In this case as well, the owner is bound by the contractual clauses, having the possibility to unilaterally terminate the contract before the expiration of the contractual term, in compliance with a notice period. After the termination of the contractual relations, we appreciate that if the owner informs the judicial bodies of this fact, they can no longer order the extension of the house arrest with the execution in the same house.

The particular case of the minor defendant

A special situation concerns minors who are criminally liable and who commit a crime for which they would be required to be placed under house arrest.

According to article 27 of the Emergency Ordinance no. 97/2005 on the registration, domicile, residence and identity documents of Romanian citizens, republished to which he is entrusted in the placement. If the minor's parents, who are in accordance with the law in specialized centers under the authority of the public social assistance services, are not known or cannot be identified, the minor's domicile is at the address of the respective center".

After establishing the legal status of the domicile of the minor who is criminally liable, he may be placed under house arrest either at the domicile of his parents or his legal representative, or in specialized centers.

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