

The Marriage of Convenience and Some Effects on the Regime of Foreigners in Romania

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Abstract: The migration, the organized crime, terrorism, human trafficking affect the societal security. In this context it is possible through the usage of simulation in some family relationships to create the appearance of some legal relationships, in the purpose of attracting the appliance of some legal depositions. The study aims at analyzing the legal mechanisms through which fictional marriage may be a "springboard" for obtaining the legal right to stay in Romania, not with the purpose to start a family, but to infringe the national security, which would lead to fueling immigration by well-known processes: family reunification, mixed marriages, birth of children, inviting relatives, adoption, etc. The interest of foreigners in Romania and its laws using legal channels to achieve an illegal goal increased considerably after Romania's integration into the EU.

Keywords: simulation, fictional marriage, immigration, jurisprudence, the foreigners, legal regime

1. Justification

After Romania's EU integration, the interest in knowing the Romanian laws by aliens from some non-EU states has increased considerably, in order to use the legal channels to achieve unlawful purpose, such as migration, for themselves or for their community¹. (Sava, 2005, pp. 283-295)

¹ Risk theory society, which belongs to the German sociologist Ulrich Beck, treated by the Security Studies in the 1990s, prevents us on the negative effects of reflexive modernity and its globalization, which replaces the military threats, specific to industrial society, with the risks of economic (financial and economic crises, unemployment, poverty), societal (identity aggression, terrorism, migration,

Regardless the factors that determine the migration cases (famine, armed conflicts, natural disasters, religious restrictions), migration of foreign citizens in Romania, which is used as a target or transition country, produces a range of negative consequences, such as: engaging in illegal activities or work illegally at various firms, a source of conflict and offence, the opportunity to infiltrate and operate various terrorist groups, assuming significant expenditure for the national budget in order to return to aliens to their countries or for housing, maintenance, social assistance and integration of foreigners who have acquired some form of protection in Romania. (Rotaru, 2008, p. 27)

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The theoretical scheme to which the alien appeals, corresponds with all the characteristics of simulation, as it was described in literature: through a public document achieved by marriage, it creates an appearance that is contradicted by the simulator agreement which takes the form of a secret act made between the prospective spouses, all at the service of best foreigner's interests, in order to obtain the right of residence in Romania and, hence, other legal effects and thus other targets.

2. On Simulation in Family Relations

Taking into consideration the following definition of simulation from literature: "the single legal transaction that creates a unconformable appearance by concluding two legal acts, a public one and a mendacious one, whose effects are removed or modified, totally or partially, by other which is secret and true, which contains implicitly or explicitly the agreement of the parties to simulate" (92), we can say that simulation is a means, authorized or sanctioned by law, that is available to the legal issues, that leads to one of the most diverse purposes, which may be fair and mostly with false pretences.

organized crime, corruption, human trafficking) and environmental nature (pollution, nuclear accidents, depletion of energy resources).

In order to conceal reality, by means of simulation the participants, through a valid legal act, aim at creating voluntarily a misleading appearance¹, other than a legal fiction, which is the exclusive work of the legislator (Deleanu, 2005, pp. 30-32). A separate legal figure, with its own structure and a specific legal regime, the simulation has often a double legal valence, being a way of creating the appearance in law through the agreement of will, but also a means to achieve fraud law.

Exclusively for third parties, the simulation excludes good-faith. Participants in the simulation are agreed to lie the others, which "serves" a deceiving appearance, maintained throughout the interim period of simulation, that is from the moment of rising the concerted legal deceit until its discovery through the action in simulation (for example, in our case, finding a marriage of convenience). (Doe, 2007, p. 183)

Mostly covered by mandatory rules, the legal documents in family law can know various forms of simulation, doctrine and especially the jurisprudence which retained some of them, such as the fictional marriage, the fictitious recognition of paternity², fictitious adoption. (Ionascu *et ali.*, 1980, p. 66) (Avram, 2001, p. 69) (Filipescu, 2002, pp. 142-154) (Hârceagă, 2009, pp. 110-116)

3. The Marriage of Convenience

Referring to the legal act of marriage, the legislation, the doctrine and sometimes the jurisprudence gives us a wide range of legal categories somewhat similar, but with a meaning and, especially, different legal consequences to each of them: the clandestine marriage, secret marriage, fictional marriage, simulated marriage, marriage of convenience and putative marriage. (Bacaci *et ali*, 2005, p. 126-129, 133) (Lupaşcu, 2007, p. 128-130) (Corhan, 2009, p. 171- 174).

Regarding our study, we chose the concept of "marriage of convenience", within the meaning of Government Emergency Ordinance no. 194 of December 12th, 2002 on

¹ Producing an erroneous view of reality, the simulation can be confused with the legal fiction. If the latter, used by the legislator, distorts the truth in order to obtain a result required by principles of law, simulation is a form of deceit which is reached by participants' understanding of the legal act, the aim being mostly fraudulent.

² Through an apparent legal act, which takes the form of a statement to civil service status or a genuine document, it acknowledges to the alien the paternity of a child, and through the stimulatory agreement made between man, on the one hand, and mother and child both Romanian citizens, on the other hand, agreed, explicitly or tacitly, on the fictional parentage, the latter standing in passivity, not putting forward the action contesting the paternity recognition.

foreigners' regime in Romania¹, which is defined in article 2 point 1): "The marriage is concluded with the sole purpose of circumventing the conditions of entering and staying of foreigners and to obtain the right of residence in Romania".

After analyzing the definition given by the legislator, the marriage of convenience is a case for applying simulation, being fulfilled those conditions of the existence of fictional marriage recognized in the specialized literature, namely: the legal marriage concluded having other purposes none included the foundation of a family; the marriage aims solely at obtaining legal consequences. (Baias, 2003, p. 263)

The courts have sanctioned by absolute nullity the marriage concluded in the purpose of circumvention from the offender's criminal liability for rape, obtaining a bank loan to purchase a home for young married couples, the acquisition of a testamentary trust, under the condition of proving the quality of married person, obtaining a parish by a priest, acquire Romanian citizenship. The same penalty was applied to new marriages concluded in Romania between the same persons, who were already married in Greece, the purpose being to acquire the wife's surname as a result of a new marriage, in order to have a new identity, in its attempt to avoid the banishment to travel in the Schengen area.² (Florian, 2003, p. 61) (Moloman, 2009, p. 211)

Starting from general to particular, the marriage of convenience concludes for the sake of appearance, between an alien and a Romanian citizen, without corresponding to real personal and financial relationships that should exist between them, the aim being to obtain marriage side effects, which otherwise in the absence of the legal act of marriage, the alien could not achieve.

Simulation and good faith are mutually exclusive in the case of marriage of convenience, the future spouses know that through marriage certificate they will create just the appearance of a marriage which would led to a legal and juridical situation. Simulation is the instrument for creating the appearance of a married person for the foreigner, who may receive only in such manner the legal effects of the institution of marriage provided by the Romanian law.

¹ Republished in the Official Monitor of Romania, Part I, no. 241, June 5th, 2008 under the article 7, Ordinance no. 55/2007 on the establishment of the Romanian Immigration Office by the Authority for Aliens and the reorganization of the National Office for Refugees, amending and supplementing certain acts, published in the Official Monitor of Romania, Part I, no. 242, June 26th, 2007, approved with amendments by Law no. 347/2007, published in the Official Monitor of Romania, Part I no. 851, December 12th, 2007, giving the texts a new numbering.

² Iasi Court, the civil sentence no. 60, 3rd February 2003, published in the Law no. 7/2004, p. 201-203, with explanatory and partially critically note by Gabriela Lupsan.

Marriage of convenience is ascertained by the interview officers¹ and it produces legal consequences in staying regime of foreigners in Romania. Thus, there are cases where a foreigner cannot be removed from the territory of Romania because it is married to a Romanian citizen and it is not a marriage of convenience.

Based on data resulted from interviews conducted separately and with the husbands, from the analysis of submitted documents, the statements' assessment of a third parties and controls in the conjugal home, the officer's interview establishes if in that case there are items listed by the legislator in Article 63 paragraph (2) of Government Emergency Ordinance no. 194/2002 on aliens in Romania², according to which a marriage may be considered of convenience or not. These statutory factors are: no matrimonial cohabitation, wives were not known before marriage, lack of effective contributions to the obligations arising from marriage, spouses do not speak a language understood by both, there are data that previously one of the spouses concluded a marriage of convenience, spouses are inconsistent in declaring personal data, the circumstances under which they have met or other relevant information about them; the marriage was conditioned on a payment of a sum of money between spouses, except for sums paid as dowry. (Chelaru, 2003, pp. 203-206)

After finding a marriage of convenience, the Romanian Immigration Office determines the refusal to approve the application for the extension of the temporary stay right for family reunification made by a foreigner that is married to a Romanian citizen and hence the emission of returning decision from the Romanian territory.

Regarding the burden of proving an unresolved marriage in the purpose of building a family, it is up to the foreigner, who can suggest any evidence in the process of cancelling the decision of returning and approving the application for extension the temporary stay right; the court is required to assess and evaluate the evidence material, according to the same legal criteria laid down by article 64 (2) of the Ordinance.

Along with the above stated situation, the findings of a marriage of convenience may be subject to a legal action for absolute nullity of marriage, promoted by any interested person.

¹ According to the data posted on the website of the Romanian Office for Immigrants, in the first half of 2009 there were recorded 40 marriages of convenience, each case having their return decision.

² *Brevitatis causa*, in order to avoid duplication and the ease of expression, in the study, the references to the text of Government Emergency Ordinance no. 194/2002 on foreigners regime in Romania, it will be used the term "ordinance."

4. Hypothetical Plan and the Means of State Defense

Knowing the Romanian law, it allows foreigners to build up a plan in order to call upon the legal institutions of family law, in this case, the marriage to a Romanian citizen, in order to achieve the purpose related to Romania, the first step would be obtaining the right of residency, and finally obtaining Romanian citizenship which would imply the freedom of movement within the European Union.

4.1. Obtaining Visas

Short-stay visa allows foreigners to enter the Romanian territory for reasons other than immigration, an uninterrupted stay or several stay whose duration does not exceed 90 days within 6 months from date of first entry, as provided in the article 23 paragraph (1) of the Ordinance. (Catrinciuc, 2008)

Regarding the *stated purpose* for obtaining short stay visas, it may be one of those provided in article 36 paragraph (1) of the Ordinance, namely tourism (point b), visit (point c and the invitation procedure is provided in article 37-39, business (point d), cultural, scientific, humanitarian activities (point g) or for studies. (Tatar, 2008, pp. 165-169)

The real purpose for obtaining short stay visas is marriage in Romania with a Romanian citizen, the marriage closing according to the Romanian law, in the local public administration authority, the residence of the future husband, a Romanian citizen, or according to the foreign law established at the diplomatic mission headquarters or consular office of the foreign state of Romania.

In the envisioned project, this step may be removed by closing marriage by Romanian citizens abroad; in which case the provisions of article 43 paragraph (3) of Law no. 119/1996 are applicable regarding the civil status documents¹, marriage certificate being submitted to the administrative transcription procedure in the Romanian civil status registers.

Although transcription procedure is longer, this version of closing marriage abroad is safer, with full chances to succeed, unlike the first one, where there are two obstacles: getting quite restrictive conditions in terms of obtaining short stay visas

¹ Published in the Official Monitor, Part I, no. 282 of November 11th, 1996.

for a foreigner and the impossibility to extension of this visa after closing the marriage, in accordance with article 23 paragraph (5) of the Ordinance.

The foreign citizen requires a visa to enter Romania on grounds concerning the territorial status of the husband of a Romanian citizen, proved by the marriage certificate issued by the Romanian registration. The provisions of article 6 (1) of the ordinance stipulate the conditions under which the foreign citizens, family members with Romanian citizens, are allowed to entry in Romania.¹

4.2. Introducing the Foreigner at the Point of Crossing State Border

Regardless the hypothesis of entering into Romania in order to conclude a marriage or the acquirement of marriage certificate abroad, at the time of introducing the foreigner at the point of crossing the state, the Romanian Border Police verifies if there is any reason not to allow the entrance in the country, according to article 8. (1) and (2) of the Ordinance, namely that the alien has a valid passage document to cross state border, which is supported by the Romanian State and it is not reported by the international organizations to which Romania is party, and also by specialized institutions that finance terrorism, train, support in any way or commit terrorist acts.

4.3. Marriage in Romania

Marriage, subject to the rule *locus regit actum* in terms of the shape, is concluded according to the procedure provided by the Romanian law, if the official place is at the civil status service of the public local authority in Romania (according to article 11 of the Family Code, the address of the Romanian citizen determines the jurisdiction), each of the prospective spouses is required to prove the fulfillment of the conditions laid down by their national law, according to article 18 paragraph (1) of Law no. 105/1992 on the regulation of private international law.²

¹And these conditions are: he possess a valid state border crossing document which is supported by the Romanian State; he possess a Romanian visa, if applicable, a residency permit, if by international agreements it was not otherwise stated; he is not included in the category of foreigner to which it was imposed the measure to ban the entry into Romania or who were declared undesirable; he did not previously violated the declared purpose in order to obtain a visa or, where appropriate, to enter into the Romanian territory; also he did not try to cross the Romanian border with false documents; there were not information from the Schengen Information System for refusing entry; he does not represent a danger for the national security and defense, the public order, health or morals.

²Published in the Official Monitor, Part I, no. 245 of November 1st, 1992.

After acquiring a new status, as alien married to a Romanian citizen, it must be applied the article 13 paragraph (1) of the Ordinance, according to which during their stay in Romania, foreigners are obliged to declare at the territorial formation of the Romanian Immigration Office, which granted them the right of residence, any change in personal circumstances, in our case, the conclusion of a marriage.

4.4. Long-stay Visa in a Family

Long-stay visa for family reunification, obtained under the conditions of article 24 letter f), and article 46 paragraph (16) of the Ordinance, it allows foreigners to live in Romania for a period of 90 days, with one or more journeys.¹

Taking advantage of the status of a person married to a Romanian citizen, or if there is a child resulted from the marriage and of the parent's status of a Romanian child, as evidenced by documents, the alien requests from the diplomatic mission or Romanian consular office from the country where it resides or the residence of the visa for family reunification.² In such case, it is not necessary the approval of the Romanian Immigration Office for the visa application made in terms of article 46 paragraph (7) of the Ordinance; it is sufficient the proof of parentage or marriage relationship, depending on the situation, and also the submission of health insurance for the duration of the visa and criminal record certificate from the country of residence of foreigner.

The alien who was granted a long stay in Romania for family reunification shall receive by the territorial formation of the Romanian Immigration Office a residence card which is part of his residence in the country (articles 114-117 of the Ordinance).

Parallel to this stage and in the same law conditions, the alien may apply for long-stay visa for family reunification also for other members of his family abroad, expressly and exhaustively listed by the legislator: his children, whether biological

¹ In terms of country of origin, most foreigners that hold a legal residence in Romania according to the statements in June 30th, 2009, from Moldova (28%), Turkey (17%), China (14%), Syria (4%), that have established their residency in Bucharest (41%), Iasi (6%), Ilfov (6%), Cluj (6%), according to official site Romanian Immigration Office.

² According to article 46 paragraph (16) point b), c) and d) of the Ordinance, based on the free union (cohabitation) between a foreigner and a Romanian citizen, it may require long-stay visa for family reunification and unmarried foreigners who live with unmarried Romanian citizens, if they have at least one child together.

or adopted, unless they have attained the age of 21 years and their first degree relatives in ascending line.¹

4.5. The Extension of Temporary Stay Right for Family Reunification

One of the situations in which an alien cannot be removed from the Romanian territory of is when it is married to a Romanian citizen and it is not a marriage of convenience. So, the foreigner must prove the fact that he is married to a Romanian citizen, living with him, and his marriage takes the personal and financial effects.

Out of the published practice (Lupaşcu & Cristuş, 2009, pp. 233-266) there are some cases in matters of marriage of convenience:

Thus, the court² in relation to the items specified in article 64 (2) of the Ordinance held the produced evidence (witness statements, photographs, documents) at the request of the applicant, an Iraqi citizen, stating that different answers to detailed questions put by the officer to the spouses, does not prove the existence of a marriage of convenience, it did not obey the conditions provided by law.

Thus, although the plaintiff met his wife through the Internet in winter 2007, in March 2007 the applicant was introduced to her family, and the marriage ending on May 28, 2007. The marriage was not a subject to the payment of any sum of money. From the date of marriage, the spouses had a marital cohabitation in different residences, in Teleorman County and in Bucharest, and living and housing together; they initially understood each other in English, and then the foreigner started learning Romanian. The claimant has acquired the right to residency in Romania, but the application to extend the right of residence for family reunification was rejected by the Romanian Immigration Office because it was found a marriage of convenience, which led to the issuance of the decision to return.

In another case³, the court held that the decision to return was challenged legally, and it was issued as a result of finding the conclusion of a marriage of convenience. Thus, it was noted that the alien has concluded the marriage shortly after he met his

¹ The family members of Romanian citizens or of EU citizens are 33% of all foreigners with legal residency in Romania. Out of these, 27.7% represent the family members of Romanian citizens, according to the Romanian Immigration Office data.

² Court of Appeal, Bucharest, Section VIII of the administrative and fiscal contentious, decision no. 2623/2008.

³ Court of Appeal, Bucharest, Section VIII of the administrative and fiscal contentious, decision no. 2804/2008.

future wife, that they do not speak a common language, the wife did not know any Arabic or English language and their statements taken at the interview were inconsistent regarding the personal matters.

Also, the practice of European Court of Human Rights have held that the annulment of a concluded marriage with the only purpose of acquiring a specific nationality, it is a necessary interference to avoid disorder and protect the rights of others¹ and it is an exception from the guarantee of the rights to defense according to article 8 of the European Convention on Human Rights. (Bârsan, 2005, pp. 678-679)

Or *Ciliy c / Holland cause*², where a Turkish citizen claimed that the expulsion measure taken by the Dutch authorities was an interference in his right to a family life, because he had a child with a Dutch, that was entrusted to rise, and the European court admitted that the expulsion measure aimed at preserving the economic wellbeing of the residence country by stopping the flow of immigrants, serving as a legitimate interest, according to article 8 of European Convention on Human Rights. (Lundström, 1996)

4.6. Obtaining the Right of Permanent Residence in Romania

After a continuous and legal residency³ in Romania in the last 5 years preceding the application, the alien applies to Romanian Immigration Office, in terms of article 71-72 of the Ordinance, granting the right of permanent residence. Besides proving the condition relating to the length of stay, the foreigner must also prove the following: to have a health insurance and a living space under the law, to speak Romanian at least satisfactory and that he is not a danger to public order and national security.

Two categories of foreigners, who hold a residence right, enjoy a special status; this is a right which is granted without the condition related to the duration of stay and without providing proofs that he meets all the legal requirements. The first category includes the foreign of Romanian origin or those born in Romania and those whose residence is in the interest of Romanian state; the article 71 paragraph (2) of the Ordinance requires them to fulfill only the final condition regarding the public order

¹ ECHR, January 6th, 1992, no. 18643/1991, Benes c/Autriche.

² ECHR, 11th July 2000.

³ Continuous residency means the situation in which the absence period from Romania is less than 6 consecutive months, but it does not exceed a total of 10 months. The stay is considered legal, if against the alien it has not been ordered any measure of expulsion from Romania.

and state security. The second category, according to article 71, paragraph (4) of the Ordinance refers to foreigners who can prove that they have made a minimum investment of 1,000,000 Euros or created over 100 full-time jobs in Romania.

The Supreme Court¹ held that the proper settlement of the case, considering the active role required by article 129 of Penal Civil code, it was incumbent for the Fund Judge to require the transmission of information on which it was considered that the applicant's situation was not fulfilling the condition imposed by article 70 point f) of the Ordinance. The formal examination of the decision for rejecting the application for determining the residency in Romania, without verifying whether the applicant presents a danger to national security or public order and without being requested, provided and analyzed the information on the committed acts; it is likely to reach to his privacy, which will breach article 8 of the European Convention on Human Rights by failing to receive, from the Romanian Immigration Office or the court, a minimum degree of protection against the arbitrariness of the issuer; it is not sufficient to invoke the provisions of Law no. 51/1991 on the national security of Romania² and of Law no. 189/2002 on the protection of classified information.³

In another case,⁴ the Court of Appeal held that the request for establishing the right of permanent residence in Romania filled in by a citizen of Iran must be upheld by the Romanian Immigration Office, since the alien has filed documents with the situation indicating that it has been recognized his refugee status in Romania through a civil verdict in 1997, married since 2003 with a Romanian citizen, having a minor child, being a sports instructor and counselor training for Taekwondo national groups within the Specialty Romanian Federation, living in an apartment, personal property, the Romanian language awareness can be assessed as "good"; the circumstances detained by the authorities are not sufficiently characterized by means of objective factors underlying the conclusion that there is a danger to the national security.

After obtaining the right of permanent residence, the alien, being a family member of a Romanian citizen, received a permanent residence card for a period of 10 years, with the possibility of successive renewing for same period.

¹ The High Court of Cassation and Justice, the administrative and fiscal contentious department, the decision no. 516 of February 3, 2009, *Pandectele Române* no. 6/2009, pp. 179-182.

² Published in the Official Monitor, Part I, no. 163 of August 7th 1991.

³ Published in the Official Monitor, Part I, no. 248 of April 12th, 2002.

⁴ Decision no. 2979/2008, section VIII of the administrative and fiscal contentious.

4.7. Obtaining Romanian citizenship

After the passage of 5 years from the date of marriage, the alien, married to a Romanian citizen, under the article 8 of Law no. 21/1991 on Romanian citizenship, must apply for acquiring Romanian citizenship¹ and obtain approval, if he proves also other conditions stipulated by law.² (Berceanu, 1999, p. 127-134). This period of 5 years residency in Romania may be reduced by half in the following possible situations in our project: the alien is an internationally recognized personality; the alien has invested in Romania amounts exceeding 1,000,000 Euros.³

This is how, in the most optimistic plan, after at least 2 and a half years after marriage, which may be of convenience, undiscovered by the authorities, and aided by some organizations to invest in Romania the minimum amount necessary to shorten some deadlines, the foreigner achieved its purpose. The Romanian passport gives to the foreigner freedom of movement within the European Union.

If under the provisions of article 17 (1) of the Treaty on European Union, a citizen of the EU is any person holding the nationality of a Member State, consequently, the alien who acquires the Romanian citizenship also becomes a EU citizen enjoying all rights and obligations under the Treaty. (Burca, 2009, pp. 1053 - 1055)

5. Conclusions

In this study we tried to provide a snapshot of the simulation in relation to marriage, developing a draft of a plan, through which the institution of family law, a foreigner can circumvent the conditions of entry and staying under the Romanian law, obtaining the right to residency in Romania and subsequently the Romanian

¹ Republished in the Official Monitor, Part I, no. 98 of March 6th, 2000.

² These conditions are specified in article 8 points b-g, of the Romanian citizenship law: he proves through his conduct, actions and attitudes, loyalty towards the Romanian state, he does not take or support actions against the law and order or national security and he declares that in the past he has not taken such action; he has provided decent legal existence in Romania, according to the requirements of the law on foreigners; he is known of having a good conduct; he was not sentenced in his country or abroad for an offense that makes him unworthy of being Romanian citizen; he speaks Romanian and he has the basic notions of the Romanian culture and civilization, sufficiently to fit into society; he knows the Constitution of Romania and the national anthem.

³ These changes were introduced by Law no. 172 of 8th May 2009 on approving Government Emergency Ordinance no. 147/2008 for amending and supplementing Law No. 21/1991 on Romanian citizenship, published in the Official Monitor, Part I, no. 321 of May 14th, 2009. Other situations, in which the term of 8 years of residency in Romania for the foreign born abroad, and 5 years for an alien married to a Romanian citizen, may be reduced to half, are: the applicant is a citizen of a European Union member state; the applicant has acquired the refugee status according to the law.

citizenship, thus the European one, in order to initiate actions the fall within the definition of legal or illegal migration.

Regarding immigration, which may be achieved by generalization of some marriages of convenience, which can create security risks for countries of origin (those who leave are often active people, families with high qualification, which cause dysfunctional families with children deprived of parental supervision, pension system without resources), for the transit ones (the emergence of human trafficking industry, involving forged documents, guides, illegal travel system) and also for the receiving Members (the emergence and proliferation of refugee camps, crime rates, local community resistance, difficult social integration, ethnic and religious conflicts).

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