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The European Court of Human Rights requirements concerning the excessive length of proceedings in Romanian national law system

Adriana-Florina Bălăşoiu (Marta) *

Abstract
Romanian legislation should provide the possibility of compensation for procedures that take excessive time. Given that there are many similar cases based on requests made against Romania are currently pending before the Court concerning the excessive length of the criminal or civil procedure, the Court concluded that there is a systemic problem that requires the adoption of legislative reforms in Romania to ensure the right to a fair trial within a reasonable time. This was the conclusion in the case Vlad and others against Romania from November 23rd 2013 and now we face the same problem. The aspects which will be analyzed concern in particular the reasonableness of the length of proceedings that must be assessed taking into account the circumstances of the case and the following criteria: the complexity of the case, the conduct of the applicants and of the relevant authorities.

Keywords: *the reasonableness of the length of proceedings, European Court of Human Rights, circumstances of the case, the complexity of the case, the conduct of the plaintiff and of the competent authorities*

* PhD, University of Craiova, Faculty of Law, Phone: 0040721282186, E-mail: afbalasoiu@gmail.com

The reasonableness of the length of the proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the plaintiff and of the competent authorities, and the plaintiff's litigation stake (*European Court of Human Rights*, Case of McFarlane v. Ireland from 10/09/2010). As a preliminary point, it should be noted that, irrespective of the scope, the point of departure of the term is considered to be, if a State signatory to the Convention has not recognized the right to an individual appeal under Art. 34 (formerly art. 25) of the Convention, when the State against which the applicant is directed acknowledges this right. For example, in the business *Pretto et al., Italy*, the plaintiff notified the Tribunal of Vicenza on September, 24th 1971, the proceedings ending on February, 5th 1977. But as Italy acknowledged the right to an individual appeal only on August, 1st 1973, the Court included the duration of the term analysed only for the period from August 1st 1973 to February, 5th 1977. However, in order to rule on the reasonableness of the duration of the procedure from the moment when the Convention has produced full effects for the Contracting State concerned, the Court takes into account the status of the internal procedure at that time.

The absence of an effective remedy through which justifiers can complain of the excessive length of proceedings violates Article 13 of the Convention. In several parallel lawsuits, the plaintiff attempted to obtain damages for breaching his inventor's rights. One of the trials lasted 5 years and a half and another 7 years and one month. After finding that Article 6 of the Convention has been breached due to the unreasonable duration of the two proceedings, the Court examined compliance with the provisions of Article 13, meaning the existence in the Roman system of an effective means by which the plaintiff could have complained of the excessive duration of Procedures (Abramiuc vs. Romania, 37411/02, February 24th 2009). The judgment of the European Court of Human Rights in this case is also significant *Vlad and Others v. Romania,* of November 26th , 2013, in which the Court found a general deficiency of the Romanian legislative system that does not provide for effective remedies in the event of an unreasonably large duration of a civil or criminal proceeding.

In the judgment, the Court ruled on the complaints made by 3 petitioners, all about the length of judicial proceedings. Mr Vlad, one of the petitioners, complained that the criminal trial in which he had been indicted took more than 12 years. Another petitioner, Mr Plaţa, has filed a complaint with the ECHR on judicial proceedings in civil matters lasting over 16 years and has not yet been finalized, and Mrs Bratu complained that the court proceedings in which he had been a party lasted for 9 years. Also, two of the complainants - Plaţa and Bratu - complained that they had no internal access to an effective remedy over the excessive length of judicial proceedings.

According to the ECHR, there is a systemic problem in Romania regarding the length of judicial proceedings. The Court indicated that it ruled on about 200 cases related to the length of judicial proceedings and there are almost 500 other cases on the same issue, all against Romania. In "Civil matter", the starting point is basically the moment when the court has been notified by a request for a summons to court, according to the customary uses of the internal law. Usually, the competent court is the court of first instance, but there are situations where the point of departure of the term relates to the moment of notifying a higher court judging in the first and last instance.

However, the initial moment is appreciated in other cases as well by reference to procedural acts or procedural forms of a contentious nature, which may indicate the

beginning of the term in civil matters: issuance of a payment order; confiscation of seized goods; declaration of constitution as civil party; the application for interim measures; the opposition to enforcement made by the plaintiff in the domestic proceedings; making an application for action in an ongoing proceeding. By way of exception, if the court notification has to be preceded by an administrative appeal, the term runs from the date of the administrative appeal.

Thus, in the case König v. Germany, the plaintiff was withdrawn the right to practice in his own medical clinic. Before appealing to the Administrative Court in Frankfurt, the plaintiff had to go through a preliminary administrative procedure (*Vorverfahren*) before the authority which issued the contested administrative act. The Court appreciated, referring to the earlier judgment in the case of *Golder vs. UK*, that since the plaintiff could have recourse to the competent authority only after the completion of the administrative procedure, the initial moment taken into account for the determination of the term should be "*the moment the plaintiff filed an objection against the withdrawal of the authorisation to practice*". Instead, in "Criminal matter" the term begins to run from the date on which a "charge" was formulated, otherwise it would be impossible to determine the existence of a "criminal charge". It is appropriate to recall in this respect that "accusation in criminal matters" is defined as "the official notification, emanating from the competent authority, of the incrimination of having committed a criminal offence" and induce the idea of "significant repercussion for the situation of the person concerned".

As regards the end point of the term to be examined, there are no differences between civil matters and criminal matters. In general, in both matters, the period over which bears control of the Court is concluded, in principle, from the date on which the last judicial internal decision, that has become final, was executed. However, there are situations in which the national procedure is still *pending* at the time of the pronouncement of the European Court, in which case the end point of the time limit is the date of the judgment of the European Court. In criminal matters, in the case of non-prosecution solutions, it will be considered that the final moment of the term is the order by which the prosecutor solves the case in a negative sense.

It is worth recalling that the Strasbourg court has consistently established in its case-law that, according to Art. 6 paragraph 1 of the Convention, it is necessary that the decisions of the administrative authorities which do not meet the requirements of this conventional text be subjected to a subsequent control exercised by a judicial authority with full jurisdiction.

Moreover, the period during which the settlement of the appeal is suspended is taken into account in determining the reasonableness of the conduct of the procedure, namely, if the imputed facts do not prove to meet the typical features of the offense, the resumption of the appeal by the administrative authority is mandatory, and the eventual challenge to this substantive decision before the competent court will bring an excessive length of judicial proceedings to the fore, since in their calculation also enter the administrative phase - a compulsory phase in order for the interested person to access the judicial phase of the case - of solving the contestation. Thus, in the Romanian legal system there can be noticed a constant problem regarding the provisions of art. 214 par. (1) lett. a) of the Government Ordinance no. 92/2003 regarding the Code of fiscal procedure, also found in the new regulation of Law no. 207/2015: Art. 277 Suspension of the administrative settlement procedure of the contestation. (1) The competent resolution body may, by reasoned decision, suspend the settlement of the case when: a) the body that

carried out the control activity notified the bodies in charge of the existence of indications of committing a crime in connection with the evidence on the establishment of the tax base and whose finding would have a decisive influence on the solution to be given in administrative procedure; b) the settlement of the case depends, in whole or in part, on the existence or non-existence of a right which is the subject of another judgment. "

The legal provisions violate the constitutional provisions because they provide for the possibility of suspending the appeal in the administrative procedure by the competent resolution body without establishing clear criteria and objectives in which it may be ordered to suspend the settlement of the appeal, which impedes the principle of predictability of the law, a principle which is at the basis of the rule of law. The possibility of suspension does not intervene at a time clearly defined by law, such as the commencement of criminal prosecution or the initiation of criminal proceedings, which are clearly defined by the Code of Criminal Procedure and which do not depend on the attitude of one of the parties to the proceedings, but by the criminal investigating body, third party in relation to the tax dispute, as is the case under the hypothesis regulated by art. 413 paragraph (1) point 2 of the new Civil Procedure Code, but it intervenes whenever the body that carried out the control (from the same administrative structure with the resolution body) notified the rightful bodies about the existence of indications of committing an offense whose finding would have a decisive influence on the solution to be adopted in the administrative procedure.

The notions used by this text of the law, which define the cumulative conditions in which the possibility of suspending the settlement of the appeal occurs, namely that there are "indications of committing a crime" that would have a "decisive influence" on the solution to be given in the administrative procedure are vague, are not defined by legislation. Therefore, they allow subjective and arbitrary interpretations, at the discretion of the competent resolution body, without being predictable. Also, when the process is affected by the disadvantage of one of the parties involved in relation to the other party, both the principle of equality and the right to a fair trial are violated. The fair trial can only be achieved in the conditions in which it complies with the unanimously accepted fundamental principles that ensure the balance between the general interest of society and the legitimate interests of each individual. Moreover, the right of access to a court must be achieved within a reasonable and predictable timeframe. The State also has the obligation to take all the necessary measures, including legislative measures, so that a lawsuit does not take too long and ensures the right to an effective appeal before a national court. Or, once the suspension under the critiqued provision of unconstitutionality intervenes, the Fiscal Procedure Code does not provide for the possibility for the competent resolution body to revoke the measure of suspension or to resume the settlement within a certain time to the extent that the investigations of the criminal investigation bodies exceed a certain amount of time deemed reasonable (similar to the provisions of Art. 413 par. (3) of the New Code of Civil Procedure].

When deciding to suspend the appeal, the administrative authority checks two conditions *sine qua non*, as follows: (1) the body that carried out the control activity has notified the bodies of law of the existence of indications of committing a crime and (2) the respective crime has a decisive influence on the solution to be given in the administrative procedure. The first condition has an objective character (whether or not there is a referral of the control body), and the second condition is an essentially subjective one (the decisive nature of the crime over the administrative solution). It is noted that the decision of the competent administrative authority regarding the fulfilment / non-

fulfilment of these conditions is final, and any mistakes of appreciation cannot be challenged before the court. Similarly, the law grants an optional character in the exercise of this power of the administrative authority, in that, although the two conditions are met, the authority concerned may not suspend the procedure (by using the word "may"). Moreover, considering the reverse situation, it can be found that the order of the suspension measure can be made even if the body which carried out the control clearly notified the criminal prosecution authorities in a wrong manner. In this case, the administrative authority that resolves the appeal may also suspend the administrative procedure. Therefore, these aspects demonstrate that the law creates the premise of an arbitrary conduct of the administrative body, conduct not subject to judicial control.

Thus, any excess of power on the part of the administrative authority cannot be sanctioned in any way. Although, in order to avoid the obligation, the person challenging the tax administrative act may apply to the administrative court to suspend the execution of the administrative act under the terms of a bail, however, the suspension of the act during the period of suspension of the administrative procedure has nothing to do with the merits / legality of the decision to suspend the procedure. In other words, although it has an interest, the person affected by the suspension decision will not be able to challenge it, this one enjoying an absolute presumption of legality.

Of course, the right of access to justice is not absolute; it may allow implied limitations, because by its very nature, it is regulated by the State. By drafting such a regulation, the States enjoy a certain margin of appreciation. However, the restrictions applied cannot limit the person's access in such a way or so that the right is reached in the substance itself. In addition, these restrictions are not in line with art. 6 paragraph 1 of the Convention unless they are pursuing a legitimate aim and if there is a reasonable ratio of proportionality between the means used and the targeted purpose (Judgment of 26 January 2006 in Case *Lungoci against Romania*, paragraph 36). However, in the present case, nor can one achieve the proportionality test previously shown since the impossibility of attacking the decision of suspension of the proceedings does not constitute a restriction of the free access to justice, but also a denial of it, even a violation brought to the substance of the law.

In conclusion, a measure taken by an administrative authority, even if it does not resolve the claim fund, but affects the rights/interests of the person, may not remain in itself final by the impossibility to challenge it in the administrative court. It is obvious that the person concerned cannot be left to the discretion of the administration, a matter which is found in the present case, in the absence of judicial control.

Another problem should also be mentioned, namely whether in a tax trial, settling a litigious matter into the criminal file - namely that the inventory shortage at the level of the applicant company was wrongly established, and it does not exist - creates a legal presumption of *res judicata* in the meaning of Art. 431 paragraph (2) NCCP, with the consequence of the impossibility of determining the tax liability of the company for the same state of affairs. In the most simple manner, this legal problem can be summed up as follows: since in the criminal proceedings it was established that there was a inventory shortage, it may be considered later in the tax process, that this inventory shortage exists, with the consequence of conferring the corresponding tax consequences? (Costas, 2016).

From this perspective there are objectionable some Romanian court rulings that summarizes everything in the following manner: there is no identity of parties, object and cause between criminal litigation (in which the criminal complaint endorsed the company's administrator) and tax litigation (where tax liabilities relate to the company).

In fact, as stated in the doctrine, instead of the "object" and "cause" elements there should be used, especially in the environment of the new Code of Civil Procedure, another element: the identity of a litigious matter (*eadem quaestio*). In matters of res judicata, there is much interest for what was the subject of controversial debates before the court and what the court eventually decided. Therefore, since objectively it has been established in the criminal file that there are no assets missing from the company's inventory, no tax obligations can be established considering that those assets would be missing from the company's inventory.

In such a case it was considered that criminal decision, made in connection with the verification of the legality of the solution of not initiating the criminal prosecution, could be mentioned, since they are: (i) the judgment of the courts of Romania; (ii) the judgments in the contentious matter ; (iii) decisions which solve the fund of the cause (Leș, 2014: 562). Admitting the exception of the authority of res judicata would thus avoid a legally incomprehensible situation in which the Arad Court and the Arad Tribunal, as in the present case, together with the Prosecutor's Office attached to the Arad Tribunal, would conclude that there is no shortage from the company's inventory (2010) and five years later the Arad Tribunal would however rule that this inventory shortage exists and that it may be attributed tax consequences in the sense to oblige the company to pay additional tax liabilities.

It is also violated art. 4 of Protocol no. 7 which must be understood as prohibiting the prosecution or judgement of the second 'offense' in so far as it results from identical facts or facts which are substantially the same. The European Court of Human Rights (Grand Chamber) pronounced in this respect by judgment of February 10th 2009 in the Case *Sergey Zolotukhin v. Russia* (paragraph 82. Art. 4 of the Additional Protocol no. 7 does not prohibit the parallel conduct of the fiscal procedure and of the criminal procedure.) However, there is a violation of the principle *ne bis in idem* when, following a final judgment in one of the proceedings, the other procedure continues. In any case, even if it was not formally invoked the violation of art. 4 of the Additional Protocol no. 7, the existence of a second (criminal court) ruling on a first final judgment (the tax court, for example) constitutes a violation of the principle of legal security (according to the position of the European Court of Human Rights, pronounced in the judgment of October 21st 2014 in the case *Lungu and others vs. Romania*). The interpretation, of course, also works symmetrically in reverse.

All these issues are likely to draw attention to the rationality of the cases in domestic law, but obviously without affecting the quality of the act of justice. Our legal literature and jurisprudence have recognized the major relevance of fundamental rights and are commonly referred to these. In order to avoid condemnation of the Romanian State, the procedures must become effective and the national judge is the essential link. This issue needs to be remedied in order to avoid pronouncing a pilot decision against Romania on this matter. The pilot procedure starts with the choice by the European Court of one or more representative cases of a repetitive nature, which it is to deal as a priority, and the solution under the pilot procedure will also address the other similar pending cases (Ignat, 2015: 68, 50).

There is a rich practice of the European Court of Human Rights on pilot decisions on many States. Among the causes that lead to repetitive complaints, there are analyzed: dysfunctions of the legislation; faulty application of laws; internal practices contrary to the laws and provisions of the Convention; non-enforcement of the judgments of the national courts; but also the excessive duration of the judicial proceedings.

As stated in another article (*Recent Developments in the European Court of Human Rights Pilot-Judgment Procedure*), that with respect to Romania an important issue is that of inhuman or degrading treatment (violation of art. 3 of the Convention), and that the European Court of Human Rights could very well have recourse to a pilot solution to remedy the serious problems in prison systems (European Court of Human Rights) which happened in the judgment of April 25th 2017 in the case *Rezmiveș and others against Romania*, as well as the excessive duration of procedures, it is very likely that the same thing happens. It should be remembered that a pilot decision was also issued against Romania, *Maria Atanasiu and others against Romania*, in the field of restitution of nationalized properties. In order to avoid the above mentioned, a first step must be taken to reorganize the regularization procedure in order to eliminate the excessive rigidity of some judges who ask the applicants to file documents that they do not have in order to cancel their application.

The European Court emphasizes that the settlement of the Case Maria Atanasiu takes place after having already pronounced itself in various Romanian Cases, where it acknowledged the breach of art. 6 § 1 of the Convention and of art.1 from the First additional Protocol as a consequence of the deficiencies in the Romanian system regarding the return of the properties lost during the Communist period and granting compensations in this respect. The Court found that the inefficiency of this system persists and it is manifested on a large scale as the number of cases in which the same type of violation is increasing. Not only does this state of affairs represent an aggravation of the State's liability but it is also a threat to the efficiency of the control device created by the Convention, reason for which it was necessary to apply the pilot judgement procedure.

The situation existing in the internal legal order with regard to compensations, both on a legislative level and from the perspective of the administrative practice, was incompatible with the provisions of the Convention. By trying to identify the reasons for which such an incompatible situation aims at such a great number of individuals, the Court ascertained the gradual extension of the range of application of the laws stipulating remedies, as well as the absence of a threshold for these remedies.

According to the Court, the complexity of the legislative provisions and their quick change determined an incoherent judicial practice which led to the creation of a general judicial uncertainty concerning the rights of the former owners, of the State and of the third acquiring parties. Also, a start would be to set a clear deadline in which the files may be distributed randomly and forwarded to the appropriate panel of judges to carry out, from that recommended date, the procedures preceding the first hearing. Against the silence of the text of the New Civil Procedure Code, this recommended date still has the nature of a purely administrative, indicative ("referral date") term and not a legal, judicial or conventional procedural term.

In practice, this "immediately" may in some cases amount to more than one year, given that the recommended date set by the ECRIS program may vary, depending on the score (complexity) of the dossiers recorded on each panel, from a few days to one year (these variations being also found in large courts in the immediate period following the entry into force of the NCCP). The existence of this unacceptably large temporal fluctuation between panels continues to create differentiations between terms of recommendation appropriate to the causes of the individuals. If for some, regularization begins only a few days after registration, in others' case, regularization starts after more than a year. There is kept, therefore, a wording that is often incorrect. So, related to these aspects it is also the phenomenon of massive human rights violations. „This phenomenon

has created a preoccupation among states and within the international community with how these acts should be remedied in a human rights context. It asserts that while the Court, for various reasons, has taken a rather conservative approach, it has nonetheless succeeded in developing a doctrine of procedural obligations under Articles 2, 3 and 5 of the European Convention on Human Rights and in removing juridical obstacles to domestic prosecutions, such as amnesty laws or non-retroactivity penal norms" (Răduleț, 2015).

The most radical changes should take place in the political system and in the economic structure. These changes were contemporary politicians' answers to the above experience of the recent past. Above all, capitalism should be replaced with a mixed economic system, which had, however, from the beginning to play a dominant role nationalized, therefore, the public sector and private enterprise should be relegated to the role of mere adjunct in the consumer products industry and services (Bures, 2017).

The notion of "rule of law" represents one of the main characteristics of the European constitutionalism. Through this concept, the state itself restricts the field of its action, in view of its own values system. The limitation of a fundamental freedom must be imposed by a particular situation and should always follow a specific purpose, namely to protect freedom of others or of a public interest, and that purpose can be achieved only by taking the respective limitation measure. If for fulfilling the objective pursued another measure less restrictive could be taken in terms of limiting a fundamental freedom, then that measure should be taken even if the measure less restrictive and most drastic would achieve the legitimate pursued objective. The norms by which the State must act must be effectively applied by the courts, thus, according to the principles of a democratic State (State type mentioned in the preamble of the Convention, in which may be protected the fundamental rights and freedoms), the State powers must be controlled each one by the other. The European Convention of Human Rights represents the natural connection between individuals fundamental freedoms and democratic society requirements, as the jurisdictional case-law of the Court of Strasbourg emphasized it many times *"the important place that the right to a fair lawsuit hods in a democratic society"*. In the same time, the case-law regarding the application of the Convention underlined many times: *"The Convention's objective is not the protection of non-theoretical or illusory rights, but of those rights which are real and effective"*. Recognition of applicability of the principle of equality of arms to any proceedings, litigation or amnesty, including proceedings before some administrative and jurisdictional authorities, leads to the idea that there is the obligation of examination of the other defining elements of the right to a fair trial.

The notion of democracy as a form of political organization and management of society involves the notions of sovereignty, *demos*, state of law. The individual complaints mechanism of the ECtHR is the world's most advanced international system for protecting civil and political liberties. Generally, the judgments of the Court by which it is acknowledged the violation of a fundamental right defended by the Convention immediately create in the responsibility of the States only individual obligations concerning the respective Plaintiff. Thus, the direct and immediate effects of these judgements, based on their res judicata, are produced only between the parties in the process.

Nevertheless, the judgements of the Court have an indirect effect. As such, the State concerned, after having been sentenced for the violation of a fundamental right in a case, is obliged to eliminate the malfunctions ascertained so as to avoid subsequent convictions in cases of the same type. These actions of the State are not imposed by the

Court through the judgment pronounced, which as effect only *inter partes*, but they are identified and set by the body in charge with the enforcement of the decisions of the Court, namely the Committee of Ministers of the Council of Europe (Răduleţu and Şandru, 2011: 24).

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