COMPLYING WITH THE PRINCIPLE OF EQUALITY OF ARMS IN ADMINISTRATIVE HEARINGS

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Abstract
In analysing complaints against the reports on administrative offences, we hereby note that similar problems would perpetuate even in later stages and are included by the parties in the grounds of appeal: the issue of assisting witnesses who signed the reports without having been actually present or having really witnessing the facts, the obligation (or lack of obligation?) of the officials to submit additional evidence in defence, with the exception of the concluded report, not specifying the objections / mentions within these reports, insofar as the heading itself is required to be filled in, if the respective offender wishes, even at the suggestion of the procedural agent.
Since we have relatively recently confronted with these issues on the merits of the case, in administrative hearings, we decided to investigate such practical issues, each with its specific nature, starting from concrete cases in relation to the courts of appeal ought to consider the problems mentioned above in connection the principle of equality of arms, in its form derived from the interpretation of art. 6 of the ECHR.
Key words : *Administrative report, administrative offence, audi alteram partem, equality of arms.*

1. Introduction

It is well known that E.C.H.R. assimilates and analyses administrative offences as being part of the European sphere of autonomous criminal notions (see the case of Anghel v. Romania), all the jurisprudence of this European forum permanently assimilating such facts to those of a criminal nature and reporting their degree of social danger to that of crimes, taking into account in particular the provisions of many European laws regarding such antisocial facts (Criminal Codes or Codes of Administrative Offences).

According to the case law of the ECHR, applicable on the basis of Article 6 of the Convention, although the petitioner in a matter of administrative offence enjoys the presumption of innocence, he must bring evidence that is contrary to that recorded in the legal report in case the evidence administered by the officials can convince the court regarding the culpability of the "accused", beyond any reasonable doubt [1].

The issues that emerge in practice with respect to this reversal of the burden of proof and that are virtually derived from the legislation in force are those set out in the summary of our work. Such matters unquestionably relate to the principle of equality of arms mentioned in art. 6 of the ECHR - the right to a fair trial.

By interpreting the norms of law in force we infer that the report related to the administrative offence is an individual administrative act that benefits from the character (and the presumption) of authenticity and truthfulness precisely because it is concluded by a representative of the state, an official, which lead to the situation in which anyone may be declared an offender from the outset (the equivalent of the defendant in the criminal sphere) and be forced to prove their potential innocence by presenting evidence before the court to counter the statements of the official.

The report concluded by the traffic agent has the character of an administrative report. The mere fact that such a document is being issued does not violate the presumption of innocence due to the fact that the person against whom it was issued is not placed before a definitive verdict of guilt and responsibility. Moreover, the effects of the report can be removed by exercising the remedies provided by law. Besides, according to the theory and jurisprudence of the ECHR, “the problem of establishing guilt in the matter of administrative offences does not consider the extrajudicial phase of the administrative sanction, but its judicial phase”, which implies complying with the right to a fair trial and the guarantees provided by article 6 of the Convention. This article fully conforms to the provisions of art. 23 paragraph 11 of the Constitution - according to which "until the definitive stay of the sentence of conviction the person is considered innocent". [2].

2. Analysing the application of the principle of equality of arms in administrative hearings

Starting from two situations recently encountered in practice, we will attempt to demonstrate that in the scope of such hearings, it is very difficult to make sure that there is a balance between the offender and the official since the latter benefits from the opportunity to be credible precisely because law provides him or her with the right to conclude such reports, and more than often, the scope of the evidence that may stand as

evidence as to the authenticity of the concluded document narrows down to the report in itself. If we were to sketch a parallelism (an unfair one, we might say), we would note that the offender is not permitted to bring in his favour a single item of evidence (for example, a single witness present in the applicant's car and a relative / husband / wife with him), being forced to submit at least two items of evidence to be credible (witnesses and records, multiple records, photo boards and witnesses, etc.).

Thus, in one of the cases we wish to bring forwards, the petitioner was fined by an official of TRANSURB SA Galati, who recorded (in an abusive way, we consider) that she was travelling by public bus with a falsified ticket. The official said that the ticket was a forged one, that the passenger had it intervened upon both chemically, using medicinal alcohol, and physically, by having smoothened it with the iron. He also addressed her in an inappropriate and abusive manner, insulting her before all the other travellers in the sense that "she seems to be a person predisposed to commit such deeds constantly". All these happened in the context in which the passenger had used such bus tickets previously and had never had any traffic problems.

In this case, the imbalance was - in our view – given by the fact that the person was confiscated the ticket and was unable to bring a witness to demonstrate what had happened, taking account of the circumstances in which everything happened. The petitioner was fined with 100 lei, and the court of law did not remove the sanction [3].

Returning to the presumptions mentioned above, in its case law, “through art. 6 of the Convention, the Court focused on the balance that must exist between the presumption of innocence specific to the matter and the presumption of legality and validity of the report, existing in national law”. However, what the Convention enforces, through the standpoint of paragraph 2 of art. 6 of the Convention, “is precisely that a certain proportion between all these and the presumption of innocence established in favour of the accused, has to be obeyed. What is more, while analysing such proportionality it is necessary to take account of the actual stake of the hearing for the individual on the one hand, and his right to defence, on the on the other hand “[4] .

The failure to comply with the legal provisions and the mere fact of creating an unbalanced situation between the offender and the official were also due to the fact that the latter had not informed the former that she had the right to insert her objections in the

contents of the report, which is, according us, a case of relative nullity and removes without doubt the presumption of the legality and validity of the report, as provided by national law.

Moreover, in the case Bosoni against France, the European Court of Human Rights ruled that the probative force of reports or minutes is decided upon by each legal system, and the importance of each item of evidence may similarly be established, “but the court has the obligation to respect the fairness of the procedure as a whole, when administering and evaluating the evidentiary evidence” [5] apud.[6].

According to the GO no. 2/2001, art. 16 paragraph (7), the agent has the obligation that, at the conclusion of the administrative offence report, he shall inform the offender on the right to formulate objections regarding the contents of the report. Not complying with these provisions, may lead to the nullity of the report. ”The right of the offender to raise any objections with respect to those contained in the report that notes and sanctions the contravention, objections to be recorded in this report, is a form of the right to defence.” [7].

Starting from the practical situation set out above we consider that in such circumstances the official "takes advantage" of the offender’s lack of knowledge in administrative matters, thus depriving him or her, from the outset, of the possibility to make his or her own observations on how the facts unfolded, a fact that unquestionably violates the future "equality of arms" which the ECHR jurisprudence speaks of and which the offender should benefit from throughout the trial.

“With regard to the evidentiary that is proposed and administered (that may be administered), the competent court will administer the evidence provided by law, necessary to verify the legality and reliability of the report. The courts cannot strictly apply the “onus probandi incumbent actors” rule, but, on the contrary, they themselves must play an active role in finding out the truth, since the administrative offence falls under art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms” [8].

That is why, as regards the merits, according to the ECHR jurisprudence, applicable on the basis of Article 6 of the Convention, although the offender enjoys the presumption of innocence, he must prove contrary to those recorded in the report only if the evidence administered by the respondent can convince the court of his guilt, which

means that the presumption of the facts being found truthful by the agent and recorded in the report is not absolute.

Thus, through the decisions given in the cases Salabiaku v. France and Anghel v. Romania, it is revealed that the presumptions of fact and of law are recognized in all legal systems, “allowing them to be used in criminal matters as well, in order to demonstrate the offender's guilt, within certain reasonable limits, taking into account the severity of the matter and preserving the rights of the defence”, the presumption of truthfulness of the facts ascertained by the official and those recorded in the report “that may extend to the limit to which by applying it would not lead to the situation in which the person accused of committing the deed is unable to prove otherwise, although from the evidence administered by the accusation the court cannot be convinced of the accused's guilt beyond any reasonable doubt “[9].

This is precisely what has been noted and emphasized by the ECHR jurisprudence - the impossibility of demonstrating the contrary, is in our opinion questionable when the offender does not have any means of evidence or of the only possible means of evidence or when the deposition of an assistant witness, who was not present neither when the alleged fact took place nor when the minutes were concluded is brought as a supplementary evidence against those facts brought forward by the latter. We consider that such situations reveal a violation of art. 6 ECHR and of the principle of equality of arms.

This is all the more so since the doctrine demonstrates that in so far as the witnesses of the accusation are concerned, "the right to interrogate them expressly implies the right to be confronted with them". For example, it was decided that “a conviction based only on the statements of two witnesses made in front of the police, without the defendant being confronted with them” is being considered as a violation of article 6 paragraph 3 point d of the Convention [10] apud. [11].

In the situation mentioned above, as in other similar situations found in practice, such assistant witnesses are not brought before the judge to confirm what was recorded by the investigating agent in the report, which also implies that the petitioner who made the contravention complaint does not have the possibility to ask them questions or to ask

for their clarifying the facts. This is an evident shadowing of the principle audi alteram partem mentioned by article 14 Code of Civil Procedure.

In fact, the role of the audi alteram partem principle is to enable the parties involved in the case to "actively participate in presenting, arguing and demonstrating their rights or defences during the trial, having the right to discuss and combat the claims made by each of them, as well as to express their views on the motives of the court in order to establish the truth and to pronounce a legal and comprehensive decision." ([12] apud. [13].

The European Court's jurisprudence has held that the principle of equality of arms - one of the elements of the broader notion of a fair trial - "requires that each party is given the reasonable opportunity to support its cause under conditions that would not put it in a situation of net disadvantage when compared to the opposing party" [14] apud [15].

The right of the offender conferred by law, to address the court in oder to file a complaint against the administrative offence report, is liable to remove any injury. "Regarding the signing of the report by a witness, it states that the role of the latter is not to confirm the guilt or innocence of the offender, but to confirm the existence of the circumstances provided by law in case the report is not signed by the offender" [16].

In the situation presented by us, the offender signed the contravention report and as such, there was no need for an assistant witness to confirm those mentioned by the agent, which makes such evidence in such situations not be relevant or conclusive, especially in the context in which such a witness is, in many cases, another agent and especially that the provisions of art. 19 paragraph 2 of the G.O. 2/2001 prohibit another investigating agent to sign as a witness such a report in case the report is concluded in the absence of the offender or when the latter refuses to sign it.

However, we should note that in practice, the courts have found that the provisions of art. 19 of O.G. 2/2001 do not prohibit the hearing as a witness of the agent who is part of the team [17], but the specialized literature stated that "at the moment the progress of the trial is undermined by the disadvantage of one of the participating parties in relation to the other party, the right under litigation falls from the orbit on which it gravitates, an unfair process leading even to the denial of a fundamental right » [18] apud. [19].

The reason why another agent cannot be an assistant witness is obvious, "the equivocation of a partisan attitude has to be removed from the beginning, because there

may be a tendency for two agents from the same institution to leave together on the field and give each other " mutual assistance" in drafting the report, one as assistant witness of the other, situation, considered, of course, inadmissible" Also, it is shown that" the respective quality (of agent) must exist at the time of the conclusion of the report, being admissible that the latter had this quality, but lost it when the report was drawn up. In this situation, the second person is allowed to participate as an assistant witness" [20] apud. [21].

A situation that we also consider to be discriminatory is that of the person who is alone in the car and who was stopped, fined, and at the same time applied the sanction of retaining the driving license. As the only evidence that could have been used were the cameras in the intersection where it is assumed that the contravention was committed, the offender did not have the opportunity to obtain the recordings because such images on the video cameras in the intersections are taken over and managed by the local authorities for a period of 30 days or this term has been exceeded until the case itself has been judged by the court.

Art. 14 of the National Supervisory Authority for Personal Data Processing Decision no. 52 of 31st May 2012 on the processing of personal data using video surveillance means:

" (1)The storage period for the data obtained through the use of the video surveillance system must be proportionate with the purpose for which they are processed, but no longer than 30 days, except for the cases expressly provided by law or of well grounded cases. (2)After the deadline established by the data controller under the conditions mentioned in paragraph (1) has expired, the recordings are destroyed or deleted, as the case may be, depending on the medium on which they were stored".

Again, in this case we were in the situation that, from an objective point of view, the offender was not objectively offered the opportunity to bring evidence in his favour, considering that he was alone in the car and also that the report was signed as in the previous case, by a colleague of the agent, with the role of assistant witness. Obviously, the only "basis" for the application of administrative sanction was the report thus concluded [22].

We consider that art. 6 ECHR and the principle of equality of arms were also violated in this case as the offender did not have the practical possibility of contradicting the ones mentioned by the agent, considering that the only evidence in his defence was the recording of the video cameras and he did not have the opportunity to bring a witness in his support, bearing in mind that he was alone in the car he was driving.

The requirements of article 6 paragraph (3) point d) The ECHR are specific aspects of the right to a fair trial guaranteed in paragraph 1 of this provision, which must be taken into account when assessing the fairness of the procedure. Article 6 paragraph (3) point d) enshrines the principle that, before a defendant can be convicted, “all the evidence of the accusation must in principle be presented in front of him or her in public hearing, for a contradictory debate”. The principle in question does not apply without exceptions, “these can only be accepted subject to the right of defence; as a general rule, they require that the accused is given an adequate and sufficient opportunity to challenge the accusations and to interrogate their authors, at the time of their deposition or later”[23].

Acording to Art. 6 §1 and art. 3 lit. d) of the Convention, which provides the following in its relevant part: 1. „In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. 3. Everyone charged with a criminal offence has the following minimum rights: Every accused has, in particular, the right: […](d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; [...] ."

From this general principle, according to the Court's case-law, two requirements come forward: the first –“ the absence of a witness must be justified by a serious reason; the second - when a conviction is based wholly or to a considerable extent on the testimony of a person to whom the accused could not ask questions or could not ask to be listened to either in the instrumental stage or during the debates, the right to defence may be incompatible with the guarantees provided in art. 6” [24] apud. [25].

However, in our opinion, the fact that the court assures us that the fact mentioned in the report are real, through the intermediary of an assistant witness, who, in fact, was absent from the scene, is not at all justifiable or correct, taking into account of the lack of

objectivity of such an assistant witness. On the contrary, it does nothing but to destabilise the balance in favour of the official, already in a favourable position, thanks to the legal provisions in the matter, which is equivalent, from the onset with a discrimination of the offender. In so far as the European Convention on Human Rights “is concerned, it actually provides a double ban a in the matter of discrimination, in the sense that art. 14 only establishes a limited prohibition, whereas Protocol no. 12 to the European Convention contains a general prohibition, so that all persons under the jurisdiction of the Contracting States will be able to plead before the European court the violation of the right of non-discrimination by the national authorities not only with regard to the rights and freedoms guaranteed by the Convention, but also with respect to any right recognized in the national law of the Contracting State concerned” [26] apud. [27].

Discrimination “does not tend to manifest itself in an open and easily identifiable manner”. Proving a case of direct discrimination “is often difficult, even though, by definition, differentiated treatment” is "openly" based on a characteristic of the victim”. As already discussed,” the reason for differential treatment is often unexpressed or superficially associated with another factor” [28].

Typically, the person forwarding the action must convince the decision-making body that discrimination has taken place. However, “it may be particularly difficult to demonstrate that differentiated treatment has been applied based on a certain protected characteristic. This is because the reason that underlies a differentiated treatment often exists only in the mind of the author” [29] apud. [30].

However, in our opinion, the two cases that are presented herein and particularly the first situation are relevant both on discrimination and "imbalance of forces", as well as on double abuse by the officials who, by taking over the only one evidence - the alleged fake travel ticket, they did not give the opposing party the possibility of making copy of it or taking a photograph to be shown later, to the court, also being verbally aggressive and offending her, facts that should have been sanctioned disciplinarily by their senior leaders.

3. Conclusions:

Through those discussed and analysed above, we wanted to demonstrate that, in practice, it sometimes is very difficult for the two parties of an administrative hearing to

guarantee a clear balance in terms of the possibility to bring and administer evidence in defence. Though the facts that were presented above, we wanted to point at least two situations when this imbalance seems to be obvious, especially in the situation where the deed took place in a means of transport, and in this situation the and in this case, the opportunity to obtain a relevant testimony of another traveller or to obtain a written document (photo) or supporting evidence demonstrating the cause of the petitioner is non-existent.

All these situations show us that the principle of equality of arms derived from the provisions of art 6 ECHR can be violated or questioned in everyday practice, and this situation will be accentuated as long as the legislator maintains his position in the normative act which gives, from the beginning, a favourable position to agent regarding the evidence, the written report, thus being the legal "beneficiary" of the presumptions of authenticity and legitimacy.

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