THE LEGAL NATURE OF THE INFRINGEMENT REPORT

Eugenia IOVANAS[*]

ABSTRACT: *Regarding the probative force of the infringement report in the trial instances' legal maxim there have been framed two different opinions that have found a unitary rendition over the legal problem submitted to the debate.*
According to the solution adopted by ECHR in the cause Anghel vs. Romania, the report didn't have the same probative force that previously had, that is the situation of its appeal on the complaint, such that for the re-establishment of the equality of the juridical procedures that the parties have in their hands within the started legal procedure is necessary that this start from the presumed innocence premise in favor of the claimant, with the consequence of the necessity for the court to prove – inclusively the claimant's guilt.
The author of the work considers that in the situation that the report has been signed with objections by the offender, at the moment of the fact's ascertainment comes to the ascertaining agent, the infringement report is governed by the legal premise and the premise of absolute solidity.

KEYWORDS: *sanction report, ECHR in the cause Anghel vs. Romania, presumed innocence, legal premise*

JEL CLASSIFICATION: *K 23*

In the complaint recorded on the 3 May 2007, under the number 56802/197/2007 at the Brasov Law Courts, petitioner Oltean Ionut Florin required contradictorily with respondent in appeal, Brasov Road Police Service, the canceling of the control and sanction report of the infringement Series AZ no.0189096 of 24 April 2007 and as consequence, the canceling of all the decided measures and the return of the driving license, and in addition, the replacement of infringement fine sanction with that of warning.

Motivating the complaint, the drawer of the petition showed that he was punished with an infringement fine in value of 156 Ron and the additional measure of holding back the driving license, Category B no. 00205757 H, because on the 24 April 2007, while he was driving his own car, Opel Corsa, from Brasov towards Oradea, he was stopped by a crew of the Road Police Service being accused of having done on overtaking in the area of the "forbidden overtaking" sign.

[*] PhD., "Aurel Vlaicu" University of Arad, Romania.

The petitioner also mentioned in his infringement complaint that the notes written in the report were not real, he did not recognize the commitment of the infringement, fact mentioned in the Report in the chapter entitled "Mentions"

By means of the Civil Sentence no.7488/17 September 2007[1] issued by the Brasov Law Courts, the instance admitted the infringement complaint of the petitioner Oltean Florin Ionut contradictorily with respondent in appeal the Police Inspectorate of Brasov Police and decided the canceling of the infringement report exonerating him of the fine payment in value of 156 Ron, put in practice by the report Series AZ no. 0189096 made by the Brasov County Police Inspectorate.

For delivering this decision, the court has found out that the infringement given to the petitioner, fulfills the elements of a charge in penal code, see article 6, paragraph 1 from ECHR, because the area of putting into practice the OUG no 195/2003 takes into account all the citizens, and the infringement has a repressive and preventive character.

Taking into account the consequences, in the petitioner's case, it was recognized the procedure guarantees specific to the penal law regarding the right to an equitable trial, among others, the assumption of innocence, foreseen by the paragraph 2 of article 6 of ECHR.

This assumption, as any legal assumption, brings about the falling down of the test role, so within the contravention complaint frame , the one who must bring out the evidence of the deed/action, of the person who committed it and of the latter's innocence is the one who ascertains it.

The court discovered that the report did not prove the fact by itself in order to bring the falling of the assumption of innocence which functioned in the favor of the petitioner. The infringement report is the document by means of which the petitioner is accused of committing the contravention.

As a consequence of functioning the assumption of innocence, the court appreciated that in this example, this assumption was not turned upside down by the respondent in appeal, and admitted the complaint that was addressed to it and decided the canceling of the report.

Regarding the law topic under debate, the practice, according to which, the internal contravention norm is based on the existence of legal assumption of the infringement report, has determined the courts, invested to solve infringement litigation, to answer the question who is to bring the evidence, to present a full evidence of those described in the report, the agent who establishes the deeds or the offender.

Regarding the interpretation given by ECHR in the Decision *Anghel vs Romania* of 4 October 2007, as it comes out of the underlined decision, the infringement report gains from legal and sound advantages. This assumption, as any relative legal assumption brings the falling down of the test, so, within the infringement complain, the one who must make the evidence of the deed, of the person who committed it and the guiltiness of the action, is the one who finds it out.

In judicial practice, it is also taken into account the opinion according to which Art.15 paragraph 1 together with Art.16 from OG no. 2/2001, can be interpreted in a similar way to those stated in ECHR in the case *Anghel vs Romania*, namely the control

[1] Civil Sentence no. 7488, not published, uttered in the Civil File no. 5802/197/2007/ Brasov Law Courts

and sanction report, given by the agent who found out the deeds, can be considered real and is a proof up to the moment the other proof is brought.

Not even ECHR makes opposition to the use of the assumptions, underlining only that these must not exceed a reasonable limit, it is not the case here, and appreciates the authors of this opinion, under the conditions in which this limit is formed by the agent who personally finds the deed.

Opposite to these opinions, in the jurisprudence of the law courts, it has been drawn another opinion according to which the supporting of the innocence assumption is not founded because this assumption is applied only to the offenders in penal and not civil, and the appeal against the infringement report is solved according to the Civil Procedure Code not the Penal one[2].

The authors of this opinion say that the petitioner is not under penal charges, the Romanian legislation has no possibility to give infringement fines, ECHR decision in case *Anghel vs. Romania* is given in the conditions of the existence in the Romanian legislation of the sanction with an infringement imprisonment (the Court gives this decision on this basis), under this circumstance the infringement regime is assimilated by the penal one.

It is to be mentioned that under these circumstances, the offender takes advantage of all the warranties of an equitable trial, is summoned in the trial in order to prove the deeds presented in the written complaint, according to Art.1169 of the Civil Code and Art.129 paragraph 1 Civil Procedure Code, rule according to which the civil trials are solved, any person who makes a proposal in front of the court has to prove it, and the parts in the trial must prove their demands and defense. In this case the petitioner is the part that must prove, and the part who finds out the deeds is the part that makes the defense[3].

Taking into account the above mentioned points of view, we consider that we have to make the following remarks:

Constantly in its jurisprudence, the Constitutional Court of Romania presents the right to an equitable trial making reference to the constitutional aspect of the infringement procedure[4].

The aspects of law debated in the decision, mentioned, have in view: the non legal establishment of the infringement guilt and the task of proving in the common law contravention procedure, the putting into practice of the constitutional and contravention norms which assure the right to obey to the assumption of innocence; violation of right to obey to the assumption of innocence by the judicial norms regarding the contravention procedure of common law, differences between judicial norms regarding judicial contravention procedure of common law and constitution and the conventional principle of the democratic state that respects the rights of human beings.

It is to be mentioned the fact that regarding the infringement procedure the background is formed of OG no.2/2001, regarding the judicial regime of infringements

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[2] Civil Sentence no. 11159/30.11.2009, not published, uttered in the Civil File no. 10280/55/2009, Arad Law Courts

[3] Civil Sentence no 728 of 6 February 2008, pronounced by the Arad Courts in File no. 13069/55/2007, final and irrevocable by the Civil Decision no.1528/03 Dec.2009, given by Arad Court in File no.138/55/2008, un published.

[4] Decision no.183/08.May 2003, it refers to the exception on non constitutionality of the previsions Art.16 paragraph 1, Art 17, Art 18. Art.19, paragraph 1, Art.1 paragraph 1 and 3, art, 26, paragraph 3, art.27. art.28, art.33, paragraph1 and art, 34 paragrapha1 of OG no.2/2001, with modifications and further information.

and it has two phases (an administrative one and a judicial one). The former has in view the finding out of the infringement and the putting into practice of the infringement fine, these measures are to be done by the administrative agent, and the judicial document which finds out the infringement and puts into practice the fine is the report which is an administrative act. The second one appears only when the offender disputes the report, the solving of the complaint is done by the court, its sentence can be attacked by an appeal which is solved by the Department of the solicitor's office of the Law Courts.

The infringement judicial procedure has a civil nature and is it is completed by the civil procedure; the two parts involved in the trial are the offender, who makes the appeal, and the agent who finds out the deeds and applies the fine. In the usual case, the doctrine and jurisprudence previous to the decision of 4 October 2007 of ECHR, in the case Anghel vs. Romania, establishes that , the initiative of the judicial action belongs to the complainer who complained against the sanction infringement report, this person is supposed to bring the deeds, according to the general principle of the common law existing in the civil procedure, in the frame in which the attacked deed is an administrative fact, is legal, authentic and real, so the person who complains

Against the report has to prove it to be illegal, unfounded and requires its canceling.

We have to mention here that ECHR states through its decision that the infringement though has an extra penal nature according to the internal Romanian law, it enters the area of autonomous European domain of the word "penal", so that the Art.6 of the European Convention of the Human Rights regarding the right to an equitable trial is put into practice, and in the degree in which the conventional procedure obliges the complainer to prove the illegal and unfounded aspect of the report, it violates the assumption of innocence.

Having in view this European jurisprudence, in a natural way the inner jurisprudence of the Romanian courts have suffered modifications or accepted different shades, according to the cases under debate. For the qualification of a subject to be "penal" or not the Strasbourg Court uses three criteria: qualification given by the national law; nature and seriousness of the deed reproached to the offender; nature, roughness and role of the fine which the offender is to suffer, criteria which are alternative. According to the first criterion, everything that is qualified to be penal by the internal law is penal in the European autonomous meaning. But there are some domains that are extra penal according to the national law which in their turn will be qualified penal in the European meaning, if one of the next two criteria are fulfilled. So, the deeds that are serious/and or their punishment is severe (one has no right to be free or has to pay high fees) and /or there are to be applied general norms that have a punitive or preventive role belong to penal from the autonomous point of view no matter how they are qualified on the national level.

By means of this, ECHR tries to get rid of fraud (Convention is not to be disobeyed) and the states are not to be allowed to make an appeal to formal penalty in order to make inapplicable the conventional warranties (a state may change the judicial qualification for severe deeds, but it mentions severe fines).

For example, by means of the adopted solution in the case Anghel vs Romania, the Courts established that the infringement existing in the Romanian law has a penal nature, in the context in which, in many cases, the conventional deeds are enough severe and the fines enough harsh (very high fines in some cases even higher than in the penal cases, confiscation of goods of high value).

On the other side, making reference to the conformity of the stipulations of legislative nature with respect to infringement judicial person with constitutional exigency, it is to be noted that the Constitutional Courts of Romania has stated that this cannot view the extrajudicial phase of the infringement procedure, but only the judicial one, speaking about the right to an equitable trial which has the assumption of innocence, the conclusions view the legal norms if OG no.2/2001 are according to the constitutional exigencies, as these obey the right to make appeal to law, to an equitable trail and to defend yourself.

Last but not least, it is to be mentioned the Decision of the European Court of the Human Rights in the case *Neata vs, Romania*[5] of 18.November 2008 which points out that a detailed group of rights and relevant internal practices with reference to infringement are present in the paragraphs 29-40 of the Decision Anghel vs. Romania, but in the conclusions of this decision there are presented reasons and arguments opposite to those used in the previous jurisprudence, for example:

- it was stated that, the simple fact, that the national courts discovered incoherence and contradictions in the depositions of the witnesses appealed in the cause, decided not to take them into account, and they took as grounded the deeds presented in the infringement report, the procedure cannot be an arbitrary one (a contrario, Anghel quoted in the above 62 paragraph)
- the courts have not expected the complainer to fall down the assumption of grounding and legality of the report in trial, presenting deeds opposite to those described in the report (*a contrario* Anghel, quoted before, paragraphs 58, 59)

Under these circumstances, taking into account the jurisprudence of the European Courts of the Human Rights present in the above mentioned cases, we consider that the offender must be considered innocent in the conditions he objected in a way to the making of the infringement put on him, but in accordance with the jurisprudence of the same Court of Strasbourg, regarding the assumption and the reasonable limit the states are not allowed to exceed, the sanction report is to be considered legal and sound, assumption which is relative but can fall down because of contrary deeds and has to be correlated with other proofs.

Or if this last assumption is not to be used up to the limit the pretended offender is obliged to prove his innocence, neither the assumption of innocence must be considered an absolute value and this conclusion is in full agreement with the already mentioned and gets a value of final and compulsory value by the Constitutional court through the already mentioned decision, the agent is not obliged to produce additional proofs which make reference to the already mentioned ones in the context of the report ,in the case, the offender has recognized his deed . The situation is similar to the one when the doer of the deed has signed the report without making comments and this document is not void, quality foreseen by art.16 paragraph 7, from OG no.2/2001, in accordance with which, this brings a fine, the agent does not tell the offender about the rights the latter has (of formulating objections) or not writing some objections (which have been previously formulated).

[5] Request no.17857/03.

In putting into practice the previous argument adopted by ECHR, the courts will put themselves in the position of accepting the deeds presented in the report by the offender, in the moment the report is ended, any further invocation of deeds requires the latter's demonstration as long as it is not a constraint of signing the report mentioning an explicit or implicit recognition of the deeds he is accused of.

The offender has all the legal procedures to prove a situation different of the one he has already assumed before free willingly.

On the other side, the formulation of such a defense based on a state different from the one accepted before, cannot oblige, automatically, the agent himself to prove the commitment of the deed done by the offender.

As long as he has accepted tacitly, the deeds, not declaring anything at the chapter objections, and has not proved, that the admitted fact is different from the real one, the formulated complaint has no background.

This is valid more than ever when the agent has proved, using test s, that the offender is guilty of the deeds presented in the complained report.

On the contrary, when such objections were formulated by the offender, written in the chapter "Other mentioned things" of the report or the doing of the deed is complained of by the presumed offender, making the corresponding remarks in the report, the existence of the report only is not enough for proving the deeds, but it has enough power if it is put together with at least one other proof, it has a judicial assumption but only if this is powerful and may bring proofs or with other proof means approved by civil law.

The importance of analysis of arguments formulated by parts is underlined in the jurisprudence of the European Court of Human Rights, jurisprudence which is compulsory for the Romanian courts, under the conditions in which Romania has ratified the European Convention of Human Rights by Law no.30/1994. In the meaning adopted by this Court, among the warranties offered by the right to an equitable trial, in the meaning of Art.6, paragraph 1 of the Convention, it is recorded the obligation of the Courts to analyze the requests and arguments presented by the parts when they state their reasons for their actions.

The European Court of the Human Rights stated – in paragraph 30 of the decision of 28 April 2005 in case *Albina vs. Romania*[6], that "the right to an equitable trial, guaranteed by Art 6.1 of the Convention, includes among other things, the right of the parts to present the remarks they consider useful for their case. Because the convention has not the target the act of guaranteeing some theoretical rights or imaginary ones, but real and sound rights (Decision Artico vs. Italy, of 13 May 1980, Series A, no.37, p.16, paragraph 33) this right cannot be effectively considered only if these remarks are really listened to, examined by the required. In other words, Art.6 obliges the court to examine the means, arguments and the elements used as proofs, paragraph 80, CEDH 2004-I, and Decision *Van der Hurk vs. Holland*, of 19 April 1994, Series A, no. 288, p.19, paragraph 59)."

The European Court of the Human Rights presents these conclusions in other two decisions, namely paragraph no.34 of the Decision of 16 November 2006, given in the case *Dima vs. Romania*[7], as well as in paragraph no.63 of the Decision dated on 24 May 2005 in case *Buzescu vs, Romania*[8].

[6] Published in Official Gazette, Part I, no.1049 of 25 November 2005.
[7] Published in Official Gazette, Part I, no.473 of 13 July 2007.
[8] Published in Official Gazette, Part I, no.210 of 8 March 2006.

The paragraphs no.38 and 39 of the Decision dated on 8 June 2006, case *Vlasie Grigore Vasilescu vs. Romania*[9] the European Court demonstrated that "although Art.6 $1 of the Convention, does not regulate admittance and probative force of the reasons, arguments and evidence means of the parts, it is the task of the courts to analyze them for estimating their relevance (*Van der Hurk vs, Holland*, Decision of 19 April 1994, Series A no.288 p.19&59)

Under these conditions, we consider the examination of arguments and written documents invoked by parts must be compulsory, essential and enforced on the Romanian courts.

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[9] Published in Official Gazette, Part I, no.587 of 5 August 2008.