

RETRIAL IN THE CASE OF EXTRADITION UNDER A EUROPEAN ARREST WARRANT, BETWEEN THE INTERPRETATION OF THE ROMANIAN CRIMINAL PROCEDURE CODE AND THE CRIMINAL CASE LAW OF THE COURTS IN ROMANIA

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ABSTRACT: *Regardless a convicted person had been noticed or not about the proceedings against it, as long as it was tried and convicted in absentia it is a serious, just and solid reason not to request retrial in cases of extradition under a European arrest warrant.*

KEYWORDS: *European arrest warrant, conviction, Romanian Criminal Procedure Code, retrial, in absentia, extradition*

JEL CLASSIFICATION: *K14, K42*

A very recent decision of the High Court of Cassation and Justice in Romania¹ says that the mere fact that the petitioner – convicted was present in at least one of the hearings in the first instance, after which „evaded trial” by moving overseas, is sufficient for his application for retrial to be rejected.

According to Article 522 paragraph 1 of the Romanian Criminal Procedure Code, where extradition is requested under a European arrest warrant for a person tried and convicted *in absentia*, the case will be retried by the court who ruled in the first instance at the request of the convict².

It is noticed, as a *general rule* that extradition³ as well as retrial⁴ are voluntary and as a *special rule* in the first case (nevertheless, extradition shall be granted if the requesting

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¹ Decision no. 4121 of 12 December 2012, The High Court of Cassation and Justice, Criminal section, Romania – not published.

² Article 522 paragraph 1 in this form was introduced in the Romanian Criminal Procedure Code through the Article XVIII section 65 of the Law no. 202/2010 published in the Official Journal of Romania Part I, no. 714 of 26 October 2010.

³ The Second Additional Protocol to the European Convention on Extradition, Title III, Article 3 – judgment *in absentia*. About extradition see also Dragoş Chilea, *The European regulation of extradition*, in the Review “*Juridical Current*” no. 2/2013, pp. 36-48.

⁴ Article 522 paragraph 1 Romanian Criminal Procedure Code.

party gives an assurance considered sufficient to ensure the person whose extradition is requested the right to a new procedure of trial which would safeguard his right to defense)⁵ and in the second case (however extradition shall be granted if the requesting State gives an assurance considered sufficient to ensure the person whose extradition is requested the right to a new procedure of trial which would safeguard his right to defense)⁶, even if it is about a passive extradition the requesting State must provide assurances (guarantees) appreciated as sufficient for the retrial. And why should it be otherwise in the case of active extradition?

Along with the issuance and execution of the European arrest warrant, cumulated with the surrender of the person arrested and convicted *in absentia* to the requesting State, arises its vocation to request the retrial according to Article 522 paragraph 1 Romanian Criminal Procedure Code, in conjunction with Articles 405-408 Romanian Criminal Procedure Code (the rules of admissibility in what concerns revision), Article 71 paragraph 2 and Article 92 paragraph 2 of Law no. 302/2004 on international judicial cooperation in criminal matters.

The text above shows that the national legislator, based on European legislation has introduced a new special court procedure to consider and strengthen the right to defense of a person convicted in *absentia*, based on the real exercise within a process of the principle of non-conveyance, orality and especially of adversariality, principles that were not used in the criminal trial in case of the defendant's absence (Article 289 of the Romanian Criminal Procedure Code).

This new procedure, which borrows elements from the special procedure of review has an early stage ie. an admission phase basically to which are applied the provisions of Article 405 paragraph 1 of the Romanian Criminal Procedure Code, under which the judge is held to determine how to make judgment on the merits, in the defendant's absence or not etc.

In the phase of admission basically the judge verifies if the convicted person had or had not knowledge about the trial. If the convicted was present, even once, if it has been cited at the address given, if it has more addresses, in some of the courts' view it is sufficient to reject the application for retrial. "The right of the extradited person to benefit from the retrial of a case can be restricted only if the convicted person was present at one of the hearings or at the judgments or was aware of the judgment proceedings"⁷.

In this case it is considered that the defendant had a culpable procedural conduct and as such his conduct may not be protected by the provisions of Article 34 of Law no. 302/2004 on international judicial cooperation in criminal matters.

The Romanian case law has shown another point of view, meaning that, the application for retrial is permissible even if the convicted person was present only at one time or was aware of the trial.

If the provisions of the Article 522 paragraph 1 of the Romanian Criminal Procedure Code feature the general rule and requires as a condition for retrial the extradition of a person tried and convicted in *absentia*, the special rule is found in Article 72 paragraph 2

⁵ The Second Additional Protocol to the European Convention on Extradition, Title III, Article 3.

⁶ Article 32 paragraph 1 of the Law no. 302/2004 regarding the international judicial cooperation in criminal matters, published in the Official Journal of Romania, Part I.

⁷ Criminal Decision no. 5424 of 13 November 2007 – The High Court of Cassation and Justice, Criminal section, Romania – not published.

of Law no. 302/2004, amended, which clearly requires that the extradited person to have been convicted *in absentia*⁸.

Therefore, according to the incident principle “*specialia generalibus derogant*” for retrial, in a restrictive interpretation, the requirements of the special rule would suffice (application *stricto sensu*).

The economy of the legal text and of the European Convention on Extradition (Paris, December 13, 1957) and the addenda features the conditions necessary in order to proceed to the second phase – retrial, namely:

- a final sentence imposed by a national court;
- the issuance of a European arrest warrant;
- application for extradition of the authorities of the requesting State;
- application for retrial that can only be done by the convicted person
- if the person condemned missed the judgment and the conviction

(Article 72 paragraph 2 of Law no. 302/2004 as amended by Law no. 224/2006 provides: “if the extradited was sentenced *in absentia* he would be retried, on request, complying to the rights provided by Article 34 paragraph 1”).

The Romanian case law stated that the voluntary surrender of a person convicted in circumstances where there is a European arrest warrant (even not enforced and extradition request) makes the retrial unacceptable because the requirements for admitting the application would not be met⁹.

Accepting the thesis according to which it is sufficient for “the person making the application for retrial has been convicted in absentia” means that its rights of defense can be respected only if this option is given, namely the case to be retried. To repeat the trial, this time, in the presence of the defendant, is a guarantee that no innocent person will be convicted¹⁰.

If compared to the initial provisions of Article 522 paragraph 1, the Romanian Criminal Procedure Code which for the admittance of the application for retrial requested the proceedings to be made *in absentia*, and subsequently the person to be tried and convicted *in absentia*, the provisions of Article 72 paragraph 2 of Law no. 302/2004, amended by Law no. 224/2006, require for the admission of such an application with such object the person to have been only convicted *in absentia*, that is to have been absent at the ruling of the judgment.

In order to guarantee and ensure the right to defense of a person already convicted, it is noted that according to the European general rules protecting the human rights¹¹, any

⁸ The possibility of a potential conflict between the statutory legal provisions and the fundamental law circumscribes to the sphere of the Control of Constitutionality exercised by the Constitutional Court in Romania – see Daniela Valea, *Sistemul de control de constituționalitate în România*, Universul Juridic Publishing House, Bucharest, 2010, pp. 298-305; Daniela Cristina Valea, *The Constitutional Court of Romania – an innovation in the Romanian constitutional system*, in the Review „*Juridical Current*”, no. 1/2010, pp. 54-62

⁹ Decision no. 297 of 11 July 2012 – The Oradea Court of Appeal, criminal section for issues involving minors, Buletinul Curților de Apel no. 8-9/2013 p. 45.

¹⁰ About the means of protection and guarantee of the fundamental rights and freedoms. – see Daniela Cristina Valea, *Constitutional justice – between the role of guarantor of the supremacy of the Constitution and the role of the protector of the fundamental rights and freedoms. Case study - Romania*, in the Review „*Juridical Current*”, no. 3/2013, pp. 21-26.

¹¹ Dragoș Chilea, *European Union common policy in criminal matters through punishment's harmonization*, in the Review „*Juridical Current*”, no. 1/2010, pp. 40-53. About the influence of the European law and ECHR case

requesting State may refuse extradition in the absence of certain guarantees regarding the retrial procedure and the rights of defense¹².

Once the Romanian law, the Law no. 302/2004 as amended by Law no. 224/2006 provides as a condition the mere conviction in absentia, we do not see why the Romanian judge supplements this condition with another condition, namely avoiding in a culpable way the criminal proceedings (“the right of defense was provided by a publicly appointed lawyer was not violated in any way, and petitioner knew he had chosen the possibility of choosing a lawyer and he knew that he had an ongoing process”)¹³.

The guarantee required by the Romanian legislator doubles the guarantee regarding the principles of an ongoing criminal trial¹⁴. To ensure the finding of the truth, nothing is too little, not even a retrial but in the renewed coat, by the exercise of the right of defense based on the adversariality of administering evidences¹⁵.

In conclusion, we believe that facing the person’s application, convicted in absentia, by which the convicted requests the retrial, the judge has the obligation and not the faculty to act upon it, the more so as it is possible that without this guarantee which protects the presumption of innocence, the Requested State had never admitted the extradition request.

law – see Ramona Mihaela Coman, *Reasoning for ordering the custody on remand in the light of ECHR jurisprudence*, in the Review „*Juridical Current*”, no. 3/2013, pp. 35-39.

¹² Dragoş Chilea, *The European regulation of extradition*, in the Review „*Juridical Current*”, no. 2/2013, pp. 36-48.

¹³ Criminal Decision no. 4121 of 12 December 2012 – The High Court of Cassation and Justice of Romania (File no. 2263/102/2012) – not published.

¹⁴ About the right to a fair trial, see Dragoş Chilea, *The right to a fair trial*, in the Review „*Juridical Current*”, no. 3/2010, pp. 29-50.

¹⁵ About “the (in)equality of arms” in the criminal trial – see Dragoş Chilea, *Some aspects regarding the inequality of arms in the Romanian criminal Law*, in the Review „*Juridical Current*”, no. 3/2013, pp. 27-34.