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COMPENSATIONS IN THE MATTER OF THE ADMINISTRATIVE LITIGATION, IN THE LIGHT OF ARTICLE 19 OF LAW NO. 554/2004

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ABSTRACT

The appearance in 2004 of Law no. 554 on administrative litigation brought a new perspective on this institution, with all the necessary implications. Many of the concepts specific to administrative litigation have been rethought, including the issue of damages, a matter of the utmost importance, given that, we are on the ground of a struggle between the state, on the one hand, and the individual, on the other. In most cases, the annulment of an administrative act cannot but entail a compensation to which the person who obtained the annulment of the act is fully entitled. The same reasoning is similar if the authority refuses to respond within the legal deadlines. In addition to the pecuniary damage, it is obvious that the moral damage will also be discussed, because, in addition to the actual damage suffered, the claimant can prove that he also suffered moral damage. Therefore, the authority can be held responsible for illegal conduct (by annulling the act or recognizing the right) and can also be held responsible for paying amounts of money that, not infrequently, can reach quite significant values for the public budget. Precisely for this reason, I considered useful a review of what involves the issue of damages in administrative litigation, related to those recently ruled by the High Court of Cassation and Justice, in an appeal in the interest of the law.

KEYWORDS: *administrative litigation, compensations, limitation period, High Court of Cassation and Justice, injured person, administrative act, Law on administrative litigation.*

1. THE PROBLEM OF COMPENSATIONS IN THE PHILOSOPHY OF LAW NO. 554/2004 ON ADMINISTRATIVE LITIGATION

With the change in the philosophy of administrative litigation (and we can mark this moment since the entry into force of Law no. 29/1990 - the first law of administrative litigation after the revolution in 1989), the issue of public authorities' liability for illegal administrative acts or for non-recognition of a legitimate right or interest was discussed. As a collateral and as a natural consequence of the idea of damage, the problem of how to repair them arose.

Art. 52 of the Constitution refers to the fact that the person injured in a right or legitimate interest, by a public authority, by an administrative act or by not resolving a petition within the legal term, is entitled, in addition to the recognition of the claimed right or the legitimate interest and the annulment of the act, to obtain the damage repair. The notion of damage reparation has in view both the granting of material and moral damages by the court, but also the finality of the act of justice - the execution of the judgment - without which the reparation of the damage would be illusory.[1]

The basis for granting material or moral damages is also the art. 1349 of the Civil Code, text which provides that: Paragraph 1 "*Every person has the duty to observe the rules of*

[1] Cătălin – Silviu Săraru, Contenciosul administrativ român (Romanian administrative litigation), C.H. Beck Publishing, Bucharest, 2019, p. 320

conduct that the law or the custom of the place imposes and not to infringe, through his actions or inactions, the rights or legitimate interests of other persons.

Paragraph 2 *He who, having discernment, violates this duty is liable for all damages caused, being obliged to repair them in full."*

Starting from this general principle of law, we find in Law no. 554/2004 on administrative litigation, texts that directly address the issue of damages.

Thus, art. 8 which regulates the object of the legal action shows that the entitled person can also request, in addition to the annulment of the act the "*reparation of the damage caused and, possibly, reparations for moral damages".*

Art. 18 detailing the solutions pronounced by the administrative litigation court shows that the court may order the obligation: "*to pay compensation for pecuniary and moral damages, if the claimant has requested this*."

Art. 19 regulates the limitation period for compensations, when they are not requested by the main action, and shows: Paragraph 1 "*When the injured person has requested the annulment of the administrative act, without requesting compensation at the same time, the limitation period for the compensation claim runs from the date on which he knew or should have known the extent of the damage*.

Paragraph 2 "*The petitions are addressed ... within one year provided in art. 11 para. 2."*

We will see below that this very term has given rise to various interpretations in the practice of the courts, an aspect that led to the an appeal in the interest of the law by the High Court of Cassation and Justice. It is about Decision no. 22 / 24.06.2019, ruled on appeal in the interest of the law and published in the Official Journal of Romania, Part I, no. 853 of October 22, 2019, which we will comment on during this study.

From the analysis of the texts listed above, it is undeniable that in administrative disputes, the claimant can ask both material and moral damage, provided that we are in a subjective dispute, as we will analyse in detail.

The court will award such damages only to the extent that they have been claimed by the claimant, and will not be able to establish ex officio any damage (material and / or moral) to cover. In conclusion, the court cannot rule ex officio on the removal of the unfavourable consequences of the unilateral administrative act (typical or assimilated) considered illegal. This conclusion is necessary, as the court must rule only on the concrete claims made by the claimant, who is also the one who sets the procedural framework by indicating a specific object for the summons, the principle of availability being applicable. [2]

Regarding the damage to property and the criteria for granting them, the High Court of Cassation and Justice ruled that the court may require the defendant to pay them, to the extent that proof of actual and certain damage is provided. Material damages are not granted automatically, as an effect of admitting the action in annulment of the act, but certain objective criteria must be taken into account resulting from the degree of damage to the protected social values, aspects based on which the intensity and severity of the damage must be considered.[3]

If in the matter of material damage, the evidence is somewhat obvious, in the sense that this damage must be proved with all the evidence available to the claimant and the court will grant it only to the extent that it is proven, things are much more sensitive in the matter of moral damages.

Under the rule of the current Law on administrative litigation no. 554/2004, there was a change of courts' perspective, which, following the principle of law *restitutio in integrum*, material and moral damage is granted, noting that the full reparation of the damage involves

[2] Iuliana Rîciu, *Procedura contenciosului administrativ (Administrative litigation procedure),* Hamangiu Publishing, 2012, p. 368

[3] Iuliana Rîciu, op. cit., p. 370

the removal of all harmful consequences of an unlawful and culpable act, be they patrimonial or non-patrimonial, in order to restore the injured person to the previous situation.[4]

The problem that has arisen is that of the evidence in case of requesting and granting these damages, a matter much more difficult to prove compared to the material damages, where we talk about a concrete quantification of the requested amounts in relation to the benefit that the legal administrative act would have produced or to the damage caused by the illegal administrative act.

In the literature, moral damages are considered to be an injury to the existence of the individual, bodily integrity and health, honour, dignity and honour, professional prestige.[5]

According to the provisions of art. 1169 of the Civil Code, the burden of proof in the claim for moral damage falls on the claimant, according to the principle *actori incumbit onus probandi*. Based on the rules of common law, the claimant must prove the existence of the attempted moral damage, the unlawful nature of the act committed by the defendant with guilt and the causal relationship between that damage and the defendant's act.[6]

The courts considered that evidence must also be administered to prove the occurrence of moral suffering because the mere fact of the annulment of an administrative act is not likely to lead to the conclusion of psychological harm, and if they occurred, they differ depending on the elements related to the personal and moral status of each person injured in rights.[7]

With regard to the determination of the amount of moral damage, the court will consider that they are compensatory in nature, and cannot constitute excessive amnesia for the perpetrators of damages or unjustified income for the victims.[8]

In conclusion, it can be argued that the claim for damages is ancillary to the main proceedings. Mainly, this petition is introduced in the main proceedings of administrative litigation. Exceptionally, if the claimant does not know the extent of the damage at the date of the trial of the main action, the action for damages may be filed later, according to art. 19 of Law no. 554/2004 on administrative litigation.[9]

Under no circumstances may an action for damages be brought before the main action in administrative proceedings. In that regard, in Case C-25/62 Plaumann v. Commission of the EEC, ruled by judgment of 15 July 1963, the Court held that the action for damages sought to remove the legal effects that the contested decision had on the claimant, but an administrative act which has not been annulled is not liable to cause damage to the persons to whom it is addressed, and the latter cannot claim appropriate damages.[10]

2. COMPENSATIONS - SPECIAL LOOK AT ART. 19 OF LAW NO. 554/2004 ON ADMINISTRATIVE LITIGATION

As shown by a reputable judge from the administrative contentious section of the High Court of Cassation and Justice and an exceptional doctrinaire, art. 19 entitled "Limitation period for compensation" does not excel in rigor, neither in terms of normative technique, nor in terms of the legal qualification of the term it provides.[11]

Another drafting imperfection would be the location of art. 19 regarding the compensations in a separate way (in its essence) before art. 20 which has as object the appeal in administrative litigation. We appreciate that it would have been necessary to place such a

[4] Iuliana Rîciu, op. cit., p. 369
[5] Gabriela Bogasiu, Legea contenciosului administrativ comentată și adnotată (Administrative Litigation Law discussed and annotated), Editura Universul Juridic, 2018, p. 509
[6] Gabriela Bogasiu, op. cit., p. 509
[7] Iuliana Rîciu, op. cit., p. 369
[8] Gabriela Bogasiu, op. cit., p. 509
[9] Anton Trailescu, Drept administrativ. Partea special (Administrative law. The special part), Editura C.H.Beck, București, 2020, p.222
[10] Gabriela Bogasiu, op. cit., p. 534
[11] Gabriela Bogasiu, op. cit. P. 534

text after the one that regulates the appeal, since the idea of the action promoted by art. 19 is distinct from the completion of the procedure before the administrative contentious court (merits and appeal). Basically, in the application of art. 19 we have in mind a separate action having as object the damages in a separate way, conditioned by the annulment of the act and not exceeding the term of one year from the moment the damage becomes known.

The premise of formulating a petition based on the provisions of art. 19 of Law no. 554/2004 is represented by the formulation of an action for annulment having as object a harmful administrative act. Subsequent to the annulment of that administrative act, the injured person (*id est* is the one who filed the action for annulment) may formulate the action for damages provided by the art. 19 para. (1) of Law no. 554/2004 since at the date of bringing the action for annulment he was not aware of the extent of the damage.

Article 19 in its current wording raises several discussions, which we will detail below.

The first would be related to the admissibility / inadmissibility of the action for damages compared to an objective / subjective litigation.

The second discussion would have in view the prescription of the material right to action, the term of one year, which in the wording of the law runs ”from the date on which the claimant knew or should have known the extent of the damage. "

A third discussion is related to the person who has an active procedural capacity to bring the action, related to the fact that an action for damages based on art. 19 is conditioned by a previous court decision annulling an illegal administrative act.

These issues were resolved by the High Court of Cassation and Justice by Decision no. 22 / 24.06.2019, pronounced on appeal in the interest of the law and published in the Official Journal of Romania, Part I, no. 853 of October 22, 2019.

The issue of inadmissibility appeared in the discussion by referring to the two types of litigation regulated by Law no. 554/2004.

Thus, administrative litigation is objective when the dispute is based on a legitimate public interest which concerns the rule of law and constitutional democracy, the guarantee of the fundamental rights, freedoms and duties of citizens, the satisfaction of Community needs, the exercise of public authority. The contentious objective concerns a litigation against the administrative act strictly related to the violation of some normative acts that govern its issuance or adoption.[12] Examples of such actions would be those promoted by the People's Advocate (Ombudsperson), the Public Ministry, the National Agency of Civil Servants, obviously by virtue of the active procedural quality conferred by Law no. 554/2004.

Administrative litigation is subjective when the dispute is based on a subjective right or a legitimate private interest that is alleged to be harmed by an administrative act. Subjective litigation concerns a litigation that focuses on or concerns the violation of subjective rights or legitimate interests of individuals, without concern for the objective legality of the administrative act.[13]

Therefore, in relation to the two types of litigation, has the legitimate issue been discussed, regarding the time when damages can be claimed separately?

The issue of inadmissibility was decided by the High Court of Cassation and Justice in the sense that: *From the systematic interpretation of the provisions of art. 18 para. (3) of Law no. 554/2004, in correlation with the norms contained in art.8 of the law, which regulates the object of the judicial action, it results that the court can grant compensations for the moral or material damage* ***only in the case of actions in subjective litigation****, because the actions based on violation of a legitimate public interest may have as object only the annulment of the act or the obligation of the defendant authority to issue an act or another document, respectively to carry out an administrative operation.*

In order to engage the administrative-patrimonial responsibility of the defendant public authority, it is necessary the cumulative fulfilment of the following conditions, deduced

[12] Cătălin – Silviu Sararu, op. cit., p. 42
[13] Cătălin – Silviu Săraru, op. cit., p. 43

from the interpretation of the provisions of art. 1,349 and art. 1,357 et seq. of the Civil Code, in correlation with the rules that configure the legal regime of administrative litigation: the existence of an illegal act consisting in an illegal administrative act annulled by the court or an unjustified refusal or failure to resolve a request, found as such by the court; causing damage; proof of the causal link between the unlawful administrative act and the damage suffered by the claimant . "

The solution is perfectly in line with the entire philosophy of the Law on Administrative Litigation, which also created the two types of litigation. It is obvious that in an objective litigation, in which the defence of some public / general interests is wanted, the admission of the action cannot imply the reparation of some damages as these damages cannot be estimated, not being a report to a concrete case, in which the damage can be estimated.

The interpretation given by the High Court of Cassation and Justice is not likely to violate the right of access to justice, as the European Convention on Human Rights regulates it in art. 6. The provisions of art. 6 of the ECHR recognize access to justice for the protection of civil rights or obligations of a natural or legal person.

The prescription of the material right to action was another much debated issue. In the literature, the question has arisen whether the prescription in administrative litigation is an institution identical to that currently regulated by the new Civil Code or, in reality, it is a completely different notion, the term "prescription" being misused.[14]

In the analysis of the issue of prescription, we should start from the provisions of art. 2523 of the Civil Code, which provide "*The prescription begins to run from the date when the holder of the right to action knew or, depending on the circumstances, should have known its occurrence*."

These provisions must be corroborated with art. 2528 of the same code: "*The prescription of the right to action in reparation of a damage that was caused by an illicit deed begins to run from the date when the injured party knew or should have known both the damage and the person responsible for it."*

The above provisions are interpreted in the matter of compensations requested pursuant to art. 19 of Law no. 554/2004 by reference to the text of this article, which provides, as we have already shown, that special term of one year.

The prescription of the material right to action was settled by the High Court of Cassation and Justice as follows: - „*79. The limitation period is one year and runs from the date on which the* ***claimant*** ***knew or should have known the extent of the damage*** *[...], the time at which the* ***injured person knew or should have known the extent of the damage is a matter of fact*** *which is determined according to the circumstances of the case, taking into account the* ***nature***, ***content*** *and* ***effects*** *of the illegal administrative conduct* ".

In the light of the foregoing, it is common ground that the date of final decision notification has no relevance in determining when the limitation period begins to run, determining, *inter alia*, the nature, content and effects of the unlawful administrative act.

On the provisions of art. 19 para. 2 of Law no. 554/2004 on administrative litigation, the Constitutional Court also ruled by Decision no. 568 of June 7, 2007, published in the Official Journal no. 544 of August 9, 2007 showing that the term provided in art. 19 para. 2 considers precisely those situations in which, at the moment of introducing the petition for the annulment of the individual administrative act, the injured person cannot objectively know the existence and extent of the damage, so he cannot simultaneously formulate an action for compensation. After resolving the action for annulment, he may estimate and claim the damage caused by the annulled administrative act, having at his disposal a period of one year for the formulation of such an action. "

[14] Ovidiu Podaru, Dreptul administrativ. O concepție. O viziune (Administrative law. A conception. A vision), Hamangiu Publishing, BUcharest, 2017, p. 156

The active procedural quality was also settled by the High Court of Cassation and Justice which ruled that: *In the situation where the **injured person**, due to the fact that he did not know the amount of damage or for other reasons, did not file the petition for the annulment of the act, has the possibility to act under the conditions of art. 19 of Law no. 554/2004* ".

*The claim for compensation formulated separately, based on the provisions of art. 19 of Law no. 554/2004, **is conditioned by the existence of a court decision by which the action directed against the illegal, typical or assimilated administrative act was admitted, because the reparation of the injured person's damage is an intrinsic side of the administrative dispute**. Otherwise, the **claimant** can only resort to the common law for the incumbent liability of the public authority, under the conditions provided by the Civil Code.*

*From the systematic interpretation of the provisions [...], **the rule of the action in subjective litigation of full jurisdiction** is outlined, containing also the petition regarding the **payment of compensations** for reparation and removal of the harmful consequences of the administrative act - typical or assimilated - illegal. Therefore, the procedural way regulated by art. 19 is an exceptional one, which should be used only when the case provides evidence that would lead to the conclusion that the **claimant was not reasonably able to know the extent of the damage from the date of the action for annulment** within the terms provided in art. 11 of Law no. 554/2004. "*

From the considerations set out above, it results unequivocally that only the claimant in the action for annulment of the administrative act can have an active procedural capacity to introduce an action based on the provisions of art. 19 of Law no. 554/2004.

Moreover, this conclusion is also supported by the practice of the High Court of Cassation and Justice, of which we quote an extremely telling example: "*The provisions of art. 19 of Law no. 554/2004 concern the claims submitted after the annulment of the administrative act, under the conditions, the court procedure and the competence provided by Law no. 554/2004.*

Such a claim remains unresolved, only because the injured person did not request, together with the annulment of the administrative act and compensations [art. 19 para. (1)], the party may address separately a petition to the same court competent to resolve the main dispute [art. 19 para. (2)]. This legal provision is a procedural application of the rule of accessories, the court competent in resolving the main claim (seeking annulment of the act) remaining competent to adjudicate the accessory claim consisting in damages, even when it was not brought to trial at the same time as the main one.

On the other hand, as long as the contravention report was not subject to control and annulled under the conditions provided by Law no. 554/2004, but pursuant to G.O. no. 2/2001, normative act that represents the basis in contravention matter, the determination of the competence to solve the action for repairing the damage produced by the wrong finding of the contravention, will not be made under the conditions of art. 19 of Law no. 554/2004, but in relation to the common law norms of the civil procedure, to which the provisions of art. 47 of O.G. no. 2/2001 refer. Thus, the administrative nature of the annulled act - identified as the cause of the damage - is not relevant, as long as the dispute is evaded from the contentious-administrative jurisdiction regulated by Law no. 554/2004 and subject to the rules of common law as a court procedure and rules of jurisdiction.

The essential difference between administrative disputes given in the jurisdiction of certain courts by special rules and those given only in the jurisdiction of ordinary administrative courts is that the former will not be judged according to the procedure provided by the law of administrative litigation, based on the common law procedure of civil procedural law." (High Court of Cassation and Justice, Decision no. 286/2017 - Minutes of finding and sanctioning the contravention. Damage created as a result of illegal confiscation of property and application of the fine. Annulment of the act under Government Ordinance no. 2/2001. Action for damages based on the provisions of common law (substantive procedural jurisdiction to settle the dispute, published in the Bulletin of Cassation No. 12 of

December 30, 2017).

3. CONCLUSIONS

In the current system imagined by Law no. 554/2004 of the administrative litigation, the liability of the public authorities for the acts they issue has become a guarantee and a protection. We can say that it is a dimension of the rule of law, because without these guarantees, we would face forms without merits.

The law therefore regulates this pecuniary liability in several texts, providing for the possibility of claiming damages from the moment the object of the action is regulated in administrative litigation, subsequently providing for the possibility for the court to grant them (see the solutions that the court may rule), in order to subsequently dedicate a separate text to the situation in which the injured party did not know at the time of the action the extent of the damage, subsequently formulating a petition in this regard.

Therefore, we face a protection offered by law so that the citizen not only benefits from the annulment of the act / recognition of the right but also from the coverage of any damages he would have suffered, a natural solution meant to put the authorities in a position to think thoroughly when deciding on the issuance of an act.

The damages suffered by the individual can be significant, especially when we consider the individual administrative acts, which can infringe extremely concrete legitimate rights and interests, related to the situation of the beneficiary. Only if we consider the effects and impact of a cancelled or suspended building permit, the picture of damage becomes quite clear.

However, as we have shown, the texts of Law no. 554/2004 with incidence in the matter were criticized, being gaps in wording and expression. It is from here that the need to clarify the interpretation arose, an aspect widely debated as a result of the admission of appeal in the interest of the law analysed in this study.

Under the impact of those presented, in view of the criticisms and comments taken into account, we do not exclude the possibility of amending the incident legislation, in the sense of establishing clearer criteria for the administrative court to take into account in awarding material and especially moral damages. We insist on this point, since, as we have shown, moral damages remain in the current form of the law in the realm of a probation that is quite difficult to perform, both the claimant and the judge being subject to arbitrariness. In the matter of moral damages, the claimant will always plead the case with a dose of subjectivism, and, in the absence of award criteria (quite difficult to imagine), the judge will resort to free will in granting / diminishing / rejecting them.

However, the overall picture provided by the Law on Administrative Litigation remains one of citizen's protection against the abuses of public authorities, which, as I said, encourages the struggle of individuals with the state. The appeal of the litigant before the judge for a full understanding of the case remains the last redoubt he must conquer and a desideratum of the hope reported to the principle "*Fiat justitia, perat mundi.*"

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