ISSN: 1841-6195 (print); e-ISSN: 2067-8509 (electronic)

Jurnalul de Studii Juridice
Year XI, No. 3-4, December 2016, pp. 57-66

ANALYSIS OF THE LEGAL NATURE OF THE ADMINISTRATIVE APPEAL IN ROMANIA

Liana-Teodora PASCARIU

Covered in:
CEEOL, Index Copernicus, Ideas RePeC,
EconPapers, Socionet

How to cite: **Pascariu, L-T. (2016). Analysis of the legal nature of the administrative appeal in Romania. Jurnalul de Studii Juridice, Year XI, No. 3-4, December 2016, 57-66.**

ANALYSIS OF THE LEGAL NATURE OF THE ADMINISTRATIVE APPEAL IN ROMANIA

Liana-Teodora PASCARIU[1]

Abstract

An appeal to the administrative court is currently a remedy that ensures only reviews of the legality of the judgment under appeal, and this is the conclusion arising from the linking of the Civil Procedure Code and the Administrative Litigation Law.

The article examines whether the new conception of appeal in matters of administrative disputes should not be reconfirmed by the High Court of Cassation and Justice, in the procedure regulated by art.519-521 of the New Civil Procedure Code, by a judgment of law interpretation.

Keywords:

judgment of law interpretation, Law of Administrative Procedure, Administrative Litigation Law, administrative appeal

JEL Clasification: **K12, K23**

[1] Lecturer PhD, University Stefan cel Mare Suceava, liana.pascariu@fdsa.usv.ro, 0756793955.

Pascariu, L-T. (2016). Analysis of the legal nature of the administrative appeal in Romania. Jurnalul de Studii Juridice, Year XI, No. 3-4, December 2016, 57-66.

Introduction

The law keeps on the principle of double jurisdiction for disputes concerning administrative contracts as well as for the other types of administrative litigation, with the two procedural phases, adjudicated in substance at the Court of First Instance or the Court of Appeal and on appeal in the Court of Appeal, namely the High Court of Cassation and Justice.

In the New Civil Procedure Code, the general principles applicable to appeals have received for the first time an explicit dedication within art.456-465, i.e. the lawfulness of the appeal, the subjects, the order of exercise, the uniqueness of the appeal, the part of the judgment that can be appealed, the understanding of the parties and the appeal to the judgment. The appeal is governed by Title II - Appeals, Chapter III - Extraordinary Appeals, Section 1, and the art. 456 of the NCPC states that the second appeal is an extraordinary appeal, along with the appeal in annulment and revision, which means that it can only be exercised under the law and for the reasons expressly and legally stipulated by the law, (Marin, 2016) without evolution, unlike the appeal.

The main body of the article

In its original wording, art.20 provided that the decision given at first instance may be judged under appeal within 15 days of its delivery or communication, without distinguishing which were the subjects for which the deadlines were different, and under what conditions it was possible to do this.

The legal provision has been challenged with a plea of unconstitutionality, admitted, the criticism of unconstitutionality consisting in essence in the claim that the imprecise drafting of the criticized text leads judges into the situation to add to the law, by establishing the cases, the conditions and the parties for whom the term of second appeal in which the judgment of the first instance may be appealed shall run from the pronouncement, respectively from the communication, thus infringing the provisions of art.21 of the Constitution, on free access to justice, art.24 par.1) of the Constitution, regarding the guarantee of the right to defence, of art.61 par. 1) of the Constitution, regarding the role of Parliament and those of art.129 of the Constitution, on the use of legal remedies. As a result, art.20 of the current wording provides that the decision given at first instance may be judged under appeal within 15 days of the communication.

Through Decision no.189/2006 published in the Official Monitor of Romania no.307 from April, 5th, 2006 the Court stated that the matter could not be resolved by applying the provisions of the Civil Code to which refers

Pascariu, L-T. (2016). Analysis of the legal nature of the administrative appeal in Romania. Jurnalul de Studii Juridice, Year XI, No. 3-4, December 2016, 57-66.

art.28 par. 1) from Law no.554/2004, because the CPC makes clear distinctions in the sense that the term of judgment under appeal runs, for the prosecutor, from the pronouncement of the decision, unless the prosecutor participated to the trial when the term runs from the communication of the decision and for the parties as well. But the art.20 par. 1) of Law no. 554/2004, which is the subject of the exception of unconstitutionality, makes no distinction and, due to the restrictive and unconditional drafting, does not allow the application of the differentiation rules provided in art.301 and art.284 of the CPC. Under these circumstances, the judge is forced to establish himself by way of a law based off law, that is to say by substituting the legislator, the rules necessary to declare for the second appeal, and the parties have no reliable indication of the term in which they may appeal the decision of the administrative court at first instance, which makes their access to justice on the basis of the remedy provided by law 'uncertain and random, that is to say, limited.'

The sanction for not appealing within the term of the decision of the first instance is the one stipulated by art.185 of the CPC which provides that the absence of any remedy or any other procedural act within the legal term shall lead to the decay, unless the law provides otherwise or when the party proves to have been hampered by a circumstance above his will, and the latter must be proven.

The second appeal must have the same form required by art.486 of the Civil Procedure Code:

a) The name and surname domicile or residence of the party to whom the second appeal is based, the name, surname and business address of the lawyer making the request or, for legal persons, their name and registered office, and the name and surname of the legal advisor making the request. These provisions are also applied if the appellant lives abroad;

b) The name and surname, domicile or residence, or, where appropriate, the name and address of the claimant;

c) Indication of the judgment to be contested;

d) The grounds on illegality on which the second appeal and its development are based or, as the case may be, the statement that the reasons are to be filled by a separate memorial;

e) The signature of the party or the representative in the case provided by the art.13 par.2), his lawyer or, as the case may be, the legal advisor.

Concerning to the grounds of the second appeal, as the special law makes no distinction, the provisions of the art.488 from the CPC are applicable, stating that it may be necessary to quash certain judgments (in

Pascariu, L-T. (2016). Analysis of the legal nature of the administrative appeal in Romania. Jurnalul de Studii Juridice, Year XI, No. 3-4, December 2016, 57-66.

the old regulation the amendment was also mentioned), only for reasons of lawfulness, in the following situations:

1. When the court was not constituted according to the legal provisions;

2. if the decision has been pronounced by a judge other than the one who took part to the substantive debate of the trial or by a court other than the one that was randomly appointed to settle the case or whose composition was changed, in violation of the law;

3. When the judgment was given in violation of the public order jurisdiction of another court, invoked under the law;

4. When the court has exceeded the powers of its jurisdiction;

5. Where, by that decision, the court has breached procedural rules, the non-compliance of which entails the sanction of nullity;

6. When the decision does not contain the grounds on which it is based or where it contains contradictory grounds or only grounds other than the nature of the case;

7. When the case law has been violated;

8. Where the judgment was given in violation or misapplication of the rules of substantive law.

The provisions of the first instance and appeal proceedings also apply to the second appeal, in so far as they are not inconsistent with those contained in the section dealing with the appeal in the Civil Procedure Code. In the case of admitting the second appeal in the litigation of the administrative contract, the court of appeal, taking the sentence, will reject the litigation in the case, unless there are grounds for cassation with dispatch to retrial. If the appeal has been declared admissible in principle, the court, verifying all the grounds relied on and hearing the second appeal, may admit it, reject it or cancel it, or find it obsolete. The retrial will be made by the court of appeal either at the time when the second appeal was admitted, in which a single decision is pronounced or at another time set for that purpose.

Art. 498 par. 2 of the CPC attests that the Courts of Appeal would decide the cassation with dispatch to retrial only once in the course of the proceedings, if the court whose judgment is appealed has resolved the case without going to court or the trial was made in the absence of the party that was unlawfully quoted, both to the evidence-taking and the substantive debate. For retrial, the case shall be referred to the court which delivered the judgment or to another court of the same rank with that court in the same constituency. The provisions of the art.497 shall apply accordingly, in case of incompetence, exceeding of the power of the jurisdiction and violation of the case law.

Pascariu, L-T. (2016). Analysis of the legal nature of the administrative appeal in Romania. Jurnalul de Studii Juridice, Year XI, No. 3-4, December 2016, 57-66.

What matters here is whether **the second appeal in administrative contracts, therefore according to the provision of dispatch from Law no.554/2004, is indeed a reforming, non-devolutive, extraordinary and non-suspensive in execution remedy of law**, since the New Code did not repeat the similar provisions of the former art. 304^1 - Civil Procedure Code from 1865.

The issue in question starts from the corroboration of art. 7 of the Law no. 76/2012 for the implementation of Law no. 134/2010 on the Code of Civil Procedure, stating that "unless otherwise provided by this law, whenever a special law provides that the first instance court decision is" final ", from the date of its entry into force of the Civil Procedure Code, it will be subject only to the appeal to the higher court ". The provisions of par.(1) also apply if a special law provides that the court of first instance is "subject to the second appeal" or "may be appealed against" or, where appropriate, the special law uses a similar expression with art. 20 par.(1) of Law no. 554/2004, which states that "the judgment delivered at first instance may be appealed against within 15 days from the communication", and with art. 14 par.(4), on the remedy of the second appeal in the case of the decision pronouncing the suspension, respectively art. 15 par.(2). However, the par.(3) of art. 7 certifies that the provisions of paragraphs (1) and (2) shall not apply to administrative and fiscal litigation, including asylum matters.

It is true that in a Decision of 2014 (Decision no. 462 of September, 17, 2014 on the objection of unconstitutionality of the provisions of art. 13 par.(2) second sentence, art. 83 par. (3) and art. 486 par.. (3) of Civil Procedure Code), the Constitutional Court observes that, according to art. 7 par.(3) Of the Law no. 76/2012 for the implementation of Law no. 134/2010 on the Civil Procedure Code, published in the Official Monitor of Romania, Part I, no. 365 of May 30, 2012, the legislator chose to maintain the remedy of the second appeal and not to replace it with the remedy of the appeal. In the light of the NCPC, the second appeal in the area of administrative litigation is fundamentally different from the remedy in the old regulation, which in principle permitted the examination of the case in all aspects by the judgment under appeal. As a result of this exclusion, the decisions of the first instance in administrative litigation remain subject to the second appeal.

However, what the Constitutional Court considers in its decision, according to its specific object, is the potential violation of access to justice, which is not an absolute right, and can be limited by certain formal and substantive conditions imposed by the legislator in relation to the provisions of art.21 of the Constitution. However, conditionality cannot be accepted if it affects fundamental right in its very substance and limitations to the

Pascariu, L-T. (2016). Analysis of the legal nature of the administrative appeal in Romania. Jurnalul de Studii Juridice, Year XI, No. 3-4, December 2016, 57-66.

fundamental right are admissible only if they concern a legitimate aim and there is a proportionality between the means used by the legislator and the aim pursued by him (The Court also refers to previous decisions, Decision No. 176 of March, 24, 2005, published in the Official Monitor of Romania, Part I, No. 356 of April, 27, 2005).

In Decision no. 141/2015 (Decision no. 141 of March,12, 2015 on exception of unconstitutionality of the provisions of art. 20 of Administrative Contencious Law no. 554/2004 and those of art. 7 par. (3) of Law no. 76/2012 for the implementation of Law no. 134/2010 on The Code of Civil Procedure), on the grounds of the objection of unconstitutionality, it was assumed that through the criticized legal texts a discriminatory regime is created in the area of administrative litigation, because the dissatisfied party can appeal against the decision of the court of law only for the express and limitative reasons provided by the law, only by second appeal, not by appeal, the second appeal becoming an extraordinary remedy of law. The provisions of the art.488 of the CPC which set out the grounds for the quashing of judgments show that the legislator has given greater efficiency to the principle that the second appeal is a non-devolutive remedy of law. Unlike the old regulation which established the possibility of examining the case in all its aspects, according to art. 304^1 of the CPC of 1865, the new rules no longer provide for any exception to the aforementioned rule. It has been pointed out by the constituting judge that even after the entry into force of the NCPC, the appeal against the decision of the court of first instance is exercised under the conditions provided by art. 20 par.(1) of Law no. 554/2004, within 15 days from the communication, the appeal being a suspensive one. The Court held that, in matters of administrative litigation the decisions of the courts of first instance cannot be appealed, the only remedy of law that can be exercised is that of second appeal. The special rule contained in art. 20 par.(1) of Law no. 554/2004 has remained applicable after the entry into force of the NCPC, a situation expressly regulated in art. 7 par.(3) of the Law no. 76/2012, according to which, in the matter of administrative and fiscal litigation, as well as asylum matters, no appeal is provided.

Previously, the Constitutional Court ruled on the unconstitutionality of the above-mentioned articles, pointing out that the legal nature of the second appeal in the appeal system against judgments has changed over time, and the second appeal is sometimes considered an ordinary stage of appeal, at other times, even though it is considered an extraordinary remedy of law, it could also be exercised for reasons of groundlessness of the judgment, and at present, in the new regulation of this legal institution, the second appeal is qualified as an extraordinary remedy of law, solely for

Pascariu, L-T. (2016). Analysis of the legal nature of the administrative appeal in Romania. Jurnalul de Studii Juridice, Year XI, No. 3-4, December 2016, 57-66.

reasons of unlawfulness of the judgment (Decision no. 747 of December,17, 2014 on exception of unconstitutionality of the provisions of art. 488 of Code of Civil Procedure corroborated with those of art. 10 par. (2) and art. 20 par. (1) of Administrative Contencious Law no. 554/2004, as well as the provisions of art. 7 par. (3) of Law no. 76/2012 for the implementation of Law no. 134/2010 on Code of Civil Procedure).

Thus, summarizing the decisions of the Constitutional Court, it follows from the above that, in the matter of administrative litigation, the remedy remained the second appeal. However, the issue of interest is to determine **the legal nature of the second appeal**, where this is the remedy against the decision given in the case. If the court accepts the second appeal, quashes the judgment and decides the retrial on the merits, does the retrial become devolutive as provided in art.498 of the CPC? According to the article invoked, if the jurisdiction to resolve the second appeal belongs to the tribunal or the court of appeal and the contested judgment was quashed, the retrial will be made by the court of appeal either at the time when the second appeal was granted, the situation in which a single decision is pronounced, or at another time set for that purpose. The distinction is of particular importance in practice, since cassation with dispatch to retrial can only take place in the hypotheses strictly determined by art. 498, par. 2, according to which the courts provided in par. 1 shall quash with dispatch to retrial only once in the course of the lawsuit if the court whose appeal has been appealed has settled the case without going to court or the case was brought in the absence of the party that was unlawfully quoted, both to the evidence-taking and the substantive debate.

In fact in most cases, the cassation after admission of the reason provided by art. 488 (8) (where the judgment was given in breach or misapplication of the substantive rules of law) or, possibly, point 6 (where the judgment does not contain the grounds on which it is based, or contains contradictory grounds or only alien to the nature of the case) needs for additional evidence, for example witnesses or expertise. Within the tight frame of the non-devolutive appeal, it is obvious that the evidence sought by the second appeal becomes inadmissible.

The subject of a petition to qualify the legal nature of the appeal in the case of a retrial would meet all the conditions listed in art. 519 of the CPC if it has been invoked in a pending litigation (Patancius, 2015):

a) To be formulated in connection with an ongoing lawsuit;

b) Judgment indicated at letter a) is in the role of the High Court of Cassation and Justice, of a court of appeal or of a tribunal, and they shall be entrusted with settling the case as a last resort;

Pascariu, L-T. (2016). Analysis of the legal nature of the administrative appeal in Romania. Jurnalul de Studii Juridice, Year XI, No. 3-4, December 2016, 57-66.

c) Clarification of the question of law to be decisive in dealing with the substance of the case in which it was raised;

d) Be new, not have the High Court of Cassation and Justice judged on it and not be the subject of an appeal in the interest of the law.

There are authors (Vucmanocivi, 2015) who reasonably claim the need to reconsider new views on the second appeal in the matter of administrative litigation, in accordance with the rules for the interpretation of legal norms, the interpretation of a legal norm (Law 554/2004) not being permissible under other legal norms (Law no. 76/2012), so as to create a *lex tertia*. Moreover, it is shown that the law of art. 7 par. 3 of the Law no. 76/2012 does not meet the conditions of clarity, predictability and accessibility claimed by the provisions of art. 1 par.(5) of the Romanian Constitution, which enshrines the principle of legality. The provisions of art.7 par. 3 of the Law no. 76/2012 cannot be taken into account, alone, as a fundamental reference in changing the optics on the structure of the institution of appeal in the field of administrative litigation in Romania.

It is rightly pointed out that "contradictory interpretations would arise, which would lead to a differentiated application of the provisions of art.7 paragraph 3 of the Law no. 76/2012 in relation to those of art.20 par.1 of the Law no. 554/2004. Thus, it should be noted that the provisions of art.2 par. 1 letter ş) of Law no. 554/2004, regarding the notion of "imminent damage", as well as those of art. 1 of the Law no. 554/2004 on the subject of the action in administrative litigation ("recognition of the claimed right or of the legitimate interest and reparation of the damage caused to him") would be in conformity with the provisions of art. 483 of the NCPC, for the qualification of the appeal which can be exercised depending on the value of the action brought to the court, therefore the amount of the damage caused, which according to art. 8 par. 1 of the Law no. 554/2004, would entitle the administrative courts to "repair the damage caused and possibly (upon granting) repairs for moral damages". A differentiated admissibility of the appeal would follow, depending on the value of the administrative appeal to the court in a way that would harm the unitary application of the Law no. 554/2004.

In settling the exceptions of unconstitutionality with which it was invested, the Constitutional Court ruled on the legal nature of the indirect second appeal, within the limits of the unconstitutionality with which it was invested, and not in the light of the qualification of the limits of the retrial by calling the merits of the case (for example, the authoress of the exception of unconstitutionality of Decision No. 747/2014 considers that "it is necessary to amend these legal texts, since the court in administrative litigation turns into a court where there is no appeal, since limiting only to these grounds

Pascariu, L-T. (2016). Analysis of the legal nature of the administrative appeal in Romania. Jurnalul de Studii Juridice, Year XI, No. 3-4, December 2016, 57-66.

for cassation under art. 488 of the NCPC removes the possibility of bringing a second appeal for the fact that the decision of the litigant was pronounced groundlessly "), meaning that considering art. 519 a notification can be admissible with the express clarification of this aspect.

An additional argument put forward in the doctrine is that only the second appeal from Law 554/2004 falls within the scope of the double degree of jurisdiction, since the purpose of this appeal to common law is to provide additional control, exclusively on matters of legality, for which the second appeal cannot be considered a degree of jurisdiction that provides a third trial on the merits, it is a remedy by which a legality control is carried out (Grigoraș, 2014).

Conclusions

Qualifying (happily, I dare say) the second appeal as devolutive, starting from the provision outlined above (art. 498 par. 1 concerning a retrial in the substantive proceedings), would allow the appeal court to perform a new judgment, verifying in this way the legality of the decision. The re-judgment implies the re-examination of the case, which in turn leads to complete admissibility of the evidence.

Previously, the above issues did not raise any controversy, since through point 31 of Law no. 202/2010 on some measures for accelerating the settlement of the proceedings it was ordered the amendment of Article 315, after paragraph 3 a new paragraph, paragraph 31, was added, with the following content: "In the case of retrial after cassation, with restraint or with dispatch, any evidence provided by law is admissible."

Or it is clear that at present it is not possible to examine the case in all aspects of the second appeal, subject to the grounds of illegality strictly listed in art. 488, but I appreciate that eventually in the light of the High Court of Cassation and Justice's request for a prior ruling on a resolution of matters of law, according to art. 519 of the Code of Civil Procedure, it is possible to elucidate the aspect of the administration of the new evidence in the second appeal, in the light of the qualification of the limits of the retrial after cassation without dispatch.

Bibliography

Grigoras Constantin, The Administrative Contencious according to the New Code of Civil Procedure, Hamangiu Publishing House, 2014.

Eugenia Marin, Settlement of the administrative appeal by The High Court of Cassation and Justice, article published on **http://bloghamangiu.ro/solutionarea-recursului-de-catre-**

Pascariu, L-T. (2016). Analysis of the legal nature of the administrative appeal in Romania. Jurnalul de Studii Juridice, Year XI, No. 3-4, December 2016, 57-66.

inalta-curte-de-casatie-si-justitie-in-materia-contenciosului-administrativ.

Tiberiu Patancius, Referral of the HCCJ for a prior ruling on a resolution of a matter of law – regulation, doctrine analysis and practical ability, article published on 1.04.2015 on *https://www.juridice.ro/368328/sesizarea-iccj-in-vederea-pronuntarii-unei-hotarari-prealabile-pentru-dezlegarea-unei-chestiuni-de-drept-reglementare-analiza-doctrinei-si-aplicabilitate-practica.html.*

Iulia Vucmanovici, The New Appeal in Romanian administrative litigation, article published on 20.05.2015 on https://www.juridice.ro/376645/noul-recurs-in-contenciosul-administrativ-roman.html.

Decision no. 462 of September, 17, 2014 on the objection of unconstitutionality of the provisions of art. 13 par.(2) second sentence, art. 83 par. (3) and art. 486 par.. (3) of Civil Procedure Code, published on https://www.ccr.ro/files/products/Dec_462-2014.pdf.

Decision no. 141 of March,12, 2015 on exception of unconstitutionality of the provisions of art. 20 of Administrative Contencious Law no. 554/2004 and those of art. 7 par. (3) of Law no. 76/2012 for the implementation of Law no. 134/2010 on The Code of Civil Procedure, published on **http://legislatie.just.ro/Public/DetaliiDocument/167782.**

Decision no. 747 of December,17, 2014 on exception of unconstitutionality of the provisions of art. 488 of Code of Civil Procedure corroborated with those of art. 10 par. (2) and art. 20 par. (1) of Administrative Contencious Law no. 554/2004, as well as the provisions of art. 7 par. (3) of Law no. 76/2012 for the implementation of Law no. 134/2010 on Code of Civil Procedure, published on **http://legislatie.just.ro/Public/DetaliiDocumentAfis/165476.**

Pascariu, L-T. (2016). Analysis of the legal nature of the administrative appeal in Romania. Jurnalul de Studii Juridice, Year XI, No. 3-4, December 2016, 57-66.