DEFICIENCIES IN THE APPLICATION OF SOME NORMATIVE ACTS REGARDING THE RECONGNITION OF SOME RIGHTS IN THE MATTER OF PENSIONS OR OF SOME SPECIAL INDEMNITIES

Cătălina-Georgeta DINU*

Abstract

The present study considers two concrete situations, namely, the abolition of a decision establishing the right to pension, once it has become final, respectively the abolition of a decision on partial admission or rejection of recognition of entitlement to compensation as a result of political persecution by the dictatorship. established on March 6, 1945 in Romania.

Both situations refer to individual administrative acts, intuitu personae, to which a distinct legal framework applies: on the one hand, Law no. 263/2010 on the unitary public pension system, and on the other hand, the Decree- Law no. 118/1990 on granting rights to persons persecuted for political reasons by the dictatorship established starting with March 6, 1945, as well as to those deported abroad or constituted as prisoners.

When we refer to the situation of contesting a decision to reject the right to pension by the applicant, the identification of legal remedies is clear, but what happens when the administrative authority competent to issue an administrative act reverts to its own decision, revokes it retroactively and withdraws the right to a pension? We will explain that a retirement decision can only be revoked under certain conditions. In the second situation, we signal not only a deficient application of the legal provisions of Law no. 232/2020 that amended the Decree-Law no. 118/1990, but also a deficiency in the elaboration of the legal framework, which leads to confusions in the situation where the applicant wishes to contest a decision by which his rights to the special indemnity provided by this normative act are not recognized.

Key Words*: compensation, Decree-Law no. 118/1990, revocation, annulment, preliminary*.
JEL Classification: [K39]

1. Introduction

What happens in the situation of a public servant who has been hired as a parliamentary adviser within an authority of the central public administration, namely, the Permanent Electoral Authority, and who wants to quit the job and benefit the right to special pension? In several situations, employees of this institution requested and subsequently obtained a decision recognizing the right to a service pension. Such decisions have been issued since last year, the applicants having no reasons to challenge these decisions, as they were favorable.

Consequently, the labor relations ceased, being issued decisions by the head of the public authority in this respect. Retirement decisions remained final after 45 days from the communication and took legal effect. Subsequently, however, the territorial pension houses issued decisions to review the decisions that had granted

* PhD, Lecturer, Faculty of Law, Transylvania University of Brasov.

the service pension based on Law no. 7/2006 on the Statute of the parliamentary public servant, republished, with subsequent amendments and completion.

In the motivation of the revision decisions, it is mentioned that "the application for registration is rejected because, in accordance with the provisions of art. 94 of Law no. 7/2006 on the Statute of the parliamentary public servant, republished, with subsequent amendments and completions, and of art.102 paragraph (2) of the second sentence of Law no. 208/2015 on the election of the Senate and the Chamber of Deputies, as well as the functioning of the Permanent Electoral Authority, the service pension regulated by art. 73^1 of Law no. 7/2006 is not appropriate for the staff of the Permanent Electoral Authority. In this sense, the High Court of Cassation and Justice ruled by Decision no. 50 of 18 June 2018".

2. Can the right to a pension be reviewed, *ex officio*, by the territorial pension funds, if the first decision has produced legal effects?

Therefore, a review decision rejected an application for an occupational pension and replaced a previous final decision to grant an occupational pension.

The question that arises is whether the revision decision violates the provisions of art. 106 of Law no. 263/2010 on the unitary public pension system, as the previous decision was already final, by non-challenge and produced legal effects, namely the issuance of the decision of the President of the Authority Permanent Electoral Offices regarding the termination of employment, so that the persons in this situation no longer have a pension or a salary. Or should the decisions to review pension funds take into account the provisions of art. 107 of Law no. 263/2010, namely, to be issued when there are differences between the amounts that have been paid and those legally due?

In this context, we mention that, according to art. 521 paragraph (3) of the Civil Procedure Code, with subsequent amendments and completions, "the resolution given to legal issues is mandatory from the date of publication of the decision in the Official Gazette of Romania, Part I, and for the court that requested the release, from the date of pronouncing the decision".

Also, on September 24, 2018 - namely, the date on which it was published in the Official Gazette of Romania, Decision no. 50/2018 of the High Court of Cassation and Justice (2018), art. 521 paragraph (3) of the Code of Civil Procedure mentioned: "release given the issues of law is mandatory for the court that requested the release from the date of pronouncing the decision, and for the other courts, from the date of publication of the decision in the Official Gazette of Romania, Part I".

As a result, Decision no. 50/2018 is binding on the courts, according to the provisions of the Civil Procedure Code, in force at the time when the High Court of Cassation and Justice decision in question became mandatory by publishing it in the Official Gazette of Romania.

According to art. 106 of Law no. 263/2010, with subsequent amendments and completions, the admission or rejection of the retirement application is made by decision issued by the territorial pension house, within 45 days from the date of

registration of the application. This decision includes the factual and legal grounds on which the application for retirement is admitted or rejected and within 30 days from the communication, the pension decision may be annulled at the request of the holder. The decision of the territorial pension house shall be communicated to the person who requested the retirement, within 5 days from the date of issue.

Also, the provisions of art. 107 of the same law regulate the following: in the situation where, following the establishment and / or payment of pension rights, there are differences between the amounts established and / or paid and those legally due, the territorial pension house operates, *ex officio* or at the request of the pensioner, the necessary changes, by revision decision; (3) The pension can be recalculated by adding the incomes and / or the contribution stages, to the periods assimilated to the contribution stages provided by law and by capitalizing other documents likely to lead to the modification of the pension rights, not revalued when establishing it.

As the provisions of art. 1 paragraph (6) of Law no. 554/2004 establish, "the public authority issuing an illegal unilateral administrative act may request the court to annul it, in case the act can no longer be revoked as it entered the civil circuit and produced legal effects. If the action is admitted, the court shall rule, if it has been notified by the request for a summons, on the validity of legal acts concluded on the basis of the illegal administrative act, as well as on the legal effects produced by them. The action may be brought within one year from the date of issuance of the act". Therefore, the principle of revocability of administrative acts is applicable as long as illegal unilateral acts have not entered the civil circuit, revocation justifies a public interest, the acts have not produced any legal effects, and the issuing authority must take into account the legitimate expectations of the beneficiaries.

We consider that the revision decisions of the pension funds must take into account the provisions of art. 107 of Law no. 263/2010, namely, to be issued when there are differences between the amounts that have been paid and those legally due. Therefore, the review decisions must limit to the object of *the amount* of the pension granted, and not extend it to the existence or non-existence of the right to a pension. Moreover, this aspect is strengthened by the provisions of paragraph (3) of Law no. 263/2010: "adding revenues and/or contribution periods, periods assimilated to contribution periods provided by law and by capitalizing on other documents likely to lead when modifying the pension rights, not valued at its establishment".

Extrapolating, the county pension funds issued revision decisions to find that the persons in this situation cannot be recognized the right to pension, although a favorable decision had already been issued in this respect - a decision that remained final on 14 November 2020 (prior to the issuance of the Revision Decision no. 34490/25.11.2020) and which produced legal effects.

Or, in such a situation, according to the principle of legality, we consider that the issuing public authority *no longer has the possibility to revoke the individual administrative act* that has already been issued, but it is necessary to go

through the procedure provided by art.1 paragraph (6) of Law no. 554/2004, with subsequent amendments (Șaramet, 2021, p. 193). Therefore, the County Pension House had to address the competent court and request the finding of the nullity of the decision initially issued without complying with the High Court of Cassation and Justice Decision no. 50 from 18 June 2018.

In this sense, we also invoke the clarifications of the Romanian Constitutional Court from Decision no. 55/2000, according to which: it can only be done by the competent authority to establish the responsibilities for the violation of the law, an authority that cannot be other than the judicial authority. Otherwise, the stability of legal relations would be seriously affected (Adam, 2021, p. 84).

Moreover, as can be seen, the High Court of Cassation and Justice Decision 50/2018 invoked by the territorial pension authorities to "withdraw" the pensioner's right to pension, was already in force at the time of issuing the first decision - the admission of the petitioner's application. As a result, in the time elapsed between the issuance of the first and second decisions, there is no new element that would have intervened and that would have led to the change in the interpretation of a retirement application by the county pension house.

In this context, we mention that, according to art. 521 paragraph (3) of the Code of Civil Procedure, with subsequent amendments and completions, "the resolution given to legal issues is mandatory from the date of publication of the decision in the Official Gazette of Romania, Part I, and for the court that requested the release, from the date of pronouncing the decision".

Also, on September 24, 2018 - namely, the date on which it was published in the Official Gazette of Romania, Decision no. 50/2018 of the HCCJ, art. 521 paragraph (3) of the Code of Civil Procedure mentioned: "release given the issues of law is mandatory for the court that requested the release from the date of pronouncing the decision, and for the other courts, from the date of publication of the decision in the Official Gazette of Romania, Part I".

As a result, Decision no. 50/2018 is binding on the courts, according to the provisions of the Code of Civil Procedure in force at the time when the HCCJ decision in question became mandatory by publishing it in the Official Gazette of Romania.

According to Article 1 paragraph (6) of Law no. 554/2004, "the public authority issuing an illegal unilateral administrative act may request the court to annul it, in case the act can no longer be revoked because it entered the civil circuit and produced legal effects. If the action is admitted, the court shall rule, if it has been notified by the request for a summons, on the validity of legal acts concluded on the basis of the illegal administrative act, as well as on the legal effects produced by them. The action may be brought within one year from the date of issuance of the act".

Therefore, the principle of revocability of administrative acts is applicable as long as illegal unilateral acts have not entered the civil circuit, revocation justifies

a public interest, the acts have not produced any legal effects, and the issuing authority must take into account the legitimate expectations of the beneficiaries.

In this regard, the Romanian juridical doctrine has underlined that the theory of revocation has its own limits, as the institution of revocation raises some special issues, such as the situation of the legal effects already produced until then, as well as the legal consequences of the effects produced in relation to the causes that determined it (Prisăcaru, 2002, *apud* Apostol Tofan, 2017, p. 74).

Moreover, regarding the exceptions from the principle of revocation of administrative acts, it is accepted that (Iorgovan, 2005, p. 85), when individual administrative acts are in question, one of these exceptions reveals the administrative acts that give birth to subjective rights guaranteed by law that recognize stability. Another exception refers to administrative acts that have already been materially executed.

3. Aspects related to the application of the provisions of art. 13 and art. 15 of the Decree-Law no. 118/1990, republished and to the procedure for contesting the issued administrative acts

The second situation we want to analyze refers to the provisions of *Decree-Law no. 118/1990 on granting rights to persons persecuted for political reasons by the dictatorship established starting with March 6, 1945, as well as to those deported abroad or constituted as prisoners*, taking in view that it is not clear what is the procedure to be followed by an applicant who is dissatisfied with the decision issued in this regard by the county agency for payments and competent social inspection.

Thus, some persons understand to address the court directly, and others understand to first file an appeal to the issuing administrative authority.

Considering the mentioned aspects, we find that, by Law no. 130/2020 and by Law no. 232/2020, the Decree-Law no. 118/1990 was amended and supplemented, so that, starting with 18 July 2020, certain categories of persons have the possibility to request the recognition of the right to compensation (child of the deceased in the fights with the communist repression organs, in peasant uprisings or of the deceased, from the category of those disappeared or exterminated during detention, abusively hospitalized in psychiatric hospitals, deportees, displaced persons, prisoners or who have been given compulsory residence, the minor child on the date on which one or both parents were in one of the situations provided for, the child born in the period in which one or both parents were in one of the anticipated situations; the child born after the cessation of the predicted situations) (Matei, 2010, p. 591).

According to art. 13 paragraphs (7) - (8) of the Decree-Law no. 118/1990, republished after its completion by Law no. 130/2020 and Law no. 232/2020, the county agencies for payments and social inspection, respectively of the Bucharest municipality are obliged to decide on the application for establishing the quality of beneficiary and the monthly allowance provided by this decree-law, within

maximum 30 days from the date of registration of the application, by a reasoned decision.

Against the decision, the interested person may appeal to the administrative and fiscal contentious section of the court, within 30 days from the date of communication of the decision, according to the Law on administrative contentious no. 554/2004, with subsequent amendments and completions. The court's decision is final. Appeals are exempt from judicial stamp duty.

Prior to the amendments suffered by Law no. 232/2020, art. 12 of the Decree-Law no. 118/1990 provided the following: "against the decision the interested person may appeal according to Law no. 554/2004, with the subsequent modifications and completions".

On the other hand, according to art. 15 of the Decree-Law no. 118/1990, republished, the county agencies for payments and social inspection, respectively of Bucharest, based on the notifications received or on their own initiative, will verify the legality of the rights granted to the beneficiaries of the decree-law.

If violations of the legal provisions are found, a review decision is issued.

Against the revision decision issued under the conditions of par. (1) & (2) the interested person may file an appeal, under the conditions of Law no. 554/2004, with subsequent amendments and completions.

These last legal provisions have not been amended by Law no. 232/2020. As a result, considering that the legislator amended the legal provisions according to which a decision on establishing the quality of beneficiary of Decree-Law no. 118/1990 can be challenged, they having a new content, as it results from the provisions of art. 13 of the same decree-law, we consider it necessary that the county agencies for payments and social inspection communicate in a unitary way the way in which the issued decisions can be challenged (Slabu, 2018, p. 114): either by initially submitting an appeal to the issuing authority, thus respecting the preliminary procedure provided by art. 7 of Law no. 554/2004 on administrative litigation, with subsequent amendments and completions, either by filing a lawsuit, directly, without following a prior procedure, otherwise there is a risk of restricting access to justice for the persons concerned, holders of files regarding the request for recognition of certain rights regulated by Decree-Law no. 118/1990.

We appreciate that the legislation in force requires the observance of the preliminary procedure, before addressing the court, but, on the other hand, a judicial practice has emerged at the level of some courts, which does not require the parties to fulfill a preliminary procedure provided by art. 13 paragraph (8) of Decree-Law no. 118/1990.

However, it is important that the administrative authority must correctly inform the individual both about the administrative appeal and the judicial review, taking in view that the lack of these information can lead to the impossibility of the individual to attack the unilateral administrative act and to have a real access to justice. Nevertheless, the administrative appeal is based on less restrictive rules than the judicial review, also the administrative authority has the chance to repair its

possible mistake, being exempted, together with the complainant from paying the court taxes. (Joldos, 2011, p. 281)

Conclusions

Although the power of revoking administrative acts is a particular manifestation of the general power that the administration uses in order to organize its own activity, we have to analyze the limits and the conditions that have to be fulfilled. Of course, according to the previously mentioned, we limit ourselves to the issue of individual administrative acts. Otherwise, the persons who should be the beneficiaries of these administrative acts become „victims" and their rights are put at risk of being violated.

As the national doctrine says: "*privileged* at the issuance of the act, the administration is *unprivileged* at its revocation". (Podaru, 2010, apud Apostol Tofan, 2017, p. 75).

On the other hand, although the principle of juridical security changes its limits according to more recent features of reality – as the first situation which is mentioned above – the administrative act that produces juridical effects and enters in the civil circuit, being followed by other official acts edicted as a consequence, cannot be revoked through the decision of an administrative entity, but only by a judicial decision.

Bibliography

1. Adam, R.A., 2013, „The Theory of the Gained Right. Aspects concerning Article 38 of the Labour Code", *Bulletin of the Transylvania University of Brasov*, 6 (55) No.1, series VII, 84-87, http://webbut.unitbv.ro/BU2013/Series% 20VII/BULETIN%20VII%20PDF/14%20Adam.pdf.
2. Apostol Tofan, D., 2017, *Drept administrativ*, vol. II, 4th Edition, Bucharest, C.H.Beck.
3. Iorgovan, A., 2005, *Tratat de drept administrativ*, vol. II, 4th Edition, Bucharest, All Beck.
4. Joldos, C., 2011, *Administrative Appeals – a Theoretical Framework (Law in Action: Case Studies in Good Governance)*, Michigan, East Lansing.
5. Matei, C.-G.; Șaramet, O., 2010, *Theoretical and Practical Aspects Regarding the Decree-Law no.118/1990, republished*, The 16th International Conference The Knowledge-Based Organization Economic, Social and Administrative Approaches to the Klowledge Based Organization, Nicolae Balcescu Land Forces Academy, Sibiu.
6. Slabu, E., 2018, *Good administration in the European administrative space*, Bucharest, C.H.Beck.

7. Șaramet, O., Spârchez, G.B., 2018, "Romanian Courts' Review of the Administrative Discretionary Decisions", *Bulletin of the Transylvania University of Brasov*, 11 (60), series VII, http://webbut.unitbv.ro/bulletin/Series%20VII/2018/TILC/25_Saramet_Spirchez_TILC_2018.pdf.

Legislation and Case Law

8. Law no. 7/2006 on the Statute of the parliamentary public servant, republished, with subsequent amendments and completions, Republished in the Official Monitor of Romania no.345 of 25 May 2009.
9. Decree-Law no.118/1990 on granting rights to persons persecuted for political reasons by the dictatorship established starting with March 6, 1945, as well as to those deported abroad or constituted as prisoners, Republished in the Official Monitor of Romania no.1208 of 10 December 2020.
10. Law no. 208/2015 on the election of the Senate and the Chamber of Deputies, Published in the Official Monitor of Romania no.553 of 24 July 2015;
11. Law no. 263/2010 on the unitary public pension system, Published in the Official Monitor of Romania no.852 of 16 December 2010.
12. Decision no. 50/2018 of the High Court of Cassation and Justice, published in the Official Monitor of Romania no.815 of 24 September 2018.