THE REFERRAL BACK TO COURT IN CASE OF EXTRADITION

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Abstract
Article 522 ind.1 Criminal procedure code, governing the referral back to court in case of extradition, refers to article 405-408 provisions review applicable to appeal, but this reference is limited to retrial procedure and solutions that can be pronounced by the court.
The review procedure and the retrial procedure after extradition have a distinct finality: if the review involves removal of essential errors to the facts withheld in a final decision, the purpose of referral back to court in case of extradition is to guarantee the right of of extradited person, who was tried and convicted in the absence, to have a fair trial and, mainly, to exercise the right to defence in a new procedural cycle, which implies the possibility for the person to be heard, to question the witnesses or other parts of the process and to administer favorable evidence, both on the facts, as well as circumstantial.

Keywords *: extradition, review, trial, judgement, conviction.*

Introduction :

The extradition, as a special and incidental criminal procedure institution (concept) that frames within the criminal procedure realm, is carried out among sovereign states, and presuppose that a state also called the requested state, on whose territory there lives a person that has been investigated or prosecuted by the court authorities of a different state, called the demanding state, it extradites such person to the demanding state upon the special application of the same, for the person to be investigated and judged by the court authorities of such state or for such person to be compelled to carry out a sentence or a detention order ruled against him/her by such authorities.

By the extradition obligation undertaken by the contracting parties they undertake to mutually extradite, according to the rules and conditions provided by the Convention, the persons investigated for committing a crime or searched for enforcing a conviction or a safety measure by the law enforcement authorities of the demanding parties, such action being subject to denial if certain requirements are not complied with.

For eliminating all the inconveniences, interdictions and inabilities initially involved by the procedure of judgement by default, that entered in conflict with the provisions of European Convention on Human Rights and Fundamental Freedoms, regarding the right to defence, the right to a fair trial, the right to cross examine the prosecution witnesses and the right to be heard before the court in the criminal law trial, the European Convention on Extradition, concluded in Paris, on 13th of December 1957, when a second Additional Protocol has been added, protocol concluded in Strasbourg, on the 17th of March 1978, introducing several provisions on the judgment by default, i.e. judgment *in absentia*.

According to this Protocol: *"When a Contracting Party requests from another Contracting Party the extradition of a person for the purpose of carrying out a sentence or detention order imposed by a decision rendered against him in absentia, the requested Party may refuse to extradite for this purpose if, in its opinion, the proceedings leading to the judgment did not satisfy the minimum rights of defence recognised as due to everyone charged with criminal offence.*

However, extradition shall be granted if the requesting Party gives an assurance considered sufficient to guarantee to the person claimed the right to a retrial which safeguards the rights of defence. This decision will authorise the requesting Party either to enforce the judgment in question

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if the convicted person does not make an opposition or, if he does, to take proceedings against the person extradited.

When the requested Party informs the person whose extradition has been requested of the judgment rendered against him in absentia, the requesting Party shall not regard this communication as a formal notification for the purposes of the criminal procedure in that State".

The right to a new trial procedure presents itself thus as a condition for granting the extradition, and the communication of the sentence rendered against him/her by the requested country to the convicted person has no effect towards him/her in the criminal procedure o the demanding country, thus it cannot be considered as the start date as of certain procedural deadlines for exercising the ordinary redress procedures (appeal or second appeal past the prescription) or the extraordinary redress procedures against the conviction order.

The above-mentioned provisions of the Strasbourg Protocol make no distinction whether the convicted person evaded the judgment or not, the reason for which the convicted person reached the territory of the requested country making no difference, from this aspect. The right to a new trial procedure is, thus, opened to both those entering the territory of the requested country, unaware of the existence of a trial brought against them, as well as to those who, although aware of the existence of a trial brought against them, have evaded the judgement.

The Convention warranties the right of the person to defend and to cross-examine or to ask for the interrogation of witnesses, which implicitly presupposes the accused presence in front of the court.

However, in the practice of the European Court for Human Rights the judgment *in absentia* does not represent a violation of the Convention, if the state has taken the necessary reasonable actions for finding and summoning the accused, the person judged by default being entitled to ask for the referral back of the case, except for the case such person has evaded the trial.[1]

The provisions of the European Convention on Extradition, concluded in Paris, including those comprised in the Strasbourg Protocol, have been initially included in the Law no. 296/2001 on extradition, but the provisions of this law have not been completed with correlative provisions in the Code of criminal procedure, stipulating the right of the person convicted person in absentia to a new trial procedure after its extradition; this completion has only been done in 2003, by the text of the article I pct. 221 of the Law no. 281/2003[2], the Code of criminal procedure being amended by the article 522 index 1 called „The case referral back of the persons judged *in absentia* in case of extradition", and which provides that „*in case of requesting the extradition of a person judged and sentenced in absentia, the cause shall be referred back to the first instance, upon the request of the convicted person*". Further, the Law no. 302/2004 regarding the international legal cooperation in the criminal matters, as further amended and completed, has reunited in a single legal instrument all forms of international legal cooperation, by including in the article 34 almost integrally the provisions of the article 3 of the Strasbourg Protocol in 1978.

In addition, by the article 69, the above-mentioned law provides that, by the extradition request, the Romanian state shall guarantee – by the Ministry of Justice – the referral back of the case for its judgment in the presence of the extradited person. Moreover, the lawgiver has provided by the art.72 paragraph 2 that "if the extradited has been sentenced *in absentia*, he/she will be put to trial again, upon request, by complying with the rights provided under the article 34 paragraph (1)".

It is thus noticed that the regulation of the institution of case referral after extradition is provided in both the Code of criminal procedure, as well as in the Law no. 302/2004. Considering the laws sequence in time, the conditions that should be considered on the case referral for a re-judgment

[1] D.Bogdan, M.Selegean, Fundamental rights and freedoms in the E.H.C.R Jurisprudence, Ed.All Beck, Bucharest, 2005, p.245-247.

[2] Published in Official Romanian Gazette, part I, no.468 from 1 st of July, 2003.

of a case subsequent to the extradition are the ones in the more recent legal instrument, i.e. Law no. 302/2004, as further amended and completed.

Unlike the provisions of the article 522 paragraph 1 Code of criminal procedure stipulating the cumulative compliance of two conditions, i.e. the person should have been judged and sentenced *in absentia*, the Law no. 302/2004, by its article 72 paragraph 2 provides solely the condition that the person to have been sentenced *in absentia*.

The right of the extradited person to benefit of the case referral back can be limited in the cases when the judgment in absentia is the consequence of the voluntary waiver from the accused to the right of being present in court for its defence. Thus, this right of the accused to the opening of the procedure is recognized only if such accused has missed the judgement of his / her cause duet o reasons beyond his/her will, caused by force majeure or other grounded reasons (see the cases Colozza vs. Italy, Demebeikov vs. Bulgaria, Medenica vs. Switzerland, and Sejdovic vs. Italy etc.).

The lack of compliance with these conditions can lead to the conclusion of a faulty procedural conduct of the extradited person, which cannot be invoked in supporting the claim for referring the case back, such conduct being unprotected by the provisions of the article 34 of the Law no. 302/2004 on international judicial cooperation in criminal matters and the Convention on extradition.

However, the summary nature of the provisions of the article 522 index 1 Code of cr. pr. raises enough questions, and numerous debates among the practitioners and generating already a series of legal interpretation problems.

A first issue of interpretation and application is whether by these provisions there has been established a new extraordinary redress procedure or a new ground for review, the references in the paragraph 2 to the procedural provisions on the review judgment, offering some grounds for such interpretation. To this end, there must be considered that in both the case of review as well as in the case of referral back to the court that has passed the decision after extradition, the first court can face the situation of recalling its own decision. Moreover, in both cases the result can be the cancellation of final court decisions.

Both the review, as well as the case referral back after the convicted person extradition renders possible the amendment of the conviction decision, both in the criminal matter and the civil matter. However, although there are obvious similarities regarding the consequences and there are even some common procedural provisions, it cannot be concluded that the case referral back after the convicted person extradition would represent a new case of review, existing major differences between the two procedures.

Paper content :

The review procedure is an extraordinary redress procedure, grounded on reasons related to the substance of the case related to new evidence that might prove the innocence of the convicted person, or by the distortion of truth by false documents or by the existence of final court decisions that cannot be reconciled, while the case re-judgment after the extradition of the convicted person is a new court procedure meant to secure the right to defence of the convicted person. However, the procedure provided by the article 522 index 1 Code of cr. pr., establishes a new redress procedure as to the reference to the provisions of the article 405-408 Code of cr. pr., an extraordinary redress procedure that might recall final court decisions, the exercise of which cannot be denied to the person facing the situation described under the article 522 index 1 paragraph1 Code of cr. pr.

The principle of guaranteeing the right to defence supersedes the *res judicata* principle applicable to the court decision ruled *in absentia* against the convicted person, thus the judgement in absentia seems rather a procedure meant to secure the direct service of evidence to the court and the preservation of such evidence until the identification and extradition of the convicted person, the case referral back after the extradition completing the procedure carried out in the absence of the convicted person by the contradictoriality ensured by the right to defence, principle that could not be complied with by a judgment *in absentia*.

The review can be requested by any of the parties in the trial, within the limits of its standing to bring proceedings, by the husband and by the close relatives of the convicted person, even after its death, as well as by the prosecutor, while the case referral back after the extradition can be exclusively requested by the extradited convicted person, who at its own discretion can accept the conviction or the referral of the case back to the court that has passed the decision.

A major difference is the fact that the review can be requested both in favour as well as against the best interest of the convicted person, while the case referral after the extradition of the convicted person can only be in its favour. Due to this fact, the effects of the case referral after the extradition of the convicted person are more extended than in the review case. If, after the review, the decisions can, in principle, only be completely opposite, i.e. conviction in case of acquittal and acquittal in case of conviction, the case referral back to the court that has passed the decision after the extradition of the convicted person can also have the effect of re-individualizing the sanction, of removing the relapse, of decreasing the quantum of the damage, etc.

Article 522 index 1 Code of criminal procedure regulating the referral back of the case after extradition makes reference to the provisions of the article 405 - 408 Code of criminal procedure, applicable to the extraordinary redress procedure of the review, however this reference is limited to the back referral procedure and to the solutions that can be ruled.

Practically, the review and the referral of the case after extradition have a different finality: if the review entails the removal of some major errors on the facts held in a final decision, the case referral back to the court that has passed the decision in case of extradition has the purpose of guaranteeing the extradited convicted person, judged in absentia, the right to a fair trial and, in principle, the exercise of the right to defence within a new trial, which presupposes its possibility to be heard, to interrogate witnesses or the parties in the trial and to service evidence in his/her defence, both regarding the *de facto* situation and the circumstantial evidence.

If there is no contrary disposition, the case referral back to the instance in case o extradition does not limit to the removal of an essential error on the facts, but it can also have effects on the individualization of the punishment and, therefore, even if the list of evidence submitted on the case referral confirms the de facto situation and the guilt of the accused, the request of the same can be accepted exclusively on the individualization of the punishment, the consequence of which being the ruling of the new decision, if the evidence presented as circumstantial evidence lead the instance appointed for judging the case again to a different conclusion on the individualization than the one established in the first trial.

Even if the article 522 index 1 Code of criminal procedure makes reference to the legal provisions applicable in the matter of review, this reference is limited to the case referral procedure and to the court decisions that can be ruled at the end of it.

In other words, although they are partly identical, the review and the case referral back to court in case of extradition have a distinct finality: if the review entails the removal of some major errors on the facts held in a final decision (mainly, the conviction of an innocent person or the ungrounded acquittal), the case referral back to the court that has passed the decision in case of extradition has the purpose of guaranteeing the extradited convicted person, judged in absentia, the right to a fair trial and, in principle, the exercise of the right to defence within a new trial.[3]

If there is no contrary disposition, the case referral back to the instance in case o extradition does not limit to the removal of an essential error on the facts, consisting in a possible conviction of an innocent person, but it can also have effects on the individualization of the punishment, if the list of evidence submitted on the case referral shall lead to a different conclusion than the one established for the same case during the first trial.

[3] H.C.C.J, penal decision no.560 from 17 th of February, 2009.

Besides the differences between the two institutions, this solution is the obvious choice, considering the situation of the extradited person, that is to be convicted in absentia, which presumes the fact that it had no possibility to submit evidence for his/her defence, both from the guilt point of view, as well as from the aspect of the applicable sanction.

This means that, even if the de facto situation and the guilt of the accused shall remain unchanged due to the list of evidence submitted on the referral of the case back to the court, the request of the accused shall be admitted exclusively on the individualization of the punishment (which might result in ruling a new decision), if the evidence submitted as circumstantial evidence lead the court appointed for judging the case again to a different conclusion regarding the sanction to be applied.

For the reasons presented above, the regulation of the procedure of case referral in case of extradition by the references to the court decision review procedure are insufficient and meant to generate doubts and interpretations of the laws, therefore a more complex regulation of such procedure is required, as the problems raised by the legislative instruments above quoted, of the case referral in case of extradition, cannot be have a unitary settlement by reference to the provisions of the article 405 – 408 C. c.pr.

Another aspect that raises numerous interpretations in the legal practice is related to the absence of the convicted person during the case judgment, as long as the referral procedure is opened solely upon the request person judged and convicted *in absentia*, without specifying however, whether the absence of the convicted person is relevant for all the procedural stages or only in the trial court.

Thus, is shapes the first situation that provides the fact that the accused did not participate either to the trial judgment, or to the other redress actions, being of no importance whether the accused has evaded or not from the case judgment or had no knowledge of that. In this case, the access to the procedure of case referral back to the court after extradition cannot be challenged.

A different situation might be that in which the accused has participated to the judgment of the case in the first instance and has exercised the right to defence, and later he/she evaded the judgment in appeal and second appeal, if such redress procedures have been exercised by the prosecutor. In these cases, too, the access of the extradited convicted person to a new judgment could not be denied, as this procedure is precisely meant to provide the due exercise of the right to defence, such right presupposing even the possibility to challenge the grounds for appeal or second appeal lodged by the prosecutor. The practice of the courts considers the priority of the principle of guaranteeing the right to defence as to the principle of res judicata related to the sentence ruled in the absence of the convicted person, by showing that the judgement in absentia seems rather a procedure meant to assure the direct service of evidence to the court and the preservation of the same as to the identification and extradition of the convicted person, such procedure being solely requested by the extradited convicted person and solely in its best interest.

If, in case of review procedure the court is asked to rule on new evidence, in case of case referral back to the court after the extradition, the reason for referring the case back to the court consists in the need to establish the procedural framework for exercising the right to defence, which would require the resuming of the judgment from that stage of the trial where such right could not be exercised.

Another possible situation would be the existence of an acquittal decision for the accused by the trial court and the absence of the accused from the case appeal, when, due to the reassessment of the evidence, the court rules a verdict that convicts the accused. Moreover, there is a similar case when the accused is acquitted by the first instance, the sentence remains the same in the appeal procedure, but the accused that fails to participate to the second appeal procedure, is convicted person by the second appeal court due to the second appeal lodged by the prosecutor. For the reasons shown above, the access of the convicted person to a new trial procedure cannot be denied.

The situation is identical also when the conviction occurs during an extraordinary redress procedure (review unfavourable to the acquitted), if the judgment of the case has been carried out in the absence of the convicted person.

If the accused participated to the judgment of the case in the first instance and had the possibility to exercise the right to defence, and subsequently, after being convicted, lodged an appeal against the court decision, however he/she failed to present to the court for supporting can no longer argument in the same manner his / her access to a new trial.

Considering the fact that the right of the accused to be present in the court is recognized in the International pact on the civil and political rights and the article 6 paragraph 3 from the Convention for the protection of human rights and fundamental freedoms recognizes for the accused „the right to defend himself" and „the right to interrogate witnesses", the European Court of Human Rights has established that the accused presence is basically obligatory when judging the case. The Court constantly states that in the case of appeal or second appeal procedure article 6 of the Convention applies less strictly, even admitting the regularity of the procedure where the hearings take place in the absence of the accused (the Ekbatani Decision). Exceptions from the rule according to which the accused must be present when the compliance with such condition would result in the unjustified delay of the procedure, especially that this situation has been checked and ascertained and if the accused is faulty missing from the court (the Colozza and Rubinat Decision).

For securing the access to a new trial for the extradited convicted person, presupposing the existence of final criminal decisions, the court referred for settling such request having to examine whether the request could be qualified as an over lapsed appeal or second appeal, or if there are reasons for acting as a relief of the defendant from the effects of the expiry of the time for appeal or second appeal, in which case the request shall be removed and no longer pending with the court and sent to the court competent for judging these redress procedures.

Regarding the possibility of admitting the request for case referral in case of extradition of a convicted person that has been judged in absentia but has been represented by a chosen lawyer, we consider that the solution that should be ruled by the court should be to admit the application, as the legal request for judgment in absentia is complied with, as the law makes no distinction for the situation in which, being absent, the accused benefited of legal representation or not, and the interpretation according to which, by the presence of his / her lawyer, there has been respected the right to defence of the convicted person, would be an addition to the law, which is unacceptable.

Moreover, in the case of an appointed lawyer, when the person convicted was absent from the judgement, the court should admit the request for referring the case back to the court after the extradition because, if in the above-illustrated example the court might find the accused absence as an interpretation of failure to comply with the right to defence – as long as the one absent from the court had however a chosen lawyer (opinion that is not shared by the author, as also mentioned above) – in the case of an appointed lawyers, the initial trial procedure has been carried out with a formal defence.

The request for case referral back to the court after the extradition of the convicted person is *de lege lata* falling always under the jurisdiction of the first court. The jurisdiction is similar to the one established in the case of review procedure, when, with the exception of existing decisions that cannot be reconciled, it is still the first instance that is the competent one for settling the review application (article 401 Code of criminal procedure). We consider that this provision should be reformulated, in the sense that the application should be referred to that court that ruled the sentence of conviction, as the need to take the case for a new judgment in front of the court of first instance or of appeal, when the decisions of such courts acquitted the accused, seems completely unjustified.

Still related to the jurisdiction of the first court there can be also raised the question whether the judge participating to the judgment of the case on the merits can judge again the same case based on the request for case referral back after extradition, or is incompatible according to the article 47

paragraph 2 Code of criminal procedure, as such judge has previously expressed his / her opinion on the decision that might be ruled in the case.

The judgment of the review request can be performed by the same panel of judges, as there is no incompatibility, the judge being asked to rule over new evidence that were unknown during the first judgement, therefore, for similar reasons, there is no incompatibility for the same panel of judges to judge the case after extradition, as the panel directly took note of the evidence serviced during the first trial and the presumption of impartiality in judging the case again could not be affected, as long as it is summoned to rule based on the new statements of defence formulated by the convicted person, defences based on evidence unknown during the first trial.[4]

In the E.C.H.R. practice, there has been stated that the presumption of impartiality of the court also subsists if, after quashing and referring the case back to court, the court vested again with the judgment of the case substance has the same structure as the one that ruled the quashed decision, situation that is totally forbidden by the Romanian criminal procedure (article 47 paragraph 1 Code of criminal procedure). Moreover, the impartiality of the court cannot be doubted in a procedure based on new evidence. We consider that there is no case of incompatibility either the case in which the convicted person understands to benefit of the provisions of the article 320 index 1 Code of criminal procedure related to the procedure of pleading guilty, by which the convicted person asks the court to rule based on the evidence serviced during the stage of criminal investigation.

As a gap of law, the provisions of the article 522 index 1 Code of criminal procedure do not establish a term for the convicted person to ask the referral of the case back to the court, such gap being able to generate procedural abuses, on one hand, and, on the other hand, the *res judicata* authority regarding the decision of conviction cannot be suspended for the whole period of sanction execution. Therefore, there should be established a term within which the convicted person can request such a procedure; when establishing such term there should be considered the fact that the communication of the sentence by the requested state can have no effect on the procedure applied in the demanding state.

We consider that such a term could be calculated from the moment the convicted person that was extradited is delivered to the imprisonment camp, on which occasion he/she could be informed, in the presence of a chosen or appointed lawyer, on the right to ask the case referral back to court, to this end drafting a protocol that would record the convicted person option, existing thus, enough guarantees that the exercise or waiver to such exercise of this right are the result of an informed decision.

The term for exercising the right to case referral back to court should be sufficient for the convicted person and for the defendant to study the file and to prepare the defence, considering that, in principle, we start from the assumption that the whole trial would have been carried out in the absence of the accused.

As far as the admission in principle is concerned, these provisions involve an option of adapting the procedural provisions on review to the procedure of case referral back to court after extradition, operation that presents its own difficulties.

According to the article 405 paragraph 1 Code of criminal procedure, the case referral to the court after the admission in principle of the review application is done according to the rules of criminal procedure on the judgment by the first instance. The provisions of the article 522 index 1 Code of criminal procedure, regarding the case referral back to court after the convict extradition make no reference to the admission in principle of the review application, provided by the article 403 Code of criminal procedure

The due application of the provisions of the article 405 paragraph 1 Code of criminal procedure to the procedure of case referral back to court after the extradition means however the

[4] D.V.Mihaiescu, V.Ramureanu, *The extraordinary redress procedures in criminal trial*, Scientific Ed., Bucharest, 1970, p.275.

existence of an admission in principle of the referral request, although the lawmaker made no reference to the provisions of the article 403 Code of criminal procedure, neither does it distinctly and actually regulate the stage of admission in principle, the provisions of the article 405 paragraph 1 Code of criminal procedure refers to the procedure subsequent to the admission in principle of the application.

In this stage, the judge shall examine whether the conviction decision is final or the request for case referral back to the court can be qualified as an appeal or second appeal over lapsed, or whether there are reasons for a relief of the defendant from the effects of the expiry of the time, in which case the judge shall send the request to the competent court.[5]

Moreover, the court must render certain prior investigations regarding the object of this procedure, and in particular whether the decision in the case is final, regarding the purpose of the extradition of the convicted person – i.e. if it has been carried out for executing the sentence or based on a temporary arrest warrant, which results in the verification of the trial jurisdiction and ordering accordingly -, regarding the manner the initial trial has been carried out, that is whether the judgment has been carried out in the absence of the convicted person or, on the contrary, the convicted person has been present to the judgment of the case, in which case it shall dismiss as inadmissible the case referral request.

If the court finds that the extradition has been done based on a temporary arrest warrant, the request shall be sent to the court settling the case that involves the accused, considering the principle of extradition speciality.

By admitting in principle the request for case referral back to the court, the court shall also establish the limits for such action, proceeding obligatory to the hearing of the convicted person, further examining the evidence submitted by the convicted person, and the new evidence requested by the convicted person shall be analyzed in the light of their pertinent and conclusive nature of the same, the court ruling on all the requested evidence, in the sense of either admitting it, fully or partially, or reasoning the dismissal of those considered not to be pertinent and conclusive, or, if it deems necessary, it shall resubmit the evidence presented during the first trial.

The court has the obligation to proceed to the hearing of the convicted person, hearing during which the court, in case of the convict judged in absentia, would have the opportunity to take note of the convicted person version of the events unfolding or of his/her option on the procedure of pleading guilty, in accordance with the provisions of the article 320 index 1 of the Code of criminal procedure.

In no case there shall be denied the convicted person requests to ask questions to the other accused persons, as well as to the prosecution witnesses, this right being guaranteed by the provisions of the article 6 of the Convention; as to other new evidence requested by the convicted person, the court shall rule depending on the pertinent and conclusive nature of such evidence.

The admission in principle of the request for case referral back to court has no effect on the conviction decision. Subsequent to case referral back to court, after submitting the list of evidence requested by the accused, if the court finds that it has no influence on the decision ruled in the first trial, shall dismiss the request for referral back to court and shall maintain the ruled decisions. This solution would result from the due application of the provisions of the article 406 paragraph 4 of the Code of criminal procedure.

If, from the evidence presented it results that the decision passed in the first trial is ungrounded or illegal, the court, after judging the case again, annuls the decisions of the first instance, even if the conviction decision has been ruled by the court of appeal or the court of second appeal, and rules a new decision according to the provisions of the article 345 – 353 Code of criminal procedure.

The court shall be able to rule, by reference to all the evidence, to pass any of the solutions provided by the article 345 Code of criminal procedure, i.e. the conviction, the acquittal or the

[5] Viorel Pasca, The referral back of a case in case of extradition, The Right Review no.2/2007.

termination of the criminal trial, as resulting from the due application of the provisions of the article 406 Code of criminal procedure. By convicting the accused, the court shall not, however, be able to create a less favourable situation than the one already created by the first conviction. The case referral back to the court is an exclusive option of the convicted person, therefore the principle *non reformatio in peius* is also applicable in the procedure of case referral after the extradition of the convicted person.

In the case referral back to the court, the court can proceed to a re-individualization of the sanction, but only in the sense of decreasing it, as fast as such decrease is allowed based on the evidence presented during the case referral back to court (i.e. mitigating circumstances, the change of legal framing to a less serious crime, the adoption of a more favourable law, etc.).

The case referral back to the court upon the request of the convicted person that has been extradited can have an extensive effect on the case of other convicted persons that would not have been able to use this procedure. Thus, the acquittal of the convicted person for no illegal deed, the lack of substantiating elements of the crime or the existence of a cause that removed the criminal nature of the deed with *in rem* effects (i.e. self defence, state of necessity, fortuitous case), is also reflected upon the other convicted persons in the case. There shall have the same extensive effect the real mitigating circumstances (the extension of the self defence or of the state of necessity).

The extensive effect of the case referral back to the court after extradition of the convicted person results from the due application of the provisions of the article 406 paragraph 2 of the Code of criminal procedure that make reference to the extensive effect of appeal (article 373 of the Code of criminal procedure).

If, after the case referral back to court, the extradited convicted person is acquitted, the referral court shall order the return of all the seized assets and of the legal expenses if paid or enforced against the convicted person (article 406 paragraph 3 Code of criminal procedure).

The case referral back to court has effect also on the civil part of the criminal trial, the referral court being able to exempt the convicted person from de payment of the civil compensations, or to reduce the quantum of such compensations as far as the need to adopt such a solution results from the evidence presented.

The provisions of the article 522 index 1 Code of criminal procedure do not have an imperative nature, leaving the court to assess whether the judgment should be rendered again, thus: „*in case it is requested the extradition of a person judged and convicted in absentia, the case can be referred back to the court that was the first court of instance, upon the request of the convicted person*".

From the analysis of the legal text it results that for proceeding to the case referral back to the court there are certain conditions that must be complied with: to be in the case of extradition to Romania of a convicted person, for the execution of a prison penalty, applied by a national court, i.e., the person whose extradition has been requested by the Romanian state must have been judged and convicted in absentia. As for the second request, the text of law requires the compliance of an essential condition, i.e. the person must have been judged and convicted in absentia, even in this situation, resulting that the case referral back to court must be seriously grounded by essential violations of the convicted persons rights, the new procedure having the purpose of safeguarding the rights to defence of such person, who, judged and convicted in absentia, was in no position to defend herself.

Therefore, the competent court opts for the admission or dismissal of the request for case referral after extradition depending on the need to go again through the stages of the trial for ensuring the compliance with the extradited person's right to a fair trial and to defence.

However, even if the article 522 index 1 Code of criminal procedure does not impose on the Romanian courts the obligation to retrial the case when by the extradition decision this is expressly stipulated, as it is a conditioned extradition according to the article 73 of the Law no. 302/2004 on the

international cooperation in criminal matter, the case referral procedure becomes obligatory for the Romanian court.

Moreover, the procedure of case referral of the extradited person that has been convicted in absentia is also provided under the article 72 paragraph 2 of the Law 302/2004 that makes reference to the provisions of the article 34 of this legislative instrument that stipulates that the extradition shall be granted if the demanding state, i.e. the Romanian one, provides sufficient proofs to the requested state of guaranteeing the person to be extradited the right to a new trial securing the right to defence of such person. The fundamental right resulting from the above-mentioned norms is closely related to the provisions of the art.6 of the E.C.H.R., any interference in the right to benefit of the case referral back to court according to the article 522 index 1 Code of criminal procedure being analysed in this context.

The legal text shown above has the purpose of harmonizing the Romanian law with the international regulations, especially for the compliance with the provisions of the article 6 of the European Convention of Human Rights providing, as an implicit guarantee for the application of the procedure of a fair trial, the right of the convicted to be present in front of the court. As the Court constantly held in its case law, the possibility of the accused to take part to the trial, results from the object and the purpose of the provisions of the article 6 of the Convention, as the letters c), d) and e) of the paragraph 3 of the same article recognize the right of „any accused" „to defend himself", „ to examine or have examined witnesses", „ to have the free assistance of an interpreter if he cannot understand or speak the language used in court", all these actions being unconceivable in its absence. The presence of an accused in the court is of at most importance considering both its right to be listened, as well as the need to control the accuracy of his/her allegations, to confront it with the ones of the victims, if the case, whose interests should be protected, as well as with the witnesses' statements.

By analyzing the case law of the European Court of Human Rights there can be established the content of the notion „judgment *in absentia*", which includes solely the situations in which a person has been sent to trial and convicted without being heard by an independent, impartial court established by law, did not have the possibility to defend herself / himself in the court, thus as to analyze the solidity of the deeds he / she is accused of (the case Constantinescu vs. Romania). Such a conviction in absentia of a person shall however meet all the requirements of the article 6 of the Convention if from all the details of the case it results that the accused, by its own will and beyond doubt, waived the right to be heard and the right to defend himself in the court (see the case Mihaies vs. France etc.). In the same time, the right to stand in court in person is not an absolute right, therefore during the redress procedures it can be subject to certain limitations, such as the case when the second appeal regards only the applicable law and not the actual deeds, limitations allowed as far as during the judgment of the case on the merits the accused has benefited of such right to stand in court in person (see the case Ekbatani vs. Sweeden).

Therefore, a person can claim she / he has been judged and convicted in absentia when the court judging the case has ordered her/his conviction, regardless of the sanction and of the enforcement means, without proceeding to the hearing of such person, without such person to have knowledge of the judiciary procedure carried out against her/him, without being defended by a law specialist, without enjoying the right to lodge statements of defence, to counter argue the evidence presented by the prosecution, to participate to the trial, to the witnesses' cross-examinations etc. More precisely, a person is judged and convicted in absentia, as provided also by the article 34 of the Law no. 302/2004, amended, when the trial procedure carried out with him/her as the accused ignored the right to defence recognized to any person accused of committing a crime, or, in a more wide approach, the right to a fair trial.

From the interpretation of the provisions of the article 34 paragraph 1 of the Law no. 302/2004, to which the provisions of the article 72 paragraph 2 of the same law make reference to, it results that the Romanian law, as requested state, can deny the extradition when the person has been

judged in absentia and the judgment failed to comply with the right to defence; however, it can grant extradition, if the demanding state guarantees the extradited person the right to have the case judged again, this time with the compliance of the rights to defence. The reference that the text of the article 72 paragraph 2 of the Law no. 302/2004 makes to the provisions of the article 34 paragraph 1 of the same law must be interpreted in the sense that, based on the reciprocity principle in the matter of international cooperation, Romania, if it is a demanding state, must offer the same guarantees and insurances as the ones that Romania can demand when it is a requested state.

Moreover, the article 69 of the Law no. 302/2004 amended and republished, called the referral back of the case of the extradition, provides that, the Ministry of Justice is the one guaranteeing the case referral back to court in the presence of the extradited person, according to article 34 paragraph 1.

Therefore, this article provides the obligation of the Ministry of Justice to guarantee to the requested state the fact that the person requested for extradition shall benefit of a new judgment, if the initial judgement was rendered in absentia.

In conclusion, the above-mentioned texts of laws illustrate the will of the Romanian legislator to establish, as a guarantee granted to the requested states, the possibility that any extradited person to Romania, that has been convicted in absentia, to benefit upon request of the case referral back to court, thus as to comply with such person's right to defence.

In the case Colozzo *versus* Italy from 12th of February 1985, E.C.H.R. established that, although the accused has the right to participate to hearings, according to article 6 of the Convention, this right is not absolute, but when the national laws allow the judgment in absentia, the convicted person must have access to a new procedure regulating in the accusations against him / her, the contracting states having a wider liberty in choosing the necessary means for this purpose. As illustrated above, E.C.H.R. makes no distinction on whether the person convicted in absentia was or was not extradited, but, it denies the right to a new procedure to those evading the trial.[6]

Conclusions

We have shown that, according to the Strasbourg Protocol, to the Convention on extradition adopted in Paris, there has been introduced in the procedure of extradition the requirement according to which the requested state guarantees the right to a new trial to the extradited convicted person. The procedure regulation however, is rested with the national legislator.

The possibility of exercising the right to a new trial granted solely to the extradited convicted person creates an unequal treatment, which might result in the violation of the constitutional principle of equality in front of the law (article 16 of the Romanian Constitution), as well as of the provisions of the article 6 of the Convention as to the persons convicted in absentia, but who remain in the country and who are not extradited, who shall have no access to this procedure. If we consider the realities of the Romanian justice that show that most of the extradited convicted persons evaded the criminal investigation and criminal trial, some of them being the authors of crimes that have been widely covered by the media, the unfairness of the procedure seems even more obvious. To this end, there must be a distinct regulation on this special procedure included in a section regarding the judgment in absentia, the E.C.H.R. practice pointing out the same solution.

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