PHYSICAL EXCLUSION OF UNLAWFULLY OBTAINED EVIDENCE

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Abstract

The aim of this study is to highlight some of the latest tendencies in the criminal court decisions ruled in the stage of the preliminary chamber regarding the exclusion of unlawfully obtained evidence, in light of the CCR decisions issued in the last years. The exclusion of unlawfully obtained evidence from criminal proceedings as a legal consequence of annulment of the tainted evidence is merely an elimination of the possibility of the judge to rely on such evidence in the solving of the case, but it does not erase from the magistrate's memory the information he or she has become aware of from the tainted evidence, this being the main argument for the positive trend of judicial practice in this specific area. Consequently, the recent court decisions are a strong emphasis of the CCR arguments that conclude that exclusion by law of evidence that was obtained unlawfully in criminal proceedings, in the absence of physical removal of such evidence from the criminal case file is not enough to actually guarantee compliance with the rule of presumption of innocence and the right to a fair trial. Although the CCR decision seems to be quite explicit, difficulties have arisen in judicial practice regarding application of the aforementioned provisions, therefore the recent court decisions highlight the necessity of complete physical exclusion of any mentioning or reference regarding the unlawfully obtained evidence.

Keywords: *unlawful, physical, exclusion, reference, evidence.*

1. Introduction

Before being reviewed by the competent court called upon to judge on the merits of a case, evidence must be checked for their lawfulness by the judge of the preliminary chamber, with reliability of the evidence brought in the case standing next in line to the rule of their lawfulness.

To safeguard the right to a fair trial, the legislator has imposed, under art. 102 CPP, the prohibition according to which judicial bodies may not rely on evidence that is thought to have been unlawfully obtained, with the said article reading as follows: *„(1) evidence obtained through torture, as well as any evidence derived from such evidence may not be used in criminal proceedings; (2) evidence obtained unlawfully may not be used in criminal proceedings; (3) the annulment of the document ordering or authorizing the production of evidence or based on which evidence was taken (adduced) shall lead to exclusion of that evidence and to removal from the case file of the proof corresponding to the evidence so excluded; (4) proofs that are directly deriving from unlawfully obtained evidence and that could not be obtained by any other means shall also be excluded from criminal proceedings*".

CCR, by its dec. no. 22/18.01.2018, admitted the plea of unconstitutionality regarding the provisions of art. 102 para. (3) CPP, finding that «[the provisions] *may be deemed constitutional only to the extent that the wording „exclusion of evidence" contained therein is understood to also mean the removal of unlawful evidence from the case file*.»

2. Recent tendencies in court decisions highlighting the arguments within the CCR dec. no. 22/18.01.2018

Prior to the delivery of the aforesaid CCR decision, art. 102 para. (3) CPP had read as follows: *„annulment of the document ordering or authorising the production of evidence or based on which evidence has been taken shall lead to exclusion of that evidence".*

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The recitals of the said dec. state that: «The Court holds that the proving beyond any reasonable doubt of the charges brought in criminal matters is an intricate process that requires the courts to carry out a careful and very thorough examination of the evidence produced in the case file and to exclude from the evidence any proof that is deemed to have been obtained unlawfully, so as to allow judges to deliver their unbiased decisions that are based on a legal reasoning that disregards any and all information deriving from tainted evidence that has been declared null and void. Proving the facts of the matter is therefore a cognitive process that is specific to judicial psychology and at the end of which the judge is expected to come to the „intime conviction" that the defendant is guilty beyond any doubt.

Consequently, the cognitive process under consideration unfolds by its own psychological rules, which intrinsically require the judge, amongst other things, to rely on his or her own subjective assessment of the information in the case file he or she is examining. For that reason, the exclusion by law from a criminal case of the evidence that is declared null and void does not imply their automatic exclusion from the reality as it is perceived by the magistrate called upon to settle the case. In other words, exclusion of unlawfully obtained evidence from criminal proceedings as a legal consequence of annulment of the tainted evidence is merely an elimination of the possibility of the judge to rely on such evidence in the solving of the case, but it does not erase from the magistrate's memory the information he or she has become aware of from the tainted evidence.

It is this legal-cognitive mechanism that was taken into account by the legislator when regulating on the annulment of unlawful evidence, as the ideal approach to applying the provisions of art. 103 in conjunction with the provisions of art. 102 CPP. However, the effectiveness of the mechanism is impaired by maintaining in the case file the proofs corresponding to the annulled evidence, such proofs representing, in fact, a way of reproducing on a physical support that evidence, a fact that CCR established by its dec. no. 383/27.05.2015. That being the case, the permanent access of the judge entrusted with the resolution of the criminal case to the material evidence that was declared null and void can only have as an effect the bringing back to the judge's attention and his or her memory of information that is likely to strengthen his or her conviction regarding the defendant's guilt/innocence, but which he may not legally rely on in resolving the case. Hence, each new potential examination of the evidence that was declared null and void by the court would trigger in the mind of the judge a psychological process whereby the information he or she has become aware of comes in conflict with the information he or she is required by law to take into account in judging on the criminal matter he or she is expected to settle. Under these circumstances, where the unlawfully obtained evidence is likely to prove the perpetrator's guilt, the repeated reliance on such evidence by the court increases and even materialises the risk of replacing the evidence, in the line of his or her judicial reasoning, by the mere conviction of the judge, to which he or she has acquired through purely cognitive mechanisms and based precisely on the tainted evidence, an approach that is prohibited under art. 102 and art. 103 CPP. Moreover, such an approach is likely to prevent the application of the *in dubio pro reo* principle enshrined under art. 4 para. (2) CPP, according to which any doubt in the judicial bodies' coming to their conviction should be interpreted in favor of the suspect/defendant, a principle that is meant to safeguard the rule of presumption of innocence and, hence, the right to a fair trial.

Consequently, while exclusion by the law of unlawfully obtained evidence from criminal proceedings appears to be a sufficient safeguard for the aforementioned fundamental rights, such safeguard is a purely theoretical one in the absence of physical removal of unlawful evidence from the case file as such. Moreover, maintaining the unlawful evidence in the case file during the ordinary and extraordinary remedies that may be resorted to in criminal proceedings can only generate the same contradictory cognitive effect, which is likely to taint the process of coming to a conviction, beyond any reasonable doubt, by the panel of judges appointed to settle the case, regarding the guilt or the innocence of the defendant.

Under the circumstances, the Court concludes that exclusion by law of evidence that was obtained unlawfully in criminal proceedings, in the absence of physical removal of such evidence from the criminal case file is not enough to actually guarantee compliance with the rule of presumption of innocence and the right to a fair trial. Art. 102 CPP regulates on exclusion of evidence, yet without stating whether exclusion must be accompanied by the actual removal from the criminal case file of evidence that was annulled by the courts, or whether, on the contrary, the annulled evidence should be maintained in the case file and excluded only from the process of judicial reasoning of the judge who is called upon to establish and motivate his or her judgment as to the guilt or the innocence of the defendant. Such being the facts, the Court finds that it is its task to clarify the aforesaid procedural issue, so that it may effectively safeguard the right to a fair trial and the rule of

presumption of innocence, as enshrined under art. 21 para. (3) and art. 23 para. (11) of the Fundamental Law of Romania.

Analysing the arguments above, the Court finds that maintaining the proofs produced in criminal case files, in spite of the fact that the related evidence was excluded from the proceedings following its annulment by the courts is likely to influence the assessment to be made by the judges called upon to settle the case, with respect to the guilt or the innocence of the defendants, while also prompting the judges to seek to decide one way or the other, even in the absence of the possibility of effectively relying on the evidence in question in the giving of reasons for their judgments, a fact that is likely to infringe the right to a fair trial and the principle of presumption of innocence applicable to any persons being tried.

Unlike the aforesaid legal solution, the physical removal of proofs from criminal case files after exclusion of the related evidence that was declared null and void according to the provisions of art. 102 para. (3) CPP, an exclusion implying the attachment of a double dimension to the meaning of the wording „exclusion of evidence" (the legal dimension and the physical exclusion dimension) is meant to safeguard in an effective manner the fundamental rights specified above, and, at the same time, to render the criticised text of law a higher degree of clarity, precision and predictability. Therefore, the Court considers that it is only under the said conditions that the institution of exclusion of evidence may be able to achieve its purpose, namely that of protecting the judge and the litigants from biassed legal reasoning and from pronouncing judgments that are directly or indirectly influenced by information acquired or from conclusions deriving from the empirical examination or re-examination by the judge of annulled evidence.

The legal issue relied on by the authors of the plea of unconstitutionality was the subject of lawmaking and of checks on constitutionality in other European countries as well. In this vein, the Court notes that the nullity of evidence implies also the physical removal of material evidence from case files in countries such as Austria, Croatia and Slovenia. For example, according to art. 139 (4) of the Austrian Criminal Procedure Code, unlawfully obtained evidence must be physically destroyed ex officio or at the request of the interested party. Also, art. 86 of the Criminal Procedure Code of Croatia stipulates that the evidence that are excluded from the criminal trial following delivery of a final judgment on such matter must be sealed and kept separately from the rest of the case file by the court secretariat and must not be examined or used during the settlement of the criminal case. Likewise, the provisions of art. 83 of the Criminal Procedure Code of Slovenia requires the physical removal from the case file of the evidence excluded from the criminal proceedings. Moreover, art. 39 of the said Code provides an additional safeguard whereby judges who examined the evidence excluded from the criminal trial are forbidden to rule on the criminal liability of the convicted person. This latter aspect is also established by dec. no. U-I-92/96 of the Constitutional Court of Slovenia, whereby the court found that the right to a fair trial was infringed by participation in the settlement of the conflicting criminal relationship of the judge who was aware of the evidence that had been declared inadmissible. According to the aforesaid Decision, the provisions of the Code of Criminal Procedure of Slovenia, which allow the judge to familiarise himself / herself with the information that the law enforcement has gathered in the pre-trial stage (which must be removed from the case file and which must not be relied upon in settling the case), but which do not provide for the exclusion of the judge who became familiar with such information, are infringing the right to a fair trial, established under art. 23 of the Fundamental Law of Slovenia. By its aforementioned Decision, the Constitutional Court of Slovenia did not declare unconstitutional some of the legal provisions contained in the Criminal Procedure Code, but it sanctioned as inconsistent with the right to a fair trial the absence from the criminal procedure legislation of a legal provision prohibiting participation in the judgment on the merits of the criminal case of the judge who is in the situation described above.

For the considerations above and relying on the provisions of art. 21 para. (3) and art. 23 para. (11) of the Fundamental Law of Romania, the Court will admit the plea of unconstitutionality of the provisions of art. 102 (3) CPP and will find that they may be deemed constitutional only to the extent that the wording „exclusion of evidence" contained therein implies also the removal of evidence from the case file.»

Thus, the Constitutional Court of Romania has established that the tainted evidence must be physically eliminated from the evidentiary material, as well as from all the references made to it in the documents of the proceedings and of the subsequent proofs.

Although the CCR decision seems to be quite explicit, difficulties have arisen in judicial practice regarding application of the aforementioned provisions, as for example: i) is the indictment to be amended by removing from its content the reference to the unlawfully obtained evidence, or should a new indictment be issued?; ii)

who is to amend the indictment by eliminating the portions that are based on unlawful evidence?; iii) should the report regarding remediation of irregularities make reference to the excluded evidence?; iv) which procedural documents are to be excluded from the criminal investigation file?, to name but a few…

For a more precise exemplification, we rely on the resolution of December 20, 2023 of the CA Bucharest, 1st crim. s., by which the Court: (i) admitted the plea of annulment of evidence consisting of the recordings made by technical devices by collaborators with real identity; and (ii) ordered, in application of the CCR dec. no. 22/18.01.2018, the removal from the case file of the excluded evidence, the elimination of all the references thereto as well as of the transcription of their content from all the procedural documents (including from the indictment drawn up in the case), as existing in the criminal investigation file, sending the case file to PICCJ - DNA, ordering it to implement the measure and requesting it to reply within 5 days from the receipt of the Court's resolution as to whether the arraignment order is to be maintained or whether the case should be referred back for further investigations.

As a result of the said request, PICCJ - DNA submitted to the case file the order to maintain the arraignment order, accompanied by the report regarding remediation of the irregularities found by the dec. of 20.12.2023. With regard to the content of the order and of the report on remediation of irregularities, and judging in relation with the requirements of the provisions of art. 102 para. (3) CPP, as defined by CCR dec. no. 22/18.01.2018, we believe that the irregularities have not been remedied insofar as the recordings made by technical devices by real identity investigators were not excluded from the procedural documents, and, as such, the only remedy is to send the file to the prosecutor's office.

By dec. no. 115/27.02.2024, CA Bucharest, 1st crim. s., irrevocably ordered that the case be referred back to PICCJ - DNA, on the ground that *„[the] prosecutor has failed to comply with the obligation imposed by the judges of the preliminary chamber by their resolution of 20.12.2023, given that the documents drawn up in the case and in particular the orders to initiate the criminal proceedings are still containing transcriptions (playbacks) of the taped conversations that were excluded as evidence, including references thereto."*

In the giving of the reasons, the judges of the preliminary chamber showed that *„the cognitive process whereby the judge comes to the intime conviction (becomes personally convinced) as to the defendant's guilt must disregard the information deriving from the evidence annulled";* and that, on the other hand*: „the exclusion the unlawfully obtained evidence from the criminal proceedings as a legal consequence of the annulment of evidence/evidentiary procedures is merely an elimination of the possibility for the judge to come up with a legal reasoning based on such evidence in the settlement of the case, and does not erase from the magistrate's mind the information he or she has acquired on the unlawful evidence". Besides, a*ccording to the said decision*: „the permanent access of the judge entrusted with resolving the criminal case to the material evidence that was declared null and void can only have as an effect the bringing back to the judge's attention or to his or her memory the information that is likely to increase his or her convictions as to the defendant's guilt/innocence, but which the judge may not legally use in solving the case. As such, each new potential examination of evidence that was declared null and void by the court would trigger in the judge's mind a psychological process whereby the information he or she has become aware of comes in conflict with the information the judge is required by law to take into account when resolving the conflicting criminal legal relationship that is the subject matter of the case*".

In this vein, the judges of the preliminary chamber held that the physical removal from the case file of the evidence containing information deriving from evidence that was declared null and void is not a sufficient measure and therefore the references to such evidence must also be excluded both from the content of the notification of the court and from all the documents of proceedings contained by the case file.

Regarding the considerations above, ECtHR ruled, in the Case *Dragoş Ioan Rusu v. Romania* (app. no. 22767/08), as follows: «*The Court reiterates the general principles established in its case-law concerning the use in trial of unlawfully obtained evidence (see Bykov v. Russia [GC], no. 4378/02, §§ 88-91, 10 March 2009): „88. The Court reiterates that, in accordance with art. 19 of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties in the Convention. In particular, it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention. While art. 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (see Schenk v. Switzerland, 12 July 1988, § 45, Series A no. 140; Teixeira de Castro v. Portugal, 9 June 1998, § 34, Reports 1998-IV; and Jalloh v. Germany [GC], no. 54810/00, §§ 94-96, ECtHR 2006-IX). 89. It is therefore not the role of the Court to determine,*

as a matter of principle, whether particular types of evidence - for example, evidence obtained unlawfully in terms of domestic law - may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the 'unlawfulness' in question and, where a violation of another Convention right is concerned, the nature of the violation found (see, among other authorities, Khan [v. the United Kingdom, no. 35394/97, § 34, ECtHR 2000-V]; P.G. and J.H. v. the United Kingdom, no. 44787/98, § 76, ECtHR 2001-IX; Heglas v. the Czech Republic, no. 5935/02, §§ 89-92, 1 March 2007; and Allan [v. the United Kingdom, no. 48539/99, § 42, ECtHR 2002-IX]). 90. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence were respected. It must be examined in particular whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (see, among other authorities, Khan, cited above, §§ 35 and 37, and Allan, cited above, § 43).

In its jurisprudence, the Court has consistently rejected the argument that proceedings leading to a conviction on the basis of evidence collected in breach of art. 8 of the Convention were unfair and, consequently, there had also been a violation of art. 6 § 1 of the Convention. This attitude has been vigorously criticised by dissenting judges in several cases. In Schenk v. Switzerland [2], Judges Pettiti, Spielmann, De Meyer and Carrillo Salcedo stressed as follows: "... compliance with the law when taking evidence is not an abstract or formalistic requirement. On the contrary, we consider that it is of the first importance for the fairness of a criminal trial. No court can, without detriment to the proper administration of justice, rely on evidence which has been obtained not only by unfair means but, above all, unlawfully. If it does so, the trial cannot be fair within the meaning of the Convention."»

3. Conclusions

In our opinion, which is in full agreement with the aforesaid judgment, it is imperative to exclude all unlawfully obtained evidence from the criminal investigation file and all the references to such evidence from the documents produced in the carrying out of the procedural steps. The court that is to pronounce a judgment on the merits of the case must not have access to any piece of evidence or to documents of proceedings that deals with a piece of evidence that is deemed to be unlawful.

Therefore, in order to comply with the exigencies imposed by CCR it is necessary to exclude all evidence and to eliminate all the references thereto from the content of the documents of proceedings, so as to allow the judge of first instance to pronounce a judgment that is free of any reminiscence of the preliminary chamber.

References

- CA Bucharest, 1st crim. s., dec. no. 115/27.02.2024;
- CCR dec. no. 22/18.01.2018;
- CPP.