



Jurgen Mëçalla

College University "Wisdom", Tirana, Albania

jurgenmecalla1@gmail.com

Naim Mëçalla

College University "Wisdom", Tirana, Albania

mecalla1963@gmail.com

Edit Bregu

College University "Wisdom", Tirana, Albania

edit_kane@yahoo.com

ORCID ID: orcid.org/0000-0001-8982-6084

The right to appeal for custom sanctions in albania in the perspective of the 13th article of the european convention on human rights

ABSTRACT

The right to appeal is a fundamental human right and means the right of the individual to appeal, the existence of a body designated to review the appeal, the unconditional acceptance of the appeal for review, reasonable deadlines for its review, an objective review, judicial control, as a final control over the appeal, as well as the possibility of possible rehabilitation because of the eventual acceptance of the appeal. In this paper we will treat, analyse, and justify why Article 282, point 2 of the Customs Code restricts the right of appeal. This provision, as it will turn out, does not meet the minimum standard for an effective appeal in the domestic courts, set by Article 13 of the The European Convention on Human Rights (ECHR). Fiscal liability that deviates from the principle of equality and proportionality in the exercise of customs and tax authority risks depriving taxpayers of the means necessary to guarantee services that protect fundamental rights. The restriction of the fundamental right to an effective appeal was made by the customs law, Article 282/2, which from the point of view of the law exceeds the limits of

this restriction set by the Constitution and the ECHR, where according to Article 17 of the Constitution the restriction must be , in proportion to the situation that has dictated it, so in this sense it must be in accordance with the principle of proportionality.

KEYWORDS: *the right to appeal, effective appeal, due process of law, principle of proportionality*

INTRODUCTION

The fundamental rights of the individual, enshrined in the ECHR, have increasingly taken on a primary role, in terms of the guarantees that must be provided to the taxpayer, during the implementation phase of fiscal obligations and taxes.^[1] Fiscal law, as a customs and tax law that regulates, among other things, the finding of means by which public expenditures are financed, has a significant impact on fundamental rights. Indeed, in times of crisis, public finances and taxes often threaten fundamental rights. A customs tax or duty that deviates from the principle of equality and proportionality in the exercise of customs and tax authority risks depriving individuals of the means necessary to guarantee services that protect their fundamental rights. What is ascertained by the customs authorities and collected by the economic operator for the account and public interest should be the result of a “fair procedure” that aims at a fair obligation and not an excess of it. The ECHR provides the taxpayer with adequate means to protect himself from fundamental rights violations, due to distortions caused by incomplete laws and bad practices. The jurisprudence of the ECHR is increasingly influencing the orientation of the doctrine and jurisprudence for the protection of the fundamental rights of economic operators and taxpayers as principles such as “The right to be heard” in the decision-making process, the principle “ Non bis in idem”, happens to

^[1] Article 281 of the Customs Code of the Republic of Albania. The right to appeal. 1. Every person has the right to appeal against any decision taken by the customs authorities in respect of a debt and / or the imposition of sanctions in connection with the application of this Code.

be violated during the application of penalties and the application of Article 282^[III] of the Customs Code.

Therefore, proper protection of taxpayer rights can be found through the ECHR and customs and tax law, and that the contribution of court jurisprudence, including that of the ECHR, can achieve a greater balance in the relationship between customs and tax authorities, and citizens when the latter is considered a “taxpayer”.^[III]

THE EFFECTIVENESS OF THE MEANS OF APPEAL IN THE LIGHT OF ARTICLE 13 OF THE ECHR

Article 13 of the ECHR provides that, “Article 13 of the Convention – Right to an effective remedy: “Everyone whose rights and freedoms as set forth in [the] Convention is violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”.^[IV]

What do we mean by effective grievance?

The right to an effective remedy is a fundamental human right and implies the right of the individual to appeal, the existence of a designated body for review of the complaint, the unconditional acceptance of the appeal for review, reasonable time limits for its review, a review objective, judicial control, as a final control over the complaint, as well as the possibility of possible rehabilitation because of the eventual acceptance of the complaint.

Article 13 of the ECHR has established national mechanisms independent of European control, to be able to fundamentally redress violations of the

^[III] Article 282 of the Customs Code approved by Law no. Nr. 102/2014, (Amended by Law No. 32/2015, dated 2.4.2015. Appeal against the decision of the customs authorities regarding a debt and / or a sanction.

^[III] https://www.filodiritto.com/il-diritto-tributario-e-la-tutela-dei-diritti-fondamentali-delluomo-la-cedu-viene-aiuto-del-contribuente#_ftn3

^[IV] Right to an effective remedy

Convention. Article 13 of the Convention, within the minimum standard, guarantees every person the right to lodge an effective complaint with the domestic courts before contacting the bodies of the Convention. This article sanctions not only the right of the individual to complain, but also the obligation of the state to guarantee him this right.^[V] In doctrinal discussions, but also in the auditorium during the presentation of administrative issues or case law, which have to do with applications of Article 282 of the Customs Code, often opposite problems and attitudes appear. In some cases, the compatibility with the Constitution of point 2 of Article 282 of the Customs Code has been questioned, specifically with one of the basic individual human rights, “The right to a fair legal process” which is guaranteed by Article 42 of the Constitution. and Article 6 of the ECHR, where the “right of access to a court” for every person is a key element of this fundamental right which extends further into the administrative process.

Is the right of an effective appeal to the Albanian taxpayer guaranteed!

At the core of the reasoning on the issue of whether an effective administrative and judicial appeal is guaranteed to the Albanian taxpayer, or whether this right is restricted by customs provisions, these questions are asked:

- Should the right of administrative and judicial appeal be allowed or not, if the legal condition provided in Article 282 point 2 of the Customs Code is not met in advance, to guarantee to the General Directorate of Customs the amount of Saxons applied for the violation object of the conflict?
- What happens if in a concrete case the economic operator, subject to a customs administrative penalty, has no effective possibility to pay a fine in addition to the payment of import duties by placing a bank guarantee as much as three times the evaded duty applied unilaterally by the customs authority?

^[V]Zaganjori, Xh. “The effectiveness of the internal means of the Albanian system in the sense of Article 13 of the ECHR

Seeing it in close connection with the provisions in Articles 256-258 of the Customs Code,^[VI] depending on the customs offenses, this customs law provides for a sanction from one to three times the evaded duty, unilaterally determined by the customs authority, for the violation found. This amount under Article 282 point 2,^[VII] even though the legislator has used the term guarantee will in fact have to be collected in the form of a bank guarantee by the economic operator on behalf of the customs authority for the undeclared goods as if they were released for free circulation and include duties customs, VAT, Excise and any other obligation listed in the national taxes as only in this way can the administrative appeal be allowed.^[VIII]

Referring to the legislation in force, the right of administrative appeal against acts of the administration itself is one of the forms of due process of law, but especially in the case of customs matters the right of administrative appeal is conditional on the advance payment (guarantee) of 100% of fines in the amount of one – three times as much as the obligation to evade and in court is directly dependent on the prior exhaustion of the administrative appeal. In view of the above, it cannot be denied, *prima facie*, the fact that Article 282, point 2 of the Customs Code, the right of administrative appeal and unsolvable with it the judicial one is conditioned by a monetary payment to a bank on behalf of the Directorate General Customs in the form of a guarantee of 100% of the fine in the amount of one – three times the import duty avoided by substantially restricting this right. In these conditions, in resolving a customs dispute, when the economic operator does not meet the above conditionality for objective or subjective reasons, the administrative appeal is disabled and consequently the lack of exhaustion of the administrative route constitutes a further reason for not having access to court.

^[VI] Articles 256 – 258 Sanctions for contraventions

^[VII] See Article 282, Appeal against the decision of the customs authorities in respect of a debt and / or a sanction. 2. In order to file a complaint, the complainant must pay the total amount of import or export duties, as defined in this Title, and guarantee to the General Directorate of Customs the amount of sanctions applied for the violation, object of the conflict.

^[VIII] For more see Title IX of the Customs Code 2014. Violations in the field of customs, sanctions, and appeal.

In this way, the imposition of a financial burden such as that provided in Articles 256 – 258,^[IX] and Article 282/2 of the Customs Code, before allowing the right of appeal, we consider that it is clearly a fundamental violation of the individual right to a due process of law guaranteed by Article 42^[XI] of the Constitution and Article 6 of the ECHR.^[XII] Moreover, in terms of the application and application of the Constitutional principles, Article 17 of the ECHR^[XIII] and Article 282 of the Customs Code, this violation, without any doubt, we must accept that it is a disproportionate restriction, in excess of the guarantees set in Article 17^[XIII] of the Constitution and those restrictions provided for in the ECHR. Clearly stated, it is true that in the present case the restriction of the right to appeal was made by the customs law, Article 282/2 in the strict sense. It should be acknowledged that this restriction by law exceeds the limits of this restriction set by the Constitution and the ECHR, where according to Article 17 of the Constitution the restriction must be, in proportion to the situation that has dictated it, so it must be in accordance with the principle of proportionality.

Referring to the above administrative and judicial practice and the above reasoning, we cannot but come to the logical conclusion that the above restriction on the right to a fair trial through Article 282/2 of the Customs Code does not pass the “constitutional test” set by Article 17 of the Constitution regarding the observance of the principle of proportionality. This constitutional principle, originating from German law, which is also guaranteed by the EU Court of Justice, means that any action taken by a public authority restricting

[IX] Article 256. Sanctions for contraventions with objective responsibility; Article 257 Sanctions for contraventions committed in negligence; Article 258 Sanctions for contraventions committed intentionally, in cooperation and attempted.

[XI] Article 42 of the Constitution. Freedom, property, and rights recognized by the Constitution and by law cannot be violated without due process of law.

[XII] Article 6 of the Convention. The right to due process of law.

[XIII] Article 17 of the ECHR. Prohibition of abuse of rights.

[XIII] Article 17 of the Constitution. Restrictions on the rights and freedoms provided for in this Constitution may be imposed only by law in the public interest or for the protection of the rights of others. The restriction must be in proportion to the situation which has dictated it. 2. These restrictions may not infringe the essence of the freedoms and rights and in no case may they exceed the restrictions provided for in the European Convention on Human Rights.

fundamental freedoms and rights already recognized and accepted by the Jurisprudence of the Court of Justice of the EU and from our Constitutional Court should be:

- appropriate, to achieve the legitimate objective.
- necessary.
- reasonable; and
- the least possible restrictive means, which makes it possible to achieve the goal in conditions when there are no other less possible means.

This obligation, which includes the amount of the fine, depending on the violation from one to three times the avoided obligation, is in fact a very high financial obligation, disproportionate and unreasonable. Bearing in mind the time it will take to complete the trial in some cases due to the measure of suspension of the execution of the appellate decision will take years for the release of the amount paid as monetary guarantee. This can lead to the bankruptcy of the subject, thus losing the legitimate interest of the judicial protection and turning the appeal into an ineffective tool. Moreover, the situation is aggravated by the fact that despite the appeal, the execution of duties is not suspended by conditioning the obligation of the customs administration to collect both the obligation and the fine applied in cases of allegations of the complainant to strike customs administrative acts for absolute invalidity.

In the trial of the analogous case, the Constitutional Court with decision no. 18/2010 stated that, “There is no doubt that the effective collection of obligations that citizens have towards the state constitutes a legitimate public interest... to justify restrictions of the right....But this intervention can be undertaken when it is necessary and there is no other way to enable the achievement of the public interest, ... and that, in no case can it violate the essence of the right and must be in full compliance with the situation that dictated the drafting of the restrictive norm, that... a careful analysis is needed by the Assembly regarding the means used to achieve the legitimate goal. Furthermore, the Constitutional Court has assessed that the collection of customs duty can be achieved by the Assembly even without imposing absolute restrictions on

the access of the individual to address the administrative body or the court as it has done in fact with Article 289 / 3KD ”.^[XIV]

In the case under discussion, the absolute obligation imposed by Article 282/2 of the Customs Code to pay 100% of the fine up to one to three times the obligation, in the form of a bank guarantee as a condition for accepting the administrative appeal and further necessary condition in advance judicial appeal, itself affects the right of access to court as an important element of the right to a due process of law. Good administration of justice begins with guarantees that an individual has access to court to ensure all aspects of the judicial form of the case are heard. Denial of the right to go to a higher court to receive a final answer from it constitutes a violation of the fundamental right to a fair trial.^[XV] The right to an effective administrative and judicial appeal guaranteed by Article 13 of the ECHR is also found in the case law of the ECHR “as a guardian of human rights”.^[XVI]

Moreover, in this case it is not about the payment of import duties but about the payment of fines which are not planned as a source of income, but as a measure of punishment. The right of effective administrative and judicial appeal guaranteed by Article 13 of the ECHR is also found in the case law of the ECHR. In the case of *Kreuz v. Poland*.^[XVII] The ECtHR, considering the financial barriers to address the court, stated that “the right of access to court should be effective and not formal” and that these financial barriers should be analyzed case by case, in accordance with the real possibilities that have the plaintiff and not to be considered as an abstract possibility to be paid by the person seeking to set the court in motion.

Another argument that supports the above reasoning regarding the incompatibility with the constitution of point 2 of article 282 of the Customs Code is the decision no. 18/2010 of the Constitutional Court which has finally decided “Repeal as incompatible with the Constitution of point 5 of article 289 of the Customs Code, a provision which, in terms of content, results mutatis

[XIV] For more see decision no. 18 / 2010 of the Constitutional Court

[XV] Sadushi S., “Administrative Court, botim Toena, Tirana 2014, p.290

[XVI] Marek Nowicki, about the European Convention

[XVII] Jurisprudence of the Strasbourg Court, http://jus.igjk.rks-gov.net/Book_ECHR_ALBPDF

mutandis (same) as point 2 of Article 282 of the Customs Code. Therefore, the legislator should have considered this position of the Constitutional Court before adopting this controversial legal provision.

While the administrative courts in adjudicating analogous cases will have to incidentally assess the non-compliance of the customs provision, specifically point 2 of Article 282 of the Customs Code with the above-mentioned concrete principles and provisions of the Constitution by suspending the adjudication of the case and requesting the Constitutional Court to check the constitutionality of Article 282/2 of the Customs Code and sending the materials of the concrete file subject to trial.

CONCLUSIONS

As above, we can reach the following conclusions:

- The right of administrative and judicial appeal and the “right of access to court” are protected and guaranteed by Article 42 of the Constitution and Articles 6 and 13 of the ECHR both as an element of the right to a fair legal process, but also of the right to an effective grievance. But in the conditions when these freedoms and rights are guaranteed in basic acts, legal provisions, article 282/2 of the customs code in force presents a constitutional problem, contradicting them.
- Provision 282/2 of the Customs Code should be amended, given that the Albanian legal framework in the field of customs already has a maximum possible degree of approximation with that of the EU.

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