

# Report for the Third Quarter of 2009

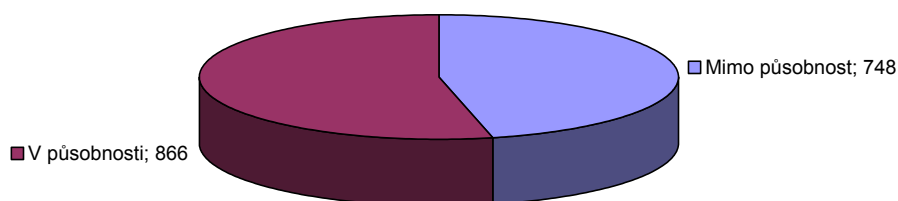
**Information on his work provided by the Public Defender of Rights  
pursuant to Section 24 (1) (a) of Act No. 349/1999 Coll. on the Public Defender  
of Rights as amended (hereinafter the Public Defender of Rights Act)  
for the period from July 1 to September 30, 2009**

The Public Defender of Rights (hereinafter the “Defender”) submits information on his work and activities in the period under scrutiny to the Chamber of Deputies of the Parliament of the Czech Republic and simultaneously informs the Deputies of the current state of public administration as reflected in the complaints dealt with. The contents of this report are a continuation of the information on his work for the second quarter of 2009.

## ***A. General Information on the Activities of the Public Defender of Rights***

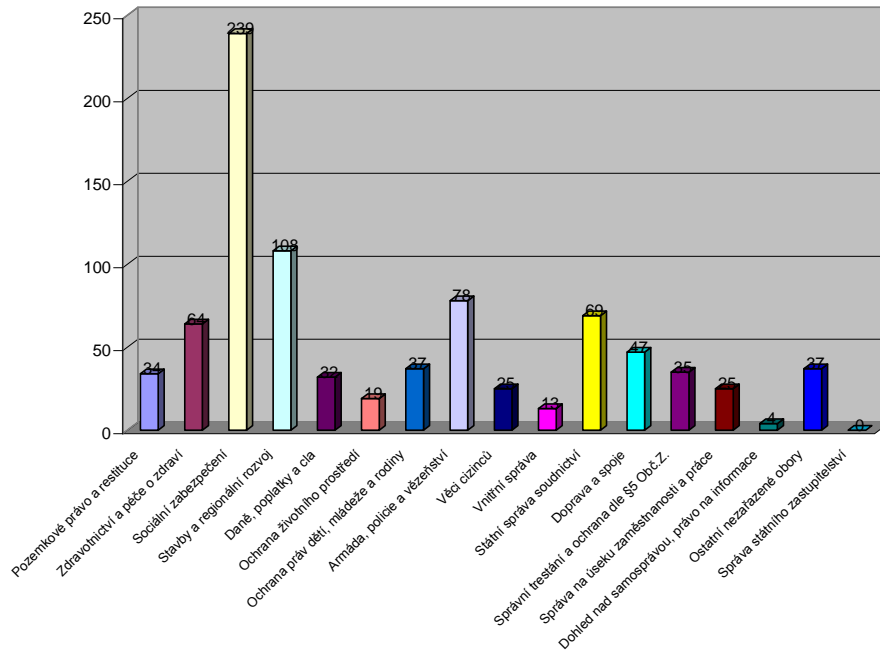
### **Number of complaints received and handled**

**Počty podnětů - III.Q 2009**



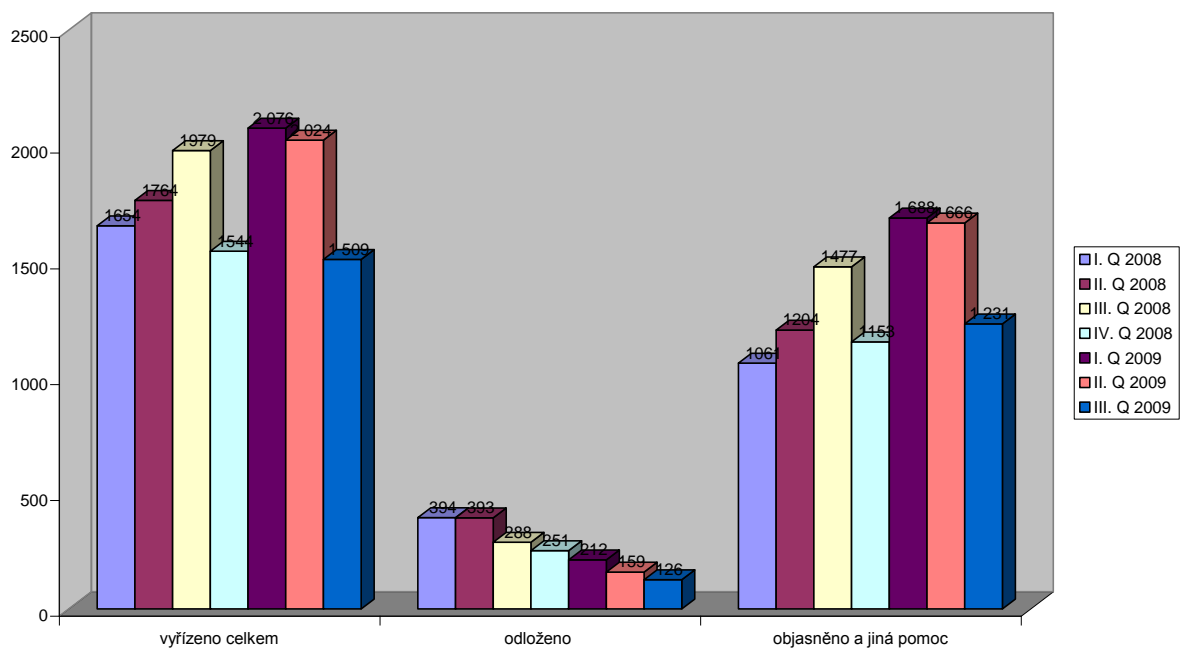
In the third quarter of 2009 the Defender received 1,614 complaints, of which 866 (53%) were within the Defender’s mandate as defined by law, and 748 (47%) were outside.

Struktura podnětů dle oblastí - III. Q 2009

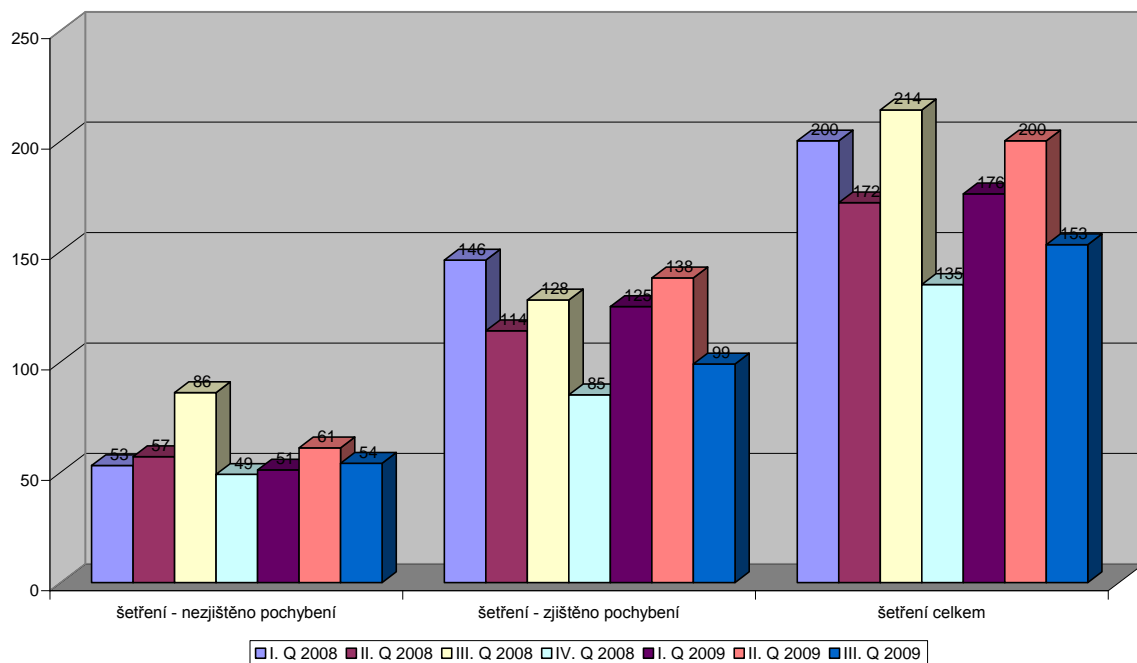


The structure of complaints received by legal area has changed only slightly over time. **Social security** is consistently the area with the highest rate of complaints (239), particularly concerning pensions and the provision of social benefits. The second biggest group of complaints in the third quarter of 2009 were those in the area of **construction and regional development** (108), a majority of which related to zoning proceedings, planning permission and approval proceedings. Complaints in the area of the **prison system, police and army** ranked third (78). Most complaints outside the Defender's mandate fall under the areas of criminal law (conduct of criminal prosecution authorities) and civil law (for instance the performance of distraintment and the issue of rented housing).

### Vyřízeno celkem, odloženo, objasněno za období 2008-2009

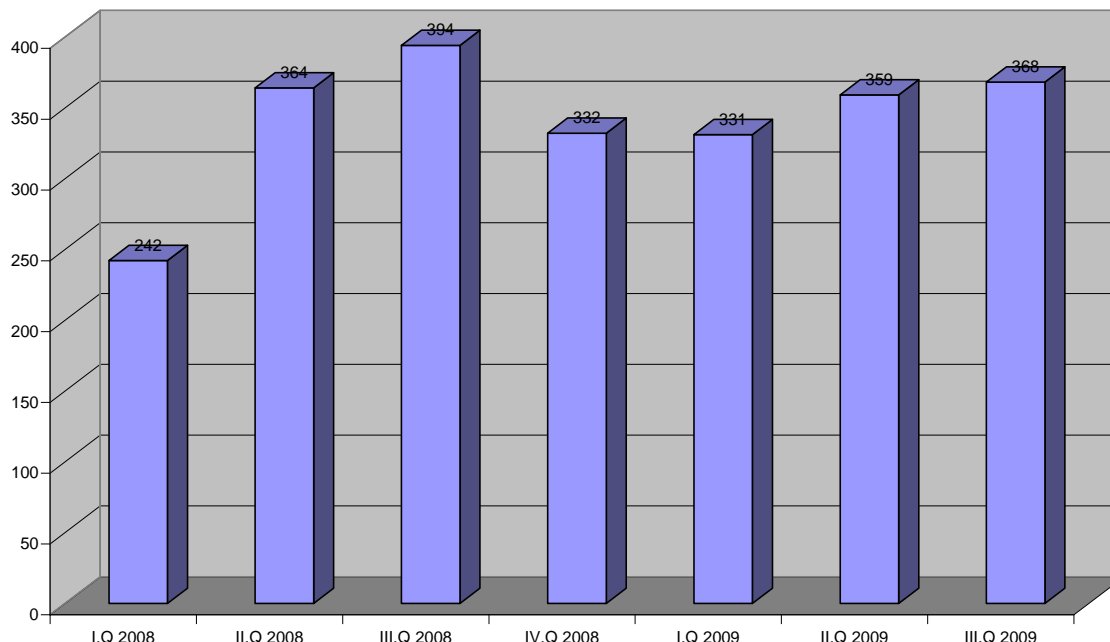


### Počty šetření za období 2008-2009



The Defender handled 1,512 complaints during the third quarter of 2009. In his inquiries he found maladministration by the authority in 99 cases (64%).

Vývoj počtu osobních podání od roku 2008



In the period under scrutiny, the Defender, his deputy and the authorised lawyers of the Office of the Public Defender of Rights continued to receive complainants who visited the Office in person. In the third quarter of 2009, 368 complainants visited the Defender's office in person either to compile a complaint in a protocol or to obtain information and simple legal advice.

## ***B. Special Powers, General Observations***

In this section of the quarterly report, the Defender informs legislators of his observations with general impact and the use of the special powers bestowed on him by the Public Defender of Rights Act.

### **I. The Defender's authorisation to make recommendations on legal regulations pursuant to Section 24 (1) (c) of the Public Defender of Rights Act**

#### **1) Comments on the draft law to amend some laws related to the reduction of the administrative burden on entrepreneurs**

The Defender supported reduction of the administrative burden on entrepreneurs; nevertheless, he was critical of some changes that could lead to a

weakening of the protection of the rights of other parties or of the protection of public interest. The Defender expressed disagreement with the proposed amendment to the provision on the labelling of products (the Defender argued that the proposed wording would cause interpretation problems). He simultaneously focused on the change in the scope of inspection competence of the Czech Trade Inspection Authority (the Defender recommended that the competence of the Inspection Authority be maintained under which the Authority could impose an obligation on the inspected parties to provide information on the remedial measures carried out).

## **2) Comments on the amendment to the Rules of Criminal Procedure**

The Defender expressed fundamental reservations on the proposed amendment to the legal regulation of compulsory defence. In the Defender's opinion, it is impossible to accept the argument of the necessity to economise on the state budget, *inter alia* because this is a response to a temporary economic situation. In connection with the financial issues related to *ex officio* defence, it is more suitable to ask whether the cost of the defence is proportionate to the quality of the legal services provided. Furthermore, the Defender disagreed with restrictions on *ex officio* defence with respect to juveniles since substantial procedural shortcomings may occur, particularly in acts preceding commencement of criminal prosecution, where even an adult lay person, not to mention a juvenile, is unable to comprehend the impact of such shortcomings. It is all the more necessary that minors be 'partners' to prosecuting bodies in the sense that they are provided with a qualified defence to defend their legitimate interests.

## **3) Comments on the amendment to the Decree on Expert Commissions**

The Defender expressed a critical opinion particularly on the fact that the Ministry of Health insists that due to the Personal Data Protection Act, it is impossible to provide information on the name of an expert who, based on authorisation from an authority, draws up a report regarding correctness of healthcare provided. The Defender, together with the Office for Personal Data Protection, rejects this interpretation, since in the aforementioned case the medical professional is subject to the exemption stipulated in Section 5 (2) (f) of the Personal Data Protection Act, according to which personal data may be processed without the consent of the data subjects provided that the personal data is provided on a publicly active person, functionary or employee of public administration and give an account of his/her public or official activities. As a professional, the author of the opinion was tasked with drawing up an opinion for the purpose of inquiring into a complaint, thus finding himself in the position of an employee of public administration. He/she simultaneously became a recipient of public means in the sense of Section 8b of the Act on Free Access to Information. For this reason, the Personal Data Protection Act does not prevent disclosure of the name of the author of the report.

The Defender also expressed his opinion that the patient should always have the right to provide a standpoint at a meeting of the commission and, if applicable, detail his/her complaint about the healthcare provided. He also commented on the proposed reduction in the number of members of expert commissions and requested that the patient always be acquainted with the result (the protocol and minutes of the meeting of the commission). A person who lodges a complaint without being a patient should always be generally acquainted with the result of the inquiry.

#### **4) Comments on the draft Expropriation Act**

The Defender rejected the attempts of the authors to make a change where the lodging of an action would generally not have suspensory effect in the given case. Courts could potentially make decisions on the granting of suspensory effect in a situation where the plaintiff's rights would be seriously endangered and the granting of suspensory effect would not unreasonably affect acquired third-party rights and would not be at variance with public law. The Defender disagrees with the submitted legal regulation since it fundamentally weakens the right of the expropriated party to the protection of ownership title under Art. 11 of the Charter of Fundamental Rights and Basic Freedoms, as well as the European Convention on Human Rights. The proposed regulation represents a fundamental change since it means the abandoning of the statutory (obligatory) suspensory effect in favour of a suspensory effect granted by a court based on a proposal of the expropriated party. If the proposed regulation were adopted, it would be impossible to rule out cases where the property concerned would be prejudiced by irreversible harm already during the court proceedings.

#### **5) Comments on the draft Decree on Assessing Invalidity**

The Defender has long pointed out that applicants for a disability pension should receive, together with the decision, also an assessment of disability, since without the latter the decision of the Czech Social Security Administration concerning assessment of the disability virtually cannot be reviewed. Thus, the applicant lacks information to assess in a qualified manner whether and for what reasons it is expedient to contest the decision by an administrative action (by so-called objection from January 1, 2010).

Compared to the existing legal state of affairs, the proposed legal regulation even narrows down the scope of information to be provided to the insured party. According to the proposed wording of the Decree, in fact only the information currently contained in a document identified as "*An Extract from the Record of a Meeting*" is to be provided. There is no doubt that on the basis of the Code of Administrative Procedure and the Convention on Human Rights and Biomedicine, the insured party has the right to the provision of all information on the assessment of the state of his/her health. The Defender proposed on the basis of the aforementioned reasons that the provision of information on a health condition be dealt with in the Decree by stipulating the requisites of a comprehensive assessment of the state of health which would contain all relevant information.

## **II. Proceedings before the Constitutional Court pursuant to Section 69 (2) of the Constitutional Court Act**

**Proposal of the Ministry of the Interior for annulment of Article 2 (3) and Article 3 (2) of the generally binding Decree of the Vodňany Municipality No. 4/2008, on the protection of public order in the operation of an innkeeper's trade**

The Defender expressed disagreement with the proposal whereby a provision stipulating closing times for restaurants is to be annulled. The Defender pointed out that local self-government units are competent to regulate the hours of operation of restaurants in all democratic states. This is because the right to operate an innkeeper's trade usually conflicts with the right to protection of private life.

The Defender holds the view that Section 10 (a) of the Municipalities Act as amended gives municipalities sufficient room for stipulating obligations for ensuring local public order matters, and specifically to regulate the opening hours of restaurants in the territory of the municipality. The Defender therefore proposed that the Constitutional Court reject the proposal of the Ministry of the Interior.

## **C. Presentation in the Media and Communication with the Public**

The Defender used all types of media in the 3<sup>rd</sup> quarter of 2009 to inform the public of his activities, continued to meet complainants in person and partake in discussions with the public.

- **Three press conferences** took place during the period under scrutiny. The July conference was concerned with **waste management** and particularly the fact that waste is not consistently recorded after its generation, in transit and deposition, which results in illegal storage facilities and deposits. At the same press conference the Defender pointed out the long-term unsatisfactory situation in overcrowded prisons. The August press conference was dedicated to the **impact of the amended Assistance in Material Need Act** in practice, particularly in relation to the unavailability of public service work. As a result of the unavailability, the condition of 20 hours of work per month cannot be fulfilled in many regions and people in material need lose their benefits. The Defender also provided information on some new rules in distraintments, particularly the increase in the non-confiscable amount. The Defender designed the September press conference as a **sanction against the Czech Statistical Office**, which by its erroneous conduct, repeatedly deprived the Kuřimská Nová Ves municipality of a part of the revenue from value added tax and income taxes. The Czech Statistical Office denies responsibility for the error and does not accept the proposal for indemnification. The Defender also provided information at the September press conference on his **new role in the area of promotion of equal treatment** under the Anti-discrimination Act.
- Individual interviews and appearances in the media were an important part of the Defender's presentation. The Defender gave extensive interviews to *Hospodářské noviny* daily and *Profit* weekly, appeared as guest of Barbora Tachecí in the *Fakta* programme on TV Prima and the Interview program on Z1 TV. In addition, statements of the Defender and his deputy appeared every day in national and regional media and on Internet servers. The distraintments in Chomutov, the payment of social benefits in Litvínov, the condition of the Kyselka Spa cultural heritage and the Anti-discrimination Act that had recently come into effect were the areas the media most frequently showed interest in.
- ČT1 began to broadcast in the 3<sup>rd</sup> quarter (September 2009) what is already the fifth series of "*people's little stories*", **A Case for the Ombudsman**. Given its popularity, Czech Television gave the programme a Friday prime time slot before the main news programme.

1,294 calls were received by the Defender's information hotline. These were mostly requests for simple legal advice, or both general and specific queries regarding the Defender's mandate or progress in the handling of a complaint.

147,299 visits were logged on the Defender's website at [www.ochrance.cz](http://www.ochrance.cz) in the period under scrutiny.

## ***D. International Relations, Conferences, Workshops***

### **Meetings with foreign delegations and participation in international conferences**

- Participation in the 3<sup>rd</sup> international Issyk Kul human rights forum (July 15 to 20, 2009, Bishkek/Issyk Kul, Kyrgyzstan)
- Participation in a summit of the “Visegrád 4” ombudspersons (September 7 to 10, 2009, Bialowieza, Poland)

### **Conferences and workshops organised**

- Round table meeting with the heads of facilities for the mentally handicapped (September 17, 2009, Brno)
- Round table meeting on Permanent Residence (September 24, 2009, Brno)

## ***E. Selected Cases from the Defender's Work in the Period under Scrutiny***

In this report, the Defender regularly incorporates brief information on interesting or otherwise important complaints that help to document, in more detail, which areas of law are frequently dealt with and the diversity of the cases handled in the period under scrutiny:

### **I. Inquiries opened on the Defender's own initiative**

#### **1) A house in a state of disrepair**

The Defender opened an inquiry regarding inactivity and delays in proceedings pursued by the planning authority of the Prague 4 Municipal Office regarding remedy for a house in a state of disrepair. The inquiry is currently directed also towards the Construction Department of Prague City Hall, since the subordinate planning authority has long been inactive as regards the heating of the premises in the winter and is likely to have given up enforcement of the imposed remedial measures.

#### **2) Necessary alterations to waterworks**

Based on information in the media, the deputy of the Defender decided to review the case of an uncovered drainage channel in Šumperk. According to the information obtained to date, the owner of a neighbouring house was injured as she fell into the aforementioned structure. The complainant had previously drawn the attention of the Municipal Authority to the fact that the structure was not properly secured. The Municipal Authority had stated that it was unaware of the owner of the structure and was therefore unable to impose any remedial measures. Based on these circumstances, the deputy of the Defender addressed the Municipal Authority with a request for information regarding the nature of the structure and whether (when) it was permitted. The deputy also requested a statement on the standard of securing of the structure.

#### **3) Management of railroad ties**

The deputy of the Defender inquired on her own initiative into the manner of handling contaminated wooden railroad ties. The latter are classified as hazardous waste and it is therefore necessary to manage and dispose of them only in the manner stipulated in the Waste Act. They cannot be sold to private individuals as a product for reuse. The deputy of the Defender therefore requested that the Czech Environmental Inspectorate (CEI) inspect the management of the aforementioned waste at its originators.

In her final statement, the deputy insists on an inspection at the originators of contaminated railroad ties and subsequent action to be taken on the basis of the results of the inspection. She also requests the CEI provide information on the results of the inquiries to date and steps the Inspection will take.

#### 4) Exercise of social and legal protection of sexually abused children

Based on news in the media, the Defender opened an inquiry into the steps of the children's home in Uherský Ostroh and the Brno-north municipal office. The objective of the inquiry is to ascertain whether both institutions could have prevented the abuse of a boy from a children's home who, as the winner of a contest for "*a child's stay with a V.I.P.*", was sent to stay with the organiser of the contest without checking the situation there, after which the organiser of the contest sexually abused the child.

The Defender concluded, based on the inquiry undertaken, that the head of the children's home had not proceeded in accordance with the Act on the Exercise of Institutional Education and Protective Education and the Act on Social and Legal Protection of Children in permitting the stay since she enabled, without written consent of the body of social and legal protection of children (BSLPC), the boy to stay at Mr H. (now convicted) who sexually abused him. Contrary to what the head of the children's home told journalists, the BSLPC had not given consent to the child's stay with Mr H., but rather the opposite: it reprimanded her for her steps immediately after learning about the boy's stay with Mr H. It cannot be said, in the Defender's opinion, that the head lacks the written consent from the BSLPC "*by mistake*" as the Defender was advised. In fact the head of the children's home does not have the document because it never existed. She should bear responsibility for breaching her statutory obligation, sending the child to stay with him without properly checking the situation, and without consent from the BSLPC, thereby enabling Mr H. to abuse the child. The heads of two other children's homes, to whose children Mr H. offered host care, observed the legal regulations (the situation with Mr H. was checked and the children were not sent to him). The head of the children's home also broke the law in the area of the notification duty as she failed to notify the BSLPC, without undue delay, of the suspicion that the boy was the victim of a crime (and she subsequently did not notify them that the boy had actually become the victim of a criminal act). Based on the Defender's recommendation, the Brno-north Municipal District opened administrative proceedings, the head of the children's home was found guilty of an administrative infringement and a fine was imposed on her.

According to the Defender, the steps of the BSLPC of the Brno-north Municipal Authority in enabling the host stay do not show maladministration. However, the Defender reprimanded the personnel of the BSLPC for the fact that when they learned that the obligation of the head of the children's home to request a written consent to the host stay had been breached, they should have notified without delay the founder of the facility and the court which had ordered institutional education. The BSLPC personnel chose to use only a reprimand as they advised the head of the children's home that they would use the aforementioned options should the situation occur again. In the Defender's opinion, the BSLPC caused, by failing to fulfil the notification duty, that the important information on the breach of the statutory obligation by the head of the children's home and on the illegal stay of the child at Mr H. did not reach the founder and the court and the latter institutions were unable to deal with the matter further.

The Defender sent a report containing his conclusions to the authorities concerned and he currently awaits their response.

## **II. Inquiries opened on the complainants' initiative**

### **1) Deletion of notes from the Land Register**

The Defender opened an inquiry against the cadastral workplace in Brno-venkov of the Land Registry Office for the South Moravian Region, in the matter of the deletion of notes from the Land Register. A complainant together with her husband had acquired ownership title to a plot of land on the basis of a court resolution on granting a knock-down. At the time of the auction, a number of restrictions on the previous owner's ownership title were registered in the title sheet (judicial lien, court order on sale of the real estate and a distraintment order). Proceedings on deletion of the relevant restrictions on the ownership title had been opened on the basis of a certificate of expiry of the restrictions on the ownership title, but the cadastral workplace had not carried out the deletion. The Land Registry Office for the South Moravian Region subsequently carried out a partial remedy, but its standpoint remained unchanged with respect to the deletion of the notes concerning the court order on sale of the real estate and the distraintment order. It justified its position by stating that if several executions of a decision are ordered and several distraintment orders issued with respect to a piece of real estate, the selling of the latter in an auction has no effect on proceedings pending in parallel, and therefore the note on distraintment could not be deleted (according to the Land Registry Office, the deletion could create an untrue impression among third parties that the court proceedings have already ended while in fact they are still in progress).

The Defender does not accept that view. He stated that if a piece of real estate is sold within the "*distraintment ordered earliest of all*", other proceedings may not continue. Thus, by contrast, failure to delete the relevant notes creates an untrue impression among third parties since a creditors' receivable can no longer be satisfied within the proceedings referred to in the note by way of selling the relevant real estate. According to the Defender, on the basis of a court resolution on granting a knock-down in distraintment proceedings, the Land Registry Office is authorised to carry out the deletion of notes referring to any later distraintments declared with respect to the same real estate.

The Defender sent his statement both to the Land Registry Office concerned and the Czech Office for Surveying, Mapping and Cadastre and awaits their statements on the findings made.

### **2) Deletion of mortgage right from the Land Register**

The Defender was addressed by a complainant with a complaint about the cadastral workplace in Opava of the Land Registry Office for the Moravian and Silesian Region. Based on the submitted agreements on the assignment of receivables, the cadastral workplace had made an entry into the Land Register whereby it deleted a mortgage right since the rights and duties with respect to the receivables concerned had merged in a single person in the sense of Section 584 of the Civil Code.

It was ascertained within the inquiry conducted by the deputy of the Public Defender of Rights that in deleting the mortgage right, the cadastral workplace had been satisfied with simple copies of the agreements that were to document the gradual passage of the secured receivable. The aforementioned procedure was

found incorrect; the Land Registry Office for the Moravian and Silesian Region admitted maladministration and pledged to provide for the originals or authenticated copies of the relevant agreements. The authenticated copies were indeed delivered to the Land Registry Office in early 2008. However, there are doubts at present as to whether the signatures on the agreements on assignment of receivables, on the basis of which the deletion of the mortgage right was carried out, are authenticated in the manner required by the relevant legal regulations. The matter continues to be inquired into. The authority will be requested to check the signatures of the agreements and provide information on its findings.

### **3) Placing a child into the care of the wider family**

After undertaking an inquiry, the Defender found maladministration by all the relevant authorities and institutions in the matter of a girl who had been placed in an infant home in spite of the fact that the mother's aunt was interested in caring for and raising her.

The Defender found fundamental maladministration by the body of social and legal protection of children (BSLPC) in Holešov, particularly in connection with the lodging of an application for ordering a preliminary injunction for placement of a minor into the care of an infant home. The Defender reprimanded the BSLPC for lodging the application for ordering a preliminary injunction without first sufficiently dealing with the question as to whether a person from the mother's broader family would be able to provide for care. In addition, the BSLPC should have advised the mother of such a serious intervention. As a result of the maladministration by the Holešov BSLPC, the minor needlessly spent more than two years in an institutional facility, which ultimately resulted in her inclusion in the records of children qualifying for foster care and placement into pre-foster care.

Furthermore, the Defender reprimanded the Holešov BSLPC, the Kyjov Infant Home and the Veselí nad Moravou BSLPC for a lack of co-operation with the family. The maladministration consisted primarily in an absence of support for the child's contact with the family, not only in the form of visits to the institutional facility, but also short-term stays with the family. The Defender noted that instead of initiation of the child's stay in the family, the latter was hampered in various ways. On the contrary, the child's stay in the foster family was permitted almost immediately after the first encounter without requiring that it be preceded by frequent visits and building a relationship with the child. As for the pre-foster care, the Defender concluded that there had not been proper conditions for placing the child into the future foster parents' care as the minor's own family, specifically the mother's aunt, showed interest in her and there were relevant reasons preventing her from caring for the minor.

The Defender acquainted the authorities concerned with his conclusions and he currently awaits their statement.

### **4) Data box of a natural person staying permanently abroad**

The new Section 10b of the Citizens Register Act came into effect on July 1, 2009, laying down the right of a citizen to report to a reporting office an address to which written materials, e.g. under the Code of Civil Procedure, are to be delivered to him/her ("*delivery address*"). A complainant – a Czech national staying permanently

in Sweden – addressed with the aforementioned request the Municipal Office in Mladá Boleslav, her last residence in the Czech Republic. The Municipal Office informed her that indicating an address for delivery abroad was not permitted by law.

The Defender ascertained within the opened inquiry that other reporting offices in the Czech Republic register addresses for delivery abroad since personnel have been trained to this effect by the Ministry of the Interior and there are no technical obstacles to this. On the other hand, the Department of Administrative Activities of the Ministry of the Interior informed the Defender of an interpretation dispute between the Ministry of the Interior and the Ministry of Justice where the latter supports a restrictive interpretation of delivery address, i.e. only for the territory of the Czech Republic. Both ministries should soon agree on a uniform application of the relevant provision of the Citizens Registry Act and their uniform standpoint should prevent non-uniform practice by administrative bodies.

The Defender addressed the Municipal Office in Mladá Boleslav and both ministries with a request for a standpoint and information on how a citizen of the Czech Republic staying permanently abroad should proceed in order to ensure that public authorities “physically” deliver written materials to his/her address abroad. The Defender will also concentrate in the inquiry on the correctness of the information provided by the information infoline for the support of data boxes and at the [www.datoveschranky.info](http://www.datoveschranky.info) website. Already at this initial stage of the inquiry, based on co-operation between the Ministry of the Interior and the Defender, it was possible to amend the application form for the establishment of a data box for a natural person where the Czech Republic was originally printed in the “state” cell. The cell is now blank. The original form generated doubts among citizens living abroad as to whether or not they were permitted to establish a data box during a long-term stay abroad. They did not receive a satisfactory answer even from the aforementioned infoline.

## **5) Non-granting of an allowance for care**

The Defender was addressed by a complainant staying in an institution for physically handicapped juveniles, with a complaint in which he objected to the non-granting of an allowance for care. The deputy of the Defender opened an inquiry into the matter, whereby she ascertained considerable contradictions between the results of the individual social inquiries and the expert report conclusions of the medical assessment service. Although 2<sup>nd</sup> degree dependence had initially been ascertained by the social inquiry, 1<sup>st</sup> degree in a repeated inquiry and even 3<sup>rd</sup> degree in an inquiry undertaken within appellate proceedings, the bodies of the medical assessment service had not found even low dependence on other natural person’s assistance. The deputy of the Defender found maladministration both in the steps of the social workers in undertaking a social inquiry and by the medical assessment bodies in the application of assessment criteria. The deputy of the Defender requested the Minister of Labour and Social Affairs to open review proceedings in the matter.

## **6) Allowance for care with respect to children placed into alternating custody**

The deputy of the Defender dealt with the method of payment of an allowance for care for a minor child placed into alternating custody. In these cases, the parent entitled to payment of the allowance is not stipulated by law. In the case concerned,

the Brno Municipal Office had required that the parents submit an agreement on the method of payment of the allowance for care, stating that it would make a decision on suspension of the payment of the allowance should the parents fail to provide the aforementioned document.

The deputy of the Defender addressed the Minister of Labour and Social Affairs with a proposal that in these cases a similar procedure be taken to that applicable to state income support benefits – parental allowance. Pursuant to Section 30a (5) of Act No. 117/1995 Coll. on state income support, if both parents are entitled to the parental allowance in single calendar months in that each of them qualifies for a part of the month, the parental allowance shall belong to the parent determined on the basis of agreement. If the parents fail to agree, the administrative body shall determine which of the parents is entitled to the allowance.

The Minister expressed consent to the proposal, stating that methodological guidance for authorities would be soon drawn up in this respect and he would consider inclusion of a similar provision in the next amendment to the Social Services Act.

## **7) Allowance for motor vehicle use in the regular travel of a partner**

The deputy of the Defender opened an inquiry into the complaint of a complainant to whom an allowance had not been granted for the year 2009 for motor vehicle use in the regular travel of his partner. He had received the allowance in the year 2008. The authority justified the change in its procedure with the amendment to the implementing Decree to the Social Security Act. Through the amendment effective as of August 15, 2008, a reference to the pension insurance regulations was inserted in the Decree in the form of a footnote. Since the aforementioned date, the authorities making decisions on benefits for the disabled have interpreted the term “related person” under the Pension Insurance Act rather than the Civil Code. A partner does not fall under the scope of persons under the pension insurance regulations. The deputy of the Defender reprimanded the authorities for an incorrect procedure since under the established case law of the Constitutional Court of the Czech Republic, a reference in the form of a footnote does not have a regulatory force. Thus, the authority was obliged to act under the general legal principles and interpret the term “related person” under the Civil Code, i.e. in favour of the applicants for benefits. The deputy of the Defender also pointed out the *in dubio pro libertate* principle, i.e. in favour of the public administration addressee in case of any doubts, which is also expressed in the case law of the Constitutional Court. The deputy of the Defender also requested the Minister of Labour and Social Affairs not only to annul the contested decision in review proceedings, but also to ensure correct procedure in similar cases in the future.

## **8) Proof of identity of a party to administrative proceedings**

A complainant did not accept that the Municipal Authority in Blansko was not satisfied with the presenting of a passport to prove the identity of a party to administrative proceedings on issuing a driving licence (DL). The complainant had to present his personal identity card (PIC), since the permanent residence address is not recorded in the passport. The complainant referred to the information published on the [www.portal.gov.cz](http://www.portal.gov.cz) website, from which it follows that a passport is sufficient

for identifying a party to proceedings. The deputy of the Defender stated that although Section 115 of the Road Traffic Act does not directly specify what identity document should be presented in the contact with an authority, on the other hand it clearly states that the holder of a driving licence must present a document from which the authority obtains the holder's basic personal data including the place of permanent residence. Given the aforementioned requirements, a passport does not comply with the above-mentioned requirements of the law. The deputy of the Defender also referred to the general legal regulation stipulated in Section 36 (4) of the Code of Administrative Procedure, which defines the so-called identity document as a public instrument where the place of permanent residence is specified.

According to the deputy of the Defender, the place of permanent residence is not very suitable as a criterion of identity document. The obligation of citizens to prove identity at the request of an administrative body is in fact limited only to the use of the personal identity card. However, the current law does not stipulate that the citizen shall always carry the personal identity card. It is therefore desirable that the citizen be allowed to prove identity also through some other public instrument which is equivalent to the personal identity card from the viewpoint of protective and security features, which is fulfilled by the passport.

The deputy of the Defender also pointed out the non-uniform procedure of authorities that overlook the formal requirement of the Code of Administrative Procedure in some cases and strictly request the presentation of a document corresponding to the legal criteria in other cases. The different approaches in a single matter are not perceived positively by ordinary citizens who object to the non-uniform procedure and unfounded discrimination. The deputy of the Defender therefore addressed the Ministry of the Interior with a question as to whether it would be appropriate to clarify these ambiguities in relation to the use of passports in accordance with Section 36 (4) of the Code of Administrative Procedure. She also addressed the Ministry of Transport, which is responsible for correctness of the information at the aforementioned portal, with a request for more detailed information on the applicable legal situation.

### **9) Procedure of an embassy in proceedings on the granting of a short-term visa to a family member of an EU citizen**

The Defender dealt with the complaint of a Czech citizen whose husband, a Macedonian national, had not been granted a visa for a stay in the Czech Republic in excess of 90 days. The Defender found several shortcomings in the steps of the Embassy and the Ministry of Foreign Affairs. He pointed out particularly the qualitatively different situation of the family members of EU/CR citizens who are entitled to the granting of a visa. An application may be rejected only based on defined grounds such as a threat to public policy, security of the State and public health.

The Defender recommended that in the sense of Directive 2004/38/EC, the Embassy inform in writing the family member of the EU citizen of the legal reasons for the non-granting of the visa and, unless this is at variance with the interests of State security, inform him also accurately and in full of the reasons on which it based the adopted decision. It should simultaneously advise the applicant for the visa that the rejection of his application for a visa may be subject to court review. The

Defender also requested the Ministry of Foreign Affairs and the embassies to take into consideration in the visa process the new status of EU citizens' family members.

The Defender also ascertained during the inquiry that the Embassy had erred in collecting the administrative fee from the applicant for the visa. The latter is exempted from the fee as a family member of a citizen of the Czech Republic. The subsequent inspection of the Embassy detected that similar maladministration had occurred in a score of other cases. The affected persons were subsequently advised by the Embassy of the maladministration and the unduly collected administrative fees will be returned to them.

The requirement to advise applicants – family members of EU citizens – of appeals has not been implemented by the Ministry of Foreign Affairs to date with reference to the necessity of interdepartmental negotiations with the Ministry of the Interior and the necessity of implementing the EU regulation into the Foreigners Residence Act.

The Defender insists on the adoption of the measures and will raise them in the amendment procedure concerning the amendment to the Foreigners Residence Act and in other negotiations with the representatives of the Ministry of Foreign Affairs.

#### **10) Inactivity of the Ministry of Justice in processing an application for the provision of adequate satisfaction under Act No. 82/1998 Coll.**

A complainant addressed the Ministry of Justice on July 14, 2008, with an application for the provision of adequate satisfaction in connection with delays that had occurred in proceedings conducted at the Municipal Court in Brno. The Ministry responded with a letter dated July 31, 2008, in which it informed the complainant that it would request the files from the court in order to undertake the necessary inquiry and the complainant would be informed of the standpoint of the Ministry on her application. However, the Ministry has neither sent her the standpoint to date nor responded to the reminder from her attorney-at-law of January 19, 2009, and March 5, 2009.

Although Act No. 82/1998 Coll. does not stipulate deadlines for the Ministry for processing such applications and the Ministry does not issue a standpoint in administrative proceedings, the Defender holds the view that the Ministry of Justice should, as a rule, issue its standpoint within six months from delivery of an application. If it is unable to observe the aforementioned deadline due to a high number of applications to be processed or other objective grounds, it is necessary that it advise the applicant of this fact. In this respect, Section 35 of the cited Act should be pointed out, according to which the period of limitation shall not run from the date of lodging a claim to the termination of the preliminary hearing (at the Ministry of Justice in the case concerned), but for a maximum of six months. Given that the Ministry had failed to advise the applicant's representative of its standpoint even within one year from the submission of the application and had not responded to reminders, the Defender stated that the steps of the Ministry were not in accordance with the principles of good administration.

The Defender called on the head of the Indemnification Division at the Ministry of Justice to explain the reasons for the delay in processing the relevant application and justification of why the Ministry of Justice had failed to respond to the reminders

from the complainant's attorney-at-law. He also requested provision of up-to-date information on the existing situation at the Compensation Department, in particular the number of applications received for the provision of satisfaction for non-proprietary damage caused by the undue length of proceedings and the personnel-related situation at the Department.

### **11) Distraintment of a fine for an offence**

A complainant addressed the Defender with a complaint against the steps of Brno Municipal Office, the Department of Budget and Financing, in exacting an on-the-spot fine that had been imposed on the complainant by the Brno Municipal Police on July 28, 2003. The complainant pointed out the unauthorised exacting of the fine due to expiry to no effect of the five-year limitation period stipulated in Section 88 (1) of Act No. 200/1990 Coll., on offences, in the wording applicable until December 31, 2005. Against this, the Municipal Office argued during the inquiry that a fine may be exacted within the period stipulated in Section 70 of Act No. 337/1992 Coll., on the administration of taxes and fees, as amended. Doubts were created by an amendment to the legal regulation associated with the adoption of the new Code of Administrative Procedure. Particularly the question was a matter of controversy as to what legal regulation shall govern the exacting of a fine if a period which began to run during the effect of the original legal regulation has not expired upon the latter's amendment. The law does not specify clearly how to proceed in such a case.

After undertaking an inquiry, the Defender concluded that the period for exacting the fine was clearly set at the beginning of the period as a five-year limitation period, which had expired to no effect already in 2008. In this respect the further steps of the Municipal Office were found illegal since it was no longer possible to take any further steps aimed at exacting the fine. The Defender notified the authority of the shortcoming and awaits its statement in the matter.

### **12) Extension of a mining area**

The deputy of the Defender inquired into the steps of the District Mining Authority in Ostrava and the Czech Mining Authority in Prague and found maladministration *inter alia* in that the author of the expert reports which served as underlying documents for decision-making by the authorities was biased. The deputy subsequently decided to order an expert standpoint aimed at assessing whether the conclusions of the expert reports were based on sufficient, exact underlying documents, whether the evaluations were based on the claimed content of the assessment and whether the interpretation of the expert reports indicated in the authorities' decisions were fully in accordance with the conclusions and recommendations of the reports.

According to the conclusions of the expert standpoint drawn up by the Institute of Geological Sciences at the Faculty of Science of Masaryk University in Brno, the expert reports and reports on which the decisions of the bodies of mining administration were based had used erroneous primary data and erroneously determined groundwater levels. Methodological and conceptual shortcomings appeared also in the interpretations of the data.

Based on the aforementioned findings, the deputy of the Defender submitted a motion for renewal of the proceedings concerning extension of the Staříč mining area.

### **13) Exacting a fine for an offence from the offender's heir**

A complainant addressed the Defender with a complaint against the inactivity of the Prague City Hall and the Ministry of Transport concerning the exacting of a fine for a traffic offence, imposed on her father in 2004. The complainant as the heir had been called on in March 2009 to pay the fine. Although she had paid the fine, she had been called on by the City Hall to pay an underpayment. Her appeal against the call had been forwarded to the Ministry of Transport, which, however, pointing out a lack of substantive competence, forwarded the appeal to the Ministry of Finance. The latter had also denied its competence and forwarded the appeal back to the Ministry of Transport. A decision on the appeal has therefore not been made as yet.

The Defender opened an inquiry into the matter since the aforementioned information suggests the existence of an adverse competence conflict between two ministries or inactivity of the ministries. The objective of the inquiry is to ascertain which administrative body is competent to issue a decision on the appeal.

### ***F. The Defender's Activities in the Area of Detention***

Work was in progress in the third quarter of 2009 on a summary report from visits to persons with disabilities, which was presented in October. Follow-up visits were simultaneously initiated to those mental homes on which the Defender had focussed in 2008. It can already be stated that the attitude of the homes to the Defender's recommendations varies. An effort to respect the Defender's recommendations and put them into practice was obvious in one of the homes. Only slight efforts at improvement were ascertained in other homes. Unfortunately, the Defender also noted a home that had committed to fulfilling the Defender's recommendations in fundamental areas (e.g. respect for the right to privacy and human dignity in connection with cameras in toilets, elimination of netted beds, proper prescription of medication for agitation control, etc.), but where this had not happened even after one year. The Defender intends to address the Ministry of Health with his findings. He has already addressed the Office for Personal Data Protection, specifically in connection with the still present cameras (which make a recording) in toilets and other rooms.

The Defender stated again in his report from the homes for persons with disabilities, as he did in 2008 in his summary report from the visits to mental homes, that he attaches a great weight to a problem which pertains particularly to people who need both a social service and healthcare – the lack of interrelatedness between both systems. Thus, medical facilities, i.e. the mental home in the case concerned (but also institutes for long-term patients) assume the roles of the inadequate network of social services in responding to the psychological and social specifics of the elderly, and also younger people, in need of highly individualised and intensive care and support. The Defender acquainted the Ministry of Labour and Social Affairs, the Ministry of Health and local self-governing authorities with his findings. The Defender once again and even more emphatically recommended that regional self-governments start actively dealing with the situation of clients/patients with specific

needs. There will always be a certain proportion of people in our society who need specific, highly individualised and continuous assistance and support. Where failure to provide it leads to permanent and massive restriction, this constitutes poor and undignified treatment, which may in certain cases harm the health of the patient/client.

### ***G. The Defender's Activities in the Area of Protection against Discrimination***

Since December 1, 2009, in connection with the adoption of the Anti-discrimination Act, the Defender has had a new competence in matters concerning the protection of persons against discrimination. The Defender will provide methodological assistance to persons who believe that they are victims of discrimination in lodging their proposals for commencement of proceedings concerning discrimination. The Defender will particularly undertake a legal evaluation of the complainant's situation and offer the most suitable options for further legal steps, provide consultancy as required and, where appropriate, co-operation in obtaining evidence. Furthermore, the Defender will issue recommendations to the public regarding discrimination, and carry out research in connection with discrimination and unequal treatment.

With a view to the most efficient possible combating of discrimination, the Defender has already negotiated on co-operation with the relevant authorities (the Czech Trade Inspection Authority, the State Labour Inspection Authority, the Czech Schools Inspectorate, and the Office for Personal Data Protection), as well as other key groups whose involvement in dealing with the problem of discrimination is essential (the Czech Bar Association, presiding judges of regional courts, and non-profit organisations). As an institution for ensuring equal treatment (equality body), the Defender will also become a member of Equinet, a European network of anti-discrimination bodies.

Brno, October 21, 2009

JUDr. Otakar M o t e j l  
Public Defender of Rights

# **Court-appointed Experts – Practical Findings of the Public Defender of Rights**

## ***1. Introduction***

The Public Defender of Rights considers the work of court-appointed experts to be one of the basic pillars influencing the administration of justice. In handling complaints from various areas of his mandate, the Defender relatively often encounters citizens' complaints about the work of experts and, within inquiries into complaints about delays in court proceedings, complaints about delays in drawing up expert reports. Complaints also concern issues falling within the area of state administration in the sector of experts and interpreters (the issue of the appointment and removal of experts, checking of experts in the form of tests, etc.). The Defender has repeatedly pointed out some problems connected with experts' work in the reports submitted by him annually to the Chamber of Deputies of Parliament of the Czech Republic. The Defender recommended that the bodies of state administration of courts employ their competences towards court-appointed experts more actively.

Under Act No. 349/1999 Coll., on the Public Defender of Rights, as amended, the mandate of the Defender does not encompass courts, with the exception of state administration of courts. It follows from this that the Defender is not authorised to review the conduct of courts in appointing experts for drawing up expert reports, to evaluate the work of experts or the content of expert reports, etc. However, the Defender may investigate whether the bodies of state administration of courts (the presiding judge, the deputy presiding judge and the Ministry of Justice) have duly (in accordance with the valid legislation) dealt with complaints about the inactivity of experts in drawing up expert reports and issues falling within the area of state administration in the sector of experts and interpreters.

In the opinion of the Public Defender of Rights, the current regulation of expert work contained in Act No. 36/1967 Coll., on experts and interpreters, as amended, and implementing Decree No. 37/1967 Coll. as amended, is in many respects unsatisfactory and fails to address current needs. The Defender considers adoption of a new legislation on expert and interpreting work to be absolutely necessary.

In the 2006 Annual Report on the Activities of the Public Defender of Rights (in the General Observations part), the Defender recommended the Chamber of Deputies of Parliament of the Czech Republic to adopt new legislation in the sector of experts and interpreters.

In the 2007 Annual Report, in the part "Evaluation of the Government Report on the Use of the Recommendations of the Public Defender of Rights for Amendment to Legislation Indicated in the Annual Report on the Activities of the Public Defender of Rights in 2006", the Defender stated that although it was indicated in the government's material that the government would take the Defender's recommendations into account in preparing a draft new law on experts and interpreters, no draft strategy for the law on experts and interpreters was contained in the plan of legislative work of the government for 2008; instead it indicates an amendment to the existing Act No. 36/1967 Coll., as amended. The Defender believes that the Ministry of Justice has been aware of the absence of a new Experts and Interpreters Act for many years and that the overall concept should change

rather than merely amending the existing law. For that reason, the Defender proposed that the government keep to its pledge and prepare a draft strategy for a new law on experts and interpreters by the end of 2008.

The Defender recommended that the Chamber of Deputies request the government to approve a draft strategy for a new law on experts and interpreters by the end of 2008 and submit a draft law on experts and interpreters by June 2009.

The former Minister of Justice, Jiří Pospíšil, advised the Defender that the Ministry of Justice was aware of the unfortunate condition in the area of experts and interpreters and it had therefore prepared an amendment to Act No. 36/1967 Coll., on experts and interpreters, which was submitted to the government under the government's legislative plan in October 2008. The amendment should resolve the most critical problems, following which it will be possible to commence work on an entirely new law on experts and interpreters. The draft amendment to the Experts and Interpreters Act has not been discussed by the government as yet.

In the existing situation, the Public Defender of Rights considers it necessary that the Ministry of Justice complete the amendment to the Experts and Interpreters Act as soon as possible and subsequently commence work on a new law on experts and interpreters.

The Public Defender of Rights decided to also inform the Chamber of Deputies on his findings in handling complaints concerning expert and interpreting work.

## ***2. Expert reports as a cause of court delays***

In the Defender's opinion, the course of court proceedings is fully within the control and responsibility of the judge and the latter should therefore not hesitate to impose a procedural fine, to decrease remuneration or to refuse its granting to an expert who causes delays in proceedings. In addition, it is always necessary to consider whether an expert assessment is actually necessary for the decision or whether it only camouflages the indecision of the judge.

During inquiries into complaints concerning delays in court proceedings, the Defender often notes that evidence by means of expert reports is taken extensively in the civil law agenda of courts and it is questionable whether the appointment of an expert to draw up an expert report is necessary in so many cases and whether *expert evidence is used too excessively*. If the court orders an expert report to be drawn up, then the proceedings are often prolonged by the appointment of the expert, sending of the procedural file to the expert and the need for co-operation of the parties to the proceedings in drawing up the expert report. Sometimes the delays are caused by the parties to the proceedings (obstructive conduct), but often by the expert him/herself. The Public Defender of Rights cannot intervene in the decision-making activities of the court (e.g. impose an obligation to penalise an expert), but he attempts to deal with the matter via the bodies of state administration of courts that supervise the smoothness of proceedings and queries about the steps taken towards an expert who is delayed in drawing up an expert report. If he ascertains considerable delays in an expert's work, he calls for a stricter penalty on the expert (e.g. decreasing the expert's remuneration, non-granting of remuneration, a procedural fine, or deletion from the list of experts). In taking measures in relation to the expert, the bodies of state administration of courts are to consider especially whether the expert has breached his/her duties for the first time or repeatedly,

whether a single complaint or several complaints have been lodged against the expert concerned, etc.

### **Problem with appointing a suitable expert**

During inquiries into complaints concerning delays in proceedings, the Defender encounters cases where the court is for up to several months unable to find a suitable expert (specialist in the field) who would be able and willing to draw up an expert report. This concerns, for example, court proceedings concerning compensation for occupational injuries or occupational diseases that often last ten or more years (complicated evidence is given and the case is often heard by courts of higher instances). The Defender holds the view that given the nature of the matter, these cases should be administered preferentially and with special care, but the courts are unable to administer them even over reasonable periods. The difficulty of these cases consists particularly in problematic factual assessment (assessment of health) and calculation of the amount of damages: an additional expert (normally an economist) must be appointed for the latter. Experts often return the file to the court without drawing up an expert report after acquainting themselves with the case, pointing out a lack of qualification for drawing up the report. Looking for another expert again prolongs the proceedings. Courts attempt to order the drawing up of expert reports at expert institutes or universities, which they expect to draw up the report to a very high quality, but the latter are for objective reasons unable to draw up the report within a reasonable period. In spite of the fact that the expert failed to draw up the report within the set deadline, the courts insist on a report from the same expert regardless of the impact on the length of the proceedings. The courts merely urge the drawing up of the report by the expert or even prolong the deadlines for drawing up the report based on the expert's request, which in the Defender's opinion is unacceptable given the right of parties to proceedings to have their case dealt within a reasonable period. A similar situation occurs for example in proceedings for the settlement of the common assets of spouses.

### **Some other problems in the sector of expert and interpreting work**

In several cases the Defender encountered complaints about exceeding the scope of an expert's qualification. In this respect, the Defender dealt for example with the question of whether in drawing up an expert evaluation, experts with a high expertise (e.g. in the area of historic weapons, postage stamps, creative arts) may also opine on the value of the assessed item (price) and whether these experts must have an economic or other corresponding background. The Defender believes that this is an interpretation problem; court practice is relatively non-uniform and it is therefore necessary to deal with it in a conceptual manner. The Defender also encountered complaints contesting a lack of professional qualification of experts (e.g. taking into consideration the developments in the field – computer technology and programming).

The Defender's findings in this area rest for example on the following specific cases:

## **Delays caused by an expert in drawing up an expert report**

***The Defender ascertained a breach of the expert's duty to carry out expert work duly and within the period set by the Experts and Interpreters Act for which he was cautioned through a measure taken by the body of state administration of courts.***

The Defender dealt with a client's complaint about the inactivity of a court-appointed expert in connection with the drawing up of an expert report to assess the delimited boundary between plots of land for the purposes of court proceedings. To handle the complaint, the Defender requested a statement from the presiding judge of the Regional Court in Plzeň (the Regional Court carries out court supervision over the work of experts and interpreters included in the lists of experts and interpreters kept by the court). The presiding judge stated that court supervision is carried out within the limits of Act No. 36/1967 Coll., on experts and interpreters, while respecting the purpose of the Act, which consists in ensuring the proper exercise of expert and interpreting work in proceedings before state bodies and in expert and interpreting work carried out in connection with the legal acts of natural or legal persons. The supervision is concerned primarily with checking observance of the duties of experts and interpreters stipulated by law and its implementing Decree and checking whether the conditions under which the expert or interpreter was appointed to the post continue to apply. The supervision is not concerned with verifying the substantial correctness of expert reports.

The presiding judge also stated on the matter that the complaint about the steps of the expert had been discussed within court supervision and found to be justified. Under Section 8 of the above-cited Act, experts are obliged to carry out expert work duly and within the set period. Under Section 12 (2) of the cited Act, if an expert prepares an expert report in connection with administrative acts of citizens at their request outside proceedings before state bodies, he/she provides this professional assistance on the basis of agreement within the discharge of his/her post. In the case concerned, the expert had committed to fulfil the subject of the order by a specific date, but he failed to observe it and did not draw up the expert report even in the subsequent period. Thus, he had violated the Experts and Interpreters Act.

The ascertained breach of the expert's duty to carry out expert work duly and within the period set under Section 8 of the Experts and Interpreters Act No. 36/1967 Coll. was grounds for "cautioning" the expert through a measure taken by the court. The complainant was advised by the court of the aforementioned measure. The expert was merely cautioned through the measure, since this was the first breach of the expert's duties (failing to deliver the expert report in time) and his removal, as the complainant required, was not in accordance with the Experts and Interpreters Act, according to which an expert may be removed if he fails to fulfil or breaches his/her duty in spite of a caution. The presiding judge informed the Defender that court supervision over the expert's work would continue and it would be checked whether a repeated breach of the same duty by the expert occurs. The Defender stated on this matter that the bodies of state administration of the Regional Court had duly dealt with the complaint about the expert's inactivity in accordance with the above-specified legal regulation.

## **Inactivity of an expert**

***If a court-appointed expert who has failed to draw up an expert report within the set period fails to respond to telephone reminders and fails to accept written materials of the court, it is desirable that the court commence a search for his/her location as soon as possible and attempt to discover the file at his/her place of residence. Thus, the file can be returned without undue delays and assigned to some other expert. If the file is not found, its reconstruction should commence as soon as possible.***

A complainant addressed the Defender with a complaint about delays in proceedings for settlement of the common assets of spouses at the Prague-West District Court. A court-appointed expert was appointed in November 2005 to estimate the market value of the real estate, which was part of the common assets of the spouses. The deadline for preparing the expert report was 30 days. The expert report was not prepared within the aforementioned period. The court subsequently urged the drawing up of the report in writing and by telephone at approximately one- to two-month intervals to no effect. The expert was not accepting letters and did not respond to the court's inquiries and reminders. He was called in September 2006 to immediately provide the expert report or return the file to the court, but the call remained unanswered.

The presiding judge of the District Court informed the complainant in a reply to her complaint that there were indeed delays in the proceedings due to inactivity of the expert, but that the court had exhausted all means of eliminating them. The presiding judge stated that it would be necessary to appoint another expert as soon as the file is returned. She intended to notify the Regional Court in Prague of the shortcomings in the expert's work and stated that deletion of the expert from the list of experts would be proposed.

The complainant addressed the Defender in November 2006. The presiding judge informed the Defender in response to his inquiry that the expert had been reminded again after processing the complainant's complaint, with a call to immediately return the file, but again without success. The District Court informed the Regional Court in Prague of the situation and submitted a motion for deletion of the expert from the list of experts. Based on the Defender's inquiry, the judge administering the case appeared at the expert's place of residence in January 2007 and talked with his family. She ascertained that the expert had been unreachable for several months, allegedly staying in Prague at unknown addresses. The file was found at neither of the expert's two addresses.

Shortly afterwards, the legal counsel of the complainant provided the court with the required written materials for reconstruction of the file. A new expert was subsequently appointed who drew up an expert report in April 2007. A court hearing was subsequently ordered in June 2007.

The Defender stated that the place of the expert's stay and the subsequent reconstruction of the file could have taken place earlier. The court carried out these acts only after the Defender initiated his inquiry in spite of the fact that it could be deduced already in 2006, based on the repeatedly futile reminders, that timely drawing up of the expert report was unlikely. The Defender closed his inquiry and requested the presiding judge to keep him informed of further developments in the matter.

## **The issue of excessive use of expert reports in court proceedings**

Although the Defender did not find unjustified delays in the proceedings, he recommended to the court to consider, from the viewpoint of procedural economy, whether further evidence and constant postponing of hearings (particularly for the purpose of drawing up expert reports) is necessary or whether the dispute could be resolved on the basis of the evidence produced to date.

The Defender dealt with the case of Mrs D. H., who had addressed him with a complaint about delays in court proceedings for returning performance following from a terminated contract for work held at the District Court in Česká Lípa. Mrs D. H. stated in her complaint that although two expert reports had been drawn up, no decision had been issued in the matter as yet. The judge had always postponed the hearing indefinitely: it had mostly been ordered only after the complainant lodged a complaint with the presiding judge. She objected that as a result of the long-lasting court proceedings, she and her family were unable to use a house that could not be approved for use.

The Defender expressed concern in the report on the inquiry as to whether the principle of procedural economy was respected in the case concerned and whether the steps of the judge who had postponed the hearing six times for indefinitely (particularly for an expert report to be drawn up) were aimed at prompt handling of the case. If the parties to the proceedings (specifically the defendant) constantly propose the drawing up of new expert reports, the case can hardly be resolved in the foreseeable future.

### **Objections to the court's steps in ordering the expert report, and failing to deal with the significant delay caused by the expert in drawing up the expert report**

***Proceedings for settlement of co-ownership are, like proceedings for settlement of the common assets of spouses, as a rule (particularly when the assets include real estate), characterised by the need for expert evidence. The length of the proceedings must be viewed in the light of this fact since the drawing up of expert reports is almost always accompanied by sending the entire procedural file to the appointed expert and while the file is with the expert, it is practically impossible for the court to carry out any other acts in the case. It is all the more necessary to stress the timely drawing up of the expert report and the court is obliged to ensure that delays do not occur in spite of the considerable workload of experts. The Defender therefore recommends that the bodies of state administration of courts employ their competences towards court-appointed experts more actively. The expert should be emphatically advised of the necessity to fulfil his/her duties and the possibility of being removed if he/she fails to fulfil or breaches his/her duties in spite of a caution. Decreasing the expert's remuneration for delays caused in proceedings is also to be considered.***

The Public Defender of Rights dealt with the complaint of Mrs V. M. about delays in court proceedings for settlement of co-ownership held at the District Court in Litoměřice. The complaint was concerned particularly with delays in drawing up the expert report (measuring the boundaries of a plot of land).

The proceedings in the case had been initiated on June 29, 2004. An expert had been appointed in the case through a resolution of the court of February 20, 2006, for the purpose of drawing up an expert report in the field of geometry and cartography. The Defender ascertained that the file had been sent to an expert institute for drawing up an expert report in April 2006, and although the court had set for the expert a period of two months for drawing up the expert report and the drawing up was requested urgently, the expert report was finally delivered as late as April 2007, i.e. after 12 months. The Defender considers the aforementioned situation to be unacceptable from the viewpoint of the complainant's interest in having her case dealt with within a reasonable period. The judge administering the case and the presiding judge argued that whereas a complicated case was concerned, for the assessment of which it was necessary to draw up a high-quality expert report, the judge decided to wait for the drawing up of the addressed expert institute even after unsuccessful reminders. The Defender could not consider the steps of the court in ordering the expert report to be correct since the judge had been too optimistic in setting a period of two months for drawing up the report without first checking whether the expert would be able to draw up the report within that period. It would have been appropriate to check with the addressed expert institute as to whether it would be able to draw up the report within the required period and obtain information from several experts. The experts' time schedules should have been taken into account in the subsequent choice. The parties to the proceedings should have been acquainted with the fact that the addressed expert institute would be unable to draw up the expert report within the required period. The judge had urged the expert several times to draw up the report (it is likely that the above-mentioned complaints contributed to the urging).

The Defender could not accept that the complaint had been assessed as unfounded when delays occurred in the drawing up of the expert report for which measures towards the expert should have been taken. On the basis of the Defender's findings, the presiding judge reprimanded the judge administering the case for her steps in dealing with the appointment of the expert and failure to deal with the significant delay in drawing up the expert report. In connection with the unreasonably long period of drawing up the expert report, the expert's remuneration was decreased pursuant to Section 27 of Decree No. 37/1967 Coll., as amended, which the judge found to be an appropriate measure given the complexity of the expert report which had been drawn up with a considerable delay. The presiding judge discussed with all the judges of the district court the issues related to the appointment of an expert, i.e. the steps of the court in applications for prolongation of time periods for drawing up expert reports, decreasing remuneration, fines, providing information to parties on the intended steps of the court, etc.

### **Expert evidence and complexity of a case**

***Justification for extensive expert evidence, which fundamentally affects the length of proceedings, should also be viewed with regard to the complexity of the subject of the proceedings. In settlement of the common assets of spouses, the scope and structure of the assets subject to settlement is concerned. If there is a justified need in such proceedings to draw up several expert reports from different specific fields and the experts fulfil their duties within the set periods, unjustified delays are not concerned although the***

***proceedings are logically prolonged due to the fact that the file cannot be sent to several experts at once.***

A complainant addressed the Defender with a complaint about delays in proceedings for settlement of the common assets of spouses at the District Court in Zlín that had lasted for approximately three years at the time of lodging the complaint. In response to the complaints lodged by her, the presiding judge had advised the complainant that in his opinion there were no delays in the proceedings and the acts necessary in the case were made within reasonable periods, regardless of how vague they may often seem to the parties to the proceedings. The presiding judge had added that he considered civil court proceedings as such to be indeed lengthy, particularly as regards proceedings for settlement of the common assets of spouses, which however followed from the nature of the issue dealt with.

Apart from witness testimony and documentary evidence, the court had taken evidence also through expert reports provided by three experts appointed by the court for ascertaining the present value of movable assets and real estate, as well as the usual value of the joint rights and obligations associated with their membership of a housing cooperative. The court had also ordered supplementation of expert evidence to ascertain the defendant's ownership interests in companies. Given the demonstrated bias of one of the appointed experts, the court appointed another. The presiding judge had held that the case proceeded very smoothly, without any reservations about the conclusions of the expert reports and appeals against the remuneration of the experts who also worked reliably. Thus, he believed that the case concerned was a relatively frequent one where the expectations of the party were not proportionate to the complexity of the case and the present state of the Code of Civil Court Procedure.

The Defender noted certain delays in the proceedings at the point when an oral hearing was postponed for the purpose of appointing experts, where the experts were appointed as late as approximately six months later. However, taking into account the scope of the property subject to the proceedings in the case, the Defender agreed with the view of the presiding judge regarding the work of the experts and he could not find delays in the case due to inactivity of the court-appointed experts. In the Defender's opinion, this was contributed to by the fact mentioned by the presiding judge that objections to the conclusions of the expert reports or amounts of expert remuneration were not raised in the proceedings. It is often necessary to take expert evidence repeatedly, whereby the proceedings are further prolonged.

A judgment at first instance was issued in the case and an appeal lodged during the Defender's inquiry. The Defender therefore pointed out that given the total length of the proceedings to date (about four years), the court should proceed as quickly as possible and forward the case without delay to the appellate court.

**Undue length of proceedings on restriction of legal capacity, including the time of drawing up an expert report**

***According to the case law of the European Court of Human Rights, appropriateness of the length of court proceedings is examined on the basis of several criteria, including the relevance of the proceedings concerned for the complainant. It is necessary in some cases that courts proceed with special***

***care. This generally applies to cases in the timely resolution of which the complainant has a personal interest since they are essentially connected with his/her personal status or existence in law. Special attention should be paid to proceedings concerning legal capacity. The Defender stated that proceedings on legal capacity lasting three years should be regarded as unduly long, particularly when termination of the proceedings was a precondition for continuation of divorce proceedings which were important from the viewpoint of the complainant's personal interests. The drawing up of an expert report in a matter as sensitive as the restriction of legal capacity took over a year.***

The Defender dealt with the complaint of Mr Š. K. about delays in court divorce and legal incapacitation proceedings held at the District Court in Ostrava. The divorce proceedings were suspended in December 2000 due to the need to resolve preferentially proceedings concerning legal capacity, where delays occurred. The complainant considered himself to have been harmed as a result of the long-lasting court proceedings as he was unable to resolve his personal circumstances. He applied for a divorce at the District Court in Ostrava in 1997. However, his wife stated that he was incapable of providing for his own maintenance, legally incapable, including the divorce, and the judge therefore requested psychiatric examination of the complainant. Proceedings on legal capacity were initiated and a court-appointed expert was to examine the state of his health. The Defender ascertained the following facts during the inquiry:

The proceedings on legal capacity were initiated at the District Court in Ostrava on August 4, 2000, and a decision on the appointment of a guardian and an expert was made on the same day. The complainant lodged an appeal against the decision, on which the Regional Court in Ostrava made a decision on September 11, 2000, and the latter decision came into legal force on April 5, 2001. The file was sent to the expert on April 12, 2001, but she requested to be relieved already on June 1, 2001, as she had ceased acting as an expert. A decision on the aforementioned request and appointment of a new expert was made on March 13, 2002. The file was lent to the Regional Court in Ostrava from March 21, 2002 to April 8, 2002, and it was delivered to the expert for drawing up an expert report on April 11, 2002. However, the required expert report was not drawn up within the set period and the expert was urged to do so by the District Court on June 1, 2002. On July 1, 2002, the expert requested prolongation of the period, stating that the person subject to examination had appeared as late as June 24, 2002, following repeated reminders and he also pointed out that the medical records were not available to him as they were kept at the Ministry of Health for reasons unknown to the court. The court sent additional reminders on August 20, September 19 and November 29, 2002, and subsequently on February 3, 2003, but the expert repeatedly stated that the records were still unavailable to him. On the court's request as late as March 19, 2002, he stated that the records had been delivered to him, but requested with reference to the considerable volume of the records that he be provided with a one-month period for providing the expert report, which the court accepted and the expert report was indeed delivered to the court on May 14, 2003. On May 19, 2003, a decision was made on restricting Mr Š. K. in his legal capacity in that he was unable to act with courts, authorities and state institutions and was not authorised to lodge a proposal for examining his capacity for a period of three years; the judgment was not delivered to him.

The Defender stated, based on the inquiry undertaken that the proceedings on legal capacity lasting three years were unduly long, especially when termination of the proceedings was a precondition for continuation of divorce proceedings, which was important from the viewpoint of the complainant's personal interests. Although the court proceeded relatively smoothly in the proceedings except for the aforementioned time of inactivity, urging the expert at regular intervals to draw up an expert report, on the other hand it did not examine in more detail why the expert was unable to draw up the expert report within the period set or for what reason it was unable to obtain the medical records from the Ministry of Health to draw up the expert report. The court should have been more active in the matter and not have been satisfied only with the expert's information that the expert report could not be drawn up since the medical records of Mr Š. K. were not available to him as they had been requested by the Ministry of Health for unknown reasons (and it seemed to be impossible to borrow them to obtain a photocopy). It followed from an overview of the court's acts in the matter that the file had been delivered to the expert to draw up an expert report on April 11, 2002, and the report had been delivered to the court as late as May 14, 2003. The Defender did not accept the information from the presiding judge that the length of the proceedings had been adversely affected primarily by the objective fact that it had been impossible to obtain the expert report for the above-specified reason.

The presiding judge adopted measures in connection with the aforementioned case, primarily by acquainting the judges in the sector of guardianship at a working meeting with the conclusions of the inquiry of the Public Defender of Rights and reminding them of the case law of the European court of Human Rights concerning the appropriate length of court proceedings: it was also stressed that the length of proceedings is viewed based on the specific circumstances of the given case, one of them being the relevance of the proceedings concerned for the complainant. It was pointed out in this context that proceedings on legal capacity are among those proceedings that should receive special attention. It was stressed that it is also necessary to engage more actively in the process of expert evidence including assistance to the expert in obtaining the required documentation so as to ensure smooth and focussed administration of matters of this kind.

### **Interrelatedness of reports and expert's specialisation**

***If an expert report is submitted after a reminder from the court approximately two weeks after expiry of the period, such a short delay cannot be regarded as the expert's inactivity and hence a delay in proceedings caused by the expert. A file can be sent to one expert only; therefore, if the drawing up of an expert report is bound to the conclusions of the previous report, the second expert may not be reprimanded for an undue delay (provided that he/she submits the report within the set period).***

Complainants addressed the Defender in January 2006 with a complaint about delays in civil proceedings before the Municipal Court in Brno. The subject matter of the dispute held since 2003 consisted of the felling of trees growing on the neighbour's plot of land, which caused health problems for the complainant's son. The complainant objected to delays in the proceedings particularly since November 2003.

It followed from the statement of the presiding judge on the complaint that an expert in the area of air quality, dispersion calculations and emissions calculations and an expert in the area of allergology and immunology had been appointed for the case in early November 2003. The first expert was to deliver the expert report in July 2004 for the period from March to June, since it was intended to draw it up on the basis of measurements during the blossoming period of birch trees. The second expert was to draw up the expert report on the basis of the conclusions of the first expert's report. In June 2004 the expert applied for prolongation of the period due to long-term inability to work and the period was prolonged until the end of September 2004 based on the aforementioned application. The report was delivered to the court on October 11, 2004, after a reminder on October 7, 2004. The second expert drew up the report without delay in January 2005. Nevertheless, the parties subsequently proposed supplementation of both reports.

Within the inquiry, the judge administering the case was consulted on the possibility of penalties for delays caused by the expert's laxness through decreasing the expert fee or, in the case of repeated delays, deletion from the list of experts. The judge agreed but stated that it had been difficult even to find an expert in the required field for the given case and the case would be further prolonged should it be necessary to appoint another expert. She also stated that she usually dealt with minor delays in the drawing up of expert reports through telephone reminders, which she did not find necessary to record in the file. It was recommended to her that she make official records in similar cases for greater conclusiveness of the court's work. The judge also stated that she had prioritised the relevant case over approximately 175 older cases. She proceeds in this manner always when the proceedings are concerned with a threat to the health or allowance of minors.

The Defender stated that he had not ascertained unjustified delays in the proceedings. The delay between the appointment of the court-appointed expert and the drawing up of his expert report was caused primarily by the fact that the expert had originally intended to draw up the expert report on the basis of measurements carried out in the next blossoming period of birch trees, i.e. in the spring of 2004. From this point of view it was not decisive how long in advance the expert had been appointed. The report was finally drawn up in the form of a model calculation without the necessity of measurement on site. Given the expert's long-term inability to work, the period for drawing up the expert report was prolonged on his justified application and the report was actually drawn up and delivered following a reminder from the court approximately two weeks after expiry of the prolonged period, which, in the Defender's opinion, cannot be regarded as a delay. After submission of the second report, the complainant proposed supplementation of both expert reports (which were again inherently interrelated), whereby the proceedings were prolonged again.

### **Breach of duties by an expert appointed to draw up an expert report**

***If an expert appointed by the court to draw up an expert report fails to fulfil or breaches his/her duties in spite of the court's caution, he/she may be removed from the post and deleted from the list of experts by the body which appointed him to the post. It is also possible to consider decreasing the expert's remuneration for the delays caused in the proceedings, imposition of a procedural measure or checking his/her professional knowledge if the expert does not respond to the court's calls to deliver the report, to return the file, etc.***

The Defender dealt with a complaint of Mrs L. P. about delays in court proceedings for settlement of the common assets of spouses held before the Prague-East District Court. The action had been lodged already in 2002. Only four hearings took place from the lodging the court action to the submission of the complaint to the Defender (December 1, 2005): an expert was appointed in the last hearing which was held as long ago as November 4, 2004. The expert remained inactive in spite of repeated reminders from the court. The presiding judge did not provide a statement on the smoothness of the proceedings in response to the complaint since he did not have the file, which had been with the expert since June 23, 2005. The expert did not communicate with the court; he was asked to return the file but he still failed to deliver the report to the court. Within his inquiry the Defender requested the bodies of state administration of courts adopt stricter measures vis-à-vis the expert and provide a statement on the delays also in the preceding period. The expert did not return the court file even after imposition of a procedural fine of CZK 5,000 by the court and the court's request. He was therefore contacted by telephone at the initiative of the court and he informed the competent judge on March 24, 2006, that after discovering the file he had addressed the parties to the proceedings and their legal representatives and promised to draw up the expert report promptly. The expert delivered the file to the court in person with the drawn up expert report and a letter of apology on May 10, 2006. He explained that the court file had been lost in moving his worksite and that he had contacted the parties to the proceedings and their legal representatives immediately after discovering it. He also apologised for the highly inappropriate communication with the court. After the inquiry, the Defender did not find any other unjustified delays by the court; he found adequate the adopted remedial measures consisting in discussion of the matter with the expert in person in the consulting body of experts, reprimanding the expert, imposition of a procedural measure and checking his professional knowledge, as well as the measures aimed at ensuring smoothness of the proceedings adopted by the presiding judge, consisting of regular monthly reviews of the court's steps.

### **Request for a review of an expert's conduct in drawing up an expert report**

***Neither the bodies of state administration of courts nor the Ministry of Justice are authorised by law to review the correctness of expert reports drawn up as evidence in court proceedings. The content of an expert report can be reviewed only within proceedings on lodged appeals. The issue of bias of a judge can also be dealt with only in court proceedings.***

The Defender received several complaints through which citizens addressed him with complaints about the work of court-appointed experts in court proceedings. The Public Defender of Rights informed the complainants in these cases that under Act No. 349/1999 Coll., on the Public Defender of Rights, as amended, he is not authorised to intervene in the decision-making practice of courts or review the steps of court experts appointed by the court for drawing up expert reports. In these cases, the Defender can only review the manner of handling complaints by the bodies of state administration of courts and the Ministry of Justice, particularly the work of the state administration of courts in the sector of expert and interpreting work.

In this respect, the Defender dealt for example with the case of Mr V. P. who addressed him with a complaint about the work of a court-appointed expert in connection with the drawing up of an expert report in the area of healthcare –

psychiatry. He considered the expert report drawn up by the expert to be unreliable since the expert had included a number of inaccuracies (he had asked for the drawing up of a revision expert report in the appeal proceedings). He also pointed out that it follows from Section 16 of Act No. 36/1967 Coll. that the Minister of Justice shall establish advisory bodies in areas the nature of which justifies this. He had addressed in the matter the bodies of state administration of the Municipal Court in Prague and the Ministry of Justice, which informed him that they were not authorised by law to deal with factual objections to the content of an expert report since they were not authorised by law to do so and lacked sufficient professional knowledge. Advisory bodies have not been established for the area of healthcare under the existing legislation, neither at the Ministry of Justice nor at regional courts.

In this case the Defender explained to the complainant that the bodies of state administration of courts may not review the correctness of a submitted expert evaluation and, in a situation where the expert report was requested as evidence in court proceedings, any objections to its correctness must be raised within the proceedings in progress as the body which has requested the expert report as evidence (i.e. the court) must consider and assess the objections of a party to the proceedings prior to making a final decision in the case.

According to the applicable legislation, it is up to the presiding judge of the regional court (i.e. the body which appointed the expert in accordance with the above-cited Act) whether or not he/she will take any measures towards the expert in the sense of Section 20 of the cited Act in connection with the complaint, particularly in the case that he/she ascertains a breach of the legal regulations or some other serious maladministration caused by the expert.

### **Scope of the expert's qualifications**

***Only an expert in the area of economics, the sector of prices and estimates, with the relevant specialisation for the valuation of things of a certain kind is authorised to provide a statement on the price of a thing. He/she must demonstrate before appointment to the post of expert that he has not only the relevant background, including special training, i.e. that he/she has expertise in valuation methods, but also sufficient experience in the area. Where an expert without the aforementioned authorisation provides a statement on the price of a thing, such conduct can be considered to exceed of the scope of expert qualification.***

In this respect, the Defender received a complaint requesting assessment as to whether an expert with great expertise in the area of historic weapons may also opine on the value of the assessed item (price) in drawing up an expert report and whether the expert must have an economics background.

The complainant argued in the complaint that the bodies of state administration of courts had not duly handled the complaint about the expert who, although lacking authorisation to value historic weapons, did so and determined incorrectly the price of a historic rifle confiscated by a court executor within distraintment proceedings. He requested removal of the expert and his deletion from the list of experts.

The deputy presiding judge of the Municipal Court in Prague stated on the case that the expert had been appointed by the aforementioned court for the area of

various technical areas with a specialisation in stabbing and cutting weapons, historic armour, mechanical firearms and historic weapons and he may submit reports only within the aforementioned scope. The expert does not have expert authorisation in the area of economics – for valuing. Thus, if he drew up an expert report where he also opined on the price of a historic weapon, he could have exceeded the scope of his expert authorisation. The deputy presiding judge simultaneously requested the expert to provide a statement on the complaint as regards the part of his expert valuation through which he valued the historic weapon in excess of his expert authorisation. She finally informed the complainant after inquiring into the matter that the bodies of state administration of courts had found no grounds for penalising or removing the expert. In response to the question of whether an expert is authorised on the basis of his post to assess not only the origin, authenticity, composition and age of historic weapons, but also to determine their price, the deputy presiding judge of the court answered that she could not give an unequivocal answer. The court had held until then that an additional professional qualification – expertise in the area of economics, prices and estimates - needed to be recognised for an expert in order to determine prices. It is true that they strictly demanded a demonstrated economic background for the appointment of an expert in the area of economics, which in the given case seemed insufficient without historical knowledge. Such an economic expertise had not been recognised for the expert concerned. However, in her opinion, there was a rational element also in the complainant's interpretation that in a high professional knowledge in the area of history, armour and weapons, the professional ability of an expert to place a weapon in a certain historic period and determine its authenticity and composition (manufacture) should be accompanied by the ability to determine its value. Since this is one of the interpretation issues for which the Ministry of Justice is competent as the Minister of Justice is, under Act No. 36/1997 Coll., an entity under whose competence is placed the agenda of experts and interpreters and whose obligation is to steer, unify and check the correctness of the steps of the subordinate regional presiding judges, the deputy presiding judge of the court asked the Ministry of Justice for an opinion, advice and potential unification of the practice of the regional courts under whose competence the agenda of experts and interpreters falls.

The Ministry of Justice stated on the matter that only an expert in the area of economics, sub-area of prices and estimates, with the relevant specialisation for the valuation of things of certain kind is authorised to provide a statement on the price of an item. He/she had to demonstrate before appointment to the post of expert not only the relevant background, including special training, i.e. knowledge of valuation methods, but also sufficient experience in the area. Where an expert without the aforementioned authorisation provides a statement on the price of an item, such conduct can be considered to be exceeding the scope of expert qualification. However, it is not true that the appointment of an expert in the area of economics, the sector of prices and estimates should be conditional on demonstrating a general economic background (e.g. a construction industry background is more suitable for experts specialised in the valuation of real estate, while an industrial background is better for the valuation of cars).

### **3. Complaints of experts and interpreters**

As regards state administration in the sector of expert and interpreting work, the Defender dealt with complaints of candidates for expert work (the issue of appointment) and experts who had been removed. He also dealt with several complaints from experts who asked him to assess the steps of the bodies of state administration of a regional court in relation to the checking of the professional knowledge of experts. He also received complaints concerning appointment as a court-appointed interpreter or delayed payment of remuneration for expert and interpreting acts. In handling complaints of this kind, the Defender mostly limits himself to explaining the legislation or requesting a standpoint from the body of state administration of courts.

The exercise of state administration of courts is stipulated particularly in Act No. 6/2002 Coll. (the Courts and Judges Act) and the exercise of state administration in the sector of experts and interpreters also in Act No. 36/1967 Coll., on experts and interpreters. Experts are appointed (and removed from the post) on the basis of authorisation of the Minister (or, as the case may be, the authorised presiding judge of the regional court). It is a matter of administrative discretion, which cannot be reviewed: on the other hand, it should not be misused, i.e. certain evaluation criteria should exist and no person should be unreasonably disadvantaged (discriminated against). It should also be emphasised that there is no legal entitlement to appointment as an expert.

Based on an interpretation of Section 20 (a) of Act No. 36/1967 Coll., on experts and interpreters, as amended, the body that appointed an expert to his/her post is authorised to verify his/her qualification to discharge the post of an expert. When ascertaining that an expert has lost eligibility for the proper exercise of expert work, it is obliged to remove him/her from the post of expert and ensure his/her deletion from the list of experts.

The Public Defender of Rights wonders whether the new Code of Administrative Procedure (Act No. 500/2004 Coll.) should apply to the issues of the appointment and removal of experts. Based on the case law of the Supreme Administrative Court, it was necessary to apply the old Code of Administrative Procedure to the removal of experts already in the past. The Defender believes that application of the new Code of Administrative Procedure could be considered. The Defender pointed out the need to augment the legislation in this area in his 2005 Annual Report. The present legislation does not guarantee a transparent procedure in the appointment and removal of experts. There is also doubt as to which procedural provisions should be used in administering complaints about experts. Better regulation of the position and accountability of experts is therefore required.

On the basis of complaints from experts and interpreters and candidates for expert and interpreting work, the Defender has dealt with, for example, the following cases:

#### **Checking of the professional knowledge of experts**

***The Experts and Interpreters Act does not explicitly stipulate a duty of experts to undergo a check of their professional knowledge. The Defender did not ascertain that the procedure in checking experts taken by the Regional***

***Court in Prague is discriminatory or violates human rights since the experts were summoned for checking of their professional knowledge based on the date of birth exclusively for capacity reasons (the same criterion as by alphabet, place of residence, etc.).***

The Defender received complaints from experts in the area of economics, prices and estimates, real estate specialisation (some were older than 70). The experts asked the Defender to assess whether the fact that the Regional Court in Prague invited only experts born in the years 1941–7 to check their professional knowledge in the form of a written test constituted discrimination against the experts on grounds of their age. They also inquired whether it was discriminatory that only experts in the aforementioned field had been invited.

The Defender addressed in the matter the presiding judge of the Regional Court in Prague who stated that the management of the aforementioned court had decided in 2002 to check the professional knowledge of experts registered in the area of economics, prices and estimates, real estate specialisation. This is a sector where legislation is frequently amended. Verifying awareness of the applicable legal regulations and their proper application therefore seemed most desirable in the aforementioned group of experts. In addition, according to the presiding judge, it is a specialisation where the highest number of complaints about expert reports occurs. It also became apparent that many experts were refusing to submit demanding reports and many stated in 2002, when the results of tests were discussed, that they no longer submitted reports other than on the price of real estate and simple constructions.

Thus, in 2002, the professional knowledge of existing experts and applicants for appointment to the post of expert were verified in the form of a written test prepared by a commission of experts. Both new applicants and experts appointed many years ago were summoned at once for capacity reasons. Out of the 39 summoned experts, 17 appeared (an alternative date was set for those who duly apologised). It was decided that the 2002 practice would continue in the year 2003. It was agreed taking into account the capacity of the hall and the time available to the members of the advisory body that experts born in the years 1933, 1934 and 1935 would be invited in addition to the new applicants. It was furthermore decided that each member of the advisory body would prepare approximately 5 questions for the written test. The chairman of the advisory body would then set up the test in its final form. The tests were locked in a safe and distributed only at the time of the written test. The experts summoned for the written test received together with the invitation the question areas and a more detailed specification of the topics contained in the written test.

The presiding judge of the Regional Court in Prague also stated that they checked professional knowledge gradually based on the dates of birth in the individual years. The aforementioned criterion is, according to the presiding judge, identical to the use of the alphabet, place of residence, etc. Apart from the aforementioned experts and applicants, the court also invites for example those against whom a complaint has been lodged.

After assessing the ascertained facts, the Defender informed the complainant that the Experts and Interpreters Act does not stipulate a duty of appointed experts to undergo a check of their professional knowledge. It relies on the discretion of the Minister of Justice or, based on authorisation, the presiding judge of the relevant

Regional Court, to determine how to ascertain whether the expert still qualifies for appointment (among other things the condition stipulated in Section 4 (1) (b) of the cited Act, i.e. whether he/she has knowledge and experience in the area where he/she is to act as an expert).

Given that discrimination against court-appointed experts of a certain age through the examination held in 2003 was not confirmed (see particularly the information from the presiding judge that the experts were summoned based on the date of birth exclusively for capacity reasons), where no significant changes in the aforementioned practice occurred in the subsequent years, the Defender found the explanation of the matter provided by the presiding judge of the Regional Court in Prague to be sufficient and stated that he had not found the steps of the bodies of state administration of the Regional Court in Prague to be at variance with the laws and the principles of good administration.

### **Appointment as an interpreter**

***Appointment as a court-appointed interpreter is necessary and required particularly for the needs of courts and other state bodies in the Czech Republic. Interpreters are appointed on the basis of authorisation of the minister (or, as the case may be, the authorised presiding judge of a court). The number of appointed interpreters is derived from the demand, which is assessed regularly every year by the Ministry of Justice on the basis of information on the number of the individual interpreting acts that each regional court is obliged to deliver. Interpreters are appointed on the basis of authorisation of the minister (or, as the case may be, the authorised presiding judge of a court). It is a matter of administrative discretion, which, however, should not be misused, i.e. certain evaluation criteria should exist and no person should be unreasonably disadvantaged.***

The Defender received a complaint concerning the request of Mrs E. M. for assistance in the matter of appointment as an interpreter of the Swedish language. She had lodged an application for appointment as an interpreter to the Municipal Court in Prague but her application was not accepted with the explanation that a higher number of interpreters were registered at the court than were actually needed based on the number of the requested acts.

She had explained her reasons for lodging the application in another letter addressed to the Municipal Court in Prague. She particularly stated that the application had been lodged based on the wishes of her customers among Swedish enterprises registered in the Czech Republic and explained that her customers required officially recognised and stamped translations from an authorised translator. She had requested the granting of a translation and interpreting authorisation. She had been advised on her inquiry regarding the recognition of official translations that whether or not a translation prepared by her will be recognised in a specific matter by Czech courts depends on the decision of the court in the matter and the appointment as an interpreter who is allowed to use a state stamp is not and cannot be a basis for the exercise of employment or an occupation.

The Defender informed the complainant in an explanatory letter that appointment as a “court-appointed interpreter” is necessary and required particularly for the needs of courts and other state bodies in the territory of the Czech Republic.

Appointment as a court interpreter under Act No. 36/1967 Coll. does not and cannot cover the entire range of activities that is possible for people with highly qualified language abilities thanks to their expertise. Thus, Mrs M can carry on the occupation of translator or interpreter without being appointed as a court-appointed interpreter under the above-cited Act. The purpose of appointment as an interpreter is, in particular, provision for interpreting and translation work in proceedings before state bodies and for the needs of the aforementioned bodies, and is not and cannot be a basis for employment as further profession and practice cannot be based on appointment as a court-appointed interpreter. Appointment as an interpreter who is allowed to use a state stamp is not and cannot be a basis for employment or an occupation.

Appointment as a court-appointed interpreter (as referred to by the above-cited Act) does not apply to translation work (for companies, etc.), but rather interpreting in proceedings before courts and state bodies, and sometimes in privileged proceedings for the translation of a document. The fact that she does not become a court-appointed interpreter will not prevent her from carrying on her work, i.e. translating for companies and other entities. The problem mentioned by her in her complaint, i.e. that her customers require officially recognised and stamped translations from an authorised translator, cannot be resolved by appointing her as a court-appointed interpreter and keeping her in a list of interpreters at a regional court. The Defender stated that appealing against the rejection of an application for appointment as a court-appointed interpreter is not possible under the existing legislation and the Defender cannot change the decision of the presiding judge of the court on the rejection of her application.

### **Payment of expert and interpreter's fees**

***Failure to pay or delayed payment of remuneration for expert and interpreting acts must be resolved through a change in the structure of the state budget, i.e. by taking into consideration the growing mandatory expenditures of courts, as well as through a legislative regulation of the remuneration of experts and interpreters (e.g. stipulation of advance payments or limited possibility of appeals against the amount of remuneration).***

A complainant (a court-appointed interpreter) complained about the fact that some district and regional courts failed to pay him the granted remuneration for acts carried out and sign language interpreting, with the explanation that they lacked funds.

The Defender noted that a lack of funds for the payment of mandatory expenditures in the budget of a court is not rare. He has encountered similar cases earlier in his practice (delayed payment of remuneration for legal representation in criminal proceedings) and addressed in this respect some of the courts concerned and the Ministry of Justice of the Czech Republic. The Defender ascertained that the problem consists primarily in the structure of the state budget. The budget chapter of the Ministry of Justice has for several years grappled with a lack of funds intended for the area of "other substantive expenditures", primarily mandatory. The aforementioned expenditures have grown constantly since 1996 as a result of a growing number of cases dealt with, the requirements for translations and interpreting and, primarily, the growing remuneration tariffs of attorneys-at-law and court-appointed experts on the basis of legislative changes. However, the Ministry of

Finance of the Czech Republic does not take into account such increased costs in approving the budget. Increased mandatory expenditures are usually drawn at the expense of the financial means intended for the normal operation of courts.

The Chamber of Court-appointed Experts of the Czech Republic currently also requires a change in the regime of payments of expert and interpreter's fees within its comments on the concept of the reform of justice in the coming years. The Chamber earlier proposed introduction of an advance payment for obtaining evidence with a sufficient financial reserve or limitation of the possibility of appeal against granted expert fees. The Chamber of Court-appointed Interpreters and Translators of the Czech Republic has also addressed the Ministry of Justice with similar requirements for reform of remuneration.

The Defender is unable to resolve the situation directly within his mandate. The Defender advises the Chamber of Deputies of the problems with delayed payments of remuneration for *ex officio* defence, expert and interpreter's fees within the regularly submitted reports on his activities (most recently in the 2008 Annual Report).

## **4. Conclusion**

Given his existing findings obtained through dealing with complaints connected with the work of experts, the Public Defender of Rights considers it absolutely necessary to adopt a new legal regulation of expert and interpreting work. The Defender expects the new legislation, in particular, to detail the criteria for appointment as an expert, as well as a uniform and transparent regulation of the appointment procedure, detailing of the exercise of expert work, method of checking expertise and supervision over the actual exercise of experts' work.

The quality and timely drawing up of expert reports has an effect on the outcome and length of many court proceedings. The submission of other than a proper expert report may both prolong proceedings and harm the parties thereto. The Defender therefore finds it necessary to adopt a legal regulation that will ensure a more transparent manner of keeping records of experts, methods of checking their expertise and supervision of the actual exercise of their work. In this respect he expects a more active attitude of the bodies of state administration of courts in the sector of expert and interpreting work in investigating complaints against the inactivity of experts in drawing up expert reports or falling within the area of state administration of courts in the sector of experts and interpreters.

As for the method of exercise of expert work, the Defender holds that an expert should exercise his/her work impartially and independently, on his/her own behalf and at his/her own responsibility. He considers it necessary to introduce a duty for experts to conclude a policy covering third-party liability insurance with respect to acting as an expert or interpreter before he/she commences operation.

The Defender maintains that the Code of Administrative Procedure should apply to the procedural issues relating to the authorisation to carry on expert work (appointment of experts as well as decision-making on expiry of the right to carry out expert work). It is also necessary to define unambiguously in the new legal regulation which bodies are authorised to make decisions on suspension or expiry of the right to carry on expert work.

In the Defender's opinion, legal entitlement to appointment as an expert should exist upon fulfilment of the set prerequisites. It is obviously impossible to stipulate in the new legal regulation that an expert is entitled to the use of his/her services by public authorities in specific cases, but in the Defender's opinion, appointment as a court-appointed expert (or interpreter) - and hence registration in the relevant list – is by nature a record-keeping matter and there is no need to deny the appointment to a person who fulfils all the conditions for appointment as an expert.

Bodies for expert issues should be established in areas whose nature justifies this (e.g. in the area of healthcare) as the advisory bodies of the Minister of Health or the presiding judge of the regional court. The members of the advisory body would be appointed by the Minister of Justice from among experts. Establishment of the advisory bodies for expert-related issues is stipulated already in the existing legislation, but according to the Defender's findings, the institute is not used in practice in all cases where its use would be justified.

Brno, October 21, 2009

JUDr. Otakar M o t e j l  
Public Defender of Rights