Veřejný ochránce práv
OMBUDSMAN

Information about activities presented by the Public Defender of Rights

in accordance with the provisions of § 24 Paragraph 1 a) of Law No. 349/1999 Coll., the Public Defender of Rights Act, as subsequently amended (hereafter simply "*the Public Defender of Rights Act*")

for the period 1 January to 31 March 2011

A. Number of cases, investigations

I received a total of **2017** cases during the first quarter of 2011. Compared to the same period last year the number of cases in relation to public administration remained at the same level, while the number of cases outside my sphere of authority as defined by the Public Defender of Rights Act fell slightly (384 fewer cases).

In addition to this I also received **92** cases relating to protection against discrimination. The staff of my office made **22** systematic visits to supervise the restriction of personal freedom. In connection with my new powers (monitoring the detention of foreigners and correct expulsion procedures) I received **363** monitoring rulings.

In the public administration agenda I saw a higher number of cases relating to social issues. I was contacted particularly by **disabled pensioners** whose pension had been reduced (as a result of the amendment to Law No. 306/2008 Coll. [the introduction of "three-degree" invalidity]) and **families with children** whose social benefits had been withdrawn (as a result of the amendment to Law No. 347/2010 Coll. [so-called savings measures adopted by the Ministry of Labour and Social Affairs]). As regards protection against discrimination I received a greater number of cases from parents whose children were not permitted **to enrol at nursery school**.

B. Activities of the Defender

B.1 Public administration

The staff of my office continued their investigations begun on the office's own initiative into ministries' handling of compensation claims in accordance with Law No. 82/1998 Coll. Besides the **Ministry of Labour and Social Affairs** and the **Ministry of Transport**, in this quarter investigations were also initiated at the **Ministry of the Interior** and **the Ministry for Regional Development**. I am critical of the Ministry of Transport primarily due to the fact that it rejects compensation claims in all cases, while these rejection rulings are generally not properly justified. In all cases the Ministry for Regional Development rejects claims for the provision of adequate compensation for intangible damages. Such a practice is in direct contravention of

the practices of the other ministries, and is also a breach of the claims the Czech government makes to the European Court of Human Rights**.**

I also continue to monitor the adoption of gradual remedial measures to eliminate inaction on the part of the **Czech Social Security Administration**; I informed the Chamber of Deputies of this problem in a special report in November 2011.

With regard to public administration I issued the following recommendations and statements during the first quarter of 2011:

B.1.1 Means-testing of applicants for contributions towards the purchase of special aids

Authorities which perform means-testing of seriously disabled people applying for contributions towards the purchase of special aids are acting against the law. Neither the wording of the Social Security Act nor the implementary directive contain provisions which would render the provision of or level of benefits dependent on the income and means of the applicant. The contribution is granted not because a citizen is in pecuniary need, but because he or she is disabled. The decisive factors are the suitability of the aid and how such an aid is of benefit to the disabled person, not the "*poverty*" of the applicant. For more details, see http://www.ochrance.cz/tiskove-zpravy/tiskove-zpravy-2011/pomoc-statu-zdravotne-postizenym-neni-jen-pro-nemajetne/

B.1.2 The situation of families after the withdrawal of their supplementary social benefits

As a result of the abolishment of supplementary social benefits as of 1 January 2011, some families with unprovided-for children have found themselves in social difficulties, or have lost the source of income they depended on to live. These benefits were claimed by families whose total income did not amount to double the minimum required to live and were used to cover the costs of educating and nurturing their children. I therefore contacted the regional authorities with recommendations on how they should proceed in dealing with the impact of social savings measures and I also passed this information on to the Ministry of Labour and Social Affairs. For more details, see http://www.ochrance.cz/tiskove-zpravy/tiskove-zpravy-2011/ochrance-doporucil-uradum-resit-dopady-uspornych-opatreni/

B.1.3 The interpretation of objections to bias

As part of her investigation into one case the Deputy Public Defender of Rights came across a situation where an objection to bias was made not only against the head of a building authority, but also against the authority's secretary and the municipal mayor. The question was whether (or how) the higher (regional) authority should proceed in such a situation. In the first instance the regional authority dealt with the question of bias on the part of the mayor, and as it ruled that the mayor, as the person at the head of the administrative authority, was guilty of bias, it then decided to delegate the administrative proceedings to the building authority in the neighbouring municipality.

The Deputy Public Defender of Rights came to the conclusion that the regional authority had acted correctly. If an objection to bias is made not only against "*an authorised official person*" but also against that person's superiors, including the person at the head of the administrative authority (according to the Municipalities Act

this is the municipal mayor), it is **first necessary to issue a ruling on the person at the head of the administrative authority**, although this person does not actually make any decisions in such proceedings. That person's involvement in the proceedings is based on the ability to decide on the bias (or lack thereof) of subordinate officials.

B.2 Supervision of the restriction of personal freedom

The staff of my office completed their systematic visits to police cells and have since been visiting facilities in which children are housed (institutional and protective care facilities, medical facilities, etc.)

As part of my "*detention agenda*" I issued ***Recommendation on the Organisation of the Regime and Running of Police Cells*** (for more details, see http://www.ochrance.cz/ochrana-osob-omezenych-na-svobode/aktuality/).
My recommendation focused on the duties of the police officers on guard and also on the rights of people in custody. I emphasised that the police officers on guard should:

- individually assess which items are capable of endangering the life and health of people in custody (glasses and other medical aids should generally not be confiscated),
- provide copies of the advice relating to the rights of people in custody in police cells
- allow people in custody to choose their doctor.

B.3 Protection against discrimination

As part of the protection against discrimination agenda I issued ***Recommendations on Equal Access to Pre-school Education***. On the basis of individual complaints from parents whose children were not accepted into nursery school, the staff of my office studied the criteria of more than 50 different nursery schools. Some of them are wholly legitimate (e.g. favouring older children), while others need to be weighed up together with other circumstances and some do actually constitute unequal treatment (disabilities). For more details, see http://www.ochrance.cz/discriminatione/doporuceni-ochrance/

The staff of the *Equal Treatment Department* also began an investigation focusing on discrimination in job vacancy advertisements.

C. Legislative recommendations and special powers of the Defender

C.1 Orphans' pensions

In relation to the repeated legislative recommendations contained in the Annual Reports of the Public Defender of Rights, I proposed to the Chamber of Deputies that as part of its discussions of the so-called "*small pension reforms*" (Parliamentary Press No. 277) it should incorporate into the law the entitlement to an orphan's pension amounting to at least the minimal guaranteed sum for those orphaned children whose parents at the time of death did not meet the conditions for

entitlement to a retirement pension or invalidity pension (guaranteed orphan's pension).

The government's draft of the law which amends Law No. 155/1995 Coll., the Pension Insurance Act, as subsequently amended, was discussed by the Social Policy Committee as part of its second reading. I exercised my right to attend a meeting of the body of the Chamber of Deputies, informed the committee members of my legislative recommendations and proposed the solution to the issue of the minimal orphan's pension.

Considering the fact that **discussion of the amendment to the Pension Insurance Act is planned for the 16th meeting of the Chamber of Deputies**, I would like to ask the ministers to pay heed to these legislative recommendations and take them into account as part of their authority to file amendment proposals to draft laws.

C.2 Unemployment benefits

The amendment to Law No. 435/2004 Coll., the Employment Act, is currently being discussed as part of the 2011 Social Reforms. When commenting on the draft amendment I responded to my recent practical findings in relation to the negative impact of Law No. 347/2010 Coll., which amends certain laws in relation to savings measures adopted by the Ministry of Labour and Social Affairs, on job seekers. My repeated reservations about the new law (§ 44a of the Employment Act) relate to situations where job seekers who are due severance pay from their previous job are not entitled to unemployment benefits. The Employment Act does not differentiate whether or not the employee in question has actually been paid severance pay. All that is needed to refuse a claim for unemployment benefits is that the employee is entitled to severance pay. In many cases this means that a job seeker receives neither severance pay nor unemployment benefits. This is particularly true of situations where it was the employee who terminated the employment contract as wages due had not been paid. I drew attention to these problems back in October 2010 (during discussion of the so-called "*savings package*"). In the discussion of the changes proposed as part of the 2011 Social Reforms I suggested that § 44a of Law No. 435/2004, the Employment Act, as subsequently amended, be annulled. However, the Ministry of Labour and Social Affairs did not accept my suggestion.

I would therefore like to suggest to ministers that as part of their authority to file amendment proposals to draft laws they propose that the provisions of § 44a of the Employment Act be annulled. This step may be taken both during the course of discussions on the draft law, which amends certain laws in relation to savings measures adopted by the Ministry of Labour and Social Affairs (**Parliamentary Press No. 315, scheduled for discussion at the 16th meeting of the Chamber of Deputies**) in relation to the abolition of Law No. 347/2010 Coll. by the Constitutional Court, and also during the course of discussions on the 2011 Social Reforms, which will probably (if approved by the government) **be passed on to the Chamber of Deputies in May 2011**.

C.3 Limiting the period for which contributions towards housing and supplementary payments towards housing are provided

As part of the 2011 Social Reforms (the draft law which amends certain laws in relation to the unification of payments of non-insurance social benefits) the Ministry of Labour and Social Affairs proposes limiting the period for which contributions towards housing and supplementary payments towards housing are provided to 60 calendar months for the last 10 years. This tightening-up of the conditions governing entitlement to housing benefits is only not applicable in the case of flats for which a flat payment contribution was provided, special-purpose flats, and flats housing people over the age of 75.

I expressed my disagreement with the proposed restriction on housing benefits. Although the impact of the new law will not be felt by benefit recipients for at least 5 years, these conditions cannot be tightened up in a situation where there is a lack of any effective means of working with people at risk of social exclusion (particularly if there is no network of low-rent social housing or other subsidised social service). Otherwise this will place low-income families with children at risk; the children are in danger of being removed from the care of their parents and ordered into institutional care on the grounds of inadequate living conditions, which is in violation of the constant practice of the European Court of Human Rights and the Supreme Court. I also drew attention to the fact that the law will also have an adverse impact on invalids (not all live in special-purpose housing) and senior citizens under the age of 75 who are practically unable to increase their income by their own means.

If the draft law is approved by the government, **it will be passed on to the Chamber of Deputies**, evidently **in May 2011**. I would therefore like to propose that when discussing the draft law which amends certain laws in relation to the unification of payments of non-insurance social benefits ministers request that the proposed provisions of § 35a of the Act on Assistance in Material Need and the provisions of § 27a of the State Social Benefits Act be omitted.

D. Status and authority of the Public Defender of Rights

D.1 Implementation of the Defender's authority in relation to the government

I came to an agreement with the Prime Minister regarding the implementation of my authority in relation to the government. The Public Defender of Rights may turn to the government in basically three groups of cases. The first involves situations where one of the ministries fails to adopt adequate remedial measures; in the second group of cases the Defender informs the government about systemic shortcomings in the activities of ministries (§ 20 Paragraph 2 of the Public Defender of Rights Act); in the third category of cases the Defender recommends that the government issue a legal enactment (§ 22 of the Public Defender of Rights Act).

As agreed, in the first group of cases I will be presenting the government with my findings in the form of informational material. In the second and third groups I will be presenting the government with the matter in question with no comments procedure, with the proviso that the government will discuss it in my presence.

I appreciate the Prime Minister's constructive approach towards the Public Defender of Rights Act, as when material has been presented to the government in the past there have been problems coordinating the Public Defender of Rights Act with the government's rules of procedure.

D.2 Disciplinary powers of the Defender in relation to presiding judges

The Public Defender of Rights continues to have the right to propose the initiation of disciplinary proceedings with presiding judges and deputy presiding judges. This was ruled upon by the Constitutional Court, when it rejected as unjustified the proposal of the judicial disciplinary panel of the Supreme Administrative Court to annul the powers granted to the Defender in 2008.

The Constitutional Court did not concur with the stance of the Supreme Administrative Court and on 15 March 2011 issued a resolution ruling that the right to propose the initiation of disciplinary proceedings is fully in compliance with the role of the institute of the Public Defender of Rights. "*If the exercise of judicial administration by presiding judges and deputy presiding judges is in violation of the law, it does not comply with the principles of a democratic legally consistent state and the principles of good administration, or, if assessed in terms of inaction, the active legitimation of the Public Defender of Rights in proceedings relating to disciplinary responsibility helps to protect basic rights and freedoms. The exercise of this right is in no way a violation of the principles covering the division of power and judicial independence*", stated the Constitutional Court in the justification for its resolution.

Therefore the Defender may continue to take disciplinary action against court officials.

D.3 Lawsuit to protect the public interest

I believe that the Defender should have the authority to file lawsuits to protect the public interest. He currently only has the authority to request that the Supreme Public Prosecutor file a lawsuit to protect the public interest. However, the Defender has no direct legitimate power in this respect.

The Chamber of Deputies is currently discussing the amendment to the Judicial Administrative Procedure Code (Parliamentary Press No. 319, **scheduled for discussion at the 16th meeting of the Chamber of Deputies**).

It is my opinion that the current filter, through which the Defender may only request that the Supreme Public Prosecutor file a lawsuit, is unjustifiable.

In the course of my work I come across situations where the unlawful administrative practices of authorities violate not only the subjective rights of the claimants who contact me, but also the public interest in monumental protection, environmental protection, and lawful administrative procedures while respecting the judicature of the Supreme Administrative Court and the Constitutional Court (in the case of widespread unlawful administrative practices which constitute an infringement or violation of basic rights or freedoms). In cases where all the following three conditions are met, i.e. (1) violation of the rights of claimants, (2) protection of the public interest, and (3) non-interference with the legal certainty of third parties who are in good faith, I believe that there may be a serious public interest in the filing of a lawsuit. Such a procedure is in compliance with the tasks of the Public Defender

of Rights as defined by the provisions of § 1 Paragraph 1 of the Public Defender of Rights Act.

In other countries (Poland, Slovenia, Bulgaria) it is normal for the ombudsman to have the authority to initiate judicial proceedings involving the compliance of administrative acts with the public interest. I would therefore consider it expedient for the Public Defender of Rights to have a similar sphere of authority to that of some foreign ombudsmen.

D.4 Incorporating the Defender into the Constitution

I commented on the draft amendment to the Constitution (governing the introduction of the so-called sliding mandate of ministers and the extension of the authority of the Supreme Control Office). I proposed that the Constitution be amended to include a new article, Article 97a, which would govern the status, sphere of authority and powers of the Public Defender of Rights.

The Public Defender of Rights has relatively substantial powers and often interacts with constitutional bodies (the right to join meetings of the Chamber of Deputies at any time, assuming that the case is in his sphere of authority - § 24 Paragraph 3 of the Public Defender of Rights Act), the right to recommend that the government amend a law (§ 22 Paragraph l of the Public Defender of Rights Act), right to initiate proceedings before the Constitutional Court (§ 64 Paragraph 2 f) of Law No. 182/1993 Coll., the Constitutional Court Act, as subsequently amended), or to attend such proceedings as an accessory participant (§ 69 Paragraph 2 of Law No. 182/1993 Coll., the Constitutional Court Act, as subsequently amended), the right to propose the initiation of proceedings in cases involving judges and state prosecutors and to attend such proceedings (1 Paragraph 7 of the Public Defender of Rights Act).

The absence of constitutional provisions governing the institute of the Public Defender of Rights is a regrettable constitutional deficit which should be rectified. I have therefore proposed a general outline for these provisions (in a similar manner to the Supreme Control Office), with the proviso that other questions will be (and already are, in fact) covered by an ordinary law.

The incorporation of the institute of the Public Defender of Rights into the constitution stems from the fact, amongst others, that in the majority of EU member states the institute of the ombudsman is governed by the constitution (nearby countries include the Slovak Republic, Austria, Hungary and Poland; other European countries are, for example, the Netherlands, Sweden, Denmark, Finland, Spain, and Portugal). The constitutional texts of the majority of these countries also generally only outline the ombudsman's authority and the means used to elect the ombudsman, while most other matters are treated in the law.

The Ministry of Justice did not accede to my proposal, justifying its refusal as follows: "*Considering how easy it is to reach a political consensus in the Czech Parliament, the petitioner of the act has opted for the gradual amendment of the Constitution of the Czech Republic*".

If a consensus were to be reached as regards the incorporation of the institute of the Public Defender of Rights into the constitution during the discussions on this amendment to the Constitution, I believe it would help to rectify the constitutional deficit described above. Constitutional regulation would also bestow greater legitimacy on the institute of the Public Defender of Rights and would raise its status

in the legal system. The authority and esteem which a public opinion poll has shown that the Public Defender of Rights has long deserved would also be reflected *de constitutione*.

Brno, 22 April 2011

JUDr. Pavel Varvařovský
Public Defender of Rights