



Veřejný ochránce práv

OMBUDSMAN

**Information about Activities Submitted 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 April to 30 June 2011

A. Number of cases, investigations

I received a total of **1 699** cases in the second quarter of 2011. Compared to the same period last year the number of cases in relation to public administration rose (by 186), while the number of cases outside my sphere of authority as defined by the Public Defender of Rights Act remained at basically the same level (II.Q 2011 [621]; II.Q 2010 [652]).

In addition to this I also received **58** cases relating to protection against discrimination. The staff of my office made **13** 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 **429** monitoring rulings, while my co-workers carried out **3** escorts, during which they monitored the proper exercising of deportation procedures.

In the public administration agenda I again saw a higher number of cases relating to social issues. I was contacted particularly by people filing cases against the Czech Social Security Administration (ČSSZ) and people in material need. There was also a sharp rise in the number of complaints relating to building proceedings or delays in judicial proceedings. As regards the protection against discrimination agenda I received a higher number of cases in which claimants objected to discrimination in access to education.

B. Activities of the Defender

B.1 Public administration

During the second quarter of 2011 I issued the following recommendations and statements in relation to public administration:

B.1.1 On the acquisition of recordings to be used as evidence in administrative proceedings

I believe that in justified cases it is permissible that an audio or video recording taken without the consent of the detainee be used as proof in administrative

proceedings, assuming compliance with the provisions of § 5 Paragraph 2 e) of the Personal Data Protection Act (Law No. 101/2000 Coll., as subsequently amended).

I dealt with a complaint concerning the procedure adopted by the Offences Review Committee of the Municipal Authority of Brandýs nad Labem – Stará Boleslav and the Central Bohemian Regional Authority in offence proceedings in accordance with the provisions of § 49 Paragraph 1 c) of the Offences Act. During the proceedings, as proof of a physical assault the claimant presented a video recording taken by an industrial camera monitoring the area in front of her house and the neighbouring house. The records showed that they had not installed the camera system to record their neighbours or other people and their behaviour, but in order to acquire proof for possible future offence or criminal proceedings as in the past there had allegedly been a forced break-in on their property.

The administrative body took the proposed evidence into account, but in its opinion the recording did not adequately show the course of events and it was not possible to definitively ascertain whether the persons shown in the recording were actually the claimant and the defendant. The proceedings were halted, while the Central Bohemian Regional Authority rejected the claimant's appeal as inadmissible and subsequently declared that there was no reason to initiate review proceedings. The fundamental issue here is that in the Regional Authority's opinion, the recording was taken in contravention of the provisions of § 12 of the Civil Code, i.e. without the consent of the defendant.

As the administrative bodies did not concur with my legal assessment of the case, I proceeded to issue a final statement in which I stated that the acquisition of a video or audio recording as evidence to be used in administrative proceedings should not be judged primarily in accordance with the provisions of § 12 of the Civil Code, but most of all in accordance with the Personal Data Protection Act. The provisions of § 5 Paragraph 2 e) of the Act grant an exception to the general obligation to process the personal data of subjects with the subjects' consent in cases where it is essential to assure the protection of the rights and interests of the data administrator, recipient or other appropriate entity as granted by the law; however, the processing of such personal data must not be in violation of the subject's right to the protection of his or her privacy and personal life. In my opinion this exception may also be extended to cover the acquisition of a video or audio recording for the purposes of administrative proceedings.

The administrative bodies did eventually accede to my reasoning. The Ministry of the Interior promised to inform representatives of the regional authorities of my conclusions at a consultation day for staff dealing with the offences agenda.

For more, see <http://www.ochrance.cz/stiznosti-na-urady/stanoviska-ochrance/stanoviska-prestupky/>

B.1.2 On the procedure adopted by the Ministry of Agriculture in the methodical management of regional authorities in proceedings concerning the existence of a watercourse

In the past my deputy investigated a case which included the question of whether or not the claimant's land included a watercourse as defined by the Water Act (Law No. 254/2001 Coll., as subsequently amended). The investigation related to

the methodical management performed by the Ministry of Agriculture with regard to this aspect of state administration.

The Deputy Defender reprehended the Ministry, referring to a series of rulings issued by administrative tribunals (including the Supreme Administrative Court), stating that it urges water authorities to initiate proceedings concerning the existence of a watercourse only in cases where they have subjective doubts concerning the existence or non-existence of a watercourse. This results in water authorities initiating proceedings at their own discretion.

The Deputy Defender, however, stated that the decisive factor should be objective doubts based on evidence, including proof presented by the person requesting that proceedings be initiated in accordance with the provisions of § 43 Paragraph 2 of the Water Act. Neither the rule of law nor the judicature of the courts grant authorities free will in considerations of whether or not proceedings should be initiated. For more details, see http://www.ochrance.cz/fileadmin/user_upload/STANOVISKA/stavby_a_reg_rozvoj/3312-09-KC-ZSO.pdf

The Ministry annulled its methodical instructions and informed the regional authorities of my deputy's conclusions at regular training sessions held for water authority staff.

B.1.3 On the state's liability for damages in cases where the Czech Social Security Administration incorrectly deducts money from pensions

During the course of my work I repeatedly come across cases where the Czech Social Security Administration (ČSSZ) has acted incorrectly in deducting money from pensions on the basis of a court ruling or execution order. I am particularly contacted by people complaining about the actions (or inaction) of ČSSZ in its deductions of money from pensions, which has an adverse impact on their legal sphere. In particular this concerns the following

- Deducting money from pensions several months late
- Unlawfully depositing deductions at a time when the money should have been paid to the executor or beneficiary
- Failure to stop deducting money when a debt has already been paid off.

Such actions can be considered incorrect procedure as regards the deduction of money from pensions. In cases where deductions are made late or are unlawfully deposited, it can happen that on the basis of an execution order (and I have already come across cases like this) the appointed court executor adopts another form of execution which has a much harsher impact on the person's legal sphere (e.g. the sale of movable assets or, in extreme cases, the sale of property). The consequences of the pension payment body's wrongful actions are then truly fatal for the social security payer.

During the course of my work I urge ČSSZ to change its procedures so as to comply with the law. However, I also inform the social security payer (recipient of the pension) that it is possible to file a claim against ČSSZ for damage compensation or appropriate compensation in accordance with Law No. 82/1998 Coll., on liability for damage caused through the exercising of public power as the result of a ruling or incorrect official procedure and on amendment to the Act of the Czech National Council No. 358/1992 Coll., on notaries and notaries' activities, as subsequently

amended (hereafter Law No. 82/1998 Coll.). Decisions regarding entitlement to damage compensation or appropriate compensation are made as part of the so-called preliminary exercising of the claim procedure by the Ministry of Labour and Social Affairs.

So far the authorities in question (the Ministry of Labour and Social Affairs, ČSSZ) have not contested the possibility of filing a claim for damage compensation in accordance with Law No. 82/1998 Coll. in cases where ČSSZ could be at fault in deducting money from pensions. These days, however, I am contacted by claimants who feel that they have been damaged by the procedure adopted by ČSSZ in deducting money from pensions. The alleged malpractice on the part of ČSSZ lay in the fact that ČSSZ continued to make deductions even after the delivery of a “*resolution on the cessation of a ruling*”. Then, after ČSSZ had ceased to act incorrectly and stopped deducting money from the pension, at my recommendation the claimant contacted the Ministry of Labour and Social Affairs with a request for appropriate compensation in accordance with the provisions of § 31a of Law No. 82/1998 Coll.

However, the Ministry rejected the claimant’s application for the preliminary exercising of the claim stating that ČSSZ had not acted authoritatively and thus the application of Law No. 82/1998 Coll could not be considered.

I do not believe that this line of reasoning is correct, as ČSSZ undoubtedly does act in an authoritative manner towards the social security payer (in that it acts like an administrative authority) and, what is more, both the specialised literature and the court judicature are both of the opinion that “*incorrect official procedure consists of any kind of activity related to a state body’s exercising of its powers if the exercising of such powers constitutes or results in a breach of the rules prescribed by the laws in relation to its actions or constitutes or results in a breach of the order designated by the nature and function of the procedure*”. For more details, see http://www.ochrance.cz/fileadmin/user_upload/STANOVISKA/socialni_zabezpeceni/5899-10-TNC-ZSO.pdf

In the individual investigations I am carrying out against it the Ministry stands by its opinion, and therefore I intend to take this matter directly to the Minister of Labour and Social Affairs.

B.2 Supervision of the restriction of personal freedom

In May 2011 I, like the Public Defender of Rights in the past, repeatedly drew the public’s attention to the fact that the childcare system is still fragmented, with some children suffering harm as a consequence. In my opinion we need to try to move from institutionalised care towards the establishment of small family-type facilities which would be able to respond flexibly to children’s needs. There is also a lack of systematic social work with families which would improve the child’s chance to return home from institutional care.

As part of my supervision of the restriction of personal freedom, this year I have decided to carry out a comprehensive review of childcare and adherence to the rights of the child. My co-workers have therefore been focusing on facilities which house children placed there either on the basis of a court ruling or at their parents’ request. These facilities are as follows:

- School facilities: children’s homes, homes with a school, educational institutions, diagnostic institutions
- Medical facilities: psychiatric clinics, baby institutions;
- Facilities for the social and legal protection of children.

The visits made so far confirm the conclusion that the childcare system is hampered by “*ministerial departmentalism*” (childcare and the individual types of facilities fall under three different ministries – the Ministry of Education, the Ministry of Health, and the Ministry of Labour and Social Affairs). One of the aims of these systematic visits is to compare how children are treated in the different types of facilities and to formulate general standards which should be respected regardless of whether the facility in question is an educational facility or a medical facility.

B.3 Protection against discrimination

During the last quarter I focused on the issue of discrimination in access to employment. My co-workers analysed 12 044 classified advertisements published on the largest job advertising site in the Czech Republic, www.prace.cz. The analysis showed that discrimination is not uncommon in job advertisements. One in six classified advertisements contained one or even more discriminatory requirements for job applicants. Many candidates who complied with the qualification conditions were excluded from the chance to apply for the vacancy beforehand by the employer.

The most common forms of discrimination in job advertisements were due to age and sex, although there were also classified advertisements which discriminated against the disabled or advertisements that were discriminatory on the grounds of citizenship or nationality. Another matter I considered problematic was the requirement that applicants prove their good character by presenting a “*clean*” extract from the criminal records files.

For more, see

http://www.ochrance.cz/fileadmin/user_upload/DISCRIMINATION/Doporuceni/Doporuceni-Inzerce.pdf

C. Legislative recommendations and special powers of the Defender

C1. Government statement on the population register information system

On 13 April 2011 the government adopted the proposal I filed in relation to the flagging of incorrect personal data in the population register information system. In future, children who have been adopted on a permanent basis should no longer be contact by authorities, courts or the police in matters concerning their biological parents. This should prevent any insensitive interference into the privacy of adopted children.

Back in 2009 the Public Defender of Rights proposed to the Ministry of the Interior that incorrect data in the population register should be flagged as inaccurate; however, the matter was not rectified, even though to do so does not require any

change to the law. The Office for Personal Data Protection also tried to push forward a similar change. I therefore contacted the government with a proposal that it pass a resolution obliging the Ministry of the Interior to put in place a technical solution ensuring that personal data suspected of being incorrect or out of date be properly labelled as such by 30 September 2011. I also proposed that to speed up the transfer of information courts should be given remote access to data concerning adoption. The government passed a resolution approving both these proposals.

C.2 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 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 Ministry of Labour and Social Affairs, whose representative I repeatedly discussed this matter with, presented the government with an analysis of the consequences of its refusal to grant an orphan's pension on the social situations of individual types of families, in which the Ministry assessed the legal and financial impact of the introduction of a guaranteed orphan's pension, and proposed that the social situation of orphans who are not entitled to an orphan's pension under the current laws be resolved.

The essence of the Ministry's proposal is that the new entitlement to an orphan's pension arises if as of the date of death the policy holder has not held the insurance policy for a sufficient length of time to become entitled to an invalidity pension as stipulated by the Pension Insurance Act, but has held the policy for at least half of this amount of time.

The amount of orphan's pension will be calculated in accordance with the existing law, with the proviso that in percentual terms it must not be lower than 40 % of the minimal percentage, which amounts to 770 CZK. The minimal orphan's pension will therefore amount to 2 538 CZK per month.

The appropriate proposed amendment implementing this measure should be applied by the Chamber of Deputies as part of the second reading of the amendment to Law No. 187/2006 Coll., the Sickness Insurance Act, as subsequently amended, which should be discussed by the Chamber of Deputies this autumn.

C.3 Unemployment benefits

Part of the so-called 2011 Savings Package included discussion of the amendment to Law No. 435/2004 Coll., the Employment Act. As regards the implementation of comments to the amendment I responded to topical finds relating to the negative impact Law No. 347/2010 Coll., which amends certain laws in relation to the savings measures in the competency of the Ministry of Labour and Social Affairs, would have on job-seekers.

My repeated reservations concerning the new law (§ 44a of the Employment Act) relate to situations where a job-seeker who is entitled to severance pay from a previous job is not entitled to receive unemployment benefits. The Employment Act

does not differentiate between whether or not the former employee has been paid severance pay. All that is required to refuse unemployment benefits is that the former employee is entitled to severance pay. In many cases this means that the job-seeker does not receive severance pay or 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 therefore welcome the fact that the Social Committee of the Chamber of Deputies accepted the proposed amendment (Parliamentary Press 315/1), which is in response to my comments. It should now apply that “*a job-seeker who becomes entitled to unemployment benefits but who has not been paid severance pay, surrender, or a leaving allowance following the termination of employment or service on the next pay-day specified for the employer to pay the wage or salary or on the day on which the employment or service terminated should be paid compensation by the Employment Office for the period between the date on which the job-seeker is registered as seeking work and the expiry of the period specified in § 44a*”. For more, see <http://www.psp.cz/sqw/text/tiskt.sqw?o=6&ct=315&ct1=1>.

The proposed amendment is capable of eliminating the injustice caused by the current law. I therefore recommend that the Chamber of Deputies approve the amendment of the Social Committee at the second reading.

C.4 Lawsuit to protect the public interest

As I mentioned in my previous quarterly report, I assume that the Defender should have the power 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, I have no direct legitimate power in this respect.

I therefore welcome the fact that during discussion of the amendment to the Code of Administrative Justice (Parliamentary Press No. 319), the third reading saw the approval of the proposed amendment of the Constitutional Committee of the Chamber of Deputies, which would allow the Public Defender of Rights to file lawsuits to protect the public interest, provided that it could be proven that there were sufficient public interest in the filing of such a suit (§ 66 Paragraph 2 of the Code of Administrative Justice).

C.5 Regulation of video-lottery terminals

The Constitutional Court heard my opinion (as a secondary party to the proceedings) and rejected the Ministry of the Interior’s proposal to annul the provisions of Article I of generally binding directive of the Municipal Authority of Chrastava No. 5/2009, on the designation of places in which interactive video-lottery terminals are permitted (ILV).

The Constitutional Court concluded that the municipality is entitled to regulate the places in which ILV may be installed in its own sphere of authority and in a ruling dated 14 June 2011 (File No. Pl. ÚS 29/10) stated that the municipality’s efforts to

regulate the placement of video-lottery terminals do not infringe upon the competency of the Ministry of Finance. Therefore, the municipality, if it feels there is a local need to do so, may issue a generally binding directive to regulate the placement of video-lottery terminals within the town. The Constitutional Court found that the regulation of the placement of ILV falls under the municipality's legislative competency, in accordance with the provisions of a special law as also defined by § 10 d) of the Municipalities Act, and in the view of the Constitutional Court the enforcement of such powers and competency by the municipality does not constitute an unlawful infringement of state power or state administration.

For more, see <http://www.usoud.cz/clanek/tz-33-11>.

Brno, 19 July 2011

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