Public Defender of Rights
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 July to 30 September 2011

A. Number of cases, investigations

I received a total of **1607** cases in the third quarter of 2011. Compared to the same period last year the number of cases in relation to public administration rose (by 491), while the number of cases outside my sphere of authority as defined by the Public Defender of Rights Act remained at roughly the same level (III.Q 2011 [987; 61.4%]; III.Q 2010 [695; 62.3%]).

In addition to this I also received **56** cases relating to protection against discrimination. The staff of my office made **9** systematic visits to supervise the restriction of personal freedom. In connection with monitoring the detention of foreigners and correct expulsion procedures I received **589** monitoring rulings, while my co-workers carried out **1** escort, during which they monitored the proper exercising of deportation procedures.

In the public administration agenda the structure of cases received remained similar to previous periods (social security – 322; healthcare – 96, building proceedings, town planning – 93).

B. Activities of the Defender

B.1 Public administration

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

B.1.1 Procedure adopted by the Ministry of Finance in permitting gambling

As part of the investigations into the procedure adopted by the Ministry of Finance permitting gambling using so-called other technical gambling facilities similar to the classic gambling machines (particularly video-lottery terminals), I issued a report on my investigation, which I sent to the Minister of Finance. I consider the

procedure adopted by the Ministry to be unlawful in a number of respects. In permitting this form of gambling the Ministry has failed to properly apply the provisions of the second part of the Lotteries Act (Law No. 202/1990 Coll., as subsequently amended) and has not respected the generally binding municipal directives regulating the operation of gambling machines. It has also permitted gambling in which the highest stake for one game or the highest hourly loss are in violation of the limits stipulated by the provisions of § 17 Paragraphs 4 and 6 of the Lotteries Act. Moreover, for a certain length of time it failed to ascertain whether the placement of technical gambling facilities does not lead to a violation of the ban on the operation of such equipment in schools, school facilities, social and medical facilities, the buildings of state authorities and churches, as well as in the vicinity of these buildings (§ 17 Paragraph 11 of the Lotteries Act). Although permits for the operation of gambling machines are issued for a maximum of one year (§ 18 Paragraph 3 of the Lotteries Act), the Ministry permitted gambling using other facilities for a period of 10 years or more.

The Minister of Finance de facto rejected my conclusions. It sees no reason for adopting remedial measures and annulling rulings which were issued in contravention of the Lotteries Act. In its rulings on the Interior Ministry's proposal to annul a generally binding directive issued by the municipal authority of Kladno (File Ref. No. Pl. ÚS 22/11), the Constitutional Court explicitly stated:

"*If, however, the Ministry of Finance does not initiate review proceedings in relation to the existing generally binding directive, **it is in violation of the municipality's constitutionally guaranteed right to local government**. In these proceedings, as the Constitutional Court has stated in previous rulings, the existence of the permit must be judged with regard to other constitutionally defined principles, but essentially the operators of such facilities must be aware of the existence of the provisions of § 43 of the Lotteries Act, and therefore the fact that this permit may be repealed at practically any time if circumstances arise which preclude the operation of the facilities during the period for which the permit is valid*".

Owing to the Minister of Finance's refusal, I will be compelled to issue my final statement on the matter, in which I will request the Ministry of Finance to annul all rulings issued in contravention of the Lotteries Act in accordance with the provisions of § 43 of the Lotteries Act.

B.1.2 Functionality of the Visapoint system

As part of several cases I found that for certain destinations (the Ukraine, Kazakhstan, Uzbekistan and Vietnam) the Visapoint system does not allow users to register to submit applications for long-term visas or short-term/permanent residency. On the basis of these cases, from 1 April 2011 my co-workers began to continuously monitor the functionality of the Visapoint system.

It is essential that the Visapoint system works properly as the Czech embassies de facto reject applications for long-term or permanent residency if such applications are not filed through Visapoint. Although this requirement has no legal basis (a fact I have drawn to the attention of the Minister of Foreign Affairs and have asked him to rectify the matter), it is crucial that until the matter is rectified, applicants are able to submit their applications. It was also found that, for example, the

Visapoint registration in Lvov ceased to function on 21 March 2011 (originally for 7-10 days) and, during a check carried out on 1 April 2011, it was found that the Ukraine did not appear at all in Visapoint. This situation is particularly alarming as regards applications for long-term stays for the purpose of studying or bring families together, and is also in contravention of European Union guidelines.

B.1.3 Traffic accident record as an impediment to discussion of an offence

The claimant's son was involved in a minor traffic accident, to which the Police of the Czech Republic were not called (nor was it necessary according to the law). The parties to the accident wrote out and signed a traffic accident record. Later, when the claimant (the owner of the vehicle) realised what his son had signed, he informed the police of the accident, informing them that the assessment of blame on the accident record did not reflect what had actually happened during the accident.

The Police of the Czech Republic carried out an investigation and informed the administrative authority of its suspicions that an offence had been committed, with the other party to the accident being at fault (a gynaecologist/obstetrician, well known locally). The administrative authority deferred the notification, stating that it did not constitute grounds for the initiation of offence proceedings (§ 66 Paragraph 3a of the Offences Act [Law No. 200/1990 Coll., as subsequently amended]). The reason the administrative authority gave was that considering that an accident record had been made, discussion of the offence was not in the public interest. The regional authority confirmed that the administrative authority had acted correctly in the first instance.

I consider the procedure adopted by the administrative authorities to be erroneous. In no case can making an accident record constitute an impediment to administrative proceedings, and has no influence over the persistence or existence of the public interest in the discussion of an offence.

After my final statement had been issued the authorities in question acknowledged their error and promised to rectify the matter in similar cases. In this case, however, the matter could not be rectified as the foreclosure period had already expired.

B.2 Supervision of the restriction of personal freedom

As part of the supervision of the restriction of personal freedom my staff continued in their systematic visits to facilities which house children placed there either on the basis of a court ruling or at their parents' request (school facilities, medical facilities and facilities for the social and legal protection of children). A visit was made to a school facility exclusively for foreign children, to supplement the original investigation into one children's home and child psychiatric clinic. The staff of my office also visited two nurseries. In October 2011 an assessment will be carried out of all the visits made so far, attended by the directors of the facilities in question.

In addition to the plan of visits to facilities for children at risk, other systematic visits were also made: a visit to a prison for women inmates (including women with children), and a visit to a police emergency and escort department.

My staff also focused on the issue of malnutrition and guardianship, which was the subject of visits in a home with a special regime (residential social service), and in two psychiatric clinics focusing on the gerontopsychiatric departments.

As part of the supervision agenda a special report was also drawn up for the Standing Commission on Privacy Protection, which monitors the right to privacy in the context of all the facilities I have supervised since 2006. This includes police subdivisions, facilities for foreigners (reception asylum facilities and detention facilities for foreigners), medical facilities (hospices, psychiatric clinics), facilities looking after at-risk children (schooling, healthcare, work, and social affairs), prisons (prisons and remand prisons) and facilities providing residential social services (retirement homes and homes for the physically and mentally disabled).

The bleak situation in the Czech prison service relating to long-term underfunding, which is reflected not only in the material facilities of prisons and their inadequate capacity, but also in the lack of officers and specialised staff, led me to contact the Minister of Justice, JUDr. Jiří Pospíšil, with a proposal for measures to improve the situation. The current state of Czech prisons not only distorts the purpose of imprisonment, but is also starting to become a relatively serious security risk.

B.3 Protection against discrimination

In relation to research carried out in spring 2011, relating to the problem of discrimination in job advertisements, as part of which (on the basis of an analysis of more than 12,000 classified advertisements from the portals www.prace.cz and www.jobs.cz) it was found that one in every six classified advertisements contained one or even more discriminatory requirements for job applicants, I began to work with the operator of these portals, LMC. It became apparent that advertisements classed as discriminatory were not generally placed on the portals with "*malicious intent*", but rather as the result of a lack of information relating to protection against discrimination. As I consider it important that further information about anti-discrimination law be provided to entrepreneurial subjects, in 2012 workshops will be organised for personnel officers and "*human resources management*" in collaboration with LMC. These workshops will enable participants to learn more about labour law and the principles of anti-discrimination.

In addition to this, during the last quarter I focused on the issue of price differentiation, which in principle is possible and permissible, but must be reasonably justified and must not show signs of discrimination. As it is the task of the Anti-discrimination Act to protect personal dignity, neither legal entities nor other economic competitors may be the victims of discrimination.

One form of prohibited discrimination which can be prevented through the application of the Anti-discrimination Act is unjustified price differentiation based on reasons prohibited by the law. Differentiation on the grounds of race, ethnic origin and nationality is wholly unjustifiable.

I do not consider it to be discrimination when differing prices serve to increase the number of customers or are used to balance out the number of members of certain groups (provided that the means used to balance out these numbers is justifiable). Providers of goods and services have the general right to aim to "*acquire*"

consumers from whom the highest possible profit can be expected. If, however, it is the provider's intention to exclude the members of a certain group, such action may be in contravention of the Anti-discrimination Act. In the EU the citizens of all member states must be guaranteed the same conditions when using services and purchasing goods.

C. Legislative recommendations and special powers of the Defender

C1. Government statement on the proposal to amend the Administrative Fees Act

In August this year I recommended that the government amend Item No. 3 of the Administrative Fees Tariff, which forms an appendix to the Administrative Fees Act (Law No. 634/2004 Coll., as subsequently amended). This item states, amongst other things, that there is a charge of 15 CZK per page for photocopies of records documentation.

As part of an investigation carried out on my own initiative, I focused on the question of whether administrative fees for copies of documents from administrative files do not in some cases restrict the right of parties to proceedings to a fair trial. As the result of my investigation I concluded that authorities should not claim this administrative fee from parties to administrative proceedings that have not yet been completed.

The Ministry of Finance, as its coordinator, concurred with this interpretation of the Administrative Fees Act. However, the Interior Ministry, which carries out the methodical supervision of authorities in their application of the Code of Administrative Procedure, refused to accept it. It insisted that it would only be able to accept this opinion if an amendment were made to the Administrative Fees Act. The Ministry of Finance stated that the body responsible for preparing and submitting the amendment to the item in question of the Administrative Fees Tariff is the Interior Ministry.

After assessing the arguments I came to the conclusion that the main cause of the problem is primarily the level of the fee for making copies of documents from files. I see the level of this fee as a certain relic of the past, when the use of photocopiers was not yet a routine part of office work. I therefore proposed that the government request that the Interior Ministry prepare an amendment to this item of the Administrative Fees Tariff, which would reduce the fee to reflect the actual cost of making the copies. A similar charge for copies of official documents is stipulated by the Freedom of Information Act, and consistency in this respect would be desirable.

Owing to the similarity of the topic I also accompanied this proposal with the suggestion that the wide variety of payments stipulated in certain departmental regulations (although classifiable as administrative fees) should be incorporated directly into the tariff scale issued to accompany the Administrative Fees Act. These include, for example, fees for the use of public archives or charges for the provision of copies of documents and other print-outs from the Land Registry.

In a meeting on 29 August 2011 the government ordered the Interior Minister and the Minister of Finance to compile an amendment to Item No. 3 of the Administrative Fees Tariff, an appendix to the Administrative Fees Act, which should be based on my recommendations. The government also ordered the Minister of Finance to work with other members of the government to carry out an analysis of all payments in public administration which can be classed as administrative fees yet are covered by departmental implementary regulations.

C.2 Government statement on the proposal to amend the Highways Act

I also contacted the government with a proposal for the amendment of the Highways Act (Law No. 13/1997 Coll., as subsequently amended).

The first amendment relates to the competence of highways authorities in matters concerning local and publicly accessible purpose-built highways (this was a reaction to negative experience resulting from the lack of professionalism on the part of small municipalities exercising the powers of highways authorities). The aim of the second amendment was to supplement the facts of administrative breaches of civil duty concerning the pollution of or damage to publicly accessible purpose-built highways (under the current law it is not possible to punish he pollution of or damage to publicly accessible purpose-built highways; this fact makes it much more difficult for highways authorities to protect purpose-built highways).

These amendments were elaborated in such a way as to allow the government to rule on them through separate resolutions.

On 24 August 2011 the government accepted the second of my recommendations and passed a resolution ordering the Ministry of Transport to prepare a draft regulation to deal with the problem of the pollution of or damage to publicly accessible purpose-built highways. Regarding the powers of highways authorities it was stated at a governmental meeting that this question would be resolved as part of a comprehensive analysis into municipal authorities' exercising of public administration, which would be presented to the government during the fourth quarter of 2011.

C.3 Statement on the parliamentary proposal to amend the Act on Assistance in Material Need and the Civil Procedure Code (Parliamentary Press No. 268)

This proposal, which was approved by the Chamber of Deputies on 23 September 2011, is an attempt to enable the enforcement of rulings (executions) and the agreement on deductions from the so-called living allowance.

From a legislatively technical point of view the proposed amendment does not come under the comprehensive provisions governing the enforcement of rulings in the Civil Procedure Code and is an unsystematic attempt to break down the existing principle of the non-executability of material need benefits through the enforcement of a ruling and a ban on the deductions agreement.

I personally support the new comprehensive provisions governing the enforcement of rulings, including the reassessment of the existing approach towards benefit deductions, directly in the Civil Procedure Code. At present unjustified

disparities can arise in executory deductions from the incomes of individuals (families) on the basis of their gainful activities, in comparison with the incomes of individuals (families) from benefits. Such disparities should therefore be eliminated (after thorough analysis).

I see a further problem in the attempt to use the proposed provisions of § 48 Paragraph 3 the Act on Assistance in Material Need to allow the "*deductions agreement*" in contravention of the laws governing deductions as defined by the Civil Procedure Code (the agreement may also be on higher deductions than the level permitted by the Civil Procedure Code). In the future this will be reflected in, amongst other things, the unjustified advantage of executive authorities or local government bodies over other creditors.

C.4 Amendments to the government draft of the Healthcare Services Act (Parliamentary Press No. 405)

My proposals related primarily to the wording of the provisions of §§ 97 and 119 Paragraph 2 of the Healthcare Services Act. This is a long-term problem, when patients who file complaints regarding healthcare (or now medical services) they have received are not told the name of the specialist (expert) who issues a statement on adherence or non-adherence to correct medical procedures. Therefore, I proposed (with reference to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine [Memo No. 96/2001 Coll. m. s.], amongst others) that the Healthcare Services Act should explicitly oblige administrative bodies (most often regional authorities) to inform patients of the name and surname of the independent expert or members of the independent expert responsible for issuing a statement on whether a specific procedure was *lege artis*.

Another proposal related to the explicit specification of the deadlines by which administrative bodies (most often regional authorities) should deal with complaints concerning medical services. This should guarantee patients' right to have their complaints dealt with within a reasonable period of time.

All my proposals were accepted by the Chamber of Deputies.

C.5 Regulation of video-lottery terminals

The Constitutional Court again heard my opinion (as a subsidiary party to the proceedings) and rejected the Interior Ministry's proposal to annul the generally binding directive of the town of Františkovy Lázně No. 1/2010, on assuring local public order in relation to restrictions on gambling.

In its ruling dated 7 September 2011 (File Ref. Pl. ÚS 56/10), as in the case of the so-called "*Chrastava Directive*" (File Ref. Pl. ÚS 29/10), the Constitutional Court stated that the municipality's constitutionally guaranteed right to local government implies that municipalities cannot be stripped of their powers to issue generally binding directives ruling that premises operating lotteries and other similar games may be situated in their territory, regardless of their internal technical layout. The Constitutional Court emphasised that in regulating gambling municipalities are pursuing a legitimate aim, as "*lotteries and other similar games are predominantly on the margins of activities that can be classed as socially acceptable*."

The Constitutional Court repeated similar conclusions in its ruling dated 27 September 2011 (File Ref. Pl. ÚS 22/11) on the proposal to annul the generally binding directive of the town of Kladno No. 46/10, specifying places for the operation of other technical gambling facilities permitted by the Ministry of Finance within the town of Kladno.

In both cases the Constitutional Court explicitly made a statement on the tardiness of the Ministry of Finance in annulling rulings already issued in accordance with the provisions of § 43 of the Lotteries Act. The Constitutional Court stated that, by failing to act, the Ministry of Finance was committing an infringement of the municipalities' constitutional right to local government.

Although I am currently leading an investigation on my own initiative into the Ministry of Finance, as part of which I will be requesting that the Ministry annual rulings issued in contravention of the Lotteries Act and in violation of generally binding directives, I believe that it is the responsibility of the municipalities themselves to file so-called communal constitutional complaints and to press for the annulment of specific administrative rulings at the Constitutional Court.

Brno, 22 October 2011

JUDr. Pavel Varvařovský

Public Defender of Rights