Public Defender of Rights
OMBUDSMAN

ANNUAL REPORT ON THE ACTIVITIES OF THE PUBLIC DEFENDER OF RIGHTS 2010






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2010

CONTENTS

INTRODUCTION

In this report JUDr. Pavel Varvařovský, the Public Defender of Rights (hereafter simply "*the Defender*"), performs an audit of inspection work in public administration in 2010.

The Defender is continuing in the trend adopted by the first the Public Defender of Rights JUDr. Otakar Motejl in his second term of office, and attempts to describe particularly his generalised findings gleaned in the individual areas of public administration. Besides analysing some of the most prominent cases relating to inspections of public administration bodies, this report is also devoted to the Defender's activities in commenting on laws, his work in relation to proceedings before the Constitutional Court or in proposals made to the Supreme Public Prosecutor to file suits in the public interest.

With regard to the Defender's new sphere of authority (monitoring the detention of foreigners and deportation), granted as of 1 January 2011 by the amendment to the Residency of Foreigners Act (amendment No. 427/2010 Coll.), the Defender now takes a greater interest in the legal status of foreigners (this is particularly a detailed interpretation of the partial provisions of the Residency of Foreigners Act).

The report is divided up into seven parts.

The first part comprises general information about the management of the Office of the Public Defender of Rights (hereafter simply "*Office*") and details of the Defender's international activities.

The second part of the report is devoted to the Defender's special powers and his involvement in proceedings before the Constitutional Court. The Defender also presents information about his work in comments proceedings and cases where lawsuits are filed to protect the public interest, sent in the previous year by the Supreme Public Prosecutor.

The third part contains statistics and presents findings from individual areas of state administration. In compliance with the provisions of § 2 Paragraph 4 of the Public Defender of Rights Act (Law No. 349/1999 Coll., as subsequently amended) the Defender entrusted some of his authority to his deputy, RNDr. Jitka Seitlová. As regards the following areas: family and children, healthcare, land rights, buildings and territorial development, the environment, civil records, the right to information, consumer protection, state supervision and inspection of municipal authorities, protection of personal data, the conclusions and opinions of the Defender are understood to mean the conclusions and opinions of the Deputy Public Defender of Rights.

In **the fourth part** the Defender presents information about the results of his systematic visits to facilities containing persons deprived of their liberty.

The fifth part focuses on protection against discrimination in accordance with the Anti-discrimination Act (Law No. 198/2009 Coll.)

The sixth part contains a generalisation of the most serious problems; in this part, the Defender attempts to describe possible solutions to these problems.

The seventh part comprises the final summary.

The Annual Report contains findings from all aspects of the Defender's work (inspection, detention, discrimination) and constitutes, amongst other things,

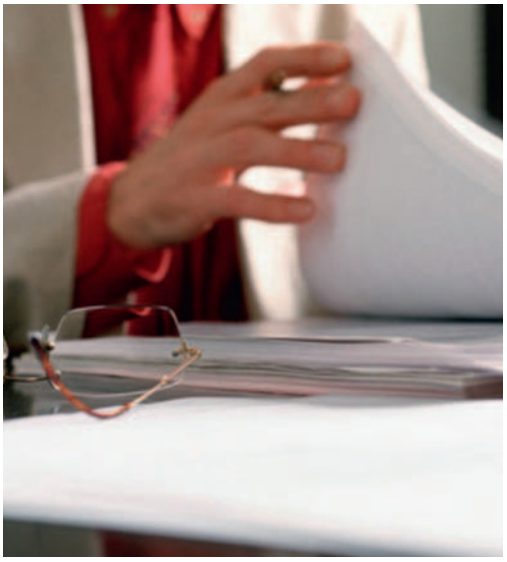
a report in accordance with Article 23 of the Optional Protocol on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment;

an annual report in accordance with Article 13 Paragraph 2 of Council Directive 2000/43/EC, which implements the principle of equal treatment regardless of race or ethnic origin;

an annual report in accordance with Article 8a Paragraph 2 of European Parliament and Council Directive 2002/73/EC, as amended by Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women with respect to access to employment, a vocational education and career advancement, and work conditions;

an annual report in accordance with Article 20 Paragraph 2 of European Parliament and Council Directive 2006/54/EC dated 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment for men and women with respect to employment and career.


SÁL O



1 THE PUBLIC DEFENDER OF RIGHTS AND HIS OFFICE

1 / BUDGET AND BUDGET SPENDING IN 2010

During the course of 2010 the Office of the Public Defender of Rights worked with an approved budget totalling **104 154 thousand CZK**. During 2010 **79 008 thousand CZK** of this sum was spent, totalling 75.86 % of the budget.

The saving of 25 146 thousand CZK on the 2010 budget was primarily due to the drawing of current funds amounting to 23 497 thousand CZK, particularly to cover staff salaries and other payments for work performed, partly on operating expenses, and 1 649 thousand CZK was saved in investment expenses.

During the course of 2010 part of the Office's budgetary expenses were tied up twice to a total sum of **4 934 thousand CZK**, meaning the total amount drawn on the budget was **80.60 %**.

Detailed results of the Office economy are published on the Defender's website at http://www.ochrance.cz.

2 / STAFFING SITUATION IN 2010

The budget for 2010 stipulated a binding **limit on the number of Office employees**, this limit being **111 members of staff**. The **actual** average converted **number of registered staff** in 2010 was **108** employees, which was within the limit stipulated by the state budget. Of these, 83 employees dealt directly with cases and carried out detention visits.

Due to the need for a comprehensive assessment of certain prominent cases, **collaboration continued with external experts**, particularly from the Faculty of Law Masaryk University, the Faculty of Law Palacký University in Olomouc, non-governmental organisations and medical facilities. In relation to the Faculty of Law Masaryk University, the Office also hosted selected students from the 4th and 5th years of the Masters study program who were gaining their compulsory legal work experience.

3 / MEDIA PRESENTATIONS, INTERNATIONAL COLLABORATION, CONFERENCES

PRESS RELEASES, TELEVISION SERIES, WEBSITE

In 2010 the Defender organised **12 regular press conferences** and **1 special briefing**. These focused on the Defender's findings from his investigations into serious social cases, findings from systematic preventive visits to containing persons deprived of their liberty, and the Defender's recommendations in matters of equal treatment. In particular:

– criticism of the harshness of the Act on Assistance in Material Need towards invalids, and an appeal to ministers to change the law;

– recommendations on compliance with the law on equal treatment in the assessment of applications for the lease of municipal flats and in access for guide and assistance dogs to public buildings;

– findings from the systematic visits to remand prisons and police cells;

– the punitive exposure of the situation in Šternberk Psychiatric Clinic due to persistent shortcomings and the clinic's unwillingness to rectify the matter;

– the problem of inadequacies in the law covering the work of authorised inspectors;

– the status of foreigners in the Czech Republic from the viewpoint of the Anti-discrimination Act in relation to the differing levels of access to health insurance and education;

– findings regarding the procedure adopted by ministries in handling compensation claims and adequate compensation for improper official procedure, where the Defender found cases of bad practice and long-term inaction;

– summary of findings relating to the protection of personal data and the punitive exposure of a case where medical documentation was lost by a non-state medical facility;

– findings relating to traffic noise pollution.

During the course of the year, journalists were provided with more than 50 press releases, statements, declarations and other information. These are all available on the Defender's website (www.ochrance.cz).

In the editorial series of the Stanoviska (Statements) collected works, the Defender published works entitled "***Noise Pollution***" and "***Prisons***". He also began to prepare updates to already published collected works in relation to the new practice of the courts and the Defender's new findings from his investigations into individual cases. All the collected works are available at http://www.ochrance.cz/publikace/sborniky-stanoviska/.

In the Good Administrative Practice series the Defender, together with the Ministry of the Interior, published **Recommendations for Municipalities and Towns – Municipal Taxes** (local fees, property tax, communal waste tax).

Czech Television premiered 16 parts of the sixth series of **A Case for the Ombudsman**.

Proof of the media's interest in the work of the Defender comes in the form of a total of 5 622 printed or broadcast reports, articles and reportages. Television time covered the Defender's activities in 583 cases; ČTK together with the Mediafax agency in 457 reports. The media coverage of the Defender's statements and findings was greatly boosted by a total of 2 221 reports and articles on the Internet. The Defender and Deputy Defender appeared on television and radio broadcasts, provided a series of interviews, participated in live broadcasts and answered questions posed by citizens in on-line interviews on internet news servers.

At the beginning of 2010 modifications were made to the graphical layout and content of the Defender's website. The new version is easier for users to navigate and has created space for the gradual publication of a greater number of the Defender's statements and investigation reports. The Defender's website is frequently visited, with 647 959 views a year. The Defender's website continues to bear a certificate confirming access for the blind and visually impaired.

INTERNATIONAL MEETINGS AND CONFERENCES

- **Meeting with the Ukrainian ambassador** (Brno, 4 March 2010)
  Topic: problems of Ukrainian citizens in the Czech Republic and collaboration with the Ukrainian Ombudsman

- **Visit by representatives of the Bar Council of Armenia** (Brno, 3 June 2010)
  Topic: work of the Defender, legal system of the Czech Republic

- **Participation in the international conference entitled "*Role and Impact of the Ombudsman in Enhancing the Protection of Human Rights*"** (Tbilisi, 22–25 September 2010)
  Topic: role of the Ombudsman in the protection of human rights

- **Participation in the 10th annual meeting and international conference of I.O.I. (International Ombudsman Institute)** (Barcelona, 3–6 October 2010)
  Topic: human rights, compliance with the Optional Protocol on the Convention against Torture, migrant rights, protection of children's rights

- **Meeting with the Public Defender of Rights of the Slovak Republic** (Bratislava, 19 October 2010)
  Topic: collaboration between the Czech and Slovak ombudsmen

- **Visit by the delegation of Korean ombudsmen and high state officials** (Brno, 10 November 2010)
  Topic: the Defender's sphere of authority and his role in the Czech Republic

- **Visit by staff of the Thai ombudsman** (Brno, 19 November 2010)
  Topic: the Defender's sphere of authority and activity relating to persons deprived of their liberty

- **Visit by the Slovak Public Defender of Rights to mark the 10th anniversary of the Public Defender of Rights in the Czech Republic** (Brno, 9 December 2010)
  Topic: the Defender's participation in the project involving collaboration of European National Preventive Mechanisms led by the Commissioner for Human Rights of the Council of Europe

CONFERENCES AND ROUND TABLES ORGANISED BY THE PUBLIC DEFENDER OF RIGHTS

- "***Social exclusion and poverty***" (Brno, 11 February 2010)
  Topic: Functionality of the social system, social work as a basic means of combating social exclusion, social housing

- "***Care Allowance***" (Brno, 16 March 2010)
  Topic: Assessment of the existing laws, functionality of the system, standards of medical assessors, tasks of benefit staff

- "***Inspecting the Provision of Social Services***" (Brno, 29 March 2010)Topic: protection of users' rights, content and procedure of services, contract for the provision of social services, billing for services, inspections

- "***Building Regulations***" (Brno, 27 April 2010)
  Topic: Assuring coordination and complexity of building works, land approval, building notification consent, statutory approval consent, distances, authorised inspectors

– "***Visas*"** (Brno, 16 June 2010)
  Topic: specialised foreigner-based seminar, theoretical legal and scientific aspects of visas, international comparison

– "***Inspection in Public Administration*"** (Brno, 23–24 September 2010)
  Topic: Constitutional framework of inspections in public administration, the Public Defender of Rights as an inspection mechanism sui generis, inspection of state administration and local government

– "***Role of the Ombudsman in the political system of the Czech Republic*"** (Olomouc, 2 November 2010)
  Topic: current role and future developments in the role of the Defender, definition of his position, comparison with other countries, the Defender from the viewpoint of the Parliament of the Czech Republic and the courts, how constitutional institutions relate to the Public Defender of Rights, public opinion


SBÍRKA ZÁKONŮ ČR 2002 II.
SBÍRKA ZÁKONŮ ČR 2002 III.
SBÍRKA ZÁKONŮ ČR 2002 IV.

2 RELATIONS WITH CONSTITUTIONAL BODIES AND SPECIAL POWERS OF THE DEFENDER

1 / PARTICIPATION IN MEETINGS OF BODIES OF THE CHAMBER OF DEPUTIES

The Defender regularly attends meetings of the **Petitions Committee of the Chamber of Deputies Parliament of the Czech Republic** (hereafter "*Chamber of Deputies*"), at which his quarterly reports are discussed [§ 24 Paragraph 1 a) of the Public Defender of Rights Act (Law No. 349/1999 Coll., as subsequently amended)].

The first Public Defender of Rights, JUDr. Otakar Motejl, attended a meeting of the **general assembly of the Chamber of Deputies** on 9 February 2010, where he put forward two requirements.

He first appealed to ministers to act efficiently in the favour of citizens and to hasten the amendment to the **Act on Assistance in Material Need** (Law No. 111/2006 Coll., as subsequently amended). The Act on Assistance in Material Need, amended as of 1 January 2010, was adopted in order to reduce long-term dependence on social benefits and to ensure that benefits are only paid to those who try to find work. This was a manifestation of the principle of zero tolerance towards those who avoid work and act as parasites on the social benefits system. Paradoxically, however, he was most critical of those people who abuse social benefits. Invalids with 3rd-degree invalidity, i.e. the most severely disabled who are objectively unable to work, are punished by the law due to the fact that they do not work. In the context of the abuse of benefits the Act on Assistance in Material Need places invalids far below those who really do abuse state social assistance.

The Defender's address led the Ministry of Labour and Social Affairs to take active steps to adopt the amendment to the Act on Assistance in Material Need (Amendment No. 141/2010 Coll.), which eliminated this shortcoming. The law now entitles people with a 1st or 2nd-degree invalidity to the minimum benefits without having to perform a public service. People with 3rd-degree invalidity are no longer at a disadvantage and are entitled to the minimum benefits including additional benefits to cover special diets.

The second case was related to **arbitration clauses in consumer contracts**. Besides some non-bank loan companies, this practice is also used by certain banks, real estate agencies, car dealers, etc. From the hundreds of cases received by the Defender in recent years, it is evident that consumers often do not notice the arbitration clauses in contractual conditions, they are not pointed out to them, and, worst of all, consumers are not familiar with the legal consequences of signing such a contract. The arbitration clause states that any future disputes will not be decided upon by a court but by an arbitrator, which has immense consequences for the consumer. By signing the contract the consumer forfeits his right to claim judicial protection and an unbiased ruling.

An arbitrator is much less of a guarantee that any ruling issued will be fair and unbiased. In practice it even happens that the arbitrator can be linked to the entrepreneur-claimant, a fact which is obviously reflected in the result of the arbitration proceedings. Rulings come into effect immediately and there is no chance of appeal. If the consumer attempts to take the matter to court, the matter is usually not heard as the court halts the proceedings on the grounds of an unavoidable impediment after the counterparty

has filed an objection to the arbitration clause in the contract. The result of the arbitration proceedings is not necessarily in line with the valid laws.

The Defender came across a number of arbitration proceedings which were odd, to say the least, and which condemned consumers to unlawful fulfilment and draconian sanctions which would never stand up in court. He therefore requested that the Chamber of Deputies, adopt a law banning preliminary arbitration clauses in all consumer contracts. This solution would guarantee the constitutional right of every citizen to judicial protection while not precluding the possibility that disputes may be resolved out of court.

The Chamber of Deputies did not get round to discussing the amendment to the law during its fifth term in office. At present, **however, the Minister of Justice is preparing a draft amendment to the Arbitration Proceedings Act** (Law No. 216/1994 Coll., as subsequently amended), which should eliminate these shortcomings.

In relation to the meeting of the Petitions Committee of the Chamber of Deputies on 30 September 2010, the newly-elected Public Defender of Rights, JUDr. Pavel Varvařovský, presented the Committee with **information on his findings in relation to delays and possible malpractice on the part of the Czech Social Security Administration**. This partly concerned pensions involving a foreign aspect, but was primarily about his findings relating to delays in making deductions from pensions. The report will be discussed by the Petitions Committee in spring 2011.

In December 2010 the Defender sent ministers his statement on the **amendment to the Asylum Act** (amendment published as 427/2010 Coll.) Here he particularly appealed for the amendment to continue to treat the obligation to ensure that records of interviews with applicants for long-term visas are signed by the applicant. The Chamber of Deputies took the Defender's arguments into account and § 57 Paragraph 2 of the Asylum Act, effective as of 1 January 2011, states that "*the embassy will draw up a record of the interview, which contains particularly data identifying the applicant, a description of the course of the interview, the date, the name and surname or service number and the signature of the person conducting the interview and the signature of the applicant*".

2 / COMMENTS ON LEGISLATION

The Defender took the opportunity to comment on legislation (he issued statements on draft laws and directives in a total of **22 cases**). These comments especially apply in cases where, through the course of his work, he finds that the law needs to be changed. In a simplified manner in comments proceedings he exerts his authority granted by the provisions of § 22 of the Public Defender of Rights Act (Law No. 349/1999 Coll., as subsequently amended), which allow him to **make recommendations for the issue, amendment or annulment of a law or internal regulation**.

3 / THE DEFENDER AND THE CONSTITUTIONAL COURT

In relation to the Constitutional Court the Defender most often takes on the role of a subsidiary participant in proceedings on proposals to annul legislative rules (usually the generally bindings decrees issued by municipalities). In 2010 the Defender **issued statements on a total of 5 proposals**.

The Defender has the authority to submit proposals for the annulment of laws, although only in the case of by-laws [§ 64 Paragraph 2 of the Constitutional Court Act (Law No. 182/1993 Coll., as subsequently amended)]. However, in his work the Defender comes up against a number of legal provisions where there are legitimate doubts as to whether they comply with constitutional order. Therefore, in the fu-

ture the Defender would welcome the **right to submit proposals for the annulment of provisions of the law**, as is the case in Slovenia (Article 37 of the law on the Slovenian Ombudsman; Articles 23, 50, 52 of the Constitutional Court Act of the Slovenian Republic, available at: http://www.varuh-rs.si/index.php?id=1&L=6) or in Slovakia [§ 21 of the Public Defender of Rights Act (Law No. 564/2001 Z.z., as subsequently amended)]

PROPOSAL OF THE MINISTRY OF THE INTERIOR TO ANNUL THE PROVISIONS OF ARTICLE 3 PARAGRAPH 1, OF THE GENERALLY BINDING DIRECTIVE OF THE TOWN OF BŘECLAV NO. 5/2008, ON THE ASSURANCE OF PUBLIC ORDER DURING PUBLIC HOUSE EVENTS IN RESIDENTIAL AREAS

Proceedings Ref. No.: Pl. ÚS 28/09

Related: Municipalities Act; Constitution of the Czech Republic; Charter of Fundamental Rights and Freedoms

The Defender disagreed with the proposal of the Ministry of the Interior. The municipality, as a civil corporation, must have the option to act in the interests of its citizens to regulate events within its territory which local people consider to be negative (or which disturb public order within the municipality). If the municipality adopts a regulation specifying the **closing time for hostelry facilities**, and the regulation is a reasonable attempt to eliminate noise during night-time hours, there is nothing to object to.

The Defender did not concur with the stance of the Ministry of the Interior on the conflict between the provisions of this generally binding directive, stipulating binding opening hours, and Article 26 of the Charter of Fundamental Rights and Freedoms, which grants the right to do business and engage in economic activity. In the Defender's opinion the right to engage in economic activity (to do business) is an economic right and the implementation of this right is granted by the law in accordance with Article 41 Paragraph 1 of the Charter. As regards the actual constitutional limits of this right, the right can be restricted in cases where, in a democratic society, such a restriction is essential (1) for the protection of public lives and health, (2) for the protection of the rights and freedoms of others, or (3) to prevent any serious threat to public safety and order (likewise see Article 12 Paragraph 3, Article 14 Paragraph 3, Article 16 Paragraph 3, and Article 17 Paragraph 4 of the Charter).

Considering the fact that limiting the opening hours of hostelry facilities protects not only the public interest, but also the "***right to peaceful living and sleep***" as part of the right to the protection of private/family life in the broader sense of the word (Article 10 Paragraph 2 of the Charter), the Defender proposed that the Constitutional Court reject the proposal of the Ministry of the Interior.

With regard to the fact that in the past the Constitutional Court has repeatedly issued rulings to the detriment of municipalities' right to regulate the opening hours of hostelry facilities (findings Ref. No. Pl. ÚS 42/05, 58/05), if legal opinion were to change it would have to proceed in accordance with the provisions of § 13 of the Constitutional Court Act and decide based on the votes of nine judges.

The Constitutional Court acceded to the Ministry's proposal and annulled the directive, although for reasons other than those proposed by the Ministry. It annulled the directive because the specification of the opening hours was indefinite, as the **ambiguous term** "***residential area***" did not make it clear which facilities were bound by the restrictions.

As regards the Ministry's question concerning the inadequate powers of the municipality, **the Constitutional Court changed the opinion it had previously held in its rulings** (see also http://www.usoud.cz/clanek/4202). It stated that "*in situations where hostelry events during night-time hours may disturb*

public order, the municipality has the option, granted by § 10 of the Municipalities Act and Article 104 of the Constitution, to stipulate obligations for persons holding such events, including obligations consisting of limits on opening hours during the night-time".

The Constitutional Court changed its opinion for a number of reasons. Primarily it considered its own past practice in which it had gradually lightened its once restrictive stance on municipal directives. It also took account of the trend in the establishment of numerous other facilities (hostelries, gaming bars, etc.), which disturb peaceful living, particularly at night, while the negative consequences infringing on citizens' rights to privacy and an undisturbed home cannot be eliminated (or sanctioned) by other forms of regulations (a ban on excessive noise, a ban on the consumption of alcohol in public places). **Thus the Constitutional Court heard the Defender's plea**. If in a specific case the opening hours of a hostelry facility are restricted, this protects not only the public interest, but also the right to peaceful living and sleep, as part of the right to the protection of private and family life in the broader sense of the word (Article 10 Paragraph 2 of the Charter).

The Defender welcomes the Constitutional Court's ruling and assumes that it will help to further protect public order in municipalities.

4 / INSTIGATIONS TO THE SUPREME PUBLIC PROSECUTOR TO FILE SUITS FOR THE PROTECTION OF THE PUBLIC INTEREST

As of 1 January 2006 the Defender has the power, granted by the provisions of § 22 Paragraph 3 of the Public Defender of Rights Act (Law No. 349/1999 Coll., as subsequently amended), to propose that the Supreme Public Prosecutor file a suit to protect the public interest. If the Supreme Public Prosecutor does not file the suit, he is obliged to inform the Defender of such, no later than within 3 months of the date on which the proposal was delivered. The Supreme Public Prosecutor must state the reasons for refusing to comply with the proposal.

In the Defender's line of work this is a rare means of securing a remedy in cases where the unlawful action taken by an office could not be otherwise rectified. In 2010 the Defender, in compliance with the provisions of § 22 Paragraph 3 of the Public Defender of Rights Act, decided to take one case to the Supreme Public Prosecutor.

Under consideration in relation to the talks on the amendment to the Administrative Procedure Code is a legislative change which would allow the Defender to file a direct suit for the protection of the public interest.

Territorial ruling on the extension of the metro A line in Prague

The Defender investigated a case filed by the Červený Vrch Civil Association (hereafter simply "*association*"), in which the association complained about the procedure adopted by the Office of the Prague 6 City District, building department (hereafter simply "*office*") and the Municipal Council of the Capital City of Prague (hereafter simply "*Municipal Council*") in relation to the issue of a territorial ruling on the placement of a building. The ruling included the **extension of the metro A line from Dejvická via Petřiny to Motol**.

According to the association, an error was made when this ruling was issued, as the documentation for the territorial proceedings and the territorial ruling itself **are not in compliance with the approved change** (Z1344/00) and the applicable binding part of the **Territorial Plan of the Capital City of Prague** for the Červený Vrch locality. Although the association had repeatedly warned both administrative bodies of this

conflict, as well as the risks inherent in the work to extend the metro A line below residential buildings (the conclusions of the Klokner Institute of the Czech Technical University in Prague show that the work to build the metro could cause homes to subside or tilt), no remedial measures were taken.

The association highlighted the fact that, in contrast to the territorial plan, **the metro route runs directly under five 14-storey blocks of flats, around 100 m from the approved route in the valid territorial plan**. The association discovered this in November 2009 during the passportisation of the buildings in question. It also criticised the building authority for the fact that when issuing its territorial ruling it was satisfied with the statement issued by the Municipal Council in 2007, which was issued two years before the investor even applied for the territorial ruling, and eighteen months before the change to the territorial plan Z1344/00, dated 18 September 2009, was approved.

After assessing the case the Defender decided to begin an investigation, in which he called for a statement from the mayor of the Prague 6 City District and the director of the Municipal Council of the Capital City of Prague. In his report on the investigation the Defender stated that the Municipal Council had failed to provide convincing proof that the building was in compliance with the territorial plan. The Defender was critical of the fact that when handling the association's case the Municipal Council did not deal with the objection that the rights of the owners of the houses (flats) above the metro building works had been infringed. The Municipal Council stated that **these rights could not have been infringed upon, as the metro is an underground structure which cannot impinge upon the rights and interests of owners of buildings above ground level**.

The Defender also pointed out that the administrative authorities had failed when they, together with the builder (Dopravní podnik hlavního města Prahy, a.s. (Transport Authority of the Capital City of Prague)) failed to inform citizens beforehand that due to geological conditions the metro line would have to be diverted from the route specified in the territorial plan.

Considering the fact that there is currently no due or extraordinary means of appeal to call for a review of the territorial ruling for the metro line extension, the Defender decided to use his special powers and proposed that the Supreme Public Prosecutor file a suit in the public interest against the ruling of the Prague 6 City District Authority, building department, dated 31 March 2009, as amended by the Municipal Council ruling dated 11 August 2009. Considering the fact that the Municipal Council had already issued two building permits for this project, a case was also filed in relation to these building permits.

As of the date this report was drawn up the Defender has not been notified by the Supreme Public Prosecutor regarding whether this suit to protect the public interest has been filed.

5 / PROPOSAL OF THE DEFENDER TO INITIATE DISCIPLINARY PROCEEDINGS

For the first time since the amendment to the Act on Courts and Judges came into force (amendment No. 314/2008 Coll., effective as of 1 October 2008) the Defender used his special powers [§ 8 Paragraph 3 c) of the law on proceedings relating to judges, state attorneys and court executors (Law No. 7/2002 Coll. as subsequently amended)] and approached the Supreme Administrative Court to file a **proposal to initiate disciplinary proceedings against the Deputy Presiding Judge of the High Court in Prague, JUDr. Jaroslav Bureš**.

The proposal related to the matter of **publicity of court hearings**, which the Defender has been concerned with for some time. During meetings with court officials of all levels he has repeatedly called upon

them to oversee judges' actions when complaints about malpractice by judges are being dealt with, and to investigate whether or not the institutes of public exclusion or denying access to hearings are used to excess or even abused in judicial practice. The Defender concerns are based on the premise that the **overuse of these institutes may, depending on the specific circumstances, also constitute a breach of the obligations imposed on judges by the provisions of § 80 of the Judicial Act**. The state administration body of the court is obliged to investigate these incidents as part of the complaints mechanism in accordance with § 164 and following of the Judicial Act and, in justified cases, redress the situation as necessary (including the possible filing of a proposal to initiate disciplinary proceedings). If this does not happen, the presiding judge or deputy presiding judge may be committing a disciplinary offence.

On 10 August 2010 the Supreme Administrative Court issued a resolution (Ref. No.: 13 Kss 1/2010-82) to abort disciplinary proceedings initiated at the Defender's proposal. The disciplinary court concluded that the Defender's power to file a proposal to initiate disciplinary proceedings "*raises doubts concerning compliance with the Constitution*". It therefore informed the Defender that it would file a proposal with the Constitutional Court in accordance with the provisions of § 64 Paragraph 3 of the Constitutional Court Act (Law No. 182/1993 Coll., as subsequently amended) for the annulment of the provisions of § 8 Paragraph 3 c) of the law on proceedings relating to judges, state attorneys and court executors and § 1 Paragraph 7 of the Public Defender of Rights Act (Law No. 349/1999 Coll., as subsequently amended).

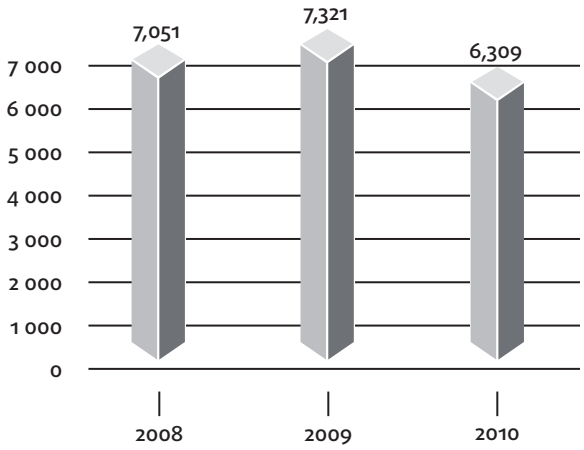
3 COMPLAINTS BROUGHT TO THE DEFENDER IN RELATION TO PUBLIC ADMINISTRATION

1 / BASIC STATISTICS

1 / 1 / INFORMATION ABOUT COMPLAINTS BROUGHT

During the course of 2010 the Defender was presented with a total of **6 309 complaints**. The Defender's Office **visited** a total of **1 356 people** in person, **597** of whom filed their **complaint verbally to a report** and **759** people were given **legal advice** on how to go about resolving a specific problem (these are not included in the total number of complaints brought). For the sake of thoroughness it should be said that the number of complaints brought has not included and does not include other pleas made by claimants to the Defender when files are being dealt with. A comparison of the number of complaints brought in the past is shown in the following bar graph.

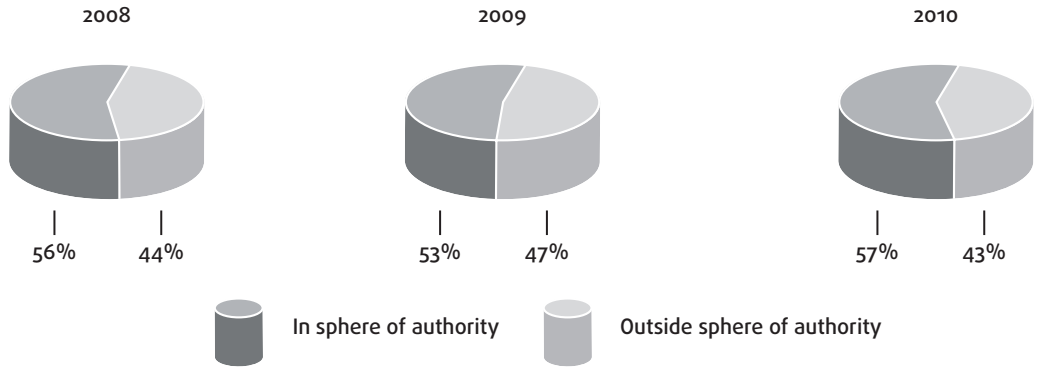
COMPLAINS RECEIVED IN INDIVIDUAL YEARS



The information telephone lines, which are used when seeking simple legal advice and asking about progress with complaints, were used by **5 307 people** during the last year.

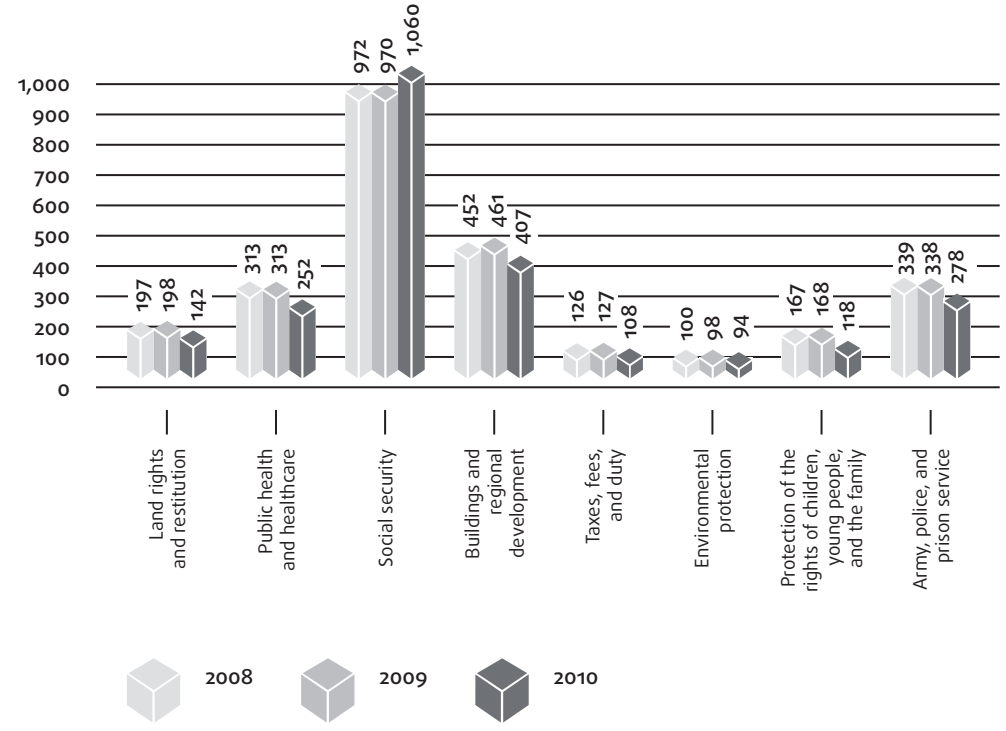
In terms of the Defender's sphere of authority the structure of complaints did not change particularly in 2010 compared with previous years (see the graph). As in the past, the majority of complaints were within the Defender's competence. Of the total number of complaints received in 2010, **57 % were within the Defender's sphere of authority**, and **43 % of complaints were outside the Defender's sphere of authority**.

COMPLAINS RECEIVED IN INDIVIDUAL YEARS

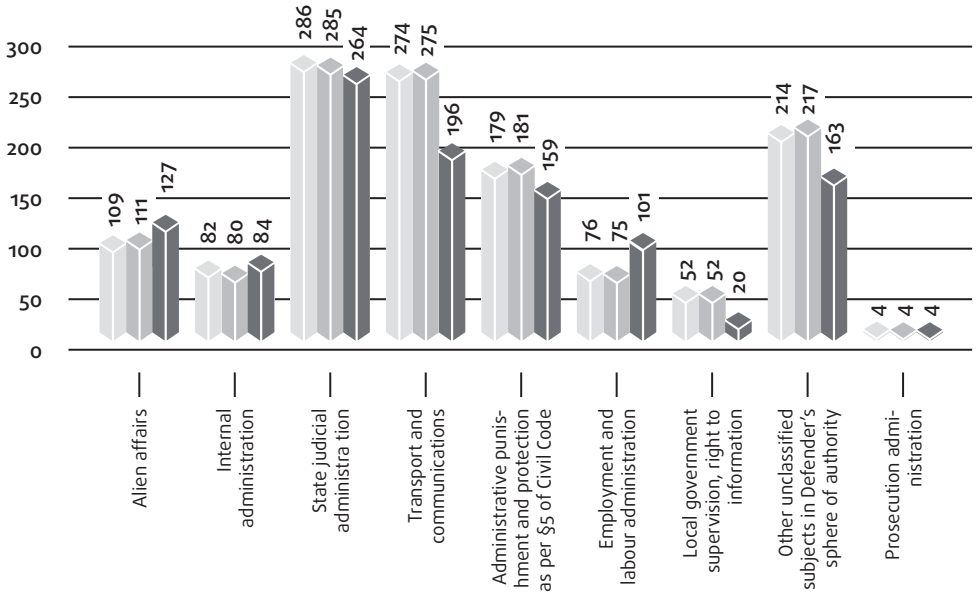


Cases delivered to the Defender are classified not only in terms of his sphere of authority, but also in accordance with the individual areas of state administration. The following graph shows that the Defender is **mostly contacted by citizens with cases relating to social security, building regulations, prisons, healthcare, and state administration of the courts**.

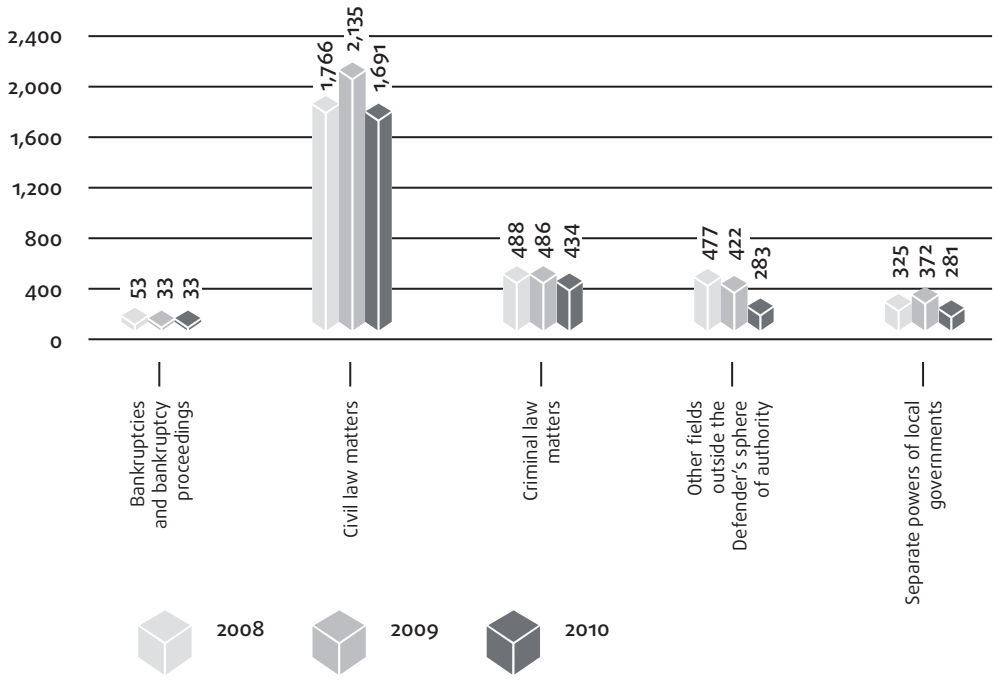
COMPLAINTS RECEIVED IN SPHERE OF AUTHORITY IN INDIVIDUAL YEARS, BY SUBJECT:



COMPLAINTS RECEIVED IN SPHERE OF AUTHORITY IN INDIVIDUAL YEARS, BY SUBJECT:

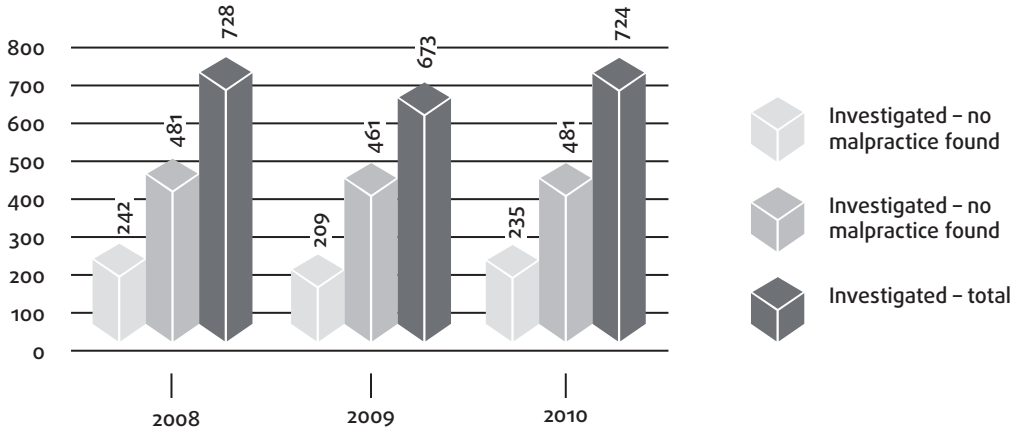


COMPLAINTS RECEIVED OUTSIDE SPHERE OF AUTHORITY IN INDIVIDUAL YEARS, BY SUBJECT:



In 2010 the Defender **began** a total of **724 investigations**; in **40 cases** he exercised his **authority to begin investigations on his own initiative**. The number of such investigations is a quarter higher than in 2009 (29 cases). As in previous years these were problems of a general nature or situations where the Defender heard of improper action taken by authorities through the mass media.

NUMBERS OF INVESTIGATIONS, NUMBERS OF CASES OF MALPRACTICE FOUND:



1 / 2 / DATA ON COMPLAINTS HANDLED

In 2010 the Defender **handled** a total of **6 339 complaints**. Of this total:

- **358 complaints were deferred**. The reason for the deferral was mostly lack of competence. To a lesser extent these involved deferrals due to non-compliance with the requisite details of the complaint, or complaints which were deferred because they were evidently unfounded;

- **5 145 complaints were clarified**. In such cases the Defender mostly provided claimants with advice on how to proceed in order to protect their rights. In certain cases the Defender dealt with a complaint by clarifying matters, by stating that the claimant's problem is not unique, and on the basis of similar complaints began more general investigations on his own initiative.

In 2010 the Defender **completed** a total of **716** investigations:

- **235** cases were concluded with the Defender stating that he had not found any malpractice in the actions of the office in question;

- **481** cases were concluded with the Defender stating that an office was at fault; of these,

  - in **395** cases the office itself rectified its mistakes after the Defender had issued his **investigation report**;

  - in **69** cases the office did not rectify its mistakes itself and the Defender had to issue a **final statement**, which included proposed remedial measures (the office's mistakes were rectified on the basis of this final statement);

- in **17** cases the office did not rectify its mistakes even after a final statement had been issued. The Defender therefore applied his **power to impose sanctions** and informed the superior body and the public about the office's mistakes.

The number of complaints dealt with in 2010 also includes **106 cases** where claimants retracted their plea, as well as **4 cases** where the content of the complaint made it **an appeal** as defined by the laws covering administrative or judicial matters (§ 13 of the Public Defender of Rights Act).

In 2010 the Defender also completed **8 investigations of special importance**, which were intended to bring about a change in administrative practice in certain areas or to formulate legislative recommendations to the government and Chamber of Deputies. Information from this type of investigation is contained in, amongst other sources, the commentaries on individual areas of state administration, as well as in Part VI. (Recommendations to the Chamber of Deputies).

2 / SELECTED COMPLAINTS AND COMMENTS

2 / 1 / SOCIAL SECURITY

ASSISTANCE IN MATERIAL NEED BENEFITS

What the Defender saw as the most serious problem was the **reduction in subsistence benefits for people with 3rd-degree invalidity who are not entitled to an invalidity pension**. From 1 January 2010 such people have not only seen their subsistence benefits reduced [§ 24 Paragraph 1 h) of the Assistance in Material Need Act (Law No. 111/2006 Coll., as subsequently amended)] by more than 1000 CZK, but also benefits for special diets.

Together with the Ministry of Labour and Social Affairs the Defender initiated the **submission of an amendment to the Assistance in Material Need Act, which was intended to eliminate this imbalance**. He also made a personal appeal to the legislators, asking them to discuss and adopt this legislative change as soon as possible. The law was changed as of 1 June 2010 by Amendment No. 141/2010 Coll.

This law entitled people with a 1st or 2nd-degree invalidity to the minimum benefits without having to perform a public service. People with 3rd-degree invalidity are no longer at a disadvantage and are entitled to the minimum benefits including additional benefits to cover special diets.

Some of the most common cases relating to assistance in material need benefits involved **complaints about the reduction in subsistence benefits due to non-performance of a public service, voluntary service, or short-term employment** (§ 24 Paragraph 1g) of the law in question). Claimants often referred to health restrictions which prevented them from performing the public services available where they live.

When investigating specific complaints the Defender found that offices had acted improperly when **assessing benefit recipients' ability to perform a public service in the month** in which they were recognised as being temporarily unfit for work, while this incapacity for work only lasted for part of the month. The administrative offices automatically assumed that the recipient of the benefit was able to perform a public service in that part of the month when he or she was not recognised to **be temporarily unfit for work**. The Defender objected to this blanket approach. According to the law, the office is obliged to assess everyone individually as to whether they are or are not able to perform a public service (taking account of the recipient's incapacity for work and the scheduling of the public service).

The Defender also came across **cases of homeless people**. In some cases administrative offices reject applications for subsistence contributions when applicants fail to specify their place of residence in their application. In relation to this the Defender points out that offices are obliged to duly perform social work and to **provide applicants living on the street with basic social and legal consultancy**. In no case is it possible to require specification of the claimant's exact address before acknowledging the right to benefits. An individual approach must be taken when communicating with the homeless.

When investigating cases relating to decisions taken by administrative offices about assistance in material need benefits the Defender also frequently finds that as a result of **inadequate justification, applicants were evidently wholly unaware of the reasons behind any change in their benefits**. He has also come across cases where the amount of benefits has been set wrongly due to the erroneous calculation of "*bonuses*" where claimants' income is increased through their own actions (e.g. as a result of work or claiming lawful entitlements and recovering debts)

COMPLAINT REF. NO.: 1921/2009/VOP/JŠL

I. When making decisions concerning subsistence contributions, assistance in material need bodies must always assess the efforts made by the applicant to increase his or her income through work, with the exception of people whose efforts in this regard do not need to be assessed by law.

II. If the assistance in material need body does not consider the applicant's efforts to be adequate to have his or her subsistence benefit increased, this conclusion must be stated and justified in the notification that the benefit has been recognised, or subsequently in a ruling.

The Public Defender of Rights was contacted by Mr. M. R., who complained that his subsistence benefit was too low. His appeal against the decision of the Brno-Černovice District Council was rejected by Brno Municipal Council.

After investigating the case the Defender found that in order to determine the level of Mr. M. R.'s subsistence benefits, the authorities had not taken account of the man's attempts to find suitable employment, despite the fact that the claimant presented a list of employers he had applied to for a job. Neither the rulings of the offices in question nor the calculation sheets specified any reason why Mr. M. R.'s efforts to find work to increase his income had not been taken into account.

Considering the fact that the Defender found out about this shortly before the one-year deadline for the initiation of review proceedings had expired, before issuing his report on the investigation he asked the Regional Authority of South Moravia to review the matter. The regional authority complied with the Defender's request, annulling the ruling of the offices in question and ordering the Brno-Černovice District Council to take account of Mr. M. R.'s efforts to find work to increase his income when recognising his claim to subsistence benefits. As a result of this Mr. M. R.'s benefits were increased and the Defender concluded his investigation.

CONTRIBUTIONS TOWARDS CARE IN ACCORDANCE WITH THE SOCIAL SERVICES ACT

In complaints relating to contributions towards care, what claimants most often objected to was the fact that contributions were not recognised to the required amount or were reduced on the basis of a medical examination.

The Defender again began to look into these complaints from the viewpoint of the **conflict between the result of the social investigation and the report of the medical assessor**, or the assessment committee of the Ministry of Labour and Social Affairs. Specific investigations focused on whether assessments of the degree of dependence are complete and cogent and whether the medical assessor based his report on all the relevant facts, covered such facts in his assessment, and provided proper justification for his opinions. In this regards he faced the legal question of whether a medical assessor's conclusions are binding for the administrative body which runs the proceedings and decides on the case.

In accordance with the established practice of the Supreme Administrative Court (e.g. its ruling of 22 October 2009, Ref. No. 3 Ads 48/2009) **the report of an assessment service in benefit proceedings is not binding**, and the content of such a report is not binding for the propositional part of a municipal authority's decision. **Administrative bodies should therefore assess the report of an assessment service doctor in the same way as with any other evidence**, even though the evidence tends to be of decisive importance.

The Defender, however, drew attention to the fact that, in accordance with the law applicable as of 31 December 2010, administrative bodies were not entitled to know the details of the complete report. To aid the decision-making process the municipal and regional authorities running proceedings were only provided with a final report stating the tasks which the person is unable to perform (this is a sub-report, which does not contain any sensitive personal data on the person's state of health). This meant that the authorities were not informed what facts the report was based on, what factual findings were made, or even how such findings were assessed. The authorities were therefore unable to assess the report from the viewpoint of completeness and cogency.

The conflict between the requirements of administrative jurisdiction and the law thus placed the administrative authorities in an irresolvable dilemma. This was temporarily spanned by the methodical recommendations of the Ministry of Labour and Social Affairs that administrative bodies involved in care contribution proceedings should always ask for the applicant's consent to having the complete report sent. The problem was definitively resolved with the change in the law from 1 January 2011 (Amendment No. 347/2010 Coll.), which obliged assessment bodies to send the relevant authorities a copy of the complete report.

When resolving specific cases the Defender also dealt with cases involving people with mental disabilities, behavioural disorders, or autism spectrum disorders. What all these complaints had in common was that **no assessment was made of the applicant's ability to recognise the need to perform a task, the ability to perform the task over the long term, independently, reliably and repeatedly in the usual manner and to check that the task has been performed correctly**. The result was that a lower degree of dependence was found, resulting in lower benefits.

BENEFITS FOR THE DISABLED

As regards benefits for the disabled the Defender particularly dealt with complaints relating to reductions in the level of exceptional benefits for disabled citizens and denial of benefits for the disabled (e.g. a contribution towards the running of a motor vehicle).

In the case of **contributions towards the purchase of special aids** (§ 33 of Decree No. 182/1991 Coll.) the Defender dealt more systematically with the topic of **determining applicants' proprietary and social situation**. While investigating several cases he found that administrative bodies do not take a uniform approach, particularly as regards the scope used to determine applicants' proprietary and social situation, or the reasons given for carrying out a social investigation where the applicant lives. Some administrative bodies require nothing more than proof of income and only carry out a social investigation in the case of par-

ticularly costly aids (e.g. access platforms, stair-lifts), while other offices require information about savings, and movable and immovable assets. These then carry out a social investigation into every applicant. Some offices, however, do not require any proof of income, nor do they carry out any social investigations.

PENSION INSURANCE

When dealing with complaints relating to pension insurance during 2010 the Defender witnessed the impact of the amendment to the Pension Insurance Act (Amendment No. 306/2008 Coll.) and the decree covering the assessment of invalidity (Decree No. 359/2009 Coll.)

The first fundamental change saw the **introduction of an ordinary appeal against CSSA decisions on pensions – an objection**. The option to file an objection was taken advantage of by a great many applicants who were not granted the pension they had applied for, which soon led to the CSSA complaints department becoming overloaded. This was also reflected in the increase in the number of complaints addressed to the Defender during the second half of 2010. The Defender made this the topic of a personal meeting with the Central Director of CSSA and the Minister of Labour and Social Affairs, the result of which was that these offices promised that the situation would improve within a few months.

RETIREMENT PENSIONS

Complaints concerning retirement pensions particularly related to the **amount of pension granted**. When dealing with such cases the Defender usually ascertains whether policy holders have been assessed in compliance with the law on all the insurance periods stated in their pension application or application to change their pension. Despite the anomalies in the Law on the Organization and Implementation of Social Security (Law No. 582/1991 Coll., on the organization and implementation of social security, as subsequently amended), pension insurance proceedings are classic administrative proceedings in which the Administrative Procedure Code is used as the alternative.

COMPLAINT REF. NO.: 2244/2010/VOP/DŘ

In proceedings concerning the modification of pension benefits the Czech Social Security Administration is obliged to accept as proof of the length of insurance the statutory declaration of two witnesses, if there are no other records to corroborate the insurance period in question.

The Defender was contacted by Mrs. K. L. with a complaint in which she complained about the actions of CSSA in its handling of her request to assess the time she spent studying in the ninth class of basic school.

Her complaint and the evidence she presented showed that CSSA had not decided on her request at all, but had just sent her a message clarifying what documents are recognised by CSSA (the original or certified photocopy of a certificate or class register, or confirmation from the school), stating that the "declaration" which Mrs. K. L. sent without an accompanying letter could not be taken into account. The claimant did not have the appropriate certificate, the school in question no longer exists, and she had no success in the archive. The statutory declarations were signed by a witness – a former classmate of the claimant in possession of the relevant certificates.

The Defender began an investigation, during which CSSA rectified the matter. CSSA admitted it had been at fault and issued a decision in which it assessed the insurance period on the basis of these statutory declarations.

The Defender stated that the law does not stipulate any compulsory evidence to prove a period of insurance, and so the claimant was able to prove the length of her insurance with the statutory declarations of two witnesses. Considering the fact that the claimant did not have her certificates, the school she had attended had been closed down, and the documents she needed were not available in the archive, CSSA should have accepted the statutory declarations and assessed the insurance period. As CSSA did not do this in the first place, it was at fault. CSSA also acted wrongly in that it did not issue a decision on the claimant's request, despite being obliged to do so by law.

The situation was rectified on the basis of the Defender's investigations and the claimant's time spent in the 9th class of basic school was classed as being part of her insurance period.

ORPHANS' ANNUITIES

The Defender has repeatedly drawn attention to the shortcomings in the law covering orphans' annuities. **This law seems unfair towards children who are not entitled to an orphan's annuity as the deceased had not paid pension insurance for the required amount of time**, or because **the child was not mainly dependent on the deceased**.

In the first group of cases the Defender proposes that **changes be made to the Law on Pension Insurance** (Law No. 155/1995 Coll., as subsequently amended) to ensure that orphaned children are entitled to an orphan's annuity in every case; the amount of the annuity would be derived from the social security premiums paid by the deceased parent.

In other cases the Defender sees a problem in the wording of the law on pension insurance, as CSSA does not recognise a child's entitlement to an orphan's annuity if the deceased took a child into care as a substitute for parental care (e.g. foster care) yet the child was not mainly dependent on the deceased. Cases like this also call for a **change in the legislation** to explicitly define an orphan child's entitlement, with no room for doubt as regards interpretation.

In relation to this the Defender's Annual Report on Activities in 2009 recommended that the Chamber of Deputies request that the government put forward an amendment to the law on pension insurance, to clearly treat entitlement to an orphan's annuity from a person who took the child into care as a substitute for parental care and the child was not mainly dependent on the that person at the time of their death.

Last year the Defender discussed both problems with the Minister of Labour and Social Affairs. Although both agreed on the need to change the existing law on pension insurance, no specific legislative steps were put forward. **The Defender therefore again proposes that the Chamber of Deputies issues legislation to resolve at least the situation of orphans' annuities.**

COMPENSATION IN ACCORDANCE WITH THE LAW ON LIABILITY FOR DAMAGE CAUSED THROUGH THE EXERCISING OF PUBLIC AUTHORITY

During the course of 2009 and 2010 the Defender was contacted by approximately 20 claimants concerning the procedure adopted by the Ministry of Labour and Social Affairs in handling applications for adequate compensation for delays in CSSA proceedings. What these complaints had in common was the fact that **the Ministry does not deal with applications for adequate compensation within the compulsory period of six months, or fails to respond to such applications at all, which leads to unnecessary**

judicial disputes. The Ministry also did not appoint ministerial staff to represent the Czech Republic in subsequent judicial disputes, but the staff of a law office.

The Defender began an investigation in which he found that a hired law office had represented the Ministry since February 2009, exclusively in cases of claimants represented by the same lawyer. The Ministry did not deal with these claims at all and passed them straight on to the external law office, even though they were routine cases. In defence of its actions the Ministry referred to the sharp increase in the number of claims for adequate compensation. The Defender, however, considers this approach to be inadmissible. This constitutes the **wasteful and inexpedient use of funds from the state budget**, which is confirmed by, amongst others, the Constitutional Court, which in 2008 stated that if the state has organisational branches funded from the state budget, there is no reason for it to transfer the work of these branches to private subjects (Constitutional Court verdict dated 9 October 2008, Ref. No.: I. ÚS 2929/07).

Collaboration with the law office was not renewed in 2010, although representation mandates remain in force in the case of claims already submitted.

As regards delays on the part of the Ministry, the Defender found that some progress had been made, as with the exception of the most complex cases the Ministry not responds to all claims within the compulsory six-month period.

SOCIAL SECURITY INVOLVING A FOREIGN ELEMENT

As these days people move around the European Union more and more, the Defender sees an increasing number of cases relating to social security which involve a cross-border element. This particularly concerns family benefits (particularly parental contribution), long-term care benefits (care allowance) and pensions.

The Defender repeatedly dealt with **cases of parental contributions received by people residing abroad in the long term**. The Defender was contacted by several parents (Czech citizens) who had been granted a parental contribution in accordance with Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (hereafter simply "*Regulation No. 1408/71*"), even though they have lived and still live with their family in another European Union member state yet are registered as permanent residents of the Czech Republic. After Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (hereafter simply "*new regulation*") came into effect, this contribution was withdrawn without claimants knowing why, as nothing in their situation had changed. The change was supposedly justified by the Czech bodies as being down to the fact that the new regulation had come into force. An investigation found that before this the new regulation came into effect (i.e. prior to 1 May 2010), all that the Czech authorities needed as proof of address was a registered permanent residence in the Czech Republic, which, however, is in contravention of the proper interpretation of the above regulations. Therefore this deficient procedure was rectified. With regard to the above, the Defender called upon the authorities to explain these problems to applicants and to inform them about the change in the application of the European regulations.

Since 2008 now the Defender has been systematically dealing with the problem of **non-recognition of long-term care benefits** (in the Czech Republic this is known as the care allowance) **for people with permanent residency in the Czech Republic** (these are usually Czech citizens) **who are claiming a pension from Slovakia**. These benefits are subject to the laws of the European Community. With the application of Regulation No. 1408/71, Article 28 could be interpreted in such a way that monetary sickness ben-

efits would be provided by the state in which the claimant is registered as a permanent resident rather than the state the pensioner claims the pension from. However, the Ministry of Labour and Social Affairs refused to accede to this interpretation. It justified its refusal by referring to the new legal form contained in the new regulation, effective as of 1 May 2010, which states such benefits are to be paid by the state from which the pension is claimed. There is a problem on the Slovak side in that the Slovak Ministry of Labour, Social Affairs and the Family has long insisted that monetary contributions towards custody constitute a social care benefit and are thus not subject to coordination. Both states therefore referred the matter to the European Commission asking for a statement as to whether or not Slovak contributions towards custody are subject to coordination.

In February 2010 the European Commission issued a statement in which it confirmed that Slovak contributions towards custody are subject to coordination in accordance with Regulation No. 1408/71 (the same also applies now the new regulation has come into force). Unfortunately the Slovak authorities, despite acknowledging that contributions were exportable, do not yet pay them to the Czech Republic due to unresolved technical cooperation between the Czech and Slovak authorities. The Defender will therefore continue to monitor this matter and will try to have it brought to a speedy conclusion.

As regards pensions involving a foreign element, on 1 May 2010 a fundamental change was made to the law once the new regulation came into force. When dealing with complaints in relation to this, the Defender again found cases of **delays in proceedings regarding the acknowledgement of pension claims**, with proceedings lasting for several months, sometimes even longer than a year. In several cases the Defender also found that average indexed earnings were not taken into account when determining the level of Czech partial pensions.

The Defender considers the most crucial problem to be the **lack of contractual relations with certain succession states of the former Soviet Union** (particularly the Russian Federation). The result of this is that when people who worked in the former Soviet Union and the Czech Republic apply for a Czech pension, the period of pension insurance acquired in another country is not taken into account and they are generally not entitled to pension benefits (particularly a retirement pension). These people thus often find themselves in poverty.

The Defender has also long taken an interest in problems relating to the **application of the Social Security Treaty concluded between the Czech Republic and Slovakia** (Ministry of Foreign Affairs Memo No. 228/1993 Coll., hereinafter "*Treaty*"). The matter of Czech/Slovak pensions also includes dozens of complaints brought to the attention of the Defender by former employees of Czechoslovak State Railways. What these cases had in common was that they all objected to the CSSA's decision to apply the Treaty when assessing their pension entitlement, despite the fact that this was not in compliance with the law (the decisive criterion for the application of this Treaty is the differentiation between whether prior to January 1 1993 these people were employed by Czechoslovak State Railways, which was based in Prague, or the organisational branch of the Transport Revenue Accounting Administration, which was based in Bratislava). In 2006, after detailed analysis, the Defender concluded that their employer was Czechoslovak State Railways based in Prague, and thus that the pension insurance periods acquired by the claimants prior to 1 January 1993 pertained to the Czech Republic.

CSSA and the Ministry of Labour and Social Affairs had previously tended towards the opposite opinion and considered the pension insurance periods acquired as pertaining to the Slovak Republic. The Defender therefore welcomed the **Constitutional Court verdict** dated 3 August 2010, Ref. No. III. ÚS 939/10, in which the Constitutional Court, **when assessing the pension entitlement of one of the employees, acted in accordance with the conclusions of the Public Defender of Rights and acknowledged her entitlement to a retirement pension from the pension system of the Czech Republic for the entire length of her pension insurance period**.

CSSA DELAYS IN THE ENFORCEMENT OF DECISIONS

When investigating the procedure of the CSSA the Defender has frequently found that CSSA is often guilty of delays when enforcing a decision (execution) in the form of pension deductions. This is a recurring problem. CSSA is either late in enforcing a pension-related decision (execution), or unlawfully deposits deducted sums when they should be remitted to the executor (beneficiary), or **continues to deduct money** even after debts have been paid, or does not respond to pleas to rectify the matter.

Since he first began to take notice of these shortcomings in 2007, the Defender has been convinced that these persistent problems of pension deductions can only be resolved **through the use of software** to allow execution cases to be processed by computer. This software has been designed and introduced, and in August 2010 the last phase of the application software began running. The question now is how long it will take to get all the data on people whose pensions are subject to an execution order into the system. Qualified estimates claim it is likely to take several years.

CSSA is trying to draw attention to the situation and adopt partial remedial measures, although these have not yet been particularly forthcoming. The number of decisions (executions) which CSSA has to process is rising at an enormous rate. This means that CSSA is unable to rid itself of the old deficit (the number of new claims exceeds the number of claims already processed). The situation can only be resolved by increasing the number of staff working on the execution agenda.

At the beginning of December 2010 the Defender had a meeting on this topic with the Minister of Labour and Social Affairs and the Central Director of CSSA. At this meeting the Defender was promised that the situation would be stabilised no later than by 30 June 2011.

2 / 2 / WORK AND EMPLOYMENT

ADMINISTRATION IN THE EMPLOYMENT SECTOR

The Defender's work in the employment administration sector partly involved the application of the Employment Act (Law No. 435/2004 Coll., as subsequently amended), while at other times he attended comments proceedings to two amendments to the Employment Act.

In the case of the amendment to the Employment Act involving the so-called "*savings package*" (amendment No. 347/2010 Coll.), the Defender expressed **strong disagreement with the proposed reduction of unemployment benefits to 45% of average earnings in cases where the employee gives notice to terminate employment for no serious reason or concludes an employment termination agreement with the employer**. The Defender assumes that such a reduction is in contravention of the constitutionally guaranteed right to reasonable creature comforts for people who, through no fault of their own, are unable to secure funds to live through work (Article 26 of the Charter of Fundamental Rights and Freedoms). The Defender considers the reduction of unemployment benefits in cases where an employee's employment contract terminates due to "*mistreatment*" by his or her employer (e.g. unfair treatment, harassment or discrimination) as unjust. In such cases the recognition or non-recognition of "*serious reasons resulting in the termination of an employment contract*" is wholly at the discretion of a member of staff at the employment office, with great potential for arbitrary decisions. Considering the fact that the Ministry of Labour and Social Affairs did not accept the Defender's reasoning and the amendment to the Employment Act was adopted, the Defender will pay closer attention to the interpretation of the term "*serious reasons resulting in the termination of an employment contract*" in the practice applied by employment offices.

COMPLAINT REF. NO.: 5963/2009/VOP/JB

If the registration of a job-seeker is conditional upon the non-performance of certain activities defined by the law (e.g. the performance of the work of a liquidator in accordance with § 25 Paragraph 1 o) of the Employment Act), the details of that person's appointment to office as listed in the Commercial Register are not the decisive factor. The employment office is obliged to check whether this work is actually performed.

The Defender was contacted by Mr. K. Š., who complained about the actions of the Employment Office in Cheb, which refused to register him as a job-seeker, referring to the provisions of § 25 Paragraph 1 o) of the Employment Act. According to these provisions a job-seeker must be a physical entity who is not a liquidator as defined by a special law (§ 70 and following of the Commercial Code).

The employment office found that when the application was submitted, the claimant was listed in the Commercial Register as a company liquidator. The claimant stated that he longer acted as a liquidator, as the bankruptcy proceedings had been terminated back in 2005 due to the fulfillment of an allocation decree.

The Defender began an investigation in the course of which he warned the Ministry of Labour and Social Affairs that in accordance with § 68 Paragraph 3 of the Commercial Code the company was wound down through the annulment of bankruptcy for the fulfillment of an allocation decree. Although the claimant is currently listed as a liquidator in the Commercial Register, since the annulment of the bankruptcy proceedings in December 2005 he has been unable to legitimately engage in this work.

During the course of the investigation the Ministry of Labour and Social Affairs began review proceedings in which the Ministry acceded to the Defender's argument and annulled the employment office's ruling to refuse to register the claimant. The claimant was subsequently registered and granted unemployment benefits.

LABOUR INSPECTION

When dealing with complaints relating to procedures adopted by labour inspection bodies, the Defender repeatedly came across complaints where **inspections were not performed thoroughly**. The Labour Inspectorate only takes account of certain facts specified in inspection requests and overlooks other important facts implying a possible violation of the law. The Defender also handled a case involving a **breach of the duty of confidentiality by labour inspection staff**. In the past he has dealt with similar cases of procedures taken by labour inspection bodies when checking employment agencies' compliance with labour-law and payroll regulations.

The Defender also investigated procedures taken by labour inspection bodies when resolving **lack of co-operation by employers subject to inspections**, which in many cases means that inspection bodies are forced to abandon their planned inspections. During the course of his work the Defender has repeatedly witnessed problems where claimants were not paid by their former employer and no employee card was issued. The Regional Labour Inspectorate has frequently tried to carry out inspections of employers, although they refused to provide the necessary cooperation and did not allow inspection staff to enter the premises, or failed to present documentation when requested to do so. Despite repeated attempts to carry out checks and impose a series of fines, owing to the employer's refusal to cooperate and insistence on hindering the matter, no inspection was performed. The labour inspectorates in question have no stopped trying to push for these inspections and have said that they have exhausted all the possible means of forcing such employers to cooperate with a state administrative body. The

claimants also, through no fault of their own, found themselves in a very difficult situation when applying for unemployment benefits or looking for a new job. The Defender is therefore convinced that labour inspection bodies should be given effective means of enforcing their authority in the performance of inspections.

2 / 3 / THE FAMILY AND CHILD

In 2010 the Defender again repeatedly dealt with complaints involving complaints about the actions or lack of action of child protection bodies.

It should be said here that the state administration continues to employ procedures which are **in violation of children's interests**. These are particularly cases where children are removed from the care of their family (family environment) or where insufficient foster care support is offered in the form of consultancy, which should not only cover the child's upbringing (the rights and obligations of foster parents), but should also provide basic information about how to cater to children's needs by means of social benefits.

WITHDRAWAL OF CHILDREN FROM FAMILY CARE

The Defender continues to face excessive cases where children are withdrawn from family care through preliminary measures in accordance with § 76a of the Civil Procedure Code (Law No. 99/1963 Coll., as subsequently amended), even though the **reasons given by child protection bodies in their proposals to impose preliminary measures do not imply a serious threat to the positive development of the child**.

The Defender stated that parents cannot be assumed to be unfit to bring up their children on the basis of presuppositions, unverified information, or refusal to cooperate with child protection bodies. The Defender believes that this approach is contradictory to the child's interests and to the purpose of preliminary measures in accordance with § 76a of the Civil Procedure Code. The Defender considers the application of this instrument in similar cases (see below) as a **flagrantly unreasonable infringement of the family and private life** of the child and its parents.

COMPLAINT REF. NO.: 2754/2010/VOP/KP

It cannot be assumed that parents are unfit to bring up their children and that there is a threat to the positive development of the child on the grounds of refusal to cooperate with child protection bodies, or due to the fact that, during pregnancy, the child's mother did not undergo voluntary preventive medical examinations. Likewise, the fact that a child is not given a name immediately after the birth cannot constitute a serious threat to the child's positive development. These reasons do not automatically mean that parents are unable to provide their child with adequate care and do not represent a serious threat to the positive development of the child, taken either individually or as a whole. Withdrawing a child from parental care under such circumstances is an unreasonable infringement of family and private life.

The Defender dealt with the complaint of a mother whose child was taken from her care a few days after the birth. After investigating the matter the Defender found that the Child Protection Body of the City District of Prague 9 (hereafter simply "child protection body" or "office") had acted wrongly by filing a proposal to impose preliminary measures in accordance with § 76a of the Civil Procedure Code. The reason why the child was taken from its mother's care was

particularly her unwillingness to cooperate with the child protection body, combined with various other reasons. The mother was registered as living in an uninhabitable house, while the child protection body had doubts as to whether she and her child would have adequate living conditions. After investigating the address in question, the office found that the property was not permanently occupied by anyone and that the mother was evidently with her grandparents in a 3+1 flat in an apartment block. Before making this serious intervention into the family's life the office did not contact the grandparents in an attempt to verify this information or to resolve the matter with their help.

The Defender rejected the office's argument that the mother and later the grandparents were unwilling to cooperate with the child protection body and allow it to check the conditions in their flat. According to the Defender, this cannot be taken as evidence that the mother was unfit to raise her child. First of all, the child protection body should try to guide and motivate parents to cooperate – by explaining tasks and competencies in a clear, comprehensible and reasonable manner, or by drawing attention to the possible consequences of failing to comply with parental responsibilities. Parents can be induced to cooperate with the child protection body in other ways, such as through the threat of a fine. This option, however, was not used. According to the record of interviews in the maternity ward the mother was not informed of the possibility that restrictive measures could be imposed, nor was she told that the office intended to file a proposal for preliminary measures to withdraw the child from her care.

Nor can the mother be assumed to be unfit to raise her child on the grounds of the fact that when she was pregnant she did not go for regular checkups at the doctor, as this was not a violation of her obligations imposed by the law. The fact that the child was not given a name immediately after the birth does not constitute a serious threat to the child's positive development. The office argued that the mother had violated the fundamental rights of the child as defined in Article 7 of the Convention on the Rights of the Child by not giving the child a name as soon as it was born. However, parental obligations do not directly correspond to this right of the child. According to the law, if a parent does not give a child a name within one month after the child is born, the registry office is obliged to inform the court of the matter. The court may then initiate proceedings to encourage the parent or parents to comply with the obligations involved in caring for an underage child.

According to the Defender, in the case of the child A. K. No facts came to light which would indicate that the mother was unable to provide her child with adequate care and which would constitute grounds for such a serious infringement of family and private life as removing the child from its mother's care. According to the Defender, these reasons did not imply a serious threat to the positive development of the child, taken either individually or as a whole. On 20 July 2010, the Constitutional Court issued ruling No.: IV. ÚS 2244/2009 to annul the resolution to impose preliminary measures to withdraw the child from the mother's care; however, the child has not yet been returned to the care of her mother.

With regard to the fact that the Office of the City District of Prague 9 did not take any steps to rectify the situation, the Defender was forced to issue a final statement requesting that measures be adopted to return the child to her mother. For future cases he requests that fundamental changes be made to the approach taken by child protection bodies when resolving similar cases. The investigation is still not complete as of the date this report was compiled.

THE PLACEMENT OF CHILDREN INTO A "*NEUTRAL ENVIRONMENT*"

In cases where a child is adversely affected by the behaviour of one or both parents (or other relatives or persons close to the child) and where the conflict situation between the parents is so severe that the child could suffer psychological damage, the current law allows the courts to decide to place the child for as long as is necessary into a **suitable environment** (specified in the court resolution). A suitable environment is understood to mean a nurturing environment with a person or in a facility competent to provide the child with the proper care with regard to his or her physical and mental state as well as the child's intellectual maturity and to enable the implementation of any other necessary measures stipulated by a preliminary measure.

When investigating similar cases the Defender came to the conclusion that when applying such measures the competent bodies should proceed very cautiously. It is always necessary to thoroughly consider whether the threat to the child is a serious one and whether or not other less invasive measures could be used (such as enforcing attendance of family therapy or mediation sessions). It is also important to take account of the individual nature of the child, his or her age, psychological condition and current mental state. Therefore whenever a child protection body proposes or recommends similar measures in court, it should always carefully and responsibly assess all the factors and circumstances of the case in question.

The Defender also considers it essential that the placement of a child into a "*neutral environment*" is accompanied by **compulsory family therapy or mediation**. It is not acceptable if measures focus on the child, when it is the parents that are the cause of the situation.

The Defender believes that the most suitable solution to situations where a child is at risk of being adversely affected by the behaviour of one or both parents is to temporarily put the child into foster care [§ 45a Paragraph 2 of the Family Code (Law No. 94/1963 Coll., as subsequently amended) and § 27a of the Child Protection Act (Law No. 359/1999 Coll., as subsequently amended)]. **A carefully chosen and prepared foster family which could take care of the child temporarily could be a more suitable solution than placing the child into an institution**. The child's parents should be ordered to attend family therapy or mediation.

Although temporary foster care has been covered by Czech law for four years now, in practice there is still the problem that foster parents have almost zero interest in this form of care. The Czech Republic also **lacks specialised professional facilities to comprehensively deal with these cases and to work with the family as a whole**. In practice it often happens that for these reasons a healthy child is placed into an unsuitable institution, e.g. a psychiatric clinic.

PUBLICATION OF CHILDREN'S PERSONAL DATA ON THE INTERNET FOR THE MEDIATION OF FOSTER CARE

As part of an investigation begun on his own initiative into the activities of the child protection section of the Municipal Council of the Capital City of Prague, one of the questions the Defender dealt with was the **publication of children's personal data on the website of the Children in Need Fund** for the purposes of mediating foster care.

The Defender stated that the law does not permit child protection bodies, institutional care facilities, facilities for children requiring immediate care, or bodies specified by the Child Protection Act to publish personal data about children on the Internet or anywhere else for the purposes of mediating foster care. This information (including photographs and sensitive information relating to medical history, ethnic origin or religious persuasion) may only be provided by potential foster parents who have been certified by the state and chosen in accordance with the law as suitable applicants for a specific child from the register of children up for foster care. **The general public may only have access to anonymous data**, i.e. data which does not lead to a specific or identifiable child. The Child Protection Act explicitly states that, apart from state bodies, no other subjects have the right to mediate foster care by selecting specific applicants for a specific child. This right does not apply to the Children in Need Fund, not even from its status as a child protection body as granted by the Ministry of Labour and Social Affairs.

It is therefore not possible to accept the argument that in some cases consent to the publication of personal data was granted by a legal representative, a child protection body or even by the child itself. **In the Defender's opinion, parental consent to the publication of photographs of a child seeking foster care constitutes a conflict of interests between the parent(s) and the child** (particularly with the child's interests as regards the care and nurturing of its own parents and the child's right to privacy). In such

cases parental consent cannot be considered to constitute a valid legal act as defined by the Civil Code and the Personal Data Protection Act. If consent is granted by a child protection body, such as a guardian ad litem appointed for this specific legal action, **such consent would be subject to court approval**. The consent of the child itself must be assessed on an individual basis, taking account of the child's volition and intellectual maturity with respect to the age of the child.

THE RIGHT OF CHILDREN TO BE HEARD

The Defender stated that child protection bodies acting as guardians ad litem in proceedings relating to the care of a child should propose **that the child be heard**, assuming that with regard to his or her age the child is **able to formulate an opinion before the court** (if the court is unable to decide on its own). As a guardian ad litem a child protection body is permitted to make such a proposal to the court, as it is the child's representative in court and should thus defend the child's interests. **In the great majority of cases it is in the child's justified interests that the child itself is able to express its opinion to the court when decisions are being made concerning the future fate of the child**. If the court itself does not call upon the child to give testimony, the child protection body should propose that the court take this step, referring to the provisions of § 100 Paragraph 4 of the Civil Procedure Code (see also the Constitutional Court ruling dated 26 August 2010, Ref. No.: III. ÚS 3007/2009).

COMPLAINT REF. NO.: 1455/2010/VOP/ZG

I. Special attention must be given to children's opinions, with regard to their age and intellectual maturity. If the child's opinion is not in direct conflict with the child's interests, it should be one of the priority factors to be considered when the court makes its decision, especially in the case of older children.

II. In the interests of the child the child protection body should actively urge all those involved to ensure that the child has contact with its parents when the family does not live together in a shared household.

The Defender was contacted by Mr. J. S., who complained about the procedure adopted by the child protection body of the District Authority of Prague 4 (hereafter simply "child protection body" or "office") in the social and legal protection of his son, M. S., a minor. The father stated that the office had requested to hear the child's opinion of his relations with his father, which it would respect. The claimant felt that the office staff had acted tardily, in favour of the mother, and not in the interests of the child.

The Defender stated that the office was at fault in that from October 2008 to March 2010, when the father broke off contact with his son, the office did not take adequate action. In the interests of maintaining contact between the child and his parent, who do not live together, the child protection body should have contacted the child M. S. and the father to try to get them to comply with the court adjudication concerning contact. The office did not make sufficiently active appeals to the father to change his attitude and approach towards his son, to respect the court's decision on contact and to take account of the son's activities, which he had been informed about.

Owing to the age of M. S. (approaching maturity) the office ascertained the child's opinion about his father and then informed the father of that opinion. M. S. stated that he wanted to have contact with his father, but only at the weekend. The office and the court respected the child's opinion.

Considering the fact that the child protection body had begun to take more active steps and there was now contact between the child and his father, the Defender closed the investigation.

2 / 4 / HEALTHCARE

HANDLING CLAIMS RELATING TO MEDICAL CARE

As in previous years the Defender looked at specific complaints involving procedures adopted by the Ministry of Health and regional authorities when dealing with complaints about medical care. In some cases these administrative offices had acted improperly, the result of which was that their conclusions were not convincing. **The most common errors were as follows**:

– extending deadlines for handling complaints without informing claimants,

– failing to take account of every aspect of claims, resulting in claims not being dealt with fully,

– failing to provide information regarding important findings on the basis of which the office came to a certain conclusion,

– sending our incomplete or mostly incomprehensible responses,

– failure to respond to additional queries regarding claims,

– failure to complete reports on discussions of claims with claimants, where such discussions took place, rendering such meetings inconclusive,

– failure to respect the rights of patients and bereaved kin to information from medical and other records.

PROCEDURE ADOPTED BY REGIONAL AUTHORITIES WHEN HANDLING COMPLAINTS ABOUT MEDICAL CARE

As in 2009 the Defender draws attention to the fact that one persistent problem in the handling of complaints about non-state medical facilities is the **unresolved legal treatment of administrative punishment**. The result of this is that fines cannot be imposed on non-state medical facilities for breaching their obligations stipulated by the Act on Medical Care in Non-State Medical Facilities (Law No. 160/1992 Coll., as subsequently amended) and the Public Health Act (Law No. 20/1966 Coll., as subsequently amended).

INCOMPLETE HANDLING OF COMPLAINTS DUE TO FAILURE TO RESPOND TO ADDITIONAL QUESTIONS

There are a number of reasons why complaints about the provision of medical care are not dealt with properly and completely (see above). One of them is that complaints are not completely settled due to failure to respond to additional questions (see the following case).

COMPLAINT REF. NO.: 425/2009/VOP/EH

The regional authority is obliged not only to properly investigate, but also to properly resolve complaints filed with respect to medical care provided. If a claimant asks specific additional questions as part of an investigation, the office is obliged to provide a comprehensible answer on the basis of the information available.

The Defender investigated the actions of a regional authority which was contacted by the wife of a deceased patient, Mrs. E. Š. Although in her first letter she had informed the office of her concerns regarding the medical care provided and the causes of her husband's death, in its reply the office only responded to the second part of her case and did not inform her of the option to initiate an inquiry into the matter. It was only after receiving the second letter from the claimant that the regional authority began to investigate the case by setting up a Regional Expert Committee. After the investigation was completed, however, another error was made in the handling of the complaint, when the authority sent the deceased man's wife just a very brief and mostly unintelligible letter containing a number of specialised Latin phrases. The regional authority did not react at all to her later queries about the investigation and wholly without reason passed the complaint on to be investigated by the Ministry of Health.

Considering these shortcomings, the action of the regional authority can be considered wholly erroneous. Unlike the regional authority, the Ministry investigated the case properly and thoroughly and settled it in a comprehensible manner.

As a result of the Defender's investigation report and closing statement the office management adopted the recommended remedial measures and apologised to the claimant for its errors.

PROCEDURES ADOPTED BY HEALTH INSURANCE COMPANIES

Most complaints in this area related to steps taken by health insurance companies in the assessment and recovery in arrears of health insurance premiums. Despite the relative scarcity of cases of malpractice, the Defender considers it necessary to mention some cases involving serious errors.

In his Annual Report on Activities in 2009 the Defender drew attention to the fact that **the five-year term of limitation** specified by the provisions of § 16 Paragraph 1 of the Act on General Health Insurance Premiums (Law No. 592/1992 Coll., as subsequently amended) must be interpreted as a **foreclosure period**. This means that health insurance companies' right to claim money owned on premiums is forfeited upon the expiry of this period, which health insurance companies are officially obliged to take into account. Despite this the Defender has dealt with a number of cases where a health insurance company **has demanded the payment of a defunct debt and refused to acknowledge the debtors objections to foreclosure.**

2 / 5 / COURTS

DELAYS IN JUDICIAL PROCEEDINGS

As part of the state court administration the Defender still tends to mostly see cases where state court administration bodies settle delay-related complaints in court. Some state court administration bodies (which act as court functionaries – the presiding judges and deputy presiding judges of courts) **continue to settle complaints relating to delays in proceedings as being unfounded, despite the fact that delays have been ascertained on the part of the court**.

The Defender has long been of the opinion that in such cases state court administration bodies do not act in compliance with the Act on Courts and Judges (Law No. 6/2002 Coll., as subsequently amended). If, when a complaint is being settled, the court proceedings are found to be at fault (terminologically referred to as delays, inaction, etc.) as a result of objective circumstances (overburdening of the court, inadequate staffing, etc.) and the complaint is justified from the viewpoint of the claimant's right to a timely hearing of the case (Article 38 Paragraph 2 of the Charter of Fundamental Rights and Freedoms), the Defender considers it unacceptable when a state court administration body rules that a complaint is unfounded.

COMPLAINT REF. NO.: 2632/2010/VOP/PPO

If a state court administration body rules that a complaint about delays in proceedings is unfounded, despite the fact that such delays were demonstrably the result of objective circumstances on the part of the court (the high number of incoming cases, lack of staff, long-term indisposition of court staff due to illness), that state court administration body is then guilty of malpractice.

Ruling that a complaint is well-grounded is not only a reflection of the state's obligation to comply with its international legal commitments (Article 1 Paragraph 2 of the Constitution, Article 6 Paragraph 1 of the Charter of Fundamental Rights and Freedoms), but also of the state's duty towards individuals whose right to a fair trial is guaranteed by the state (Article 38 Paragraph 2 of the Charter of Fundamental Rights and Freedoms).

In April 2010 the claimant S. R., a Tunisian citizen, filed a complaint concerning delays in guardianship proceedings at the District Court of Chrudim. Although the proceedings, on the custody of a child following its parents' divorce, began in October 2006, by the time the claimant contacted the Defender, the matter had not been decided in the first instance and no hearing had been arranged.

The Defender found that there had been delays in this case, at two different intervals. In the first interval (June 2008 – April 2009) the delays were due to a lack of staff and a large backlog of cases. In the proceedings in question the court took procedural steps, but with a long time between them, which affected the overall fluidity of the proceedings. Even cases like this can be considered as "delays" from the viewpoint of the practice of the European Court of Human Rights. This is most evident where the implementation of the requested action abroad is concerned. In the second interval (April – July 2010) the delays were caused by the judge being indisposed on medical grounds.

In the Defender's opinion in this case there were objective reasons for the delays, which were not caused by the party to the proceedings. This led to a situation where no action was taken to decide on the case within a reasonable period of time, yet there were no subjective causes for this situation (the existence of culpability in the form of intention or negligence). In such cases complaints should be deemed as justified. If state court administration bodies rule that such complaints are unjustified, this implies that the complaints were not filed de iure, even though it is clear that the party to the proceedings' requirement that the case be heard within a reasonable period of time has not been complied with.

What the Defender found alarming about this case was the fact that the delays were not rectified even after the claimant had exercised the available remedies (a complaint filed with the presiding judge of the court, a request for a deadline to be issued for procedural action). During that time a check was even carried out at the court by the Ministry of Justice, focusing on decisions on relations with minors. Not even this led to the matter being rectified. The criterion of the average length of the process must apply more strictly in guardianship proceedings, as the passage of time could have irrevocable consequences for the parties' private and family lives.

On the basis of the Defender's investigation the presiding judge of the court issued Amendment IV to the work roster for 2010 and allocated guardianship files to other judges. A hearing was convened on the case itself. The claimant's complaint was retrospectively deemed as being well-grounded and the Ministry amended the conclusions of its check to comply with the Defender's statement.

Although the proceedings were finally completed in November 2010, the Defender is still in contact with the Minister and the presiding judge of the Regional Court of Hradec Králové in order to have more staff taken on at the District Court of Chrudim.

Others found to be at fault in their handling of complaints, besides the presiding judge of the District Court of Chrudim, were also the presiding judge of the Regional Court of Brno and the presiding judge of the District Court of Břeclav.

As the Defender found that the approach taken by the presiding judge of the Regional Court of Brno, JUDr. Jaromír Pořízek, was unique in comparison to the procedures adopted by other presiding judges of regional courts and as no consensus of opinion was reached during the investigation, the Defender decided to contact the Minister of Justice. The Defender assumes that the Ministry of Justice, as the guarantor of the state's administration of its courts, should not tolerate inconsistency on the part of court officials and should take the necessary steps to **consolidate court practices**. Therefore, as a remedial measure the Defender proposed that this issue should be included in the agenda of the next meeting of the presiding judges of all regional courts and, in the presence of a ministerial representative, a unified procedure should be set forth for court officials.

DELAYS IN PROCEEDINGS AT THE SUPREME COURT OF THE CZECH REPUBLIC

In 2010 the Defender dealt with a number of complaints concerning delays in appellate proceedings at the Supreme Court, particularly in civil matters (Cdo register). **The situation is still unacceptable** (the average length of appellate proceedings is 13 months), despite the fact that during the course of 2010 the presiding judge of the Supreme Court attempted to resolve the matter (by adding staff to the overburdened senate, drawing up a schedule for dealing with cases more than two years old, changing the order in which individual cases are handled).

Expectations that a partial reduction of the length of time proceedings take before the Supreme Court will result from limitations on the admissibility of appeals as incorporated in the amendment to the Civil Procedure Code No. 7/2009 Coll. have only partially come to fruition. From the beginning of 2010 to 4 November 2010 the Supreme Court received 4361 civil appeals, compared with 4646 cases during the same period in the previous year. Therefore, the presiding judge of the Supreme Court is in talks with the Ministry of Justice concerning the implementation of further legislative changes in appellate proceedings.

Nevertheless, the steps taken by the presiding judge of the Supreme Court have resulted in a reduction in the number of civil appeals that have not been processed. While as of 31 August 2009 the Supreme Court registered 5734 unprocessed civil appeals, by 31 October 2010 the number of cases not dealt with in the Cdo register was 5181, and 34 insolvency cases.

In November 2010 the Defender was assured that the presiding judge would continue to take steps to reduce the number of open cases and to cut the average length of appellate proceedings. Despite this, the Defender considers the information about the average duration of appellate proceedings and the overall burden on the appellate court to be unsatisfactory, and will therefore continue to work to improve the appeals agenda.

COURT-APPOINTED EXPERTS AND INTERPRETERS

As in previous years, when dealing with complaints involving the state's administration of its courts, the Defender faced complaints concerning the work of court-appointed experts. These were generally problems relating to **the overuse of expert evidence**, **finding a suitable expert with the appropriate qualifications**, **failure to abide by deadlines** set by the court **for expert testimony,** and **delays on the part of experts in returning files to the court**.

The Defender tries to urge state court administration bodies to take a proper approach to settling complaints concerning delays in proceedings caused by experts and to impose sanctions corresponding to the nature of the experts' actions within the scope of the law (a caution, dismissal, withdrawal of the expert from the court's list of experts).

The Defender has repeatedly drawn attention to problems relating to the work of court-appointed experts in his annual reports presented every year to the Chamber of Deputies. He has also passed on his findings to the Minister of Justice.

The Defender not only investigates complaints from parties to court proceedings, but also complaints filed by court-appointed experts and interpreters themselves, the majority of which relate to shortcomings in the appointment or dismissal procedure.

The Defender (with regard to the findings made in the aforementioned case, amongst others) considers it essential that **new laws on court-appointed experts and interpreters be adopted**. Staff of the Office of the Public Defender of Rights have helped to prepare the general scope of the new law on court-appointed experts and interpreters, which is being drawn up by the Ministry of Justice. Until a completely new law is adopted (according to the legislative plan the paragraph wording should be presented to the government in 2012), fundamental problems should be resolved by issuing an amendment to the existing law (specifying the prerequisites for the appointment of an expert, dismissing and striking off experts, Ministry of Justice supervision over the activities of experts, infractions committed by experts, etc.)

DELAYS IN HANDLING CLAIMS FOR ADEQUATE COMPENSATION FOR NON-PECUNIARY DAMAGE IN ACCORDANCE WITH THE ACT ON LIABILITY FOR DAMAGE CAUSED THROUGH THE EXERCISE OF PUBLIC AUTHORITY

During the course of 2010 the Defender received several complaints about **inaction on the part of the Ministry of Justice in handling claims for adequate compensation for non-pecuniary damage in accordance with the Act on Liability for Damage Caused Through the Exercise of Public Authority** (Law No. 82/1998 Coll., as subsequently amended), when the Ministry failed to inform the applicant of the status of the claim within six months. The Defender does not have the authority to review the statement issued by the Ministry in this matter (this is not a ruling in accordance with procedural regulations, but an out-of-court settlement before the person takes the claim to court). However, if **the Ministry fails to comply with the six-month deadline**, the Defender is convinced that this is a violation of the principles of good administration. He therefore contacted the Ministry of Justice requesting that it take measures to ensure that claimants are always informed about the status of their claim no later than within six months (or given reasons why this deadline cannot be met).

In October 2010 the Ministry of Justice adopted the following measures:

- (1) if the six-month period allotted for the case to be settled out of court is exceeded, the claimant will automatically be informed of the reasons for the delay; whenever possible the claimant will be told approximately when the case is likely to be settled;

- (2) the Ministry will react to queries from claimants about the status of their claims or pleas for urgency, apart from

- i) cases where a final decision can be expected soon after the claimant's plea is delivered, or

- ii) cases which are evidently groundless or involve chicanery;

- (3) in cases open for more than 6 months, by the end of November the Ministry should have informed claimants of the out-of-court status of their cases; managerial staff were also instructed to ensure that this action had been taken.

Despite these measures, the Defender will continue to look into the matter of "*compensation*".

2 / 6 / LAND RIGHTS

Although land register offices merely keep records, and thus have no power to decide about legal property relations, in 2010 the Defender again came across a number of cases in which claimants demanded that land register offices issue rulings outside their scope of authority. Therefore the Defender **welcomed the initiative of the Czech Office for Surveying, Mapping and Cadastre**, which issued an **information leaflet relating to the more accurate determination of the geometric and positional designation of property** for the general public. This material goes into clear detail about the already amended yet little used stipulations of the Cadastre Act (Law No. 344/1992 Coll., as subsequently amended), which allows for borders to be specified by agreement by neighbouring land owners when marking out the boundaries of a piece of land (§ 19a Paragraph 4).

PARTICIPATION IN PROCEEDINGS CONCERNING THE CORRECTION OF ERRORS IN CADASTRAL DOCUMENTATION

As in previous years the Defender received a great many complaints concerning the correction of errors in cadastral documentation. The procedure for correcting errors is somewhat peculiar in relation to the Administrative Procedure Code, which sometimes results in improper procedure on the part of land register offices. One thing the Defender looked at in proceedings relating to the correction of errors was the question of **participation**.

COMPLAINT REF. NO.: 2764/2010/VOP/DV

If one of the possible outcomes of proceedings, no matter how unlikely it might seem during the course of the proceedings, is a ruling which would lead to the amendment of an entry in the property register in the favour of a certain person, this person is considered to be a participant in the proceedings, as it is possible that that person's rights and obligations could be affected.

Mr. V. B. objected to the actions of the Surveying, Mapping and Cadastre Inspectorate in Prague, which refused to call the Czech Republic as a participant in administrative proceedings. The claimant therefore pressed for the participation of the Czech Republic as the proceedings could end in a ruling that the Czech Republic would be listed in the property register as the owner of the land which was the subject of the proceedings.

The Surveying, Mapping and Cadastre Inspectorate justified its refusal by stating that the proceedings had clearly shown that the proceedings to correct an error would not end with the entry of ownership rights in the property register in the favour of the Czech Republic, and so there could be no infringement of the country's rights. The Defender did not agree with this stance. In his opinion this, in factual terms, leads to anticipation of the result of the ruling. The administrative authority's reasoning does not merely count on the potential impact on rights and obligations as assumed by the Administrative Procedure Code (§ 27 Paragraph 2), but directly asks whether there is, or could be as a result of the ruling, an infringement on the rights and obligations of the Czech Republic. This procedure cannot be accepted, as it can never be ruled out that a specific subject whose rights could be affected by a decision could present evidence that would influence the outcome of the proceedings.

The Surveying, Mapping and Cadastre Inspectorate did not concur with the Defender's opinion. Therefore the Defender considers applying sanctions.

OWNERLESS LAND

In the past the Defender has dealt with cases of property which is listed in the property register stating that **the owner is not known or is probably deceased, or the registered owner can no longer be identified.** The Defender has tried to push forward a law which would make it easier to resolve ownership relations to all different groups of property and would eliminate these ambiguities from the property register. He presented his findings in his Annual Report on Activities for 2005 and 2006 and formulated recommendations for the Chamber of Deputies to order the government to present a draft law which would resolve situations where no owner is listed for properties.

The government's response implied that in December 2007 a new draft law would be submitted to amend the Cadastre Act, which would also resolve the question of ownership rights to properties which are listed as ownerless in the property register, or where the owner is unknown. This should also resolve the procedural question (locating heirs, determining a transitional period prior to the eventual disposal of property) so as to avoid any further action being taken with property whose owner comes forward or is eventually found. This draft, however, was not submitted to the government. The Defender was also informed that fundamental changes relating to the ownership of property and property records are linked to the new Civil Code, which, however, has not yet been passed.

Therefore, the matter of ownerless land or land with an unknown owner is still not resolved in the legislation. The Defender appreciates the **approach taken by the Office for State Representation in Property Matters, which, in collaboration with the Czech Office for Surveying, Mapping and Cadastre**, has in a number of cases managed to locate the owners of certain plots of land. Locating property owners

requires in-depth general and specialised knowledge of property law, as well as a knowledge of past and present laws covering property records in the Czech Republic. There are problems not simply with the spatial identification of plots of land which are still registered in simplified records, but also with identifying owners – physical entities, as the Office does not have access to registry office data. In roughly half of cases, the state is found to be the owner.

A report from the Office for State Representation in Property Matters also shows that although in some cases the owners of land have been successfully located, for the present at least the number of pieces of land with an unknown owner (or where the owner can reasonably be assumed to have died) continues to increase.

The Defender will monitor the matter of ownerless land during discussions on the draft of the new Civil Code in 2011.

RESTITUTION

The restitution process culminated in 1994 to 1996, while the settlement of cases involved almost 450 thousand administrative proceedings. In the restitution process decisions were made concerning 1.7 million hectares of land (which makes up 21% of the total area of the Czech Republic). A total of 1.3 million hectares of land was granted, and in the case of another 130 thousand hectares the beneficiaries are entitled to compensation, which is being resolved by the Land Fund of the Czech Republic.

Considering the fact that the number of this type of complaints is falling, the Defender asked the Central Land Office of the Ministry of Agriculture for up-to-date statistics on unsettled restitution cases, which show that as of 23 November 2010 during the restitution process 225 thousand claims had been filed by potential beneficiaries. The current estimate (as of the end of 2010) concerning all the property of claimants is that 99.75 % of cases have been settled, meaning that 553 claims (cases) still remain open.

SETTLEMENT OF PROPERTY SHARES IN AGRICULTURAL COOPERATIVES

As in previous years, the Defender still receives cases from owners of property shares in agricultural cooperatives whose claims have not been settled.

The Defender therefore again draws attention to the fact that in accordance with the Act on Adjustment of Property Relations and Settlement of Property Claims in Cooperatives (Law No. 42/1992 Coll., as subsequently amended) beneficiaries now have receivables claimable from existing agricultural concerns, the majority of which, however, do not have the funds available to cover the settlement of property shares. This means that **beneficiaries' rights as granted by law cannot be fulfilled, as in practice compulsory subjects do not have sufficient funds**. The Defender can thus do nothing more than to state that despite repeated attempts by legislators to find a systematic solution, it has not proven possible to settle the claims of these beneficiaries.

With respect to this it should be said that in relation to suits filed against the Czech Republic at the European Court of Human Rights, in July 2010 the Defender was contacted by the Office of the Government Agent representing the Czech Republic before the European Court of Human Rights and asked to pass on his findings made in handling complaints relating to the settlement of the property shares of beneficiaries in agricultural cooperatives.

In this report the Defender describes cases he had dealt with since 2001 (the figure is now roughly 250 complains), summarises proposed legislative measures, as well as legal arguments which mostly

agree with the claimants' objections. Another factor the Defender still considers crucial is that it is practically impossible to recover debts from agricultural cooperatives (the law has allowed the purposeful stripping of cooperatives' assets to third parties).

In his report the Defender has also raised the question of **state liability for delaying the adoption of laws which would prevent the stripping of assets**. The basic aim of the Transformation Act was to determine and settle the property claims of potential beneficiaries against cooperatives or their legal successors. Despite the fact that the state acknowledged beneficiaries' right to a settlement for property which they had lost title to in the past, no legislation was in place to ensure that this right was exercisable and that beneficiaries had the option to recover the property.

COMPENSATION FOR PROPERTY LEFT IN CARPATHIAN RUTHENIA

The Defender has come across a number of complaints criticising the conditions under which the law grants compensation to alleviate the property grievances of citizens of the Czech Republic for property they left in Carpathian Ruthenia when it was contractually transferred to the Union of Soviet Socialist Republics (Law No. 212/2009 Coll., hereafter simply "*Compensation Act*"). The provisions in question are those of § 3 Paragraph 1 c) of the Compensation Act, in accordance with which property had to be left in Carpathian Ruthenia between 5 November 1938 and 18 March 1939. In these complaints the Defender found that the Ministry of the Interior has rejected a number of applications for compensation purely on the grounds that the claimants' ancestors had left Carpathian Ruthenia later than the date specified in the law, i.e. 18 March 1939, sometimes just a few days or weeks afterwards. While the provisions of § 3 Paragraph 1 of the original draft of the law (until it was changed by the comprehensive proposed amendment of the Constitutional Legal Committee of the Chamber of Deputies) defined those who could be classed as potential beneficiaries much more broadly, by stating that "*a potential beneficiary as defined by this law is a physical entity who possessed Czechoslovak state citizenship as of 29 June 1945 or acquired it no later than as of 1 March 1946 through an option and left property in the Zakarpattia Oblast district of the Ukraine*".

From 14th to 18th March 1939 organised groups of Czechs, Slovaks and Ruthenians fought against attacks from Hungarian troops in Carpathian Ruthenia. **Not all the Czechoslovak citizens managed to evacuate by 18 March 1939, some due to the fact that battles were still raging, and left over the following days and weeks**. The historical circumstances together with the number of complaints received imply that setting the deadline at 18 March 1939 as the final date for leaving assets is not realistic. The Compensation Act this leads to further injustice for the successors of those forced to leave property in Carpathian Ruthenia.

Therefore, on the basis of these complaints the Defender calls upon the Chamber of Deputies to **adopt a legislative change**.

2 / 7 / BUILDINGS AND TERRITORIAL DEVELOPMENT

Since the office of the Public Defender of Rights was first established, complaints relating to territorial decision-making and building proceedings have made up a major part of his agenda, and this was also true in 2010. On a general level, one persistent problem is still the unreasonable amount of time it takes for cases to be reviewed by building authorities, which is often caused by the frequently inadequate decision-making procedures of first-instance bodies, whose rulings are then subsequently annulled by appeal bodies. One can also highlight the lack of enforcement of final rulings (removal of a building, alternative enforcement of a decision), which leads the public to lose faith in the work of state bodies. The last group of the most common complaints are complaints concerning the activities of authorised inspectors.

LAND PLANNING – COMPENSATION FOR THE LIMITATION OF PROPERTY RIGHTS

During the course of his work the Defender has received a number of irate complaints from people whose land has been included in territorial plans as public greenery, sports grounds, local biocentres, etc. The new Building Act (Law No. 183/2006 Coll., as subsequently amended) now grants **financial compensation for the limitation of property rights**, although these provisions will not come into effect until 1 January 2012. In accordance with the provisions of § 102 Paragraph 2 of the Building Act, in the future the owners of land whose designation as land for building was annulled as the result of a change to the territorial plan or regulatory plan, or through the issue of a new territorial plan or regulatory plan or the abolition of a territorial ruling will be entitled to compensation. It is important to add that the law in question will only relate to procedures carried out in accordance with the new Building Act (i.e. since 1 January 2007).

From this it is clear that the existing building laws allow for the granting of compensation in relation to the negative impact territorial planning can have on people's ownership rights, although only in precisely defined cases and only from 2012. With regard to the fact that these provisions will soon come into effect, the Defender has seen efforts to further defer the implementation of these provisions with the aim of warding off municipalities' obligation to compensate landowners for costs relating to territorial planning. **The Defender therefore now appeals to the Ministry for Regional Development and the Chamber of Deputies to refute attempts to defer the implementation of these provisions of the Building Act and to enable landowners to claim compensation for this limitation of their property rights**.

AUTHORISED INSPECTORS

In 2010 the Defender also dealt with a number of cases involving the activities of authorised inspectors. The cases confirmed existing fears that the laws covering the work of authorised inspectors in summary building proceedings do not provide adequate legal assurance in cases where the actions of an authorised inspector are in contravention of the law. The Defender also felt obliged to state that he is unable to exert his investigative powers against authorised inspectors, as although an authorised inspector is a person who works in a building department on the appointment of the Minister for Regional Development, he is not, however, an administrative office.

After certain building authorities had also contacted the Defender objecting to the fact that **it is not possible make any changes to a certificate issued by an authorised inspector** or sanction actions taken by such inspectors which are in violation of the law, the Defender began an investigation in which he called upon the Minister for Regional Development to adopt a methodical instruction which would provide building authorities with guidelines as to how to proceed under the current law. The Minister stated that even in the case of buildings "*with permits*", in summary building proceedings it is possible to apply the provisions of § 171 of the Building Act which treat the supervision of building authorities. The building work may not proceed unless all the conditions stipulated for summary building proceedings have been met. If a building authority becomes aware of such a fact, it must ask the builder not to begin the construction work and also warn him of the possible sanctions that he faces if he does not comply. The builder is then obliged to obtain a new certificate. The Minister also stated that the building authority must notify the Ministry for Regional Development of each serious infringement of public interests by an authorised inspector or action taken by an authorised inspector to allow the Ministry to consider the matter and, if applicable, exercise its supervisory powers. However, the Defender feels it necessary to reprimand the Ministry for Regional Development for the fact that it has not yet issued this methodical instruction or made ay statement. Therefore in any case the Defender will inform the building authority of the Ministry's opinion and will request that it abide by it.

In his work the Defender primarily faces two situations which, until they are resolved, are in violation of the law. Firstly these are cases where an **authorised inspector issues a certificate in contravention of the Building Act** (e.g. in violation of a territorial ruling) or **fails to notify people who would otherwise participate in building proceedings** or was in some inadmissible way involved in the prior preparations for the building work. The second group comprises cases where an authorised inspector issues a certificate in compliance with a territorial ruling and abides by the conditions of the Building Act, yet the territorial ruling is later annulled due to discrepancies. In "*classic*" building proceedings this kind of situation, i.e. if the territorial ruling were related to planning permission, would constitute grounds for the renewal of the proceedings. However, no proceedings are held concerning certificates.

The certificates of authorised inspectors is a matter that is also dealt with by the administrative courts. In its ruling dated 4 August 2010, Ref. No. 9 As 63/2010, the Supreme Administrative Court finally came to the conclusion that a certificate must be considered equivalent to an administrative decision, which can be reviewed by the court.

In his correspondence with the Ministry for Regional Development the Defender also requested (in compliance with the Annual Report on Activities for 2009, Page 157) **that an amendment be made to the Building Act**, which would allow an appeal to be filed against the certificate of an authorised inspector, which would guarantee the legal protection of persons with ownership or other rights to neighbouring properties. The Minister promised the Defender that he would prepare this change in the law.

PARTICIPATION IN BUILDING PROCEEDINGS

In 2010 se the Defender again came across cases where a blanket exclusion was placed on civil associations wanting to participate in building proceedings. In such cases building authorities refer to the fact that the provisions of the Building Act covering parties to building proceedings (§ 109) does not explicitly state that people specified in a special law may also be parties to building proceedings. From this they infer that unlike territorial proceedings, which are explicitly covered by this law (§ 85 Paragraph 2), in building proceedings there is nothing that states that other persons, even those specified in a special law, have the right to participate in building proceedings.

The Defender makes systematic reference to the inadmissibility of legislative attempts to exclude civil associations which represent the public from administrative proceedings (see the Annual Report on the Activities of the Public Defender of Rights for 2008). The reason for this is the need for transparency and public involvement in decisions taken by administrative authorities, as well as the requirement stipulated by the international commitments of the Czech Republic (the Aarhus Convention).

The Defender considers this interpretation of the appropriate provisions of the Building Act and the Nature and Landscape Protection Act (Law No. 114/1992 Coll., as subsequently amended) on the part of building authorities to be irregular. **The Nature and Landscape Protection Act clearly states that a civil association whose primary task as defined by its articles of association is the protection of nature and the landscape is entitled to participate in administrative proceedings which could infringe upon the interests of nature and landscape protection as defined by this law, provided that it declares its intention to participate in the proceedings sufficiently beforehand**. The Nature and Landscape Protection Act is a special law (*lex specialis*), which allows civil associations to participate in all administrative proceedings which could (not necessarily will) affect the interests of nature and landscape protection as defined by the Nature and Landscape Protection Act. This interpretation was also confirmed by the Supreme Administrative Court in its ruling dated 27 May 2010, Ref. No.: 5 As 41/2009.

ALTERNATIVE ENFORCEMENT OF A DECISION

Since the office was first established the Defender has come across cases of **inaction in the enforcement of building authorities' rulings in the form of alternative enforcement**. For example in his Annual Report on the Activities of the Public Defender of Rights for 2004 the Defender gave detailed criticism of situations where building authority rulings ordering the removal of buildings or the execution of maintenance work and essential repairs are not enforced. Building authorities repeatedly draw attention to **their lack of funds** and the unwillingness of local government bodies to provide the requisite funding to cover the enforcement of a particular ruling.

This criticism is repeated in all subsequent Annual Reports. Although in 2010 the Defender did not see any major progress in finding a solution to this serious issue, he did register a case which documented that the alternative enforcement of a decision may be successfully applied.

The Defender therefore again calls upon the appropriate authorities to cater to the needs of local governments for funds to cover costs relating to the alternative enforcement of rulings issued by building authorities.

COMPLAINT REF. NO.: 1508/2008/VOP/JK

A local government body, if it is an executory administrative body, cannot give up on enforcing an administrative ruling it has issued on the grounds that specific executory proceedings are too costly for the local government body.

The Defender was contacted by Mr. V. H. with a complaint about the Building Authority of Moravský Krumlov, which in his opinion was not doing enough to resolve the poor structural and technical condition of his neighbour's building, particularly the objectionable manner in which waste waters were disposed of. Faecal matter and polluted water was leaking from the neighbouring Mr. M. K.'s sump into the claimant's well. Therefore on 23 September 2008 the building authority issued a ruling in which it ordered M. K. To build a cesspit, drainage connection and connection for rainwater by 30 November 2008. This, however, was not done.

The claimant therefore again contacted the Defender complaining about the building authority's inaction in its capacity as an executory administrative body. In February 2009 the building authority imposed a compulsory fine of 5 000 CZK and also repeatedly tried, with no success, to enforce an alternative ruling. However, he also referred to the fact that all the immovable assets were subject to an executory order from the appropriate execution office and the enforcement of other hypothetical fines was too costly for the municipal authority's budget and would have no effect.

Despite the above the Defender is of the opinion that a legitimate and enforceable administrative decision must be carried out. Procrastination with the enforcement of any administrative decision causes the public to lose faith in administrative bodies. Therefore the Defender recommended that the building authority continue to try to enforce its decision from 2008 and, if necessary, should request that an execution be performed by a court executor or the court itself. If this ruling were not to be enforced, it would also be possible to consider the cost of the administrative proceedings preceding the issuance of the ruling to be redundant, which is unacceptable.

Considering the fact that no executory order had been issued as of the date on which this report was compiled, the Defender is considering taking the matter to a higher authority and exposing the case in the media.

PROCEEDINGS CONCERNING THE REMOVAL OF BUILDINGS

In his work concerning building proceedings the Defender has come across the practice where **building authorities repeatedly and for no good reason extend the amount of time allowed for builders of illegal buildings (i.e. those with no permit) to supply the necessary additional source materials to applications for supplementary building permits**. The time it takes to deal with the administrative aspects of illegal buildings is extended by the very fact that building authorities have to go through two sets of administrative proceedings (proceedings to remove a building and proceedings for a supplementary permit for the building). If we add to that the tardiness of the building authority and the inconsistency of the builder, the time required to deal with cases of illegal buildings is actually significantly longer.

COMPLAINT REF. NO.: 6604/2009/VOP/MH

Repeated extension of the deadline for furnishing additional source materials to applications for supplementary building permits, especially when a supplementary building permit is blocked by a territorial plan, constitutes improper official procedure.

The Defender initiated an investigation on his own initiative into the matter of unlawful buildings and landscaping work in the municipality of Řehlovice, in the land register of Moravany u Dubic, in the Protected Landscape Area of the Czech Central Mountains. The Defender was led to begin an investigation into this matter by reports from the public media which stated that the builder P. O. intended to carry out building work and extensive and landscaping work without the requisite planning permit, the consent of the Administrative Authority of the Protected Landscape Area of the Czech Central Mountains, and in violation of the territorial plan of the municipality of Řehlovice. Press releases showed that the case should originally have been decided by the Municipal Authority of Trmice. The Trmice building authority managed to initiate proceedings concerning the removal of buildings, yet before it had the chance to issue a decision on the case, the matter was taken over by the Ústí Regional Authority (hereafter simply "regional authority"). On the basis of a resolution of the regional authority the case was passed on to be settled by the Municipal Council of Ústí nad Labem (hereafter simply "Municipal Council").

The Defender summarised his findings in his report on the investigation, in which he critically objected to the fact that the builder was guilty of gross building indiscipline, when, without the permission of the building authority and the relevant state administrative bodies, including the Administrative Authority of the Protected Landscape Area of the Czech Central Mountains, he went ahead and erected a number of buildings and carried out landscaping work. The Defender emphasised that the Building Act does not leave it up to the building authority as to whether or not it should initiate proceedings to have buildings and landscaping work removed. The building authority is obliged to act without unnecessary delay and exercise its official power to initiate proceedings provided that it has grounds to do so. As regards the fact that the case was taken over by the regional authority, the Defender summarised his findings by saying that, in his opinion, this constituted practice that was both substandard and deviated from the general practice applied by administrative bodies in the building council. He therefore deemed that this action was in violation of the Administrative Procedure Code as well as the principles of good administration and the principle guaranteeing legal certainty for all parties to the proceedings.

In the matter of the territorial plan, the Defender has proof that Řehlovice Municipal Council received a number of requests from the builder asking for his land to be included as land for building, and that the Council denied his requests. The Defender therefore stated that it is wholly evident that the builder had not managed to have his land included in the change to the territorial plan so that it would be classed as land for building. The Ústí Building Authority should take note of this and respect the ruling of Řehlovice Municipal Council.

In conclusion the Defender stated that extending the period granted to apply for a supplementary building permit on the grounds that a change was being prepared to the territorial plan which could allow building work on the site in question cannot justify the years of tolerance of illegal buildings, as it is not in the building authority's power to influence a ruling concerning a territorial plan. The builder had more than two years to rectify the matter, to collect the necessary documents required to apply for a supplementary building permit and to present the building authority with a qualified application for a supplementary building permit covering all the unlawful buildings. With regard to the above, any further extension of the deadline would, according to the Defender, be completely unnecessary and unjustified. Therefore the Defender deemed that the building authority had acted erroneously and in violation of the Administrative Procedure Code and the principles of good administration.

As of the date on which this report was compiled, the authorities have taken no steps to rectify the matter.

PERUSAL OF RECORDS HELD BY BUILDING AUTHORITIES

The Defender continues to be critical of the law covering the provision of information from records held by building authorities. Firstly, all he can do is repeatedly stress that the existing law, specifically **restrictions on the provision of copies of building-related documentation, is unsatisfactory**. He also continues to propose that the restrictions imposed by the provisions of § 168 Paragraph 2 (second sentence) of the Building Act should be lifted, as there is reason to doubt that these provisions are in compliance with the constitutionally guaranteed right information held by public administrative bodies.

REFERENCE TO TECHNICAL STANDARDS IN LEGISLATION

The Defender concluded the final statement on his investigation relating to reference to technical standards in legislation. In this statement he recommended two amendments to the government's legislative regulations.

The first of these was to ensure that next time the proposers of laws, orders and decrees prioritise **indicative references to technical standards over preclusive references**. An indicative reference is one which does not specify that a procedure in accordance with technical standards is binding and the only possible course of action, but only prioritises such a procedure. It is assumed that a procedure in accordance with technical standards will comply with the basic technical requirements as stipulated by the law. However, it also allows the addressee of a law to apply a different procedure to that specified by a particular technical standard, although that person must prove that the other procedure will be in compliance with the basic technical requirements. Of course, some ministries avoid this model, as it places high demands on the person proposing the law, as the legislator in the law must give a concise, comprehensible, precise and pertinent definition of the basic technical requirements (e.g. requirements concerning different types of buildings).

The second recommendation is that technical standards which are referred to in a law should be clearly identified in the law. It is not sufficient to merely to refer to "*standard values*", for example, but the specific technical requirement should be quoted directly in the text of the law or should be contained in a law issued on the basis of statutory authorisation.

HERITAGE CARE

One thing the Defender considers to be call for alarm is the lack of action on the part of state heritage care bodies, which **are breaching the obligations imposed on owners of listed buildings** and **subsequently fail to force owners to comply with their legal obligations in a thorough and timely manner** (particularly the obligation to preserve cultural monuments and keep them in good condition). The reasons why state heritage care bodies are not ordered to take the appropriate remedial measures are particularly fears over the cost and the difficulty in recovering the money from the owners of the monuments. The result of this, however, is that the administration just sits and watches how monuments fall into such a state of disrepair that they can no longer be saved.

INVESTIGATIONS ON HIS OWN INITIATIVE REF. NO.: 517/2009/VOP/MH

The failure of state heritage care bodies in the protection of listed buildings is in contravention of the State Heritage Care Act and also goes against the principles of good administration and a democratic legally consistent state.

In 2010 the Defender dealt with a case involving the spa in Kyselka. During the investigation he referred to the fact that if a cultural monument is in an emergency state of disrepair, work on studies into how such buildings will be used in the future cannot be considered to be effective rescue measures, nor can preparatory work to collate materials for the territorial proceedings which would precede the restoration of the buildings.

In his Annual Report for 2009 the Defender stated that if the state is interested in protecting its monuments, if the owner of the building takes no action, the state is obliged to take the necessary steps on the owner's behalf to save the listed building and then claim the money invested in this work back from the owner. The state of the listed buildings in Kyselka is proof of what can happen to listed buildings if inaction on the part of the owner is combined with inaction on the part of the state and state bodies, including the non-functional institute of the alternative enforcement of a ruling.

In 2010 the case has progressed to a situation where an appraisal drawn up by the National Monuments Institute stated that that the structural and technical condition of the spa site and the Mattoni Villa was one of total disrepair. In the opinion of the National Monuments Institute there was de facto nothing to prevent the building authority from ordering the removal of the buildings, which posed a direct threat to public safety and traffic. According to the Ministry of Culture the buildings had fallen into such a state of disrepair that the preservation of the artistic and historical value of the interiors could not be guaranteed. The Ministry of Culture therefore began to take steps to have the cultural monument status of the former Kyselka spa complex, or at least of part of the site, repealed. As regards the Mattoni factory complex, this has been assessed as being in a stable condition and operative following rescue work. In this case the Ministry of Culture is not considering annulling this site's status as a cultural monument.

With regard to the above it should be said that despite all the Defender's efforts, the state heritage care bodies have not managed to comply with their obligations as imposed by the law and, through their inaction, have brought the matter to a situation where it is no longer possible to save the listed buildings of the former spa in the municipality of Kyselka. The only conclusion to be drawn here is that there has been a complete failure of heritage care in the case of the Kyselka spa.

Another persistent problem relating to heritage care is the question of securing compensation for owners of properties in monumental zones and reservations. These owners are at a disadvantage compared to the owners of properties which have been declared cultural monuments, who are entitled to remuneration from the state for the limitation

of their property rights. This is the third time that the Defender has warned the Chamber of Deputies, as well as other responsible authorities and institutions, including the Ministry of Culture, that **the owners of historical buildings in monumental reservations and zones which are not cultural monuments have no legal right to remuneration for the costs of restoring the cultural and historical treasures of these buildings** (see the Annual Reports on the Activities of the Public Defender of Rights for 2007, 2008, and 2009).

In some regions and cities there are now grant programs which also support these owners, although whether such grants are allocated to the owners of these historical properties depends on local government budgets and priorities. However, the responsible heritage care institutions, i.e. primarily the Ministry of Culture, have not yet adopted any systematic measures to resolve this problem.

Therefore, in 2009 the Defender again called upon the Chamber of Deputies to request that the government present a new Heritage Care Act (Law No. 20/1987 Coll., as subsequently amended), which would cover compensation for the costs of restoring and maintaining monuments and valuables in buildings in monumental reservations and zones which are not cultural monuments. The Defender argues that restricting owners of properties in monumental zones and reservations, who, unlike owners of cultural monuments, are not entitled to a grant, is not, according to the provisions of Article 11 Paragraph 4 of the Charter of Fundamental Rights and Freedoms, compensated by the law (see the Annual Report on the Activities of the Public Defender of Rights for 2009, Page 157).

For these reasons the Defender therefore addresses these same legislative recommendations to the Chamber of Deputies this year, too.

2 / 8 / PROTECTION AGAINST NOISE

NOISE POLLUTION

In 2010 the Defender issued a collected volume of statements entitled "*Noise Pollution*", containing selected problems involving protection against noise and noise pollution (the collected volume is available at: http://www.ochrance.cz/publikace/sborniky-stanoviska/). Even though the volume was only compiled and published relatively recently, since its publication certain new types of cases have come up which have led to the addition of other statements.

NOISE FROM RESTAURANTS AND PUBLIC MUSIC PRODUCTIONS

The Defender again registered a series of complaints in which citizens complained about noise from public music productions or noise from restaurant facilities. Perhaps the most important fact in relation to this is that in a ruling dated 2 November 2010, Ref. No. Pl. ÚS 28/09, **the Constitutional Court** inferred that **municipalities may**, on the basis of the provisions of § 10 a) of the Municipalities Act (Law No. 128/2000 Coll., as subsequently amended), **set the opening hours of hostelry facilities in selected parts of the municipality**.

LOW-FREQUENCY NOISE

The annoyance of low-frequency noise is a specific yet far from unique phenomenon, involving noise which falls mainly below 100 Hz and is thus borderline audible. This noise can still easily penetrate through relatively thick perimeter walls into a building's interior and can then be felt as noise with a strong tonal

component (at low frequencies). Moreover, this sort of noise is **subjectively felt in a more detrimental way in comparison with noise at medium and high frequencies and may thus induce certain health problems**. In persons with increased susceptibility to physical environmental factors (assumed to comprise up to 20 % of the population), in combination with the psychosocial conditionality of the nature of perception, this can subjectively be experienced as a "*droning noise*". Experts have shown that when noise levels increase in the form of pulses and in the case of long-term exposure these pulses may be perceived as being continual (a person's hearing "*tunes into*" these frequencies).

Typical sources of low frequencies can be machinery in large construction and technological facilities (e.g. power stations or production facilities equipped with large numbers of machines of the same type, etc.)

A crucial factor here is the fact that there are no noise limits covering low-frequency noise in the sheltered interiors of buildings, sheltered outdoor parts of buildings and sheltered outdoor areas and the current methods used to assess noise measurements are not construed to assess low-frequency noise. The reason for this is that the effect of such noise varies from person to person, making it difficult to assess. At present there is no reliable was of assessing the impact or harmfulness of this kind of noise pollution.

Investigations of two cases (from different localities) involving harm caused by long-term exposure to low-frequency noise found that the problem of low-frequency noise is a relatively new area that has not yet been much explored. Compared to other European countries, the process of assessing the effect of low-frequency noise on public health is still at the very early stages.

As this topic has so far been of marginal interest to public health bodies, the Defender referred the matter to the National Reference Laboratory for Communal Noise at the Ostrava Medical Institute, which compiled a paper entitled "*Special Information on the Assessment of Low-frequency Noise*". From this material it is evident, amongst other things, that **long-term exposure to low-frequency sound** (or noise) may have not only beneficial (therapeutic) effects (e.g. special meditation music, which can soothe brain activity), but also **a detrimental effect on the human body**, including serious health implications (disturbed sleep patterns, irritable behaviour, disorientation, performance degradation).

In some countries of Europe (Sweden, The Netherlands, Denmark, Germany, and Poland) official limits have long been in place to regulate low-frequency noise and infrasound inside residential and civil buildings. What is important, however, is that these are merely recommendations and not binding limits, primarily due to the fact that there are great differences in how noise is perceived.

The Defender also took this matter to the Head Health Officer of the Czech Republic at the Ministry of Health and will continue to look into this matter to ensure that the public are kept adequately informed about the results of findings of the appropriate bodies of state administration on the subject of low-frequency noise.

TRAFFIC NOISE

The fact that noise pollution caused particularly by the rising number of cars on the streets is a major problem these days is a widely acknowledged fact. The Defender is therefore of the opinion that all public administration bodies should get involved in this matter to help to reduce noise pollution as far as they are able to.

The Defender has taken an interest in this matter for a long time now and considers it essential that the Ministry of Health and regional hygiene stations thoroughly supervise compliance with the obligations stipulated by rulings on noise exceptions issued for roads which exceed permissible noise limits and also exercise all their available powers to force the owners of such roads to take noise-reduction measures.

Although it is not possible to wholly disregard the budgetary means of road owners (the state in the case of motorways and Class I roads, regional authorities in the case of Class II and III roads), **it is not permissible that the implementation of suitable anti-noise measures aimed at keeping noise levels at least at a reasonably feasible limit be continually deferred on the grounds of the state's or regional authority's lack of funding** (limited budget, other budget priorities).

The Defender has also often met with the opinion that the **imposition of fines for failure to implement anti-noise measures** on the grounds of lack of funds does not serve its purpose, as funds spent on fines could otherwise be used to put these anti-noise measures into practice. Although the imposition of fines for failure to comply with rulings permitting noise exceptions on roads which exceed noise limits can undoubtedly be seen as an extreme solution, in the Defender's opinion it is a necessary measure, particularly in situations where a road owner has long neglected his obligations in relation to the protection of public health, as there is no doubt that the threat of sanctions for violating the Public Health Protection Act plays a crucial motivational role. It should be said that basic hygienic limits for noise from roads are higher than for other sources of noise. They are even higher in the case of so-called old noise pollution. However, even if noise from a road does exceed these hygiene limits, it is necessary to assume that the owner or administrator of the road knew about this and was thus responsible. In such a case the owner or administrator should apply for a time-limited permit to operate the noise source; however, it must meet the conditions stipulated in this permit by a public health body. If the owner or administrator of the source of noise fails to comply even with this minimal obligation, in the Defender's opinion it is not permissible to impose a fine that is below the lower limit, and certainly not to waive it completely. In relation to this the Defender would also like to point out that failure to impose fines on the owners or administrators of roads (or transport infrastructure in general) may lead to **unequal treatment towards operators of other sources of noise** who are given fines or whose fines are not waived.

One separate problem that claimants continue to bring to the Defender's attention involves **noise pollution of residents in flight zones**. In the case of plans to expand airports (e.g. the new runway at Prague Ruzyně) and to run flights, particularly at night, again and again people run up against the unwillingness of the authorities in question to provide information about discussion of these plans, especially the means by which noise levels are measures and the results and assessment of such measurements. The Defender considers the growing noise pollution from air transport to be a serious problem from the viewpoint of public health and therefore intends to focus on this issue in the future.

2 / 9 / PUBLIC ROADS

ROAD ADMINISTRATIVE OFFICES

Back in his Annual Report for 2003 the Defender highlighted practical applicational problems connected with the fact that every municipality in the country (no matter how small) is a road administrative authority. On the basis of the hundreds of complaints relating to road (public highway) administration over the last few years, the Defender is convinced that this is such a complex agenda that small municipalities do not have the power to cope.

As the years have passed the situation has not improved for small municipalities and, due to the lack of a specialised bureaucracy, has had no chance of improving. The agenda is complicated not only by the very diversity of its nature, but particularly by the fact that the application of the current Roads Act, which is far from perfect, involves ever more specialised work with court judicature (or the Defender's statements), which is something that cannot reasonably be expected from the mayors of small municipalities. In proceedings concerning the existence of roads or the removal of fixed obstructions from roads, as well as in other types of proceedings, road administrative authorities routinely have to interpret a number of

ambiguous legal terms (the content of which, however, has already been specified by the judicature). Authorities most often deal at the level of constitutional law (the protection of ownership rights) and, last but not least, have to resolve the complex preliminary problem of title to a particular road, something which has not yet been clarified even in civil judicature. All these circumstances taken together lead to interminable administrative proceedings where repeated annulment rulings of regional authorities are unable to eliminate these persistent problems and bring the proceedings to an end.

The Defender's conclusions regarding the **need to transfer the scope of authority of road administrative authorities exclusively to the municipal authorities of municipalities with extended powers** are supported not only by the sentiments of regional authorities, but also by the professional literature. The present practice, by which a number of regional authorities literally try to methodically guide "*each step taken by mayors of small municipalities*", is both unthinkable and unsustainable in the long-term. It is only thanks to the commendable efforts made by regional authority staff that the system of protecting roads has not ground to a halt. Despite the fact that this has been brought to the attention of the Ministry of Transport, the Ministry has not yet taken any steps to rectify the situation. Therefore the Defender proceeded to make legislative recommendations to the Chamber of Deputies.

2 / 10 / OFFENCES AGAINST PEACEFUL COEXISTENCE, PROTECTION OF THE PEACE

THE APPLICABILITY OF AUDIO OR VIDEO RECORDINGS AS PROOF IN ADMINISTRATIVE PROCEEDINGS

In recent years, bodies dealing with offences have been finding more and more that parties to proceedings often try to corroborate their claims by presenting audio or video recordings. From what the Defender has found, the attitude of administrative bodies on the admissibility of such evidence in administrative proceedings tends to be somewhat reserved. Administrative bodies refer primarily to the fact that these recordings were not made with the consent of the persons recorded, and that therefore such evidence has been obtained in violation of the law (§ 12 Paragraph 1 of the Civil Code).

The Defender believes that it is necessary to **consider not only the suspect's right to privacy**, but in justified cases (e.g. on the grounds of prior negative experience with the suspect, or with earlier proceedings which were halted on the grounds of lack of evidence) also the **public interest in a fair hearing of the offence**. Other factors in play include **a person's constitutional right to immunity, the protection of their dignity, personal honour, good reputation and name** (Articles 7 and 10 of the Charter of Fundamental Rights and Freedoms). If someone makes an audio or video recording to use as proof in administrative proceedings in order to protect their rights and interests as protected by the law, then the admissibility of this proof should also be assessed with regard to the conditions stipulated by the Personal Data Protection Act (Law No. 101/2000 Coll., as subsequently amended), particularly on exceptions to the general ban on the processing of personal data without the subject's consent as defined in the provisions of § 5 Paragraph 2 e) of the Personal Data Protection Act.

COMPLAINT REF. NO.: 5432/2009/VOP/IK

In justified cases audio or video recordings made without the consent of the detainee may be used as proof in administrative proceedings, provided that the conditions stipulated in the provisions of § 5 Paragraph 2 e) of the Personal Data Protection Act are met.

The Defender was contacted by Mr. And Mrs. H. with a complaint regarding the procedure adopted by the Petty Offences Committee of the town of Brandýs nad Labem – Stará Boleslav and the Regional Authority of Central Bohemia in proceedings relating to an offence in accordance with the provisions of § 49 Paragraph 1 c) of the Petty Offences Act (Law No. 200/1990 Coll., as subsequently amended). The offence was allegedly committed against Mrs. H. by Mr. S. During the course of the proceedings Mrs. H. presented evidence in the form of a video recording taken by an industrial camera monitoring the area in front of her house and the neighbouring house (Mr. And Mrs. H. installed the camera system following previous incidents involving Mr. S.).

The administrative body looked at this evidence, yet claimed that it did not constitute sufficient proof of how the incident took place and that it was not possible to ascertain with any certainty whether the persons captured in the recording are Mrs. H. and Mr. S. The proceedings were halted, while the Regional Authority of Central Bohemia rejected the claimant's appeal as being inadmissible and subsequently took no steps to find grounds for initiating review proceedings. In the opinion of the regional authority the recording was made in violation of the provisions of § 12 of the Civil Code, i.e. without the consent of the accused.

The Defender inferred that it was necessary to take account of personal protection on the one hand, and the need for a proper hearing of the offence and the protection of peaceful coexistence on the other, while the administrative body should weigh up these two opposing interests and determine which interest should predominate in this specific case. He also cast doubt on the conclusions of the Petty Offences Committee of the town of Brandýs nad Labem – Stará Boleslav, stating that the nature of the incident is not clear from the video recording and that the Regional Authority of Central Bohemia and the Ministry of the Interior, which H. also contacted in relation to this case, should initiate review proceedings.

Considering the fact that the administrative bodies did not concur with the Defender's conclusions, the Defender issued a final statement in which he inferred that the making of video or audio recordings as evidence for administrative proceedings should not be judged primarily in accordance with the provisions of § 12 of the Civil Code, but in accordance with the Personal Data Protection Act. The provisions of § 5 Paragraph 2 e) of this act allow for an exception to the general obligation to only process personal data with the subject's consent, including in cases where it is essential for the protection of the rights and lawful interests of the administrator, recipient or other persons involved; such processing of personal data, however, must not infringe upon the subject's right to privacy and personal life. In the Defender's opinion this exception can also be interpreted as covering the making of video or audio recordings for use in administrative proceedings.

The administrative bodies acceded to the Defender's proposals. The Ministry of the Interior promised that it would inform representatives of the regional authority of the Defender's conclusions at a consultation day for those working with petty offenses.

LENGTH OF PROCEEDINGS ON PROTECTION OF THE PEACE

Proceedings on protection of the peace are an institute granting preliminary civil-law protection, yet at the same time they are also "*fully-fledged administrative proceedings*". The lay public tends to perceive such proceedings as meaning that the authority in question must act as soon as an application is

filed. However, in procedural terms the new Administrative Procedure Code Code (Law No. 500/2004 Coll., as subsequently amended) is even more detailed than the Administrative Procedure Code Code dating from 1967 and imposes on administrative bodies a series of procedural obligations [to inform other parties of the commencement of proceedings (§ 47 of the Administrative Procedure Code Code); to order oral hearings (§ 49); to carry out an inspection of the proof (§ 54) – through a local investigation; to call upon parties to make a conclusive statement on collated source materials (§ 36 Paragraph 3)]. Although some of these obligations can be conveniently combined, it is obvious that the idea that an administrative ruling could be issued within the space of just a few hours is wholly unreal from a procedural viewpoint.

Nevertheless, administrative bodies should attempt to **proceed as quickly as possible in matters relating to protection of the peace**, the fundamental attribute of which is that protection should be provided (or denied) as soon as possible.

COMPLAINT REF. NO.: 1126/2010/VOP/DS

In proceedings on protection of the peace it is important to abide closely by the provisions of § 71 Paragraph 1 of the Administrative Procedure Code Code and issue rulings "without undue delay". Here, the period of 30 days (or 60 days in the case of an oral hearing) must be seen as a limit which cannot be exceeded, more so than in other administrative proceedings.

On the basis of a complaint filed by the claimants J. D. and L. D. the Defender investigated the alleged inaction of Luhačovice Municipal Authority and the Regional Authority of Zlín in proceedings on protection of the peace. The subject of these proceedings was the erection of an obstruction on a road which was, until the obstruction, used by the claimants to access their property.

Considering the amount of procedural action required in the first-instance proceedings (including an oral hearing and local investigation), the Defender deemed the length of the proceedings at the municipal authority (approximately 1.5 months) to be satisfactory.

However, the Defender considered the length of the appeal proceedings with the regional authority (more than two months) as inadmissible, not only as it exceeded the sixty-day limit as stipulated by § 71 of the Administrative Procedure Code Code. The Defender expressed the opinion that the settlement of appeals in cases relating to protection of the peace should last for no longer than 30 days, as the appeal body has all the files at its disposal, and often convenes neither an oral hearing nor a local investigation. There is no reason why the issue of an annulment ruling should take several weeks, especially if the case is only to be returned for procedural reasons.

The Defender also appealed to both authorities to improve the organisation of their work so that there are generally no delays in proceedings on protection of the peace (not even just two or three days). The responsible officials should always act immediately, i.e. on the same day (or the following day) that they receive a certain document allowing the proceedings to move forward. Administrative proceedings on protection of the peace by should be settled preferentially.

The administrative bodies agreed with the Defender's opinion, and the regional authority in particular took suitable organisational measures.

2 / 11 / POLICE

CONSIDERATION OF OFFENCES COMMITTED BY THE POLICE OF THE CZECH REPUBLIC

The Defender came across cases where a staff officer ran proceedings for action characterisable as an offence on the part of a member of the Police of the Czech Republic, where the plaintiff was also a party to the proceedings as well as the defendant. Despite this, however, the ruling on the matter was not delivered to the plaintiff and the proceedings themselves did not comply with the usual standards stipulated by the Administrative Procedure Code Code, such as compliance with deadlines for starting proceedings and issuing rulings, proper adherence to protocols, etc.

The Defender inferred that in the case of proceedings in accordance with the Service Act (Law No. 361/2003 Coll., as subsequently amended), on the basis of the provisions of § 1 Paragraph 2 of the Administrative Procedure Code Code (Law No. 500/2004 Coll., as subsequently amended) **the legislation contained in the Administrative Procedure Code** is applied in cases where the Service Act does not specify a different approach. The Defender is convinced that the service official who runs the proceedings is classed as an "*administrative body*", the legislative abbreviation contained in the provisions of § 1 Paragraph 1 of the Administrative Procedure Code. One reason for assuming this is the definition of the term "*public authority*" in the Constitutional Court resolution dated 25 November 1993, Ref. No. II. ÚS 75/93, which defines this term as an authority which "*makes an authoritative decision on the rights and obligations of subjects, either directly or through an intermediary*", while "*the subject whose rights and obligations are decided on by a body of public authority does not share the same legal status as the authority and the content of the decision of this body is independent of the will of the subject*". This definition then needs to be put into the context of the provisions of § 170 of the Service Act, in accordance with which decisions are made concerning the rights and obligations of parties in service-related matters. The nature of state service was also dealt with by the Supreme Administrative Court in a resolution passed by a special senate set up in accordance with Law No. 131/2002 Coll., on rulings on certain competency disputes, dated 13 December 2007, Ref. No. Konf 26/2005.

Although the Service Act contains comprehensive provisions governing proceedings, there are institutes covered by the Administrative Procedure Code which are not contained in the Service Act and which therefore need to be applied directly on the basis of the Administrative Procedure Code. These include, for example, action against inaction (§ 80 of the Administrative Procedure Code), exclusion from hearings and decisions on cases (§ 14 of the Administrative Procedure Code), assuring the purpose and course of proceedings (§ 58 to § 63 of the Administrative Procedure Code) or nullity of rulings (§ 77 and § 78 of the Administrative Procedure Code).

COMPLAINT REF. NO.: 366/2010/VOP/IK

Unless the Service Act specifies a different procedure, the Administrative Procedure Code is used for proceedings concerning action characterisable as an offence on the part of a member of the security force.

The Defender was contacted by Ing. I. S., who did not agree with the procedure adopted by a service official of the Regional Police Directorate of the Region of Western Bohemia (now Plzeň) in proceedings concerning action characterisable as an offence in accordance with the provisions of § 49 Paragraph 1 c) of the Offences Act (Law No. 200/1990 Coll., as subsequently amended), which involved the use of coarse and vulgar expressions (of a sexual nature) which were allegedly aimed at her and her daughter.

The staff officer halted the proceedings, while considering how he appraised the deed [not as slander in accordance with § 49 Paragraph 1 a) of the Offences Act, but as gross conduct in accordance with c)] he only informed the defendant police officer about the decision, while only sending the decision for her information. Ing. I. S. filed an appeal against the decision, although this was not objectively assessed.

The Defender found errors in terms of legal qualification, resulting in the fact that the claimant was not considered a party to the proceedings. Another error was the use of protocols and official records of the Police of the Czech Republic as evidence and also the lack of an oral hearing.

The Defender also made a statement concerning the applicability of the Administrative Procedure Code in proceedings in accordance with the Service Act (see above for reasons) and on the basis of his findings recommended that the director of the Regional Police Directorate of the Plzeň Region propose the initiation of a review of this matter by the Ministry of the Interior.

In the justification for the ruling the Minister of the Interior concurred with the Defender's claim relating to the subsidiary application of the Administrative Procedure Code in proceedings in accordance with the Service Act. This ruling should bring a change in the practice of the Police of the Czech Republic in disciplinary matters (until this time the individual provisions of the Administrative Procedure Code were only used analogically).

EXTENT OF POLICE ACTION PRIOR TO THE NOTIFICATION OF AN OFFENCE

When notified of offences by the appropriate administrative body the police should ensure that it acts speedily and efficiently. It should take action within the scope essential for finding the person suspected of having committed a crime and to secure the necessary evidence to later prove its case in front of an administrative body (§ 58 Paragraph 2 of the Offences Act). If any doubts arise with regard to the qualification of the terms "*offence vs. crime*", the police body should then take action appropriate for criminal proceedings in accordance with § 158 Paragraph 3 of the Rules of Criminal Procedure, which would halt the preclusive period covering the hearing of the offence.

During the course of an investigation the Defender came across situations where a police body, within the scope of its authority as defined by § 58 of the Offences Act, also took action which could not be classified under the term "*investigation essential for finding the person suspected of having committed a crime and to secure the necessary evidence to later prove its case in front of an administrative body*" This **superfluous procedure** is, amongst other things, in violation of Binding Order of the Police Commissioner No. 83 dated 2006, which states that **police officers should only take those actions** which are predominantly **urgent or non-recurring in nature** and which could not be taken later by an administrative

body (Article 9 Paragraph 1). The scope of these actions should be deemed sufficient if such actions do nothing more than imply reasonable grounds for suspicion that the case in question constitutes an offence and was committed by a specific person (Article 9 Paragraph 2).

COMPLAINTS PROCEDURE

In the past the Defender has repeatedly criticised the police for the way in which it responds to complaints. Although it is true that major progress has been made in recent years, there are still claims from people who never find out anything about the reasons why their complaints were rejected as unfounded, despite the efforts of police bodies to collate the necessary materials required to assess the complaints. Excessively **brief responses** to complaints go against the principles of good administration, particularly the principle of conclusiveness. In addition to this, from the basic principles of the activities of administrative bodies and from the proportional application of the provisions covering the justification of a ruling it can be inferred (on the basis of the provisions of § 154 in combination with the provisions of § 177 Paragraph 2 and § 158 Paragraph 1 of the Administrative Procedure Code) that in its response the administrative body should cover all the claimed included in the complaint, react to them, and state **what factors and considerations it has based its conclusions on**.

COMPLAINT REF. NO.: 4821/2010/VOP/MK

According to § 175 of the Administrative Procedure Code responses to claims and complaints must contain information about which materials the inspection body (the body handling the complaint) based its conclusion on and what factors were taken into consideration it its assessment of the matter.

The Defender was contacted by the members of a civil association "Dvanáctým hráčem jsme my!" ("We're the Twelfth Player" – fans of AC Sparta Praha football club), who complained about the disproportionate measures taken by the police against fans of AC Sparta Praha in July 2010 in Hradec Králové, which involved, amongst other things, the use coercive measures.

The lawyer representing the civil association contacted the Regional Police Directorate of the Region of Hradec Králové with a complaint against the police's actions. A letter of response to the complaint was received within the time limit as defined by the law, which merely stated that the inspection body had not come to a conclusion on the malpractice of the police officers involved (no crime or disciplinary offence had been committed; the criminal finding was evidently taken from the Police Inspection body, to which the complaint was also addressed).

However, the notification sent by the Regional Police Directorate of the Region of Hradec Králové to the lawyer representing the civil association did not contain any information about what materials this conclusion was based on, or which factors were taken into consideration by the inspection body when appraising the police officers' actions. The general principles on the activities of administrative authorities imply that the administrative body should respond to all the claims included in the claimant's complaint.

The Defender contacted the Police Headquarters, which began a separate investigation. The Defender will then assess the result of this inquiry.

PROCEDURE ADOPTED BY THE POLICE WHEN PLACING DETAINEES IN POLICE CELLS

The Defender also dealt with the procedure adopted by the Police of the Czech Republic in detaining a person who was subsequently placed in a police cell and **shackled several times in the cell**. The person was escorted to a police station by municipal police officers in order to ascertain his identity, as he was not carrying a citizen's identity card. Then, suspected of committing an offence against peaceful coexistence against the police officers present, a matter which is under the authority of the municipal offences committee, the person was arrested and placed in a police cell. After an hour he was released with no further charges and the case was passed on to the municipal offences committee.

When investigating individual complaint of a similar type, the Defender draws on his experience acquired through his visits to detention facilities. In this specific case the Defender stated that there had been a **breach of the Police Act** (Law No. 273/2008 Coll. on the Police of the Czech Republic, as subsequently amended), consisting of failure to obtain sufficient grounds for placing the person in a police cell (§ 31 Paragraph 1), the lack of adequate records corroborating the detention (§ 57 Paragraph 2) and the unreasonable use of coercive measures (§ 11 Paragraph 1 c). The Defender based his conclusions on the rule expressed in the finding of the Constitutional Court dated 18 February 2010, Ref. No. I. ÚS 1849/08, which states that "*in terms of substantive law the exercising of public authority may not be unsubstantial or inexpedient and it is not possible to tolerate the exercising of public authority as the mere application of the formally predicted authority of a body of public authority without there being a presumptive and rational legally traceable purpose for the specific exercising of authority*".

In this case there was no reason to put the person in a police cell, or even to detain him at the police station, when it was apparent that no procedural steps would be taken. According to the response of the head of the police department, the case will be subject to an inquiry as part of an inspection survey carried out by staff of the internal inspection department.

2 / 12 / THE ENVIRONMENT

As in previous years, in 2010 the Defender received a number of different cases relating to the environment. These were particularly complaints about nature and landscape protection, protection of the atmosphere, agricultural land resources, waste, etc. The Defender also saw a slight increase in the number of complaints about bad odours from industrial plants.

ASSESSMENT OF ENVIRONMENTAL IMPACT (EIA)

The law on the assessment of environmental impact (EIA procedure – *Environmental Impact Assessment*) was adopted with the aim of helping to find the optimal alternatives to investment ventures from the viewpoint of environmental protection. As part of the EIA procedure it is necessary to weigh up the optimal form of plans, including alternative solutions. The result of the EIA procedure is not binding for a specific building project from the viewpoint of other action to be taken by public administration bodies in the subsequent review and approval of the plan, **yet it does, however, constitute an indispensable expert basis**. It is the task of state administration bodies, using an environmental impact assessment, to ensure an objective assessment of the relevant alternatives, including selection of the optimal plan. Public involvement in the assessment process can be a great help here.

WASTE MANAGEMENT

In 2010 the Defender also looked at the problem of waste management by a physical entity in a place not designated for such a purpose by law. The previous year he had drawn attention to a gap in the legislation consisting of the fact that a non-entrepreneurial physical entity could not be ordered to take remedial measures (e.g. in the form of an order to remove the waste by a certain deadline). Therefore, the Defender appealed to the Minister of the Environment with a recommendation that the law be amended; the Minister considers this to be a suitable inducement to take into account when drawing up any potential amendment to the current Waste Act (Law No. 185/2001 Coll., as subsequently amended). The Minister informed the Defender that he was preparing a draft legislative plan for a completely new waste law (which should come into force in 2014), stating that this recommendation would be discussed as part of the preparations for this law.

2 / 13 / ACTIVITY OF THE PRISON SERVICE

OVERCROWDING IN PRISONS

The worst-case scenario regarding the number of prisoners as given in the Czech Prison Service Development Concept to 2015 (Prison Service, 2005) was 21 000 prisoners. Czech prisons and remand prisons currently hold more than 22 000 people, not counting a further 7 000 or so convicts who are avoiding serving their sentence. The Defender has been highlighting the problems over overcrowding in Czech prisons and the lack of staff (both specialised employees and Prison Service officers) for a long time now, most recently in his previous Annual Report.

So far the situation has not been improved by the recodification of the Criminal Code, with the **introduction of alternative punishments**, the greater use of which in court decision-making practice is due to the as yet non-existent electronic monitoring system (sentence of house arrest).

Overcrowding in prisons makes it much more difficult to relocate prisoners. Convicts are placed in prisons several hundred kilometres away from their families, which greatly restricts any beneficial contact with the outside world. The overwhelming majority of relocation requests are refused due to capacity constraints.

Through complaints filed by convicts the Defender has information about impending lawsuits against the Czech Republic for its violation of the ban on inhumane treatment (arising from Article 3 of the Charter of Fundamental Rights and Freedoms) due to **prison overcrowding**. If certain circumstances were to accumulate (such as restrictions on hygiene, for example), this could lead to accusations of a violation of the Treaty and claims for compensation.

SAVINGS MEASURES

The dominant topic for the Prison Service in the second half of 2010 is savings measures. An order issued by the General Director of the Prison Service obliged prison governors to take measures to save on the costs of hot water and the use of electrical appliances and lighting. In relation to this the Defender has seen a series of complaints objecting to these savings. It is evident that the adoption of savings measures in combination with inadequate prison capacity puts further mental pressure on prisoners and could lead to minor conflicts or disciplinary offences, or, in worst cases, unrest (as certain prisoners have implied in their complaints).

One fundamental problem is **bathing once a week** (twice a week in remand), which is in compliance with the Imprisonment Regulations, but in violation of the European Prison Regulations (Regulation 19.4). If bathrooms

are to be locked, with the exception of the weekly time set aside for bathing, convicts could lose the chance to wash themselves, albeit in cold water (not everyone has a washbasin in their cell/bedroom). The problem is not systemic, but individual (for each section of the prison), to set access times for hot/cold water (for washing machines, kettles, etc.) so that all prisons get to take their turn within a reasonable amount of time. **The Defender is currently holding several investigations focusing on these savings measures**.

MEDICAL CARE

The Defender regularly receives complaints from prisoners objecting to the quality and availability of medical care during their time on remand or in prison. Evident problems are caused by **lack of medical healthcare staff in prisons**, which reduces the availability of medical care (e.g. waiting times for women's gynaecological examinations; see the initial medical examinations performed "*no later than within 4 days of arrival*" which have drawn criticism in the past). Other complains about medical care have traditionally related to refusal to prescribe needed medication or refusal to grant appointments for special examinations, but also complaints that medical care has not been provided due to prisoners' lacking the means to pay mandatory healthcare fees or prescription charges.

COERCIVE MEASURES

The Defender was contacted by several convicts complaining about the use of shackles ("*chain handcuffs*" in the terminology of the Prison Service) instead of the standard handcuffs, claiming that the **European Prison Regulations forbid the use of chains**. The Defender has explored the reasons and frequency that this form of coercive measures is used during these systematic visits to prisons. In 2010 several cases where prisoners escaped led to a tightening up of the rules covering shackling when prisoners are under escort, e.g. to civilian medical facilities.

COMPLAINT REF. NO.: 755/2010/VOP/MS

The regulations covering time in prison do not specify handcuffs as a basic coercive measure. However, if there are such a coercive measures in two comparable designs (in terms of purpose) and one of these designs constitutes an unreasonable infringement of the right to human dignity, it is necessary to use the design which presents the least serious violation of the prisoner's rights.

The Defender's investigation into this case did not focus on the shackling itself [which in this case was in compliance with the provisions of § 17 of the Prison Service Act (Law No. 555/1992 Coll., as subsequently amended)], but on the specific coercive measures used to shackle the prisoner. Sometimes prisoners tend to be shackled with chain handcuffs, which de facto consist of a chain with two loops to lace it through. The shackles are then fastened together with a standard padlock. In some prisons chains are used, for example, when escorting dangerous convicts, elsewhere as a routine alternative to standard rigid handcuffs. Yet the use of chains is explicitly forbidden by the European Prison Regulations. The primary argument put forward by the Prison Service is that in the past convicts shackled using standard rigid handcuffs have allegedly managed to slip out of the handcuffs by dislocating their thumbs (assuming that they have narrow palms).

In this matter the Defender (with regard to the principle of minimal intervention as stipulated by Article 4 Paragraph 4 of the Charter of Fundamental Rights and Freedoms) carried out a proportionality test. He determined whether the use of shackles (and the inherent potential violation of the right to human dignity or the ban on torture) was pro-

portionate to the further principle of a democratic legally consistent state, i.e. to the public interest as regards the safe escort/transport of prisoners (in the broader sense of the protection of life, health, property, and public order). He came to the conclusion that there are sufficient alternatives which constitute much less of an infringement of the right to human dignity. If, in exceptional cases, the physique of a prisoner would allow the standard rigid handcuffs to be slipped off, the handcuffs could be tightened, or this coercive measure could be combined with another (a restraining belt, rigid cuffs for the legs).

The Defender assumes that shackling chains have remained in use by the Prison Service as a relic of pre-war times. This is not a coercive measure that should be used in the 21st century, particularly as far as respect for human dignity is concerned.

Shackling chains could easily be replaced by rigid handcuffs with a restraining belt (in rare cases, when merely handcuffs would not suffice). In exceptional cases the Prison Service also has rigid cuffs for the legs, which can be combined with rigid handcuffs and/or with a restraining belt. It is important to remember that the application of shackling chains (on the hands or the feet) poses a far greater security risk (potential assaults by prisoners when the chains are being put on) than rigid handcuffs. The Police of the Czech Republic does not have this reprehensible coercive measure in its armoury. The Defender also has no information about whether shackling chains are used as a coercive measure in other democratic countries.

The Defender informed the General Director of the Prison Service of his findings. He did not concur with the Defender's conclusions. The Defender then summed up his arguments and as a remedial measure proposed that the Prison Service stop using this means of coercion. As of the date on which this report was compiled, the investigation is still ongoing.

OVERPRICING OF GOODS IN PRISON CANTEENS

The Defender has taken an interest in prices in prison canteens for some time now. Besides investigating individual complaints filed by prisoners, the Defender also began to carry out a blanket check on these outlets (inspections were performed in 11 out of 36 prisons and remand prisons) through the pricing control department of the regional financial directorates. These financial directorates concluded that the prices of certain types of goods are towards the upper limit, yet are still in line with the pricing regulations. In one case a fine was imposed for breach of the duty to provide information.

It is the prison governors themselves who should check that prices in canteens are kept at reasonable levels. It is their duty to their prisoners to ensure that the prices of goods in prison shops do not exceed the prices usual for the area where the prison is situated. The General Director of the Prison Service informed the Defender that canteens are subject to a quarterly comparison with prices in nearby shops, performed by the prisons themselves.

Considering the limited range of goods, the limited number of customers in prisons, and thus the limited turnover, it is not relevant to compare prison canteens with shops such as supermarkets. Comparison of prices with the surrounding area is in many cases also relativized by the location of the prison (it is not possible to compare an outlying prison with a supermarket in the nearest town).

The Defender agreed with the financial directorates' assessment, including the fact that prison canteens cannot be compared with supermarket outlets and that it is necessary to take the objective conditions into account. Nevertheless, he drew attention to the fact that not even objective conditions can serve in the future as a pretext for setting excessive prices in prison shops. **The Defender considers comparable**

shops to be, for example, late-night shops, university, hospital and company buffets and canteens on the periphery of the prison.

RIGHT TO INFORMATION

The Defender also dealt with cases where access was denied to information which the Prison Service keeps in convicts' personal files, as it relates to the work of the Prison Service (e.g. a sentencing verdict). An internal regulation of the Prison Service (Order of the General Director No. 50/2008) contained provisions which forbade the provision of information other than that resulting from the work of the Prison Service.

In the Defender's express opinion this regulation goes against the fundamental principles regarding the work of administrative bodies and also against the rules covering the provision of information as defined in the Freedom of Access to Information Act (Law No. 106/1999 Coll., as subsequently amended). In a specific case a prison refused to provide a prisoner with a copy of his sentence report (i.e. a file not resulting from the work of the Prison Service, but directly relating to the Prison Service's work), while it was on the basis of this very verdict that the claimant was serving his prison sentence.

In this case the refusal to provide information may constitute the **preclusion or serious restriction of the prisoner's right to acquaint himself with the wording of his sentencing verdict** and thus his right to prepare his own defence (e.g. through the use of extraordinary appeals) as granted by the Charter of Fundamental Rights and Freedoms.

After the Defender intervened, the **internal regulation was changed** to comply with the higher statues of law.

DISCIPLINARY PUNISHMENTS

The Defender continues to hear from a number of convicts objecting to their disciplinary punishment. Convicts are generally bothered simply by the fact that they have been subjected to a disciplinary punishment. For prisoners, the imposition of a disciplinary punishment places them at a disadvantage within the prison's internal differentiation; disciplinary punishments are also taken into account when employing convicts, in proceedings concerning conditional releases, etc.

The Constitutional Court, in its finding dated 29 September 2010, Ref. No. Pl. ÚS 32/08, **annulled that part of the Imprisonment Act** (Law No. 169/1999 Coll., as subsequently amended) which precluded any judicial review of rulings issued in disciplinary proceedings. The annulment of this provision was deferred until 30 June 2011. Until then, the legislators have time to adopt a new law which will reflect the conclusions of the Constitutional Court. One key matter this will resolve is the court's competence to hear proposals for reviews of rulings concerning the imposition of disciplinary punishments (general courts and administrative courts).

This Constitutional Court ruling clearly shows that it does not aim for a blanket review process for all rulings concerning the imposition of disciplinary punishments, but only to those **disciplinary punishments which constitute a serious infringement of the personal integrity of the prisoner** (these are particularly disciplinary punishments involving placing prisoners into solitary confinement, put all day into a closed section or put into a closed section apart from designated times). The Defender welcomes the possibility of this review process, as he regularly finds that rulings concerning the imposition of these disciplinary punishments are inadequately justified. Disciplinary proceedings involving a decision to impose a punish-

ment for self-harm or the use of narcotic or psychotropic substances, for example, often show evidential shortcomings (see the following case).

COMPLAINT REF. NO.: 5977/2009/VOP/JPK

Disciplinary proceedings against a prisoner who has harmed himself should consider the cause of this self-harm (deliberate behaviour or real mental problems). A doctor should issue a statement of the reasons for the self-mutilation. Otherwise there is insufficient proof for the subjective element of the disciplinary offence – culpability.

The claimant M. K. objected to the fact that he was not provided with the appropriate medical care in Oráčov Prison (including the prescription of diazepam) and also to treatment which twice led him to harm himself, for which he was repeatedly subjected to disciplinary punishment, as the Imprisonment Act forbids prisoners to deliberately harm themselves. He stated that he suffered from a serious personality disorder and stage 4 alcoholism, which were some of the causes of his anxiety, depression, self-destructive urges and behaviour. This claim is also confirmed by the fact that the man used to harm himself before he came to prison.

From what the prison management said the Defender found that diazepam had been prescribed to the claimant on the direct recommendations of psychiatric specialists from Brno Prison hospital, as it contains substances which the prisoner was addicted to before he began to serve his sentence. From this viewpoint the man's self-harming could also be a deliberate form of pressure, to force the drug to be prescribed again. The claimant was punished for harming himself by being placed in a closed section, apart from designated times.

In earlier cases of proposed disciplinary punishments for self-harming the Defender requested that the prisoner first be given a medical examination. The purpose of this examination is to determine the cause of the self-harm. If the doctor states that it is due to manipulative behaviour or a desire to apply pressure, the prisoner is demonstrably at fault, and also imputable. It is only in such a case that a disciplinary punishment may be imposed for this kind of behaviour. Otherwise (for example if the behaviour is due to mental illness, the result of which is that the prisoner's recognition and control abilities are impaired), no disciplinary punishment may be imposed for self-harm.

Considering the fact that prior to his disciplinary punishment, the prisoner M. K. was not assessed by a doctor to ascertain the causes of his self-harm, the Prison Service was at fault. There was a serious flaw in the disciplinary proceedings, the result of which is that there is insufficient proof of the person's competence to be judged responsible for committing a disciplinary offence. Due to the application of the "in dubio pro reo" rule (when in doubt, in favour of the accused) regarding punishments governed by public law, the Defender stated that the claimant's tort eligibility was not proven to the extent sufficient to allow the imposition of a disciplinary punishment.

The Defender passed on his conclusions to the governor of the prison and also to the General Director of the Prison Service. The claimant's disciplinary punishments were subsequently lifted, as there were no legitimate grounds for them.

2 / 14 / TRANSPORT

ADMINISTRATIVE PUNISHMENT FOR A TRAFFIC OFFENCE AND THE QUESTION OF THE SCOPE OF APPEALS

In general the scope of appeals is covered by the provisions of § 82 Paragraph 2 of the Administrative Procedure Code (Law No. 500/2004 Coll., as subsequently amended): "*Unless the appeal specifies the extent to which the appellant objects to the appeal, it is assumed that the annulment of the decision as a whole is being sought*". The Defender, however, came across a case where an excessively literal interpretation of this wording of this law led to illogical procedure on the part of the authorities.

The claimant was accused of several traffic offences, while the 1st degree administrative body found him guilty of only one of these offences, and halted the proceedings on the other accusations. The claimant appealed against the decision, which in the operative part was not divided into individual statements, but formed one whole. The appeal was relatively brief. Although it was not explicitly evident that the appeal was directed only against the guilty verdict, it was clear with regard to the circumstances of the case.

The excessively literal interpretation of § 82 of the Administrative Procedure Code was to the detriment of the claimant's rights, as the administrative bodies did not consider the predication to halt the proceedings to be legitimate (they concluded that the appeal was against the ruling as a whole). The Defender stated that particularly in cases when the appellant objects to a ruling which partly exonerates him of charges, **when assessing the scope of the appeal the administrative bodies must act not only on the basis of a literal interpretation** of § 82 of the Administrative Procedure Code, but also **on the logic and all the circumstances of the case**. It makes no sense to infer that an appeal is also directed against accusations on which proceedings have already been halted, as the appellant, who has legal capacity, will not usually file an appeal to his own detriment (an appeal against a predication to halt proceedings would make sense if the appellant objected to the reason for halting the proceedings; such a requirement would, however, certainly be expressed in any appeal). The administrative bodies (1st and 2nd degree) accepted the Defender's conclusions.

LIABILITY FOR DAMAGE CAUSED THROUGH THE EXERCISING OF PUBLIC AUTHORITY

In 2010, the Defender found that the Ministry of Transport had **rejected** claims for compensation in accordance with the law on state liability for damage caused through the exercising of public authority in the form of a ruling or incorrect official procedure (§ 1 and following of Law No. 82/1998 Coll., as subsequently amended) **in all cases** (**not one case of voluntary compensation was found**). This is in direct contrast to the situation in other ministries and also to the claims that the Czech government makes to the European Court of Human Rights. The Defender therefore has serious concerns as to whether the institute of preliminary assessment claims in the form applied by the Ministry of Transport really is an effective remedy or whether it constitutes merely an **unnecessary six-month prolongation of the judicial compensation procedure**. Moreover, these rulings are generally not legally justified. This is largely down to the fact that there is no central claims assessment point with staff systematically trained in this agenda who would follow judicial developments (Czech and international) and would pool their knowledge and experience with the staff of other ministries. As of the date on which this Annual Report was published, the Minister of Transport **had not yet adopted any satisfactory remedial measures**.

2 / 15 / TAXES, FEES, CUSTOMS DUTY

INABILITY TO REFUND VALUE-ADDED TAX TO PERSONS WITH DISABILITIES WHEN PURCHASING A VEHICLE ABROAD

The Defender looked at the compatibility of the Czech laws with Union (Community) law as regards the conditions covering the refund of value-added tax to persons with disabilities who purchase a vehicle in this country [§ 85 Paragraph 1 of the Value Added Tax Act (Law No. 235/2004 Coll., as subsequently amended)].

He decided to do so following complaints from claimants who had purchased a vehicle abroad and who had failed to win appeal proceedings objecting to incompatibility. The Defender first called for the opinions of the authorities in question.

He came to the conclusion that **the condition that the vehicle be purchased in this country** as contained in the provisions of § 85 Paragraph 1 of the Value Added Tax Act, which entitles persons with disabilities to claim a refund on value-added tax only on vehicles purchased in this country (not abroad) **is probably not compatible with community law**.

According to the practice of the European Union Court of Justice (ruling C-12095 "*Decker*" dated 28 April 1998, available at http://eur-lex.europa.eu), an obstruction to the free movement of goods may be in the form of a law which motivates a person's decision about where to purchase goods. As the phrase "*in this country*" motivates a disabled person who would otherwise meet the conditions covering tax refunds to purchase a vehicle in and only in the Czech Republic, it could be in conflict with Union law in that it creates an obstruction to the free movement of goods. The Defender considers that the law, which is not based on Community law (is not the result of a so-called harmonization procedure), should respect the basic principles of free movement, in this case of goods.

DEDUCTIONS ON PENSIONS TRANSFERRED TO A BANK ACCOUNT AS A RESULT OF AN EXECUTION ORDER INVOLVING THE RECOVERY OF THE RECEIVABLE FROM AN ACCOUNT

The Defender is regularly contacted in cases where an execution order results in money being withdrawn from an account to which a salary, pension or benefits are transferred. These are mostly executions carried out by court executors, although there have been cases of this involving tax administrators. The Defender does not doubt the legitimacy of execution orders involving the deduction of receivables from an account. However, he does believe that when implementing such execution orders it is necessary to respect the protection of certain incomes as guaranteed by the law.

Salary, pension, certain benefits or other forms of income which are (generally) a substitute for remuneration for work, may be subject to execution, but only partially – through deductions [§ 276 and following and § 299 of the Civil Procedure Code (Law No. 99/1963 Coll., as subsequently amended)], or at a certain ratio (§ 318 and 319 of the Civil Procedure Code). Some forms of income are not subject to execution at all (§ 317 of the Civil Procedure Code).

The Defender is of the opinion that **if the mandatory subject can prove to the tax administrator** (for example by presenting the last three account statements) that **no incomes are paid to that account other than those** which are not subject to execution or are only subject to deductions, and that as of the moment that the execution was ordered on this account there were no other funds than the last such incomes transferred to the account (i.e. there are no savings on the account), **the tax administrator should cancel the execution order** (in cases where an appeal is made in a timely manner) or **should stop the**

execution involving the deduction of receivables from the account, partially, where necessary (taking account of savings or funds paid into the account which are fully subject to execution).

Mandatory subjects are currently granted immediate protection by the provisions of § 304b of the Civil Procedure, which allows the mandatory subject to withdraw from the account in question a sum corresponding to double the minimum sum required for living (currently totalling 6 252 CZK). The mandatory subject must be notified of this entitlement in the execution order.

If the incomes specified above are paid into the account, **the mandatory subject is not guilty of misconduct if he changes the method used to pay them**. If such redirected incomes are subject to deductions, there is obviously nothing to prevent the tax administrator from sanctioning them in this way. Unfortunately, however, redirecting payments is not effective in the case of pensions owing to the deadline stipulated by the law in relation to changing payment methods. In such cases the only real recourse is to file an objection against the executory order or later request that the execution be stopped and proving the nature of the funds currently paid into the account.

2 / 16 / ALIEN AGENDA

VISA PROCESS

As in previous years the Defender investigated a series of complaints involving the procedures adopted by administrative bodies in proceedings for the granting of short-term and long-term visas. On 16 June 2010 the Defender organised a scientific seminar on current problems with visa policy and applicational practice. The individual papers are collected in the volume entitled *Visa Policy and Practice in the Czech Republic in the Context of the European Union, Quo vadis visa?*, which is available on the Defender's website (see http://www.ochrance.cz/fileadmin/user_upload/Publikace/Vizova_politika_2010.pdf).

EMBASSY WEBSITES, VISAPOINT

Unlike in previous years, when visa applicants were often not provided with adequate information on consular website, positive progress has been made in recent years and the Ministry of Foreign Affairs **has managed to rectify most of the shortcomings found**. For these reasons the Defender decided to close his investigations into this matter. Nevertheless, with regard to the persistent inaccuracies on the websites of certain embassies, he recommended that the Ministry of Foreign Affairs clearly mark out a specific body in its organisational structure to be responsible for ensuring that all information provided is accurate, correct, and up to date.

The introduction of an electronic registration system for filing applications for visas to the Czech Republic – VISAPOINT (https://www.visapoint.eu) has helped to **streamline the visa process**, which the Defender sees as a positive step. Information from publicly available sources, however, imply that for applicants from certain countries the VISAPOINT registration system in relation to the appropriate resolutions of the government of the Czech Republic (the most recent of which is Government Resolution No. 1205 dated 16 September 2009) serves more as a means of regulating work-related and entrepreneurial migration.

The Defender does not consider the idea of regulating the total number of visas issued as a problem, but there is a problem in the fact that besides the legal regulation of migration as contained particularly in the Residence of Aliens Act (Law No. 326/1999 Coll., as subsequently amended), **this de facto leads to**

the creation of another regulation system which has no basis in the law. This affects the overall concept of regulating the issuance of visas and the division of responsibilities between individual bodies of state administration (e.g. concerning protection of the labour market, enterprise). The existing quota system may also give rise to doubts concerning equal opportunities for applicants from different countries, not to mention the political impacts such measures could have abroad. The Defender considers it essential that competency for determining quotas be explicitly defined in the law. He has brought this problem to the attention of the Ministry of the Interior and the Ministry of Foreign Affairs.

RECORDINGS OF INTERVIEWS IN THE VISA PROCESS

The Defender has managed to bring about a major step forward in the matter of **recordings of interviews in proceedings relating to the granting of residency visas exceeding 90 days** during the course of the interdepartmental comments proceedings on the amendment to the Residence of Aliens Act. The recording of interviews was formerly only governed by the methodology of the Ministry of Foreign Affairs. However, the Defender's many years of experience in investigating visa cases shows that the practice of making recordings by the individual embassies is inconsistent and in many cases non-transparent (no recording is made of the interview, or the recording contains insufficient information to assessment the application).

The amendment to the Residence of Aliens Act (amendment No. 427/2010 Coll.), effective as of 1 January 2011, now **directly covers recordings of interviews**, including the formalities of such recordings. According to the amended provisions of § 57 Paragraph 2 of the Residence of Aliens Act, recordings of interviews, which, by the way, must be drawn up as a separate document, must contain "*data identifying the applicant, a description of the course of the interview, the date, the name and surname or service number and the signature of the person conducting the interview and the signature of the applicant*". This was the culmination of several years of effort on the part of the Defender and the law covering recordings of interviews relating to long-term visas now meets with his requirements.

COLLECTION OF VISAS FROM EMBASSIES, THE PROVISION OF LEGAL SERVICES IN A FOREIGN COUNTRY AND THE PRINCIPLE OF PROPORTIONALITY WHEN REJECTING VISA APPLICATIONS

Positive progress has also been made regarding the collection of visas from embassies. As part of remedial measures the Defender asked the Ministry of Foreign Affairs to instruct all embassies to respect the provisions of § 33 and § 34 of the Administrative Procedure Code (Law No. 500/2004 Coll., as subsequently amended) when issuing visas and **to allow the collection of visas on the basis of a power of attorney**. In February 2010 the Defender was informed that "*the Ministry of Foreign Affairs, through the Consular Department of Concepts and Methodology, had sent letters with instructions to all embassies of the Czech Republic abroad, reminding them that travel documents marked as visas can also be issued to a person officially empowered to do so by the applicant". The requirement to present an "officially certified*" power of attorney, however, is still beyond the scope of the law.

During the course of the year 2010 the Defender concluded his investigation into failure to respect **the right to the provision of legal services by a Czech lawyer in actions performed at an embassy of the Czech Republic in another European Union member state**. The representing lawyer was asked to substantiate the necessary "*legal authorisation to work in the country*" as granted by the European Union member state in question. According to the statement of the Ministry of Foreign Affairs, the embassy was unable to accept the submission of the application by proxy as "*a form of legal aid, or advocacy by a Czech lawyer, without the permission of the receiving state, which could be perceived as an activity in contravention of Article 41*" of the Vienna Convention on Diplomatic Relations (Directive No. 157/1964 Coll.)

According to the Defender, in cases where an embassy holds administrative proceedings under the Residence of Aliens Act in compliance with the Czech legal system and the legitimate function of its mission, **it should not raise the question of the competition of the law of the receiving state in the matter of legal representation**. In this respect it is also not relevant whether it is an embassy of the Czech Republic in another European Union country or in a third country, nor is it pertinent whether the proceedings concern a permanent/long-term residency permit (which are proceedings held in accordance with parts two and three of the Administrative Procedure Code) or proceedings to grant a residency visa for up to/exceeding 90 days (proceedings in accordance with part four of the Administrative Procedure Code). In compliance with the provisions of § 154 of the Administrative Procedure Code the provisions concerning representation on the basis of a power of attorney in accordance with §§ 33 – 35 also fully apply to proceedings held under part four of the Administrative Procedure Code. In such proceedings embassies should allow legal representation in compliance with the legal system of the Czech Republic. Obviously, it cannot be ruled out that a bilateral treaty may specify a different procedure for such cases.

In March 2010 the Ministry of Foreign Affairs **concurred with the Defender's legal opinion** and stated that "*embassies of the Czech Republic abroad allow for representation by a lawyer in proceedings held before such embassies (assuming that legal representation is permitted for such an act). Proceedings, including legal representation, are governed by the legal system of the Czech Republic …*"

Foreign Police bodies also accepted the Defender's legal interpretation on the application of the provisions of § 56 Paragraph 2 c) of the Residence of Aliens Act (in relation to decisions concerning visa applications). In this respect the Defender highlighted the **principle of proportionality** as a general constitutional principle and stated that not every violation of the residency regimen can be considered as such a serious threat to society's interests as to justify the adverse consequences the denial of the visa would mean for the foreigner. The administrative body should assess partly the degree to which public interests would be affected (in this case the nature and frequency of the obligations breached, prior time spent by the claimant in the country, the claimant's efforts to resolve the situation in keeping with the Residence of Aliens Act) and weigh these factors up against the impact of the denial of a visa on the foreigner's overall situation. If the visa is not granted, **the records files must contain sufficient grounds for the decision to deny the visa** and must duly prove that the consequences of denying the visa are commensurate to the reason for denying the visa and that the consequences as regards the foreigner's private and family life resulting from denial of the visa have been assessed (e.g. in the form of an official record stating specific reasons).

REFUSAL TO GRANT A SHORT-TERM VISA TO THE FAMILY MEMBERS OF CZECH CITIZENS

The Defender was contacted by several foreigners from third countries who are also the family members (husbands/wives) of citizens of the Czech Republic, complaining about the denial of a short-term visa.

In these cases the Defender found that the embassies which decide about short-term visas had acted wrongly in a number of cases, such as failure to respect the 14-day deadline for the issuance of decisions to deny a visa, requesting documentation other than that specified by the law, failure to comply with requirements covering the notification of decisions to refuse visa applications, failure to prove the existence of lawful reasons for refusing visa applications, etc. The Defender emphasised that in the case of family members of citizens of the Czech Republic it is important to take account of Directive 2004/58/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states. In national terms the provisions of § 15a Paragraph 5 of the Residence of Aliens Act **evened up the status of the family members of citizens of the Czech Republic in relation to the status of the**

family members of citizens of the European Union. The appropriate methodical instructions make it clear that this interpretation is also supported by the Ministry of Foreign Affairs. Since 5 April 2010 the granting of short-term visas has been governed directly by the applicable Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code). The Visa Code derogates the law covering short-term visas in the Residence of Aliens Act. The provisions, which were in contravention of the Visa Code, cannot be applied after 5 April 2010. If, however, the Visa Code did not cover a given procedural situation (an apt example is the more detailed requirements regarding interviews with a family member and the recording of such interviews), the special stipulations of the Residence of Aliens Act are applied. If the Residence of Aliens Act as a *lex specialis* cannot be applied, as the last resort the fourth part of the Administrative Procedure Code is used. This means the reasonable application of the provisions of parts two and three of the Administrative Procedure Code and the basic principles covering the activities of administrative bodies (§§ 2 – 8 of the Administrative Procedure Code).

The Defender's investigation also showed that a large number of the procedural guarantees for family members of citizens of the European Union (the Czech Republic) as defined by Directive 2004/38/EC **have not been transposed into the Residence of Aliens Act in time**, or were transposed late or inadequately. These include the obligation to provide appropriate reasons for decisions to deny visas, the requirement that when a visa is denied the applicant must be informed of his or her right to counteract the denial of the visa by filing a suit or calling of a judicial review of the decision to deny the visa. It is **essential that these shortcomings be covered by a Euro-conformant interpretation** (indirect effect) of the appropriate provisions of the Residence of Aliens Act and the Administrative Procedure Code.

THE STATUS OF FAMILY MEMBERS OF CITIZENS OF THE EUROPEAN UNION/ CZECH REPUBLIC AND RESIDENCY PROCEEDINGS

Besides complaints focusing on denial of short-term visas the Defender dealt with a series of complaints relating to the residency of family members of citizens of the European Union (the Czech Republic).

INTERPRETATION OF PUBLIC ORDER

The Defender welcomed the shift in the interpretation of public order (§ 87e, 87f, 87k and 87l of the Residence of Aliens Act) in proceedings concerning the granting of temporary/permanent residency permit with the family member of a citizen of the Czech Republic towards the Euro-conformant view of this term.

COMPLAINT REF. NO.: 4421/2009/VOP/PP

The family member (e.g. husband/wife) of a citizen of the Czech Republic may, through a national settlement (§ 15a Paragraph 5 of the Residence of Aliens Act) make full use of the guarantees assured to family members of citizens of the European Union by Directive 2004/38/EC, as interpreted by the Court of Justice of the European Union.

For the application of public order the family member of a citizen of the Czech Republic must represent "the existence of a real, actual and adequately severe threat affecting the fundamental interests of society" (these conditions must be fulfilled cumulatively). The existence of a person convicted of a crime may only serve as grounds if the circumstances which led to the conviction imply conduct which constitutes a permanent threat to the fundamental interests of society.

The Defender was contacted by Mr. K. M. Z, a citizen of Jordan, who was denied a temporary residency permit by the Foreign Police Inspectorate of Teplice, with the Inspectorate's decision being confirmed by the Directorate of the Foreign Police Service. The claimant had no success requesting that the Ministry of the Interior carry out review proceedings. He objected to the application of public order on his person as the family member of a citizen of the Czech Republic (the claimant has been married to a Czech citizen since 2001). He objected to the fact that the decision did not take account of the specific status of the family members of citizens of the European Union and the practice of the Court of Justice of the European Union, and that the same applies with the practice of the European Court of Human Rights in relation the right to protection of one's private and family life.

According to the Defender, through an intrastate comparison (§ 15a Paragraph 5 of the Residence of Aliens Act) the claimant may fully draw on the guarantees assured to the family members of citizens of the European Union by Directive 2004/38/EC as interpreted by the Court of Justice of the European Union. The materials provided by the Directorate of the Foreign Police Service show that the claimant committed the crime of obstruction by remaining in the Czech Republic despite having been forbidden to do so. The claimant's actions did not result in any damage to property or public health. Ten years had passed since the claimant served his punishment. This was neither a violent crime nor a crime involving particular cruelty. The punishment imposed was at the lower end of the punishment scale at the time (3 months from 2 years). In the interim from the imposition of the last administrative expulsion more than 10 years ago, the claimant had not committed any further crimes or violated any laws. In addition to this, the administrative bodies did not consider the severity of the trouble that the claimant's wife would have to face in Jordan if the couple were forced to move there, being unable to secure a temporary residency permit. In this regard the proportionality of the decision not to grant the temporary residency permit was not assessed in relation to the impact of such a decision on the family life of the claimant and his wife. According to the Defender the proper interpretation of Regulation 2004/38/EC in relation to citizens of the European Union and their family members is conveyed by the Memo from the Commission to the European Parliament and the Council on guidelines for better implementation and enforcement of Regulation 2004/38/EC dated 2 July 2009.

The Directorate of the Foreign Police Service and the Asylum and Migration Policy Department of the Ministry of the Interior agreed with the Defender's arguments and the claimant was subsequently granted a temporary residency permit for a family member of an EU citizen. The Defender also welcomed the information from the Asylum and Migration Policy Department of the Ministry of the Interior stating that the memo had been incorporated into the handbook used by permanent residency offices (plus the fact that this memo should have been sent out to all the heads of permanent residency offices). The Director of the Foreign Police Service informed the Defender that the memo had been provided to subordinate offices, which had been instructed to use it in the course of their work.

INTERPRETATION OF THE PROVISIONS OF § 15A OF THE RESIDENCE OF ALIENS ACT

The Defender also looked at the interpretation of the provisions of § 15a Paragraph 1 d) and Paragraph 3 a) of the Residence of Aliens Act, which **considers the family member of a citizen of the European Union to be that citizen's dependant next of kin (descendant or ascendant in direct line)** or such relative of the EU citizen´s spouse who "*is systematically preparing for a future career.*" This term has been interpreted by Foreign Police bodies as meaning that besides presenting proof of their studies, foreigners also have to prove that "*since completing their primary school studies they have been systematically preparing for a future career and that this course of study has never been interrupted.*" This **interpretation was in violation of the provisions of Article 2 Paragraph 2 c) of Directive 2004/38/EC**, which defines family members as "*direct descendants under the age of 21 or dependants, and those offspring of the spouse or partner specified in letter b*)". In relation to descendants over the age of 21 the regulation mentions dependants (with the spouse of an EU citizen) and specifies no restrictions such as uninter-

rupted studies since the completion of primary school. It is also possible to fall back on the Commission Memo 2 July 2009 (see above).

The Asylum and Migration Policy Department of the Ministry of the Interior accepted the Defender's interpretation and **amended the methodical instruction in question**. It also notified bodies of the Foreign Police that are methodically subordinate. When proving systematic preparation for a future career there is no longer the requirement that the study be immediately sequential or uninterrupted.

As part of the adoption of the amendment to the Residence of Aliens Act the Defender also pressed for **improvement in the legal status of foreigners** who in the past have faced administrative expulsion yet have acquired family ties in the Czech Republic, meaning that in proceedings in accordance with § 120a Paragraph 2 of the Residence of Aliens Act there were grounds preventing expulsion in accordance with § 179 of the Residence of Aliens Act. In practice these are particularly the husbands/wives of citizens of the Czech Republic whose **expulsion would be in violation of the right to the protection of private and family life**, or the right to free movement for the family of European Union citizens. Immediately after becoming classed as family members, such people will be able to request the annulment of previous rulings on administrative expulsion and subsequently on temporary residency.

FURTHER SHORTCOMINGS IN PROCEEDINGS CONCERNING THE GRANTING OF PERMANENT RESIDENCY, THE NEED FOR A EURO-CONFORMANT INTERPRETATION

After the Defender had drawn attention to this, the Ministry of the Interior amended its methodical instruction relating to the condition stipulating 5 years' uninterrupted residency in the country as defined in the provisions of § 68 of the Residence of Aliens Act (permanent residency in the country). In accordance with its earlier interpretation, fulfilment of the condition stipulating five years' uninterrupted residency in the country at the time the application for permanent residency was filed was not enough for the Ministry of the Interior; it required that foreigners remain residents continuously until a decision had been made on the application. However, in the Defender's opinion, the Residence of Aliens Act does not stipulate this. The Defender believes that **it suffices if the foreigner has been a continuous resident in the country for 5 years at the time the application is made**, or immediately prior to making the application. This interpretation is also corroborated by Article 4 Paragraph 1 of Council Directive 2003/109/EC dated 25 November 2003 on the legal status of citizens of third countries who are long-term residents.

The Defender also looked at the procedure adopted by the Ministry of the Interior in cases where it refused to grant permanent residency in accordance with § 67 of the Residence of Aliens Act. These complaints highlighted **shortcomings in the system**. The Defender found there had been a violation of the provisions relating to informing parties to proceedings. In response to the Defender's report the Minister of the Interior promised that in permanent residency proceedings "*it will be assured that during the course of administrative proceedings an entry will always be made into the records to confirm that the parties to the proceedings have been informed about their procedural rights and obligations*".

The Defender also emphasised the **obligation to abide by the Euro-conformant interpretation** when rejecting applications for permanent residency and refusing to acknowledge the legal status of long-term residents.

2 / 17 / CIVIL RECORDS, REGISTRY OFFICES, TRAVEL CARDS, DATA BOXES

GETTING MARRIED WHEN ONE'S LIFE IS AT RISK

The Defender was contacted by the adult children of one claimant who had been hospitalised for some time and had died a few hours after getting married in the hospital. On the basis of this complaint the Defender looked at how registrars should proceed when a person gets married when his or her life is at risk (§ 7 of the Families Act). The law does not specify how to prove whether life is at risk or not.

The Defender is of the opinion that the registrar should ask for a statement from the attending doctor or should try to communicate with the fiancé before the registrar asks the traditional question about voluntary betrothal. The person who accepts the wedding vows of the couple is **obliged to pay close attention when verifying the identities of the couple and also to ensure that the declaration is made freely, seriously, and in a definite and comprehensible manner**.

DOCUMENTS FOR THE REGISTRATION OF A BIRTH DURING PLANNED HOME BIRTHS

According to some registry offices, there is no room for doubt in cases where a birth is completed in a medical facility or, if the birth was not completed in a medical facility, where a doctor has provided assistance during or after the birth and has notified the registry office of such in the appropriate manner. However, as regards home births in situations when the midwife, registered with a non-state medical facility, is not qualified to oversee physiological births without expert supervision, the mother is asked to present either a pregnancy card or confirmation from a gynaecologist stating that the woman has given birth, as well as confirmation from a paediatrician stating the sex of the baby and that the baby has been examined. This procedure is justified by the need to verify that a baby has been born to a specific woman. In general the Defender considers this procedure to be a violation of the principles of good administration, specifically the principle of proportionality.

If a registry office has reason to doubt the accuracy of information about the mother as stated in the "*Birth Report*" (also completed by large hospitals), and therefore asks the parents to furnish additional documentation on the basis of the appropriate provisions of the Registries Act, this course of action would be appropriate. Otherwise, in the case of serious doubts, the registry office should be officially obliged to investigate the matter.

If the **identity of the mother** is ascertained by a midwife qualified to provide post-natal medical care (but not qualified to oversee physiological births without expert supervision) and subsequently confirmed by the father of the child, while the **documentation provided** (birth report completed by the midwife) **gives no grounds for doubting the accuracy of the information therein**, the office's request that the parents present other documents confirming that the woman who claims to be the mother of the newborn child actually gave birth to the child is unreasonable and excessive. It is in violation of the principles of good administration if an office asks parties to proceedings to present documentation which is not essential in order to achieve the purpose of the proceedings.

SURNAMES OF CHILDREN OF UNMARRIED COUPLES

The question of a child's surname is a very personal matter. Public regulation here should have well-defined limits. In the more recent practice of the courts (see, for example, the verdict of the Supreme Administrative Court dated 26 November 2008, Ref. No. 6 Aps 4/2007) it has several times been empha-

sised that during the course of public administration it is necessary to consider whether the public interest in the case in question is significant enough to justify interference in a person's legal sphere.

The Defender expressed doubts as to whether the public interest in the fact that children of the same parents bear the same surname is really so great that it must predominate over a different decision made by the parents**. According to the Defender it is not essential that children of the same parents should always have the same surname**. The fact that the children have different surnames does not harm children whose parents are married. What is more important for the interests of the children is whether their parents live together in harmony. Marriage and the same surname for the entire family do not in themselves guarantee happy cohabitation. A surname common to children from the mother and the father may be a sign of mutual respect and a balanced relationship between the parents.

The Ministry of the Interior believes otherwise, and insists that the provisions of § 38 Paragraph 2 of the Families Act must be interpreted in accordance with the judicature from the early sixties (R 13/64) so that it is not possible for the children of unmarried parents to have different surnames.

More detailed information on this matter is given in the amendment to the collected statements of the Public Defender of Rights entitled "*Registry Offices*", which is available in electronic form at: http://www.ochrance.cz/publikace/sborniky-stanoviska/matriky-dodatky/

DENOTATION OF INCORRECT DATA IN THE CIVIL RECORDS INFORMATION SYSTEM

The fact that the technical state of the civil records information system does not allow the **blocking of inaccurate data** was mentioned in the Annual Report on the Activities of the Public Defender of Rights for 2009 (see Page 125). This persistent unlawful situation, where **technical compliance** with the provisions of § 5 Paragraph 1 c) of the Personal Data Protection Act (Law No. 101/2000 Coll., as subsequently amended), in effect since 1 June 2000, as well as the provisions of § 8a Paragraph 2 of the Civil Records Act (Law No. 133/2000 Coll., as subsequently amended), effective as of 1 April 2004, **is not assured**, is something the Defender considers to be serious.

On 1 July 2010 there was an amendment to the Civil Records Act (amendment No. 227/2009 Coll.) and entries into the civil records information system are now also made by registry offices and courts, which when entering and using data in practice run up against inaccuracies and falsehoods. If an error cannot be rectified immediately and a longer investigation is required, the dubious data remains in the civil records information system unchanged. Instead of "*blocking data to prevent any further processing*", since 1 July 2010 the law now states "*denotation of data as incorrect*". However, the appropriate technical and organisation measures to assure these actions, aimed at protecting the subjects of such data, have not yet been implemented.

The Defender brought this unsatisfactory situation to the attention of both the former and the present Minister of the Interior. In a letter dated 27 August 2010 the Minister informed the Defender that the construction of part of the new administrative records information systems to resolve this problem should be complete by the end of the first half of 2011. The Defender continues to monitor this matter and purge bodies of executory power to ensure compliance with the provisions of the laws covering the blocking or denotation of incorrect in the civil records information system.

SUBMISSION OF A CERTIFICATE IN ACCORDANCE WITH ARTICLE 39 OF BRUSSELS REGULATION IIA FOR THE ISSUE OF A NEW IDENTITY CARD AFTER A DIVORCE ABROAD

Considering the complexity of the law covering registry administration (a combination of intrastate, Union and international private law sources), the Defender considers it crucial that registry offices and the municipal authorities of municipalities with extended authority dealing with the identity card and passport agenda always take account of the meaning and purpose of the law and do not unconditionally insist on the submission of documents if such documents are difficult to acquire and also if the person is able to furnish decisive proof of fact (e.g. the conclusion of a marriage or divorce, change of surname) using other creditable and duly verified documents. The diversity of legal systems and living situation is now much greater and a person does not always have to secure harmonized documentation required by a Czech administrative body from another state.

According to the Defender an equally important role is played by the methodology of the Ministry of the Interior, which should react to problems as they arise.

COMPLAINT REF. NO.: 4807/2009/VOP/PPO

Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility within European Union member states is also used for recognising rulings concerning the dissolution of marriage. The regulation, however, does not imply any compulsory obligation to present certification of judgments in matrimonial matters in accordance with Article 39, particularly as regards recognition in accordance with Article 21 Paragraph 2 where records of marital status are updated.

Administrative bodies are at fault if they unconditionally insist on the submission of certification in accordance with Article 39 of the regulation, particularly if it is difficult for the person to secure such documents and if the administrative body can reliably determine the truth from other documentation.

The claimant J. L. got married and then divorced in Spain. Towards the end of 2008 she applied for a new citizen's identity card. In order to update her marital status in the civil records information system Plzeň Municipal Council asked her to provide certification in accordance with Article 39 of Council Regulation (EC) No. 2201/2003 dated 27 November 2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility (hereafter simply "Brussels IIa"). The claimant, however, was unable to obtain this document from the Spanish authorities. She repeatedly presented Spanish registry documents translated into Czech, but these were not sufficient for the Municipal Council. Referring to the methodology of the Ministry of the Interior, the Municipal Council unconditionally insisted that she provide certification. The claimant contacted the Defender for assistance.

The Defender focused on situations in which a physical entity is obliged, on the basis of a directly applicable Union regulation, to present certification in accordance with Appendix I of Brussels IIa. He found that in matters of personal marital rights a physical entity presents certification in cases when that person wants the court of a member state to issue a decision recognising an original divorce ruling (Article 21 Paragraph 3 of the regulation) or objecting to the original ruling (i.e. requesting that the ruling not be recognised in accordance with Article 22 of the regulation), or proposes the declaration of its enforceability (in the wording of Article 28).It is obvious that by making an application for a new identity card the claimant is not proposing any of these procedures (and nor is anyone else with similar status). The fact that a municipal council issues a citizen's identity card with updated marital status details does not mean that the marriage is terminated. It only additionally takes into account the updated data on marital status, as

already decided on by another competent authority. The Municipal Council was thus at fault as it imposed an obligation upon the claimant which had no basis in the generally binding laws.

Another error the Defender found lay in the fact that the Municipal Council did not inform the claimant that in accordance with the Identity Cards Act (Law No. 328/1999 Coll., as subsequently amended) all that is needed to accompany the application is either (1) the divorce ruling from a foreign court with an official translation into Czech, or (2) an extract from the register book of the actual registry office (marriage certificate containing a note about the divorce). The Defender found that the Municipal Council was definitely at fault in that it did not inform the claimant about her options of contesting the procedure adopted by the administrative body (e.g. a complaint about inaction on the part of the council, an administrative suit), although considering the nature of the case and the claimant's personal situation, it should have done this.

There were also mistakes in the methodology of the Ministry of the Interior, as the current methodology contains misleading information which could lead to frequent misunderstandings in the work of the administrative authorities.

During the course of the investigation the claimant was eventually issued with a citizen's identity card. The Defender then focused on changing the methodology of the Ministry of the Interior to prevent any recurrence of similar situations in the future. He also took the matter to the Ministry of Justice, the Office for international Legal Protection of Children, and the registry office in Brno. These agreed with the Defender. The Ministry of Justice urged the Ministry of the Interior to change its methodology. As of the date on which this report was compiled, no change had been made in this methodology.

2 / 18 / THE RIGHT TO INFORMATION

The Defender takes a broad view of the topic of free access to information and sees it as also including parties to proceedings' access to information from the proceedings in question. Here, he has frequently come across several problems caused by shortcomings in the law. The Defender has already warned the Chamber of Deputies of all the problematic legal provisions in the conclusions of previous annual reports. He has proposed that certain provisions be omitted, and others amended. So far, no action has yet been taken.

The most problematic matter is **citizens' access to information from proceedings involving building authorities**. These, for example, in violation of the Administrative Procedure Code, refuse parties to proceedings and people proving a legal interest access to files after a ruling has entered into force or refuse to provide copies of documents from the files. In many cases they also do not issue a resolution on such a ruling, which prevents applicants from having any recourse against this refusal to provide access to files. The Defender believes that these problems could be resolved by more thorough methodical management by the Ministry for Regional Development.

The Defender considers a serious legislative obstruction to access to information in the field of building law to be the provisions of sentence two of § 168 Paragraph 2 of the Building Act (Law No. 183/2006 Coll., as subsequently amended). This **makes the granting of copies of building documentation conditional upon the consent of the person who had the documentation drawn up**, or the owner of the building. If these people refuse to grant their consent, the building authority does not make the copy, not even for parties in proceedings under way concerning a permit for the building in question. Yet the Building Act adequately assures the protection of important public and private interests in the following paragraph of the same provisions, which state that the building authority may only refuse access to certain parts of documentation in the case of buildings which are important for state defence and buildings of civil pro-

tection and security, or in order to protect people and property. In the Defender's opinion these provisions restricting the copying of building documentation should therefore be omitted from the Building Act.

A similar unjustified restriction of the rights of parties to proceedings to copies of documents from administrative files is also imposed by the provisions of § 23a of the Asylum Act (Law No. 325/1999 Coll., as subsequently amended), which state that the Ministry of the Interior does not make copies of files at all. These provisions are also a completely necessary obstruction to parties to proceedings and are in violation of their right to express an opinion on the source materials used in the proceedings. In the Defender's opinion these provisions should also be annulled as being superfluous.

For these reasons back in 2008 the Defender recommended that the Chamber of Deputies adopt amendments to these laws (Annual Report on the Activities of the Public Defender of Rights for 2008, Page 114). As there has still been no response to this recommendation, which was also mentioned in the Annual Report on the Activities of the Public Defender of Rights for 2009 (Page 156), the Defender considers it necessary to again draw attention to this matter as a whole.

Another major legislative complication as regards the right to information is also the long unamended **administrative charge for copies of documents from administrative files, amounting to 15 CZK per copy**. However, the Freedom of Access to Information Act (Law No. 106/1999 Coll., as subsequently amended) states that copies are provided at their actual cost (§17 Paragraph 1). This discrepancy between both laws leads to some absurd situations. In cases where a citizen has the right to information in accordance with both laws, **the final charge for copies depends on how the specific official sees the request**. The Defender therefore recommends that the administrative fee for making copies of documents from files be reduced to the actual cost of making the copy.

2 / 19 / CONSUMER PROTECTION

SANCTIONS ON UNFAIR TRADING PRACTICES OF SECOND-HAND CAR LOTS BY THE CZECH TRADE INSPECTORATE

During the course of the year the Defender dealt with several cases where people complained about second-hand car lots, which had provided them with misleading information about the number of kilometres cars had done and which had not been sanctioned by the Czech Trade Inspectorate, which they contacted with regard to possible unfair trading practices on the part of these dealers.

A major problem when selling used cars is stating (declaring) the tachometer reading, although this does not necessarily reflect the actual number of kilometres done, something consumers are not warned about. The Defender issued a statement in this matter, in which he expressed the opinion that if the Czech Trade Inspectorate is contacted by a consumer (buyer) complaining about a second-hand car lot which has incorrectly stated the actual number of kilometres done by a car, or the tachometer reading, the matter should be investigated as a **possible unfair (deceptive) trading practice**. Information about the tachometer reading or the actual number of kilometres done by a car is important for the consumer, as it not only characterises the degree of wear and tear on the vehicle, but it also plays a major role in the person's decision as to whether or not to purchase the vehicle.

In its inspections the Czech Trade Inspectorate **should also focus on the wording of the purchase contract**. If a second-hand car lot which has concluded a contract for the sale of the vehicle with the vehicle owner or which is itself the owner of the vehicle sells the vehicle to the buyer, stating the tachometer reading and also promising that the condition of the vehicle corresponds to the degree of wear and tear and the number of kilometres done, one may infer that this is the actual number of kilometres done. If

the two figures are not the same and do not correspond to the actual number of kilometres done, such action on the part of the second-hand car lot is a violation of the obligation to provide information as stipulated by § 9 of the Consumer Protection Act (Law No. 634/1992 Coll., as subsequently amended) and also such action may be classed, in accordance with § 5 Paragraph 1 b) of this law, as an unfair trading practice. Therefore the seller (the second-hand car lot) should be sanctioned for its actions by the Czech Trade Inspectorate in compliance with § 24 of the Consumer Protection Act.

The Czech Trade Inspectorate accepted the Defender's recommendations and will apply the conclusions arising from the Defender's statement in its supervisory work.

UNFAIR PRACTICES AT DEMONSTRATIONS

During the year the Defender was contacted by people "*affected*" by the actions of retailers who at demonstrations sold (many times as a pretext to win several other things) goods, such as a pot for a certain price, and in the purchase contract included a clause entitling the seller to visit the purchaser's house to order more goods. Because of this clause, which buyers do not notice, the seller then does not recognise the right to withdraw from the contract within 14 days (§ 57 Paragraph 1 of the Civil Code). In such cases se the Defender attempts to explain to claimants how to proceed and who to contact (the court, if they are able to prove that they bought the goods at a demonstration outside normal business premises and that they did not arrange for the seller to visit to make further orders; or the Czech Trade Inspectorate, which has the authority to investigate unfair trading practices on the part of these companies).

COMPLAINTS PROCEDURES

During the course of the year the Defender also dealt with complaints about claims were settled, or the fact that claims were not settled in a timely manner. Where he had grounds to suspect that in some cases this could constitute a breach of the obligation to settle claims within thirty days (§ 19 Paragraph 3 of the Consumer Protection Act), he recommended that claimants contact the Czech Trade Inspectorate, which has the authority to investigate such cases. The Defender only received feedback in one case, when the Czech Trade Inspectorate imposed a fine of 10 000 CZK on one retailer for being delayed in settling a claim.

The Defender also tries to inform consumers about their option to opt for an out-of-court settlement of consumer disputes, referring to a list of contact points for the out-of-court settlement of consumer disputes (see the Ministry of Trade and Industry's website at http://www.mpo.cz/cz/ochrana-spotrebitele/mimosoudni-reseni).

2 / 20 / STATE SUPERVISION AND INSPECTION OF MUNICIPAL AUTHORITIES

THE RIGHT OF CITIZENS TO EXPRESS AN OPINION AT COUNCIL MEETINGS

The Defender found that the Rules of Procedure of the Municipal Council of the Capital City of Prague allowed citizens of the capital to express their opinions at council meetings only in writing, and that verbal statements required the consent of the council. The Rules of Procedure have also inspired some city districts and the council Rules of Procedure of these city districts define the rights of citizens to express their opinions in a similar manner. In the Rules of Procedure of city district councils within Prague the Defender has found other provisions which limit or preclude citizens' right to express an opinion, e.g. citizens' comments on a certain point of the agenda are only permitted with the consent of the council or after the agenda has been fully covered.

The Defender is convinced that the **procedure where a citizen cannot freely choose to express his opinion verbally at council meetings and any such statement requires the prior consent of the council is an inadmissible restriction of that citizen's rights**. The Defender sees this as an unlawful infringement on the citizen's rights, a breach of Article 17 of the Charter of Fundamental Rights and Freedoms, § 7 d), or § 8 d) of the law on the Capital City of Prague (Law No. 131/2000 Coll., as subsequently amended), a violation of the public principles of local government council meetings and the weakening of external checks on public administration.

At the Defender's instigation the Ministry of the Interior looked at the Rules of Procedure of the Municipal Council of the Capital City of Prague, **calling upon the Capital City of Prague to rectify the matter**. The Defender also appealed to the Municipal Council of the capital to begin supervising and inspecting the legality of the rules of procedure of the municipal councils of city districts and to issue a statement on the rights of citizens at city district council meetings.

REVIEWING THE ECONOMY OF TERRITORIAL LOCAL GOVERNMENTS

The Defender dealt with cases in which claimants objected to **unlawful economic management by municipalities** allegedly involving the unauthorised drawing of bonuses for council members and curtailment of municipalities' tax liabilities. However, both the Ministry and the regional authority claimed that checks upon municipal economies as required by the claimants are not within their sphere of authority.

During his investigations the Defender found that in this case the dispute was not about the competency of the administrative authorities, as the Ministry of the Interior and the regional authority looked at the remuneration of municipal council members for their inspection work carried out within their sphere of authority and refused to deal with the requirements of claimants which exceeded their competency and authority. This situation leads to tension between both administrative authorities and the need to clarify their spheres of competence, coordinate their procedures and inform those who have filed complaints.

The Ministry of the Interior therefore passed on the claimants' claims to the Ministry of Finance and also organised **a joint meeting of both ministries with the aim of resolving this conflict in competencies**. Representatives of the ministries agreed that the competence of the Ministry of the Interior as regards the supervision and inspection of the autonomous authority of municipalities primarily involved **checking the procedural steps** used in the disposal of property in accordance with the Municipalities Act, i.e. publishing plans to dispose of property in accordance with § 39 Paragraph 1 and 3 of the Municipalities Act (Law No. 128/2000 Coll., as subsequently amended), respecting the competence of municipal bodies and their quorum and the validity of resolutions passed by municipal councils. **The authority of the Ministry of Finance covers financial aspects**, e.g. requirements for the lawful modification of the price of property in accordance with § 39 Paragraph 2 of the Municipalities Act, competence as defined by § 7 of the Act on Financial Controls (Law No. 320/2001 Coll., as subsequently amended) and Reviews of Economic Management in accordance with § 3 and 4 of the Act on Reviews of Economic Management of Local Governments and Voluntary Associations of Municipalities (Law No. 420/2004 Coll., as subsequently amended). It was also agreed that reviews of economic management in accordance with the latter law also includes reviews of remuneration for municipal council members. The methodology and interpretation of the law is performed by the Ministry of the Interior, while the actual process of reviewing the legitimacy of remuneration payments is part of the inspection or audit work carried out by the regional authority or auditor. The Ministry of Finance pledged to remind regional authorities that reviews of the legitimacy of remuneration payments made to municipal council members is part of its competence in reviewing the economic management of municipalities.

The two ministries also agreed that claims made against the economic management of municipalities which exceed the competency of the Ministry of the Interior will be passed on the Ministry of Finance for further measures to be taken within its competence and to inform claimants. Other meetings were arranged in the interests of resolving any additional problems and coordinating the procedure of both authorities. The Ministry of the Interior provided the Defender with a report on the results of these meetings. The Defender welcomed the adoption of systematic measures in the supervisory competence of the Ministry of Finance as the central body of state administration responsible for reviewing the economic management of local governments in accordance with § 4 Paragraph 1 of the Act on Establishment of Ministries and Other Central Bodies of State Administration of the Czech Republic (Law No. 2/1969 Coll., as subsequently amended).

2 / 21 / PROTECTION OF PERSONAL DATA

The number of complaints relating to the protection of personal data continues to rise as people become more and more aware of the need to protect their privacy. Although this is not a particularly major part of the Defender's work, the development of modern technology and the sharing of ever increasing amounts of information are prompting people to be more cautious and to require greater security as regards access to personal and sensitive data.

Despite the fact that the use of camera systems is one of the most commonly discussed problems, during the last year the Defender also dealt with complaints relating to electronic recordings in the automated tax information system (ADIS), the loss of medical documentation from a non-state medical facility, the existence of records in the activities of the municipal police, the processing of personal data in debtors registers, the provision of personal data by the Prague Securities Centre, the use of birth registration numbers in postal traffic, the publication of the personal records care of a member of military counterintelligence on the website of the Security Forces Archive, and the role of classified advertisement companies as administrators of personal data.

In all these cases the Defender looked at the actions of the Personal Data Protection Office (hereafter simply "*Office*"), in whose competence it is to provide supervision in the form of state inspections and to take effective steps in response to any breach of the Personal Data Protection Act (Law No. 101/2000 Coll., as subsequently amended) or other laws in place to protect personal privacy.

ROLE OF THE DEFENDER IN ENFORCING THE RIGHT TO THE PROTECTION OF PERSONAL DATA

In his correspondence with the Office the Defender met with the opinion that **the competence of the Public Defender of Rights** does not cover, for example, the interpretation of the basic defining provisions of the Personal Data Protection Act (personal and sensitive data, data processing, data administrators, etc.). The Office stated that considering its role and competence as an independent supervisory body, apart from the courts, it is only the Office that is qualified to interpret these basic terms.

What the Defender believes is crucial in relation to this is the fact that in the conditions of the Czech Republic the Office was established as an administrative body with all the appropriate supervisory and sanctioning powers. According to § 28 Paragraph 2 of the Personal Data Protection Act, it is only possible to interfere in the activities of the Office on the basis of the law, i.e. on the grounds of and within the confines of the Public Defender of Rights Act (Law No. 349/1999 Coll., as subsequently amended). **Besides the administrative courts, the Defender is the only independent form of checks on the activities of the Office, as regards its procedural and decision-making work**. It should be said that the administrative court may only express an opinion on the Office's decision-making activities if the Office and a data administrator, data processor or

physical entity (usually an employer of a data administrator or data processor) initiate proceedings, if such proceedings make reference to subjects forced to comply with their obligations (to take remedial measures or pay a fine) and an administrative suit was subsequently filed against this obligation.

However, the great majority of the complaints received by the Defender are not from administrators or processors of data, but "*subjects of data*" (physical entities who believe that their right to the protection of personal data has been infringed and who claim that the Office has not done enough to rectify the matter). Subjects of data do not have the status of an inspected entity or a party to proceedings and thus cannot adequately exercise their rights (put forward proposals for the implementation of evidence, protect themselves by filing appeals). Their only recourse as granted by the law is the complaints mechanism (§ 175 of the Administrative Procedure Code) and the option to take the complaint to the Public Defender of Rights. If the Office informed the claimant that it does not intend to deal with the matter as it is out of its sphere of authority, since the person who was allegedly guilty of wrongful conduct cannot be classed as a data administrator, or according to the Office the data is not personal, or it is not a case of data processing as defined by the law, the claimant may take the matter to the Defender. The Defender may look at the Office's claims, ask it to make a statement, and then assess whether the "*deferral of the matter*" (procedural course of action) was in compliance with the law (the defining or substantive provisions of the Personal Data Protection Act).

LENGTH OF STATE INSPECTIONS CARRIED OUT BY THE PERSONAL DATA PROTECTION OFFICE AND THE FILING OF REPORTS ON REMEDIAL MEASURES ADOPTED

One of the key topics subject to more detailed investigation by the Defender was the **unreasonable length of state inspections carried out by the Office**. The Personal Data Protection Act and the State Inspections Act (Law No. 552/1991 Coll., as subsequently amended) do not contain any special rules on deadlines by which state inspections should be carried out and completed. The law can be considered to be deficient in this respect. This, however, does not imply that there are any time restrictions on inspection work. In the Defender's opinion, one essential attribute of protection that must be guaranteed by the Office is timeliness. Therefore the principle of proportionality must be applied in such cases as one of the basic principles of a democratic legally consistent state.

The decisive criterion for the application of the **principle of proportionality** should always be the interests of the subjects of data which the Office was set up to protect. Another guideline to this principle of proportionality is the impact the passage of time has on the legislation covering administrative liability. When carrying out an inspection, the Office's inspector should bear in mind that **liability for an offence expires one year from the date the offence was committed**; in the case of **administrative offences the objective and subjective deadline for the initiation of proceedings should be taken into account**. If the inspector finds that there has been a breach of the obligations stipulated by the Personal Data Protection Act, he should order that measures be taken to eliminate the shortcomings. Accordance to the existing judicature of the Supreme Administrative Court, remedial measures are classed as administrative rulings (verdict of the Supreme Administrative Court dated 14 November 2007, Ref. No. 1 As 13/2006). Such measures should therefore be imposed with similar deadlines to those specified by the Administrative Procedure Code (Law No. 500/2004 Coll., as subsequently amended).

The Defender reviews the resulting length of state inspections (in a similar manner to judicial delays) with regard to the complexity of the case in question, the behaviour of the person or body being inspected, the procedure of the person or body carrying out the inspection, and, where applicable, the related procedures adopted by other state bodies, since there is no abstract determinable deadline which could generally be considered reasonable.

COMPLAINT REF. NO.: 3107/2009/VOP/PPO

I. It helps in reinforcing the principles of good administration (compliance with the law, responsibility and timeliness) if the chairman of the Personal Data Protection Office monitors the overall length of state inspections. In order to keep the length of proceedings within reasonable limits the chairman, as the head member of staff, has the authority to give the inspector instructions which the inspector is obliged to respect. If the inspector fails to comply with these instructions and has no other reasonable grounds for justifying his actions, he is guilty of misconduct.

II. If the Office's inspector orders the person or body being inspected to take measures to comply with the administrator's obligation to provide notification in accordance with § 16 of the Personal Data Protection Act, it is in violation of § 6 Paragraph 2 of the Administrative Procedure Code if the inspector requests that the person or body being inspected later inform him that such measures have been taken, as the inspector can find out whether or not his orders have been carried out from the register ("official records") kept by the Office in accordance with § 35 of the Personal Data Protection Act. The inspector must always check the register to obtain qualified assurance that it is necessary to proceed in accordance with § 39 Paragraph 2 of the Personal Data Protection Act (imposition of a disciplinary penalty).

A landlord installed a camera system into the shared areas of an apartment building without the consent of the tenants, and then began to charge a fee of 72 CZK per person per month for this "security service". One disgruntled tenant contacted the Office, which began a state inspection into the matter. However, after this state inspection had lasted for more than one year, the tenant contacted the Defender, who subsequently communicated with the Office management a number of times.

The Defender found that there had been delays in the inspection work carried out by the Office. An inspection lasting 16 months and 10 days was, considering the nature of the inspection, unreasonably long and the Office breached the principle of fluid proceedings stipulated by the provisions of § 6 Paragraph 1 of the Administrative Procedure Code. Even the length of the inspection was partly caused by the indisposition of the inspector on health grounds and the ever-increasing influx of complaints concerning violations of the regulations in place to protect personal privacy, the Defender felt obliged to firmly state that the chairman of the Office (as the head member of staff) is responsible for supervising the fluidity of steps taken by the inspector during the course of a state inspection. However, the chairman of the Office refused to comply with this task, referring to the provisions of § 33 Paragraph 3 of the Personal Data Protection Act (inspections are to be headed by an inspector) and § 12 Paragraph 1 of the State Inspections Act (the obligation of the inspector to ascertain the actual situation).

At the end of the investigation, however, the chairman acknowledged that this supervisory was work was his responsibility. He promised to thoroughly adhere to the internal procedures and abide by the principle of ensuring that proceedings are kept to a reasonable length and began to draw up an internal regulation which would prevent similar cases from arising in the future. At the same time, however, he also pointed out the difficulties involved in enforcing the principles of good administration, as inspectors are appointed by the President at the proposal of the Senate of the Parliament of the Czech Republic for a period of 10 years (the chair for just 5 years) and their status is similar to that of members of the Supreme Inspection Office. This means that the traditional labour-law means of motivation (reduction in personal rating, etc.) are not applicable in these specific cases.

In this investigation the Defender also looked at a case of misconduct against the principle of procedural economy. From the inspection report he found that the inspector had ordered the subject of the inspection to inform the Office that data was being processed by means of the camera system and to then inform the inspector that this obligation had been carried out. The Defender came to the conclusion that the inspector could find out whether this had been done by looking at the register kept by the Office, and therefore it was not necessary to request the cooperation of subject of the inspection. The Defender is also convinced that the inspector should always check the register to ob-

tain qualified assurance that there are grounds for the imposition of a disciplinary penalty. The Office accepted the Defender's conclusions and the matter was discussed by the inspector in question.

As regards the use of the camera system's compliance with the Personal Data Protection Act, the owner of the apartment building was ordered to pay a fine in administrative proceedings. The owner subsequently stopped using the camera system to make recordings.

USE OF A BIRTH REGISTRATION NUMBER

The Defender received a number of complaints relating to use of a Birth Registration Number. Although the law does not define the Birth Registration Number as sensitive data, many people see it as such, as nowadays the Birth Registration Number **acts as a universal identifier**, serving as the key to many public and private databases. According to the Defender, it should therefore be adequately protected against possible misuse.

Most of the complaints the Defender dealt with related to the publication of the Birth Registration Numbers of the statutory representatives of trading companies in the Commercial Register and the use of the Birth Registration Number as a Tax Identification Number (DIČ) in the case of physical entities with a trading licence. In such cases the Defender and the Personal Data Protection Office both agree that the relevant laws [the Commercial Code (Law No. 513/1991 Coll., as subsequently amended), together with the Government Regulation on the Business Journal (Government Regulation No. 503/2000 Coll., as subsequently amended) and the Administration of Taxes and Fees Act (Law No. 337/1992 Coll., as subsequently amended)] are formally in compliance with the Personal Data Protection Act and the Civil Records and Birth Registration Numbers Act (Law No. 133/2000 Coll., as subsequently amended). From the viewpoint of the principles governing the protection of personal data (proportionality and non-discrimination), however, these laws are problematic. Therefore the only possible solution is to have the laws amended.

In relation to this the Defender draws attention to the fact that nothing will be changed by the new Tax Regulations (Law No. 280/2009 Coll.), which as of 1 January 2011 replaces the Administration of Taxes and Fees Act , as in accordance with the provisions of § 130 Paragraph 3 of this law Birth Registration Numbers will continue to be used as the general means of identifying physical entities (DIČ).

A certain change could result from the Act on Basic Registers (Law No. 111/2009 Coll., as subsequently amended), which introduces completely new types of identifiers for physical entities. Each physical entity should be allocated a **physical entity source identifier** (ZIFO), which would then be used to generate **physical entity agenda identifiers** (AIFO). In each of the individual agendas (e.g. healthcare, social affairs, trades, the education system) each person would then be registered under a different number, which should not allow the inference of any other personal data. Moreover, this data would be non-public. Although state administration will continue to use Birth Registration Numbers until around 2025, we may assume that the importance of the Birth Registration Number (as a national identification number based on the principle of unicity) will decline with the new law on basic registers. These new identifiers should start to be generated for real in 2012. The Defender will continue to monitor this matter.

COMPLAINT REF. NO.: 5299/2008/VOP/PPO

I. In cases where a data administrators deliver correspondence containing personal and sensitive data to facilities which usually contain many more people than most places of residence (e.g. to prisons, ac-

commodation facilities, medical facilities or social services facilities) and where there is a greater likelihood of the addressee being mistaken for someone else, using more details to identify the addressee is not only possible, but is usually a sensible precaution. These additional details can be in the form of the date of birth or home address of the addressee, if different from the delivery address.

II. If, however, a consignment cannot be delivered even when these details are stated (such as cases where there are two or more people with the same name, surname, date of birth or permanent address living at the same address), use of the Birth Registration Number is in compliance with the provisions of § 5 Paragraph 3 and § 10 of the Personal Data Protection Act.

The Personal Data Protection Office refused to deal with a complaint filed by the claimant D. P., objecting to the procedure adopted by the General Health Insurance Company (VZP). The claimant said that VZP had delivered ordinary correspondence (confirmation of liabilities) to him in prison and had written his Birth Registration Number on the envelope. The Office did not see this as a breach of the law. The Defender did not agree and began an investigation.

For health insurance purposes the Birth Registration Number is the policy holder's number. The provisions of § 53c of the Public Health Insurance Act (Law No. 48/1997 Coll., as subsequently amended) state that when complying with their obligations as imposed by the law health insurance companies are entitled to state people's Birth Registration Numbers. Health insurance companies' obligations include the duty to issue confirmation of policy holders' liabilities relating to premiums, penalties, fines, and increases in insurance premiums. Therefore if a policy holder (a person who pays insurance premiums) requests that confirmation be issued in accordance with the provisions of § 26e of the Law on general health insurance premiums (Law No. 592/1998 Coll., as subsequently amended) the Birth Registration Number serves as an essential identifier in order to locate people and the relevant data, and later also to match important data with a specific person. These are the only basic uses for the Birth Registration Number as the policy holder's number.

However, as regards the delivery of correspondence, the Defender is of the opinion that health insurance companies are not obliged to state the Birth Registration Number on the envelope (health insurance companies are "entitled", not "obliged", to state people's Birth Registration Number). Therefore the decision of the health insurance company (the data administrator) to state the Birth Registration Number on the envelope can never be an automatic decision, but must be derived from the actual circumstances of the case justifying such a procedure. The Birth Registration Number may be stated on the envelope if there are two people with the same name, surname, and date of birth living at the same address (e.g. in prison or in a social services or medical facility). In such cases the Birth Registration Number is the only possible means of distinguishing between the people and the use of this number of precisely identify the addressee of correspondence cannot be considered to be a violation of the Personal Data Protection Act.

The Defender concluded that in cases where the data administrator has a choice between two different methods of processing data (here, the choice between date of birth and Birth Registration Number), the administrator must choose the method which constitutes the least infringement on personal privacy. If the data administrator chooses the more invasive of the two options, this could constitute a breach of § 5 Paragraph 3 and § 10 of the Personal Data Protection Act. The Office, however, did not take account of these considerations, which the Defender believes to have been a mistake.

On the basis of the Defender's statement the Office contacted the Czech Telecommunication Office (ČTÚ) and informed it of the opinion relating to the problematic wording of postal conditions. These state that the Birth Registration Number may be used as one of the means of identifying the addressee. The ČTÚ accepted the comments of the Office and the Defender and as of 1 January 2011 amended its postal conditions to ensure greater protection of people's privacy.

CAMERA SYSTEMS

The Defender considers the existing laws covering the operation of camera systems to be unsatisfactory considering the **significant infringement on human privacy** such devices constitute. He sees the greatest shortcoming in the differentiation between the Personal Data Protection Act and the Civil Code (Law No. 40/1964 Coll., as subsequently amended) depending on whether cameras make a recording (compare the definition of "*data processing*" contained in § 4 e) of the Personal Data Protection Act) or not (the cameras serve merely as an "*extended eye*"). Although this differentiation is based on the valid law, paradoxically it does not help to protect people, their privacy or their dignity. These legal regimes do have a major impact both on the obligations of operators of camera systems, but also particularly on the exercising of subjects' rights. In the first case the Personal Data Protection Office may intervene, while in the second case the person must file a suit in court to enforce their own protection. It should also be pointed out that modern technology allows operators to switch from one mode to the other, basically by just pressing a switch. This means that checks by the Personal Data Protection Office may not have the expected effect. Therefore, what the Defender primarily expects from the new legislation is that it will take account of these differences and adopt consistent regulation of so-called surveillance systems.

The Defender has frequently come across the use of cameras during the course of his systematic visits to facilities which contain or could contain persons deprived of their liberty. The Defender passes on complaints where he believes that there has been a breach of the law on to the Personal Data Protection Office. As regards specific cases, the Defender has received complaints relating to the use of cameras in apartment buildings, schools, and hotel facilities. The Defender began an investigation into the last of these cases.

COMPLAINT REF. NO.: 5423/2008/VOP/PPO

For guests, hotel facilities are a temporary place to live and as such guests should have the corresponding right to privacy. Through the systematic monitoring of areas leading to hotel rooms, the camera system administrator has access to basic information about the private and personal lives of guests. Therefore, the only legal grounds for monitoring corridors leading to hotel rooms is the informed consent of guests.

The claimant J. H. Decided to install a camera system with recording facilities in the corridors of the hotel which led to guests' rooms for the purpose of protecting persons and property. The recordings should have been archived for 7 days. The Personal Data Protection Office, however, did not agree with this, and the claimant therefore contacted the Defender.

As part of his investigation the Defender stated that the use of a camera system in intimate areas (toilets, changing rooms, guests' rooms) without the consent of the guests or employees is always inadmissible, whatever the circumstances. In other cases he prefers to make an individual assessment of the administrator's intentions in relation to the infringement of the rights of those who are monitored, as the Defender considers the protection of persons and property to be a legitimate intention. This intention, however, must also be in compliance with the Personal Data Protection Act and must respect general principles, such as the principles of appropriateness and proportionality. It is also important to bear in mind that for guests, a hotel is a temporary place to live and as such guests have the corresponding right to privacy. As regards cameras in passageways (corridors) leading to guests' rooms, the Defender stated that these are undoubtedly places where guests should enjoy the greatest degree of privacy (obviously apart from inside their actual rooms). The Defender sees this as analogous to the monitoring of areas in apartment blocks. Through the systematic monitoring of these areas, the camera system administrator, whether intentionally or not,

has access to basic information about the private and personal lives of guests. Therefore the only legal grounds for monitoring corridors leading to hotel rooms is the informed consent of guests.

The claimant, however, said it was impossible to acquire the necessary consent. In the Defender's opinion guests could be informed about the camera system when they book accommodation over the telephone or using the Internet (or through a travel agency). When guests check in (e.g. when they pay for their accommodation or are given keys, or chip cards for their rooms), reception staff could request their written consent, stating that the guests' personal data will be processed by cameras situated in the hotel corridors for their own protection. If a guest refuses to grant consent, the hotel staff could place that person in a part of the hotel that is not monitored. As regards the length of the recording, the Defender was of the opinion that a three-day period is in compliance with § 5 Paragraph 1 e) of the Personal Data Protection Act. If the claimant states in a declaration that the purpose of the system was to protect persons and property (i.e. to record any unlawful activity in the hotel – theft, assault, and other crimes), records may be kept for no longer than a few days, during which time any such crime would naturally come to light.

Outside the scope of the original complaint the Defender made a detailed study of the files held by the Personal Data Protection Office from four state inspections of hotels. He found that the Personal Data Protection Office always abided by the stipulations of the valid and effective law, proceeded systematically in compliance with the principles of good administration (compliance with the law, impartiality, proportionality) and the principles it had formulated in its statements and which otherwise it also applied in the case of the claimant J. H. (the principle of predictability). The substantive assessment of this matter (e.g. compliance with certain stipulations covering data processing as defined by the provisions of § 5 Paragraph 2 of the law, the length of time for which data was archived) was then also confirmed by the Municipal Court of Prague in a ruling dated 11 May 2010, Ref. No.: 11 Ca 433/2008, which related to the use of cameras in the Savoy Hotel in Prague.

The Defender therefore concluded his investigation into the Office without finding any evidence of malpractice.

2 / 22 / OTHER BODIES OF STATE ADMINISTRATION

ADMINISTRATION RELATING TO ELECTRONIC COMMUNICATIONS

The Defender saw a rise in the number of complaints brought against providers of publicly accessible telephone services. As he has no authority in this respect, he tries to explain to claimants how they should best proceed. In his responses he generally refers to the relevant local branch of the Czech Telecommunication Office and provides basic guidance on how to successfully file a proposal to initiate proceedings to object to how a claim has been handled. From the nature of these complaints it is clear that most claimants still have no idea that the Electronic Communication Act (Law No. 127/2005 Coll., as subsequently amended) stipulates that it is first necessary to make a claim against the billing, and then file a proposal with the Czech Telecommunication Office.

The Defender also sees a problem in **distance contracts**, where the professionally trained staff of electronic communication service providers (generally telephone services) call customers to conclude a contract over the telephone. The Defender has registered several cases typified by the fact that a customer of retirement age is chosen, who is so surprised to receive the call that he or she is unable to grasp the real reason for the call (i.e. to conclude a contract). If that person then receives a bill for services which do not provide the promised benefits (the person does not use telephone services) and the price of the services has increased, it is not possible to terminate the contract without the risk of having to pay a penalty.

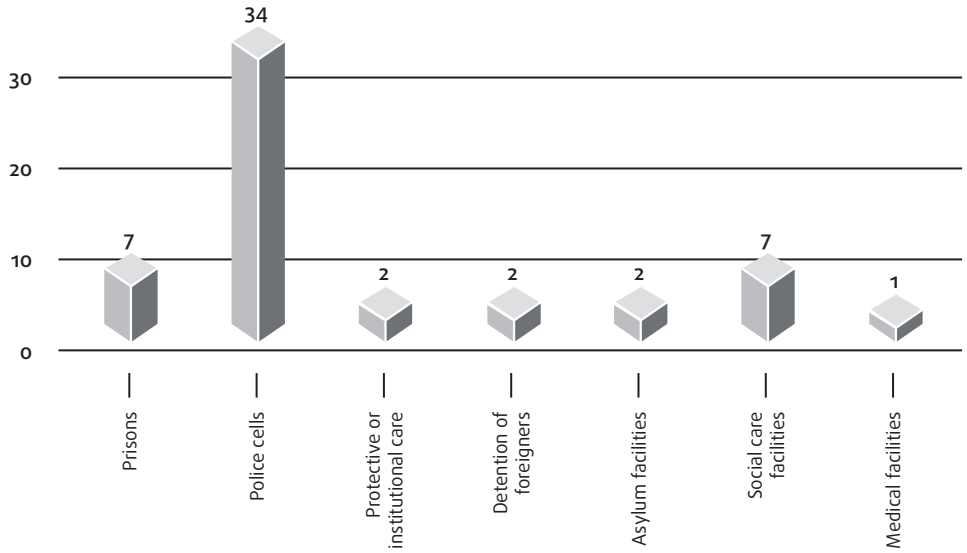
Even with written contracts it is not possible to rule out the possibility of **deception of the consumer** [§ 4 to § 5a of the Consumer Protection Act (Law No. 634/1992 Coll., as subsequently amended)]. The Defender is convinced that any form of unfair competition by electronic communication service providers can be significant in administrative proceedings before the Czech Telecommunication Office, particularly in cases where it is necessary to verify whether or not a contract was concluded in a valid manner. In administrative proceedings the Czech Telecommunication Office cannot overlook the Commercial Code's ban on unfair competition and the consequences of any breach of this ban, i.e. any contract the conclusion of which involved a breach of the ban on unfair competition is invalid from the start**. In such cases the role of the Czech Telecommunication Office may be conveniently supplemented by the Czech Trade Inspectorate, which is the body legally appointed to ensure civil consumer protection**.

In 2010 an amendment to the Electronic Communication Act (amendment No. 153/2010 Coll., effective as of 1 July 2010) extended the framework for the assessment of general conditions in favour of consumer protection ("*The Office may order the provider of a publicly accessible electronic communication service to amend the general conditions covering the publicly accessible electronic communication service if they are in violation of the law or the implementary regulations to the law or if it is essential to do so in order to protect consumers due to unfair, deceptive or aggressive trading practices or due to discrimination against the consumer*"). So far the Defender has only looked at one case involving the procedure adopted by the Czech Telecommunication Office in the assessment of general conditions.

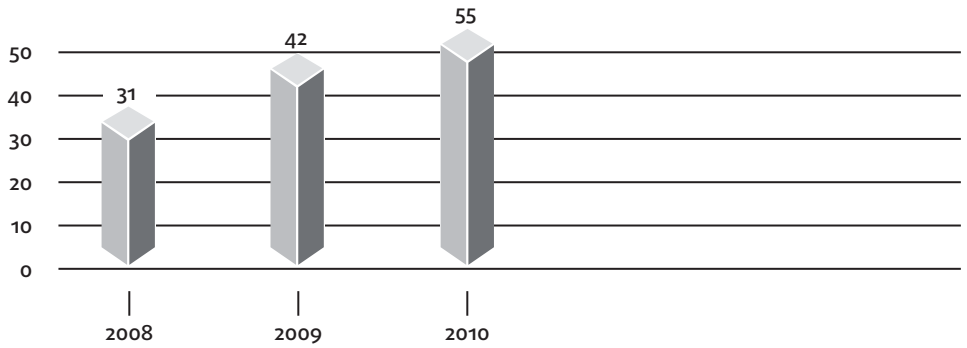
4 SYSTEMATIC VISITS OF FACILITIES WITH PERSONS RESTRICTED IN THEIR FREEDOM

In 2010, the Defender focused on facilities of so-called de iure detention, i.e. facilities where there may be persons restricted in their personal freedom by public authority [§ 1 Paragraph 3 and 4 a) and b) of the Public Defender of Rights Act (Law No. 349/1999 Coll., as subsequently amended)]. In particular, they concerned **remand prisons, prisons for the imprisonment of women and juveniles** and **police cells** and **facilities with foreigners under administrative detention.** The structure of the visited facilities and development of the number of visits made are shown in the following graphs.

STRUCTURE OF FACILITIES VISITED IN 2010



NUMBER OF SYSTEMATIC VISITS MADE IN INDIVIDUAL YEARS



Subsequent visits were made by the Defender to **homes for people with health disabilities** and **psychiatric hospitals,** i.e. facilities where the restriction in personal freedom may be the result of dependence on the care provided (§ 1, Paragraph 4 c) of the Public Defender of Rights Act).

In accordance with the **sanction authorisation** arising from the provisions of § 21a, Paragraph 3 of the Public Defender of Rights Act, as amended on 31 December 2010, the Defender informed the public about the unsatisfactory cooperation with the Psychiatric Hospital in Šternberk. Although a number of desirable changes were identified on another visit to the Hospital, negotiations with the Hospital management on taking the recommended measures took place until the end of 2010.

1 / REMAND PRISONS

At the turn of 2009 and 2010, the Defender made unannounced two-day or three-day visits to remand prisons (hereafter simply „*prisons*" or „*facilities*"). The visits targeted all groups of persons under arrest (men, women, adults, the young, foreigners). The Defender also visited public prosecutors exercising supervision over custody at the appropriate facility.

Workers of the Office of the Public Defender of Rights visited **a total of four remand prisons**. When selecting the specific facilities, the Defender had also considered his observations from various complaints with which persons in custody addressed him. Prisons in both Bohemia and Moravia were represented.

The prevailing part of the accused persons are in custody in conditions not much different from material conditions from the time before the transformation of the Czech prison service was initiated. Although the new legislation regarding custody guarantees a significantly greater extent of rights to the persons subject to custody and also creates conditions for implementing preventive educational and sports programmes, the actual conditions in custody are often dramatically worse than when serving actual prison terms. The main reasons include **lack of staff** and **unsuitable custody spaces** (small cells with poor hygiene conditions) that are the result of the old architectural layout of buildings, often not allowing any activity to be performed outside the cell. The Prison Service is unable to satisfactorily make sure the programmes of treating defendants are implemented to the extent provided by the Custody Act (Act No. 293/1993 Coll., as subsequently amended).

The solution to a considerable part of the below-described deficiencies is to a significant extent limited by the funds available.

RECOMMENDATIONS

STAFFING AND CAPACITY OF PRISONS

Custody is provided by the Prison Service of the Czech Republic (hereafter simply „*Prison Service*") through uniformed members of the prison guard and civilian employees, with the latter hardly present in the custody parts of prisons. In some cases, there are joint educators, pedagogues, psychologists, etc. for the custody department and imprisonments (hereafter simply „*term*"). In the Prison Service in Ostrava, three psychologists take care of approximately six hundred persons (app. 300 defendants and 300 convicts); the situation with social workers is even worse – with just two of them being available for the whole prison.

The Defender repeatedly criticised the inadequate staffing levels in the Prison Service as well as the lack of prison capacity. This situation means that the rights of defendants are infringed upon (see be-

low) and a potential security risk is also faced. Therefore, the Ministry of Justice is recommended by the Defender to begin negotiations to exempt the Czech Prison Service from its obligation to make annual staffing cuts.

ACCOMMODATION AND MATERIAL MEASURES

Cells are the accommodation standard in remand prisons. Their capacity ranges from one to eight defendants with cells including two to four beds being represented most often. In addition, prisons establish specialised cells (cultural rooms, gyms, lawyer interview rooms, etc.). All the visited prisons dispose of rooms for interviews with the lawyer where invasion of privacy was not identified. All the visited prisons also include visiting rooms for meeting close persons, with the Remand Prison in Ostrava also featuring visiting rooms that are very elegantly and practically equipped and where children can spend time.

In the absolute majority of cases, the equipment of cells met the legal regulations and standards arising from the European Prison Rules. A lack of boxes or chairs was only rarely experienced.

The lighting in cells was inadequate, in particular, where natural daylight was concerned. Apart from the construction-technical limitation of old buildings (small windows), light access is also prevented by the additionally installed transparent plastic screens. Their purpose is to limit the penetration of noise from cells into the environment (urban agglomeration) and prevent forbidden contact between defendants. Due to weather conditions, however, the screens are hardly translucent and, moreover, they prevent fresh air flow into the cells. The situation with the lighting is also complicated because of the fact the Prison Service's internal regulations governing the required artificial lighting intensity were abolished in the past without any compensation.

The Defender recommended to the General Directorate of the Prison Service (hereafter simply „General Directorate") to re-evaluate the necessity to use the existing screens. At the same time, he recommended to the General Directorate and Ministry of Justice, as the building authority for prison service purposes, to draw up, in cooperation with the Ministry of Health, binding standards for lighting in prisons (day, night, artificial or mixed) that would handle the issue of shielding screens and illumination of rooms with daylight. Based on a statement from the General Directorate, representatives of the offices in question agreed that the determination of hygiene limits for the internal environment of habitable rooms could be issued in the form of internal regulations of the Prison Service.

EXERCISE SPACES

The exercise spaces in remand prisons take the form of narrow, concrete block-delimited corridors in exercise yards. The absolute majority of the visited exercise spaces did not meet the requirements of the European Prison Rules (Prison Rules; Recommendation (2006) of the Committee of Ministers to member countries of the Council of Europe), sometimes not even the internal regulations of the Prison Service, and looked more like additional cells with no roof. An example may include the exercise yard of the Prague – Ruzyně Remand Prison, with a length of app. 12 m and width ranging from 1 to 5 metres, or the Remand Prison in Litoměřice, where spaces were not even roofed to any extent or equipped with benches to rest.

The Defender recommended performing construction-technical works so that staying in fresh air does not mean just mere promenading in narrow concreted berths. Where exercise yards are designed inappropriately, he recommended their reconstruction and cultivation, including additional equipment with shelters and benches or facilities for sports activities so that requirements of internal regulations are met.

CUSTODY WITH A MODERATE REGIME

Sections with a moderate regime, where the defendant may be placed if this poses no threat to the purpose of custody, are established within remand prisons. The share of this type of custody was different in the visited prisons and ranged from 15.5 % to 28 % of the capacity. Although the executive regulation prefers placing young defendants in this type of section, there was no special section for young defendants established at any of the facilities. For foreigners, there is a section with the mentioned regime in the Prague – Ruzyně Remand Prison.

According to the Defender, the current standard custody should in the future only apply to defendants in collusive custody. Other defendants should ***a priori*** be placed in moderate regime sections, which shall in particular apply to young defendants.

The Defender recommended to the General Directorate to implement a plan to increase the moderate regime section capacity to at least 30% of the total capacity of prisons by the end of 2010.

PROTECTING THE RIGHTS OF DEFENDANTS

Defendants learn their rights and obligations in a demonstrable manner with a sufficient number of foreign language versions of instructions being available. Rather less optimal is the situation of translations of internal rules of prisons, which are usually missing. The Defender would welcome the where foreigners are given access to at least fundamental information on their rights and obligations arising from the internal rules.

HYGIENE PROVISION CONDITIONS

Showering in hot water is enabled twice a week, more often in exceptional cases (hard work, sports activities), which is in accordance with both the legal regulations and European Prison Rules. Significant differences between individual prisons were found in the provision of soap and toilet paper to defendants. There were also cases where the provision of basic hygiene needs was inadequate under certain circumstances (more people in cells) in respect of some groups of defendants (women).

The Defender recommended to the General Directorate to supplement the appropriate internal regulations with a provision saying toilet paper and soap are provided to every defendant at least once a month, with other basic hygiene needs being given upon a request.

SOCIAL AND CULTURAL CONDITIONS

Only four defendants (out of 956) had a job. This fact increases the need to provide suitable leisure activities for other defendants. Due to insufficient spaces, overcrowding and low staffing levels, however, the offer is quite inadequate.

The Defender recommended offering the defendants as many leisure activities as possible.

The Defender experienced the situation where defendants could not combine their own bedclothes and prison issue bedclothes and clothing. There is no lawful or objective reason for such limitation.

The Defender recommended that the prisons enable the wearing of a combination of one's own clothing and prison issue clothing, which would also apply to sports and leisure activities and which had

been prevented by internal regulations of the Prison Service. The regulations were changed based on the recommendation.

The finding that prison workers did not provide young defendants with suitable and reasonable sports clothing or shoes for sports and leisure activities despite provisions of their own internal rules is considered a serious misconduct by the Defender. This was subsequently mentioned as one of the reasons why such activities are not carried out.

The Defender referred to the above-mentioned and stated the inadmissibility of such practices.

MEDICAL CARE

Medical centres are established in individual prisons. An employment contract is usually concluded between a prison and doctor as far as general practitioners and dentists are concerned. Specialists generally work in prisons without an employment contract. Expressed in a table, there are approximately 100 prisoners per one doctor (including dentists and specialists) (however, three times more per general practitioner). The medical care availability is complicated to a significant extent by the fact medical positions are often unoccupied.

A serious interference with the privacy protection right is the presence of guards during medical examinations, with this being considered an absolute matter of course at three of the visited facilities. Guards are even present in the gynaecological room. This practice is in conflict with both generally binding regulations and the internal regulations of the Prison Service.

The Defender repeatedly recommended fitting medical room doors with transparent inspection holes that would enable the guards to check the situation without being present in the room and hearing the communication between the defendant and doctor (i.e. to be within eyeshot, not earshot).

MANDATORY HEALTHCARE FEES

A serious obstacle even able to prevent health care availability includes the obligation for poor defendants to pay mandatory healthcare fees and eventually additional charges for drugs. Based on the Public Health Insurance (Act No. 48/1997 Coll. as amended) amendment effective as of 1 January 2008 (Amendment No. 261/2007 Coll. on the stabilisation of public finances), defendants **cannot be exempted from the obligation to pay mandatory healthcare fees due to material need**, as their situation would be evaluated if they were free. At the same time, they are virtually forbidden to work when in custody and – in contrast to convicts – they do not receive CZK 100 as social pocket money. If they do not have any funds from the time before being arrested, any other income or are not given any funds from anyone else as a gift, they do not have access to health care pursuant to the literal wording of the law. The obligation to pay mandatory healthcare fees also applies to minor defendants.

The Prison Service responded to such a situation by issuing an internal regulation assuming that **unpaid mandatory healthcare fees will be enforced only after the debtor is set free and the unsettled payment for drugs becomes a receivable from the State**. The Defender welcomed such approach while being aware it was the only way to comply with the law and meet the international standards for the protection of human rights regarding the approach of persons restricted in their freedom to medical care under the current legal situation. However, he does not consider it optimum, either in terms of the enforceability of receivables and the administrative costs of the process of enforcing or, in particular, consid-

ering the impacts on the socio-economic situation of the person after being released from prison, his/her subsequent adaptation and social integration.

COMMUNICATION WITH THE OUTSIDE WORLD

Correspondence is received and sent by the defendants at their own expense and with no limitation – it is checked only in case of collusive custody. The check is to be carried out by law enforcement authorities within 14 days pursuant to internal regulations. However, the term is not met at all times.

The Defender required that the Prison Service check the meeting the terms by a law enforcement authority and inform without undue delay its governing body if terms are not met.

Based on the finding of the Defender, prisons do not allow defendants without any funds to buy a phone card to call a lawyer. The Defender pointed out that the State assumes some obligations upon itself by disfranchising a person, including that a person in custody will not be deprived of some of his/her rights (the right to legal aid in accordance with Article 37, Paragraph 2 and Article , Paragraph 3 of the Charter of Fundamental Rights and Freedoms), the State will provide that person with a certain minimum standard of security (this does not apply just to food and clothing, but also undoubtedly the exercising of one's rights) and that other rights will not be limited unreasonably. Article 40, Paragraph 3 of the Charter of Fundamental Rights and Freedoms explicitly states that a „***defendant shall have the right to be provided with the time and opportunity for defence preparation, to be able to defend (...) through a solicitor***". This „***opportunity***" naturally also features a material-technical dimension in itself, i.e. the to address a lawyer, consult with him the preparation of one's defence, etc. The defendant cannot be deprived of the right to legal aid with reference to the lack of funds necessary to make a call.

The Defender recommended to the General Directorate to regulate by a methodical measure the opportunity of defendants who are demonstrably without any funds to exercise the right to legal aid by contacting their legal representative or lawyer at the expense of the prison budget first.

INTERNAL SECURITY

No excesses, i.e. excessive or unreasonable imposition of disciplinary punishments or other evident misconducts, were found with disciplinary offences or, to be more precise, in proceedings for awarding disciplinary punishments.

Proper attention is paid to preventing violence between defendants. Once a week, usually when showering, guards carry out a visual check of identified groups of defendants who could be perpetrators or victims of violence; once a month, a similar check is then provided by the doctor. Violence between defendants is at a steady or decreasing level. Violence by employees towards prisoners was not specifically identified but certain observations and more or less open statements of defendants and some employees suggested some violence had taken place in areas not under effective camera monitoring. However, these cases had concerned individual excesses dealt by the prisons. In the past, two prisons had to dismiss one employee each for aggressive behaviour towards imprisoned persons.

Complaints from imprisoned persons were made in respect of inspections of cells, in particular, damage to items by the inspecting workers of the Prison Service. Nevertheless, the mentioned unlawful conduct could not be demonstrated and even written documents were missing.

Violating human dignity and privacy was identified by the Defender in the case of the so-called thorough search of a person. Searching was often of a collective nature and there was absolutely no protection of privacy of persons subject to searching.

The Defender recommended to the General Directorate to amend the appropriate internal regulation to set the obligation to fit the inspection area with shields or boxes providing a certain level of privacy and dignity for the defendants.

CUSTODY OF JUVENILES

Special treatment of juveniles as provided by the Custody Act is basically adhered to. Serious deficiencies, however, can be found in the pedagogic and social care of these defendants. Although visits by workers of social legal protection services of children take place at regular intervals, they are only of a formal nature. Institutional or protective education had been ordered for some juveniles before being taken into custody but in no case was it found that the educational institution or children's home was somehow interested in them. The Defender pointed out that these defendants were disadvantaged in several aspects compared to defendants with a family (visits, line change, parcels, etc.).

The Defender recommended that prisons actively establish cooperation through a social worker with school facilities where the defendant had previously been subject to institutional or protective education.

Serious deficiencies were found in securing compulsory schooling. Prison workers described the unwillingness of school workers to visit the prison as it is not legally established which school should provide schooling. Teaching of juveniles is therefore most often provided by the prison special pedagogue, who actually gives children grades and the school formally recognises these grades. At school, defendants only take part in the final revision period at the year's end. However, it was also found that in the past a pupil had not been sent by the prison for the final exams, after which the compulsory schooling had been finished by the school in a lower year. On the contrary, an example of good practice includes the cooperation of the Remand Prison in Ostrava and the Elementary School of Přemysl Pitr in Ostrava – Přívoz.

The Defender recommended that prisons pursue the good practice identified in the Remand Prison in Ostrava when cooperating with a school.

A burning question is the lack of suitable leisure activities, which can represent one of the main reasons for increased aggression of juveniles against property and people.

The Defender asked prisons to expend the maximum effort to provide a sufficient amount of suitable leisure activities for juvenile defendants.

2 / PRISONS FOR JUVENILE DEFENDANTS SERVING TERMS

Serving terms of juvenile men is concentrated in the **Všehrdy Prison** in the Czech Republic; for juvenile women, there is a special section within the prison for serving terms in Světlá nad Sázavou. In 2010, the Defender made an unannounced visit to both of these facilities. In the **Prison in Světlá nad Sázavou**, there was no woman below 18 years of age and only 6 women at an age close to juvenile age at the time of the visit, which is why the **following summary only deals with the Všehrdy Prison** (hereafter simply *„Prison" or „Facility"*). Besides several hundred adults, there were 140 juveniles at the time of the visit.

The concentration of all juvenile convicted men into one facility within the State was forced by the reconstruction of part of the Opava Prison into a detention institute and turns out to be unsatisfactory in case there is a need to relocate a problem juvenile or juvenile in danger to any other place.

RECOMMENDATIONS OF THE DEFENDER

MATERIAL SECURITY, STAFF CONDITIONS AND CAPACITY

Equipment and spatial conditions are above average, which is also given by the construction layout and size of the prison area, so the absence of shelters in exercise yards can be regarded as the only deficiency. As in other prisons, significant lack of staff was identified here. The prison capacity and staffing are on the brink of their capacity and the management plan to seek to reduce the capacity and build a section with a cell system for the most aggressive juveniles.

The Defender recommended fitting the exercise spaces of juveniles with shelters against rain. He also voiced his support for the intention to construct at least a couple of cells enabling the separation of the most aggressive prisoners from the others.

SOCIAL NEEDS

The prison includes the Education Centre (hereafter simply „***School***") with 20 pedagogues. The School, with a total capacity of 132 persons, does not enable compulsory schooling to be completed; it only provides education in 7 fields of study and 5 five-month courses. What is more, both the capacity and the range of fields and courses have a decreasing tendency over time. As far as inclusion in programmes is concerned, there is an evident effort to prefer adults over juveniles as they are less problematic. In summer, teaching does not take place at all; in addition, the defendant may only be included in the programmes at the beginning of the tuition or course, otherwise, he/she must wait until the beginning of the new cycle. Such practice makes it impossible for juveniles who have spent a rather short time in the prison to complete the field of study.

The Defender recommended creating conditions for broader inclusion of convicts in the tuition programmes during the year and placing greater emphasis on educating juveniles.

3 / PRISONS FOR WOMEN SERVING TERMS

Two facilities were visited without any prior announcement as part of supervision of places where terms are served by women. The first included the **Prison in Světlá nad Sázavou**, with a modern construction-technical design, where app. 700 convicts were serving their sentence in the inspection, supervision and surveillance category at the time of the visit (May 2010). There is also a section for mothers with children and a section for women permanently incapable of work. The Defender paid special attention to the conditions and regime of both the last-mentioned sections.

Another prison that was visited was the **Prison in Opava,** where there were 299 women in all prison types (including those serving life sentences) at the time of the visit (September 2010). There are two specialised sections established in this prison: for addiction treatment and for persons with mental and behavioural disorders. Separate premises are furnished for women with the second building being designed for terms served by men.

In the second half of 2010, fierce austerity measures (restriction of the hot water supply, lighting, heating, use of cookers, provision of hygiene needs) were introduced at Prison Service facilities. Combined with the overcrowding of prisons, these measures may potentially affect dignity of those serving terms and support the growth of negative manifestations. **Generally speaking, although the Defender has a rather positive evaluation of the treatment of women restricted in their personal freedom, he warns against the impacts of the current trends when we are facing an increase in the number of underprivileged persons in prisons, capacity and, at the same time, a mounting pressure on expenditure restraints.** The absence of blanket testing for some infectious diseases can also be considered a potential risk.

The Defender recommended sensitive selection of individual austerity measures, taking into account the rights of the convicts and providing standard social conditions for poor convicts.

RECOMMENDATIONS

MATERIAL SECURITY, STAFF CONDITIONS AND CAPACITY

It is especially the Opava Prison that suffers from overcrowding, which is very unbalanced. While for example the overall utilised capacity of the women's part of the Opava Prison was 108% at the time of the visit, in the surveillance type of the prison the utilised capacity was 134% and in the supervision type prison it was even 146%, which by itself makes serving the term much more difficult. As in other prisons, a significant lack of staff was identified there.

The Defender recommended to the prison management to seek to strengthen the staff levels, in particular, the civilian employees. Further, he pointed out the fact that determining table positions of employees assigned to various prisons cannot be based just upon the average situation of the employees and convicts, but it is also necessary to individually review the local conditions of prisons (e.g. Opava Prison consists of two separate buildings, which is why the staffing requirements for its surveillance and security are necessarily much higher with the same capacity).

SOCIAL AND CULTURAL CONDITIONS

In the Prison in Světlá nad Sázavou, the Defender experienced an unlawful interpretation of the internal regulation issued by the Managing Director of the Prison Service, where poor convicts were forced to preferably buy hygiene needs from their social pocket money amounting to CZK 100. As a result, they lacked money to satisfy other needs.

The Defender strongly asked that practice be stopped. The legal opinion of the Defender was also shared by the Managing Director of the Prison Service, who the Defender had to address due to the absence of the prison's cooperation. Subsequently, social pocket money can now be used upon the discretion of the convicts even in this prison.

COMMUNICATION WITH THE OUTSIDE WORLD

It was especially in the Prison in Světlá nad Sázavou where the Defender found that there were problems in allowing phone calls when the convict or the called person speaks a foreign language.

The Defender insists on the statement that the use of a foreign language itself cannot be a reason for not allowing (finishing) a call in case one of the communicating persons does not have a command of

Czech (this applies to e.g. small children with their mothers in prison. Therefore, he recommended that prison management instruct the responsible workers in this regard.

MEDICAL CARE

The Defender characterised the medical care in the Světlá nad Sázavou Prison as sad, in particular, in terms of its availability. The reason especially included the position of the prison doctor, for a long time unoccupied. The fact that until recently there had been no gynaecologist having office hours in a prison with app. 700 convicted women and that at the time of the visit the gynaecologist had office hours once every 14 days only seemed incomprehensible. At weekends, the medical service is not available at all at this facility.

The Defender strongly recommended providing at least one general practitioner in the Světlá nad Sázavou Prison, which was subsequently fulfilled. Further, he recommended that women over forty years of age be referred to the option to undergo a mammography investigation and an annual gynaecological investigation.

Again, the Defender faced a burning issue of the obligation placed on poor convicts in the prison to pay mandatory healthcare fees and additional charges for drugs. Although the situation of poor persons serving terms is rather better than that of persons in custody (see above), the payment of fees is not without problems even here. Moreover, it is often the case at prisons (not only for women but also in remand prisons) that the practice often uses the terms like „***urgent***" or even „***life-saving***" as the condition for free care. However, this is not in accordance with the internal regulations of the Prison Service, based upon which it is postponed with enforcement of the receivables for mandatory healthcare fees until the prison term has been served or, to be more specific, receivables from additional charges for drugs are transferred upon the State by these regulations.

The Defender strongly insists that the basic principles included in e.g. the European Prison Rules or internal regulations of the Prison Service, are based upon the fact the State has disfranchised a person, assumed responsibility for such person to some extent by e.g. providing such person with proper health care. Such care can surely not be limited to just so-called „urgent" or „life-saving" cases. Therefore, the lack of money cannot be a reason to deny care other than „urgent" or even just „life-saving" care.

The same as described in the chapter dealing with visits to remand prisons applies to maintaining human dignity and the protection of sensitive information during medical examinations.

PRIVACY DURING SAFETY INSPECTIONS

Carrying out so-called thorough inspections (before escorting, before and after visits or during so-called technical inspections) collectively is a serious misconduct by workers in the Prison in Světlá nad Sázavou. Women were forced to strip naked in front of others, reputedly even when they were menstruating.

The practice of collective thorough inspections is regarded by the Defender as quite unacceptable and he recommended that such inspections be stopped immediately.

COERCIVE MEANS

The same as described in respect of this issue in the chapter dealing with visits of remand prisons applies to using coercive means. Moreover, the consequences of the case followed by the media of the escape of an imprisoned person when being escorted to a medical facility in Plzeň also had a negative impact. The Managing Director of the Prison Service issued an internal regulation on binding persons during escorts, virtually introducing blanket use of shackles with a restraint belt regardless of the individual physical and personal characteristics of the person subject to escort or criminal act relevance. As far as serving prison terms is concerned, this instruction leads to absurd situations where e.g. women in the most moderate type of prison with inspection who are commonly allowed to move freely to unguarded workplaces outside the prison must be escorted to medical facilities with their hands tied, shackled to the with a restraint belt.

The Defender asked that suitability and rationality be provided when using coercive means.

4 / POLICE CELLS

In the period from March to August 2010, the Defender made systematic visits to police cells (hereafter simply „***Cells***"). **A total of 34 police departments were visited**. Of this number, two were subject to the foreign police administration under which 126 cells for 192 persons are established. All visits were made without prior announcement, some of them in the evening or at night. In some cases, facilities were also entered in the early morning after being investigated the preceding evening or night.

Since 2006, when the Defender started making systematic visits of police cells, there was a fundamental change to the legal regulations regarding the cells. The Act on the Police of the Czech Republic (Act No. 273/2008 Coll., as subsequently amended) regulating the details on placing persons in cells was adopted. Further, a binding instruction of the Chief of Police No. 159 of 2 December 2009 on escorts, guarding of persons and police cells (hereafter simply „***Binding Instruction***") was adopted.

RECOMMENDATIONS

INSTRUCTIONS TO PERSONS WHEN BEING PLACED IN A CELL

A person placed in a cell must be demonstrably informed of his/her rights and obligations under the Police Act. Instructions are provided through a form called „***Instructing a Person when Being Placed in a Cell***" (hereafter simply „***Instructions***") signed by the person placed in the cell and the text of which is set by the appendix of the Binding Instruction, which states that one copy of the form is given to the person being placed in the cell, which mostly is not the case in practice as the paper is evaluated by the Police as a matter able to the put life or health of the person placed in the cell at risk. Policemen proceed across the board without evaluating the level of risk in relation to the person placed in the cell. The Defender criticises this procedure as informing about rights and obligations is the basic condition of their implementation. There is a difference between the ability to receive information within procedures following one after another after the restriction of freedom and the ability to receive it later (in relative peace). That is why the person placed in the cell should have the „***Instructions***" with him/her in the cell. According to the Defender, the „***Instructions***" form does not need to be given to the person in the cell for safety reasons, however, only after individual evaluation of the specific person's characteristics that would suggest the form would be used for self-inflicted harm or to put another person at risk. In such a case, the form should be kept with the items taken from the person and given to him/her when leaving the cell.

The Defender recommended placing the Instructions form in the cell.

Pursuant to the applicable regulation, the person should be instructed when being placed in the cell in respect of the legal reasons behind the act being taken and his/her rights and obligations. However, the practice of many police departments is such that the person placed in the cell is instructed by the police authority that has restricted the person in his/her freedom (often a couple of hours before their actual placement in the cell). The policeman taking the person to the cell will receive from the supplying policeman the signed „***Instructions***" but then does not need to make sure the person has understood the Instructions. Combined with not placing the „***Instructions***" form copy in the cell, there is a real risk that the person placed in the cell is actually not informed of his/her rights.

The Defender recommended respecting the Binding Instruction provisions and giving Instructions when placing a person in the cell or making sure the person has properly understood the Instructions.

MEDICAL TREATMENT AND STATEMENT ON THE STATE OF HEALTH

If there is any reasonable suspicion that the person that is to be placed in the cell suffers from a serious disease, the policeman is obliged – under the Police Act – to provide such person with medical treatment and ask the doctor to provide a statement on his/her state of health.In one case, the Defender found that there was a person in a cell about whom the had known from the beginning suffered from a mental disorder and was subject to care from a psychiatrist (in the past, they had assisted several times in his/her involuntary hospitalisation in a psychiatric hospital); despite that, they had not asked for a statement from the doctor regarding his/her health care before such person was placed in the cell. They even did not make sure the detained person was given the that he/she was using on a regular basis.

The Defender evaluated this procedure as breaching the statutory obligation, in particular, breaching the detained person's right to health protection. He strongly recommended respecting the Police Act.

The situation where policemen had had the state of health of the person placed in the cell evaluated by the doctor and had given the person the prescribed medications but had not learnt their amount or the intervals of their use or, to be more specific, this information had not been given in any documentation, was evaluated by the Defender as misconduct. It may be assumed that the information the medication was to be given in the morning had been transmitted orally by the policemen but there had been a risk of exchanging the amount and intervals of giving the medications or omission. The person placed in the cell was thus subject to the risk of their health being affected.

The Defender recommended providing instructions from the doctor on medicine administration at all times (intervals, amount, etc.)

The Police Act provides that a person restricted in freedom has the right to be examined or treated by the doctor of his/her choice (note: this does not apply to examinations by a doctor to find out whether the person can be placed in the police cell). The Police will allow the appointed doctor to access the person to treat or examine him/her. The Defender found that the right would not be respected in some prisons due to a lack of knowledge of the regulations and the unusual character of such requirement, and policemen would not notify the doctor of the person's request to be examined by him/her.

The Defender recommended respecting the Act and allowing the person placed in the cell to be accessed by the doctor of his/her choice.

In case of the medical examination of a person restricted in his/her freedom, the policemen are obliged to provide safety of the treating staff and prevent the person restricted in his/her freedom from escaping if the examination is carried out outside the cell or police station.There is a conflict of several rights and obligations: protection of safety of the medical staff, protection of privacy of the examined person, maintaining medical confidentiality and the to prevent the escape of the examined person. Based on the Binding Instruction, there is a different regime for examinations outside the cell where the policeman is paradoxically only meant to stay in visual contact, and examinations in the police cell where a policeman is to be present. Policemen clearly preferred the maximum safety aspect, i.e. presence in the cell. As a reasonable compromise, the Defender sees it fit that the guard remains in visual contact outside the cell and only enters it when asked to do so by the doctor.

The Defender recommended respecting the privacy of a person in respect of medical examinations.

LEGAL AID PROVISION

Access to legal aid is not only an integral part of implementing the right to a fair trial but also one of the ways to prevent maltreatment when a person is being placed in the cell. Under the Police Act (§ 24, Paragraph 4), a person restricted in freedom has the right to be provided with legal aid at his/her own expense and to talk to a legal representative without any third person being present. The right to legal aid is usually implemented in such a way that the guarding policeman notifies the police unit that has placed the person in the cell of the wish of the person placed in the cell to talk to a lawyer (unless already appointed within the so-called necessary defence) to review the request and mediate the contact. According to the Defender, however, this is not sufficient. Such procedure is suitable when criminal proceedings are being undertaken. Nevertheless, there are not just detained persons (i.e. within the criminal proceedings) in the cells but also persons restricted in their freedom for other reasons (police detention or parading). Policemen guarding the cells must be ready to provide such persons with legal aid, which mostly is not the case as found by the Defender. And these are not difficult tasks – providing a phonebook and phone call.

The Defender recommended that a list of lawyers from the surroundings be available at the police cells that can be offered to the person placed in the cell. The Defender recommended conveying the right to legal aid also to persons placed in the cell for detention or, if you like, persons before being notified of their charge.

If no special visiting room for consulting the legal representative is established in the appropriate workplace, consulting usually takes place directly in the cell. In some cases, however, the technical situation does not allow complete confidentiality of the meeting. Communication facilities in the cells would, for example, allow monitoring of the actual interview (specific monitoring not identified). In one case, it would be possible to monitor even a specially created visiting room.

The Defender recommended finding a solution so that legal aid could be provided without any third person being present.

NOTIFICATION OF A THIRD PERSON

The Police have a statutory obligation to notify, upon the request of the person restricted in his/her freedom, a person close to him/her or any other person specified by the person restricted in his/her freedom of that fact. Guarding policemen handle the notification request on their own or ask the police authority that has supplied the person to be placed in the cell to do it. In the latter case, the problem is the fact that guarding policemen do not check whether the supplying authority has managed to contact and no-

tify the third person. As a result, it happens that the person placed in the cell is uncertain of whether the third person knows of his/her existing situation. Notifying a third person may be requested at any time during the stay in the cell, however, this right is often not applied as persons placed in the cell are not aware of that – they do not have the „***Instructions***" form with them and have forgotten the instructions given to them orally.

The Defender recommended informing the person placed in the cell at all times of whether notifying the third person has been successful. If „Instructions" have not been given, the Defender recommends informing the person continuously of his/her right to notify a third person.

FILING COMPLAINTS

Policemen guarding the cells usually said they were not authorised to take a complaint from the mentioned person and that a specialised unit (internal inspection) worker needed to be called for that purpose. However, the procedure according to the Binding Instruction assumes that the person placed in the cell writes the complaint himself/herself or through the legal representative. The internal inspection worker should only be called to write a complaint if the person is unable to write it himself/herself for objective reasons.

The Defender recommended respecting the applicable legislation, allowing the person to write a complaint and accepting it.

WITHDRAWING OF ITEMS AND HEALTH AIDS

Before a person is placed in a cell, a policeman is authorised to check whether the person has a gun or any other item able to put life or health at risk and confiscate such item from the person. For this purpose, the policeman is authorised to inspect the person. In practice, all items including documents related to their placing in the cell or their prosecution, items of everyday use or watches are confiscated in most cases. There is the question of whether such action corresponds to the intention of a legislator. The Police Act (§ 29) allows the confiscation from a person of „***an item able to put life or health at risk***", not all items. Nevertheless, policemen proceed as if an item unable to put life or health at risk did not exist.

No item is able to put life or health at risk by itself but only in connection with the action of a person with that intention (or negligent or inappropriate actions). The Defender therefore asks for individual evaluation, considering the characteristics of the person placed in the cell.

Confiscating all items may lead to the impossibility to orientate in time (many cells do not have access to daylight), the impossibility to familiarise oneself with the criminal regulations, documents related to prosecution, or to pass the time by reading a magazine during the stay in the cell. There is no reason to cause such „***discomfort***" according to the Defender. Restricting the personal freedom itself is a heavy psychological intervention and should be reduced to the necessary minimum given by its purpose: preventing escape, thwarting investigation or continuing in prohibited acts.

The Defender recommended individual evaluation for items confiscation and usually allowing the person to keep documents related to his/her placement in the cell and his/her criminal case so that he/she could be familiarised with them to a sufficient extent. Further, he recommended that watches only be confiscated in well-founded cases, and such reason is always given in the service aids. If watches are confiscated or if the person does not have one, the Defender recommends notifying such person, even without a request, of the time at regular cell inspections, food supply or presentation.

Under the Police Act (§ 29), if the item the confiscation of which causes a psychological injury or physical harm includes a health aid, there must be a special reason for such confiscation. At most of the visited sites, glasses are almost always confiscated. The Defender does not agree with this generally applied – blanket approach. The policeman must be able to individually evaluate whether there is any special reason for glasses to be confiscated, which is to be subsequently recorded in documents. In other words, the policeman should automatically keep the glasses; to legally confiscate glasses, there must be yet another „***special***" reason.

The Defender recommended keeping glasses on principle and confiscating them only in individual cases after a special reason for their confiscation has been identified.

SERVING MEALS

Pursuant to the Binding Instruction, the person has the right to be provided meals three times a day at reasonable intervals. At some stations, there was still the old, long implemented practice of serving meals after 6 hours after personal freedom is restricted.

The Defender recommended that meal serving roughly respected the time of the main meals of the day with the policemen monitoring in their service records the time the person ate last.

Depending on the local conditions, the person placed in the cell may be provided, upon his/her request and at his/her expense, with meals reasonably per his/her requirements if such person disposes of the necessary money, with whom there is no reasonable suspicion the money comes from criminal activity. In some departments, buying one's own meals was not allowed, saying it would be administratively difficult to report it.

The Defender recommended respecting the Binding Instruction and finding a suitable method for reporting purchases from funds of the person placed in the cell.

MEETING THE PERSONAL FREEDOM RESTRICTION TERM

Systematic visits did not find any cases of exceeding the terms set by the Police Act and Criminal Procedure Code (Act No. 141/1961 Coll., as subsequently amended) for the restriction of the personal freedom of persons; nevertheless, a practice enabling the exceeding of terms was identified. Statutory periods may namely be changed during freedom restriction by the police authority. If the detained person for whose freedom restriction a term of 48 hours applies is submitted to the court by a prosecutor, the term is extended by 24 hours. At several sites, the Defender found that these details had not been recorded in the freedom restriction documentation. Although exceeding terms was not documented in specific cases, it was evident that policemen changing guard in shifts did not have any demonstrable information about when the term was to expire and the person was to be set free. Formally, it concerned breaching the Binding Instruction (a policeman is to make a record in the information system or service aids if he has received instructions regarding the statutory period for freedom restriction). Where such misconduct was commented upon by the Defender, better cooperation and exchange of information with the prosecution was promised.

The Defender requested the documentation be kept in such a way that it is demonstrably provided that the statutory period will not be exceeded.

Another issue regarding the „***Instructions***" form where it talks about placement in a cell for a necessary period, however, not more than 72 hours, is connected with the length of the term for personal freedom restriction. This, however, does not apply in case of the institute of detention under the Police Act. Deten-

tion of a person may not last more than 24 hours following the personal freedom restriction moment, or 48 hours in case a foreigner is detained.

The Defender recommended making the „Instructions" form more precise and supplementing it with information on the length of placement in a cell in case of the institute of detention.

STRUCTURAL AND TECHNICAL LAYOUT

The Binding Instruction sets requirements for the structural and technical equipment and layout of cells. At some sites, the following deficiencies were identified: the basin was not placed outside the camera's reach and the part of the cell with the basin and WC was not visually separated from the remaining part of the cell; basins were not fitted with running water or water could not be run from the cell but only from the corridor; dual lighting mode (day, night) was not installed or the night lighting did not work as a result of which day lighting was on at night to allow cameras to work; the signalling system did not work.

The Defender recommended modifying the cells to meet the Binding Instruction requirements.

A table providing information to persons placed in the cell on continuous cell space monitoring in the following wording: „***Cell spaces subject to camera system monitoring***" as required by the regulations, was not present in all of the cells.

The Defender recommended posting the information table.

ASSURING PROTECTION AND THE DIGNITY OF PERSONS

At some cells, the room for searching of persons before being put in the cell was not provided and searches were carried out e.g. in the corridor. In such cases, it was always investigated whether the improvised search spaces were accessible by unauthorised persons and Police members of the opposite sex. Misconduct was identified in several cases. Apart from that, there were glass doors through which it was possible to see inside in some rooms designed for searches.

The Defender recommended establishing search rooms. Further, he recommended that the privacy of persons subject to searches be immediately assured, e.g. by temporary curtains or an appropriately covered peephole.

In connection with the searches, the Defender also emphasized the issue of dignity and privacy of the person in the case of camera monitoring of special rooms. A situation where the picture is shown on a monitor in a room where other persons, even those of the opposite sex, are commonly present or where the monitor can be viewed from stations that can even be accessed by the public is considered by the Defender misconduct.

The Defender recommended taking such measures so that the dignity and privacy of persons during searches and in connection with picture transmission by cameras are respected.

MATERIAL EQUIPMENT OF CELLS

In some cells, even in newly built ones, toilet seats were missing. As far back as in connection with the systematic visits of police cells in 2006, the Defender recommended that toilets in cells be equipped with toilet seats and also lids for toilet bowls at least in cases where the flushing control is placed outside the cell.

In exceptional cases, it was found that mattresses were not used in the cells and, as a result, persons were sleeping directly on the bed's wooden boards. This concerns a breach of the Binding Instruction, as in cases where mattresses on beds only have a textile surface. Based on the Binding Instruction, the bed should be fitted with a washable sleeve or mattress with a washable surface.

The Defender recommended supplementing the missing equipment in cells.

In each cell, there should be one bed sheet or sheeting and a cover with a blanket used as standard. In some places, paper torn from a roll was used while in other places there was no sheeting and persons had to lie directly on the mattress. At some sites, blankets were not cleaned after being used. The Defender criticised cases where the equipment did not allow contact with the exposed surfaces or surfaces unable to be cleaned to be avoided. If a person was eligible, based on a previous Binding Instruction, to have two pieces of sheeting so that one could be used as a sheet and due to that, immediate physical contact with an already used blanket (or mattress) could be avoided, nowadays, a person is only eligible to one sheet or, to be more specific, a single bed sheet and such contact cannot be avoided.

The Defender recommended increasing the hygiene standard, providing regular cleaning of blankets and offering persons two pieces of sheeting.

In most cases, it was found that a person in the cell had to specifically ask to be given equipment the stations are obliged to dispose of and to which the person is entitled. This also concerns hygiene needs (toothbrush and paste). Combined with the failure to provide „***Instructions***" in the cell, in practice this means that the person placed in the cell only rarely asks for these items to be given to him/her.

The Defender recommended providing hygiene needs ipso jure.

5 / FACILITIES FOR THE DETENTION OF FOREIGNERS AND ASYLUM RECEPTION CENTRES

In the second quarter of 2010, the Defender made systematic visits to facilities where there are foreigners in the administrative detention regime. This concerned two facilities for the detention of foreigners where – based on § 130 of the Act on the Residence of Foreigners in the Czech Republic (Act No. 326/1999 Coll., as subsequently amended) – they provide their securing for the purpose of administrative deportation, exit or handover or extradition in transit. Also, two asylum facilities that are used – pursuant to § 79, Paragraph 1 of the Asylum Act (Act No. 325/1999 Coll., as subsequently amended) – to accommodate applicants for international protection for the time necessary to perform operations according to § 46 of the Asylum Act were selected. **In 2010, the Defender visited all facilities in the Czech Republic that are used to detain foreigners or initially place asylum seekers** (hereafter simply „***Facilities***").

Apart from the reception centre in Zastávka u Brna, this was the second systematic visit to these facilities. The first visits were made in 2006 and 2007. For this reason, the visits were not conceived of as just the seeking of new facts but also focused on evaluating and supplementing the original recom-

mendations of the Defender. The visits were not announced in advance, lasted one day, two days in one case, and were always made by four Office employees.

The operator of all the facilities **includes the Refugee Facilities Administration of the Ministry of the Interior** (hereafter simply „*Refugee Facilities Administration*"), the employees of which take care of the regular operation of the facility, acquaint foreigners with the environment, identify their needs, provide leisure activities, etc. Health care at facilities is provided by the Medical Facility of the Ministry of the Interior (hereafter simply „*Medical Facility*"). The surveillance of the facilities for the detention of foreigners is provided by the Police of the Czech Republic – Alien Police Service (hereafter simply „*Alien Police*" or „*Police*"), which also ensure the so-called strict regime and carry out searches of persons at these facilities. The Alien Police are present in the reception centres but only provide searches of foreigners or escorts. In the reception centres and facilities for the detention of foreigners there are also workers from private security agencies whose task is to provide internal safety and keep order.

After visiting the facilities, the Defender initiated negotiations with representatives of the Refugee Facilities Administration, Medical Facility, Alien Police and Asylum and Migration Policy Department of the Ministry of the Interior (hereafter simply „*Asylum and Migration Policy Department*"). Issues relating to individual recommendations were discussed and statements from all parties concerned were clarified, too.

RECOMMENDATIONS

SEARCHES OF FOREIGNERS AND THEIR BELONGINGS

The statements from detained foreigners and information from non-government organisations suggested that the Alien Police inspected the rooms and belongings of foreigners in an – at least – unprofessional manner. During the inspections, foreigners reputedly stand scantily clad in corridors and their belongings are treated roughly. The overall character of these searches is regarded by the Defender as unreasonable as the described practice is not common even at stricter detention facilities such as prisons.

Although no misconduct could be demonstrated, the Defender appealed for the search procedure to be changed. He recommended that the foreigner always be present when his/her belongings are searched along with another independent person that would guarantee the suitability and dignity of the search.

SHACKLING OF ESCORTED PERSONS

Cases where shackles were used for escorts outside the facility for the detention of foreigners were identified, although the escorted person had been evaluated in the escort decision as inoffensive and there was no reason to believe he/she could inhibit the escort process. It is evident that policemen do not evaluate individual risk and take a blanket approach to the shackling of persons, although they should proceed individually based on the applicable regulations.

The Defender recommended that shackles only be used for escorted foreigners after individual evaluation and just in well-founded cases.

LONG-TERM STAY IN A STRICT REGIME

Facilities for the detention of foreigners are divided into those with a moderate regime and those with a strict regime, where persons acting aggressively or breaching their obligations are placed. Foreigners can be included in the strict regime for a necessary period, however, not longer than 30 days. For reasons provided by the Act on Residence of Foreigners (§ 135 Paragraph 5), the term may be extended by a decision by 30 days. In a specific case, the Defender found that the stay of a foreigner in the strict regime had lasted for two months and, moreover, it had occurred repeatedly. Although such placement had been fully legitimate, its conditions are reminiscent of custody or even the disciplinary punishment of solitary confinement, which, however, is not allowed in the administrative detention regime.

Except for an hour outside cells, detained foreigners in the strict regime are not offered any leisure activities, books, etc. and they are prevented access to legal counselling provided by non-governmental non-profit organisations, which the Defender views as serious.

The Defender considers it desirable to include in the legislation a rule that would only mark the strict regime residence as one of the legal tools designed for correcting the behaviour of detained foreigners, which is the ultima ratio tool. For correct behaviour, tools of disciplinary punishment the introduction of which is also proposed by the Defender should be used first.

STRICT REGIME AND DECIDING ON COMPLAINTS

A record on inclusion in a strict regime will be written by the Police, the foreigner will be familiarised with such record and sign it. If an interpreter is appointed, he/she will sign the record, too. The foreigner will have the right to file a complaint with the Ministry of the Interior about being included in the strict regime. If the foreigner is placed in the strict regime for more than 48 hours, the Police will render a decision on such. It is surprising that in 2009 – 2010, the Ministry of the Interior did not register any such complaint and no foreigner contacted the administrative court with a request to review the decision. According to the Defender, this shows evidence of possible system failure. As far as the formal aspect of the issue is concerned, records and decisions with errors were identified.

The Defender recommended that policemen instruct foreigners of the possibility to appeal to a court if included in the strict regime. Further, he recommended taking measures that would prevent wrong decisions and records being issued.

RECEIVING VISITORS IN THE STRICT REGIME

Within the systematic visits to facilities in 2006 and 2007, the Defender criticised the fact that foreigners could meet their visitors in a room fitted with a glass barrier. While in moderate regime areas, barriers had already been removed, the Defender encountered them at the Bělá-Jezová's Facility for the Detention of Foreigners in the strict regime part. With reference to the fact that even the prison regulations admit non-contact visits only in exceptional cases, the Defender considers such state in the administrative detention regime inadmissible.

The Defender recommended removing the glass barriers in the visiting rooms of the strict regime.

PRIVACY DURING VISITS

Visits to facilities for the detention of foreigners always take place in the presence of a private security service worker or at least under his visual or audible supervision. Any physical contact (handshake, kissing) is prohibited. Such restriction in the administrative detention regime is considered unreasonable by the Defender as it is not common even in prisons. Such restriction does not apply in reception centres, however, the Defender found misconduct in the conditions of receiving visitors in the Reception Centre in Zastávka u Brna. The visiting room only comprises part of the entry hall near the reception delimited by hanging blinds, so one cannot speak about any privacy. To make the description complete, it is necessary to state that meetings with legal representatives (lawyers, non-profit organisations) take place at all of the facilities without the presence of third persons and in spaces where privacy is fully provided.

The Defender recommended maintaining privacy during visits and enabling the detained persons to have reasonably physical contact with visitors. Further, the Defender recommended providing in the Reception Centre in Zastávka u Brna such a visiting room that would ensure a sufficient level of privacy during visits.

LOCKABLE SPACES FOR PERSONAL ITEMS

Despite the recommendations of the Defender made after its visits in 2006 and 2007, foreigners at the facilities continue not to be allowed to keep their personal items in lockable spaces, whether directly in the room or in any other place within the moderate regime. Although they may keep their items in the deposit area with the operator, this is not the right solution for items used every day. The Refugee Facilities Administration management defended the existing unsatisfactory situation not by reason of financial costs but by the fear that safety at facilities could get worse. However, the Defender objects to the fact that boxes can be locked with a universal key and are subject to regular checks.

The Defender again recommended that foreigners have at their disposal a lockable space to deposit their personal items in.

SENDING OFFICIAL DOCUMENTS

Foreigners usually come to the facility with just some financial means, which is why many of them do not have the chance to buy postage stamps. Social workers provide foreigners with envelopes and paper, however, not postage stamps. A poor foreigner may thus file papers directed to the Asylum and Migration Policy Department by submitting them to a Refugee Facilities Administration employee. Other filings in matters of his/her proceedings (e.g. appeal against the decision of an Administrative Procedure Code, administrative action, filing to the Public Defender of Rights or international organisations) are not guaranteed. A foreigner is therefore exposed to actual damage to his/her rights. At present, the risk of letters and files not being sent due to a lack of means is minimised by the activities of non-governmental organisations, but it is not possible to rely on their help all the time.

The Defender recommended creating an efficient system of providing postage stamps so that poor foreigners are actually guaranteed the right to appeal to a court or other institutions.

COMPLAINT MECHANISM

A foreigner at a facility is authorised to file complaints on conditions at the facility, health care, activities of employees of the Refugee Facilities Administration, etc. In practice, however, there are problems in evaluating the filed complaints. A number of them can be evaluated as complaints about the activity of the Refugee Facilities Administration (handled by the Refuge Facilities Administration) and complaints about breaching Chapter XII. of the Act on Residence of Foreigners (handled by the Asylum and Migration Policy Department). Although a foreigner has the option to file a complaint, he/she does not have any actual idea of who will handle such complaint.

The Defender recommended that the Refugee Facilities Administration handle only such complaints that are related to inappropriate or unethical behaviour of employees of the Refugee Facilities Administration. All other complaints should be handled by the Asylum and Migration Policy Department.

APPOINTING OF GUARDIANS

Findings of the Defender suggest that in exceptional cases a guardian for detention proceedings had not immediately been appointed to minor foreigners with no accompanying person but had been appointed only after a person had been placed in the facility. This had put the timeliness of filing remedies against the detention decision at risk. The Act on Residence of Foreigners (§ 124, Paragraph 4) conceives the guardian institute in such a way that he/she should be appointed as early as in the detention decision-making process.

The Defender recommended taking measures that would prevent the late appointing of guardians for proceedings. A remedy was provided by the Act of Residence of Foreigners amendment imposing on the Alien Police the task to immediately appoint a guardian to a minor foreigner without any accompanying person.

HEALTH CARE EXTENT

Foreigners placed in the facility are not informed of the fact they are not entitled to be provided health care to the full extent under the Act on Residence of Foreigners, which often elicits negative responses and the subjective feeling that the necessary health care has been neglected. Further, foreigners are not instructed on the medical treatment purpose, medicine administration nature and their right to reject any medical service. The only exception includes information relating to the initial medical examination. In the past, the Defender pointed out that under such situation, it was not possible to talk about granting an informed consent to treatment. Also, the presence of private security agency members or policemen during a medical examination clashes with the right to the protection of privacy of the person subject to examination or with medical confidentiality.

The Defender repeatedly recommended providing foreign-language instructions on the nature and purpose of the most frequent medical examinations and medicines administered so that a foreigner be sufficiently and clearly informed of the health care provided. Further, he recommended providing the necessary language versions for rejecting a medical intervention and respecting the privacy of the person subject to examination. The presence of a third person can only be allowed in well-founded cases.

CAMERA SYSTEM IN RECEPTION CENTRES

Despite the previous recommendations of the Defender, the Refugee Facilities Administration has no legal support for using a camera system in asylum facilities. Although such legal regulations were proposed, according to the Office for Personal Data Protection no amendment is necessary and the Refugee Facilities Administration should take the direction of the notification requirement under § 16 of the Personal Data Protection Act (Act No. 101/2000 Coll., as subsequently amended). However, this opinion was not shared by the Defender – he insists on his previous recommendation and declares the need for statutory authorisation to use a camera system, similarly as the provisions of § 132a of the Act on Residence of Foreigners.

The Defender still perceives it as desirable to regulate in the Asylum Act the use of a camera system as in § 132a of the Act of Residence of Foreigners so that the invasion of privacy of foreigners is in accordance with the Charter of Fundamental Rights and Freedoms.

6 / SUBSEQUENT VISITS TO HOMES FOR PEOPLE WITH DISABILITIES

The purpose of subsequent visits at six homes for people with disabilities (hereafter simply „***Homes***" or „***Facilities***") was to check the meeting of recommendations addressed to Home managements after the visits in 2009 and also recommendations summarised in October 2009 in the Report on Visits to Homes for People with Disabilities, which was also intended for facility founders and regional and municipal government units.

The subsequent visits were made to the following facilities: **Regional Home for Children Under 3 Years of Age** (Aš), **Social Welfare Institute in Háj u Duchcova, Social Welfare Institute in Křižanov**, **Social Welfare Institute in Litvínov – Janov**, **Home in the Castle (Nezamyslice)** and **Nováček Home (Plzeň)**. Visits were always attended by an expert in the field of social services invited by the Defender, and one time a psychiatrist. In several cases, due to that fact, the visited facility was also provided with an expert commentary, i.e. support exceeding the framework of potential maltreatment evaluation.

It was confirmed by the subsequent visits that a number of recommendations by the Defender had been fulfilled. Where it was not the case, the Defender resumed discussions with the facility management.

MATERIAL EQUIPMENT AND PRIVACY STANDARD

In the meantime, at some facilities, some construction or technical improvements had been carried out based on the recommendations of the Defender. For instance, transit bedrooms were removed, the capacity of bedrooms was reduced, windows were fitted with blinds to provide more comfort for the clients, etc. In some cases, recommendations for improving privacy, equipping rooms with lockable boxes, providing room keys to selected clients and toilet occupancy signalling were implemented to a various extent.

At one facility, however, increasing privacy was merely promised, not only in the case of toilets but also missing shower curtains. Clients with appropriate skills and abilities were not given bedroom keys, either.

FREEDOM OF MOVEMENT OF USERS

Since the last visits, an improvement in implementing movement restricting measures was registered. At two facilities, beds with a high lattice cage attached to them that may be used as a restriction in certain cases were fully removed and their number was reduced at least at another facility. At one facility, the removal was provided only as a result of a subsequent visit by the Defender.

Where using a cage bed (though not locked but the client was fixated to its use) was still identified in the subsequent visit, the bed was immediately dismantled to some extent and a directed process of eliminating its need by the client began. At such facility, internal regulations were improved as a response to the subsequent visit so the risk of optional use of movement restricting measures is minimised. In another case, the practice where one client was actually living in an isolation room stopped being used.

The Defender recommended evaluating the restricting measures not as being merely protective but also as perceiving their restricting potential. At all times, it is necessary to evaluate which client, considering his/her mobility, may be restricted in his/her free movement by the bed (this consideration was successfully handled in e.g. the Home in Háj u Duchcova) and to fit the facility with beds allowing the client to leave them in a safe way whenever he/she wants.

Using a restraining belt for a mobile client was identified as a new misconduct at one facility. After commenting upon this misconduct, the facility provided a remedy.

Positive changes were made in cases where clients were restricted in their movement either as a result of the facility regime or due to the risk of the movement itself. Facilities had taken steps to re-evaluate the situation of individual clients and provide an accompanying person where independent movement of a client with disabilities had represented a risk.

At one facility, the Defender after the original visit clearly recommended re-evaluating the psychiatric medications of the service users as, according to the opinion of the invited expert, it was exaggerated. By the subsequent visit it had been verified that medications had been adjusted by the doctor. At the facility, conditions for administering medication had also been made stricter and measures preventing the administering of medication without immediate medical indications had been taken.

Exceptional administration of calming medication is admitted by the revised Social Services Act (Act No. 108/2006 Coll., as subsequently amended) as a movement restricting measure, based just on examination by the called doctor and in his/her presence. Om subsequent visits, except for one case, the Defender did not encounter breach of the obligation set in this way. Just at one facility, based on interviews, was it found that workers would act on their own rather than call a doctor.

The Defender recommended respecting the law and not using any calming medications without the presence of a doctor.

REGIME OF A FACILITY AND USER'S AUTONOMY

The recommendations of the Defender to change the internal rules as well as his recommendations on the wording of draft agreements on social service provision were implemented. At one facility, they did not follow the recommendations to familiarise clients, i.e. people who either have difficulties understanding a text or do not understand a text at all, with at least the most important rules and information from the home rules.

The Defender recommends using alternative options of providing important information to clients (e.g. through pictures, cartoons, photos) as already takes place at some of the facilities.

The approach to the client as a partner influencing the nature of the service provided had improved. Clients were allowed to cancel various meals and be refunded the suitable amount paid. At two facilities, clients could choose from a number of main courses. At some sites, it was found that clients could influence the individual plan of service provision or selection of clothing to a greater extent. The process of general lights out at 7 PM was cancelled at one facility.

At one facility, remedy of the commented situation where clients are not given personal clothes was not provided.

Once again, the Defender recommended taking organisational measures so that each client have his/her (prison issue, though) clothing separately in their own boxes.

HANDLING THE MONEY OF USERS

After the original visits, the Defender criticised the manner of managing money of the clients. At some facilities, clients were not allowed to access their money, usually because of their legal incompetence, although such clients actually managed minor shopping and were offended by such action of the facility. The recommendations of the Defender were implemented to some extent by e.g. releasing pocket money to the clients, engaging clients in making decisions on using their money, practicing money treatment, etc. At one of the facilities, however, such unsatisfactory situation persisted.

SCHOOL ATTENDANCE

There was some improvement at facilities at which the Defender had recommended concentrating on users exempted from compulsory schooling pursuant to prior legal regulations and such clients were able to continue in their basic education.

LACK OF STAFF

In reports from the original visits, the Defender recommended critical assessment of the reasonability of the number of workers with respect to meeting the needs of the users, as the current state did not allow proceeding under the Social Services Act and responding to individual needs of the user. There was no significant shift in this respect and the managements of all facilities subsequently visited experience a lack of staff. While social services are sufficient for clients with a lower disability level, it is not the case for clients with a higher disability level. Due to the lack of staff, the service is conceived as monitoring a group and maintaining peace. As a result, it is not possible for clients to live in a home-like environment as it is necessary to have the group together at all times, e.g. in one common room or in the corridor. At the facilities in Nezamyslice and Háj u Duchcova, the situation with the staff seemed to be very acute even in the subsequent visit.

The Defender recommended a prompt increase in the number of workers employed in social services. In the long term, facilities should develop a concept of a gradual increase in the number of workers and reduction in the facility's capacity, and notify the founders of such.

The lack of night shift staff may directly put the safety of clients at risk. At one facility, the suspicion of sexual abuse between the clients was investigated at the time of the first visit by the Defender. The De-

fender recommended providing for the safety of clients at night (staff were not present at night in some places; only checks were carried out) and drawing up rules to prevent sexual abuse. The subsequent visits showed that no steps to increase safety at nights had been taken since the first visit and that rules to prevent sexual abuse brought nothing in this respect, either.

Once again, the Defender recommended providing the permanent presence of a facility worker at night. The development at this facility needs to be monitored by the Defender and he is ready to address the founder if no remedy is provided within the set term.

Due to the lack of staff, clients cannot regularly stay outdoors as there are no staff members to provide the necessary support. For example, at one facility, the Defender recommended in the original report for clients who are unable to move on their own and need help from others to include in a plan how often staying out in the garden will be allowed for them. The recommendation was not implemented and had to be repeated, also just in connection with the recommendation to increase the staff levels. The insufficient allowed time outdoors is also a problem at two other facilities.

CLIENTS WITH SPECIFIC NEEDS

The lack of staff prevents more successful work with clients with specific needs (e.g. with more frequent demonstrations of aggressive behaviour) who are present at almost every facility. Not only can their state not be improved but the lack of staff leads to using movement restricting measures and an increase in psychiatric medications.

The Defender recommended seeking a special approach to clients with specific support and care requirements. If a facility is not able to provide such care and damage to the client could be faced (due to long hospitalisation, free movement restriction), he recommended notifying the service founder in writing. Further, the Defender recommends that regions address the homes themselves and request urgent solutions to the situation of these clients.

In this connection, a forbidden mechanical means of restriction was commented upon at two facilities. It was also repeatedly demonstrated that warning signs in the behaviour of clients were not sufficiently monitored or evaluated. After some time, the situation resulted in use of a restriction (legally from the formal aspect) without the facility being able to demonstrate it had met the statutory requirement and use a method preventing situations where a movement restricting measure needs to be applied.

The Defender recommended strengthening the staff levels of such facilities and immediately ending unauthorised restrictions. Further, he recommended cooperating with an external expert in the field of social services to prevent similar situations from taking place.

At one facility, inadequately provided ambulatory psychiatric care was identified on the subsequent visit, however, the facility promised a remedy to provide it.

LEGAL CAPACITY AND GUARDIANSHIP

The life of clients at homes for people with disabilities is to a significant extent influenced by the restriction in/depriving of their legal capacity, i.e. a matter falling within the court's powers. The initial visits confirmed that the regulation of restriction in/depriving of their legal capacity does not meet the needs of the clients. Clients deprived of their legal capacity prevail, although many of them are actually competent in certain matters. The tendency of the courts to deprive them of the legal capacity instead of restrict-

ing it is also criticised by the Constitutional Court of the Czech Republic in its current judicature (see the Constitutional Court judgement of 18 August 2009, file No. I. ÚS 557/2009).

After the initial visits, the Defender recommended to facilities to provide a critical evaluation of the current regulations of the legal capacity for adult clients and an active procedure to return them (to at least some extent) where necessary. In some cases, two facilities (Křižanov and Nezamyslice) had proceeded in this way.

On subsequent visits, the Defender found that **it is not easy to provide remedy in case of a permanent conflict of interests consisting in the parallel provision of guardianship and social service**. At three of the subsequently visited homes, there is still a situation where the facility (or a worker) is appointed by the court as a guardian to the client (or a large number of clients). If, for example, the facility director, in assessing a social service provision contract being performed on one side as the representative of an entity, is obliged to provide the service but, at the same time, on the other side is the representative of a user of a service, this evidently concerns a conflict of interests.

The Defender recommended to facilities to appeal to a guardianship court with a proposal to change the guardian. Two facilities were discouraged by the court from filing such a proposal (the same court was concerned); other facilities only proceeded in this manner in the case of just a few clients.

The Ministry of Justice stated on this issue that considering the length of discussions on the new Civil Code, it is preparing a proposal to assume the legislative regulations of the legal competence and support measures and include them in the existing Civil Code and Civil Procedure Code.

The Defender intends to discuss his specific findings with chairmen of the regional courts and at the same time obtain information on the current decision-making practice in this field.

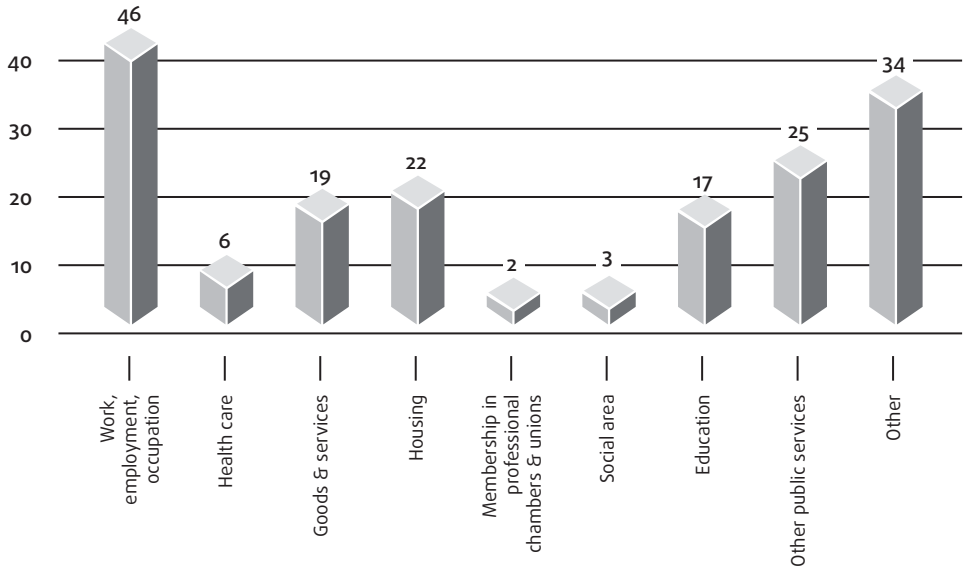
5 DISCRIMINATION

As of 1 December 2009, the Defender has been engaged in the protection of persons against discrimination and unequal treatment. He provides methodological help to victims of discrimination, consisting, in particular, in the legal assessment of the unequal treatment objected to by the claimant. In case discrimination is identified in a specific case, the Defender assists the claimant in such a way as to make sure the undesirable behaviour is removed and the victim is compensated (e.g. by instituting legal proceedings). In 2010, the Defender most frequently dealt with cases of argued discrimination on the basis of sex, age and ethnicity in education, the provision of goods and services and the labour law. The Defender also registered some complaints about unequal treatment in respect of citizens from other member countries of the European Union, in particular, when providing goods and services.

Within his anti-discrimination agenda, the Defender received a total of **176** complaints, of which 149 were settled (investigation is taking place in respect of most of the unhandled complaints) Discrimination was identified in **29** cases. In other cases, he provided an analysis of the given issue and advice on procedures in protecting one's rights.

The most frequent areas where discrimination is objected to include **work and employment** (46), **housing** (22) and **access to goods and services** (19).

STRUCTURE OF CASES PER AREAS WHERE DISCRIMINATION IS OBJECTED TO



In 2010, the Defender issued **4** recommendations (available on the Defender's web pages http://www.ochrance.cz/diskriminace/diskriminace-pravni-stanoviska/) in the Protection against Discrimination section.

1 / DISCRIMINATION AT WORK AND EMPLOYMENT

In the access to employment, discrimination is differentiated between citizens of the **Czech Republic** and **citizens of European Union countries**, discrimination in remuneration by reason of maternity, discrimination on the basis of a criminal record and also, for example, a complaint related to bullying in the workplace.

This concerns areas affected by the Treaty on the European Union and Regulation No. 1612/68 on the free movement of workers within the Community, dated 15 October 1968. Provisions of the Treaty on the European Union and the Regulation are directly applicable and are also implemented by the Employment Act (Act No. 435/2004 Coll., as subsequently amended). As to access to employment, citizens of member countries of the European Union should have identical conditions as citizens of the Czech Republic. Otherwise, it means the Treaty on the European Union and Regulation are breached.

DISCRIMINATION AND CITIZENSHIP OF ANOTHER MEMBER COUNTRY OF THE EUROPEAN UNION

COMPLAINT REF. NO.: 2/2009/DIS/JKV

Citizens of member countries of the European Union have the same rights in respect of access to employment as citizens of the Czech Republic. It is necessary to distinguish foreigners coming from member countries of the European Union and third countries.

Mr K. complained about the provisions of a hospital internal document, the interpretation of which could lead to preferring citizens of the Czech Republic over citizens of member countries of the European Union in access to employment.

The free movement of workers on the territory of member countries of the European Union is anchored in Paragraph 45 of the Treaty on the European Union. This Paragraph of an international treaty has both a horizontal and vertical direct effect. It is not only binding upon a country, i.e. the Czech Republic, but every entity may directly appeal to it, both in relation to the State and any other private entity. More detailed rules for the free movement of workers in the European Union territory are set by Regulation No. 1612/68 on the free movement of workers within the Community. Pursuant to the provisions of Paragraph 1 of the Regulation, every citizen of a member country has the right to access to employment and its performance on the territory of another member country under legal regulations governing the employment of citizens of that country. On the territory of another member country, a citizen of a member country of the European Union enjoys the same privileges to access to employment as other citizens of that country. In relations governed by the Employment Act, citizens of member countries of the European Union are in the same position as citizens of the Czech Republic.

The hospital statement on the internal document suggested that the disputed provision does not anchor the order in which applicants should be employed. It should only specify the conditions under which the applicable employment office issues permits to obtain an employee from abroad in accordance with the provisions of § 92 of the Employment Act. The hospital did not intend to set the rules in such a way that citizens of the Czech Republic were employed preferentially.

The hospital promised to revise the regulation to prevent any further interpretation difficulties.

DISCRIMINATION AND CLEAN CRIMINAL RECORD

The Defender received a number of complaints about different treatment regarding access to employment due to a **criminal record**. A clean criminal record is sometimes required in cases where it is not related to the nature of the performed work.

COMPLAINT REF. NO.: 33/2010/DIS/JKV, 46/2010/DIS/JKV

A clean criminal record may only be required in case the requirement for the submission thereof is related to the nature of the performed work or when provided so by a special legal regulation.

Mr F. and Mr M. complained about discrimination against persons with a criminal record in respect of access to employment. It is a widespread practice that employers require a „clean" criminal record as one of the determining requirements for being given a job.

Criminal integrity is not even a discrimination reason under the Anti-Discrimination Act (Act No. 198/2009 Coll., as subsequently amended), or the Employment Act, therefore, direct discrimination cannot be concerned in this case.

However, Labour Code breaching (Act No. 262/2006 Coll., as subsequently amended) could be concerned. The provisions of § 30, Paragraph 2 of the Labour Code namely provide that an employer may only require information immediately related to concluding an employment contract in connection with behaviour before employment arises. An explicit prohibition on requiring information on criminal integrity then arises from the provision of § 316, Paragraph 4, letter h) of the Labour Code (with exceptions when a substantive reason for demonstrating integrity is given). The provision of § 12 of the Employment Act prohibits making employment offers that are in conflict with labour regulations.

The integrity requirement should therefore be in direct connection with the nature of the employment. That is why information on criminal convictions must be individualised for each case and an employer should only exclude from the selection procedure those job applicants the criminal activity of whom would be inconsistent with the job performance.

SEX AS A DISCRIMINATION REASON WITHIN THE LABOUR LAW

In several cases, the Defender considered a discrimination objection within employment and remuneration on the basis of maternity, which is considered gender discrimination for the purposes of the Anti-Discrimination Act (§ 2, Paragraph 4 of the Anti-Discrimination Act).

COMPLAINT REF. NO.: 68/2010/DIS/JKV

Discrimination is not a measure the purpose of which is to compensate disadvantages arising from parenthood if leading to providing equal treatment and equal opportunities.

Mrs K. complained of the discriminatory legal regulations in the remuneration of employees in the public administration that, in her opinion, disadvantages parents with more children. With the provision of § 4, Paragraph 5 of the Government Regulation on payment conditions of employees in public services and administration (Regulation No.

564/2006 Coll., as subsequently amended) the upper limit of 6 years is set to include taking maternity leave and parental leave in the overall practice when determining the salary grade.

Mrs K. is the mother of four children, i.e. she spent a total of 12 years on maternity and parental leave. Setting a fixed time limit for including the time spent on maternal and parental leave was considered inadequate by the claimant and therefore discriminatory in relation to parents who spent more than 6 years on maternal and parental leave.

Discrimination on grounds of maternity or paternity is considered gender discrimination. The Government Regulation, as the secondary legislation, must be in accordance with the law and must not contravene it. However, the legal form of the Regulation subject to review fully corresponds with the principles of providing equality between childless employees and those who have spent some time on maternity and parental leave. To find it discriminatory on the basis of sex, it would be necessary to identify a different impact on the parents when compared to childless employees.

Determining the time limit selected by the Government in creating the Regulation subject to review is fully within the competence of the State. It is a reasonable measure that is used for fulfilling material equality, also considering the fact it is a field of social rights where the State has a broad range of options when considering the manner of regulating such rights.

DISCRIMINATION, BOSSING AND MOBBING

The Defender is often contacted by people with the problem of bullying in the workplace; they frequently identify the given actions and behaviour as discrimination. The law of the Czech Republic does not regulate protection against bullying by the boss (bossing) or associates (mobbing) in any systematic manner. To handle bullying of an employee, **means included in the Labour Code** (or in any other labour or service regulation), tools for the protection of person under the Civil Code (Act No. 40/1964 Coll., as subsequently amended) **may especially be applied**. If the cause of bossing or mobbing includes any of the prohibited discriminatory reasons, we may talk about discrimination and application of the Anti-Discrimination Act may be considered.

COMPLAINT REF. NO.: 102/2010/DIS/AHŘ

I. Bullying in the workplace by the boss (bossing) cannot be identified as discrimination ipso jure, although such action is unlawful.

II. Discrimination may be the case where disadvantaging of the employee is motivated by any of the prohibited discriminatory reasons.

The Defender was contacted by Mr J. M. with a request for advice on how to proceed when discriminated against within his job as a worker of the Fire and Rescue Service of the Czech Republic. The discrimination was supposed to consist in repeated retesting of the physical fitness of the claimant for reasons of personal aversion by the boss.

The employment of Fire and Rescue Service members is not governed by the Labour Code but by a special act on civil service of members of security forces (Act No. 361/2003 Coll., as subsequently amended). As far as protection against discrimination within civil service is concerned, there is some double-tracking as the discrimination prohibition is anchored in both the Act on Civil Service of Members of Security Forces and in the Anti-Discrimination Act. As

far as the claimant is concerned, appropriate provisions of the Act on Civil Service of Members of Security Forces may be applied as lex specialis.

Considering the fact that the motive behind the different treatment was not a discriminatory reason in the case of the claimant under the Act on Civil Service of Members of Security Forces, we cannot talk about any discriminatory action. Applying the general prohibition of misusing the enforcement of rights and obligations arising from civil service to the detriment of any other party or applying the general right to equal treatment of all members of security forces could only be considered. The claimant with his matter was therefore especially referred to a solution within the service hierarchy of the Fire and Rescue Service.

2 / DISCRIMINATION IN PROVIDING GOODS AND SERVICES

DISCRIMINATION AGAINST DEAF PERSONS

COMPLAINT REF. NO.: 6609/2009/VOP/JŠM

An operator of nationwide television broadcasting that only formally performs a statutory obligation to provide a certain percentage of the broadcast programmes with hidden or open subtitles commits discrimination in the access to services on the basis of health disability.

The provision of § 32, Paragraph 2 of the Act on Radio and Television Broadcasting Operation (Act No. 231/2001 Coll., as subsequently amended) imposes an obligation on the television broadcasting operator to provide 15 % of the broadcast programmes with hidden or open subtitles. By this, it ensures the minimum standard for persons with impaired hearing in the access to services in the form of television broadcasting (i.e. information, entertainment, etc. provided by broadcasting). Due to this fact, deaf persons are in a situation comparable to persons with no health disability as far as the provision of television services is concerned.

Some operators, however, did not provide subtitles for 15% of the total time range of the broadcast programmes but for 15% of the total number of programmes. When such interpretation is applied, there could be absurd situations where the reserved 15% of programmes provided with subtitles only had a minimum footage when compared to other programmes. In this way, television broadcast operators could only limit themselves to providing subtitles for short programmes, which would be economical for them and reduce their obligation to the minimum level. Nevertheless, the vast majority of programmes within the broadcast time would be inaccessible to deaf persons, which would put them in a disadvantageous position compared to persons with no hearing impairment. Such purpose limitation of the access to television broadcasting therefore meets the conditions of discrimination on the basis of health disability in accordance with the provision of § 2, Paragraph 3 of the Anti-Discrimination Act.

The purpose of the legal standard (to provide a minimum standard of access to broadcasting for persons with impaired hearing) may only be fulfilled to the full extent if the obligation of the television broadcast operator is performed equally, both in terms of time and quality. It is therefore necessary to relate the obligation to provide subtitles to programmes of all sorts (feature films, news programmes, etc.) and provide them in a systematic manner (to prevent situations where only one part of a two-part programme is available, etc.).

SEX AS A REASON TO DISCRIMINATE IN PROVIDING GOODS AND SERVICES

COMPLAINT REF. NO.: /2010/DIS/JKV

Differentiation in the access to goods and services is not discrimination if it is objectively reasoned by a legitimate goal and the means to achieve the goal are reasonable and necessary.

In his complaint, Mr H. objected to gender discrimination that allegedly took place as a result of providing free entry to a football match to women whereas men had to pay to enter.

The football match organiser used a method the purpose of which was to attract more fans to matches and in doing so, he targeted women (or children), who watch sports matches less often. The organiser tried to attract a group of fans to stands that would normally not be likely to come (or come in smaller numbers) by taking a more advantageous approach. Men make up the common fan base and the organiser expected they would come to see the match in large numbers even if they had to pay the admission. The measure taken by the organiser was to support the attendance of women. In some cases (e.g. in Poland), this practice is used to influence the composition of fans in order to reduce the possible violence sometimes committed by football hooligans.

The aim the organiser followed is a legitimate one, therefore, discrimination under the Anti-Discrimination Act (§ 6, Paragraph 7) is not concerned.

DISCRIMINATION ON THE BASIS OF BELONGING TO A EUROPEAN UNION MEMBER COUNTRY IN THE ACCESS TO SERVICES

COMPLAINT REF. NO.: 75/2010/DIS/JŠK

The rule enabling the issuing of a ticket to a football stadium to the sector for visitors only after submitting a document demonstrating the buyer is a Czech Republic citizen represents direct discrimination in the access to services on the basis of nationality.

The Defender was referred to a document governing the access of football fans to a stadium. Among other things, it included another rule based on which a ticket to the sector for visitors could only be sold after submitting a document demonstrating Czech Republic nationality. That rule was allegedly applied to prevent inappropriate behaviour by Polish supporters of a specific football club. From the factual point of view, however, it happened that anyone unable to demonstrate they were a Czech citizen could not buy a ticket to the sector for visitors.

Although the given situation is not covered by the Anti-Discrimination Act, it was necessary to review whether such measure is in accordance with the Treaty on the European Union and related regulations. The provision of Article 56 of the Treaty Governing the Free Movement of Services prohibits any restriction in the free movement of services within the Union. A service provider from a member country may not be restricted in providing the service on the territory of any member country of the European Union on the basis of nationality. Based on the judicature of the Court of Justice of the European Union (formerly the European Court of Justice), the same right also applies to the service recipient from a European Union member country (the so-called passive aspect of the free movement of services). In order for the service providers or recipients not to rely just on the direct application of the mentioned provision, Directive of the European Parliament and Council No. 2006/123/EC on services in the internal market has

been issued and is incorporated in the Czech law by the Act on Free Movement of Services (Act No. 222/2009 Coll., as subsequently amended).

The provision of § 12, Paragraph 1 of that Act prohibits the service provider from discriminating against service recipients in particular on the basis of nationality or place of residence. Under the second Article of that provision, setting different conditions of access to services based on objective criteria is not discriminatory. Different conditions are therefore admissible e.g. in case the service provider incurs – due to the distance or technical nature – objectively higher costs with which different conditions are directly connected. However, such situation was not concerned in the given case as the reviewed prohibition of entering the sector for visitors to foreigners is not connected with a blanket increase in expenses incurred in providing a service as a result of e.g. distance. That is why the application of the mentioned rule in practice caused inadmissible discrimination against service recipients on the basis of nationality.

DISCRIMINATION ON THE BASIS OF HEALTH DISABILITY IN PROVIDING GOODS AND SERVICES

COMPLAINT REF. NO.: /2010/DIS/JKV

If a measure that is necessary to implement the rights of persons with a health disability represents an unreasonable burden, the service provider is not obliged to take such measure.

Mrs K. stated that she must strictly follow a gluten-free diet. However, an airline does not offer appropriate meals for this type of diet in its economy class for short flights. This fact was identified by the claimant as discriminatory and undignified. Moreover, safety regulations prevent her from taking any liquids or meals in a liquid state on board a plane.

Health disability (celiac disease in this specific case) is protected as a specific discriminatory reason and failure to take an appropriate measure in favour of disabled persons is also deemed discrimination. Nevertheless, the measure must be reasonable or, to be more specific, it must not represent any unreasonable burden for the service provider or potential employer.

Celiac disease is not the only disorder requiring a special diet. According to a press release, the airline offers a total of 14 types of special meals, including gluten-free, that the passengers may order from before the flight. The offer of special meals, however, does not relate to all service levels within Economy class. Unlike the commonly served standard, the offer of special meals is, without any doubt, connected with increased costs. It is therefore legitimate that a selection from the special offer is not enabled when cheaper products with a lower service standard are concerned. Imposing an obligation to offer a gluten-free meal also in cheaper air transport options would most likely represent an unreasonable burden, considering the type of health disability and the type of transport. The failure to provide a gluten-free meal is not connected with an immediate threat to life or significant health deterioration, regardless of the fact that bringing in food in a solid state on board a plane is basically not limited.

With respect to the fact the required measure would represent an unreasonable burden to the service provider, discrimination under the Anti-Discrimination Act is not concerned.

RECOMMENDATIONS OF THE PUBLIC DEFENDER OF RIGHTS ON THE ACCESS OF GUIDE AND ASSISTANCE DOGS TO PUBLIC AREAS

In August 2010, the Defender issued a recommendation regarding the access of visually impaired persons with assistance dogs to public areas. The full wording of the statement can be found on the Defender's web pages (see http://www.ochrance.cz/diskriminace/doporuceni-ochrance/).

The Defender came to the following conclusions:

- Public areas must be available to persons with health disability and disabled persons must also have access to all activities that are performed by persons with no disability;
- A dog trained to accompany a person with a health disability is considered an indispensable part of the disabled person, enabling such person to fully exercise the right to free movement, freedom and independence;
- Providing access to dogs specially trained to accompany persons with a health disability and serving as an aid to compensate the health disability to public areas is necessary to exercise the right not to be discriminated and other rights of persons with a health disability;
- Requiring a special payment for dogs with special training to enter public areas would represent an unreasoned and unreasonable burden on persons with a health disability and their handicap compared to persons with no disability, and therefore would represent discrimination;
- Excluding an assistance or guide dog from public areas is only allowed in individual, objectively reasoned cases.

Considering the need to enforce the rights of persons with a health disability, the Defender **recommended submitting legal regulations that would supersede the incomplete, insufficient and fragmented legal regulations dealing with the issue of dogs with special training and places to which access of persons accompanied by such dog cannot be denied.** That is why the regulations should not be limited only to guide dogs but should also include assistance (or signal, balance) dogs. The legal regulations concerning training dogs intended to accompany persons with a health disability (both assistance and guide dogs) as well as regulations dealing with the position of the entity that would evaluate the dog training quality and issue certificates declaring the status of the guide and assistance dog, could help increase the training quality and thus provide more efficient health disability compensation.

Further, the Defender recommended **joining the Optional Protocol to the Convention on the Rights of Persons with a Health Disability** so that disabled persons could efficiently use the rights provided by the Convention.

3 / DISCRIMINATION IN THE ACCESS TO HOUSING

EQUAL CONDITIONS FOR ACCESS TO PUBLIC HOUSING

The Defender has long dealt with the issue of housing, in particular, in the context of so-called „***social housing***" and the phenomenon called „***social exclusion***". Under the Anti-Discrimination Act, offered pub-

lic housing is a service to which access for all people regardless of their race, ethnicity, nationality, sex, sexual orientation, age, health disability, religion, faith or world view must be provided. In the past, the Defender repeatedly **referred to the basic and specific role of municipalities performing a number of public tasks** including, among other things, the duty of satisfying the need for housing municipality citizens [§ 35, Paragraph 2 of the Municipalities Act (Act No. 128/2000 Coll., as subsequently amended)]. The Defender believes it is an obligation clearly arising from the law and a municipality cannot waive the consistent implementation thereof.

RECOMMENDATIONS FOR EXERCISING THE RIGHT TO EQUAL TREATMENT WITH COUNCIL FLAT APPLICANTS

In his recommendation (full text in electronic form available at: http://www.ochrance.cz/diskriminace/doporuceni-ochrance/), the Defender came to the conclusion that any discrimination in access to housing is prohibited if housing is offered to the public. All persons must be guaranteed the right to equal treatment and this principle applies to all entities when offering housing to the public. As far as municipalities are concerned, the equal treatment requirement is even strengthened by their public legal status. **The municipality namely does not have exactly the same status as the lessor** (natural person or legal entity). As a public corporation, special obligations towards its inhabitants and other persons are imposed on it under the law.

The Defender stated that the goal of the municipality does not primarily need to include discrimination of the council flat applicant, however, in terms of the Anti-Discrimination Act, it is important whether the created rules do not have any discriminatory impact as a consequence. Discrimination is not concerned where different treatment pursues a legitimate aim and the means to achieve it are reasonable. Nevertheless, considering its public legal status, the area the municipality has to demonstrate a legitimate aim is narrower than common lessors have. Other criteria are also applied to assess the reasonability of the means to achieve the aim and thorough knowledge of the local situation of the municipality plays an important role.

In evaluating the criteria applied by municipalities, among other things, the Defender came to the following conclusions:

When selecting the future lessee, the municipality must consider the adequacy of the required income amount in order not to breach the right to equal treatment of applicants, in contrast to a common lessor, which may set the income of the future lessee as a criterion. The requirement to demonstrate an income in an inadequate amount as a condition to be included in the registration of council flat applicants may be considered indirect gender discrimination. The negative assessment of an applicant receiving parental contributions or maternity benefits is also in conflict with the discrimination prohibition. Both of these benefits are a relevant source of income of the applicant.

The criterion of the number of children or household members appears disputable, too; that is because it is highly likely that it indirectly discriminates against the Roma. The number of children or household members, however, may be used as a criterion providing advantages within so-called positive measures.

Disadvantaging a citizen – worker of any other country of the European Union against citizens of the Czech Republic is also discriminatory.

4 / DISCRIMINATION AND THE SOCIAL FIELD

DISCRIMINATION ON THE BASIS OF GENDER AND SEXUAL ORIENTATION IN MATTERS REGARDING SURVIVOR BENEFITS

The Defender encountered several cases referring to possible discriminatory regulations in respect of survivor benefits. Discrimination was not identified by the Defender in any case.

COMPLAINT REF. NO.: 47/2010/DIS/JKV

The State has a broad space to consider how laws regarding social rights should be amended based on the current social policies.

Mrs F. addressed the Defender with the uneconomical state policy regarding the old age pension scheme and asked him to intervene in amending the Pension Insurance Act. In particular, cancelling of the widow's pension benefit for men was concerned.

Mrs F. mainly argued that the widow's pension benefit should only be provided to poor persons, which, in most cases, includes women. According to Mrs F., the widow's pension only belongs to women as they mostly took care of the household and children. In her opinion, with the widow's pension benefit being provided to men, the inequality between women and men is deepened.

Mrs F. was informed that the Pension Insurance Act had anchored a new pension system within which, in contrast to the previous system, there are no groups of persons discriminated against or given preferential treatment to the prejudice of others.

Harmonisation in the equal status of men and women also falls within the activities of the European Union in the field of social security. Considering social changes, the emancipation of women in society is necessarily also followed by making available advantages, reserved until that time for women, to men. It is no longer a rule that men fulfil themselves at work away from home and women are busy working in the household.

As far as widow's pensions are concerned, they were also addressed by the European Court of Human Rights in its decisions in cases from 2002 – 2008 [compare e.g. the judgment dated 11 June 2002, Willis vs. United Kingdom (complaint No. 36042/97); judgment dated 14 November 2006, Hobbs, Richards, Walsh and Green vs. United Kingdom (complaint No. 63684/00, 63475/00, 63484/00, 63468/00); judgment dated 25 July 2007, Runkee and White vs. United Kingdom (complaint No. 42949/98, 53134/99); judgment dated 22 April 2008, Goodwin vs. United Kingdom (complaint No. 65723/01)] which came to the conclusion that the different treatment of men and women in connection with claims in respect of widow's pensions is not based on any objective or reasonable reason.

COMPLAINT REF. NO.: 72/2010/DIS/AG

Different treatment based on law cannot be reviewed under the Anti-Discrimination Act. If it is claimed that a legal regulation is discriminatory, its compliance with the constitutional order and international treaties by which the Czech Republic is bound should be reviewed.

The Defender was addressed by Mr Z., a surviving partner from a registered partnership [Act on Registered Partnership and on change of some related acts (Act No. 115/2006 Coll., on as subsequently amended]). Mr Z. objected that the provisions of the Pension Insurance Act are discriminatory as they do not provide surviving registered partners with survivor's pensions (widow's) or benefits to which the deceased had been entitled as of the day of their death but have not yet been paid. As a result, surviving registered partners are in a less favourable position compared to the position of surviving married spouses. In his opinion, sexual discrimination is the reason for such distinguishing.

Even though sexual orientation is not inquired upon when a registered partnership is concluded, the nature of the matter suggests that the registered partnership institute was introduced to Czech law as a mean of conferring just some rights to persons within same-sex couples.

As the different attitude in the treatment is based on law, discrimination under the Anti-Discrimination Act cannot be concerned. The prohibition of discrimination based on sexual orientation within social security is covered by the draft directive of implementing the principle of equal treatment of persons, regardless of their religion or faith, health disability, age or sexual orientation 2008/0140 (CNS). However, the directive has not yet been approved.

To evaluate the compliance or non-compliance of the provision of the Pension Insurance Act with the Charter of Fundamental Rights and Freedoms, the Constitutional Court is the only court competent for that purpose. In this issue, Mr Z. was referred to the possibility to deal with the case through administrative justice and initiate subsequent proceedings before the Constitutional Court.

5 / DISCRIMINATION AND EDUCATION

DISCRIMINATION AND CRITERIA FOR ACCEPTING INTO KINDERGARTENS

COMPLAINT REF. NO.: 2813/2010/VOP/DV

If a kindergarten director decides to not accept a child into a kindergarten because neither of its parents, citizens of another member country of the European Union, has permanent residence in the municipality where the kindergarten is located, it is indirect discrimination on the basis of nationality assessed under the community law.

The son of the claimant was not accepted to be educated in a kindergarten because he did not meet the requirement of permanent residence of both of his parents in the municipality where the kindergarten is located.

The reasons based on which discrimination is prohibited under the Anti-Discrimination Act do not include permanent residence. It is therefore not possible to come to the conclusion that discrimination is concerned.

Under the Treaty on the European Union, however, one prohibited reason includes distinguishing nationality. The given criterion of the kindergarten disadvantages children of foreigners, either from member countries of the European Union or non-member countries. If, after accepting the child, a director requires permanent residence in the municipality both in respect of the child and his/her parents, children or, to be more specific, families of foreigners, cannot meet such condition. Foreigners from European Union countries and third countries may obtain a permanent residence permit, by which, however, permanent residence on the territory of the Czech Republic, not in any specific municipality, is meant.

Although a foreigner must report a specific place of residence in the Czech Republic, i.e. state the municipality of residence, it is not an institute identical with permanent residence in the municipality. A foreign national does not have a permanent residence in any specific municipality and therefore cannot meet the required condition.

Although the kindergarten director requires permanent residence of the child and parents regardless of their nationality, i.e. he proceeds in the same manner in relation to both Czechs and foreigners, he makes education impossible for foreigners as a result. According to the Defender, it is indirect discrimination on the basis of nationality in accordance with Article 18 of the Treaty on the European Union.

DISCRIMINATION ON THE BASIS OF ETHNICITY IN ACCESS TO EDUCATION AT MAINSTREAM SCHOOLS

COMPLAINT REF. NO.: 94/2010/DIS/LO

The excessive number of Roma children that do not have a mental disability recommended by a school counselling facility to be educated at a practical elementary school represents indirect discrimination.

Last year, the Defender was asked by the Czech School Inspection whether the submitted results of its examination could be qualified as discrimination. The examination took place following the judgment of the European Court of Human Rights concerning D.H. and others against the Czech Republic, complaint No. 57325/00. from November 2007, by which the Czech Republic was convicted of discrimination against Roma pupils at special (practical) schools. The Inspection found that children without any mental disorder are educated in special education institutes or, to be more specific, not at standard elementary schools in some cases. Roma made up approximately one quarter of them. The Inspection asked the Defender whether discrimination was concerned. It was also found that approximately one third of pupils diagnosed by psychological clinics as mentally handicapped and subsequently recommended for special education includes Roma.

The Anti-Discrimination Act prohibits discrimination in access to education. One of the prohibited reasons of discrimination includes race or ethnic or national origin. In this case, both conditions are met. Different treatment is another discrimination feature. Even this condition is met (education at common vs. special schools). A disproportionally high number of Roma children at special schools compared to the numerical representation of the Roma minority in Czech society is the result of different treatment. Disproportion consisting in the excessive numbers of diagnoses of mental disability of Roma cannot be justified by a legitimate aim under the Anti-Discrimination Act.

The Anti-Discrimination Act not only prohibits direct discrimination but also so-called indirect discrimination. Not the aim of the discriminating person but the consequence is followed in this type of discrimination. The important fact in this case is that Roma children are segregated outside the main education stream as a result of the way they are tested by counselling psychologists (or school counselling facilities). By this, some children are denied access to high-quality education the achieving of which is a basis for successful social integration. There is no legitimate discriminating reason or aim by which it would be possible to reason the overly high percentage of Roma children recommended to be educated at special schools under these circumstances.

6 / DISCRIMINATION AND THE TAX SYSTEM, LEGAL STATUS OF FOREIGNERS

OBJECTED DISCRIMINATION AGAINST REGISTERED PARTNERS IN THE TAX SYSTEM

COMPLAINT REF. NO.: 97/2010/DIS/LO

In some issues, the law provides a different regime for married couples and registered partners. A discriminatory nature of tax regulations because they do not enable the tax payer to apply a tax advantage for a child of a registered partner cannot be objected to. In European law orders, respect for sexual minorities is based rather on the protection of private, not family life.

The claimant addressed the Defender with the objection that regulations regarding tax advantages are discriminatory based on sexual orientation as they disadvantage registered partners compared to married couples. The way regulations on possible tax advantages for minor children are interpreted is considered discriminatory by the claimant. Based on the provision of the Income Tax Act (Act No. 586/1992 Coll., as subsequently amended), the payer may apply a tax advantage (in the form of a tax bonus or tax credit) for a dependent child living with him/her in a common household. A dependent child includes his/her own child, adopted child, child in care substituting the care of parents, child of the other spouse and a grandson (granddaughter). A credit cannot therefore be applied for the child of a registered partner.

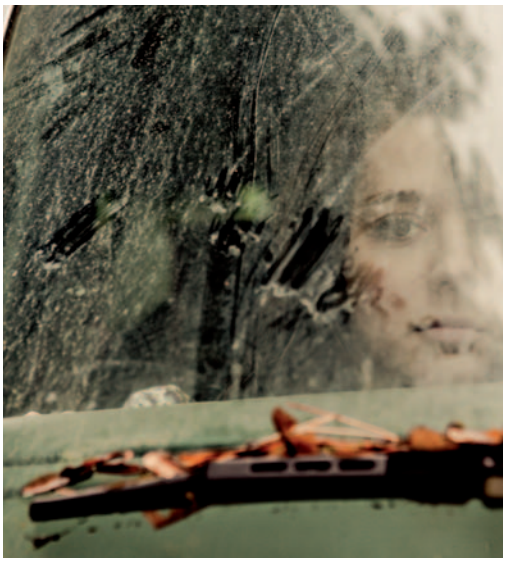
The claimant was informed by the Defender that an administrative authority cannot apply an extensive interpretation, i.e. it cannot apply a provision on the possible application of tax credits of one of the spouses also to registered partners.

In the given context, it is not possible to come to the conclusion that discrimination is concerned. The relationship of two legal regulations of the same legal force cannot be reviewed, i.e. declare the conclusion that specific legal regulations (Income Tax Act) are in conflict with the prohibition of discrimination under the Anti-Discrimination Act. In this sense, only the constitutionality of the regulation concerned may be questioned.

As far as the registered partnership concept is concerned, it is necessary to state that both the Czech legislator and the European Court of Justice and the European Court of Human Rights perceive the marriage of persons of different sex and registered partnership of persons of the same sex as two different qualities. By adopting the Registered Partnership Act, the legislator did not put both types of unions on the same level and it was not his intention, either as is evident from the explanatory report or the wording of the Act itself. That is why unions of persons of the same sex are not subject to the same regime as traditional marriages. For the given conclusion, the European Court of Human Rights applies argumentation according to which tolerance of different sexual orientation is based rather on the protection of private, not family life.

RECOMMENDATIONS OF THE PUBLIC DEFENDER OF RIGHTS FOR FULFILLING THE RIGHT OF EQUAL TREATMENT OF FOREIGNERS

As suggested by the activity of the Defender, foreigners, citizens of third countries (i.e. not European Union citizens) find themselves in an unequal position compared to citizens of the Czech Republic or citizens of a European Union member country in some legal relationships. Not always is the inequality reasoned. Therefore, the Defender drew up a recommendation (see also http://www.ochrance.cz/diskriminace/doporuceni-ochrance/) in which he dealt with relationships in the field of health insurance, education, the right to vote and association from the position of citizens of third countries. Discrimination was finally declared only in respect of commercial health insurance and the exercise of the right to free association. In other areas, he referred to the fact that the different treatment of foreigners does not correspond to the concept of integration of foreigners as approved by the Government of the Czech Republic in its resolution dated 22 March, Resolution No. 224.



6 GENERALISATION OF FINDINGS– RECOMMENDATIONS TO THE CHAMBER OF DEPUTIES

In this part of this Annual Report, the Defender recapitulates his existing recommendations, referring to the necessary changes of legal regulations with which he has addressed the Chamber of Deputies in recent years. At the same time, the Defender attaches new recommendations arising from his activity in 2010.

In contrast to past years, the Defender only concentrates on such recommendations that he considers absolutely fundamental (i.e. there are fewer recommendations than in previous years). The Defender would welcome it if the Chamber of Deputies readopts a resolution in which it would ask the Government to deal with the legislative initiatives mentioned at the end of the Annual Report. Unlike in the past, however, the Defender will directly seek consideration for his **legislative recommendations by committees of the Chamber of Deputies** so that some MPs eventually adopt such recommendations within their **legislative initiative**.

Apart from the legislative recommendations, the Defender also states his **recommendation of a non-legislative nature** which responds to the comprehensive examination undertaken by the Defender in relation to three ministries concerning the handling of claims for compensation for an unlawful decision or incorrect official procedure. Among others, the aim of the ***„Ten Methods of Good Practice to Evaluate a Claim for Compensation"*** is to set criteria according to which the Defender will evaluate the correct procedures of ministries.

1 / NON-LEGISLATIVE RECOMMENDATIONS OF THE DEFENDER

PROCEDURE OF MINISTRIES WHEN HANDLING CLAIMS FOR COMPENSATION FOR AN UNLAWFUL DECISION OR INCORRECT OFFICIAL PROCEDURE OF AUTHORITIES

In 2010 the Defender examined, at his own initiative, the process procedure of the Ministry of Justice, Ministry of Labour and Social Affairs and the Ministry of Transport under the provisions of §§ 14 and 15 of the Act on Liability for Damage Caused in the Execution of Public Authority by a Decision or Incorrect Official Procedure (Act No. 82/1998 Coll., as subsequently amended) in handling claims applied by natural persons and legal entities in the so-called **preliminary claim assessment** regime, which is an obligatory precursor to a judicial process. Examination with other ministries will be taking place during 2011.

According to the Defender, the preliminary claim assessment is not governed by purely civil principles but a public regime is concerned to a significant extent. Compensation namely takes place as a result of previous unlawful public authority execution by the State or a local authority. The procedure of ministries and other central administrative offices in the preliminary claim assessment must therefore be understood as public service execution – ***sui generis***. With respect to the provision of § 177, Paragraph 1 of the Administrative Rules (Act No. 500/2004 Coll., as subsequently amended), it is necessary to respect at least the basic principles of the activity of administrative authorities (§ 2 – § 8 of the Administrative Rules) and assessing such procedures through good governance principles is also possible.

The Defender composed the ***„Ten Methods of Good Practice to Evaluate a Claim for Compensation"*** which was published on his web pages http://www.ochrance.cz

1. Each ministry is to have one office to handle claims for compensation under the Act on Liability for Damage Caused in the Execution of Public Authority by a Decision or Incorrect Official Procedure.
At a ministry, there is one organisational unit where claims under the Act on Liability for Damage Caused in the Execution of Public Authority by a Decision or Incorrect Official Procedure are collected. Other units immediately assign the claims to one office authorised to examine and handle them. Ministries exchange information with each other and unify individual procedures.

2. The ministry is to keep statistics of the received claims for compensation.
With each ministry, there must be a system for statistical data monitoring that should be divided into prevailing areas. The statistics must also include accurate and clear registration of cases in which the compensation for damage or reasonable satisfaction was provided (considering possible predictability in similar matters) and the amount thereof.

3. The ministry must strictly consider each claim based on its contents.
After receiving the claim, the ministry will consider whether compensation for damage caused by an incorrect official procedure (by the inactivity of the appropriate authority, in particular) or unlawful decision is concerned, based on the contents; at the same time, it will also consider whether a claim for providing reasonable satisfaction for incurred non-property damage is concerned. Claims must not be considered based on their name or evidently wrongly selected definition .

4. The ministry is to notify the applicants of receiving a claim.
After receiving a claim, the ministry should notify each applicant of receiving such claim or ask the applicant to provide the number of their account to which the required compensation for damage should be sent if the claim is considered justified.

5. The ministry should take steps to remove the causes of inactivity often included in the claims for compensation.
If practice suggests any inactivity (systematic) in any agenda of the ministry, the ministry shall immediately take decisive steps to remove the causes of such inactivity. It will do so in the interest of the protection of rights of individuals against inactivity, to provide a fair process and reduce the costs of the State for any damage incurred.

6. The ministry is to call the applicants to supplement the claim.
If any important detail without which the claim cannot be considered objectively is missing in the claim or the amount of the required compensation for damage or reasonable satisfaction is not included, the ministry will call the applicant to provide such details.

7. The ministry must not reject a priori a voluntary performance if any misconduct is identified.
If the ministry finds there was misconduct by any authority (inactivity, in particular) in the case subject to review, a decision by the court is not necessary to provide compensation.

If misconduct is identified, the voluntary performance is an out-of-court settlement. Both parties save costs of the legal proceedings and courts are not unreasonably burdened at the same time.

The ministry considers voluntary performance based on knowledge of the Convention for the Protection of Human Rights and Fundamental Freedoms in the wording of protocols No. 3, 5 and 8 and also the European Court of Human Rights judicature.

The practice of voluntary performance if misconduct is identified is one of the criteria of effectiveness of a domestic means of protection as required by both the Convention and the European Court of Human Rights.

8. The ministry must notify the applicant of the claim result within six months.
The ministry will notify the applicant within 6 months whether or not their claim has been satisfied.

If, for any serious reason, the ministry is unable to handle the matter within 6 months, it will notify the applicant of the reasons for such default and the date when a response from the ministry can be expected. At the same time, the ministry is obliged to notify the applicant of his right to claim compensation with an applicable court.

9. The ministry is to provide reasons for the claim consideration result. If the claim is satisfied, it must pay the compensation without undue delay.
The ministry will explain and properly state to the applicant the reasons for which the claim could not be satisfied. The ministry will also have such obligation in case the claim for compensation for damage is satisfied to the full or a certain extent.

If a person asks for reasonable satisfaction for the non-property damage incurred, the claim satisfaction will not only include payment of money but also a declaration of unlawfulness or inactivity and an apology based on the non-property damage intensity. The reasonable satisfaction (in money) is provided when two conditions are met at the same time:

a) non-property damage could not be compensated for in any other way;

b) breach of the declaration itself does not seem to be sufficient.

When considering whether a claim is reasoned, the ministry must respect the settled judicature of the European Court of Human Rights. If necessary, the ministry will ask the Ministry of Justice to provide assistance.

If the claim is satisfied to the full or a certain extent, the compensation must be paid without undue delay, not later than six months after the claim was received.

10. The ministry may only choose to be represented by a lawyer in quite exceptional cases, complex in terms of the facts and law.
The ministry handles claims for compensation through its professional staff. In case the applicant applies his claim at the court, the ministry should also be represented by its professional staff. Representation of the ministry by a lawyer may only be limited to quite exceptional cases, complex in terms of the facts and law. Representation of the ministry by a lawyer in case of a standard and common agenda of the ministry is quite inadmissible. It cannot be ruled out that the court will not award the legal representation costs to the State even if the State is completely successful in a legal dispute. Costs incurred in relation to a lawyer will to the full extent be to the detriment of the state. The above-mentioned can be summarised by the words of the Constitutional Court „***representation of the State may be accepted as an exception to the rule that must be interpreted in a strictly restrictive manner***".

2 / LEGISLATIVE RECOMMENDATIONS OF THE DEFENDER

2 / 1 / ORPHAN'S ANNUITIES

The Public Defender of Rights has long (since 2004) recommended in his Annual Reports on his activity of revising the legal regulations regarding orphan's annuities in favour of social security for orphaned children. In doing so, he seeks for it not to be to the detriment of a child when a deceased parent has not met the necessary length of insurance to be entitled to a pension. The Defender believes that the death of a parent is an event where the State should pay increased attention to the social security of orphaned children.

Solving the social situation of orphans is becoming imminent in connection with the social benefit cancellation (with effect from 1 January 2011) that could, at least to a certain extent, compensate the loss of income or alimentary obligation in a broad sense as a result of the death of one of the parents.

The Ministry of Labour and Social Affairs rejects the proposed change with reference to the need for strict meeting of the insurance principle, and mentions the possible compensation of the loss of income of a family through material need benefits. However, the applicable social benefits are much lower and the drawing thereof is also influenced by other facts, which as a consequence often means that such benefits are not awarded. That means the purpose of the orphan's annuity, which includes partial compensation for the loss of the breadwinner, is not met. In recent years, the ministry has proposed the introduction of a new social benefit as a solution. With respect to the fact the ministry has not taken such step and not even notified of the introduction thereof in connection with the reform of social benefits, the Defender does not believe that the situation of orphaned children will be resolved in the near future.

Therefore, the Defender recommends to the Chamber of Deputies that it anchor – within discussing the so-called minor pension reform – the entitlement to orphan's annuity in at least the minimum guaranteed amount even to those orphaned children whose parents had not met the retirement or disability pension claim conditions at the time of their death (guaranteed orphan's annuity).

2 / 2 / AUTHORISED INSPECTOR

The Defender repeatedly encountered complaints about the procedure of the authorised inspector and, in this connection, he referred in the Annual Report in 2009 to the deficiencies of the legal regulations of the Building Act, the consequences of which include e.g. the inability to review the procedure of the authorised inspector and the lower possibility of legal protection against his potential unlawful procedure (certificate).

The Defender believes that the Building Act needs to be changed in a way that persons that would otherwise be entitled to take part in administrative proceedings and therefore appeal are conferred the right to a remedy even against a certificate of the authorised inspector. In the legal opinion of the Defender, the given certificate has unquestionable public effects that may directly affect the rights of persons that would otherwise be in the position of participants in general planning or building permit proceedings.

The Defender therefore recommends to the Chamber of Deputies to adopt – within discussing the Building Act amendment – such legal regulations that will enable a remedy to be allowed against

a certificate of an authorised inspector and legal protection of persons with proprietary or other rights to neighbouring real estate to be provided in this way.

2 / 3 / CHANGE IN COMPETENCE OF ROAD ADMINISTRATIVE OFFICES

Based on his findings, the practice of regional authorities and the opinions of the professional public, the Defender considers the existing legal regulations of the competence of road administrative offices inappropriate and unsustainable in the long term. Today, a road administrative office includes every local authority in the country which, considering the agenda complexity, causes overwhelming practical problems for small municipalities.

Therefore, the Defender recommends to the Chamber of Deputies to adopt an amendment to the Roads Act (Act No. 13/1997 Coll., as subsequently amended) that would give the competence of a road administrative office explicitly to local authorities of municipalities with extended powers.

2 / 4 / HERITAGE CARE

The Defender has long referred to the deficiencies of the legal regulations regarding heritage care (see the Annual Reports for 2008 and 2009). In particular, he has referred to the lack of anchoring of the claim of owners of real estate in heritage reservations and zones to the provision of a contribution for the restoration of historical objects that are not cultural monuments. In the long term, there has been the state where owners of real estate in heritage zones and reservations are obliged to meet heritage care requirements when repairing such objects, however, in contrast to owners of cultural monuments, they are not entitled to be provided contribution to maintain the cultural historical values of objects. By this, the limitation of owners of real estate in heritage zones and reservations is not compensated in accordance with Art. 11, Paragraph 4 of the Charter of Fundamental Rights and Freedoms.

Problems with heritage care protection two-tracking are also negatively manifested where there are two separate institutions (heritage institutes and heritage authorities) regarding a quite different building plan in many cases existing next to each other.

That is why the Defender repeatedly recommends adopting a new heritage care act that will

(1) regulate the possibility of compensation for costs of reconstruction and maintenance of heritage values with objects in heritage reservations and zones that are not cultural monuments and

(2) unify the exercising of heritage care under one institution the statement of which on the protection of heritage care will be binding.

2 / 5 / CHANGE OF THE EMPLOYMENT ACT

As far back as the legislative process, the Defender criticised the draft amendment to the Employment Act (adopted under No. 347/2010 Coll.) under which the right to unemployment compensation for an employee eligible for compensation money is shifted (by the appropriate months). The essence of the problem lies in the fact that the law does not distinguish the compensation money claim from its actual payment as the law speaks about compensation money to which the employee is "entitled". The Defender has already encountered the practical consequences of the above-mentioned legal regulations. Unemployment compensation is namely not provided in cases where employment is immediately terminated

by the employee because wages are not given to him. Although an entitlement to compensation money arises in respect of the employee, it would be naïve to think that an employer that has not paid wages would pay compensation money. It is the entitlement to compensation money, regardless of its actual payment, that is the reason for employment offices shifting the payment of unemployment compensation by three months, after which the registered job applicant is entitled to compensation money.

It is necessary to emphasise that in the opinion of the Defender, the adopted legal regulations contradict the sense and purpose of the compensation money. The sense and purpose include certain satisfaction for the difficulties (sometimes trauma) the loss of employment brings. Apart from that, the Defender is convinced that the legislator surely did not want to create a state where job applicants are left without any funds when compensation money is not paid. At present, the legal regulations have rough consequences for job applicants to whom compensation money was never paid and who expect assistance from the State in connection with the loss of employment.

Therefore, the Defender recommends adopting an amendment to the Employment Act (Act No. 435/2004 Coll., as subsequently amended) that would replace the word „*entitled*" with „*was paid*" in provision of § 44a.

2 / 6 / "*COMMERCIAL REGISTRIES*"

The Trade Licensing Act (Act No. 455/1991 Coll., as subsequently amended) was changed by adopting the Archiving Act (Act No. 499/2004 Coll., as subsequently amended) and licensed trade „*registry keeping*" was introduced. A free reporting trade had been concerned in respect of the care of record materials of companies subject to liquidation until the Archiving Act took effect (1 January 2005). However, the Act did not deal with what would happen with documents of companies subject to liquidation if operators of the existing, so-called commercial registries did not ask for the granting of a concession in a transitional period.

At present, there are „*registries*" the operators of which no longer possess the business licence. In these registries, there are still documents that are to be used to make copies from for personal and official needs and that are to be excluded after appropriate terms with a statement from the appropriate state archive that they have expired. However, operators of some registries are inactive after losing their business licence and do not provide the activities for which they have been paid in advance. With this inactivity, employees of companies subject to liquidation, in particular, asking for a certificate of earnings and number of years of employment, find themselves in a difficult situation in proceedings for pension benefit.

Legislatively, treatment of the kept documents is not dealt with if an operator ends the licensed trade of „*registry keeping*" with no legal successor.

The Defender persuaded a representative of the Ministry of the Interior and the Ministry of Industry and Trade to take part in a joint meeting that took place in December 2010. However, a satisfactory solution to the problem was not found. The archival management opposes the taking into the care of the state archives a significant number of documents that are not archival documents. The Ministry of Industry and Trade asks the question whether it is appropriate whatsoever that registry keeping is a trade considering the specific features of this activity. The manner of funding the treatment of documents after the operator of the so-called commercial registry is no longer active could presumably be resolved by setting the obligation to gradually convert part of the received funds into a deposit.

The Defender recommends to the Chamber of Deputies to ask the Government to handle the issues of so-called commercial registries. Legislatively, it is necessary to resolve the manner

(1) of treating the documents still kept with registries, the operators of which no longer possess a business licence,

(2) of preventing similar situations from happening in the future.

2 / 7 / USING MEANS OF RESTRICTION AT MEDICAL FACILITIES

For the means of restriction, see the Report from subsequent visits to psychiatric hospitals from 3 November 2010 available at: http://www.ochrance.cz/ochrana-osob-omezenych-na-svobode/zarizeni/psychiatricke-lecebny/

The Care of Peoples Health Act (Act No. 20/1966 Coll., as subsequently amended) currently regulates only some legal aspects of a patient hospitalised at a medical facility against their will. The stay conditions are not governed at all. The new draft health legislation (Health Services Act, in particular) was to remedy the legal aspects of hospitalisation of a patient but it did not pass through the legislative process.

An involuntary stay of patients at medical facilities represents a very significant interference in personal freedom, comparable with a sentence of imprisonment in some cases. With respect to the fact that it was found– when psychiatric hospitals were visited – that the life of patients considerably differs at individual hospitals, it would be necessary to regulate this area at the legal level. This especially concerns the issue of using means of restriction (which has so far been regulated at the level of a methodological measure of the Ministry of Health, No. 37800/2010) and the issues of regime measures and living conditions of patients.

Considering the fact the Defender has already referred to the issue of insufficient legal regulations of the use of means of restriction for the second time and with respect to the fact that a partial amendment to the existing legal regulations (i.e. Care of Peoples Health Act) is enough to achieve the objective,

he recommends adopting legal regulations that would regulate the use of means of restriction and living conditions of patients at psychiatric hospitals.

2 / 8 / COMPENSATION FOR PROPERTY LEFT IN CARPATHIAN RUTHENIA

The defender repeatedly encounters complaints where conditions under which compensation is provided by the act by which property injustice to citizens of the Czech Republic in respect of real estate they had left in the territory of Carpathian Ruthenia in connection with its contractual assignment to the Union of Soviet Socialist Republics (Act No. 212/2009 Coll., hereinafter referred to as the „*Compensation Act*") are subject to criticism. The provision of § 3, Paragraph 1, subparagraph c) of the Compensation Act, according to which property on the territory of Carpathian Ruthenia had to be left from 5 November 1938 to 18 March 1939 appears to be problematic. The Defender is made aware of the fact the Ministry of the Interior only rejects a number of compensation claims because ancestors of claimants left the territory of Carpathian Ruthenia later than as provided in the Act, i.e. by 18 March 1939. Not all Czechoslovak citizens, however, managed to evacuate by 18 March 1939 or could not evacuate due to running battles and only did so in the following days or weeks.

It is evident that the Act was significantly changed within the legislative process in the Chamber of Deputies; among other things, such changes concerned the specification of the range of authorised persons. Compared to the original wording of the provision of § 3 of the Compensation Act, the range was dramatically narrowed. In specific cases, strict time limitation with no serious reasons is the basis of different treatment (and therefore, de facto, new injustice).

Based on the collected findings, the Defender recommends amending the Compensation Act (Act No. 212/2009 Coll.) in a way that the term specifying by when property had to be left in Carpathian Ruthenia considered the historic reality, i.e. is not ended by 18 March 1939, when occupation of that territory by Hungarian troops finished but not all Czechoslovak citizens managed to evacuate from the territory of Carpathian Ruthenia in that term.

7 FINAL SUMMARY

My signature completes the Report, which to a significant extent is specific. It includes the period when the function of the Public Defender of Rights was held by JUDr. Otakar Motejl, the period when after his death the running of the Office was managed by the Deputy of the Public Defender of Rights – RNDr. Jitka Seitlová, and finally the period from 13 September 2010 when I took office by taking the oath.

Similarly as my predecessor, I would like to state that the Public Defender of Rights is no longer the person he used to be at the time this institution was established. During those ten years, there have been new tasks and competencies and it remains questionable whether that has always been to the benefit of those who address the Public Defender of Rights. By that I mean an institution should have steady competencies that should „*last*" for some time to fully enter the minds of people as is required for any legal regulation to work properly. In other words, so that those addressing the Public Defender of Rights can clearly know they are "*in the right place*" to resolve their problems.

If I can ask for something in conclusion, I have two wishes.

In particular, I would like to ask for the legislative measures that I propose to be respected. They are not led by any power or political calculation. They are based on how legal regulations work in practice and how (insensitively in many cases) they interfere with the life of people.

My second wish relates to the future legislative restraint in the intentions to give the Public Defender of Rights other competencies for the independent monitoring of areas that have very little in common with his activity or, to be more specific, the traditional model of the ombudsman institution.

In Brno on 21 March 2011

JUDr. Pavel Varvařovský
Public Defender of Rights

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