Veřejný ochránce práv
OMBUDSMAN

Information about activities presented by the Public Defender of Rights

in accordance with the provisions of Section 24 (1) (a) of Act No. 349/1999 Coll., on the Public Defender of Rights, as amended (hereinafter also "the Public Defender of Rights Act")

for the first quarter of 2014

On 14 February 2014 I was elected the Public Defender of Rights by the Chamber of Deputies of the Parliament of the Czech Republic and upon being sworn in on 18 February 2014 I took up the office.

A. Number of cases, investigations

A total of **2,027** submissions were received in the first quarter of 2014, which is down **230** compared to the same period last year. The number of cases in relation to public administration slightly declined - **1,138** cases received, which means **186** fewer than in the first quarter of 2013. The percentage of cases outside the sphere of the authority as defined by the Public Defender of Rights Act did not show major changes (I.Q 2014 [889; 44%]; I.Q 2013 [933; 41%]).

In addition, a total of **79** cases claiming unequal treatment within the area of public administration and on the part of private persons were received. Discrimination within the Antidiscrimination Act was claimed in **41** cases. In the area of protection against discrimination, assistance was provided to international entities or domestic bodies in a total of **15** cases.

Further, **6** systematic visits were made to supervise the restriction of personal freedom. In connection with the powers concerning the monitoring of the detention of foreigners and administrative expulsion procedures, **678** monitoring rulings were received. One escort was carried out during which the expulsion of a foreigner was monitored.

In the public administration agenda, most cases received again related to social security – 326, followed by cases relating to building proceedings and town planning – 109, and by cases relating to the prison system, police and army – 81.

B. Activities of the Defender

B.1 Public administration

During the first quarter of 2014, in particular the following recommendations and statements in relation to public administration were issued.

B.1.1 Subsistence allowance and child benefit after leaving children's home

The Defender received a complaint with request for help from a complainant who upon his 18th birthday left a children's home and found his own housing. With respect to his studies he had applied for **benefits of assistance in material need**. The Labour Office of the Czech Republic, regional branch for the Capital City of Prague (the "labour office") had called on him to submit a confirmation of the children's home that he could no longer stay in the children's home. On grounds of the complainant's leaving the children's home, the labour office had withdrawn the **child benefit**.

An inquiry into the complaint showed that **the requirement of the labour office to submit a confirmation of the children's home that the complainant could not stay in the children's home was unreasonable** and in violation of the Act on Assistance in Material Need (Act No. 111/2006 Coll., as amended). It is a right and not a duty of a dependent child continuing studies to stay voluntarily in a children's home until the age of 26 even after reaching the legal age and the termination of institutional education. In assessing an entitlement to a subsistence allowance, the labour office should not take into consideration that the dependent child has decided to leave the children's home.

In addition, the labour office had proceeded in violation of the Act on State Social Support (Act No. 117/1995 Coll., as amended) when it had removed the child benefit of the complainant. If statutory conditions are met, a child is entitled to a child benefit. In case of a dependent minor in a children's home, the benefit is paid to the children's home, which also represents the child in benefit proceedings. After the child reaches legal age, he or she does not lose entitlement to the child benefit – only the benefit recipient changes because **after the child reaches legal age**, the benefit may be paid directly to the child. The labour office then stops paying benefits to the children's home.

The labour office agreed with the conclusions. In order to prevent similar situations in future, it adopted an internal rule setting a duty to provide social counselling and to record in writing any dealings with clients.

B.1.2 Placement of a person under guardianship in a residential social service facility

An inquiry was made into a complaint submitted by professional field workers working over a long term with a specific person with limited legal capacity and under guardianship of the Authority of Prague 6 Municipal Ward. The complainants objected that the public **guardian had decided to place the person under guardianship in a home with special regime (residential social service) despite**

a disagreement of that person (after his previous indecisiveness) and a negative stance of his outpatient psychiatrist and other experts in regular contact with him.

The inquiry revealed that the person under guardianship (suffering from schizophrenia) was stable in terms of health and relatively settled socially as he **had a lease for an indefinite period of time**, was employed, under regular care of the psychiatrist and had a home care service arranged. He only complained about occasional problems in neighbourly relations. That mode of care was **evaluated as optimal** by the client and the staff involved. However, the guardian saw the best interest of the person under guardianship in safe environment of the home with special regime, where a place had become vacant and the application of the person under guardianship (filed years ago under different circumstances) could be satisfied. The home was 130 km from his place of residence. The decision about moving the person to the home **had not been consulted by the guardian with experts**. In decision-making about important matters concerning a person under guardianship, however, the guardian is obliged to consult the life situation of the person with experts working with such person.

In the course of the inquiry into the complaint, the public guardian decided to suspend the person's registration at the facility. Recommendations following from the inquiry are therefore future-oriented. With respect to obligations arising from the Convention on the Rights of Persons with Disabilities, when public guardianship is performed, attention needs to be paid to the **integration of persons under guardianship in society to the greatest possible extent**, which also applies to persons with permanent mental illness. To this end, a social service that is restrictive as little as possible should be selected. It is not in the best interest of a person under guardianship to be removed from his natural environment without a serious reason and placed in a remote institutional facility.

B.1.3 Proportionality of the manner of performing distrainment

My predecessor JUDr. Pavel Varvařovský was approached by a complainant requesting an inquiry into the procedure of the Ministry of Justice in supervising the activity of a court distrainor. He found the manner of distrainment **out of proportion** because the distrainor had “froze” eleven of the complainant's properties worth several million Czech korunas (and also three current accounts) for his failing to pay the maintenance and support of his son, slightly exceeding CZK 70,000.

It was ascertained that the distrainor had created a distrainor's security interest in all properties of the obligor not constituting a united functional unit and simultaneously had issued distrainment orders to sell the properties, regardless of the size of the enforced claim with accessions. The Ministry of Justice had not reproached the distrainor for the procedure. Following an inquiry it was concluded that it was necessary always to assess the proportionality of the aim of the distrainment and necessary interference with the rights of the obligor. Where it is sufficient to create a security interest **only in some properties** of the obligor (in one functional unit) to pay the claim with all accessions, including the due margin pursuant to the provision of 58 (1) of the Rules of Distrainment (Act No. 120/2001 Coll., as amended), **it is excessive to create a security interest in other properties** and thus limit the rights of the obligor more than necessary for guaranteeing the rights of the obligee.

With the application of the *minore ad maius* argument, the conclusions also apply to the practice of “automatic” issuance of distrainment orders ordering the performance of distrainment through the sale of (all) properties of the obligor. **There is no legitimate reason to order automatically distrainment through the sale of (all) properties of the obligor**.

After the conducted inquiry, an agreement was reached with the Ministry of the Justice that the issuance of a distrainment order to sell a property did not only have the character of a security and, all the more so, proportionality needed to be emphasised in respect of such order. The Ministry of Justice promised that it would conduct disciplinary proceedings against distrainors for a disproportionate manner of performing distrainment through the sale of immovable property. Negative impacts of disproportionateness in creating a distrainor's security interest were mitigated by an amendment of the Rules of Distrainment, which removed the prohibition to dispose of property with a distrainor's security interest.

B.1.4 Changing the use of a part of structure from a flat to an office

A complainant addressed my deputy with a request to inquire into the procedure of the construction division of the Municipality of the City of Olomouc (“the construction authority”) and its superior Regional Authority of the Olomouc Region concerning the change of the purpose of using a part of a structure – a unit in a block of flats (from a flat to an office). The complainant noted an insufficiently justified shift in the practice of the relevant administrative authorities over the years, which he considered incorrect. The interpretation of the term “structure” in relation to a private-law regulation was also problematic.

My deputy described the consideration of the administrative authorities as completely inadequate, emphasising that it was not based on specific and clear legal argumentation. Specifically, the construction authority had erred in **giving consent to the change of the purpose of using a unit without the consent of all unit owners** (according to the legislation then in force - the Flat Ownership Act No. 72/1994 Coll., as amended). Moreover, the administrative authorities involved in the inquiry had violated the principle of good governance (in particular the principle of predictability and conclusiveness) since in a similar case dated 2007 they had required the consent of other unit owners. They had failed to provide any justification of the deviation from the practice although there had not been any change in the applicable provisions of the legal regulations concerned. From the procedural point of view, the authorities of both instances had applied incorrectly Sec. 127 (3) of the Building Act (Act No. 183/2006 Coll., in wording valid until 31 December 2012), because **the change under consideration could also impact the rights of third parties** (other unit owners in the house) and therefore the construction authority should have conducted the notification procedure within administrative proceedings.

My deputy closed the case, among other things because it is now subject to new legal regulation of residential co-ownership according to the new Civil Code (Act No. 89/2012 Coll.), which no longer creates room for uncertainty in interpretation. The provision of Sec. 1208 expressly stipulates that the **powers of the meeting of unit owners** include decision-making about the change of the purpose of using a house or **a flat** and, therefore, in future it will be necessary always to attach a decision of the meeting of unit owners to the notification of change of the purpose of a unit.

B.2 Supervision of the restriction of personal freedom

As part of the supervision of the restriction of personal freedom, the staff of the Office of the Public Defender of Rights made a total of **six systematic visits** to facilities in 1Q 2014. Four visits were made to facilities providing, in addition to accommodation, "day care". Such facilities are de facto occupied by persons dependent on care, which, in my opinion, has in the given cases the character of social service commonly provided in residential social service facilities. Further, one visit was made to a sobering-up station, a healthcare facility of its kind. One visit was made to police cells.

Within the performance of duties arising out of the so-called Returns Directive, **the transit** of a Slovak citizen to Václav Havel Airport Prague **was monitored**. In that specific case, the monitoring of the transit was the result of international cooperation of entities monitoring forced returns; the execution of the forced return was supervised by a German supervisory body on the territory of Germany and by the Public Defender of Rights on the territory of the Czech Republic.

An **international conference** on "The protection of the rights of the elderly in institutions, with emphasis on persons with dementia" was held. The following topics were presented by the staff of the Office of the Public Defender of Rights: "Sedatives in the practice of social service facilities for the elderly based on the Defender's findings from systematic visits", "Autonomy of will of clients with dementia" and "Findings from systematic visits: provision of meals to persons with dementia in social service facilities". In connection with the conference, **an expert meeting** of the representatives of Czech, French, Slovenian and Polish **National Preventive Mechanisms** and the employees of the Slovak and Hungarian ombudsmen took place. The aim of the working meeting was to share findings and experience related to the supervision of places where persons restricted in freedom are or may be kept. A whole range of issues currently encountered by monitoring teams during their work were discussed.

A series of systematic **visits to sobering-up stations**, made in 2013 – 2014, was rounded off with a round-table discussion titled "On current problems in treatment of persons at sobering-up stations for the treatment of acute intoxication with alcohol and drugs". It was attended by the representatives of six sobering-up stations visited and experts on the care of intoxicated persons and also by the representatives of the Ministry of Health and the Ministry of Justice.

Following visits to fourteen **social service facilities providing care to persons with dementia**, a round table discussion titled "Recommendation to increase the standard of care for the elderly in residential social service facilities" was organised. The participants included the staff of the facilities visited as well as experts from Czech Alzheimer Society and Czech Association of Nurses, collaborating with the Defender on a long-term basis.

B.3 Protection against discrimination

B.3.1 Discrimination on grounds of sex – the main theme in raising public awareness and research activities in 2014 in the area of equal treatment

I have decided to share my experience gained from inquiries into complaints regarding gender discrimination with inspection bodies, non-government

organisations and legal counsels specialising in equal treatment. By means of round-table discussions, I shall endeavour to share the findings available to ensure that all the mentioned entities are able to provide qualified help to victims of gender discrimination. One such discussion with the participation of inspection bodies was held in February. A meeting with the representatives of the non-government sector took place in April and a meeting with legal counsels is scheduled for September.

I shall also finish a research activity started by my predecessor JUDr. Pavel Varvařovský regarding **the employment of women as paramedics**. In the past, the former Defender had encountered complaints of women who had been constantly rejected for the mentioned position by potential employers with reference to Government Regulation No. 361/2007 Coll., which contains so-called weight limits for lifting (different for men and women). The results will be available in the second half of 2014.

Throughout the year, I shall carefully monitor the fulfilment of **three recommendations** of the Defender made in the past. The first, repeatedly addressed to the Ministry of Health, concerned changes in secondary **legislation regulating abortion** (Decree No. 75/1986 Coll., as amended by Decree No. 467/1992 Coll.), which gives rise to unequal treatment of women on grounds of age. The second recommendation, addressed to the Ministry of Labour and Social Affairs, was to draw attention of the department management to the necessity of **increasing staff** and more intensive methodological guidance (including continuous training) of employees of **labour inspectorates in the area of** (not only gender) **discrimination**. In April, employees of regional inspectorates attended the first seminar on that topic, held at the Office of the Public Defender of Rights. The third recommendation relates to **the conditions for post-doctoral grant** projects within Czech Science Foundation. My predecessor JUDr. Varvařovský had recommended that Czech Science Foundation change its rigid conditions with respect to the balance of work and private life of male and female scientists. Considering the latest media reports, I am of the opinion that the discussion on this topic is not over.

Activities aimed at raising public awareness in the area of discrimination on grounds of sex will be concluded with a two-day **international conference** called “Work-Life Balance” held at the Office of the Public Defender of Rights on 23 – 24 October 2014. The aim of the meeting is to "hold the mirror up" to the Czech Republic and look for examples of good governance abroad that could be incorporated in Czech legislation.

B.3.2 Statement to the Committee of Ministers of the Council of Europe – execution of judgment regarding D. H. and others vs. Czech Republic

After familiarising myself with the situation in carrying out the above-mentioned judgment of the European Court of Human Rights, I decided, in accordance with Rule 9 of Rules of the Committee of Ministers for the supervision of the execution of judgments, to submit my statement to the international body competent to check on a regular basis whether Member States of the Council of Europe duly execute judgments of the European Court of Human Rights.

The mentioned step represents the **fulfilment of my statutory duty** pursuant to Sec. 21 (d) of the Public Defender of Rights Act, according to which I should provide for exchange of available information with relevant European parties. It

follows from the statement that I am not satisfied with **the steps of the Czech Republic in the area of educating Romany pupils**. I am of the opinion that the new government must make considerable effort to ensure that Romany pupils stop receiving their education within simplified educational curriculum and have access to mainstream primary education. The “Equal opportunities” plan of measures, created in 2012 also with the contribution of my predecessor JUDr. Varvařovský, was a promising start, in my opinion, after several years of unwillingness to face the existing problem. Nevertheless, developments in the past few months show that the enforcement of a fair and equal access of the mention group of pupils to education is still hindered by many obstacles.

What I consider **absolutely crucial** is bringing education implementing decrees into accord with the Education Act, changing the diagnostics of children with special educational needs, changing the funding of regional education, ensuring the separation of chief officers of counselling facilities from those of special schools, more consistent monitoring of Czech School Inspectorate (in counselling facilities, primary schools and preparatory classes), more intensive cooperation of Czech School Inspectorate with bodies of social and legal protection of children and, last but not least, revising Framework Education Programmes for primary education. Unless those measures are implemented, the principle of non-discrimination in Czech education cannot be implemented.

B.3.3 Refusal of a postal licence holder to hand over a parcel

My deputy dealt with a complaint submitted by a minor who had ordered goods online, using his saved-up pocket money. When he had wanted to collect the parcel in person at a branch of a postal licence holder, he was rejected despite proving his identity by means of a valid passport. An employee of the branch had claimed that she could not hand over a consignment to a person under 15 years of age according to postal rules. As a result, the parents of A. M. had had to go to the branch to collect the consignment. Subsequently A. M. had turned to the Defender, considering the given practice unreasonable.

The arguments presented by the postal licence holder did not convince my deputy of the lawfulness of the procedure in handing over so-called recorded consignments. He came to the conclusion that the practice described above not only violated the Antidiscrimination Act (Act No. 198/2009 Coll., as amended) but was also contrary to the right of the child to the protection of his privacy (prohibition of arbitrary interference with the child’s correspondence). The Defender recommended changing the postal terms and conditions effective from 1 January 2014, among other things in connection with the coming into effect of the new Civil Code.

Failure of a postal licence holder to hand over selected types of consignments to persons under 15 years of age constitutes direct discrimination on grounds of age according to Sec. 1 (1) (j) in connection with Sec. 2 (3) of the Antidiscrimination Act. At the same time, it could constitute an administrative offense consisting in putting a group of persons requesting postal services within Sec. 37a (3) (c) in connection with Sec. 33 (4) of the Postal Services Act (Act No. 29/2000 Coll., as amended) at a disadvantage without justification.

A child has a right to the protection of privacy, which includes the prohibition of arbitrary interference with correspondence. In order for the child to be able to actively

exercise his or her right, the child first needs get to the parcel. Therefore, it is **unacceptable if a postal licence holder** sets internal rules that de facto **restrict** the child's right. Such interference is possible solely on the basis of a law.

The postal licence holder did not agree with the Defender's conclusion and did not accept the recommendation. The Defender thus turned to the Czech Telecommunication Office, competent to start administrative proceedings with the postal licence holder. The Czech Telecommunication Office stated that it **agreed** with the legal opinion described above and promised to **provide for remedy in the given case**.

C. Legislative recommendations and special powers of the Defender

C.1 Proceedings regarding the annulment of the provision of Sec. 41 (1) of Act No. 435/2004 Coll., on Employment, in wording effective from 1 January 2012

Upon a petition of the Regional Court in Hradec Králové to the Constitutional Court, I entered the mentioned proceedings as an interested party, according to Sec. 69 (3) of the Constitutional Court Act (Act No. 182/1993 Coll., ad amended). In its petition, the petitioner pointed out a specific case (which was being heard by it) in which the amended wording of Sec. 41 (1) of the Employment Act was contrary to the complainant's legitimate expectations concerning the provision of adequate material security in the form of an unemployment benefit.

I agreed with the argumentation of the petitioner and stated in my opinion that the given state of affairs had been already pointed out by the **previous Public Defender of Rights** in his Annual report on the activities in 2012, where he had recommended that the Chamber of Deputies of the Parliament of the Czech Republic remove the **undesirable impact** of the reduction of the reference period for assessing entitlement to unemployment benefits with respect to persons on a long-term sick leave.

I informed the Constitutional Court that **the present legal regulation was contrary** to the right to adequate material security provided by the State in the case of loss of employment (Art. 26 (3) and Art. 30 (1) of the Charter of Fundamental Rights and Freedoms) since in its current form it did not follow the system of sickness insurance and **fundamentally violated legitimate expectations of applicants**. Therefore, in my opinion, the legal regulation cannot stand the test of reasonableness designed by the Constitutional Court as a methodological instrument to review the intervention of the legislator in the area of constitutionally guaranteed social rights.

Last but not least, the opinion forwarded to the Constitutional Court included selected specific cases related to the given issue, addressed by the Defender as part of his inquiries in the past.

C.2 Proceedings concerning the annulment of ordinance of the town of Františkovy Lázně No. 1/2013, on the prohibition of street vending and door-to-door sale

Upon a petition of Director of the Regional Authority of the Karlovy Vary Region to the Constitutional Court, my deputy entered the mentioned proceedings as an interested party, according to the provision of Sec. 69 (3) of the Constitutional Court Act. However, he did not completely agree with the legal argumentation of the petitioner.

In his statement, he said that the Constitutional Court should consider the ordinance in terms of interference with rights guaranteed by the Constitution and address the question whether a municipality was entitled to **prohibit** street vending and door-to-door sale across the board **in consideration of the right to engage in business** guaranteed by the Charter of Fundamental Rights and Freedoms.

In addition, he noted a very problematic definition of the term "**street vending**", as defined in Art. 2 of the ordinance in question, according to which it meant any sale of goods and provision of services using a portable device or a device that is being carried or hand-to-hand sale without using any device. In the given case, the ordinance **does not follow the traditional conception of the institute**, where a seller carrying a device (or not using any device) is offering and selling goods, but de facto prohibits the placement and operation of portable devices (stalls, counters etc.) in a specific place.

D. Other activities

D.1 Meetings with deputies

On 6 March 2014 I met with the **members of the Committee on Constitutional and Legal Affairs** of the Chamber of Deputies of the Parliament of the Czech Republic visiting the Office of the Public Defender of Rights within the Committee's external meeting. Discussions related in particular to the question of extending the mandate of the Public Defender of Rights to enable the Defender to submit a petition to the Constitutional Court for the annulment of a law or its part and stipulating an action to protect the public interest (actio popularis) in the Antidiscrimination Act.

At present, the Public Defender of Rights is entitled to submit petitions for annulling secondary legislation and has a right to enter, as an interested party, proceedings before the Constitutional Court regarding the annulment of a law or its part. I am convinced that the Defender should also have the possibility to initiate such proceedings before the Constitutional Court.

An action for the protection of public interest in discrimination disputes is part of legal orders of sixteen European countries and it would enable the Public Defender of Rights to file an action for a victim of discrimination or in cases where the rights of an indefinite number of persons or the public interest would be jeopardised by discriminatory conduct.

A large part of the discussion with the deputies focused on contemporary and long-term problems in the prison system encountered by the Defender. That topic had been selected also because the day before the deputies had visited the Brno remand prison and facility for the execution of security detention, where they had been interested, for example, in the impact of amnesty on the financial situation of the Prison Service of the Czech Republic.

D.2 Meeting with ministers and their deputies

On 13 March 2014, the **Minister for Human Rights, Equal Opportunities and Legislation** visited the Office of the Public Defender of Rights. The discussion again concerned in particular the possible extension of the mandate of the Public Defender of Rights (possibility to submit a petition to the Constitutional Court for the annulment of a law or its part, possibility to file *actio popularis* concerning discrimination) and also legislative recommendations (stipulation of the Defender in the Constitution, an amendment to the Public Defender of Rights Act or an amendment to the Antidiscrimination Act).

On 21 March 2014, I held a meeting with the **Minister of Labour and Social Affairs**. I presented to the Minister the topics which, based only findings, the Ministry should address in future. They include, for example, the transfer of methodological guiding of the Labour Office back to the Ministry of Labour and Social Affairs, personnel situation at the Labour Office in the area of non-insurance social benefits, termination of payments to foster parents caring for a child depended on care, extraordinary instant assistance benefits to cover co-payments for medicinal products, change of legal regulation of housing benefits, provision of social services without registration, or an amendment of the Social Services Act.

On 28 March 2014, I met with the **First Deputy of the Minister of Justice** to discuss the preparation of a bill on free legal aid and a bill on guardianship and a possible amendment to the Act on Courts and Judges. I presented my recommendations regarding an amendment to the Code of Civil Procedure regulating distrainment.

D.3 "Together for good governance" project

Since 1 January 2014, the Office of the Public Defender of Rights has been implementing the "Together for good governance" project (reg. No. CZ.1.04/5.1.00/81.00007). The project is funded from the European Social Fund through the Human Resources and Employment Operational Programme and from the budget of the Czech Republic.

The main aim of the project is to identify opportunities to **increase the effectiveness of the activities of the Office of the Public Defender of Rights** through international cooperation. More details about the project and the activities performed in the first quarter of 2014 can be found in an attachment to this report.

Brno, 25 April 2014

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