Veřejný ochránce práv
OMBUDSMAN

Information on activities submitted by the Public Defender of Rights

pursuant to Section 24 (1)(a) of Act No. 349/1999 Coll., on the Public Defender of Rights, as amended,

for the second quarter of 2014

A - Number of complaints, investigations

A total of **2,037** complaints were received in the second quarter of 2014, which is **4** less than in the same period last year. The number of complaints in the area of public administration has slightly increased– the **1,205** complaints received are an increase by **59** compared to the second quarter of 2013. The percentage of complaints about matters outside the Defender's mandate delimited by the Public Defender of Rights Act has decreased (818, i.e. 40%, in Q2 2014 compared to 963, i.e. 47%, in Q2 2013).

Of these, a total of **60** complaints claimed unequal treatment by public administration and private entities. The number of complaints directed against discrimination in the sense of the Anti-discrimination Act reached **31**. In the area of protection against discrimination, co-operation was provided to international entities and national authorities in a total of **14** cases.

Moreover, 6 systematic visits were made in the framework of the agenda of supervision over restrictions of personal freedom. In connection with the Defender's activities in the field of monitoring of the detention of foreigners and administrative expulsion, **764** decisions to monitor were submitted.

In the public administration agenda, most complaints received, 296 in total, related to social security again, followed by complaints relating to building proceedings and land-use planning (107), and by complaints relating to transportation and communications (75).

B - Activities of the Defender

B.1 Public administration

In relation to public administration, in particular the following recommendations and statements were issued during the second quarter of 2014:

B.1.1 Overpayment of maternity benefits

I have closed investigation into a complaint concerned with an overpayment of maternity benefits worth almost CZK 50,000.00 through an error by the Czech Social Security Administration. The benefit was paid to the complainant from two insurance

policies despite the fact that she was not entitled to it under one of the policies. At request of the Czech Social Security Administration, the complainant signed the legal act of acceptance of "her debt" and she subsequently turned to the Public Defender of Rights.

It was concluded, based on the investigation performed, that the **agreement on acknowledgement of obligation was unlawful** because the applicable rules of public law do not allow public authorities to enter into civil-law agreements. Unjust enrichment occurred on the part of the Czech Social Security Administration, where the latter, by taking the above procedure, avoided the possible recourse liability of its employees for administrative overpayment under the Labour Code. Where an overpayment not caused by the recipient occurs within sickness insurance, the Czech Social Security Administration cannot require that the recipient enter into an agreement on acknowledgement of obligation (debt) under civil law.

In its statement on the report from the investigation, the Czech Social Security Administration stated its opinion that there was unjust enrichment on the complainant's part and that even an overpayment not caused by the recipient could be enforced in courts if the recipient is unwilling to reimburse the overpayment voluntarily.

I indicated in my final statement that this opinion directly contravened the case-law of the Supreme Administrative court which has clearly ruled that **the relationship between the insured and the insurance provider falls under public law and may not be subject to the provisions of the Civil Code and specifically the provisions on unjust enrichment may not apply.** The remedial measures proposed by me were to enter into a settlement agreement, to refrain from enforcement of the overpayment and to change the practice of conclusion of agreements on acknowledgement of obligation (including a change in the relevant guidelines). The Czech Social Security Administration complied with my recommendations.

B.1.2 Appropriate satisfaction for intangible damage (delays in proceedings for renewal of disability pension)

The complainant contested the procedure of the Ministry of Labour and Social Affairs (hereinafter the "Ministry"), which had **dismissed an application for reasonable satisfaction for delays** in proceedings for restoration of disability pension lasting 21 months caused by the Czech Social Security Administration. The Ministry substantiated the dismissal by describing the claimed amount as inappropriate.

My predecessor, JUDr. Pavel Varvařovský, stated in the report on the investigation that the Ministry had failed to proceed in accordance with the Ten Rules of Best Practice in Assessing Claims for Indemnification and in accordance with the opinion of the Civil and Commercial Division of the Supreme Court of 13 April 2011, file No. Cpjn 206/2010. The Ministry was not entitled to dismiss the application for reasonable satisfaction for intangible damage caused by an incorrect official procedure merely because it considered that the amount claimed was unreasonable. If the conditions for providing satisfaction in money were met, **the Ministry should have voluntarily provided a part of the claim in an amount corresponding to the conclusions made by case-law and its own established practice.** As for the

remaining part, it should have referred the complainant to courts. The then Minister of Labour and Social Affairs noted that apology by the Czech Social Security Administration was sufficient in the case concerned.

I indicated in my final statement on this case that reasonable satisfaction certainly should have been granted. I emphasised that the subject of the proceedings were more important in the complainant's case than in the cases of other applicants with which she was familiar and to which the Ministry had duly granted indemnification. I requested, as a remedial measure, that the complainant's application be reviewed and reasonable satisfaction in money provided in an amount corresponding to the case-law and usual practice in cases with similar merits.

The Minister of Labour and Social Affairs advised me that she had **reviewed** the complaint **and the complainant had been granted reasonable satisfaction**. The Ministry will proceed similarly in analogous cases in future.

B.1.3 Placement at an alcohol detention centre

A complainant was placed at an alcohol detention centre after being detained by the Police of the Czech Republic on suspicion that he had driven a motor vehicle under the influence of alcohol. When detained, the complainant was subjected to alcohol measurement by the Police, which showed 0.58 ‰; he subsequently spent almost two hours at the Police station, after which he was transported to an alcohol detention centre where he had to stay for more than eight hours. At my predecessor's instigation, the Regional Authority of the Plzeň Region as the registration authority for the alcohol detention centre performed an inspection at the facility, which confirmed that the complainant had been received and detained at the centre justifiably.

The inspection of the Regional Authority was found highly inadequate. While the authority inspected, for example, the technical equipment of the centre and the formal contents of the medical records, it had done little to assess the complainant's placement at the alcohol detention centre in substantive terms. **No professional with a medical background participated** in the inspection. If the inspection was to assess a matter based on a medical procedure, a doctor's opinion should have been sought during the inspection. The Regional Authority also made incorrect conclusions from some of the inspection findings; **the complainant had been almost sober when received at the centre** (at that time, the receiving physician had not measured the alcohol level in the body of the detained) and other statutory requirements for admitting him had not been met (when received at the centre, the complainant **had controlled his behaviour, had not threatened anyone and had not caused public nuisance**). In view of these facts, the duration of the stay at the alcohol detention centre were unjustified, given how little the complainant was intoxicated.

After I acquainted the Regional Authority with the objections to its procedure, the Regional Authority took measures consisting in a change to its guidelines and, in one case, the Regional Authority even adopted one of the proposed measures as a condition in the contracting documents for a public tender for the provision of services of an alcohol detention centre for 2015 and 2016.

B.1.4 Person detained in a police cell in degrading conditions

I was approached by a complainant requesting that I investigate the circumstances of his stay in a police cell at the Břeclav District Police Department. My investigation of the complaint covered the conditions of the stay as well as the manner in which the Regional Directorate of the Police of the South Moravian Region handled the complaint of the person detained in the cell.

After being detained by the Police of the Czech Republic, the complainant was transported for medical examination during which his underwear was damaged and the Police failed to offer him substitute clothes after placing him in the cell (although such clothes are available for this purpose), with the explanation that persons detained in a cell should explicitly request this. At night there was a **problem with access to the toilet** – it took 10 to 15 minutes before a second police officer appeared at the department to open, together with the guarding officer, the grate which separated the cell from the toilet. This was explained by security reasons, where police officers are only allowed to enter the cell with the detained person in a pair. It was also found during the investigation that the Police of the Czech Republic was unable to demonstrate that the complainant had been duly **advised** before being detained in the cell and whether a written copy of the advice had been provided to him in the cell, despite the fact that the standard procedure allows demonstrable performance of these mandatory acts. The prescribed **documentation was kept in two different versions.** It was impossible to determine when and **whether the complainant had been provided with food** and on one day the detained person had neither received, nor been offered, lunch.

I found maladministration in the procedure of the Police of the Czech Republic in that it had breached its internal rules (binding instruction of the Police President No. 159/2009, on escorts, guarding of persons and on police cells) and Act No. 273/2008 Coll., on the Police of the Czech Republic, as amended. **I found the denial of immediate access to water and toilet to be a fundamental issue** and turned directly to the Police President in this matter, requesting that he amend the binding instruction. It was recommended that the Regional Director of the Police of the South Moravian Region reinforce the guarding staff or that the grate separating the toilet from the rest of the cell be open when only one police officer is present at the relevant department of the Police of the Czech Republic or that the grate open remotely.

After the final statement was issued, the director of the Regional Directorate of the Police initiated a personal meeting where he promised remedy in all the required points, which he subsequently confirmed by his written statement on a change in the practice.

B.1.5 Rerouting transit freight transport from lower-class roads

My deputy dealt with two cases involving the use of class II roads by trucks on a mass scale. *In the first case*, truck drivers take a class II road to avoid the toll on motorway D11. A complainant approached the authorities competent to decide on traffic signs but was advised that, under the applicable legislation, a restriction could be imposed only where the detour road is in a poor technical condition. *In the second case*, traffic was even directed to a class II road by directional traffic signs (to avoid

excessive load on a section of a class I road). However, the class II road was heavily damaged and the complainants claimed that the traffic load by trucks had a damaging effect on the adjacent properties. Nevertheless, authorities were unwilling to close the road for trucks, fearing a traffic collapse on the class I road passing through the centre of the city.

In relation to the avoiding of the toll motorway, my deputy concluded that the **applicable legislation did not prevent rerouting transit freight transport from lower-class roads** and the Ministry of Transport had the same opinion. On the other hand, the traffic inspectorates of the Police of the Czech Republic, i.e. the authorities which provide their opinions on traffic signs, were of the opposite view. Based on the final statement of my deputy, where he requested that the central authorities adopt a uniform interpretation, the Directorate of the Transport Police Service of the Police Presidium concluded that traffic signs can be used to direct trucks to motorways and class I roads, even if they are toll roads. Nevertheless, the Directorate made it clear that this instrument should only be used where toll sections of motorways and class I roads are deliberately avoided.

In the second case, it was emphasised that long-distance transport should take place mainly on motorways and class I roads and if there are reasons serious enough to shift the transit of goods by trucks deliberately (using traffic signs) from a motorway or class I road to a lower-class road, such a measure can last only as long as the substitute road is capable of providing an alternative. If the structural condition of the lower-class road is such that it is no longer capable of assisting in the shift of traffic load from a motorway or class I road, administrative authorities should take a measure to change the existing (exceptional) state of affairs. In the end, the authorities satisfied the requirements of the residents living near the class II road and, **given the poor structural condition of the latter, diverted trucks back to the class I road.**

B.1.6 Floor area indexes, vegetation coefficients and changes therein in the framework of land-use planning

Civil associations (complainants) criticised the numerous changes in the floor area indexes (codes for the degree of utilisation of a territory) in the capital city of Prague, adopted in the recent years by the Municipal Authority of the Capital City of Prague with reference to Section 188 (3) of the Construction Code (Act No. 183/2006 Coll., as amended) using the procedure under the preceding Construction Act, i.e. Act No. 50/1976 Coll. So far, the recommendatory parts of land-use plans, despite their significant impact on further development of the territory in question, have been changed merely through “modifications” made by municipal authorities in a non-public procedure, without the knowledge of the affected owners and the public and without sufficient underlying documents and a possibility of checks. The Supreme Administrative Court has given a ruling on this matter (judgement of the Supreme Administrative Court of 14 November 2013, Ref. No.: 1 Aos 2/2013-135), concluding that, **substantively,** the **floor area index is to be considered a measure of general nature**.

So far, my deputy has not found a room for involvement in the matter. Nevertheless, he pointed out that in the light of the existing case-law, **the authorities concerned already understand unlawfulness of the procedures followed so far**

in the adoption of changes in the “recommendatory parts” of land-use plans and are developing activities aimed at resolving the situation. Municipalities can **prevent mass-scale cancellation of changes (modifications) of the “recommendatory parts”** of land-use plans (adopted under Section 188 (3), the second and third sentences, of the Construction Code) **by discussing them as measures of general nature in the** regime of approval of changes in the land-use plan and by temporarily not applying them in decision-making on the territory.

To be specific, in the capital city of Prague, the process of “obtaining draft modifications of the land-use plan for the settlement of the capital city of Prague” has been initiated, covering specifically modifications relating to the degree of utilisation of the territory that were adopted in the past three years. By bringing forward these modifications in the proper form of measures of a general nature, the capital city of Prague aims at remedying the existing state of affairs.

In comparison with the method of adoption of modifications formerly followed by the Municipal Authority of the Capital City of Prague, the present method, involving a discussion of the modifications in the framework of the land-use planning processes under the Construction Code, completed by a decision of the municipal board, provides room for exercising the rights and legally protected interests of the affected owners and the public. In addition, an output taking the form of measure of a general nature **leaves open the possibility of further defence** under the Code of Administrative Procedure or the Code of Administrative Justice.

B.2 Supervision over restrictions of personal freedom

Within supervision over restrictions of personal freedom, my co-workers made a total of **six systematic visits to facilities** in the second quarter of 2014. Two of the visits took place in facilities that provide their clients with “day-long care” in addition to accommodation. The persons in these facilities are in fact dependent on care which, in my opinion, has the characteristics of a social service which is commonly provided in residential social services facilities.

Two visits were made to facilities for institutional and protective education. Both were children’s homes with schools. Two pilot visits were made in prisons, whereby the authorised employees of the Office of the Public Defender of Rights started an extensive series of visits to prisons. Visits to prisons will take place also in the upcoming quarters.

In connection with a visit to an integrated services centre for the family and household in Kunštát na Moravě, **I exercised my power to impose a sanction**. I informed the public about my findings at a press conference on 24 June 2014. **I evaluated seven visits to unauthorised facilities providing social services and found maladministration** concerning inexpert care, clients restricted in their movement, discretionary administration of medication by the staff, medical acts performed by unqualified personnel and a number of other shortcomings that in their sum represent ill-treatment.

Accommodation facilities providing care without the mandatory authorisation to provide social services (registration) pose an increased risk to the life, health and human dignity of the elderly or other people dependent on care. **The quality of the**

services and care provided in them **is not bound by mandatory quality standards** and there is a general lack of qualified personnel. It therefore cannot be ruled out that clients dependent on assistance and care can be exposed to ill-treatment in these facilities.

The unauthorised facilities visited are just a fragment of the facilities of this type operated in the Czech Republic. It is in fact impossible to find out how many of them exist. Such facilities present themselves as homes, hotels or guest houses providing above-standard care or assistance. Since they have not even applied for registration to provide social services, **authorities are not aware of their existence.** Thus, the care for the clients is beyond any public control in the area of provision of social and healthcare services and even the fundamental rights and fulfilment of the essential needs cannot be guaranteed to clients. Inspections are usually carried out only when authorities become aware of the existence of a facility based on a complaint or a case of a serious threat to health.

The visits to the unauthorised facilities have confirmed that instead of specific care and protection on grounds of health condition and loss of self-reliance, clients are exposed to unacceptable restraining and organisational measures. In addition, inexpert and restrictive procedures followed by the personnel may, or even do, result in a harm to the clients. Thus, clients are exposed to ill-treatment.

In my opinion, the **reason** why this kind of business is developing is the **lack of social services and a high demand for them**. A network of assistance to the elderly, those with impaired self-reliance and the ill is underdeveloped. They cannot remain, and receive assistance and care, in their natural environment. The capacities of registered social facilities are also limited. Families that can no longer care for their loved ones find a **solution** to their often **impossible situation** by placing the relatives in unauthorised facilities.

These facilities usually hold just a trade licence for the provision of accommodation, catering, and sometimes for the provision of services for the family. This does not authorise them to provide social care and healthcare to persons dependent on care. During the visits, I encountered even cases where an accommodation facility combined the trade licence with the authorisation under Act No. 106/2008 Coll., on social services, as amended, for the provision of individual services (e.g. personal assistance, day care, etc.). If a different service is thus simulated (retirement home, special regime home), this represents circumvention of law and the facility avoids the duty to observe the quality of care standards.

It is the task of the **regional authorities to penalise illegal activities** in the area of social and healthcare services. They should verify any suspected or notified illegal facilities and conduct administrative offence proceedings with the operator. An administrative offence is punishable by a fine of up to CZK 1,000,000.00, even repeatedly, if the operator continues the activity. In that case, the unauthorised activity may grow into **the crime of unauthorised operation of business,** which must be reported to the Police of the Czech Republic and the State Attorney's Office. Any person who has knowledge of a residential care facility providing care without authorisation for the provision of social services may contact a regional authority.

I am competent to deal with the procedure followed by a regional authority in the proceedings on administrative offence of unauthorised provision of social services. I am already monitoring the procedure followed by several such authorities. I have found that the **practice of regional authorities varies greatly and I have therefore called on the Ministry of Labour and Social Affairs to provide guidelines to administrative authorities.** The Ministry of Labour and Social Affairs has promised to issue guidelines for administrative punishment by the end of August 2014.

B.3 Protection against discrimination

B.3.1 Unequal access to employment on alleged discriminatory grounds

A complainant was attracted by an advertisement published on a website, providing information about a selection procedure for the position of HR officer, for which the complainant was qualified. She therefore responded to the advertisement by sending her curriculum vitae without indicating her age. She was subsequently **requested** by an agency employee **to supplement information about age**. The complainant **found the conduct of the agency discriminatory** and she therefore approached my predecessor, who initiated an investigation of the matter.

During the investigation, the agency insisted that it had included the complainant's CV in its database of job seekers. However, the documents presented showed that the **curriculum vitae had been included in the database with a fictitious age** because the electronic database apparently did not make it possible to enter a new record without age. The complainant was 38 years old according to the record, while in fact she had reached 57 years of age. The agency had not been able to ascertain or verify this fact because the communication between the complainant and the agency had ended soon after the initial e-mail communication. **The complainant was not invited to the selection procedure for the position she had applied for and for any later vacancy.** She ultimately found a new employment on her own.

After considering all circumstances, I concluded that **discrimination could not be demonstrated in this particular case**. On the other hand, **I drew the following general conclusions** from the case.

From the viewpoint of the Anti-Discrimination Act, the **activities of an HR agency or employment agency** which offers job seekers placement services should be regarded as **falling within the area of access to employment and occupation** (Section 1 (1)(a) and (b) of the Anti-Discrimination Act (Act No. 198/2009 Coll., as amended) and Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation on grounds of belief, disability, age or sexual orientation).

If an agency fails to include a job seeker in its database because the job seeker refuses to provide information about his/her age, this constitutes discrimination on alleged grounds of age (Section 2 (5) of the Anti-Discrimination Act).

If an agency pre-selects job seekers using the age criterion without inviting a job seeker to the selection procedure or interview with a potential employer on this

ground, such conduct amounts to direct discrimination on grounds of age in access to employment and occupation.

If an agency is forced to select job seekers by age, being asked to do so by a potential employer, the employer is guilty of inciting discrimination (Section 4 (5) of the Anti-Discrimination Act).

B.3.2 Cancellation of a selection procedure for the assignment of a municipal apartment

My predecessor was approached by a complainant who had repeatedly – and unsuccessfully – participated in a **selection procedure** for lease of a municipal apartment. The complainant had met all the conditions of the publicly announced selection procedure (provided a security deposited and had no debt towards the municipality at the time of the selection procedure) and **objectively won** the procedure as the highest bidder. Yet the **lease agreement was not entered into** because the municipal council had subsequently cancelled the selection procedure for that apartment through a resolution.

The reason for the cancellation of the selection procedure had not been discernible from the resolution of the municipal council. The municipality had not disclosed the reason even when questioned repeatedly (first by the complainant and later by the Defender). The municipal council had not justified its position and indeed refused to do so. Considering that the complainant is a Romani woman and, moreover, she lives in the same household with her disabled son, there arose a **suspicion of discrimination in access to housing on grounds of ethnicity** and perhaps also on grounds of disability (multiple discrimination). However, in a situation where the municipality did enter into a lease agreement with another winner of a selection procedure for another apartment, the suspected unequal treatment can only be rebutted in litigation.

If a person with a disability shares the same household with the applicant before the application for the apartment is lodged, or if such persons show the intention to live together in the apartment being applied for, the disabled person should be regarded, for these purposes, as a person assessed jointly with the applicant provided that (s)he is the applicant's close person or a family member (typically parents and children). In that case, it is always necessary to ask, in relation to the non-assignment of an apartment, whether discrimination by association could be concerned.

The selection procedure for the lease agreement for the municipal apartment was cancelled without a reason only in relation to an applicant who met all the conditions of the selection procedure, was the highest bidder for the rent, won the selection procedure and satisfied a discrimination ground prohibited by law (ethnicity); these facts alone are sufficient for claiming unequal treatment in access to housing and transfer of the onus of proof in potential litigation.

While in the municipality refused the allegation of racial discrimination in this particular case, it again adjourned a selection procedure for the lease of a municipal apartment for which the complainant again applied. I have therefore asked the Pro bono aliance association to arrange for a legal counsel who would represent the complainant. The complainant is prepared to **enforce her rights in court**.

B.3.3 Impossibility of child adoption due to the conclusion of registered partnership

Based on a complaint, I investigated the procedure followed by the Prague 13 Municipal Ward (hereinafter the "municipal ward") and the Municipal Authority of the Capital City of Prague (hereinafter the "municipal authority") when deciding on a complainant's application for inclusion in the records of applicants qualifying as future adopters.

The complainant lives in registered partnership, for which reason the municipal ward discontinued the proceedings due to manifest inadmissibility based on Section 800 of the Civil Code, according to which only spouses or a single spouse may become adopters. In the complainant's opinion, the aforesaid provision is not applicable to the situation at hand; he noted that the municipal ward had in fact made the decision on the basis of Section 13 (2) of Act No. 115/2006 Coll., on registered partnership and on amendment to some related laws, as amended[1]. The municipal authority as the appellate body dismissed the complainant's appeal and upheld the resolution of the municipal ward. According to the municipal authority, the mediation of adoption is primarily governed by the best interest of the child, rather than adult applicants. It stated in respect of the claimed defective justification that failure to mention Section 13 (2) of the Registered Partnership Act in the first-instance decision could by no means reverse the fact that the complainant's application is manifestly inadmissible.

When investigating the complaint, I based my considerations on the fact that the cited **Section 13 (2) of the Registered Partnership Act prohibits the adoption** of a child **by registered partners** without any exception. In this situation, a solution to the question of whether adoption by registered partners is possible must be sought in the constitutional-law aspects of the case. I therefore concentrated on assessment of the question whether the prohibition of adoption by a registered partner had an **objective and reasonable ground** and whether the **measure** adopted **was appropriate for this objective**. The findings I have reached suggest that the aspects of the institute of registered partnership and adoption by registered partners are addressed mainly with prejudice and false impressions. Having found no objective and rational reason for denying registered partners the possibility of adoption, including among the claims of those opposing adoption by registered partners, **I consider that Section 13 (2) of the Registered Partnership Act is unconstitutional**.

I relied in this respect, amongst other things, on the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the "Convention"), [2] the observance of which is supervised by the European Court of Human Rights (hereinafter the "ECHR"). In the case subject to my investigation, the right concerned was the right to family life guaranteed by Art. 8 of the Convention.

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1 "A lasting partnership prevents either of the partners from becoming a child adopter."

2 Memorandum of the Federal Ministry of Foreign Affairs No. 209/1992 Coll., on the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended

Nevertheless, the above provision does not give rise to the right to found a family and to adopt a child. On the other hand, it guarantees the right to establish and develop a relationship with other human beings, the right to development of one's personality and right to self-determination. The possibility, or impossibility, to adopt a child undoubtedly falls within the sphere of the *right to establish and develop a relationship with other human beings*, and it is therefore necessary to examine the conditions of access to adoption also from the viewpoint of Art. 14 of the Convention (right to equal treatment). The Court has already dealt with a similar problem in Fretté v. France[3] and E. B. v. France[4], concluding that the **sexual orientation of an applicant** for adoption **cannot be regarded as a legitimate ground** for restricting his/her right to develop a relationship with a child suitable for adoption.

Considering that **Section 13 (2) of the Registered Partnership Act excludes registered partners** from child adoption **merely on grounds of their sexual orientation**, I am of the opinion that this provision **contravenes the Convention** and the **complainant's right to equal treatment** declared in Article 14 of the Convention **was violated** on the basis of the said provision.

As mentioned above, the administrative authorities did not comply with the complainant's application due to its manifest inadmissibility, on the basis of the above-cited provision of the Registered Partnership Act. I concluded in my investigation that administrative authorities cannot be criticised for unlawfulness and violation of the principles of good governance when they discontinued the proceedings without assessing the substance of the application, because the **legislation** did **not allow them to proceed otherwise**. However, I still believe that the **complainant's right to equal treatment was violated**. The complainant was not allowed to enjoy equal treatment in the matter of child adoption because he was deprived of the possibility of adopting a child due to his sexual orientation without objective assessment of his suitability as adopter. I concluded that **Section 13 (2) of the Registered Partnership Act** is at variance with the Charter of Fundamental Rights and Freedoms and the Convention for the Protection of Human Rights and Fundamental Freedoms and should be **repealed as unconstitutional**.

I **recommended** that the complainant defend his rights through an administrative action with the Municipal Court in Prague or by lodging a **constitutional complaint** combined with a motion for a **repeal of Section 13 (2) of the Registered Partnership Act**. The complainant subsequently informed me that he had lodged an administrative action with the Municipal Court in Prague. The action also contains a procedural motion requesting that the court stay the proceedings on the action and submit to the Constitutional Court an assessment of compliance of the relevant provision of the Registered Partnership Act with constitutional order.

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3 Ruling of the ECHR in Fretté v. France of 26 February 2002, complaint No. 36515/997

4 Ruling of the ECHR in E.B. v. France of 22 January 2008, complaint No. 43546/02

C - Legislative recommendations and special powers of the Defender

C.1.1 Comments on an amendment to the Schools Act

I have pointed out the considerable **delay of the submitter with the implementation of the legislative measures** contained in the Action Plan for enforcement of the judgement of the European Court of Human Rights in D. H. and others v. the Czech Republic of 13 November 2007, No. 57325/00, an updated version of which was discussed on from 3 to 5 June 2014 in the Committee of Ministers of the Council of Europe. This includes especially supervisory mechanisms (measure D of the Action Plan) and pre-school education (measure F of the Action Plan) that were reported to the Council of Europe as implemented by 1 January 2016. However, the presented **draft postpones the change** in supervisory mechanisms to 1 January 2017 and the **issue of mandatory pre-school education** lasting one year before commencement of compulsory education **are not contained in it at all**. I consider this approach extremely inappropriate, particularly taking into account that both materials (draft amendment to Act No. 561/2004 Coll., the Schools Act, as amended, and an updated version of the plan's implementation) were prepared in parallel. This delay will worsen the position of the Czech Republic in the field of international protection of human rights. I recommended that the submitter reconsider this aspect and accelerate performance of the plan in accordance with the original commitment.

The new **Government confirmed the commitment** to introduce the last year of pre-school education as compulsory **in the coalition agreement and in its policy statement**. Instead, the submitter made a concession by expanding the capacity of preparatory classes in elementary schools. This measure is insufficient in the context of enforcement of the above judgement because Romani children (to the extent that their parents are aware of the importance of pre-school education) already attend the "zero" grades. Stipulating the duty to attend a kindergarten would be a harsh measure aimed at balancing disadvantages and implementation of the principle of equal opportunities, with a significant positive effect on children from non-stimulating environments. It is simultaneously necessary to regulate the associated economic aspects because such a compulsory year may be a financial burden for most socially disadvantaged families, notwithstanding that the education as such would be not be paid for. It is hence necessary, after the discussions lasting several years, that the submitter finally anchor these aspects in the amendment.

C.1.2 Comments on amendment to the Act on Environmental Impact Assessment

I pointed out within the commentary procedure on the amendment to Act No. 100/2001 Coll., on environmental impact assessment, as amended (hereinafter also the "EIA Act"), that, in my opinion, the proposed **amendment to the EIA Act represents a shift in the concept** of the procedure of environmental impact assessment of projects (EIA) which is so fundamental in our legal environment that we can hardly foresee all the consequences it may bring. The draft legislation introduces **new types of administrative acts and processes** in the established practice, which may also generally obscure permit procedures and bring insecurity to all the parties involved. Application of the general instruments of the Code of

Administrative Procedure on the rather specific processes and outputs of environmental impact assessment may also prove problematic. It will also be difficult to formulate the conditions of a "binding" EIA opinion so that they can fully stand up in the following procedures envisaged by the law ("binding conditions"). In this respect, tough "battles" for the wording and actual meaning (interpretation) of the conditions can be expected in all stages of the negotiation of a given project (between the competent EIA authorities and the authorities concerned, which defend interests under the laws on individual environmental spheres, and even more importantly, between administrative authorities and the affected public), which may ultimately paralyse the whole permit procedure. I am of the opinion that the draft amendment has not sufficiently acknowledged the possible occurrence of situations that can be described as a "conflict of conditions" (between the conditions set by the binding EIA opinion and the conditions of the authorities concerned in their "follow-up" binding opinions).

It is worth pointing out that there **already existed a substantial body of case-law** on the existing EIA legislation, which became a guideline for the procedures followed by the authorities, investors and the public concerned. This is well evidenced by the explanatory memorandum on the draft amendment to the EIA Act with ample references to case-law. Where the procedures followed by authorities under the existing EIA legislation were still deemed unsatisfactory, **it should be considered whether the problem lies in the poor quality of all decision-making processes, including failure to ensure a timely and effective review, rather than in the existing legislation.** In this respect, I have noted that the current draft amendment to the EIA Act aspires to resolve this situation by **stipulating an automatic suspensory effect of actions** against decisions rendered in follow-up proceedings, as well as by stipulating an "obstacle to the issue and enforcement of additional administrative decisions". Although the submitter has resorted to a rather radical solution in this respect, it is undoubtedly an **important step in the right direction**, as far as it ensures a full review of approval processes before the project is actually implemented (which I have found to be a persisting problem).

The time required for newly set processes is also uncertain. It must be expected that in the Czech legal environment everything that can be contested will be contested by all conceivable means (including, for example, the binding verification opinion), which may bring about a further increase in administrative work. While the draft anticipates that the staff of the competent EIA bodies will be increased, impacts on the entire structure of the involved governmental bodies in terms of **increasing administrative demands and possible pitfalls of application** may have been somewhat underestimated. The regulation is likely to add administrative work to a wide range of other bodies exercising state administration in individual spheres (obligation of the bodies competent to conduct follow-up proceedings to provide information, including the provision of preliminary information, settlement of underlying documents and comments, etc.).

C.1.3 Comments on the draft substantive intent of the Act on Public Guardianship, regulation of some aspects related to support measures in the case of reduced capacity of an adult to make juridical acts

In connection with the commentary procedure concerning the above draft, I recommended **reassessment of the concept of the institute of special recipient of pensions and benefits** in social security law and the possibility of connecting it

with support measures under the Civil Code. In fact, the determination of a special recipient of benefits is a greater interference with the rights of a person than in case of assistance in decision-making. There is no reason why **the basic principles of the exercise of guardianship** should not apply to special recipients. **It is important to provide more specific regulation of the conditions applicable to the exercise of the institute of special recipient,** determine the special recipient's rights and obligations, set a system of responsibilities of such persons and perhaps extend inspection possibilities (the obligation of the authority which appointed the recipient not to ignore, for example, information about inactivity or abuse of the position of special recipient and the obligation of social workers to address this subject). I have therefore proposed that the following regulations should be expressly indicated in the draft as regulations suitable for amendment in connection with the adoption of the Act on Guardianship: Act No. 155/1995 Coll., on pension insurance, as amended; Act No. 111/2006 Coll., on assistance in material need; Act No. 117/1995 Coll., on state social assistance; Act No. 582/1991 Coll., on organisation andimplementation of social security.

Furthermore, I proposed that **Act No. 133/2000 Coll., on population records and birth identification numbers** should be **amended** so as to **supplement the information system of the population records** (Section 3 (3)(i)) with the **scope of limitation of legal capacity**. I am making this proposal for practical reasons related to the exercise of the voting right as currently stipulated by electoral laws. For the voting right to be exercised by persons with limited legal capacity, it must be specified in the information system of the population records whether the legal capacity of the person concerned is also limited in relation to the exercise of the voting right (electoral rolls provide only general information about limitation of legal capacity and not its scope; here are the seeds of future problems during elections).

The limitation of exercise of the voting right in persons with limited legal capacity is a separate problem related to the exercise of political rights of persons with disabilities and it would be appropriate to **tackle and examine it comprehensively** in connection with the work on the Act on Guardianship.

I have expressed **disagreement** with the recommendation of the submitter of the draft to amend Act No. 372/2011 Coll., on healthcare services, as amended, to the effect that **the right of the guardian to peruse the medical records of the person subject to guardianship be limited** to a mere access to the part of the records which is related to the current operation. I understand that there is an interest in fulfilment of the right of persons subject to guardianship to privacy; at the same time, however, I have identified a great need for a comprehensive defence of their interest and protection against possible ill-treatment by service providers and maladministration by authorities. The perusal of documents is required not just in connection with the granting of consent to an operation or hospitalisation. Medical records often need to perused also when defending other interests of the person subject to guardianship, e.g. to make responsible decisions regarding the lodging of complaints about the provision of healthcare (at the providers of medical and social services), in assessment whether disability pension should be granted, etc. It is not clear what scope of access to medical records would be available in these cases. It would be very complicated to delimit the possibility of perusing medical records and there is a risk related to the possibility that the medical personnel fails to select all relevant parts of the documentation (because there is the potentiality of a conflict of interest, particularly where complaints are concerned).

C.1.4 Proceedings concerning the repeal of a part of Section 6i (1) of Act No. 234/2013 Coll., amending the Act on Fuels and Petrol Stations and the Act on Business Trade

In November 2013, the Public Defender of Rights as the enjoined party in proceedings before the Constitutional Court joined the proposal of a group of senators of the Parliament of the Czech Republic for the repealing of a part of the Act on Fuels and Act on Business Trade, specifically omission of the compulsory security deposit of CZK 20,000,000.00 which must be provided by a distributor of fuels in the process of registration.

The Defender provided an opinion stating that the relevant **provision of the Act was not appropriate from the viewpoint of the principles of the rule of law**. A fundamental right or basic freedom may be limited insofar as there is an exceptionally strong and justified public interest, and even so the substance and sense of the fundamental right must be protected as far as possible. In this case, the **negative consequences** of the limitation of a fundamental right **outweigh the positives** followed by public interest. The Defender further stated that the **security deposit** set by the legislature in the given amount **cannot stand up the test of proportionality** specified in the case-law of the Constitutional Court in view of its indiscriminate nature, amongst other aspects.

On 26 May 2014, the **Constitutional Court** declared its judgement File No.: Pl. ÚS 44/13, in which it **identified with the Defender's arguments** and repealed the relevant provisions of the contested Act as of 30 June 2015.

D - Other activities

D.1.1 Meetings with Ministers and their Deputies

On 28 May 2014, I met with Mgr. Hanzlíková, the **Deputy Minister of Labour and Social affairs**. The meeting was concerned, amongst other things, with the aspects of perusal of the "Om" files by guardians *ad litem*. The existing wording of Section 55 (5) of Act No. 359/1999 Coll., on social and legal protection of children, as amended, adversely affects attorneys-at-law and other third parties (for example, employees of non-profit organisations) appointed by the court as guardians of minors in proceedings on matters concerning the care for minors by courts. If a minor's guardian *ad litem* is not a body of social and legal protection of children, he/she cannot peruse the file documents kept on the minor, which endangers the effective protection of the minor's rights. This was one of the reasons why I proposed in the 2013 Report on the Activities of the Public Defender of Rights that the Chamber of Deputies of the Parliament of the Czech Republic amend the relevant provision. The meeting was also concerned with the course of inspections of the provision of social and legal protection of children at authorised persons, methodological assistance to bodies of social and legal protection of children in work with clients using dependency producing substances, sufficient network of services for children with autism, foster care allowances for married couples.

On 23 June 2014, I met with the **Deputy Ministers of Transport,** Mgr. Rudolecký, Ing. Dobeš, and the senior director of the Legislative and Legal Section, Mgr. Kopřiva. The meeting concentrated mainly on the procedure of the Ministry of Transport under Act No 82/1999 Coll., on liability for damage caused during the

exercise of public authority by a decision or incorrect official procedure, as amended, in settlement of claims based on unreasonable length of administrative proceedings held under Act No. 13/1997 Coll., on roads, as amended, and failure to administer applications for compensation at the Operations Department within the set deadlines. The meeting also addressed the “hidden toll” on forest roads (permits for entry to the forest) and legislative work on the amendment to Act No. 49/1997 Coll., on civil aviation, as amended, in the part concerned with the operation of airports, airport properties and structures (the aspects of the settlement of airport properties owned by persons other than the operator of the airport).

D.1.2 The Together for Good Administration project

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

The main objective of the project is to identify opportunities for **increasing effectiveness of the activities of the Office of the Public Defender of Rights** through international co-operation. For more information about the activities performed in the framework of the project in the second quarter of 2014, see the annex to this Report.

Brno, 23 July 2014

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Public Defender of Rights