Veřejný ochránce práv
OMBUDSMAN

Report pursuant to Section 24

of Act No. 349/1999 Coll., on the Public Defender of Rights, as amended (hereinafter also the "Public Defender of Rights Act")

on individual cases where adequate remedial measures were not ensured even through the procedure pursuant to Section 20

In this Report, I inform the Chamber of Deputies of the Parliament of the Czech Republic of cases where adequate remedy was not ensured even by means of notifying the superior authority or the Government or by informing the public of the findings made in inquiries.

Police of the Czech Republic failed to return a thing surrendered on the basis of a request (File No. 5069/2014/VOP/MK)

The complainant asked for an inquiry into the procedure of the Police of the Czech Republic, the Nýřany District Directorate (hereinafter also the "Police"). The Police of the Czech Republic failed to return copper wires that he had surrendered to them based on a request.

The Police requested the complainant to surrender approx. 22 metres of copper wires that he was taking to a collection point, according to his statement. The complainant accommodated the request and surrendered the wires to the Police. However, it was not proven in the inquiry that followed that the complainant had stolen the wires and neither administrative nor criminal proceedings were pursued against him. The complainant asked for the wires to be returned, but since he failed to prove to the Police that he owned them (it could not be proven that he had acquired them in the manner he asserted to the Police), the Police considered that the wires had been found. They handed the wires "found" over to the competent municipal authority.

Within my inquiry, I reached the conclusion that the wires (surrendered thing) should have been returned to the complainant. I concluded that since it was impossible to prove that the wires were owned by the complainant and, simultaneously, it was by no means possible to prove that he had obtained them by unlawful conduct and no one else claimed the wires, the Police should not have considered the wires found, but should have rather returned them to the person who had surrendered them.

The Head of the Regional Directorate of the Police of the Plzeň Region did not concur with my position and, therefore, I subsequently issued a final opinion.

The currently applicable legal regulations clearly stipulate that **if a thing is not declared forfeited or confiscated, it must be returned, without delay, to the person who surrendered it or from whom it was taken.** Since this precludes further occurrences of similar errors, I merely asked the police to remedy the situation by apologising to the complainant for the incorrect procedure.

As I was unable to achieve this remedy even after informing the Police President, I am now informing the Chamber of Deputies of the Parliament of the Czech Republic.

The Police of the Czech Republic insisted on a response to notice of infraction (File No. 5656/2014/VOP/MK)

I was approached by a complainant who objected to the procedure taken by the Police of the Czech Republic (hereinafter also the "Police") within a road safety campaign. The complainant was caught **crossing the road near a pedestrian crossing, but outside it, at a time when the "go" signal was active** (the complainant crossed between cars halted by the "stop" signal). On request of a police officer, he proved his identity through his identity card and the police officer offered him the possibility of resolving the matter in summary proceedings with a fine of CZK 100. The complainant disagreed with this solution and the police officer requested that he follow him to the police car.

After walking the distance of approximately 100 metres, the complainant asked how much further he would have to go; the police officer told him that his car was about 10 minutes away. The complainant then refused to continue. However, the police officer insisted that the complainant continue with him in order to resolve the matter. **By resolving the matter, the police officer meant enabling the complainant to provide a statement (response) on the notice of infraction.** Due to the increasing passive resistance on the part of the complainant, who refused to continue walking, the police officers first warned him by invoking the law and subsequently used coercive measures. This caused injury to the complainant.

I launched an inquiry into the case and came to the conclusion that the police officers made an error consisting in an unlawful invocation of the law and the use of coercive measures. **In principle, the police officers used coercive measures to force the complainant to exercise his right to provide a statement** on the notice of infraction, even though this was not his duty. The police statement provided later that physical presence of the complainant at the police car was necessitated by the police officers' duty to carry out a search in the records was, in my opinion based on other facts, untenable and insufficient. Indeed, persons who, in similar situations in the past, committed infractions and agreed to pay a summary fine were not subsequently forced to walk anywhere; the police officers made all the necessary verifications through their portable radios. **Therefore, if police officers intend to restrict the freedom of persons** who have already proven their identity through their identity card (i.e. the manner anticipated by the law), **they may only do so in accordance with the principle of proportionality** pursuant to Section 11 of the Police Act.

The search in the records itself, which is required by the internal rules of the Police of the Czech Republic, is not problematic unless it represents unreasonable burden to the persons who are subject to it.

Another error was made by the head of the Regional Police Directorate in the Plzeň Region who qualified the complaint against the procedure of the police officers as groundless.

As a remedy, I especially proposed making systemic provisions to prevent unreasonable and unnecessary burdening of persons in the future, when police officers make searches in the information systems as part of verification of a person's identity.

Since the head of the Regional Police Directorate failed to implement the remedial measures I proposed, I exercised my punitive powers and informed the Police President of the case. As not even this procedure led to a remedy in the given case, I am hereby informing the Chamber of Deputies of the Parliament of the Czech Republic of this matter.

The General Financial Directorate failed to respect the principle of rule of law stipulating that in case of ambiguities, the law should be interpreted for the benefit of its addressees, while the Directorate favoured the State in the application of the Subsidised Energy Sources Act (File No. 5523/2012/VOP/JHO)

The complainant as an operator of a small photovoltaic plant with peak power output of 28 kW located **not** on a roof or wall of a building complained against the procedure of the General Financial Directorate in the **application of the Subsidised Energy Sources Act**. He believed than on the basis of the line of interpretation used by the General Financial Directorate, he was required, **without justification**, to pay a levy for the electricity produced between 30 May and 31 December 2012. In this period, then-valid provisions of Act No. 165/2012 Coll., on subsidised energy sources, exempted him from the levies. Many other operators of small photovoltaic plants may have encountered similar problems. The procedure of the General Financial Directorate was also approved by the Ministry of Finance, which the General Directorate asked for opinion.

My deputy came to the conclusion that the opinion of the General Financial Directorate was not correct and that the problem was caused by the lack of clarity of the legal regulation.

Until 25 May 2012, only producers operating a photovoltaic plant of peak power output below 30 kW **located on the roof or a wall of a building were exempt from the levies**. After this date, the legal regulation became ambiguous due to the new Act (No. 165/2012 Coll.), which came into effect gradually.

The provision **extending the exemption from levies also to small photovoltaic plants not located on the roofs or walls of buildings** came already into effect on 30 May 2012. However, the former legal regulation containing the more

narrowly defined exemption remained in effect (the legislators intended to repeal the original exemption, but failed to do so formally). Therefore, since 30 May 2012 there were two parallel regulations stipulating different scopes of the exemption.

In the opinion of my deputy, the rule of law entails the duty to formulate the letter of the law as clearly as possible; if this is not the case, the law must not be interpreted to the detriment of its addressees. The duty to apply the broader exemption can also be inferred from the interpretation principle of *lex posterior derogat priori* (i.e., more recent law prevails over earlier law). **Therefore, beginning on 30 May 2012, all operators of photovoltaic plants with the maximum peak power output below 30 kW should have been exempted from levies**, regardless of the positioning of the power plant. Incidentally, this conclusion also follows from the judgement of the Supreme Administrative Court of 7 November 2013, File No. 9 Afs 25/2013 (even though the court based it on different legal grounds).

Neither the General Financial Directorate nor the Ministry of Finance agree with my deputy's conclusion and insist that the procedure of the General Financial Directorate is in accordance with the law. Since my deputy **could not achieve a remedy, not even through publication of the case in the media** on 8 April 2015, I am hereby informing the Chamber of Deputies of the Parliament of the Czech Republic of this fact.

The Hostivice construction authority has been repeatedly breaching the rules, thus enabling unauthorised construction in the area (File No. 8123/2012/VOP/JCZ).

This is not the first time this case has been brought forward. The Public Defender of Rights (then Deputy Defender) has criticised the Authority for its failure to observe the deadlines for issuing decisions and other acts within proceedings, and also for its failure to keep proper file records, to respond to the citizens' applications and complaints, etc. **The as of yet unresolved case of unauthorised disposal of excavated soil, disguised as a landfill re-cultivation, in the municipalities of Chrášťany and Chýně u Prahy was especially serious.**

The situation has not improved to date. My deputy's inquiry found **continuing maladministration. The construction authority is inactive and there are long delays in proceedings concerning the developers' applications.** The developers lack any kind of legal certainty as to when and how their matters will be resolved. This is negatively reflected in the increased rate of unauthorised construction, since the developers are forced, by the authority's inactivity as well as e.g. their contractual obligations, to initiate construction without having the necessary permit.

The problems concerning the Hostivice construction authority are not limited solely to complicated construction proceedings, but also concern simpler structures or construction modifications, which my deputy illustrated on the case of a complainant who had unsuccessfully been trying to obtain permit for a superstructure, construction modifications of a barn and construction of a garden shed in the municipality of Středokluky since 2012. He also petitioned the superior Regional Authority of the Central Bohemia Region, without success. Only the

intervention of the Deputy Public Defender of Rights and local inquiry directly at the office of the construction authority led to a certain progress in the case.

My deputy's inquiry confirmed the **long-term unlawful inactivity on the part of the Hostivice construction authority (particularly Ing. Vojtěch Budil).** He recommended the Hostivice municipal authority, and specifically the construction authority, to immediately complete and resolve all proceedings relating to relevant construction projects by issuing appropriate decisions. He also asked the Regional Authority to ensure strict supervision and adoption of measures that would prevent re-occurrence of the shortcomings (chaotic file records, the lack of proper file overviews, etc.). The authorities promised a remedy and some of the complainant's matters were thus indeed resolved. However, the construction authority subsequently returned to its inactivity and again started ignoring applications and complaints, etc.

Pursuant to Section 20 (2) of the Public Defender of Rights Act, if an authority fails to adopt remedies, the Defender may inform the public, including the publication of the full names of persons acting on behalf of the erring authority. In the case of continued inactivity of the Hostivice construction authority, I not only made the case public through the media, but I am also hereby informing the Chamber of Deputies of the Parliament of the Czech Republic of this fact.

The Ministry of Justice did not adopt sufficient measures to exclude the risk of issuing untruthful extracts from the Criminal Records (File No. 5847/2012/VOP/MV)

In 2012, based on the information from the media and complains of employees of institutions which serve as public administration contact points, my predecessor, JUDr. Pavel Varvařovský, acting on his own initiative, launched an inquiry into a case of verification of the details concerning surname at birth and applications for extracts from the Criminal Records.

On the basis of an amendment to the Identity Card Act, the surname at birth is not included in the identity card effective from 1 January 2012. The employees of public administration contact points thus required that citizens requesting extracts from the Criminal Records produce their birth certificates or extracts from the information system of the records of inhabitants to prove their surname at birth. The problem of burdening the applicants was resolved in 2013 by enabling the employee of the given public administration contact point to verify, with consent of the applicant, the details concerning his/her surname at birth in the information system of the records of inhabitants.

However, it turned out during the inquiry that prior to 1 January 2014, the legislation had not defined "surname at birth". The criminal-law practice always construed surname at birth as an unchangeable constant, i.e. as the surname a person had at the moment of birth, while the Ministry of the Interior understands it as the surname indicated in the current birth certificate. However, neither the identity card nor the birth certificate serve as a proof of the surname at birth of a citizen who obtained the permit to change his/her surname. This means that the employees of public administration contact points could not and still cannot reliably verify the

correctness of the details on surname at birth in the application for an extract from the Criminal Records (neither from the birth certificates nor from identity cards issued prior to 1 January 2012).

In 2013, the director of the Criminal Records stated in his statement on the Defender's report that in respect of the previously demonstrated duplicity of birth identification numbers, entries in the information system of the Criminal Records should combine the detail on surname at birth with the birth identification number for search purposes. He stressed the importance of establishing a new constant replacing the current "surname at birth", especially in case of persons who have not been assigned a birth identification number.

In 2014, the director of the Criminal Records mentioned the possibility to modify the search algorithms so that the Criminal Records could verify the detail on surname at birth together with details on other surnames included in the information systems with respect to a certain person. He considered the possibility of issuing a "clean" extract from the Criminal Records to a person with past criminal records hypothetical; nevertheless, he did not completely exclude the possibility. The director of the Criminal Records further considered it necessary to deal with the problem in co-operation with the Ministries of Justice and of the Interior and indicated that he had contacted the head of the Supervision Department of the Ministry of Justice in this matter.

Throughout 2014, my deputy tried to contact the head of the Supervision Department of the Ministry of Justice on a number of occasions, without success. **He proposed to verify, on a specific test case** of a sentenced person who subsequently obtained a permit to change his/her surname within administrative proceedings**, whether or not the entries of the information system application used by the court contained a detail on the surname at birth.** Depending on the result of such test, the **Instruction of the Ministry of Justice** promulgating the internal and office rules for district, regional and superior courts concerning the indication of surname at birth in the crime sheets of natural persons could be modified.

Since my deputy did not receive any response despite his repeated requests, I decided to inform the Minister of Justice and, simultaneously, explain the basics of the issue to the Minister of Interior in the sense of Section 20 (2) of the Public Defender of Rights Act.

The Minister of Justice expressed the opinion that a search for a sentenced person who had changed his/her surname and the subsequent verification of the details would apparently not be in accordance with the Personal Data Protection Act. However, this does not refute my belief that the Ministry is required, pursuant to Section 13 of the Personal Data Protection Act, to adopt measures ensuring that the extracts issued by the Criminal Records are truthful, where a test of correctness of such details using a specific person as an example can represent an effective measure.

The Minister of Justice further rejected the recommendation to modify the Instruction of the Ministry of Justice promulgating the internal and office rules for district, regional and superior courts. In respect of Czech nationals, he considers the

birth identification number the main verification detail preventing confusion of persons with changed surnames.

In my opinion, the minister's response in this matter is not satisfactory. The birth identification number is not an unchangeable constant – in cases stipulated by the law, the birth identification number can be changed (if the same number was assigned to more than one person, if an incorrect number was issued, or as part of adoption or sex reassignment). The minister's response also lacks any guarantee that the modification of the search algorithms of the information system of the Criminal Records will allow to combine identification details of the person who is the subject of the search with "historical details" contained in the agenda information systems from which the Criminal Records may obtain data.

As I was unable to achieve sufficient remedial measures even after informing the Minister of Justice, I am hereby informing the Chamber of Deputies of the Parliament of the Czech Republic.

In Brno, on 22 July 2015

Mgr. Anna Šabatová, Ph.D.
Public Defender of Rights