Veřejný ochránce práv
OMBUDSMAN

Information on activities for the third quarter of 2017

Pursuant to Section 24 (1)(a) of Act No. 349/1999 Coll., on the Public Defender of Rights, as amended, I hereby inform the Chamber of Deputies of the Parliament of the Czech Republic on my activities.

Contents:

A. Number of complaints, investigations

A total of **2043** complaints were received in the 3rd quarter of 2017, which is **149** less than in the same period last year. I was approached by 1401 persons in matters falling within my competence under the law, which is 89 less than in the third quarter of the last year. **Thus, the proportion of complaints falling within the Defender's mandate increased to 68%** (the figure for the last year was 66%). Most complaints were related to social security (395 complaints); many complaints (160) concerned the area of construction proceedings and spatial planning, and also the prison system, the police and the army (122).

In **70** of the complaints received, the complainants claimed unequal treatment by public administration and private individuals. The number of complaints directed against discrimination within the meaning of the Anti-Discrimination Act reached **56**. In **16** cases, we also provided information and analyses related to discrimination to international parties and national bodies.

In the third quarter, we performed **5** systematic visits to facilities where persons restricted in their freedom are or may be present. Regarding monitoring detention of foreign nationals and the performance of administrative expulsion, we monitored **1943** decisions.

B. Defender's activities

B.1 Public administration

B.1.1 Procedure of the Czech School Inspectorate within the administrative (financial) inspection (File No. 1616/2014/VOP)

I was contacted by a complainant who complained about the procedure of the Czech School Inspectorate (hereinafter the CSI) and its administrative inspection (pursuant to Section 174 (2)(e) of the Schools Act) at an elementary school. In particular, he pointed out that during the inspection, the CSI had insufficiently investigated wasting of financial means from the State budget.

In the course of my inquiry, I focused mainly on the specific concerns raised by the complainant regarding the CSI's procedure (incomplete calculation of the funds withdrawn ineffectively for the salary of a teacher who had come back after her maternity leave, and the headmaster had failed to assign direct pedagogical activities to her for the whole 2011/2012 school year, and yet she had been provided a salary; establishing liability for the error), and also on whether the CSI had forwarded its findings to the Regional Authority. Unlike the CSI, the Regional Authority is entitled not only to carry out an inspection of whether the school manages the assigned financial means well, but also, if applicable, to initiate proceedings on breach of budgetary discipline, and subsequently order the school to return the unduly withdrawn funds to the State budget.

In my enquiry, I found out that even though the CSI had criticised the headmaster for various errors (including not assigning direct pedagogical activities to the above-mentioned teacher), it had not calculated the financial means spent for the teacher's salary for the

whole period in which the means had been ineffectively withdrawn from the State budget. At the same time, the CSI had not informed the Regional Authority of all the ineffective withdrawals from the State budget identified. I therefore concluded that the CSI had acted at variance with one of the main goals of the financial inspection, i.e. ensuring the protection of public funds and economical, effective, and purposeful exercise of public administration.

The CSI admitted its errors and informed me of the measures taken to remedy them (another inspection at the school carried out with greater care, informing the directors of all the CSI inspectorates of the correct procedure in similar situations, so that the errors would not be repeated in the future; amendment to the CSI internal regulations). Since I found the measures sufficient, I closed the matter.

B.1.2 Fences around a farm as possible interference with the appearance of the landscape (File No. 4591/2015/VOP)

A married couple (hereinafter the "complainants") turned to the ombudsman in a case involving the procedure of authorities (the Nature Conservation Body, the Construction Authority) in connection to granting permission to fence a fallow deer farm on their land.

My deputy's inquiry confirmed that the complainants had started the construction works on the fences without an appropriate permit by the Construction Authority (as well as at variance with the spatial plan), which necessarily had had to lead to proceedings on removal of the structure. My deputy critically noted that the proceedings on removal of a structure had not required the spatial planning process, and if the Construction Authority had stayed the proceedings on such grounds, its procedure had been wrong. If, after the expiry of the period for which the procedure for the removal of the structure had been stayed, the proceedings remained open for a long time, then the Construction Authority erred by being inactive.

The authorities reflected the criticised shortcomings in the current procedures, took steps against the inactivity, and promised to further act in accordance with the legal requirements. According to the current reports from the authorities, the administrative proceedings regarding the construction of the fences around the farm have not been closed by a final decision, and the complainants are parties to the proceeding, with all rights following from it, which they also actively exercise. My deputy therefore closed the inquiry.

B.1.3 Indemnification for a delay of an administrative authority (File No. 6482/2014/VOP)

In 2010, the Labour Office removed the complainant from the list of persons seeking employment. The decision on the removal was subsequently upheld by the Ministry of Labour and Social Affairs. The complainant turned to court. The court then issued a decision on the date of termination of the complainant's employment. According to the court's decision, the complainant fulfilled the condition for registration in the list of persons seeking employment. The complainant therefore applied to be registered in the list of persons seeking employment. The Ministry turned his application down. It stated that the complainant had missed the deadline for filing his application.

I commenced my inquiry into the matter and found that the Ministry of Labour and Social Affairs had erred by being inactive, when it did not issue a decision on the appeal, even after the complainant's repeated request. I considered that the Ministry's procedure was at variance with law, with the basic principles of the administrative authorities' procedure and principles of good governance, particular with the principle of timeliness and responsibility. Pursuant to Act No. 82/1998 Coll., as amended, maladministration occurs, *inter alia*, if the obligation to perform an act or issue a decision within a statutory deadline or reasonable time is breached. Regarding this fact, I recommended to the complainant to apply with the Ministry of Labour and Social Affairs for appropriate satisfaction for intangible damage caused by maladministration on the Ministry's part, based on the disproportional length of the proceedings on his application for renewal of the proceedings, which the complainant did.

After more than 4 years, the Minister issued a decision on the complainant's appeal. This year, the Ministry granted the complainant satisfaction for intangible damage in the amount of CZK 66 250, which was subsequently paid to the complainant. I therefore closed the inquiry.

B.1.4 Testing of applicants for driving licenses (File No. 6391/2016/VOP)

My deputy led an inquiry regarding a Municipal Authority in the matter of complying with the statutory deadlines for conducting tests of proficiency of applicants for driving licences (the law stipulates that the test should take place no later than within 15 days of receipt of the application to register for the test).

After several letters addressed to the mayor, the matter was remedied. At first (as of 1 January 2017), the Municipal Authority hired an external examining commissioner to help, and then, on 16 February 2017, the City Council approved increasing the number of employees in the examining officers' department by one employee, which solved the situation permanently. According to a statement of the Head of the Transport Department of the Municipal Authority made by telephone, the statutory deadlines were met without any problems in the first half of 2017. Since the matter was remedied, my deputy closed the inquiry.

B.1.5 Additional record in the book of births (File No. 2027/2016/VOP)

I dealt with the case of a Vietnamese citizen born in 1997 in Mariánské Lázně, who is interested in obtaining citizenship of the Czech Republic by declaration (possible until 21 years of age). However, the Czech Registry of Births and Deaths notified her that according to the records, she has been using a wrong surname. The Czech Registry refused to accept her Vietnamese birth certificate. It recommended to the woman to contest paternity at court, which would allow her to legalise the surname used in all her documents. However, the Czech Registry of Births and Deaths' procedure was wrong, and it should have accepted the Vietnamese birth certificate.

The problem was that according to the Registry, she should have been using the surname H., while her identity documents (Vietnamese passport, residence permit card) were issued

with the surname D.The Registry did not accept her Vietnamese birth certificate issued by the Vietnamese Embassy in Prague. I recommended that the complainant should file a written request for an additional record (of determination of paternity and change of surname) in the Book of Births. The Registry replied that she had been using the surname D. unlawfully, and it was necessary to first contest paternity at court.

According to the Agreement between the Czechoslovak Socialist Republic and the Vietnamese Socialist Republic on legal cooperation in civil and criminal matters, acknowledgement, denying and determining paternity is governed by the laws of the state of which the child was a citizen at the time of birth. The Registry erred when it requested the complainant to submit a public document on denying paternity citing provisions of the Czech laws. However, the circumstances of the case did not indicate that it would be in the complainant's interest to apply Czech laws.

The Registry erred when it informed the complainant that she had been using the surname D. unlawfully. The fact that the complainant had two different surnames in her Czech documents was not a result of her mistake, but was caused by imperfection of the Czech legislation. It is very inappropriate and rude for a Czech Authority to tell a citizen of a foreign country that they have been using the surname in their passport unlawfully. Moreover, the Registry did not consider the age of the complainant.

The Registry discontinued the proceedings on the complainant's application by a resolution. However, it failed to inform the complainant of the underlying documents it used. The complainant did not file her appeal in time due to performance of her study duties. For this reason, I sent my inquiry report to the Regional Authority as an application for initiation of review proceedings.

The Regional Authority accepted the conclusion of the report and cancelled the resolution of the Registry in the review proceedings, and returned the matter for a new hearing and decision. The Registry issued a new birth certificate to the complainant stating the surname D..

B.1.6 Logarithmic equation in the school-leaving examination (File No. 3902/2016/VOP)

I was notified by the professional public that students taking their school-leaving exam in the spring of 2016 had to solve a logarithmic equation as a part of the didactic test in mathematics *["For $x \in R$, find the equation definition field (conditions) and resolve the equation: $log8 - log2 = \frac{log(2x-2)}{2}$."]*, even though such teaching material is not included in the framework educational programme for secondary vocational schools.

According to the Schools Act, the purpose of the school-leaving exam is to check whether the students reached the goals of education stipulated by the framework and school educational programmes. The framework educational programme (FEP) is a document through which the Ministry of Education, Youth and Sports defines the mandatory contents, scope and conditions of education. That is why teaching materials that are not included in the programme cannot be part of the school-leaving exam.

Only logarithmic functions and logarithms are included in the framework educational programme for vocational schools, not logarithmic equations (this is different to the FEP for academic secondary schools, in which logarithmic equations are expressly included). I therefore consider including a logarithmic equation unlawful, as it allowed to test a skill that the students of secondary vocational school do not have to have.

The Ministry did not agree with such conclusion. It believes that the FEPs only contain general expected outputs, which are then specified in more detail by other documents. Nevertheless, the Ministry is preparing a comprehensive amendment to the mathematic educational area of FEP for secondary vocational schools effective as of the 2019/2020 school year. The "logarithmic equations" teaching material will be expressly added to the FEP. For that reason, I decided not to exercise my other authorisations for immediate remedy. Until the Ministry changes the FEP for secondary vocational schools, the students taking the school-leaving exam can lodge an action against including logarithmic equations individually.

B.2 Supervision over restrictions of personal freedom and expulsion monitoring

Within the scope of prevention of ill-treatment and supervision over restrictions of personal freedom, authorised Defender's Employees performed a total of **5** systematic visits to facilities during the third quarter of 2017 and **8** cases of monitoring both administrative expulsion and expulsion based on criminal law, both by land and by air.

The Defender's Employees carried out two systematic visits to **police cells** (Kongresová, Praha; Jindřichův Hradec), a visit to a **treatment facility for long-term patients** (Sanatorium Trutnov), **a facility providing care for senior citizens** (retirement home in Krásná Hora nad Vltavou), and a visit to an **asylum reception centre** (Václav Havel Airport in Prague).

At a press conference on 28 August, **I presented** the Summary Report on Visits to Police Cells generalising the findings and recommendations from our visits to police cells in 14 district departments of the Police of the Czech Republic. In the summary report, I pointed out the shortcomings found in particular in the area of advice to people placed there, performance of personal inspections, and taking away medical aids when placing people into cells. I sent the summary report, *inter alia*, to all police departments with cells.

In this quarter, the employees of the supervision department **were engaged in preparation of a series of systematic visits to social services facilities – homes for persons with disabilities**, which will begin with the first visit in October. Apart from a professional internship in facilities with good practice, the employees also completed a training regarding communication with people with mental disability as well as their sexuality, and individual planning in social services.

They also strengthened international cooperation with the national preventive mechanisms of other European countries at meetings organised by the Council of Europe and the European Union in Paris and Vienna.

B.3 Protection against discrimination

B.3.1 Discrimination in remuneration after return from parental leave (File No. 6862/2016/VOP)

I was contacted by a complainant who works at a ministry. After she had returned from her parental leave (hereinafter "PL"), she had applied for acceptance into a service relationship. She had been accepted into a service relationship based on a decision of the service body 5 months later, and, at the same time, a pay had been determined for her. The pay had consisted of the pay tariff and a personal extra pay in the amount of CZK 4 000 (the complainant had received the personal extra pay both before her PL and after her return). A month after the commencement of the service relationship, the complainant's pay had been changed by a decision; however, the change had only applied to the pay tariff, as she had been assigned to higher pay level.

The complainant had filed an appeal against these decisions, in which she had pointed out (*inter alia*) discrimination in remuneration. At the time of the complainant's absence at the workplace, the personal extra pay of other employees had been increased; the average personal extra pay at the complainant's position at the time of her appeal had been CZK 12 000. The appellate body had rejected the appeal and particularly pointed out in its reasoning that a personal extra pay in public services had been, as a rule, determined on the basis of the service evaluation (the service evaluation is carried out annually in the first quarter of the calendar year for the previous calendar year for those employees that performed state service for longer than 6 months in the previous calendar year). Before preparing the first service evaluation, the employee can be evaluated individually, but the appellate body found no reasons for application of this procedure, as the complainant had been in the service relationship for only a month at the time of issuance of the second decision, which was not enough time for her work to be evaluated in order to determine the amount of personal extra pay.

In my opinion, I evaluated the procedure of the (appellate) body and focused primarily on the possible discrimination on the grounds of parenthood, and breach of the principle of non-discrimination of public servants. I agreed with the appellate body that a certain amount of time is needed to get the information necessary to evaluate an employee and determine the personal extra pay; however, the amount of time must not be disproportionately different for employees with respect to which there exists a discrimination ground than for other employees. In the case of the complainant, there is a suitable comparator at hand – the employee who worked as a substitute during the complainant's PL, and who was awarded personal extra pay after some 4 months. In my opinion, considering that at the time I sent my opinion on the matter to the complainant, the service body still had not proceeded to service evaluation of the complainant in order to determine her personal extra pay (the complainant had been working for a year and 4 months since her return from the PL, of which just under a year in state services), there is a strong suspicion that the acts of the service body are discriminatory.

The case is currently being dealt with at the Municipal Court in Prague; I therefore set the matter aside. The complainant can submit my opinion during the ongoing court proceedings.

B.3.2 Foreign development co-operation assistance to a segregated school (File No. 5596/2015/VOP)

The European Roma Rights Centre turned to the Defender with a request to make an inquiry into the procedure of the Ministry of Foreign Affairs. According to the complainant, the Ministry had made an error when it had provided the amount of CZK 500 000 for a reconstruction of a building destroyed by a flood via the Embassy of the Czech Republic in Tirana. There is an elementary school located in the building, attended exclusively by Roma children. The complainant believed that this was a segregated school, and that by providing financial support for the school's reconstruction, the Ministry had supported racial discrimination in Albania.

Pursuant to Act No. 151/2010 Coll., on foreign development co-operation and humanitarian aid to foreign countries, one of the objectives of foreign development co-operation must be to promote human rights. These rights also include the right to equal treatment and the right to education. In deciding on supporting individual foreign development co-operation projects, it is necessary to consider whether these projects contribute towards the attainment of the given objective. Generally speaking, supporting segregated schools is at variance with the goals of foreign development co-operation. However, at the time of the decision on providing financial help, the Ministry had no information suggesting that the funds would support a reconstruction of a segregated school. The statements by the office of the Albanian ombudsman and the commissioner for protection against discrimination, in which the school was described as segregated, was issued after the funds had been provided. During the inquiry into the case at hand, a denial of assistance could have led to unavailability (albeit temporary) of education for Roma children to whom other schools would have been inaccessible. Moreover, not only did the reconstruction of the building damaged by the flood lead to the re-opening of the school, but also of a kindergarten, health centre and a community centre. At the same time, the Ministry was not offered any alternative solution of the situation (e.g. funding transport to a more remote school) in the application for implementation of the project (which was produced by the local government and supported by an Albanian government representative).

Based on these grounds, I closed the inquiry by stating that the Ministry did not err by providing financial means for the reconstruction of the school.

B.3.3 Discrimination on grounds of citizenship when making a purchase on an instalment plan (File No. 465/2015/VOP)

A complainant turned to the Defender with a complaint in which he claimed discrimination on grounds of citizenship. The discrimination supposedly consisted in the seller's requirement that foreign clients, citizens of the European Union, should meet different, stricter, conditions when buying goods on an instalment plan. Specifically, it was the requirement of submitting the residence permit, a copy of an identity document, and a

second supporting document, i.e. submitting three different documents. On the other hand, Czech citizens only had to submit two documents. The complainant had filed his complaint with the Czech Trade Inspection Authority (hereinafter the CTI).

The Czech Trade Inspection Authority refused to investigate the matter at first, on the grounds that it was not authorised to deal with contractual terms.

My deputy issued an inquiry report, in which he noted that the CTI had erred in that it had not initiated an investigation *ex officio*, even though it had been clear from the complaint itself, that the seller might have acted in a discriminatory way.

My deputy then concluded that if citizens of other Member States are requested to provide more documents than Czech citizens in order to obtain a consumer credit for goods, such actions constitute discrimination on grounds of citizenship, prohibited by Article 18 of the Treaty on the Functioning of the European Union and Section 6 of the Consumer Protection Act.

The seller argued that, by stipulating stricter conditions, it tried to minimise the risk of selling the goods to someone with false identity. My deputy found this objective legitimate, but did not find the measures taken to achieve it appropriate. A residency permit is a public document proving the same data as an identity card. A residency permit of a European Union citizen then serves the same function as a Czech identity card. It is therefore disproportional to the objective stated that the seller should require double identity verification in the form of another supporting document (i.e. three identification documents), when it is enough for Czech citizens to only submit an identity card and another supporting document (i.e. two identity documents).

Based on the inquiry report, the CTI initiated administrative proceeding on the administrative offence of discrimination of a consumer on the grounds of citizenship, and imposed a fine on the seller in the amount of CZK 50 000 for acting in a discriminatory way. The seller appealed against the decision; the CTI inspectorate dismissed the appeal. My deputy then closed the matter.

C. Legislative recommendations and special powers of the Defender

C.1 Abolishing parts of generally binding municipal ordinances issued by the towns of Litvínov and Varnsdorf (File No.Pl. ÚS 34/15)

In July 2017, **Constitutional Court abolished certain parts of generally binding municipal ordinances issued by the towns of** Varnsdorf and Litvínov **which prohibited sitting on curbs, walls and other structural elements not intended for sitting in the whole area of the towns**. I addressed the Constitutional Court after unsuccessful dealings with the towns and the Ministry of the Interior, which reviews the ordinances (see the details in my report for the fourth quarter of 2015). **The Constitutional Court agreed that the prohibition of sitting outside anywhere than on benches would not solve the problem of vandalism.** The only thing it would achieve would making an offender out of everyone who sits down on a wall or a railing in front of a school to eat their ice cream. People are entitled to freely sit anywhere they see fit.

In general, it is not possible to deprive the municipalities of their right to determine where people can sit and where they cannot. However, a general prohibition of sitting anywhere other than on the benches applicable in the whole town cannot be compared to a justified prohibition of sitting directly on the pavement in specific places, such as on the square, in front of the church, in front of the offices of a certain authority etc., with the current placement of benches in public areas functioning as meeting points. Municipalities can punish vandals who damage a property even without ordinances. They even have means to prevent and forestall unlawful conduct. That was also confirmed by the Constitutional Court.

C.2 Comments on the draft decree on vaccination against contagious diseases

In my comments, **I expressed my disagreement with setting a deadline for administration of the first dose of the vaccine against measles, mumps, and rubella** for the eighteenth month of the child's age for the insufficient reasoning of the necessity and proportionality of this interference with the fundamental rights and freedoms.

I personally feel that mandatory vaccination against the above-mentioned diseases is an interference with both the child's right to inviolability and privacy (Art. 7 (1) of the Charter of Fundamental Rights and Freedoms) and the parents' right to care for and represent their children when deciding on interference with their physical integrity (Art. 32 (4) of the Charter), which has been introduced for the benefit of public interest and protection of public health. It is also true that, in its judgement from 2015, the Constitutional Court did not find the general legal framework on mandatory vaccination unconstitutional.

However, I am convinced that with regards to the fundamental rights and freedoms concerned, it must carefully consider the necessity of making the conditions of mandatory vaccination stricter, and justify it convincingly. That is the only way to comply with the requirement stipulated in Art. 4 (4) of the Charter of Fundamental Rights and Freedoms which states that when employing the provisions concerning limitations upon the fundamental rights and freedoms, the essence and significance of these rights and freedoms must be preserved, which the Court emphasized in the cited judgement.

The draft regulation does not establish any new obligation of vaccination; however, by setting a very short time-frame for fulfilling the obligation (between the first day of the fifteenth month following the child's birth and the eighteenth month of the child's age) significantly limits the parent's autonomy when deciding on their child's health – that applies especially to parents who do not *a priori* refuse the vaccination, but want to postpone it to when their child is older. Moreover, in the explanatory memorandum, the submitter explained the time-frame only by the statement that the new provision would prevent „*the parents' efforts to postpone the first shots of MMR vaccine until the child is older*".

In my opinion, **the submitter failed to convincingly justify his intention to replace the current legal regulation**, which does not stipulate the upper age limit for the first shot of the MMR vaccine, but *de facto* effects the parents' motivation via by preventing a child who was not vaccinated from attending a kindergarten or a similar collective facility, or from participating in school residential trips and collective holidays.

For the reason mentioned above, I suggested removing said paragraph, as well as the related paragraphs, from the draft regulation.

Brno, 27 October 2017

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