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už 20 let pomáháme bez rozdílu

Ref. No.: KVOP-2675/2020/S

Report on cases in which remedy was not achieved even using the procedure under Section 20 of the Public Defender of Rights Act

In accordance with Section 24 (1)(b) of Act No. 349/1999 Coll., on the Public Defender of Rights, as amended, I provide information to the Chamber of Deputies of the Parliament of the Czech Republic on cases where adequate remedial measures were not achieved even by means of notifying the superior authority or the Government, or by informing the public of the findings obtained in inquiries under Section 20 of the Public Defender of Rights Act.

A. Labour offices fail to decide properly on contributions towards active employment policy (File No. 12/2019/SZD)[1]

I have ascertained that labour offices fail to conduct administrative proceedings on applications for a contribution towards active employment policy. Applications are not assessed according to formal procedures and, where an application is not granted, the applicant is merely notified of this fact. Such a notice does not give any specific reasons why the application was rejected and contains only a general statement from which it cannot be inferred on what facts the labour office relied and why it decided not to grant the application. The applicants are then practically unable to defend themselves.

Indeed, a labour office makes a decision affecting the rights and obligations of the applicant every time it assesses an application for a contribution towards active employment policy. Administrative proceedings are therefore automatically initiated when such an application is filed. If the labour office eventually decides to grant the application, a public-law agreement regarding the provision of the relevant contribution is concluded between the office and the applicant. This agreement then replaces the relevant administrative decision and the proceedings are discontinued by the office. If the office resolves not to grant the application, it has to issue an administrative decision to this effect with the necessary requisites (including reasoning), which the applicant can then contest by an appeal.

Labour offices proceed in this regard based on a methodology laid down by the Ministry of Labour and Social Affairs; I thus tried to remedy the situation by recommending a change to the Ministry. But I was unsuccessful in spite of my repeated requests. I therefore informed the Government of the unlawful practice I had ascertained and of the unsuccessful recommendation to harmonise the relevant methodology with the law. I suggested that the Government instruct the Ministry to provide methodological guidance to labour offices in that they are to make decisions on applications for a contribution towards active employment policy in administrative proceedings. The Government did not follow my suggestion.

1 Notice to the Government, press release.

B. Lengthy proceedings on a public road (File No. 6543/2018/VOP)[2]

For more than five years, the complainants unsuccessfully sought a decision establishing the existence of a public road on land serving as an access route to their holiday cabins – this would enable them to drive their cars to the cabins again. The Regional Authority of the Hradec Králové Region cancelled five times altogether the decisions of the subordinate authorities and adopted a total of five measures against inactivity; of this number, it delegated the case twice to another subordinate authority.

Public authorities are required to deal with the cases presented to them without undue delay. If they cannot issue a decision without delay, they have to do so within a deadline of 30 days, and always not later than within 60 days (subject to certain exceptions). If the superior (appellate) authority becomes aware of inactivity on the part of its subordinate authority, it must adopt an appropriate measure without delay. Under certain conditions, the appellate body may change an incorrect or unlawful decision itself. Or else, it has to cancel it and refer the case back for a new hearing. A subordinate authority may deviate from a legal opinion expressed by its superior authority only if new facts come to light. At the same time, it must not repeat any errors that have already been revealed. If a subordinate authority is unable to issue a correct decision based on a binding opinion of the superior authority, the superior authority must provide it with methodological assistance. If this does not help, the superior authority will check the exercise of delegated competence and, if appropriate, remove the task to exercise State administration (and a contribution towards the exercise of delegated competence) from the subordinate authority. If the superior authority cannot change the first-instance decision in appellate proceedings by itself, it has to consider whether it would indeed be purposeful to refer the case back, instead of delegating it to another subordinate authority or taking it over and deciding on it itself at first instance.

In the final statement, my Deputy suggested that the Regional Authority should quickly terminate the appellate proceedings by rendering its own decision, and that it should decide selected cases at first instance in the future, instead of repeatedly referring them back to the first-instance authority. However, the Regional Authority did not adopt any measure in the complainants' case, nor did it pledge to change its practice. The Deputy Defender therefore informed the Ministry of Transport. While the complainants received another first-instance decision in the meantime, and the Ministry promised to check the overall procedure of the Regional Authority as the appellate body, it nonetheless described the Regional Authority's procedure to date as correct. Consequently, no change in the approach and remedy of the questionable practice can be expected.

C. Incorrect procedure by a prison director when making a decision on suspension of imprisonment (File No. 7546/2018/VOP)[3]

The complainant asked the director of the Odolov prison to interrupt the service of his custodial sentence as his partner would undergo a surgery – there was no one to take care

2 Report on inquiry, final statement, notice to the superior authority.

3 Report on inquiry, final statement, notice to the superior authority.

of their children during that time. But the prison director did not allow the complainant to leave the prison. In his decision, he relied on an opinion presented by an expert committee, which did not find any urgent family reasons. The director failed to state the reasons for his decision.

The prison director may interrupt the service of imprisonment of a convict for urgent family reasons for up to 10 days per calendar year. When making such a decision, the director is required to also take into consideration an opinion presented by an expert committee, whose members have to provide a brief substantiation for their opinions. Neither the law nor any internal regulation expressly states that a decision whereby a prison director rejects such an application has to include reasoning. But it is nonetheless a decision where the prison director enjoys a broad discretion. In such a case, reasoning is especially important because it is otherwise impossible to verify what considerations the director followed and whether he proceeded in accordance with the basic principles governing the work of administrative authorities. These principles include the prohibition of abuse of administrative discretion and protection of legitimate expectations. The prison director has to adhere to the aforementioned principles when making his/her decision because the convict's rights to private and family life can be impaired if interruption is not permitted. Urgent family reasons can also be deemed to exist in a situation where the children's best interest might require enabling their convicted parent to take care of them for a certain period of time based on serious grounds, provided that such a procedure is necessary and proportionate.

The prison director believed that the principles applicable to the work of administrative authorities were maintained in the case at hand because neither the law nor any secondary regulation explicitly required that a rejecting decision comprise reasoning. At the same time, he denied that his decision might perhaps have interfered with the complainant's rights and explained why he had not considered the reasons given by the complainant urgent. He did not take any remedial measures. The additional explanation provided by the director cannot refute my conclusion on the existence of a duty to provide a statement of reasons in a decision not to interrupt the service of imprisonment. Therefore, I informed the Director General of the Prison Service accordingly. His statement that the reasons for the decision already clearly followed from the opinions presented by the members of the expert committee indicates that there might be a lack of understanding of the rationale behind a statement of reasons.

D. Discrimination in access to employment (File No. 700 /2017/VOP)[4]

The complainant stated he had not been hired for a job because he was ethnically Roma. The District Labour Inspectorate for the South Moravian and Zlín Regions (DLI) performed an inspection but found no discrimination in access to employment. I inquired into the procedure of the DLI. The inquiry revealed that the DLI had failed to properly ascertain the facts of the case; among other things, it had failed to verify the employer's assertions and failed to make use of the opportunity to obtain information from witnesses. However, it did

4 Report on inquiry, final statement, notice to the superior authority, invitation to a roundtable titled "Forms of Co-operation Between Labour Inspection Authorities and Non-Profit Organisations in Eradicating Discrimination on the Labour Market".

not admit any error on its part. A new inspection could no longer ensure remedy in the complainant's case and I therefore focused on achieving a general improvement of the DLI's procedure in investigating possible discrimination. Discrimination is alleged most often in the area of work and employment.

However, labour inspection authorities might not have the necessary information from the field. This is why non-profit organisations often play an irreplaceable role in combating discrimination as they have the necessary experience. Therefore, as a remedial measure, I suggested that the DLI organise a meeting with non-profit organisations which focus on working with minorities in the given region, and obtain more detailed information from them as regards organisations in which their clients encounter discrimination most often, and also as regards the forms of such discrimination. The Inspectorate would subsequently use any information thus obtained in its inspection activities.

The DLI refused to implement the proposed measure and I therefore informed the State Labour Inspectorate of the matter. Regrettably, it was to no avail. Along with doubts as to the purposefulness of such a meeting and a reference to difficulties entailed in organising it, the SLI claimed that such a meeting would be at variance with the requirement for neutrality. However, as a matter of fact, co-operation between governmental authorities and non-profit organisations is envisaged both by the "Race Equality Directive" (Council Directive 2000/43/EC), which prohibits discrimination in employment, and the Social Inclusion Strategy (2014–2020), while discrimination on the labour market and the issue of social exclusion are closely interrelated.

For the time being, I agreed with the SLI that I would organise a pilot meeting between the labour inspection authorities and non-profit organisations myself, but with active participation of the SÚIP. The meeting would be held on 12 February 2019.

E. Unauthorised structure of a shed/pergola (File No. 2477 /2019/VOP)[5]

The complainant requested that the construction authority (the Municipal Authority of Uherský Ostroh) order removal of a parking shed from which rainwater flowed down onto her property. She pointed out that the shed had been built without a permit. Neither the construction authority nor the superior Regional Authority of the Zlín Region agreed with her complaints. They evaluated the shed based on a methodological guideline issued by the Ministry for Regional Development. They reached the conclusion that the structure was not a shed, but rather a pergola, which did not require a permit from the construction authority, according to the aforementioned guideline. This was therefore not an unauthorised structure.

Construction authorities must comply primarily with the law. According to the Construction Code, a structure means any construction work that is created by a construction or assembly technology, regardless of its construction-technical design, construction products, materials and structures used, purpose of use and duration. Such a structure requires a permit unless it is explicitly listed in the Construction Code as a structure not requiring a permit.

5 Report on inquiry, final statement, notice to the superior authority.

The aforementioned methodological guideline contradicts the law as it distinguishes between sheds with a fixed roof, which require a permit, and sheds covered, e.g., by a tarpaulin, which allegedly do not require a permit because they are not sheds, but rather pergolas.

The given shed is undoubtedly a structure under the Construction Code as the strength of the roof structure is not the decisive criterion. The purpose of use and the effect of the shed on its surroundings are the same regardless of whether the roof is a fixed structure or made of a tarpaulin.

Having made an unsuccessful attempt at achieving a remedy, my Deputy notified the Ministry for Regional Development of the errors made by both authorities and asked them to intervene against their inactivity. But the Ministry responded that it could not see any errors in the authorities' procedure. It would not consider redrafting its methodological guideline either.

Brno, 31 January 2020

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Public Defender of Rights