

## **Recommendation of the Public Defender of Rights on the fulfilment of the right to equal treatment of applicants for the lease of municipal flats**

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### **Introduction**

The following recommendation can be understood as debut in fulfilling the task entrusted to the Defender by the provision of Sec. 21b (c) of Act No. 349/1999 Coll., on the Public Defender of Rights, as amended, according to which the Defender issues recommendations on issues related to discrimination. After the passage of Act. No. 198/2009 Coll., on Equal Treatment and on Amendments to Some Laws (hereinafter also the “Anti-discrimination Act”), effective from 1 September 2009, the mandate of the Defender was extended as of 1 December 2009 to include also the area of execution of the right to equal treatment and fight against discrimination.

By its content, sense and focus the presented text supplements the publication “*Doporučení pro obce a města pro předcházení tvorby a rozšiřování sociálně vyloučených lokalit se zdůrazněním zajištění potřeby bydlení*” [*Recommendation for municipalities and towns on the prevention of creation and expansion of socially excluded localities with an emphasis on satisfying housing needs*], issued in collaboration with the Ministry of Interior in spring,<sup>1</sup> and it can be understood as another part of discussion devoted to the basic triggering factor in social exclusion and to the issue of social prestige of an individual, i.e. housing.

The recommendation on equal treatment of applicants for the lease of municipal flats is intended especially for the representatives of municipal self-government; however, it also aims to be available to the broad public, in particular in situations when a specific person applies for lease. Above all, the recommendation should help municipalities to be informed of the way the Anti-discrimination Act affects the disposal of the housing stock in their ownership since housing is one of the areas impacted by the Anti-discrimination Act. As a result, the recommendation also contains an analysis of a number of specific situations and cases, which illustrate the application of the Anti-discrimination Act and enable municipalities to proceed so as not to get exposed to potential negative consequences of unequal treatment.

The Anti-discrimination Act broadens and defines the area within which it is forbidden to differentiate between persons on the grounds of specified criteria and it also determines and characterizes inadmissible forms of differentiation. Such complex legal concept of discrimination is new in the Czech Republic while in other

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<sup>1</sup> The recommendation is available at: [www.ochrance.cz](http://www.ochrance.cz).

countries it is perceived to be a necessary safeguard of democratic functioning of society and of good functioning of law in society on the basis of respect for dignity of a human being, naturally endowed with rights.

## DECALOGUE OF EQUAL TREATMENT IN ACCESS TO HOUSING

1. Any discrimination in access to housing is forbidden provided housing is offered to the public. All persons have to be guaranteed the right to equal treatment in access to housing.
2. During the process of creation, modification or future change of rules for the application for lease of municipal housing stock it needs to be borne in mind that it is not important whether a municipality intends to disadvantage unlawfully (discriminate) an applicant but whether the rules created have a discriminatory impact – an intention to discriminate or not to discriminate does not play a role.
3. The position of a municipality is fully comparable to that of a common lessor (an individual or a legal entity). As a public corporation, it is entrusted by law and legislation with special duties toward its inhabitants and other persons. The requirement of equal treatment of applicants for the lease of a municipal flat is significantly stronger than the requirement of equal treatment in case of a flat leased by an individual or a legal entity.
4. It is not discrimination if differential treatment pursues an aim that is objectively legitimate and the means to achieve this aim are proportionate. However, compared to a common lessor, a municipality has very narrow space to prove a legitimate aim and additionally, different criteria are used to assess the adequacy of the means to achieve the aim. The possibility of such assessment is conditioned on thorough knowledge of local conditions.
5. As opposed to a common lessor, who can set any level of income as a criterion for the selection of a future lessee, a municipality has to consider whether the required level of income of a future lessee is proportionate so that the right to equal treatment of applicants is not infringed.
6. Disadvantaging a citizen-worker of another Member State of the EU compared to a citizen of the Czech Republic in access to municipal housing stock is in direct contraction to the prohibition of discrimination stipulated by EU law.
7. Disadvantaging an applicant receiving parental allowance constitutes direct discrimination on the grounds of gender. Discrimination on the grounds of gender also includes discrimination on the grounds of maternity or paternity. Parental allowance is a state social support benefit and it is a relevant source of income of an applicant for the lease of a flat.
8. Disadvantaging an applicant receiving a maternity benefit constitutes direct discrimination on the grounds of gender. A maternity benefit is a sickness insurance benefit and it is a relevant source of income of an applicant for the lease of a flat.

9. The number of children or members of a household as a criterion in assessing an applicant for a municipal flat can be with high probability regarded as indirect discrimination on the grounds of ethnicity (against Roma people). However, the number of children as a criterion can be used to give advantage to applicants as part of so-called positive measures.
10. The requirement that an applicant for the lease of a municipal flat show evidence of a disproportionate amount of income in order to be included in the register of applicants for the lease of a flat constitutes indirect discrimination on the grounds of gender.

## I. Legal framework of equal treatment in providing housing

### 1. Legal framework of equal treatment

The purpose of legislative measures aimed at assertion of the right to equal treatment is not to establish absolute equality as opposed to diversity or to restrict or even deny diversity.<sup>2</sup> Differentiation is a natural and necessary process. However, it is always necessary to differentiate while recognizing limits set by the very foundation of human dignity, and the law should reflect these limits in an adequate manner.

#### a) Equal treatment as the law and policy of the European Union

Equal treatment, non-discrimination has been long perceived as the basic principle<sup>3</sup> and as an important common policy within the European Community (hereinafter also the “Community”). Gender equality (equality based on sex) is even considered a fundamental right under the Treaty of Lisbon and a priority policy of the European Union.<sup>4</sup> In addition, the prohibition of discrimination based on state citizenship of a Member State of the EU is traditionally strong within the EU.<sup>5</sup> Approximately since the turn of the millennium there has been increased activity of the EU concerning the fight against discrimination on the basis of race and affiliation to race and ethnic minority.<sup>6</sup> At present, the problem of discrimination at the EU level is dealt with by means of concept and strategic documents,<sup>7</sup> and also by means of legislation, which is reflected at the national level in the Czech Anti-discrimination Act.

#### b) The Anti-discrimination Act

On 1 September 2009, the Anti-discrimination Act became effective. Under the current rule of law, it can be regarded as a general anti-discrimination regulation. Within its subject matter it affects areas where the prohibition of differential treatment has been stipulated in law for some time (for example the area of labour law or the right to education etc.) and also legal relations where the prohibition of discrimination on the statutory level had been lacking. Housing was one of these areas. **The provision of Sec. 1 (1) (j) of the Anti-discrimination Act stipulates that equal access to goods and services, including housing, has to be ensured.**<sup>8</sup>

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<sup>2</sup> Bobek, M. Boučková, P., Kühn, Z. Rovnost a diskriminace. 1<sup>st</sup> edition. Prague: C. H. Beck, 2007, p. 6. Compare the judgment of the European Court of Human Rights in Belgian Linguistic Case (complaint No. 1474/62, 1677/62, 1769/63, 1994/63, 2126/64).

<sup>3</sup> Article 19 of the Treaty on the Functioning of the European Union.

<sup>4</sup> [http://europa.eu/legislation\\_summaries/employment\\_and\\_social\\_policy/equality\\_between\\_men\\_and\\_women/c10\\_938\\_en.htm](http://europa.eu/legislation_summaries/employment_and_social_policy/equality_between_men_and_women/c10_938_en.htm).

<sup>5</sup> Bobek, M. Boučková, P., Kühn, Z. Rovnost a diskriminace. 1<sup>st</sup> edition. Prague: C. H. Beck, 2007, p. 126.

<sup>6</sup> Meenan, H. Equality Law in an Enlarged European Union. Cambridge: Cambridge University Press, 2007. p. 146.

<sup>7</sup> E.g. “Community Programme for Employment and Social Solidarity”. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:315:0001:0008:EN:PDF> or Green Paper “Equality and Non-Discrimination in an Enlarged European Union”. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0379:FIN:EN:PDF>

<sup>8</sup> The provision of Sec. 1 (1) (j) of the Anti-discrimination Act.

### c) Prohibited criteria; direct and indirect discrimination

The Anti-discrimination Act establishes the sanctioning of various forms of discrimination. Of course, not every differentiation is prohibited. Discrimination is an act (the Anti-discrimination Act also recognizes a failure to act) differentiating between persons in a comparable situation on the basis of a prohibited criterion and in an area treated by the anti-discrimination legislation. The legal definition, including the list of discriminatory reasons, is contained in Sec. 2 (1) of the Anti-discrimination Act.

According to the Anti-discrimination Act, prohibited differentiating criteria in the area of housing, if housing is provided to the public, include:

- race,
- ethnic origin,
- nationality,
- gender,
- sexual orientation,
- age,
- disability,
- religion or belief or opinions.<sup>9</sup>

Discrimination is further divided into direct and indirect, according to the Anti-discrimination Act. **Direct discrimination** is “the oldest form” of forbidden differentiation. Putting a person at a direct disadvantage compared to another person on the basis of the above mentioned criteria in areas<sup>10</sup> defined by law usually cannot be<sup>11</sup> justified by anything (i.e. no objective justification can be found or the so-called objective aim, pursued by the measure, determined), apart from exceptions defined by law. Traditionally, prohibited differentiation on the basis of race or ethnic origin, and within the European Union (hereinafter also the “EU”) also on the basis of state citizenship, is subject to the strictest assessment.

The concept of indirect discrimination, compared to direct discrimination, is much more complex. **Indirect discrimination** is based on a seemingly neutral action by the discriminating person or on a seemingly neutral effect of a criterion selected for the treatment (i.e. the criterion does not seem to be directly prohibited at first glance; however, its implementation and impact causes or it can be expected to cause prohibited unequal treatment – discrimination). The Anti-discrimination Act mentions indirect discrimination in Sec. 3 (1) and subseq. Indirect discrimination is the manifestation of a material concept of equality, which not only takes into consideration formal requirements for achieving equal treatment but also considers their consequences. Therefore, it means that a regulation, a criterion or a rule

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<sup>9</sup> The list of prohibited reasons can be set in a different way (more broadly) if the application of another legal regulation is possible in a specific situation (e.g. the Employment Act in selecting job applicants).

<sup>10</sup> For example, typically, the anti-discrimination legislation in its essence does not have an impact on relationships following from the family law.

<sup>11</sup> In particular as regards race and gender as prohibited discriminatory reasons.

designed as “equal” at first glance but with an unfavourable impact on a group defined by a prohibited discriminatory reason can have a discriminatory effect.<sup>12,13</sup> Here, it needs to be noted that in the concept of indirect discrimination, the existence of an intention leading to discrimination is not necessary.<sup>14</sup> It is not important whether the discriminating person, be it a person that has applied the regulation in a discriminatory manner or created the regulation, wanted to discriminate or not. What is important is the general unfavourable impact on a group defined by a prohibited criterion. The conditions for the application of indirect discrimination was also addressed in detail by the European Court of Human Rights and the European Court of Justice. Additionally, in a modified form, the decision of the Supreme Court of the United States can be also applied in Continental Law.<sup>15</sup>

Indirect discrimination does not occur if, according to the Anti-discrimination Act:<sup>16</sup> “... *differentiation is objectively justified by a legitimate aim and the means for achieving thereof are proportionate and necessary*”. Of course, reasons justifying differentiation may not rest on a legally prohibited reason itself (the explanation itself may not be discriminatory).<sup>17</sup> In practice, it means that if it emerges that criteria for the lease of a municipal flat negatively affect women to a greater extent than men, this effect cannot be justified by saying that women are less economically active than men due to their care for children or that research has shown that their income is lower compared to men, and therefore that they offer lower assurance that the rent will be paid. This line of reasoning does not justify differentiation between men and women (it is not justified by a legitimate aim), and if there is not a neutral legitimate aim that would rest on objective conditions and not on prejudice, indirect discrimination occurs. If the aim is found to be legitimate, it needs to be further shown that the measures to achieve the aim are proportionate and necessary. If the aim is not found to be legitimate, the question of necessity and proportionality of a measure to achieve an aim no longer needs to be pursued.

## **2. Legal character of rules/criteria for the lease of municipal flats**

Although there is no legal entitlement to the lease of a municipal flat, according to the Defender’s view held over a long period, which corresponds to the opinion of the Division of Inspection and Supervision in Public Administration of the Ministry of the Interior, “*the right to have an application for*

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<sup>12</sup> Indirect discrimination is a concept generally accepted by the judicial practice of the European Court of Justice (c.f. for example *Bilka-Kaufhaus GmbH v. Karin Weber von Hartz* (C-170/84)), *Kowalska v. Freie Hansestadt Hamburg*, (1990) ECR-I-2591 or *Nimz v. Freie Hansestadt Hamburg*, (1990) ECR-I-297, and by The Supreme Court of USA (c.f. for example *Griggs v. Duke Power Co.*, 401 U. S. 424 (1971)). The concept of indirect discrimination and indirect impact is developed in particular in the judicial practice of the European Court of Human Rights; of its many decisions for example: *D. H. and Others v. the Czech Republic* 57325/00 of 13 November 2007, *Hugh Jordan v. United Kingdom* No. 24746/94 of 4 May 2001, or *Zarb Adami v. Malta* No. 17209/02 of 20 September 2006 and so on.

<sup>13</sup> Regarding indirect discrimination and how it is perceived by EU law, compare in particular Craig, P., De Búrca, G.: *EU Law, text, Cases and Materials*, 4th Edition, Oxford University Press, Oxford, 2008, p. 886 - 908.

<sup>14</sup> E.g. the judgment of the European Court of Human Rights in case *Hugh Jordan v. United Kingdom* No. 24746/94, of 4 May 2001, or in case *Zarb Adami v. Malta*, No. 17209/02, of 20 September 2006.

<sup>15</sup> The judgment of ECJ in case *Bilka-Kaufhaus GmbH* or the judgment of ECJ in case *D. H. v. the Czech Republic* (No. 57325/00) In *Boučková, T. Rovnost a sociální práva*. Prague: Auditorium, 2009, p. 132.

<sup>16</sup> The provision of Sec. 3 (1), second sentence.

<sup>17</sup> Cf. the judgment of the European Court of Justice in case *Seymour-Smith* (C-167/97), item 60 and 65.

*the lease of a municipal flat processed, which involves an individual assessment of a situation, belongs to all citizens of a municipality without exception, according to the Municipal Act*.<sup>18</sup> The selection itself may be subject to criteria, which, however, may not be discriminatory in character and have to be in compliance with the law.

Rules for allocating flats from the municipal housing stock are adopted by municipalities in a form mentioned in the Municipal Order in connection with the supervision of the Ministry of the Interior over the separate powers of municipalities, and thus belong de facto in the collecting category of “resolution, decision or other measure of a body of a municipality with separate powers” within Sec. 124 of the law in question. These documents are most frequently called “rules” or “criteria” and they are typically annexed to a resolution of the board of a municipality (metropolitan part/district). It needs to be noted here that it would be in violation of the provision of Sec. 16 (2) (e) of the Municipal Order<sup>19</sup> and the principle of openness and transparency of public administration,<sup>20</sup> if these rules or another form of a document were not published or if they were declared non-public.<sup>21</sup> In any case, the requirement of lawfulness formulated in Sec. 35 (3) of the Municipal Order can be applied to them, and thus as of the effective date of the Anti-discrimination Act, they must correspond also with the duty to respect the right to equal treatment defined therein. **Certainly not every municipality can declare under current conditions that its rules or criteria are in compliance with the Anti-discrimination Act.**

### **3. Responsibility of the state before the European Court of Human Rights for unlawful execution of self-government**

The Czech Republic is one of contracting parties to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by ratified Protocols (hereinafter only the “Convention”),<sup>22</sup> and as such it is bound by its content. Pursuant to Article 1 of the Convention, contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in the Convention. For a contracting state, this means an obligation of two kinds. On the one hand, a contracting state is obliged to refrain from interfering with the rights guaranteed by the Convention and, on the other hand, the state additionally has a positive obligation to secure an undisturbed exercise of these rights and freedoms.

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<sup>18</sup> The line of reasoning of the Division of Inspection and Supervision in Public Administration of the Ministry of the Interior in a specific case, which the Defender dealt with within his powers.

<sup>19</sup> The provision of Sec. 16 (2) (e) of the Municipal Order is a special provision to the provision of Sec. 2 (1) and Sec. 4 (1) of Act No. 106/1999 Coll., on Free Access to Information, as amended.

<sup>20</sup> Compare the principle of good administration No. 9 – the principle of openness in Černín, K., Hrabcová, J. (eds.): *Principy dobré správy Sborník příspěvků přednesených na pracovní konferenci, veřejný ochránce práv*, Brno, 2006, p. 17, available at: <http://www.ochrance.cz/index.php?id=101651>.

<sup>21</sup> Compare the opinion of the Division of Inspection and Supervision of the Ministry of the Interior No. 1/2006, *Právo občana obce požadovat kopie usnesení a zápisů z jednání zastupitelstva obce, usnesení rady obce, výborů zastupitelstva obce a komisí rady obce a zápisů ze schůzí rady obce* [The right of a citizen to require copies of resolutions and minutes from meetings of municipal councils, resolutions of municipal boards, committees of municipal councils and committees of municipal board and minutes from meetings of municipal boards] (in relation to the Municipal Order and the Free Access to Information Act), available at: <http://www.mvcr.cz/clanek/2006.aspx>.

<sup>22</sup> In the Czech Republic published as the Communication of the Federal Ministry of Foreign Affairs No. 209/1992.



In connection with the right to equal treatment in access to the municipal housing stock, Article 14 of the Convention can be applied. It constitutes an obligation of a contracting state to secure the enjoyment of the rights and freedoms recognized in the Convention without discrimination on any grounds defined therein.<sup>23</sup> As indicated by the diction of the given provision, Article 14 cannot be called upon separately; its breach may be claimed only in connection with another provision of the Convention. The purpose of Article 14 is to ensure that mechanisms of a public authority in the protection of a given right guaranteed by the Convention are not discriminatory. As evident from case *Karlheinz Schmidt v. Germany* (case No. 13580/88),<sup>24</sup> the compliance of the national law with the Convention has to be applied to the fullest logical extension, which means to the fundamental level of law-making. In the given case, the European Court of Human Rights (hereinafter also "ECHR") stated a discriminatory character of the execution of local administration.<sup>25</sup> **The responsibility for the actions of local government, which ECHR found unequal on the basis of gender, was in effect borne by the state** (in this case by Germany), which had to pay court costs and damages to the injured for having failed to protect the right guaranteed by Article 4 in connection with Article 14 of the Convention.

As demonstrated in cases *Havelka v. the Czech Republic*, and *Walla and Wallová v. the Czech Republic*, in the protection of private and family life (a right guaranteed by Article 8 of the Convention), a public authority is assigned the role of an active element that does not interfere with a given right; quite the contrary, through its activities it creates conditions for its fulfilment.<sup>26</sup> Both of the above-mentioned cases concerned families which found themselves in a critical housing situation, as a result of which they faced a situation when their parental competence was challenged.

There is no doubt that the national law has to secure effective protection of the rights guaranteed by the Convention. The implementation of such protection then depends on the practice of a given contracting state.<sup>27</sup> Whether the state directly incorporates the text of the Convention in its national law or not, it is obliged to ensure by relevant means that the national legislation is compatible with the Convention and, if needed, adopt necessary remedial measures.<sup>28</sup> A sanction against a contracting party shall involve a binding decision of ECHR on the breach of its obligations and, last but not least, the possibility of ECHR to afford just satisfaction to the injured party, pursuant to Article 41 of the Convention.

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<sup>23</sup> Sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

<sup>24</sup> The given case concerned a complaint of Mr Karlheinz Smidt, who had to pay a fee (tax) for fire service on the basis of a decision of the local administrative authority. This obligation was by means of a local rule, issued to implement the State Fire Act, imposed only on men. Mr Schmidt turned to German administrative courts and subsequently to the Federal Constitutional Court. However, none of them found infringement of the right to equal treatment.

<sup>25</sup> Case *Karlheinz Smidt v. Germany* (No. 13580/88), item. 6, 7 and 24 - 29.

<sup>26</sup> Case *Wallová and Walla v. the Czech Republic* (No. 23848/04), item 74, case *Havelka v the Czech Republic* (No. 23499/06), item 61.

<sup>27</sup> Ovey, C., White, R.C.A. *The European Convention on Human Rights*. Fourth Edition. Oxford: Oxford University Press, p. 19.

<sup>28</sup> *Ibid.*, p. 20.

## II. Legal means of protection against discrimination

### 1. The Anti-discrimination Act

The legal means of protection against discrimination are stipulated in the Anti-discrimination Act, namely in the provision of Sec. 10 and Sec. 11. The Anti-discrimination Act in particular defines conditions under which an individual may seek court protection against discrimination, and, in connection with the protection of the right to equal treatment, it entrusts the Defender with certain powers. They include tasks of the Defender stipulated by Sec. 21b of Act No. 349/1999 Coll. on the Public Defender of Rights, as amended, according to which the Defender, in relation to equal access to housing, provides especially methodical assistance to the victims of discrimination in lodging their proposals for commencement of proceedings due to discrimination. If the victim of discrimination decides to assert the right to equal treatment in access to housing in court, the relevant district court of the plaintiff (municipality) will have jurisdiction in the first instance.<sup>29</sup>

## III. Housing as a necessity of life; municipality as a public corporation

### 1. Housing as a necessity of life

The need for housing is a basic necessity of life of every person. It is recognized as such by a number of international documents,<sup>30</sup> above all by the mentioned European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>31</sup> namely by Article 8 stipulating the right to respect for one's private and family life, under which the problem of housing can be included under certain circumstances.<sup>32</sup> On the basis of the judicial practice of the European Court of Human Rights<sup>33</sup> related to Article 8 of the Convention, states have a wide scope of authority<sup>34</sup> as regards refraining from interference or fulfilling the right to private and family life in connection with housing. States have in particular duty not to interfere arbitrarily with the right to private and family life;<sup>35</sup> however, in connection with the fulfilment of Article 8, states not only have duties not to act (the so-called negative duty) but also to take action (the so-called positive duty).<sup>36</sup> Although it cannot be asserted that a duty of the state is to provide housing, not to mention free

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<sup>29</sup> Cf. Stanovisko veřejného ochránce práv k některým procesním aspektům antidiskriminačního zákona, zejména věcné příslušnosti soudů [Statement of the Public Defender of Rights regarding some procedural aspects of the Anti-discrimination Act, in particular the subject-matter jurisdiction], available at [www.ochrance.cz](http://www.ochrance.cz).

<sup>30</sup> E.g. Article 11 of the International Covenant on Economic, Social and Cultural Rights.

<sup>31</sup> Published in the Czech Republic as the Communication of the Federal Ministry of Foreign Affairs No. 209/1992.

<sup>32</sup> E.g. *Gillow v. United Kingdom*, of 24 November 1986 (No. 9063/80).

<sup>33</sup> E.g. *Wallová and Walla v. the Czech Republic* (No. 23848/04), *Kutzner v. Germany* of 26 February 2002 (No. 46544/99).

<sup>34</sup> The so-called margin of appreciation, regarding the margin of appreciation related to Article 8, compare *Moldovan v. Romania* of 12 July 2005, No. 41138/98, 64320/01.

<sup>35</sup> E.g. *X. v. Austria* of 30 May 1974, No. 5416/72, or *Benamar v. the Netherlands* of 5 April 2005 (No. 43786/04).

<sup>36</sup> E.g. *McGinley and Egan v. United Kingdom* of 9 June 1998, No. 21825/93, or *Marckx v. Belgium* of 13 June 1979, No. 6833/74.

housing, to every individual,<sup>37</sup> it is a duty of the state to strive to create dignified living conditions, especially for those who find themselves in an unfavourable life situation, which is also reflected in national legal regulations. In Czech legislative conditions, the specific character of housing needs is, among others, reflected by the social security system, which recognizes benefits that are intended for helping to cover housing costs.

The obligation of the state to create dignified living conditions is strengthened even more if a family with minors finds itself in a difficult social situation. In such a case, the state (public authority) plays not just the part of a defender against interference with private and family life but also of an entity that actively participates in developing family relations, which rest on the creation of basic living conditions.<sup>38</sup>

## 2. A municipality as a public corporation

The status of a municipality as a public corporation with own property follows from the Constitution of the Czech Republic (Article 101 Paragraph 3) and directly also from the provision of Sec. 2 (1) of Act No. 128/2000 Coll., on Municipalities (the Municipal Order), as amended (hereinafter also “the Municipal Act” or “the Municipal Order”). The “public” status of municipalities is also related to their tasks in self-government defined in the Municipal Act, in particular in Sec. 2 (2), Sec. 35 (2) and in Sec. 38 (1). It is in Sec. 35 (2) that municipalities are entrusted with a task, in accordance with the local conditions and local customs, to attend to the fostering of conditions for the development of social care and to the satisfaction of the needs of its citizens. Attending to the satisfaction of housing needs is explicitly mentioned and although this provision is often characterized as a provision of a declaratory character, it cannot be put aside when defining the tasks of self-government. The above-mentioned vague legal term “*in accordance with the local conditions*” cannot be dismissed without anything further by an argument that local conditions do not allow a municipality to fulfil the mentioned function of creating conditions for the development of social care and to the satisfaction of the needs of its citizens. It needs to be borne in mind that, paradoxically, a municipality itself primarily participates in the creation of local conditions.

A frequent argument, used mainly by the representatives of municipalities alone, is that a municipality acts in relationships relating to private law in the administration of property in the same position as individuals or legal entities of private law (i.e. as a common lessor in case of the lease of a flat). However, one cannot agree with such stance.<sup>39</sup> Part of the municipality’s powers related to the disposal of its housing stock and offering it to future lessees cannot be fully described as a civil relationship between a future lessee and a lessor and the municipality cannot be excluded from the supervisory power over the execution of separate powers of municipalities with reference to the provision of Sec. 124a (5) of the

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<sup>37</sup> The European Court of Human Rights would even regard a duty to provide free housing as not falling within Article 8 of the Convention and would not proceed with the case. In this respect, cf. Kilkelly, U.: *The right to respect for private and family life A guide to the implementation of Article 8 of the European Convention on Human Rights*, European Commission, 2003, Strasbourg, p. 8.

<sup>38</sup> *Kutzner v. Germany* of 26 February (No. 46544/99), item No. 61.

<sup>39</sup> See e.g. Vedral, J., Váňa, L., Břeň, J., Pšenička, S. *Zákon o obcích (obecní zřízení)*. Komentář. 1<sup>st</sup> edition. Prague: C. H. Beck, 2008, p. 220; Havlan, P., *Veřejné vlastnictví v právu a společnosti*. Prague: C. H. Beck, 2008, 68 p.; Kadečka, S. *Právo obcí a krajů v České republice*. 1<sup>st</sup> edition. Prague: C. H. Beck, 2003, p. 45.

Municipal Act. The given mode cannot be considered unconstitutional interference with the ownership right within Article 11 Paragraph 1 of the Charter of Fundamental Rights and Freedoms, but, on the contrary, as the implementation of Article 11 Paragraph 3 of the Charter of Fundamental Rights and Freedoms.<sup>40</sup> **“A municipality is a public corporation, which typically fulfils a number of public tasks prescribed by law, which fundamentally differentiates it from typical legal entities of private law”.**<sup>41</sup> This doctrine is also supported by the judicial practice:

- **judgment of the Supreme Court No. 28Cdo 3297/2008, of 8 April 2009:**  
*“It is apparent that a municipality, even as a party to a private relationship, may not be exempted from requirements imposed on the administration of public affairs. In disposing of its property, a municipality as a public corporation has certain special duties following from its status as an entity of public law. Therefore it applies that the management of municipal property has to be transparent, purposeful and accessible to the public in the highest extent”.*

- **judgment of the Constitutional Court IV. ÚS 576/2000, of 12 April 2001:**  
*“Public law determines the internal structure of this corporation,<sup>42</sup> the powers of its bodies, and last but not least the creation of legally relevant will of this corporation. Only when we take this view does a question arise whether it will hold that a local self-governing community of citizens, which a municipality first of all is, should be viewed in the same manner as a business or other corporation. The Constitutional Court is convinced that such a non-differentiating view is not just incorrect but also unconstitutional”.*

If we take into consideration the position and the tasks of a municipality following from its public corporation status and the reflection of the exercise of rights of citizens to self-government, contained in the provision of Sec. 2 in connection with the provision of Sec. 35 (2) and the provision of Sec. 38 (1) of the Municipal Act, we cannot but state the impossibility of a municipality to give up the fulfilment of its social function in attending to the satisfaction of housing needs of its citizens.<sup>43</sup>

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<sup>40</sup> Cf. Valachová, K.: Realizace základních práv a svobod jednotlivce a právo na samosprávu in Kadečka, S., Havlan, P., Valachová, K. (eds.) Právní regulace místní (a regionální) samosprávy, sborník ze 4. letní mezinárodní konference/workshopu, Masaryk University, Brno, 2008, p. 545 - 547.

<sup>41</sup> Ibid., p. 546.

<sup>42</sup> Note: In this context a corporation means a municipality.

<sup>43</sup> The provision of Sec. 2 (1): “A municipality is a public corporation which has its own property. A municipality acts in legislative relations in its own name and bears responsibility arising from these relations”. Sec. 2: “A municipality attends to the general development of its territory and to the needs of its citizens; in the fulfilment of its tasks it also protects the public interest”.; Valachová, K. In Kadečka, S., Havlan, P., Valachová, K. Právní regulace místní (a regionální) samosprávy. Sborník ze 4. letní mezinárodní konference/workshopu. Brno: Masaryk University, 2008, p. 543 - 544.

## IV. Most frequent discriminatory criteria used in the creation and application of rules for the lease of municipal flats

### 1. Relevant criteria

With respect to assessing whether the principle of equal treatment was followed, the Defender has most frequently encountered the following discriminatory criteria in his practice:

- state citizenship,
- gender,
- race and ethnic origin.

The principle of equal treatment in access to housing is with respect to gender and race or ethnic origin guaranteed directly by provisions of the Anti-discrimination Act (cf. above). In the case of the first mentioned criterion, the right to equal treatment is stipulated directly in the primary law of the EU (see below).

#### a) Discriminatory criterion: State citizenship of the Czech Republic

The citizenship of the Czech Republic as a criterion for selecting a future lessee is usually used by municipalities as:

- A condition for including an applicant in the register of applicants for a municipal flat,
- A criterion constituting more favourable point evaluation compared to other citizens of the European Union.

**The prohibition of differentiate on the basis of state citizenship within the European Union is one of the basic building bricks of the EU law** and an elementary condition for the exercise of free movement.

European Community law prohibits (on a general level) any discrimination within basic EU treaties on the grounds of state citizenship in Article 18 of the Treaty on the Functioning of the European Union. The prohibition of discrimination of EU workers on the grounds of state citizenship in general is based on Article 45 Paragraph 1 and 2 of the Treaty on the Functioning of the European Union, which mentions freedom of movement of workers within the Union. Both of the mentioned Articles have a so-called direct effect.<sup>44</sup> Differentiation on the basis of state citizenship can be justified only on the basis of reasons contained in Article 45 Paragraph 3 of the Treaty on the Functioning of the European Union, which means on the grounds of public policy, public security or public health. To determine the scope of these terms, the judicial practice of the European Court of Justice serves as an interpretation guide. It mentions a strict interpretation, subject to supervision on the part of bodies of the Community.<sup>45</sup>

<sup>44</sup> Judgment of the ECJ of 5 February 1963 in case C-26/62 - *Van Gend & Loos*.

<sup>45</sup> Tichý, L., Arnold, R., Svoboda, P., Zemánek, J., Král, R. *Evropské právo*. 3<sup>rd</sup> edition. Prague: C. H. Beck, 2006, p. 481.

Specifically, the area of housing is addressed by Regulation No. 1612/68 of the Council on freedom of movement for workers within the Community, which has general applicability, is binding to the full extent and directly applicable in each Member State.<sup>46</sup> The right to equal treatment is a so-called *complementary right*<sup>47</sup> to free movement of workers within the Union. Article 9 of the Regulation stipulates that a worker who is a citizen of a Member State and who is employed in the territory of another Member State shall enjoy all the rights and benefits accorded to national workers in matters of housing, including ownership of the housing he needs. Such worker may, with the same right as citizens, put his name down on the housing lists in the region in which he is employed, where such lists exist; he shall enjoy the resultant benefits and priorities. According to Article 10 Paragraph 3 of the same Regulation, the right to equal treatment in access to housing shall also apply to the family of the worker – a citizen of a different Member State of the EU. As regards the interpretation of the term “worker”, it needs to be subjected to European Community law and not to the law of specific Member States. Within this sense, the interpretation of this term is that a person who currently does not have an employment but is trying to find it can be also regarded as a worker.<sup>48</sup>

However, if municipalities applied the conclusions of the paragraphs above without anything further, municipalities which in selecting lessees decided to give priority to Czech citizens permanently residing<sup>49</sup> in the territory of the municipality over Czech citizens permanently residing outside the municipality would have to give priority, based on these conclusions, to Czech citizens residing in the municipality and also to EU citizens not residing in the municipality at the expense of Czech citizens living outside the municipality.

The provision of Sec. 35 (2) of the Municipal Act rests mainly on the character of a municipality as a local self-government unit, as follows from Article 100 Paragraph 1 of the Constitution of the Czech Republic and Sec. 1 of the Municipal Act, i.e. it is a local self-governing community of citizens, who form the basis of a municipality. Therefore it is legitimate, if one of the duties of a municipality with separate powers is to satisfy housing needs of its citizens, if a municipality gives preferential treatment to its citizens **to a certain extent**. However, preferential treatment needs to be also applied to other citizens of other Member States of the EU who have a certificate of temporary residence in the Czech Republic<sup>50</sup> or a permanent residence permit<sup>51</sup> and have reported their place of residence<sup>52</sup> in the territory of the municipality. Given the primary and the secondary law of the EU (see above) and pursuant to Sec. 17 of the Municipal Act, EU citizens are granted a

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<sup>46</sup> Sehnálek, D. Přednášky k právu EU. (quoted on 17 February 2010).

Available at: [http://is.muni.cz/do/1499/el/estud/praf/ps07/pravo\\_eu/texty/pdf/prednaska04.pdf](http://is.muni.cz/do/1499/el/estud/praf/ps07/pravo_eu/texty/pdf/prednaska04.pdf).

<sup>47</sup> Sehnálek, D. Přednášky k právu EU. (quoted on 17 February 2010).

Available at: [http://is.muni.cz/do/1499/el/estud/praf/ps07/pravo\\_eu/texty/pdf/prednaska07.pdf](http://is.muni.cz/do/1499/el/estud/praf/ps07/pravo_eu/texty/pdf/prednaska07.pdf).

<sup>48</sup> E.g. 75/63 Unger, 53/81, Levin In Tichý, L., Arnold, R., Svoboda, P., Zemánek, J., Král, R. Evropské právo. 3<sup>rd</sup> edition. Prague: C. H. Beck, 2006. p. 480 - 481.

<sup>49</sup> Pursuant to the provision of Sec. 10 and subseq. of Act No. 133/2000 Coll., on Register of Population and Birth Certificate Numbers, as amended.

<sup>50</sup> Pursuant to the provision of Sec. 87a and subseq. of Act. No. 326/1999 Coll., on the Residence of Aliens in the Territory of the Czech Republic, as amended.

<sup>51</sup> Pursuant to the provision of Sec. 87g and subseq. of the same regulation.

<sup>52</sup> Pursuant to the provision of Sec. 93 (2) and related Sec. 87n (2) and Sec. 87r (2), respectively, of the same regulation.

number of rights that belong to a citizen of a municipality, and therefore it is a legitimate aim to satisfy the housing needs of these persons too.

It can be summarised that during the selection of applicants for the lease of a municipal flat it is legitimate to put a citizen-worker of another Member State on a par with a citizen of the Czech Republic who does not permanently reside in the territory of the municipality. During the selection of applicants for the lease of a municipal flat a citizen of the municipality-citizen of the Czech Republic can be given preferential treatment in a proportionate way over citizens permanently residing in other municipalities in the territory of the Czech Republic. However, if a citizen of another Member State of the EU has a certificate of temporary residence or a permanent residence permit in the Czech Republic and has its place of residence registered in the territory of the municipality, he must be put on a par with a citizen of the Czech Republic permanently residing in the municipality. Thus, a citizen of another Member State of the EU with registered place of residence in the territory of the municipality has to be given the same potential preferential treatment as a citizen of the Czech Republic permanently residing in the territory of the municipality that is offering the lease of a municipal flat.

**The Defender recommends not favouring a citizen of the Czech Republic over a citizen of another Member State of the EU during the selection of a future lessee of a municipal flat without anything further. Such procedure constitutes direct discrimination. Failure to include or refusal to include an applicant – a citizen of another Member State of the EU in the register of applicants for the lease of a municipal flat constitutes direct discrimination. The Defender recommends not using a criterion disadvantaging citizens of other Member States of the EU. If a municipality intends to give priority to citizens of the CR residing in the municipality during the lease of municipal flats, citizens of other Member States of the EU with place of residence registered in the municipality have to be given the same priority.**

#### **b) Discriminatory criterion: An applicant drawing parental allowance**

The social security scheme is an internally diversified system and the fact that an applicant is making use of it cannot justify without anything further the applicant's non-inclusion in the register of applicants for a municipal flat. According to Sec. 16 (2) (f) of the Municipal Order, every individual residing in a municipality has a right to require that a matter falling within the separate powers of the municipality be considered by the municipal board or the municipal council, i.e. in this case that the person's application for a municipal flat be considered.

The category of social security benefits include both benefits in material need and social security benefits and state social support benefits. State social support benefits include parental allowance pursuant to Sec. 2 (b) item 1 of Act No. 117/1995 Coll., on State Social Support, as amended (hereinafter also "the State Social Support Act"). **The drawing of parental allowance is not tied to the level of income and thus can in no way be the evidence of the financial or social**

**situation of an applicant<sup>53</sup> for municipal housing.** Generally, parental allowance should serve to compensate for income of a parent who cares duly and on an all day-day basis for a child under the age of 4 or 7 years, respectively, and cannot be economically active as a result. Therefore, the criterion of drawing parental allowance cannot be considered legitimate.

Pursuant to Sec. 2 (4), discrimination on the grounds of maternity or paternity is also considered discrimination on the grounds of gender. Paternal allowance is, of course, in its essence intended generally for the child's parent, i.e. the child's mother or father. **Therefore if the drawing of parental allowance is a criterion of differentiation in the application of rules for selecting applicants for a municipal flat, such criterion constitutes direct discrimination on the grounds of gender, and its use is therefore in violation of law.** Simultaneously, the provision of Sec. 7 (1) of the Anti-discrimination Act stipulates that discrimination on the grounds of gender in access to housing is a differential treatment that could be justified by a legitimate aim provided the means of achieving it are necessary and proportionate. Therefore, the discrimination is not direct but indirect since parental allowance and the drawing of the allowance is not a criterion neutral enough to be considered within the intention of indirect discrimination (cf. above).<sup>54, 55, 56</sup>

**Discrimination on the grounds of gender means a situation when the drawing of parental allowance is a criterion putting an applicant for the lease of a municipal flat at disadvantage. However, the right to equal treatment does not prevent municipalities from using such criterion in the sense of giving priority to applicants for a municipal flat.**

### **c) Discriminatory criterion: An applicant drawing a maternity benefit**

The legal framework of the right to a maternity benefit is stipulated in Act No. 187/2006 Coll., on Sickness Insurance, as amended (hereinafter also "the Sickness Insurance Act"), namely in the provision of Sec. 32 and subseq. The right to a

<sup>53</sup> The drawing of parental allowance based on an increased rate, however, can indirectly describe the financial situation, cf. Sec. 30 (1) (a) of the Social Security Act.

<sup>54</sup> If a certain action, criterion or practice is found to be directly discriminatory, indirect discrimination no longer needs to be considered; nevertheless, even if we admitted that the criterion of drawing parental allowance can be regarded as neutral, **it could still be labelled as a criterion that is indirectly discriminatory**, due to the following reasons: A parent duly caring for a child on an all-day basis, thus drawing parental allowance, is in vast majority of cases the mother of the child. Statistics processed by the Czech Statistical Office state that in 2007, 98.6% of parental allowances were drawn by women. If a family breaks up, a woman is more likely to be the head of the single-parent family (with children), according to the data of the Czech Statistical Office. In addition, indicators of economic activity show a decisive difference between men and women in a single-parent home. It can be therefore concluded that the condition that an applicant for the lease of a municipal flat from the municipal housing stock not be the recipient of parental allowance, has a greater negative impact on women.

In considering the legitimacy of an aim which would possibly exclude indirect discrimination, the following facts need to be taken into account: Based on statistical surveys carried out within the EU, the risk of poverty is higher in single-parent families (usually with a mother). The European Court of Human Rights stated in judgment *Burghartz v. Switzerland* (No. 16213/90; item No. 27) that the equality of the sexes is today a major goal in the member States of the Council of Europe and that very weighty reasons would have to be put forward before a difference of treatment on the sole ground of sex could be regarded as justified. In connection with the use of the criterion of parental allowance to select an applicant for the lease of a municipal flat, the Defender, completely in conformity with the stated judgment, cannot imagine the mentioned weighty reasons.

<sup>55</sup> Draft Joint Report on Social Protection and Social Inclusion. Available at: [http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005\\_0014en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0014en01.pdf) (page 5). Quoted on [3 February 2010].

<sup>56</sup> [http://www.czso.cz/csu/2008edicniplan.nsf/t/23003251EA/\\$File/14150805.pdf](http://www.czso.cz/csu/2008edicniplan.nsf/t/23003251EA/$File/14150805.pdf).



maternity benefit belongs primarily to a woman who is at an advanced stage of pregnancy or who has given birth to a child and who has participated in the sickness insurance scheme for a period stipulated in legislation [Sec. 32 (1) (a)]. If due to certain, usually objective reasons a child cannot be taken care of by its mother and it is cared for by its father or a person substituting for the parent's care (on the basis of a decision of a relevant authority pursuant to Sec. 38 of the Sickness Insurance or on the basis of an agreement between the mother of the child and the father of the child or the woman's husband), the person may be also entitled to a maternity benefit after the lapse of 6 weeks from the day of childbirth.<sup>57</sup> As in the case of a mother of a child, this person must have participated in the sickness insurance scheme for a certain time. A maternity benefit is not, as opposed to parental allowance, a state social support benefit but a sickness insurance benefit. With parental allowance, these two benefits are part of the social security system and are tied to a maternal or a paternal role. A maternity benefit is, just parental allowance, a benefit compensating for income. In comparison to parental allowance, a maternity benefit is paid by the Czech Social Security Administration, according to Sec. 108 (1) (a) of the Sickness Insurance.

If we look at the drawing a maternity benefit as a criterion that puts the applicant at disadvantage from the point of view of the right to equal treatment, we cannot but go back to the line of reasoning mentioned in the previous section (parental allowance as a discriminatory criterion) and state again that according to Sec. 2 (4), discrimination due to maternity or paternity is also considered discrimination due to gender.

**If the drawing of a maternity benefit is a criterion of differentiation in the application of rules for selecting applicants for a municipal flat, such criterion constitutes direct discrimination on the grounds of gender and its use is in violation of law.**

A typical situation where a person is participating in the sickness insurance scheme is employment. This means, save for exceptions, that if a person is entitled to a maternity benefit, such a person has been economically active for some period of time. Therefore if the motive of a municipality is to exclude from access to the housing stock those who have been in a social situation that calls into question their ability to pay rent, it is paradoxically persons drawing maternity benefits who should satisfy the guarantee of motivation to perform economic activity.

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<sup>57</sup> The provision of Sec. 38 – “The following shall be deemed to be a decision of a relevant body pursuant to Sec. 32 (1) (b):

- a) a court decision awarding the custody of a child to an individual different than the parent,
- b) a court decision on the adoption of a child,
- c) a decision of a body for social and legal protection of children awarding the custody of a child to a future adoptive parent,
- d) a court decision on the appointment of an individual as guardian, provided the guardian personally cares for the child,
- e) a court decision awarding the custody of a child to foster parents, pursuant to a special regulation,
- f) a decision of a body for social and legal protection of children awarding the custody of a child to an individual who wishes to become a foster parent,
- g) a court decision on an emergency ruling concerning child care,
- h) submission of a motion to commence court proceedings on the appointment of an individual as guardian, provided the person personally cares for the child and does not have a duty to support and main the child, for the duration of these proceedings.

It is apparent that the purpose of a maternity benefit is above all the protection of the role of a parent. If a person has contributed to the social security system for a certain period of time, this person is entitled to assistance in a situation when due to care for a child he or she cannot be economically active. In this respect, we need to note the provision of Sec. 6 (5) of the Anti-discrimination Act, which stipulates that a difference in treatment for the purpose of the protection of a woman due to pregnancy or maternity is a legitimate aim, and thus it is not discriminatory, if the means to achieve the aim are proportionate and necessary. Therefore, the legal regulation contained in the Anti-discrimination Act not only regards disadvantaging women on the grounds of pregnancy and maternity discriminatory but also opens room for a positive action leading to their protection. The protection of pregnant women and parenthood is a continuously increasing standard, pursued over a long time at the European Union level.

**The Defender recommends the amount of a maternity benefit be counted in in the income of an applicant if the amount of income is a criterion. Discrimination on the grounds of gender occurs when the drawing of a maternity benefit is a criterion that puts an applicant for the lease of a municipal flat at disadvantage.**

**d) Discriminatory criterion: A lower number of children (members of household) for more favourable point evaluation in the register**

Disadvantaging an applicant with a higher number of family members over applicants whose family has fewer members is disputable. Based on statistical data arising out of census in 2001, Roma women have a higher number of born children,<sup>58</sup> which is shown, after all, in professional literature too.<sup>59</sup> Although the assumption of indirect discrimination of the Roma people in a situation when as a result of a seemingly neutral criterion a family with fewer children (family members) is given preference is sufficiently justified, it cannot be satisfactorily supported by representative statistical data. This is due to the absence of reliable ethnic data, which are principal but not the sole indicator of indirect discrimination.<sup>60</sup>

Within the context of discrimination on the grounds of affiliation to an ethnic minority, we need to mention multiple discrimination, which largely affects Roma women. The phenomenon of an increased danger of multiple discrimination due to ethnicity and gender (female) is also pointed out within the context of differentiating between men and women in the preamble (paragraph 14) of Council Directive 2000/43/EC, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

<sup>58</sup> [http://www.czso.cz/csu/2003edicniplan.nsf/t/C2002EA6AD/\\$File/Kapitola3.pdf](http://www.czso.cz/csu/2003edicniplan.nsf/t/C2002EA6AD/$File/Kapitola3.pdf); page. 30. However, it is a known fact that the data are not effective for determining the actual number Roma people living in the Czech Republic because the method used in the census was a self-identification method, which in this case is not reliable. In addition, the categories of nationality and ethnicity are not interchangeable.

<sup>59</sup> E.g. Ringold, D., Orenstein, M. A., Wilkens, E. Roma in expanding Europe: breaking the poverty cycle. Washington: The World Bank, 2005, p. 49.

<sup>60</sup> As regards the nature of statistical data as evidence of indirect discrimination, see the judgment of the European Court of Human Rights *Huhg Jordan v United Kingdom*, No. 27476/94, of 4 May 2001.

In connection with indirect discrimination on the grounds of affiliation to the Roma ethnic group, the results of analyses, monitoring, and inquiries within the context of the prevention or resolution of social exclusion need to be taken into account since they show that the question of housing is one of the most pressing problems of segregation of members of the Roma minority.<sup>61</sup> The stated documents are convincing evidence of the fact that social exclusion is a phenomenon stemming from complex and interrelated causes and that discrimination affects the Roma population to a higher extent in several areas of their life. Council Directive 2000/43/EC and decisions of the European Court of Human Rights and of the Supreme Court of the United States of the America give only little room for justifying differentiation on the grounds of race or ethnic origin. Differentiation on the grounds of race or ethnic origin is always a so-called “suspicious” characteristic.<sup>62</sup> The judicial practice of the European Court of Human Rights show that this court requires a stricter review of whether disadvantaging a person is connected with reasons that it calls inadmissible.<sup>63</sup> Race and affiliation to a national or an ethnic minority is, according to a general legal opinion, at the top of the scale of “importance” of prohibited discriminatory reasons and only minimum room is given for the justification of actions on the grounds of race or ethnicity. In the USA the justification of discrimination on the grounds of race is possible only if it is proven that it is justified by exceptionally important interest of the state in achieving a certain public goal, which cannot be achieved in any other way.<sup>64</sup>

As has been mentioned above, justification of a difference in treatment<sup>65</sup> on the grounds of a legitimate goal must not be connected with a criterion of differentiation, i.e. in this case with race or ethnicity. **The measure would be legitimate only if it were the so-called “positive” measure,<sup>66</sup> i.e. if it gave preferential treatment to families with a higher number of children.**

It would be interesting to monitor what objective explanations would be given by those municipalities that use point evaluation based on the number of persons in a household. At present, the legal order does not set any limits as to the number of persons per flat.

It could be concluded that the absence of sufficiently reliable data specifically related to the number of children of women of Roma origin does not enable the Defender to support indirect discriminatory impact of the criterion analysed above by data; however, the probability that this is a case of unequal treatment is close to

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<sup>61</sup> An analysis of socially excluded Roma localities and absorption capacity of entities involved in this field, 2006. National Report on Strategies for Social Protection and Social Inclusion for 2008 - 2010. Action Plan for the Decade of Roma Inclusion 2005 - 2015 Czech Republic. Zpráva o stavu romských komunit v České republice za rok 2008 [Report on the state of Roma communities in the Czech Republic].

<sup>62</sup> Ibidem.

<sup>63</sup> *Palau-Martinez v France* (No. 64927/01), *Salgueiro da Silva Mouta v. Portugal* (No. 33290/96), *Hoffmann v. Austria* (No. 12875/87), *D. H. v. the Czech Republic* (No. 57325/00), *Timishev v. Russia* (No. 55762/00 and No. 55974/00) In Boučková, T. Rovnost a sociální práva. Prague: Auditorium, 2009, p. 130.

<sup>64</sup> Ibidem, p. 129.

<sup>65</sup> The judgment of the Grand Chamber of the European Court of Human Rights in case *D. H. and others v. the Czech Republic* (complaint No. 57325/00. Item No. 196): “Where the difference in treatment is based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible”.

<sup>66</sup> Preamble to Council Directive 2000/43/EC points out the importance of the fight against discrimination on the grounds of race and ethnic origin at the Community level, when even positive action can be used to ensure to this end (Article 5).

certainty. In the Czech Republic there are no clear legislative boundaries set for the systematic collection of data about ethnical or racial origin; however, the judgment of the European Court of Human Rights in case *D. H. and others v. the Czech Republic* shows that even under these conditions, indirect discrimination on the grounds of race can be proven. It is entirely up to a court institution to assess which data it will find valid and which not.

**The Defender recommends that a lower number of children (household members) be not used as a criterion that puts an applicant for the lease of a municipal flat at advantage. The Defender regards such criterion with high probability as indirectly discriminatory against Roma people.**

**e) Discriminatory criterion: A requirement of a disproportionate amount of income of an applicant (household) for the lease of a municipal flat**

The prohibition of discrimination in access to housing as a service and within its implementation pursuant to the Anti-discrimination Act applies both to private entities and municipalities as entities of public law. Some municipalities require the evidence of the level of income as a condition for including an applicant in the register. "Allowed" or preferred sources of such income are often set too, as already discussed above.

If the criterion of a required level of income is subjected to a test to see whether it could be found to be indirectly discriminatory, it needs to be established, first of all, whether the given criterion which can be considered seemingly neutral can have a discriminatory effect, i.e. an unfavourable impact, on a certain group of persons having the characteristics of a prohibited discriminatory reason.<sup>67</sup>

In the Defender's opinion, the criterion requiring high income could have a negative impact in particular on a single mother or a single father caring for children on an all-day basis, receiving e.g. the mentioned parental allowance as the only source of income, or on women receiving maternity benefits as the only source of income (see above). At this stage of testing whether the criterion is discriminatory, it is still only a suspicion that indirect discrimination due to gender takes place (or maternity or paternity). Of course, not every unfavourable impact on a certain group of persons can be found to be (indirectly) discriminatory. As has been already mentioned several times, discrimination takes place only when it is not objectively justified by a legitimate aim and the means to achieve this aim are not proportionate.

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<sup>67</sup> Wealth or poverty is not a prohibited discriminatory reason pursuant to the Anti-discrimination Act, which is understandable since it is hardly a case of discrimination when a person cannot buy, for example, as expensive car as another person. The situation is seemingly complicated by the provision of Article 3 (1) of the Charter of Fundamental Rights and Freedoms guaranteeing fundamental rights and freedoms to all, among others irrespective of property. Property as a prohibited discriminatory reason is in its essence very problematic and worth questioning. In this legal relationship, however, the provision of the Charter of Fundamental Rights and Freedoms will not be used by definition and the so-called indirect horizontal effect of fundamental rights will not be applied either. Compare, e.g. Bobek, M., Boučková, P., Kühn, Z. *Rovnost a diskriminace*. 1<sup>st</sup> edition. Prague: C. H. Beck, 2007, p. 118 - 119.

Especially when the requirement to have a certain level of income is applied as a criterion putting an applicant for the lease of a municipal flat at advantage or disadvantage, the incomparability of the position of a municipality as opposed to that of a “common lessor” fully shows up. According to Sec. 38 (1) of the Municipal Order, a municipality has a duty to attend to the maintenance and development of its property and within this sense the Defender considers it legitimate to require the evidence of a certain level of income. Both in the case of a municipality and a “common lessor” it is completely all right to require that a potential future applicant provide information about his or her income. Therefore, the requirement that the aim be legitimate is fulfilled. By this procedure, a future applicant in essence establishes the probability of the future lessee’s having difficulty paying the rent in a due and timely manner.

What remains to be considered is whether the legitimate aim, in this case getting rent for a leased flat, is achieved using proportionate measures. A common lessor has a vested right, if considered necessary, to set the selection criteria consisting in the minimum required amount of income of jointly assessed persons at any level – his actions will be considered the legitimate exercise of his ownership right. However, the ownership right of a municipality is modified generally by Article 11 (3) of the Charter of Fundamental Rights and Freedoms<sup>68</sup> and the provision of Sec. 35 (2) of the Municipal Act, already mentioned many times in this text, in the light of which the requirement of proportionate measures to achieve a legitimate aim needs to be considered.

If we apply the test of proportionateness to a single mother whose only source of income is parental allowance or a maternity benefit, we reach the following conclusion: **In comparison to a “common lessor” a municipality cannot set a criterion requiring an arbitrary (disproportionate) level of income of jointly assessed persons, applicants for the lease of a municipal flat. Such a procedure would constitute indirect discrimination due to race, or maternity or paternity.**<sup>69</sup>

Of course, there is a suspicion that the criterion of disproportionately high income of jointly assessed persons is discriminatory mainly with respect to Roma people, or, as the case may be, multiple discrimination of Roma women occurs. Owing to the absence of relevant data (cf. above), discrimination within this sense cannot be proven. It is thus legitimate to give more priority or less priority to applicants for the lease of a municipal flat depending on the level of income; however, disproportionately high income cannot be required.

The use of the criterion concerning the level of income, if a municipality needs such a criterion, needs to be based on the knowledge of local conditions in the municipality, in particular on estimated income of persons for whom the option to lease municipal housing stock is in essence intended. In this respect, the obligation of a municipality with respect to its citizen needs to be pointed out again, as stipulated in the provision of Sec. 35 (2) of the Municipal Act.

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<sup>68</sup> Article 11 Paragraph 3 of the Charter of Fundamental Rights and Freedoms: “Ownership is binding. It may not be misused to the detriment of the rights of others or against legally protected public interests. Its exercise may not cause damage to human health, nature and the environment beyond statutory limits”.

<sup>69</sup> [http://www.czso.cz/csu/2008edicniplan.nsf/t/23003251EA/\\$File/14150805.pdf](http://www.czso.cz/csu/2008edicniplan.nsf/t/23003251EA/$File/14150805.pdf).

The Defender recommends that municipalities, when assessing an application for the lease of a municipal flat, not use the requirement of a disproportionate level of income of an applicant and other jointly assessed persons as an assessment criterion. Such criterion is discriminatory on the grounds of gender (paternity and maternity).

## V. Case interpretation<sup>70</sup>

The existing findings of the Public Defender of Rights confirm the fact that not all municipalities keeping a register and selecting applicants for the lease of a municipal flat proceed in accordance with the legal order of the Czech Republic, and in particular in accordance with the Anti-discrimination Act. On the basis of findings from cases concerning specific persons who turned to the Defender with a complaint, the following section includes an analysis of selected cases of discriminatory criteria that most frequently appear in the documents of municipalities. Due to a generalizing character, cases are presented in an anonymous form.

### 1. Principles of the lease of municipal flats of metropolitan district A

The principles of the lease of municipal flats owned by metropolitan district A contain the following provision: *"... enter in the register only an applicant who is not an owner or a lessor of another flat or an owner of a residential house or a family house and who has had permanent residence in the territory of metropolitan district A for at least 3 years and **has Czech citizenship**"*.

In a different place, in a section dealing with conditions for the exclusion of applicants from the register of applicants for a municipal flat, the following text can be found: *"... **will not enter in the register or will exclude from the register an applicant** if he has not been permanently residing in A for more than 3 years, **if he is not a citizen of the Czech Republic** (with the exception of persons who have been granted asylum of refugee status, pursuant to a special regulation of the Ministry of the Interior of the Czech Republic)"*.

The criteria are directly discriminatory – c.f. Chapters IV. 1 a) of this recommendation – since they constitute inadmissible differentiation between citizens of the Czech Republic and other citizens of the EU. Here it would be appropriate to point out the fact that giving preference to citizenship of the Czech Republic is one of the most frequent discriminatory criteria, according to the Defender's findings.

### 2. Rules regarding the management of flats of town B

Article 2, item 7 of the rules of management of flats of town B says: *"An application for the lease of a municipal flat can be submitted only by an applicant who is not or has not been a debtor of town Y in the past three years; there is not or has*

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<sup>70</sup> Case interpretations stem from real rules for the lease of municipal flats, which the Defender has at his disposal. The rules were made anonymous for the purpose of the Recommendation.

*not been a dispute against him or members of his household regarding the sanctioning of a notice to leave a flat, they have not been given notice of termination of lease, there has not been a dispute against them regarding eviction of an unlawfully occupied flat or payment of debt arisen in connection with the use of a flat, and **has been employed or has been in a similar relationship for the period of 12 months as at the date of submitting the application and the employment or similar relationship still lasts***”.

The Social Security Act stipulates in Sec. 30 (1) the conditions of entitlement to parental allowance. The Act specifically mentions that entitlement arises to a parent who “... *for the entire calendar month, on an all-day basis and in a due manner personally cares for a child that is the youngest in the family...*” Therefore the requirement of a lasting “*employment or similar relationship*” is not usually met by a person caring for a child of less than four (or seven) years of age and drawing parental allowance on that grounds. According to the above-mentioned statistics, persons drawing parental allowance are largely females.<sup>71</sup> This means that for 98.6% of women caring for a child of up to 4 years (or 7 years) of age, the possibility to submit an application for the lease of a municipal flat in town B is due to objective circumstances and due to the purpose of parental allowance (preference of personal and all-day care for a child) reduced to minimum. As a result, the requirement of continuing employment or other similar relationship can be regarded as indirect discrimination on the grounds of gender (against women).

The legitimacy of the aim could be hardly established, in the Defender’s opinion, due to the reasons presented in Chapter IV. 1 b). The legitimisation of the aim of a difference of treatment is also weakened with respect to the fact that the non-fulfilment of the analysed requirement means that the application of an applicant will not be even entered in the register and processed, which could be considered breach of Sec. 16 (2) (f) of the Municipal Order.<sup>72</sup> The necessity of differentiating between applicants for the lease of a municipal flat is understandable; however, when defining the rules, a municipality should also take into consideration the provision of the Municipal Act mentioned in the previous sentence and the social dimension of the public status of a municipality, and, of course, the legislation related to the right to equal treatment.

### **3. Criteria of an application for a flat in metropolitan district C**

The criteria for the selection of applicants for the lease of a flat in metropolitan district C award, without anything else, ***more than three times as many points to citizens of the Czech Republic compared to other citizens of the European Union***. This criterion is, as analysed above, directly discriminatory on the grounds of state citizenship of another Member State of the EU and is an example of another possible way of giving advantage on the grounds of state citizenship of the Czech Republic.

The criteria of metropolitan district C also stipulate that one of the highest rated criterion is (besides the above-mentioned criterion of citizenship of the Czech Republic, which is directly discriminatory) the evidence of income for the past three

<sup>71</sup> [Http://www.czso.cz/csu/2008edicniplan.nsf/t/23003251EA/\\$File/14150805.pdf](http://www.czso.cz/csu/2008edicniplan.nsf/t/23003251EA/$File/14150805.pdf).

<sup>72</sup>“to demand that a certain matter be discussed by the municipal board or the municipal council ...”

months with a condition that “**material welfare from the Labour Office and unemployment benefits paid are not considered proven income**”. In this case the chosen wording (material welfare from the Labour Office) is probably derived from the terminology of Act 1/1991 Coll., on Employment, which is no longer effective. With respect to the fact that parental allowance belongs to benefits paid by the Labour Office, this criterion could be again regarded as indirect discrimination against women because no person drawing parental allowance would be able to show the required income. As the many times quoted statistics clearly show, parental allowance is almost entirely drawn by women, which means that it is more likely that a woman rather than a man will not be able to meet such a condition in a comparable situation. As regards the legitimacy of the criterion used, we can refer to the line of reasoning used in Chapter IV. 1 c) of this recommendation.

#### 4. Point evaluation of an application for a flat in metropolitan district D

Metropolitan district D publishes a table on its website illustrating point evaluation of applicants for the lease of a flat in ownership of this metropolitan district. This table is attached to a document “*Pravidla pronájmu bytů v domech svěřených městské části D a kritéria*” [Rules for the lease of flats in houses entrusted to metropolitan district D and criteria].

Family with 1 minor	1
Family with 2 minors	2
<b>Family with 3 and more minors</b>	<b>3</b>

The mentioned table shows that metropolitan district D regards a situation when an applicant has a family with minors as a reason for more favourable point evaluation compared to applicants without minors. This measure is completely legitimate and it can be considered clearly positive. However, the point evaluation of families with children as shown above seems to be problematic since three categories of families are created, and the points awarded increase with the number of children in a family, stopping at three children. After that the number of points does not increase any further, which could be interpreted in a way that metropolitan district D prefers families in its territory with up to three minors. As regards the discriminatory nature of this criterion, we can refer to the part of the recommendation dealing with the criterion “A lower number of children (members of household) for more favourable point evaluation in the register.” In the Defender’s opinion, the above-mentioned practice has an unfavourable impact especially on the Roma people, which could cause their indirect discrimination. However, as has been mentioned above, with respect to the lack of clear statistical data, the existence of indirect discrimination cannot be established without reservation. The case *D. H. and others v. the Czech Republic* showed, however, that it is at the discretion of a court what statistical data will be accepted as relevant evidence of indirect discrimination.

The evaluation table of metropolitan district D also contains **point evaluation of a recommendation of the relevant social services branch**, which can be undoubtedly regarded as a positive criterion since it enables taking into account an unfavourable life situation of an applicant.



## 5. Metropolitan district E

Metropolitan district E declares in its rules for allocating municipal flats that it offers several categories of flats, which applicants can apply for (flats leased on grounds of social reasons, flats leased on grounds of health reasons, sale of non-standard flats, etc.). The category of *"the lease of flats on grounds of social reasons"* can be divided further (young people up to 30 years of age, spouses with children up to 18 years of age, single parents with children up to 18 years of age and so on). General conditions are determined, and they have to be met by all applicants for registration in this category of social flats. Moreover, additional entry criteria are set for each sub-category separately. At the beginning, it is stated that *"in this category flats are leased to applicants who are not able to solve their housing situation on their own due to serious social reasons"*. Applicants must show, among others, the evidence of net income for the past 12 months as a proof of their ability to pay rent. The amounts of the established income are differentiated according to the number of household members as follows:

For one person	CZK 10,293 – 20,586 / month
For two persons	CZK 14,704 – 29,408 / month
For three persons	CZK 20,586 – 36,760 / month
For four persons	CZK 26,467 – 44,112 / month
For five and more persons	CZK 32,349 – 49,994 / month

The aim of this criteria is clearly defined as the ability of an applicant to pay rent. Given the obligation of a municipality to attend to the maintenance and development of its property, such aim can be considered legitimate. In fulfilling its functions, however, the municipality should proceed in a proportionate manner and its interest in the maintenance and development of its property should not outweigh care for the satisfaction of housing needs of its citizens.

As regards the proportionality, what can be subjected to criticism is particularly the fact that in case of the established income, difference is not made between an adult and a minor. A household of three members has to show evidence of net income of at least CZK 20,586, regardless of the fact whether it comprises a mother with two children, in which case due to objective reasons none of the persons is engaged in a gainful activity. The criteria of metropolitan district E do not set any limits for the structure of the income to be established.

Let us imagine a situation of a woman caring for two minors, one of them younger than four years.<sup>73</sup> Income of such household will usually come from social security benefits and from maintenance and support of the minors, paid by their father. The amount of parental allowance is differentiated according to the mode of assessment chosen by a parent (from CZK 3,800 to CZK 11,400 a month, provided the child is not disabled). One can hardly imagine a situation that a woman caring for

<sup>73</sup> That it is largely women who stay as single parents is shown for example in the finding of the Czech Statistical Office: [http://www.czso.cz/csu/2008edicniplan.nsf/t/230032104E/\\$File/14150801.pdf](http://www.czso.cz/csu/2008edicniplan.nsf/t/230032104E/$File/14150801.pdf) or in an analysis of the Ministry of Labour and Social Affairs: <http://www.mpsv.cz/files/clanky/4355/analyza.pdf>.

two minors, and having to care for one of them personally, duly and on an all-day basis in order to be entitled to parental allowance (Sec. 30 (1) of the Social Security Act), would have net monthly income of CZK 20,586. The disproportionateness of the so determined level of income is illustrated by the fact that in order for a parent caring for at least one minor to be entitled to social conditions allowance pursuant to the State Social Security Act, the applicable income may not usually exceed the amount derived from the income of the assessed persons and the living minimum. The amount of social conditions allowance decreases as the income of a family adequately rises. Paradoxically, a mother of two minors with net monthly income of at least CZK 20,586 could apply for the lease of a flat on grounds of social reasons in metropolitan district E but she would not be recognized by the social support system as a person in need.

## 6. Town F

In the territory of town F, applicants for the lease of a municipal flat are selected on the basis of an auction. The town sets certain “entry” requirements for the participation in an auction. One of the conditions is that persons who cannot participate in an auction include “... **applicants drawing a maternity benefit or parental allowance as their only source of income**, with the exception of those who had been working or been engaged in an independent gainful activity, paying social insurance, before they started to draw these benefits”.

As has been mentioned a number of times in this recommendation, statistics show that women are clearly predominant among persons drawing parental allowance. A maternity benefit is a sickness insurance benefit also received by women, save for exceptions.<sup>74</sup> The above-given criterion of town YY thus excludes from the possibility to participate in an auction a group of persons, which largely comprises women. This finding therefore justifies a conclusion that the criterion constitutes indirect discrimination on the grounds of gender, provided the legitimacy of the aim is not established or it is not established that the means for achieving the aim are proportionate and necessary.

If we should think of an aim that needs to be legitimised, it will probably be a good payment record of a future lessee. The exclusion from the possibility to participate in an auction does not apply to those who show that they “... *had been working or been engaged in an independent gainful activity, paying social insurance, before they started to draw these benefits*”. This condition will have to be met by persons singled out on the basis of the criterion related to the drawing of the benefits in question, i.e. mostly by women. Therefore, a vast majority of women will be subject to stricter requirements than men, to prove that they can be “returned” to the list of applicants for an auction.

If we take into account the above line of reasoning related to parental allowance (which proportionally applies to a maternity benefit too), we cannot infer the legitimacy of the aim of differentiation between those drawing the benefits in question and those not doing so. The fact that a specific person is receiving a maternity benefit or parental allowance does not say anything about a future payment

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<sup>74</sup> The conditions for entitlement to maternity benefit are stipulated in Sec. 32 of Act No. 187/2006 Coll., on Sickness Insurance, as amended.

record or the social situation of the applicant. As regards the expression "... as *their only source of income*", it needs to be again emphasised that a parent, in order to be entitled to parental allowance, has to care for a child below four (or seven) years of age duly and on an all-day basis. As a result, it is not possible to require justly that this parent should secure an additional source of income, which probably means employment or running business. Furthermore, it cannot be omitted that a family with minors deserves the support of the state, which includes the support of a municipality as a public law corporation.

JUDr. Otakar Motejl  
Public Defender of Rights  
(the report is signed by electronic signature)