

Joint submission of

the Public Defender of Rights of the Czech Republic and

the Deputy-Commissioner for Minority Rights of Hungary

concerning the Twenty-first to twenty-third periodic

reports of Canada

to the United Nations

Committee on the Elimination of Racial Discrimination

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I. Introduction

A. Aim of the submission and the core issue

The present paper is submitted jointly by the Czech Public Defender of Rights and the Deputy-Commissioner for Minority Rights of Hungary. It is aimed to inform the United Nations Committee on the Elimination of Racial Discrimination, within the framework of the compulsory reporting procedure on the implementation of the Convention, that Canada allegedly failed to comply with its obligation and discriminated non-citizens on racial ground under extra-territorial jurisdiction. Canada referred to the Roma minority in the state report only one time and in a non-related context, the two national human rights institutions¹ decided to take a joint action and present the cases of Roma passengers heading to Canada who were subject of discriminatory and humiliating procedures during the pre-boarding screenings in European airports.

The pre-boarding screenings of Roma passengers, holding different nationalities, were implemented in an unlawfully discriminatory manner as mostly Roma people who were identifiable by appearance or by name were questioned, in an intrusive and unreasonable way e.g. requested to provide additional documentation compared to the general immigration rules. Often personal and sensitive questions were raised by unknown officials in front of the whole queue, in some cases in the presence of Canadian immigration officers. Unfortunately, the issue of extra-territorial jurisdiction cannot be discussed here due to lack of information about the involvement of the Canadian immigration services.

Based on different sources, this practice apparently aims to identify potential asylum-seekers before they arrive to Canadian territory and fall under the scope of the Refugee Convention. Carrier sanction legislations imposing financial penalties on airline companies bringing passengers without valid documentation or visa is not a recent development in Canadian law nor a unique practice on a global level. But the practice of the airline companies shall not infringe the principle of legality and the right to a fair procedure: in the cases discussed here the passengers were not provided with proper information about the screening procedure and the available remedies in case of denied boarding.

The present submission of the national human rights institutions in relation to the Canadian state report is of high relevance for several reasons. In line with General Recommendation

¹Czech Public Defender of Rights is not accredited NHRI, but we do believe that it has standing to make the submission and in the document the Defender is referred as NHRI for simplification.

XXX of the Committee on discrimination against non-citizens, the right of non-citizens to have access to services intended for use by the general public shall be guaranteed without discrimination, which includes public transportation such as travel via airplane. Also we would like to recall that the States Parties shall ensure that the immigration policies does not have the effect of discriminating against persons on the basis of race, colour, descent or national or ethnic origin. The States Parties are obliged to report about the implementation of these obligations as well.

Although the Czech and the Hungarian national human rights institutions' mandate covers several national actors involved in these cases, their thorough investigation is not possible without cooperation with the Canadian authorities. The authors of the present paper are deeply concerned that the Canadian authorities have refused to cooperate so far. At the same time, they hope that the discussion of the state report at the UN CERD will open a platform for a constructive dialogue on how to ensure the protection of human rights of passengers travelling from the territory of one country to another - without discrimination on any ground.

B. About the authors

The Public Defender of Rights of the Czech Republic protects people against the conduct of authorities and other institutions if the conduct is against the law, does not correspond to the principles of a democratic legal state and the principles of good administration, or the authorities are inactive. He/she also carries out preventive systematic visits to places where people are restricted in their freedom and seeks to ensure that their rights are respected. The Defender also contributes to promotion of the right to equal treatment and protection against discrimination as a national equality body pursuant to the law and applicable directives of the European Union (e.g. 2000/43/EC, 2000/78/EC etc.) since 2009.²

The Deputy-Commissioner for Minority Rights of Hungary protects and promotes the rights of national minorities living in Hungary with quasi-judicial competence to hear and consider complaints against public authorities and other entities providing public services as well as to initiate investigations ex-officio concerning the situation of a non-determinable group of people or the implementation of a particular fundamental right. The mandate of the Deputy Commissioner for Minority Rights includes activities supporting the work of the Commissioner for Fundamental Rights of Hungary in the field of minority protection as well as taking individual actions. The Deputy Commissioner supports the work of the Commissioner

² More information about the institution is available at <https://www.ochrance.cz/en/>

by providing up-to-date information about the situation of national minorities and early warnings aimed at preventing human rights violations. The Deputy Commissioner takes part in the inquiries of the Commissioner and may propose to initiate investigations ex officio in relation to minority rights issues.³

³ More information about the institution: <http://www.ajbh.hu/en/web/ajbh-en/>

II. Case-law of the Czech Public Defender of Rights

A. Summary of the incident

The Public Defender of Rights (the institution of Ombudsman and also the equality body in the Czech Republic) deals with a case of a Roma (hereinafter the “Complainant”) who, together with his younger daughter, wanted to visit his older daughter in Canada in summer 2015. According to the Complainant’s statement, his older daughter lives in Canada and has been granted the status of an asylum holder there in December 2014.

The Complainant stated that he had had valid return flight tickets with Air Transat (departure on 21 July 2015 at 11:20 a.m., arrival in Prague on 10 August 2015 at 4:50 p.m.), an Invitation Affidavit from his older daughter, a copy of his employment contract and a copy of a decision on admission of his younger daughter for studies at a high school in the Czech Republic. The Complainant wanted to use these documents to prove that he had a background in the Czech Republic and that he was only visiting and did not want to emigrate.

In July 2015, approximately at 9 a.m., the Complainant and his younger daughter arrived at Václav Havel Airport in Prague and joined the check-in queue. They were the only Roma in the queue. They were subsequently approached by three persons – two women and one man. The Complainant believes they were employees of the Canadian immigration control. However, the Complainant is not sure as these persons had no name tags and did not introduce themselves. They spoke Czech and Slovak.

Not far from the check-in queue, said persons started asking the Complainant about the purpose of his journey, asked if he was employed, how old was his younger daughter, who was travelling with him, where she attended school and how much money they had with them. These questions made the Complainant very uncomfortable. The Complainant presented all the documents and repeatedly stressed that he and his daughter were on vacation and had no intention of emigrating.

Subsequently, said persons verified something over the phone. After the telephone calls concluded, the Complainant was approached by one of the unidentified persons (a Slovak-speaking man) who informed him that the Embassy in Vienna would not allow him and his daughter to board the plane. The man gave them no explanation.

The Complainant therefore made a phone call to the Embassy of Canada in the Czech Republic. The Embassy employee who was dealing with the call did not understand what the problem

could be. The Complainant wanted for the man who banned him from boarding the plane to speak with the Embassy employee, but the man refused to take the call.

Furthermore, the Complainant approached officers of the Foreigners Police who were present at the airport. Police officers told the Complainant they would let them board the plane, but that the Complainant and his daughter needed a boarding ticket, which they would receive upon check-in.

In an attempt to solve the situation, the Complainant called the travel agency (Fischer) that had provided him with the flight tickets. The travel agency informed the Complainant that everything was in order on their part. That if the Embassy of Canada would not allow them to board the plane, the travel agency was not to blame.

The three persons who had asked the Complainant and his daughter about the details of their journey subsequently refused to talk to them, ignored them and pointed to the exit from the airport. The Complainant and his daughter demanded an explanation and a written copy of such ban. But to no avail.

This situation had a deep negative impact on the Complainant and his daughter. After some time, they ultimately gave up and went home.

The Complainant is convinced that he became a victim of discrimination based on his ethnicity as he and his daughter were the only Roma in the check-in queue and nobody else was so questioned or banned from boarding the plane by the three persons.

B. Further steps taken by the Complainant

After returning home, the Complainant began demanding a refund for the flight ticket he had not been able to use. He contacted the Embassy of Canada in Vienna, which forwarded his request to the Canada Border Services Agency (CBSA). The CBSA responded, stating that in order to ensure integrity of the Canadian immigration programme, some countries used the services of Liaison Officers. Such Liaison Officers provided support, guidance and training in recognising counterfeit travel documents to airlines and their contractual partners. Nevertheless, the CBSA stated that the final decision on whether a specific passenger would be allowed to board a plane lay with the airline. The CBSA made no statement regarding financial compensation.

For this reason, the Complainant turned to the airline and asked for a refund for the flight tickets. An employee of the Czech travel agency that had provided him with the flight ticket

responded to his request. The employee informed him that full refund was not possible. According to the Terms and Conditions of the tariff, only the airport taxes (approx. CZK 1,500) could be refunded to the Complainant, which they did. Regarding the refund of the remaining sum of money, the airline orally informed the Complainant that he had failed to check in on time and thus, the money could not be refunded.

Even after this experience, the Complainant would like to visit his older daughter in Canada. However, the travel agencies he has approached discourage him from purchasing flight tickets as the situation may repeat. The Complainant has information from his acquaintances that a similar practice of not allowing Roma to board flights to Canada also occurs at the Warsaw airport.

C. Steps taken by the Public Defender of Rights

The Public Defender of Rights decided to open an inquiry into the case. The Defender approached the Air Transat airline and Václav Havel Airport and requested clarification. The airline informed the Public Defender of Rights that it used the services of a private Czech security company to check travel documents. Nevertheless, even the employees of said contracted company had to follow instructions issued by the Canada Border Services Agency (CBSA), which were not known to the airline. The airport responded to the Defender's inquiry by stating that external companies could perform a preliminary passenger assessment on the basis of their contractual relationship with individual airlines using the airport facilities.

Subsequently, in early 2017, the Public Defender of Rights contacted pro-Roma associations and NGOs to inquire whether said organisations had encountered similar cases in their activities. Twelve organisations that responded to the inquiry had not encountered any such cases. However, that did not necessarily mean that the practice of questioning Roma at airports had already stopped. Apparent lack of information could be the result of a phenomenon known as underreporting, when victims of discrimination do not report the incidents.⁴

⁴ For more information in this respect, see Office of the Public Defender of Rights. Discrimination in the Czech Republic: Victims of Discrimination and Obstacles Hindering their Access to Justice. Brno: Office of the Public Defender of Rights, 2015.

Available at:

https://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Vyzkum/diskriminace_EN_fin.pdf

D. Preliminary assessment

The Czech Anti-Discrimination Act prohibits service providers from treating a person less favourably in comparison to another person in a similar situation on the grounds of race or ethnicity.⁵

The Public Defender of Rights perceives the following suspicious aspects in the case:

- the selection of passengers for detailed questioning appears to be ethnically motivated (they were the only Roma in the queue and were the only passengers to be questioned);
- the Complainant and his daughter could not apply for financial compensation for paid tickets as they in fact did not check in on time, even though it was not due to their fault but due to assessment by three unidentified persons (probably CBSA Liaison Officers or employees of a contracted security company);
- the lack of transparency of the entire process – the persons had no name tags, did not introduce themselves, provided the Complainant with no satisfactory explanation as to why he was not allowed to board the plane and did not hand him any written decision he could lodge an appeal against; the Complainant does not even know what documents he should present in order to be allowed to board a plane in the future.

The Public Defender of Rights considers that if everything happened as the Complainant described it, it could be considered a forbidden racial profiling. The inquiry into the case is not yet closed. It can be expected that the Public Defender of Rights will conclude the case by the end of 2017.

⁵ Section 2 (3) in conjunction with Section 1 (1)(j) of Act No. 198/2009 Coll., on equal treatment and legal remedies for protection against discrimination and on amendment to certain laws (the Anti-Discrimination Act), as amended

III. Case-law of the Deputy-Commissioner for Minority Rights of Hungary

A. Background

According to some media reports and complaints lodged with the Office of the Commissioner for Fundamental Rights, from 2015 at least 80 Hungarian citizens (mainly families) belonging to the Roma minority could not depart for Canada from the Budapest Liszt Ferenc International Airport irrespective of the fact that they had valid travel documents and air tickets. The airline company denied the boarding to them as a result of the pre-boarding screening and questioning that was performed off the record, by officials of unknown affiliation and most of the times in front of fellow passengers which rendered the victims subject to public humiliation. They also complained about not having received proper information about compensation for denied boarding and the ways to file complaints. In addition to the Office of the Commissioner for Fundamental Rights, many of the victims also submitted complaints to the Hungarian Equal Treatment Authority (equality body) and sought legal advice from an NGO, the Legal Defence Bureau for National and Ethnic Minorities.

The Deputy Commissioner for the Protection of Minority Rights decided to prepare a general comment on issues related to the pre-boarding screening of international passengers at airports from a human rights perspective for several reasons. As the result of the investigation it has been revealed that several stakeholders concerned in this case fell outside of the mandate of the Deputy Commissioner but may be willing to accept recommendations in order to avoid human rights violations. Furthermore, the Deputy Commissioner is aware of similar cases of Hungarian victims which occurred in the international airports of Vienna and Brussels, while the direct flight to Canada from Budapest has been relaunched this summer.

B. Concerns in relation to the protection of minority rights

The reason behind the pre-boarding passenger control practice introduced in several European airports is that if the passenger is turned back by the Canadian border control authority supervising immigration to Canada (Canadian Border Services Agency – CBSA) due to the lack of proper documentation or failure to fulfil the entry requirements, the airline concerned is obliged to arrange their transportation back to the country of origin and could be fined up to 3200 CAN \$ per passenger. The practice of the Canadian authorities induced the airline companies to try to screen out at the airports of departure those passengers whose entry to Canada would be probably refused by the CBSA.

The pre-boarding screening on the Budapest International Airport was performed by the BUD Security Ltd, a company providing security services and owned by Budapest Airport Plc, based on a service contract between them and the Canadian Air Transat airline company. The employees of the security company checked the documents of the passengers heading to Canada as well as interviewed them about their personal circumstances including questions related to their employment, financial background (income, real estate), family relations in Hungary and in Canada, purpose of travel and the financial resources allocated for the travel. If it was obvious that the passenger would fail to fulfil the entry requirements to Canada, the security officer recommended the airline company to deny the boarding to the passenger concerned. In case of any doubts, the security officer asked for clarifications from the representative of CBSA present on the spot and made their recommendations based on that. The decision on denied boarding in each case was made solely by the Canadian airline company.

The Canadian Air Transat airline, upon the request of the Deputy Commissioner, confirmed that according to the relevant Canadian laws they are only required to make sure of the passengers having valid and complete documentation needed to enter Canada, they are normally not required to actively investigate the intentions of passengers for travelling, their means of financial support while travelling or their risk for illegal migration. However, the airline company argued that the pre-boarding screening performed by their local partners (in this case the security company of the airport) and the representatives of the CBSA deemed necessary after several dozens of Hungarians applied for asylum upon arrival to Canada by a direct flight operated by them and another company in the summer of 2015. Relevant legal provisions were not referred at all.

According to the complaints, the security officers did not introduce themselves neither did they claim authorization to perform such screenings, besides, they did not inform the passengers about the purpose and the consequences of the questioning, e.g. the denial of boarding. Concerning the pre-boarding screening of the passengers performed by the security company based on the service contract with the Canadian airlines, it has been revealed that such contractual obligation which includes screening of passengers by the means of questioning and observation with the aim to prevent illegal immigration attempts totally lacks a legal background.

Consequently, in relation to the pre-boarding screenings of air passengers of Roma origin heading to Canada performed at the place of departure several human rights concerns have been raised: the potential violation of the right to fair procedure, the right to remedy and eventually the failure to respect human dignity as well as the principle of equal treatment.

C. Standards, guidelines and best practice

First of all, rules of pre-boarding screening processes of air passengers should be clearly set out in the form of a written protocol and include safeguards which guarantee the right to fair procedure for everyone. The person performing the screening shall wear a name badge, introduce themselves and state their affiliation, furthermore, shall inform the passenger about the purpose, legal basis and the consequence of the procedure. All passengers travelling with the same flight shall be screened in accordance with the rules of the procedure and exactly the same way in all cases in order to avoid any allegation of discrimination. All circumstances of the screening and the people involved shall respect the human dignity of the passengers.

Then, in case of denied boarding, the passengers shall receive the decision as well as the information about the available remedies and compensation in written form, both in English and Hungarian language. The document shall include at least the name of the company as well as the employee performing the screening, the airline company concerned, the formal denial of boarding with reasoning based on facts and the legal background (e.g. Canadian laws on entry requirements), the available remedies in case of denied boarding and complaints mechanism concerning the performance of the screening procedure. Besides, the passenger rights, the basic rules to claim compensation and the designated national enforcement body under Regulation [EC] 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights shall be covered, too.

All the guidelines mentioned above are of crucial importance in pre-boarding screenings of certain groups of air passengers by the relevant authorities of the country of destination but performed at the place of departure. Irrespective of that the passengers travel from the territory of one country to another, from one jurisdiction to another, their human rights such as the right to fair procedure, the right to remedy and their human dignity shall be protected and respected by all stakeholders without discrimination on any ground.

IV. Pending cases and the latest developments

The outcome of the investigation of the cases discussed in Chapter III was presented in a General Comment issued by the Deputy-Commissioner for Minority Rights of Hungary in June 2016. Thanks to the broad media coverage, several new complaints have been lodged with the Office of the Deputy-Commissioner and other cases have been identified, too.

Since during fall and winter, no direct flight operates between Hungary and Canada, passengers travelling to Canada have to take connecting flights in other European airports. Recently, Hungarian citizens belonging to the Roma minority who have submitted complaints were rejected boarding to Canada in the airports of Brussels, London and Paris. In these cases, the passengers started their journey and were checked-in in Budapest, then were rejected boarding to a flight to Canada right before the gates at another European airport. The procedures were quite similar to the pre-boarding screenings, the security officers neither introduced themselves nor claimed authorization to perform such screenings, besides, they did not inform the passengers about the purpose and the consequences of the questioning, among others, the denial of boarding. Furthermore, translators were not provided and all the passengers were returned to Budapest airport without informed consent and information about the ticket reclaim procedures. In some cases, elder passengers with health problems and children had to wait several hours without water and food at the airport after they were rejected. The tickets were not refunded in any of the cases. When the passengers claimed for a refund, the travel/ticket companies informed them that since they had all the necessary documents to travel to Canada and lacked the formal evidence of being rejected to boarding, the price of the ticket will not be repaid.

Due to the recent developments, this issue was put on the agenda at several European meetings. The practice of pre-boarding screening at the airports was discussed by the representatives of the European equality bodies at the European Network of Equality Bodies (EQUINET) working group meeting on 10 May 2017.

The aim of the Operational Platform for Roma Equality ("the OPRE Platform") - coordinated by the Council of Europe (CoE) with members such as the European Union Agency for Fundamental Rights (FRA), EQUINET and the European Network of National Human Rights Institutions (ENNHRI) - is to enhance closer co-operation between national and international bodies working in the field of the protection of Roma rights. At the 4th OPRE Platform meeting, held in Paris on 15-16 May 2017, the cases discussed here were presented in order to inform

the national human rights institutions and equality bodies and seek international cooperation to investigate them. As an outcome of the meeting it was agreed that national bodies, the Office of the Commissioner for Fundamental Rights of Hungary, the French Defender of Rights, the Belgian UNIA (Interfederal Centre for Equal Opportunities) and the Equality and Human Rights Commission of Great Britain will initiate procedures to investigate the Hungarian complaints concerning the airports of Brussels, London and Paris. These procedures are under preparation.

Between 31 May – 3 June 2017, at the 13th plenary meeting of the Ad hoc Committee of Experts on Roma and Traveller Issues (CAHROM) of the Council of Europe, the issue was also raised, unfortunately without the Canadian Embassy representatives who did not attend the meeting despite of the Council of Europe's invitation.