Veřejný ochránce práv
OMBUDSMAN

Information on activities submitted by the Public Defender of Rights

pursuant to Section 24 (1)(a) of Act No. 349/1999 Coll., on the Public Defender of Rights, as amended,

for the fourth quarter of 2014

A Number of complaints, investigations

A total of **1999** complaints were received in the fourth quarter of 2014, which is **55** more than in the same period last year. The number of complaints in the area of public administration has increased – the **1198** complaints received represent an increase of **108** compared to the fourth quarter of 2013. The percentage of complaints about matters outside the Defender's mandate delimited by the Public Defender of Rights Act has not changed significantly (801, i.e. 40%, in Q4 2014 as compared to 779, i.e. 44%, in Q4 2013).

Of these, a total of **67** complaints claimed unequal treatment by public administration and private entities. The number of complaints directed against discrimination in the sense of the Anti-discrimination Act reached **38**. In the area of protection against discrimination, co-operation was provided to international entities and national authorities in a total of **15** cases.

Moreover, **5** systematic visits were made in the framework of the agenda of supervision over restrictions of personal freedom. In connection with the Defender's activities in the field of monitoring of the detention of foreigners and administrative expulsion, **972** decisions to monitor were submitted. My colleagues monitored the surrender (repatriation) of **4** foreigners.

In the public administration agenda, most complaints received, 302 in total, were again related to social security, followed by complaints relating to construction proceedings and land-use planning (112), and by complaints relating to the prison system, the police and the army (84).

B Activities of the Defender

B.1 Public administration

In relation to public administration, the following recommendations and statements were issued during the fourth quarter of 2014, in particular:

B.1.1 Agreement on use of a flat and housing contribution

The complaint in question was filed by a person who had applied to the Labour Office of the Czech Republic, regional branch in Brno (hereinafter the "Labour Office"), for a housing contribution in March 2013. The Labour Office, however, dismissed her application. **The Office considered the agreement "on sublease of flat" presented by the complainant invalid** because she had entered into the agreement with the flat owner (while only a lease, and not a sublease, agreement can be concluded with the owner).

I found that the Labour Office had erred as it should have assessed the agreement by its content rather than title. According to the Civil Code, legal acts expressed in words had to be interpreted not only based on their language but, more importantly, according to the will of the party making the legal act in question. **It was clear from the content that the agreement was, in fact, a lease meeting the requisites according to the Civil Code.** It was also obvious from the agreement that the complainant intended to make an arrangement with the owner on the use of his flat for housing in consideration of payment of rent, i.e. a lease. The incorrect title of the agreement was due to the fact that it was made by persons without education in law. This is also the reason why the agreement alternately refers to "sublease" and "lease" without distinction. If the Labour Office had doubts regarding the content and validity of the agreement, it should have attempted to clarify the relevant issues and invite the complainant to specify what type of agreement she actually intended to make with the owner. **Had it correctly concluded** that the complainant had actually entered into a lease agreement, she would have been entitled to the given benefit under the law. In that case, the Labour Office **would have to grant her the housing contribution** because she had also complied with the other statutory conditions.

The **Labour Office** of the Czech Republic agreed with my conclusions and **paid the benefit** to the complainant **retroactively** for the period from March 2013 to February 2014**.**

B.1.2 Czech Schools Inspectorate and consulting facilities

I have repeatedly encountered the opinion that the Czech Schools Inspectorate **is not authorised to inspect and evaluate the professional activities** of school consulting facilities (educational psychology counselling centres and special education centres).

I therefore issued a statement in which I noted that the present legislation (Section 174 (2)(a)(b) and (5) and (7) of the Schools Act[1]) grants the Czech Schools Inspectorate the authorisation to **inspect professional, especially special education and psychology, procedures and conclusions of school consulting facilities**. The Czech Schools Inspection is therefore obliged to put together **a team** composed of its employees (invited persons) that will ensure proper inspection of all professional aspects of the approach taken by school consulting facilities.

[1] Act No. 561/2004 Coll., on preschool, elementary, secondary, higher vocational and other education, as amended.

If a school consulting facility issues reports and recommendations for the education of children with special educational needs not reflecting professional findings, the Czech Schools Inspection may find a violation of Section **16 (6) of the Schools Act[2] in conjunction with Section 2 (1)(a) or (b) of the Schools Act** [3] and impose remedial measures. I shall refer to this statement in my further investigations. I have informed the Minister of Education and Sports and the Central Schools Inspector about its existence.

B.1.3 Relocation of prisoners

I was approached by a complainant who had been unsuccessfully applying for relocation to another prison. He **had filed such applications mainly to improve his accessibility for visits by related persons**. In the given case, I criticised the fact that the Nové Sedlo Prison had been preventing the complainant's relocation on the grounds that he was, or was expected to be, assigned to work in that prison. In one of these cases, the application for relocation was dismissed by the Nové Sedlo Prison without any substantiation.

My predecessor also addressed an identical case related to the Nové Sedlo Prison (dismissal of an application for relocation substantiated by the assignment to work). Both cases indicate that the Nové Sedlo Prison has been systematically **preventing prisoners' relocation on the grounds of their assignment to work.** This is so despite the fact that prisoners can also be assigned to work in the prison to which they are relocated and, in both cases, the complainants were employed before in other prisons. Thus, it is not reasonable to assume that they would avoid work or otherwise refuse assignment to work.

I reached the conclusion during my investigation of the complaint that a prison may not prevent prisoners' relocation to a different prison on the grounds of their current or planned assignment to work. This is all the more so where it is obvious that the applicant for relocation has not been avoiding work during the service of his imprisonment.

Only in exceptional cases may an application for relocation be dismissed on the basis of planned or existing assignment of the prisoner to work and this is only possible if the prisoner's relocation would compromise the operation of the prison

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[2] Section 16 (6) of the Schools Act:
"Children, pupils and students with special educational needs have the right to education with contents, forms and methods corresponding to their educational needs and capabilities, as well as to the creation of conditions facilitating such education and to the counselling services of the school and consultancy facility. Suitable conditions meeting their needs shall be determined for pupils and students with disabilities and health handicaps in admission to and termination of education. The nature of the disability or handicap shall be taken into consideration in the evaluation of pupils and students with special educational needs. The head teacher of a school may prolong the length of secondary and higher vocational education in exceptional cases for individual pupils or students with disabilities, by a maximum of 2 school years."

[3] Section 2 (1)(a)(b) of the Schools Act:
"(1) Education is based on the principles of
(a) equal access of every national of the Czech Republic or another Member State of the European Union to education without any discrimination on grounds of race, skin colour, gender, language, faith and religion, nationality, ethnic or social origin, property, birth, health, or other status of the citizen,
(b) consideration for the educational needs of individuals."

(specifically because of the prisoner's assignment to work). This applies especially to highly qualified jobs that require special professional knowledge or experience.

The head of the prison agreed with my final statement as well as with the proposed remedial measures.

B.1.4 Infraction against property through fraud

My deputy dealt with a complaint concerning certain steps taken by the Infraction Hearing Committee of the Statutory City of Olomouc. The complainant was allegedly aggrieved by an infraction against property pursuant to Section 50 (1)(a) of Act No. 200/1990 Coll., on infractions, as amended. In the given case, the person accused of the infraction was eliciting **money for a mobile phone credit** using short text messages in which the **accused person repeatedly promised the complainant intimate visits which he never made**. Ultimately, the amount in question exceeded CZK 3,500. Nevertheless, the **Infraction Hearing Committee** of the Statutory City of Olomouc **discontinued** the **proceedings** against the accused person. It stated that it had not been demonstrated beyond doubt that the person accused of the infraction had misled the complainant with the intention to enrich himself.

My deputy concluded that intention, as the **defining element of an infraction against property, should not be linked to the motive pursued by the complainant as the aggrieved person** (it is irrelevant whether he had sent the given amounts with a view to topping up the accused person's credit at the latter's explicit request or on the basis of his own good will), **but rather to the inner motivations of the person accused of infraction**. In other words, the administrative authority should examine whether the person who committed the infraction intended to cause damage to another person's property through fraud. **An infraction** against property through fraud (Section 50 (1)(a) of the Infractions Act) **may also be committed through intentional failure to provide a promised** intangible **performance if, as a result,** the aggrieved party suffers **proprietary damage**.

In view of the circumstances of the given case and the criminal history of the accused person, who had been repeatedly convicted of property crimes, my deputy inferred that the latter had indeed committed an infraction against property through fraud. The administrative authority accepted the conclusions of the investigation and promised to follow them in its future practice.

B.1.5 Excuse of legal counsel from oral hearing

The complaint submitted in this case was related to the procedure taken by the Infraction Hearing Committee of the Statutory City of Olomouc in the matter of an alleged infraction against civil cohabitation through a minor bodily harm. The complainant referred especially to **delays in proceedings** resulting in **termination of liability for the infraction**.

My deputy ascertained during his investigation of the complaint that the delays had been mainly due to wrong assessment of the reasons for the excuses made by the accused person's lawyers. In one case, the attorney assumed legal

representation of the accused person at a time when she already demonstrably knew she would have other work commitments (representation in court in a criminal case) on the date of the oral hearing. My deputy inferred that **the accused person's legal counsel had not assumed the representation in infraction proceedings with a view to exercising the rights and obligations as the party's representative** in the sense of Section 34 of the Code of Administrative Procedure. Therefore, my deputy concluded that the **administrative authority should have deemed the excuse unsubstantiated**.

In another case, the legal counsel assumed representation of the accused person five days before the oral hearing and asked for adjournment in order to gain time for reading the file. In this case, the administrative authority correctly considered the excuse justified.

In the third case, the attorney discussed the date of the oral hearing with the administrative authority and **did not accept any of the summer dates offered** due to his alleged holiday. The administrative authority accepted the excuse although the legal counsel had not documented this allegation in any way. My deputy concluded in this respect that if the **legal counsel did not submit specific evidence** proving that he was **unable to appear** on the proposed dates of the oral hearing **because he would be on holiday** (where the dates are, in fact, not specified in the file), **the excuse should not have been accepted without further consideration**.

If an oral hearing coincides with other work commitments of the party's legal counsel, the administrative authority should take into consideration the sequence in which representation was assumed in individual cases and the summons to the oral hearing (trial) were served. In that case, it should be clear from the legal counsel's excuse that he could not have been substituted by another lawyer under Section 26 of Act No. 85/1996 Coll., on the legal profession, as amended. An administrative authority which is presented with a repeated excuse should consider that this might be a case of dilatory conduct aimed at frustrating the hearing of the infraction within the prescription period.

The administrative authority accepted the conclusions of my deputy and promised to follow them in its future practice.

B.2 Supervision over restrictions of personal freedom

B.2.1 Visits made and monitoring of expulsion

The employees of the Office of the Public Defender of Rights performed **five systematic visits** in the fourth quarter of 2014 within supervision over restrictions of personal freedom. Specifically, a visit was made to Sociální a zdravotní centrum Letiny, s.r.o. *(Social and Health Centre Letiny, limited liability company*).The latter is a registered social services facility providing the service of a special-regime home. It simultaneously serves as a medical facility providing follow-up in-patient care. This was a follow-up visit aimed at establishing how the facility fulfilled the recommendations from the first visit held on 6 to 8 August 2013. A visit was also made to the Havlíčkův Brod Psychiatric Hospital and two prisons, namely Karviná Prison and Nové Sedlo Prison. Another visit was made to the Facility for the Detention of Foreigners in Bělá-Jezová.

The surrender (repatriation) of 4 foreigners under the Dublin Regulation was monitored at the Mikulov - Drasenhofen border crossing within the performance of the duties following from the Directive on Returns.

B.2.2 Collection of papers from the conference on protection of the rights of elderly people

A collection of papers in the Czech and English languages from the conference "Protection of Rights of Elderly People in Institutions, **with an Emphasis on People Suffering from Dementia**", which was held in the Office of the Public Defender of Rights in February 2014, was published on the website[4]. The collection includes papers from leading Czech experts in care for people suffering from dementia syndrome. **A method of examining the conditions of provision of services to people suffering from dementia was developed with a view to identifying maltreatment.** I have shared these results with other national preventive mechanisms as a new impetus to the prevention of maltreatment under the [5]OPCAT.

B.2.3 Educational activities

If the recurring shortcomings are found during my systematic visits, **I always look for means of preventive action** against maltreatment so as to ensure future improvement. Such **means of prevention include awareness-raising**, negotiations with the managers of the respective facilities, their founders and inspection authorities, and also training activities. As to the latter, I would like to mention some of the events that took place in the fourth quarter of 2014.

B.2.3.1 Training for police officers guarding cells

Based on agreement with the Police President, my colleagues prepared a training programme for police officers responsible for guarding persons placed in police cells. The training was aimed at fostering the **prevention** of maltreatment, **especially in those areas where shortcomings are regularly found on the part of the Police of the Czech Republic during our systematic visits**. Pilot training for 60 police officers from the South Moravian Region took place in October 2014.

Lectures were delivered on individual rights of persons placed in cells and the corresponding duties of police officers. Specifically, advice was provided on the rights of persons placed in cells; exercise of the right to legal assistance; notifying a third party of such placement; exercise of the right to receive medical treatment from a physician of choice; serving meals three times a day at reasonable intervals; removal of medical devices; lodging of complaints. The second part of the training provided a general introduction to fundamental rights and freedoms; international treaties on fundamental rights and their protection; the status and activities of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, including the standards issued by the Committee; and activities and powers of the European Court of Human Rights and the binding effect of its rulings

[4] http://spolecne.ochrance.cz/dokumenty-ke-stazeni/konference/konference-ochrana-prav-senioru-v-instituci-s-durazem-na-osoby-s-demenci/

[5] Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Memorandum of the Ministry of Foreign Affairs No. 78/2006 Coll. Int. Tr.)

on the Czech Republic. The principles governing the possibility to bind persons in cells to a fixed piece of furniture and the use of restrictive/coercive measures in the safe environment of cells were explained using **specific examples from the case-law of the European Court of Human Rights**, including the legal case of Kummer v. the Czech Republic.

B.2.3.2 Punishment of maltreatment in social services

A round table for inspectors of social services and representatives of regional authorities and the Ministry of Labour and Social Affairs was organised in October 2014. It was aimed at discussing the possibilities of the Inspectorate of Social Services in punishing interference with the fundamental rights and freedoms of clients of residential social service facilities and sharing of experience between the employees of the Office of the Public Defender of Rights and inspectors. The employees of the Office of the Public Defender of Rights acquainted the inspectors with the most serious findings relating to interference with the clients' fundamental rights. A discussion followed regarding the possible solutions available to the Inspectorate of Social Services and possibly other governmental authorities. Special attention was paid to measures restricting the freedom of movement of persons in social services. The problem I encounter most often in this respect is the illegal use of sedatives as a measure restricting movement, which leads to excessive sedation of clients.

The meeting revealed that the Inspectorate of Social Services fails to concentrate on the main issue when inspecting measures restricting the freedom of movement – the possible abuse of these measures. Effective action is prevented mainly by insufficient powers of the Inspectorate of Social Services, especially regarding perusal of medical records (nursing documentation kept by the nurses employed in the facility).

I utilised these **findings** on inadequate administrative practice in punishing maltreatment within the **commentary process related to the draft amendment to Act No. 372/2011 Coll.**, on healthcare services and the conditions of their provision, as amended. It is desirable to allow the Inspectorate to peruse medical records to the necessary extent even without the patient's consent.

B.2.3.3 Protection of the rights of elderly people in residential social service facilities

Two educational events were organised for employees of social service facilities in 2014. The workshops focused on the rights of clients in homes for the elderly and special-regime homes, illustrated on examples of maltreatment found during the systematic visits. The **objective was to explain** the nature of interference with the rights of clients in the area of dignity, privacy, autonomy of will and personal freedom, and **to provide examples** of bad practice in handling sedating medication and ensuring safety and proper surveillance. **The Defender's recommendations were presented** in this context. Among the lecturers was a nutritional therapist who concentrated on the nourishment of persons with dementia, a consultant of the Czech Alzheimer Society who spoke about some specific aspects of care for persons with dementia, as well as a woman suffering from dementia syndrome who shared her experience with Alzheimer's disease. The workshops were prepared as a model

for communicating findings to the professional public and will be repeated on a regular basis.

B.2.3.4 Is there a need for amendment to the Criminal Code for prosecuting maltreatment?

I have repeatedly provided information about cases of maltreatment at places where persons are or may be restricted in their freedom. Related legal questions necessary arise whenever maltreatment is found. What response is appropriate when the intensity of maltreatment amounts to degrading treatment? **Does the legislation offer any means of punishment that would satisfy the requirements** of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention for the Protection of Human Rights and Fundamental Freedoms? **To answer these questions, I organised an informal discussion of these topics in December 2014.**

If a facility fails to take remedial measures after my visit, I can publish the case, which is the option I use most frequently the case. Where, however, I make a very serious finding, I can approach the competent authorities in accordance with the Public Defender of Rights Act. **In 2014, I referred to the prosecuting bodies four cases of maltreatment** in accommodation facilities for the elderly which provided care without authorisation to provide social services. I suggested that the conduct in question could amount to crimes of restriction of personal freedom, bodily harm, failure to provide assistance and exceeding trade licence. However, this does not seem to address the **main negative phenomenon – that the existing conditions generally increase the risk of maltreatment** (liability of operators and managers) and unintentional maltreatment without causing harm to health **(degrading treatment)**.

Some improvement can be expected from an amendment to Act No. 418/2011 Coll., on criminal liability of legal entities and proceedings against them, as amended, which is currently being prepared (parliamentary press No. 304). The aforementioned amendment should ensure that a **wider range of crimes** committed at places where persons are restricted in their freedom **can actually be attributed to the given legal entity**.

Discussion centred mainly around interpretation and **application of Section 149 of the Criminal Code** (torture and other inhuman and cruel treatment). **The fact that the prosecuting bodies fail to actually put the above statutory provisions into practice has been a cause of scepticism** regarding whether or not there is an effective criminal-law instrument for prosecuting maltreatment. The stigma surrounding the term “torture”, as well as the twenty-year experience with failure to apply these merits of this crime in practice, led a majority of participants to conclude that an **amendment is indeed required**. I also find it important to focus on the aspect of administrative punishment of conduct representing or causing maltreatment.

B.2.4 Low temperatures as a threat to lives and placement in a drunk tank

All the circumstances of placement of a person in a drunk tank, including the risk following from low outdoor temperatures, must be considered in examining

whether the statutory conditions have been met in this respect. I recently had to specifically emphasise this fact to all the drunk tanks I have been communicating with since August 2014, when I published my summary report on the systematic visits to drunk tanks.

I was approached by an important provider of social services for homeless people in the autumn of 2014. The provider pointed out cases where the municipal police refused to transport an intoxicated person lying on the street to a drunk tank (thus deciding not to use this service) despite the fact that the intoxicated person was actually threatened by health problems or even death due to low outdoor temperatures. The provider also expressed concerns about the consequences in situations where the drunk tanks refuse to accept intoxicated persons in cases like this. It also explained that a social service facility is not able to provide adequate healthcare to intoxicated persons who actually meet the statutory conditions for being admitted to a drunk tank.

I emphasise that none of the conclusions made in the summary report prevents homeless people from being placed in a drunk tank if the statutory conditions for their admission are satisfied (the person's conduct is such that he directly endangers himself or other persons, public policy or property). **In examining whether the statutory conditions for placing a person in a drunk tank have been satisfied, it is necessary to consider all the circumstances of the admission, including the risk following from low outdoor temperatures.**

B.3 Protection against discrimination

B.3.1 Removal from a managerial position on grounds of maternity

In this case, the complainant was **removed by her employer from a managerial position shortly before going on maternity leave**. She considered this to be discriminatory and protested against the employer's conduct in writing. The employer responded by referring to Section 73 of the Labour Code and claiming that she could be removed from such a position without being given a reason.

I agreed with the conclusion that if a senior employee can be removed under the Labour Code, the employer can generally do so at any time, for any reason and even without giving a reason. However, I emphasised that, even in such a situation, the employer was **bound by the duty of non-discrimination** and could therefore not remove an employee on discriminatory grounds, for example on grounds of maternity. In this conclusion, I relied *inter alia* on the case-law of the Supreme Court, which had opined analogously on termination of employment during the trial period. I also stated that a mere removal from office would not be the only unfavourable treatment if discrimination was found. The second adverse consequence is that the **complainant could not to return to her original job after her maternity leave** despite the fact that this is guaranteed by Section 43 of the Labour Code; instead, she would have to accept the offer of some other (lower) position generally corresponding to her qualification and employment contract, and her employment could even be terminated on the grounds of redundancy if she refused that offer.

In assessing whether discrimination had occurred, I referred, on a subsidiary basis, to Section 133a of the Code of Civil Procedure, which lays down the concept

of “shared onus of proof”. Considering that the **complainant was removed from office only two days before going on maternity leave, unfavourable treatment was obvious *prima facie***. I was of the opinion that the complainant would be able to bear her onus of proof in potential litigation and it **would be up to the employer to prove non-discriminatory grounds for her removal**. I therefore requested that the employer provide a statement on the complainant’s case in order to ascertain whether or not her removal had been motivated by different, non-discriminatory grounds (for example, poor work results, etc.). The employer explained in its statement that the complainant’s superior had officially substantiated her conduct by ensuring proper operation of the relevant department.

Since the employer did not provide any other reason for the removal, and did not further specify the proper operation of the department, I concluded that the **actual reason consisted, beyond reasonable doubt, in the complainant’s pregnancy** and the employer had been guilty of direct discrimination in the sense of Section 2 (3) of the Anti-discrimination Act[6]. **The complainant brought the case to the courts**, lodging an anti-discrimination action. The court is yet to decide on the case.

B.3.2 Failure to arrange leased housing for the Roma people

A social worker from a non-governmental organisation pointed out that, when looking for housing for her clients, she often encountered **a refusal by real estate agents to arrange leased housing for the Roma people**. Considering that the complainant’s assertion would be difficult to verify, it was decided to use the previously agreed co-operation with the Counselling Centre for Citizenship, Civil and Human Rights and the head of the Centre was asked to arrange **“situation testing”**. The employees of the Centre conducted three test interviews in which they passed themselves off as persons interested in leased housing. In two cases the testing workers introduced themselves by the name of Horvátová, in one case a Roma employee used her own name. The agents then asked the employees if they were Roma. When the employees gave a positive answer to this question, the agents told them that **they were unable to arrange the required inspection of the flat because the owner disagreed.**

I concluded that the **real estate agents were guilty of direct discrimination** because it is the objective conduct of the service provider, not his inner motivations, what is legally relevant. If the assertion made by the agents regarding the owners’ instruction was true, the **owners** would be guilty of **inciting to discriminate.**

If a published offer for lease of real estate, even if owned by a private person, excludes members of an ethnic group, the party making the offer (owner or agent) is guilty of direct discrimination against such persons in access to housing on grounds of ethnicity. The real estate agent as the arranging party is by no means exonerated by following a requirement of the owner of the real estate.

[6] Act No. 198/2009 Coll., on equal treatment and legal remedies for protection against discrimination and on amendment to certain laws, as amended

I also dealt with the matter of situation testing in my report on the investigation. I concluded that non-tangible damage incurred by a person with a discriminatory characteristic (ethnicity in the case concerned) seeking housing only ostensibly is comparable to that incurred by a person actually looking for housing because discriminatory conduct primarily interferes with the person's dignity, which is affected to the same extent in either case. Every person has the right to verify whether s/he can exercise his/her rights without interference. If this person's rights are infringed unlawfully during such verification, s/he has the same rights as if s/he faced discrimination unexpectedly.

Although Czech courts have yet to deal with any similar situation, the Swedish Supreme Court concluded in a similar case that the persons performing the tests may demand indemnification. I further concluded that the compensation granted may be reduced so as to reflect the fact that the persons concerned were not denied something they actually wanted.

Court rulings relating to compensation for damage for persons performing tests will surely be delivered in the Czech Republic, too, because one of the employees involved in the tests has decided (in co-operation with the Centre) to bring an action with the District Court in Litoměřice against one of the real estate agencies. The real estate agency concerned refused my conclusions. The two other offices did not respond to my report. I therefore requested a statement from the Association of Real Estate Agencies of the Czech Republic, the Czech Chamber of Real Estate Agencies and the Real Estate Chamber of the Czech Republic. I will consider further steps aimed at changing the conduct of real estate agents on the basis of their response.

B.3.3 Children with disabilities in after-school groups

I was approached by a complainant as the mother and legal representative of her minor son, an **exceptionally talented child with above-average intelligence (IQ 130) but, simultaneously, an autism spectrum disorder** (hereinafter "ASD"). Children diagnosed with the Asperger syndrome have difficulties in normal communication with children of the same age and socialisation in the collective of their peers. This can lead to low self-esteem and certain peculiarities in their behaviour. The complainant's son commenced his compulsory school attendance in 2011 and his **parents needed him to attend an after-school group** because they were both employed. In addition to this, the family lived far from the school and all family members travelled approx. 20 kilometres to work (and school).

The complainant stated that the school had not enabled her son to attend the after-school group with the explanation that this was impossible without the presence of a learning support assistant for the sake of the children's safety (the schools counselling facility had recommended a learning support assistant for the complainant's son only for 10 lessons per week and only for teaching purposes). The internal rules of the after-school group were amended to the effect that, from that point in time, students diagnosed with behavioural disorders and students who needed a learning support assistant could not be admitted to the after-school group at the elementary school. **After unsuccessful discussions with the representatives of the school, the complainant was forced by circumstances to de-register her son from the after-school group and look for another school,**

although frequent changes in the environment are undesirable and extremely stressful for children with ASD.

After investigating into the case, I concluded that the **adoption of a general rule that students needing a learning support assistant or students diagnosed with a behavioural disorder would not be admitted to an after-school group represented direct discrimination on grounds of disability**. The prohibition of discrimination in access to and provision of education under the Anti-discrimination Act and the schools regulations also applies to after-school groups. An after-school group is an integral part of an elementary school where recreational learning takes place (Section 111 of the Schools Act).

This was likely an isolated infringement because the school being investigated in fact provided education at both levels to a large number of children with disabilities and disadvantaged children; on the other hand, the complainant's **communication with the representatives of the school and its legal representatives proved obviously unsuccessful**, resulting in discrimination instead of looking for a constructive solution. In the case concerned, the fact that the child was prevented from participating in recreational learning in the after-school group in afternoon hours also had a very **adverse impact on the complainant's professional life**. She ultimately **lost her job** due to the difficulties in arranging care for her minor son. I was informed that the complainant would **consider filing an anti-discrimination action** against both her former employer and the school. She had already previously refused the possibility of alternative resolution of the dispute through mediation.

C Legislative recommendations and special powers of the Defender

C.1.1 Action for the protection of public interest against permission to construct a photovoltaic power plant

On 23 July 2012, the Public Defender of Rights JUDr. Varvařovský filed an action for the protection of public interest **against** several final administrative **decisions** in which the Duchcov Municipal Authority **permitted the construction of**, **and subsequently approved for use,** a photovoltaic power plant in the land-registry territory of Moldava in the Ore Mountains (Krušné hory).

Through standard investigation, the Defender ascertained a number of shortcomings in the actual administrative proceedings, including failure to assess in advance the environmental impacts of the industrial project (possible and likely modification of the appearance of the landscape, impact on the favourable condition of the East Ore Mountains Bird Area, missing exemption from the conditions for protection of specially protected species of plants and animals). Furthermore, **the Construction Code was flagrantly breached** because the construction project was permitted and carried out in an undeveloped free landscape and, hence, at variance with one of the basic principles of construction-law regulations, i.e. protection of undeveloped territories.

Considering the intensity of the unlawful conduct, contradicting the very principles of legality and prevention, and moreover, in a situation where **the**

government as a whole was unable to ensure remedy of that unlawful conduct, my predecessor took advantage of his *locus standi* and filed the above action, while being aware that this was the last resort.

The Regional Court in Ústí nad Labem ruled on the action on 8 October 2014 in that it **annulled the contested decisions of the Duchcov Municipal Authority on grounds of unlawfulness and defects in the proceedings and referred the case back to the Duchcov Municipal Authority for further proceedings.** The court concluded that the Defender had demonstrated a serious public interest in filing the action. The court confirmed that Section 90 (a) of the Construction Code had been breached by locating the construction project of the photovoltaic power plant in an undeveloped territory, which the court found unlawful. The defendant challenged the court ruling by a cassation complaint which is yet to be ruled on by the Supreme Administrative Court.

C.1.2 Proceedings concerning cancellation of the first and second sentences of Section 264 (4) of Act No. 280/2009 Coll., the Tax Rules, as amended.

I entered proceedings before the Constitutional Court concerning cancellation of a part of Section 264 of the Tax Rules, as an enjoined party in an **endeavour to bring attention to previously unmentioned aspects and risks.** The relevant proposal for cancellation was submitted to the Constitutional Court by the Supreme Administrative Court. The contested transitory provision provides that the running and duration of the period for tax assessment that did not expire by the effective date of the Tax Rules (1 January 2011) is governed from that date by the Tax Rules, but the beginning of this period and the effects of the legal facts that had an effect on its running and occurred before 1 January 2011 shall further be assessed according to Act No. 337/1992 Coll., on administration of taxes and fees, as amended. Consequently, this represents quasi-retroactivity.

According to the existing case-law of the Constitutional Court, **quasi-retroactivity is generally permissible but there may exist grounds in individual cases for finding it constitutionally impermissible.** There are exceptions to the general permissibility of quasi-retroactivity in cases where the principles of legal certainty, legitimate expectations, protection of trust in law and equality go far beyond the importance and urgency of the reason for legislative amendment. The Supreme Administrative Court found the public interest in applying the new provisions of the Tax Rules to the period for assessment or supplementary assessment of tax which commenced at a time when the Act on Administration of Taxes and Fees was still effective very weak in respect of acts made after 1 January 2011, especially in a situation where the legislator did not even formulate this public interest.

I acquainted the Constitutional Court with the fact that I **considered it controversial** to claim that the new Tax Rules **interfered with legal certainty, legitimate expectations and protection of trust in law** through its quasi-retroactive transitory provision. This is all the more so as the Tax Rules (valid already since 3 September 2009) have assured taxpayers of a considerably greater legal certainty since their effective date, i.e. 1 January 2011, in view of the fact alone that they provide an exhaustive list of circumstances causing prolongation of the given period (by one year) and its suspension (new commencement of this period), and also in view of the circumstances in which the period in question ceases running.

Cancellation of the transitory provision after (less than) four years of effect of the Tax Rules could impair with legal certainty, legitimate expectations and protection of trust in law, not to mention interference with equality of taxpayers.

The potential cancellation of the transitory provision would again give rise to the need for interpretation of the prescription period under the Act on Administration of Taxes and Fees under "new conditions". The prescription period not only protects taxpayers against actions of the tax administrator, but may also work to the detriment of the taxpayer, especially in cases where extraordinary remedies are applied or an additional tax return required.

While the Act on Administration of Taxes and Fees made it possible to initiate a review within two years after the year in which the decision subject to examination came into legal force,[7] (essentially notwithstanding the running of the period for tax assessment[8]), the Tax Rulesmake the review of decisions dependent on the running of the period for setting the tax[9].

For tax duties in respect of which the period for setting the tax began running while the Act on Administration of Taxes and Fees was effective, cancellation of the first and second sentences of Section 264 (4) of the Tax Rules would lead, as a result of the likely inapplicability of Section 55b (2) of the Act on Administration of Taxes and Fees, either to **impossibility** of reviewing **certain decisions or, to the contrary, to the possible full review that would be open until the expiry of the original period for tax assessment**. I consider that, in relation to decisions issued during effect of the Tax Rules, it is no longer possible to apply the transitory provision of Section 264 (3) of the Tax Rules[10],according to which a period of time which began running before the Tax Rules came into effect will not terminate before the day when this period would expire according to the existing legal regulations.

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7 Section 55 (2) of the Act on Administration of Taxes and Fees:
"The aforementioned review may commence no later than two years after the year in which the decision subject to review entered into legal force. This period may not be prolonged and renewal of the former state may not be permitted."

8 Resolution of the extended chamber of the Supreme Administrative Court of 23 February 2010, File No. 7 Afs 20/2007-73.
"The general prescription period for (supplementary) tax assessment pursuant to Section 47 (1) of Act No. 337/1992 Coll., on administration of taxes and fees, shall automatically not apply in proceedings on "extraordinary remedies" pursuant to Part Six of this Act and in proceedings on additional tax return pursuant to Section 41 of the Act; this Act stipulates special time limits for such proceedings. Consequently, the period of time stipulated by Section 47 (1) of the cited Act shall apply only in cases where the special stipulation of the aforementioned concepts in this Act directly refers to that period of time and where the period of time available for (supplementary) tax assessment is thus a direct part of a special period of time available for filing the relevant extraordinary remedy or an additional tax return. At the same time, in such cases, this period of time may apply solely and only to the specified extent, i.e. as part of the special period of time available for use of the given procedural instrument."

9 Section 122 (3) of the Tax Rules:
"Review of a decision on setting the tax may be ordered unless the period of time for setting the tax has expired. Review of a decision issued in proceedings concucted in respect of payment of taxes may be ordered unless the period for tax payment has expired. Review of any other decision may be ordered within 3 years of the legal force of that decision."

10 Section 264 (3) of the Tax Rules:
"For assessment of the running and duration of a period of time which commenced under the existing legal regulations, the procedure stipulated by the provisions of this Act that stipulate the period which is the nearest to the given period of time by its nature and purpose shall apply from the effective date of this Act; the given period of time shall not expire before the day when it would expire under the former legal regulations."

Therefore, I did not support the proposal for cancellation of the contested provision.

D Other activities

D.1.1 Together towards Good Governance Project

Since 1 January 2014, the Office of the Public Defender of Rights has been implementing the Together for Good Governance project (reg. No. CZ.1.04/5.1.00/81.00007). The project is financed from the European Social Fund through operational programme Human Resources and Employment and the State budget of the Czech Republic.

The main objective of the project is to identify opportunities for **increasing effectiveness of the work of the Office of the Public Defender of Rights** with the use of international co-operation.

The following activities took place during the fourth quarter of 2014 within the above project, in particular:

1) Three individual international visits with project partners and co-operating organisations

My colleagues visited the Public Defender of Georgia and the Public Defender of Rights in Slovakia. A two-day visit of foreign partners and co-operating offices took place at the Office of the Public Defender of Rights.

Topics of individual visits – exchange of experience and sharing good practice.

2) Thirteen workshops for public administration and non-profit organisations in Prague, Brno, Ostrava, Olomouc, Zlín and Pardubice

Topics: legal action against a decision rendered by an administrative authority in social affairs; right to information and personal data protection; public roads; removal of structures; social benefits for persons with disabilities; protection of rights of the elderly in residential social service facilities; heritage protection; local fees.

Total number of participants: 496

3) Seven round tables for public administration in Prague, Brno, Ostrava and Hradec Králové

Topics: discrimination at the workplace liability of the State for damage caused by an incorrect official procedure or unlawful decision administrative offences in social services facilities under the Social Services Act[11] right to information – findings of the Public Defender of Rights, assistance in material need and housing benefits; discrimination in education.

[11] Act No. 108/2006 Coll., on social services, as amended.

Total number of participants: 124.

4) **Six workshops within the Legal Clinic of Social Rights at the Palacký University in Olomouc and student internships at the Office of the Public Defender of Rights.**

Topics – initial workshop – methods of ombudsman's work; social assistance for the disabled; equal chances in education; status of a student in social security; right to private and family life of children in institutions; access to housing from the viewpoint of equal treatment; social rights in the healthcare system from the viewpoint of equal treatment.

Total number of students: 10.

5) **One two-day international conference, Work-life Balance**

Total number of participants on the first day (plenary sessions): 116.

Total number of participants on the second day (plenary sessions + workshops): 111.

6) **Eight informative and awareness-raising meetings "We take interest in you" for students and the public in the Vysočina Region, Pardubice Region, Hradec Králové Region and Moravian and Silesian Region (with participation of the Public Defender of Rights)**

Topics: diversity and discrimination; nuisance through excessive noise; social care for ageing parents.

Total number of participants: 342.

7) **Three informative and awareness-raising meetings in municipalities with up to 10,000 inhabitants (Dolní Bojanovice, Jemnice, Moravský Beroun)**

Topics: unfair business practices; social care for ageing parents; nuisance through excessive noise.

Total number of participants: 48.

In Brno, on 29 January 2015

Mgr. Anna Š a b a t o v á, Ph.D.
Public Defender of Rights