Veřejný ochránce práv
OMBUDSMAN

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

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

A. Non-payment of a granted subsidy (File No 5483/2015/VOP)

I dealt with a case where **the provider granted a subsidy but failed to pay a part of it**, reasoning that it had doubts regarding whether the recipient breached rules on public procurement or not. The Tax Authority then, for the benefit of the recipient, stated that there was no breach of budgetary discipline, yet the provider still refused to pay a portion of the subsidy, stating that not the Tax Authority, but the provider itself can assess if there was a breach of conditions or not. However, Tax Authority is not required to prove the breach of conditions to the recipient, it does not conduct any transparent administrative proceedings and, until recently, the law even excluded court review of the termination of a continuously paid subsidy.

Recipients who were granted the subsidy and legitimately expected said funds are thus facing difficult situation. Naturally, they see an element of arbitrariness and non-transparency in the provider's conduct.

One of the providers whose conduct I addressed was the Ministry of Education, Youth and Sports. The Ministry granted a subsidy within The Operational Programme Education for Competitiveness, but subsequently failed to pay a part of it. The Ministry reported alleged variances in the utilisation of the subsidy to the relevant Tax Authority. The Tax Authority conducted a tax inspection of the recipient of the subsidy, concluding that the recipient did not violate the budgetary discipline. Nonetheless, the Ministry refused to pay the subsidy, stating that it conducted its own inspection and did not agree with Tax Authority's opinion. However, it did not conduct proceedings to revoke a subsidy on the grounds of breach of conditions.

In my opinion, the budgetary rules (in the wording applicable at the time of the decision-making) allowed the ministry to halt payment of the subsidy only temporarily. Whether the breach of conditions of the subsidy did in fact occur had to be decided in different proceedings – by a Tax Authority upon establishing a levy for violating the budgetary discipline or by the provider itself in the proceedings to revoke a subsidy. Conduct of the Ministry, which failed to pay the granted subsidy despite the Tax Authority's opinion and without making a decision to revoke the subsidy had no legal basis and relied only on methodologies. **Such conduct is, in my opinion, at variance with budgetary rules, the Constitution and the Charter,** which guarantee that the state power is always enforced on the basis of the law.

The Ministry did not agree with my opinion even following the issuance of the inquiry report, not even after the issuance of final statement and, therefore, the public was informed about its procedure. Whether the providers can act in this manner **shall be decided by the Extended Chamber of the Supreme Administrative Court**.

Since I could not achieve remedy, not even by using my powers to impose penalties, I am hereby informing the Chamber of Deputies of the Parliament of the Czech Republic of this matter.

B. Error on the part of the Všehrdy in case of disciplinary proceedings of convicts (File No. 4622/2015/VOP)

I investigated a complaint by a convict in case of two, in my opinion, questionable **disciplinary punishments** and requested their repealing.

In the first case, **the prison did not respect the principle of proportionality and subsidiarity**. The complainant's actions could be regarded as not completely standard (polite). But since he sought an explanation of wrong procedure during preliminary testing on a addictive substances, as he was legally entitled to, he could not be blamed for raising his voice and shouting (without insults and vulgarities), as is stated in the reasoning for the decision on imposing a disciplinary punishment. In fact, the complainant was punished for a brash remark towards a prison officer, in the wording of "Don't be so active".

In the second case, the prison based its reasoning of disciplinary infraction (chiefly) on **the testimony of concealed witness** and did not investigate any other possible evidence (testimonies of witnesses). The Regional Court in Hradec Králové (Ref. No.: 30-A 97/2014-51) expressly states for similar cases that "if there are interrogations of specific individuals carried out in the proceedings, where such testimony is used to establish the Claimant' (convict's) culpability, **it is not possible to not specify the witnesses in reasoning for the decision** having regard to the need to eventually protect their safety. In any case, **the very use of concealed witness in disciplinary proceedings seems questionable** with regard to Section 58 (3) of the Imprisonment Rules, according to which "in proceedings on a disciplinary infraction, anything that may facilitate clarification of the act, especially findings of a Prison Service employee, testimonies of convicts and other persons, items, documents and examinations, constitutes evidence. The evidence must be specifically identified in such a manner as to allow their verification. If the evidence consists of witnesses' testimonies, a brief summary of the testimonies, along with the witnesses' signatures shall be stated.

Whereas the Všehrdy Prison director did not accept my opinion following the inquiry report, not even following the final statement, I made use of a mechanism for imposing penalties pursuant to the Public Defender of Rights Act and approached the Director General of the Prison Service of the Czech Republic. The Director General informed me in his statement that he considered the disciplinary punishment imposed in the first case to be adequate and within the limits of administrative discretion of employees with disciplinary powers. In the second described case, he stated (at variance with my conclusions) that the testimony of a concealed witness was just one of the bases used to impose disciplinary punishment, not a crucial one.

Since I could not achieve remedy, not even by using my powers to impose penalties, I am hereby informing the Chamber of Deputies of the Parliament of the Czech Republic of this matter.

C. (Non-)attendance of a convict on the funeral of his relative (File No. 1640/2016/VOP)

I was approached by a convict currently serving imprisonment in the Znojmo Prison who complained that the **prison service did not allow him to leave the prison for the purpose of attending his brother's funeral.**

Having carried out an inquiry, I concluded that the prison erred. **The right to attend a funeral of a family member falls under protection of Art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms** – right to non-interference with private and family life. If the prison infringes this right, it is required to justify its infringement adequately and convincingly.

I found that the prison director justified her refusal by the type of criminal activity of the complainant, the fact that he was not assigned to work and furthermore, by a general reference to problems with alcohol and drugs; prison director did not take the complainant's positive assessment during his imprisonment into account. **The complainant did not receive any reasoning regarding the refusal**, he merely signed that he has been acquainted with it.

The prison, thus, in my opinion infringed the complainant's right to a private and family life by not allowing him to leave the prison for the purpose of attending his brother's funeral in a situation when he was disciplined, was assigned to the first permeable group of internal differentiation and fulfilled the treatment programme.

I issued an inquiry report on the case and, later on, a final statement including proposed remedial measures. Whereas the prison director did not agree with my assessment, I approached the Director General of the Prison Service. In his statement, he informed me that in legal terms, the prison's procedure was in accordance with legal regulations. The interruption of execution of the punishment due to family emergency is a "non-claimable right". The complainant's application was discussed by a committee of specialists and the prison's director proceeded in conformity with its recommendation. At the same time, the Director General did not the prison's procedure to be at variance with Art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Since I could not achieve remedy, not even by using my powers to impose penalties, I am hereby informing the Chamber of Deputies of the Parliament of the Czech Republic of this matter.

D. Insufficient resolution of a convict's complaint (File No. 4635/2016/VOP)

My inquiry concerned the **failure to allow regular telephonic contact** of a convict in the Kuřim Prison **with his son and an insufficient resolution of the complaint**. I concluded that the prison erred in failing to allow the complainant to regularly call his son in the afternoon

of a chosen business day and I justified this requirement both by the circumstances on the part of the complainant and the interpretation of relevant legal regulations.

There was no remedy on the part of Kuřim Prison, not even following the inquiry report and the final statement; however, I only took into consideration the following statement of a Director General of the Prison Service of the Czech Republic that a **new system of convict's phone calls is currently being put into operation, which will ensure the convicts can call their close persons in a greater degree and at a lower cost** than to date. In relation to the above, further inquiry into the complainant's instigation was no longer necessary and, therefore, I concluded my inquiry at this point.

However, the Director General did not accept my argumentation that the complainant's application was not adequately resolved (the notice received by the complainant was too brief and did not address the complainant's pleas in a concise, clear and exhaustive manner). **The Director General did not agree with my opinion that in connection with addressing complaints, the Prison Service acted in the role of administrative authority** and, as such, should have proceeded pursuant to Act No. 500/2004 Coll., the Code of Administrative Procedure, as amended. Because of the lack of an act on complaints, only the Section 175 of the Code of Administrative Procedure was applied to the process of a resolution of complaints.

In my opinion, the requirements on the resolution of complaints, i.e. requirements on the form and contents of the process of resolution of a complaint, can be inferred from the basic principles of activities of administrative authorities, thus it cannot be stated that the resolution should not lack a certain element of quality. The complaint should have been investigated properly and in due time. The requirement for a proper resolution of a complaint is specified both in the Code of Administrative Procedure and in the Regulation of the Director General of the Prison Service of the Czech Republic No 55/2014. We surely cannot classify such a resolution of a complaint, in which the complainant was not informed about the manner in which the Administrative Authority (prison) reached its conclusions, as "proper".

Since I could not achieve remedy, not even by using my powers to impose penalties, I am hereby informing the Chamber of Deputies of the Parliament of the Czech Republic of this matter.

Brno, 24 April 2017

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Public Defender of Rights