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. Proportionality of police action (File No.: 7936/2016/VOP)

I led an inquiry *vis-à-vis* the Regional Police Directorate of the Capital City of Prague (hereinafter the Regional Directorate) in the case of legality and **proportionality of action taken against a senior citizen** who was to be present at the scene where her husband committed an infraction.

In August 2016, the complainant and her husband (both of them were in pensionable age) were driving away from a street where they had parked their car. The man was driving alone while his wife went to another shop. The street is a dead end so the man had to turn the car around first. When doing this, he had a minor collision with another vehicle (only the licence plate number, which was secured by one screw fell off the damaged vehicle), which the driver did not notice and the complainant, who boarded the vehicle afterwards, was not aware of this. Nonetheless, the collision was noticed by passers-by who believed that the driver wanted to drive away from accident and called the police.

A two-man patrol from the Emergency Motorised Unit of the Regional Directorate **equipped with bulletproof vests and trained to manage aggressive persons stopped the car** and asked both spouses to **produce their identity cards without telling them the reason for stopping them and checking their personal records.** Only upon request did the police officers tell the complainant that she was driving a vehicle which had caused a traffic accident and driven away. Given the fact that the complainant was not aware of any traffic accident and was not involved in it, she did not produce her identification card to the police officers and an argument ensued. Afterwards, the police officers stated that the complainant was arrogant and verbally aggressive.

In the meantime, the complainant stepped out of the vehicle and walked to the back part of the vehicle. When she started walking back towards the passenger seat, the police officer evaluated this as an attempt to escape and called upon her by invoking the phrase: “In the name of the law, stop and produce an identity card, otherwise, coercive measures shall be used!” The complainant did not react, so the police officer **twisted her arms behind her back and handcuffed her**. When doing so, the police officer told her that she was being detained. The procedure of the police officers was not even changed by the complainant's husband who was telling them his wife's identity. The police officers loaded the complainant into their patrol car and drove her to the police station. There the complainant prove her identity and was released.

Even though the complainant lodged a complaint against the police immediately after her release and there was a recording device in the police car, the Regional Directorate failed to secure the recording, which was later recorded over. The complaint was thus evaluated as unfounded.

In my opinion, **the police made a number of errors**, especially when the police officers requested a proof of identity without giving any reason; the police officer did not use any other options to establish the complainant's identity on the spot and brought her to the police station instead (he did not react to the complainant's husband identifying her); the police officer used handcuffs against a 67-year-old woman who was not assaulting him in any way and whose escape from the scene was clearly far from realistic.

With the exception of failing to secure evidence (which I also criticised the police for) the **Regional Director dismissed the described errors and adopted no remedial measures**. Therefore, I imposed a penalty. The case was presented in the media in April 2017 and, in June 2017, I personally informed the Police President about it, although the President also found no error in the actions of the police officers.

Since remedy could not be achieved, not even by imposing a penalty, I am hereby informing the Chamber of Deputies of the Parliament of the Czech Republic of this matter.

B. Limits of the use of a building (File No.: 3348/2014/VOP)

My deputy dealt with a case where **a building was issued an occupancy and use permit as a single-family house but in fact, it was used as an accommodation facility**. The surrounding area thus suffered from noise and increased traffic. Furthermore, that the building was used as an accommodation facility clearly followed from the owner's web presentation where they offer a suite and four other rooms with 27 available beds in total. The building was presented in a similar way in the offer of a travel agency. The Decree on general requirements for land use however clearly defines the terms "Residential Buildings", "Buildings for Family Recreation" and "Accommodation Facilities".

A complainant approached the Defender because he was bothered especially by the increased noise levels and traffic associated with the operation of the accommodation facility. His previous complaints addressed to the Construction Authority had not met been with a positive reaction. The Construction Authority of the town of Chrast (hereinafter the Construction Authority) had stated that the use of the building was in order. The Trade Licensing Authority of the town of Chrudim had responded in a similar way. According to the Construction Authority, the use of a single-family house by its owners or other persons for temporary stay had not required a change in purpose of the use of the building. **But the actual current use of the building had not been taken into account**.

According to the Supreme Court, it is indeed not necessary for every small change in the use of a building to be subject to approval by the Construction Authority. However, pursuant to the judgment of the Supreme Administrative Court of 2014, the purpose of proceedings on a change in the use of a building is to evaluate the impact of the proposed change in use of a building. **Thus, in some cases, the use of a building may vary, but not in a manner that is clearly at variance with the approved purpose**.

In the case at hand, the building was a single-family house which was not used by its owner but leased as "suitable for family vacation, company training, friendly meetings and all sorts of celebrations". On the website of the travel agency, the building was advertised as a "new, luxuriously furnished recreational facility with a swimming pool, suitable for accommodating demanding clients".

The results of the inquiry were notified to **the Regional Authority of the Pardubice Region, as a means of penalisation, and the Authority agreed with the results of inquiry led by my deputy**. It also considered it unacceptable for a Construction Authority to cease differentiating between a single-family house and an accommodation facility. **Therefore, it requested that the Construction Authority should perform another assessment whether the building was used in accordance with the approved purpose of use** and, therefore, if the public interest was respected. **The Trade Licensing Authority also agreed with the findings of my deputy.**

Subsequently, the Construction Authority informed my deputy that, on the basis of the above-specified request of the Regional Authority, it had performed another detailed inquiry into the matter, studied the file and performed an on-site investigation. It followed from the information provided that the owners of the building had newly built a noise barrier wall. Afterwards, the Construction Authority assessed the specific variability of use of the building, which, according to the findings of the Construction Authority was leased for recreational purposes, social events and possibly also educational events for approximately 4-5 months of the year; nonetheless, it again evaluated its findings in that the real estate was used as a single-family house and therefore adopted no further remedial measures.

Since remedy could not be achieved, not even by imposing a penalty, I am hereby informing the Chamber of Deputies of the Parliament of the Czech Republic of this matter.

C. Correction of the date of termination of permanent residence in the Czech Republic (File No.: 6562/2015/VOP)

I dealt with a case of a complainant who was dissatisfied with procedure of the authorities, because he had not reached his goal which had been to **retroactively add to his entry in the information system of records of inhabitants the information regarding the termination of his permanent residence in the Czech Republic** as of 1980, when he had left Czechoslovakia and relocated to a foreign country.

The complaint was aimed against the Ministry of Interior (hereinafter the Ministry), which had claimed that the complainant's request could not have been granted. Apart from the procedure of the Ministry, I also inquired into the procedure of the City Hall of Karviná (hereinafter the City Hall) which, on 5 November 2012, asked the complainant to terminate his permanent residence and recorded into the information system the information on the termination of permanent residence in the Czech Republic as of that date and which, in 2014, processed the complainant's request for retroactive termination of permanent residence as of 1980. The City Hall essentially claimed that the final decision on whether the permanent residence of the complainant can be retroactively terminated as of 1980 was up

to the Ministry. I inquired whether the reasons why, according to the Ministry, the complainant's request could not be granted, were justified.

My inquiry showed that a citizen's notice of termination of permanent residence in the Czech Republic must be, in accordance with the law, made in the form of a written notice. A record on an application sheet, although made and written by the complainant does not constitute a sufficient document for recording the termination of permanent residence into the information system. The record of the termination of permanent residence of the complainant in the Czech Republic made by the City Hall as of 5 November 2012 was not in accordance with law.

If, on the basis of the complainant's complaint of 30 May 2014, there arose any doubts whether any mistakes were made during the creation of the records in the application sheet for permanent residence in the past, the City Hall should have assessed the complainant's complaint as a request for correction of information in the information system of records of inhabitants, mark the disputed information as incorrect and determine the validity of the data. By using this procedure, the City Hall should have inferred from a number of clear clues that the complainant emigrated in 1980. The information on the termination of permanent residence of the complainant in the Czech Republic as of 5 November 2012 is not correct and should be corrected.

I found the reasons which, according to the Ministry, prevent retroactive termination of the complainant's permanent residence as of 1980, to be unfounded.

Given the fact that I could not achieve remedy, not even after the inquiry report and after my final statement and, **at the same time, this is not an isolated case** (see for example part D below), I made use of the mechanism for imposing penalties and drew attention to the entire issue, i.e. the fact that the Ministry refuses to correct errors in the population records by the way of a press release of 22 August 2017.

Since remedy could not be achieved, not even by imposing a penalty, I am hereby informing the Chamber of Deputies of the Parliament of the Czech Republic of this matter.

D. Correction of the date of termination of permanent residence in the Czech Republic (File No.: 843/2016/VOP)

I dealt with the same issue as in the previous part C in another case, with the only difference being that the case was about spouses who emigrated in 1968.

E. Determination of the date of commencement of a disability (File No.: 1583/2016/VOP)

The complainant was diagnosed with a multiple sclerosis in 2004. She was receiving disability pension until 22 September 2010. Then her condition stabilised enough so that the reduction of her capacity to work did not reach the 35% limit stipulated by law.

Even though her disability was again recognised on 10 February 2014, she did not become entitled to a disability pension. **She was missing 121 days of insurance to be granted a pension** (5 years out of the 10 years directly preceding the date of commencement of the

disability). **The manner of determination of the date of commencement of the disability** was not clear from the submitted documents. After commencement of the inquiry, the Czech Social Security Administration (hereinafter the CSSA) requested an extraordinary medical examination. It resulted in changing the date of commencement of the disability to 13 January 2014 (a change by less than a month).

After examining the file, I concluded that the **CSSA expert reports on the disability were incomplete and unconvincing** in the scope of determination of the date of commencement of the disability. The expert reports had not dealt with medical reports and examinations proving the deterioration of the complainant's health condition in the second half of 2013 and also had not taken into account the worsening of the complainant's associated health problems recorded in the General Practitioner's report of 1 August 2013.

In addition, I do not agree with the established practice of the CSSA consisting in that if there is a change in the date of commencement on the disability which has no effect upon the change of the existing entitlement to pension it does not initiate the "change procedures" that are concluded by issuing a decision.

As a remedial measure, I suggested to the CSSA to perform an extraordinary medical examination including the assessment of the possibility of determining an earlier date of commencement of the disability. To that end, I proposed contacting specialised doctors in whose care the complainant had been and requesting the complete medical records – especially from July 2013 to January 2014.

The CSSA did not accept the proposed measure, therefore I exercised my power to impose penalties and informed the Ministry of Labour and Social Affairs.

Since remedy could not be achieved, not even by imposing a penalty, I am hereby informing the Chamber of Deputies of the Parliament of the Czech Republic of this matter.

F. Payment of outstanding old-age pension (File No.: 1570/2016/VOP)

I already dealt with an error of the Czech Social Security Administration (hereinafter the CSSA) consisting in an **incorrect scope of provision of payment of an outstanding old-age pension** following its increase in consequence of a former error of the social security body.

At the time of the decision-making regarding the complainant's pension, i.e. 10 August 2011, and at the issue of later associated decisions, there were doubts whether the CSSA interprets the key provision of Section 15 *et seq.* of Act No. 155/1995 Coll., on pension insurance, with the application of Art. 5 (1) of the Agreement between the Czechoslovak Republic and the Union of Soviet Socialist Republics on social security No. 116/1960 Coll. correctly, since it does not regard the periods of insurance completed from 1 January 1996 in the Russian Federation as "excluded periods".

During the determination of the amount of the complainant's pension, the CSSA did not accept the correct interpretation of the relevant provisions, which was later confirmed by the Extended Chamber of the Supreme Administrative Court as, at that time, it refused to evaluate the given periods as excluded periods which should be deducted from the number

of calendar days falling to the decisive period. This, however, does not release the CSSA from its liability for incorrect procedure consisting in determination of a lower pension. Therefore, the complainant should have been entitled to a payment of the outstanding pension from the date of its increase (from 14 May 2007) and not only for the 5 years preceding the entitlement, i.e. only from 7 October 2008.

The Head of the Internal Audit and Control Department of the CSSA informed me in his statement on the inquiry report that he does not agree with my legal opinion. The same stance was also adopted by the Central Director of the CSSA in his statement on the complainant's case during my inquiry which dealt with multiple cases of application of the relevant provision. In connection with the complainant's case, he specifically stated that it did not constitute maladministration in the sense of Section 56 (1)(b) of the Pension Insurance Act, as the CSSA based its decision on valid legal regulations while respecting general legal principles laid down by theory and, for example, by the case-law and opinions of the Ministry of Labour and Social Affairs.

I exercised my punitive powers and contacted the Minister of Labour and Social Affairs.

Since remedy could not be achieved, not even by imposing a penalty, I am hereby informing the Chamber of Deputies of the Parliament of the Czech Republic of this matter.

G. Incorrect procedure of the Construction Authority in assessing construction activities (File No.: 6678/2016/VOP)

My Deputy dealt with a complaint in which the complainant challenged the procedure of the Municipal Authority of Zbiroh, Department of Construction and Environment (hereinafter the Construction Authority) in **investigating the construction activities on the relevant plots of land**. The complainant argued that movement of heavy construction machinery on said plots of land, which are located in the near vicinity of his house, caused disruption of the comfort of living in the form of nuisance through noise and dust, as well as damage to the real estate (cracks in the house).

On the basis of the inquiry performed, my deputy reached the conclusion that the Construction Authority had erred in processing the complainant's complaint in which the complainant had referred to unauthorised change of use of the land when the Authority had informed him that no violation of the Construction Code had occurred. The relevant change of use of the land concerned an area of over 300 sqm, therefore it required a decision on the change of land use to be issued pursuant to Section 80 (2)(c) of the Construction Code.

After my deputy's final statement, the Construction Authority did, in the end, review its statement of August 2016 and, subsequently, in February 2017, performed another on-site investigation, but did not invite the complainant. Furthermore, the Construction Authority stated that it did not agree with the opinion of my deputy regarding the change of use of the land and, therefore, adopted no further remedial measures proposed by my deputy. For this reason, the superior authority to the Construction Authority, i.e. the Regional Authority of the Pilsen Region was informed of the case as a means of penalisation Not even after this was any remedy achieved.

Since remedy could not be achieved, not even by imposing a penalty, I am hereby informing the Chamber of Deputies of the Parliament of the Czech Republic of this matter.

H. Incorrect procedure of the Construction Authority in issuing request to perform maintenance work (File No.: 6104/2015/VOP)

The Defender was approached by a complainant who was challenging the procedure of the Municipal Authority of Valašské Meziříčí (hereinafter the Municipal Authority) in the matter of an incorrect passport of a single-family house and construction defects in a "boiler house" and "cattle sheds" belonging to the single-family house.

After my deputy initiated an inquiry, the Municipal Authority adopted measures, which my deputy evaluated as a sufficient remedy for the incorrect passport. Nonetheless, the superior Regional Authority of the Zlín region was informed as a means of penalisation because, in relation to solving the construction defects on a "boiler house" and "cattle sheds", the Construction Authority issued a **request to perform maintenance works**; however, the issuance of such request is not permitted pursuant to Section 139 (1) of the Construction Code. The cited provision assumes that Construction Authorities will **order the performance of maintenance works by issuing a decision**. My deputy also expressed doubts as to whether some of the maintenance works requested by the Construction Authority would be feasible or sufficient to remove the construction defects found. He left it to the discretion of the Regional Authority of the Zlín Region to decide what measures would be taken in order to remedy the errors of the Construction Authority. While, on the basis of the penalty, the Regional Authority recommended the Municipal Authority to withdraw the request to perform maintenance works and initiate administrative proceedings, the Municipal Authority still did not ensure remedy.

Since remedy could not be achieved, not even by imposing a penalty, I am hereby informing the Chamber of Deputies of the Parliament of the Czech Republic of this matter.

Brno, 27 October 2017

Mgr. Anna Šabatová, Ph.D.
Public Defender of Rights