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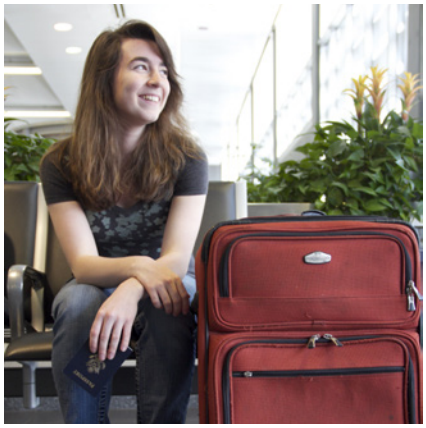
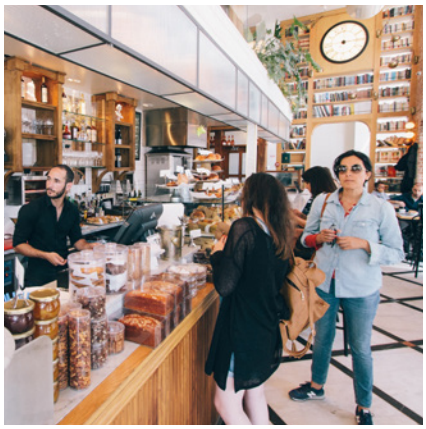
Public Defender of Rights

CITIZENSHIP OF THE EUROPEAN UNION





OPINIONS OF THE PUBLIC DEFENDER OF RIGHTS

2018

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OF THE PUBLIC DEFENDER
OF RIGHTS

2018

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THE MISSION OF THE PUBLIC DEFENDER OF RIGHTS

Since 2001, the Defender has been defending individuals against unlawful or otherwise incorrect procedure of administrative authorities and other institutions as well as against their inactivity. The Defender may peruse administrative and court files, request explanations from the authorities and carry out unannounced inquiries on site. If the Defender finds errors in the activities of an authority and fails to achieve a remedy, the Defender may inform the superior authority or the public.

Since 2006, the Defender has acted in the capacity of the national preventive mechanism pursuant to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Defender systematically visits facilities where persons are restricted in their freedom, either ex officio or as a result of dependence on the care provided. The purpose of the visits is to strengthen protection against ill-treatment. The Defender generalises his or her findings and recommendations in summary reports on visits and formulates standards of treatment on their basis. The Defender's recommendations concerning improvement of the conditions found and elimination of ill-treatment, if applicable, are directed both to the facilities themselves and to their founders as well as the central governmental authorities.

In 2009, the Defender became the national body responsible for equal treatment and protection against discrimination (equality body). The Defender helps victims of discrimination, carries out surveys, publishes reports and recommendations and communicates with international partners. The Defender also raises awareness of important topics and carries out educational activities.

Since 2011, the Defender has also been monitoring detention of foreign nationals and the performance of administrative expulsion.

In January 2018, the Defender became a monitoring body for the implementation of rights recognised in the Convention on the Rights of Persons with Disabilities, also helping European Union citizens who live and work in the Czech Republic. The Defender provides them with information on their rights and helps them in cases of suspected discrimination on grounds of their citizenship. The Defender also co-operates with foreign bodies with similar responsibilities regarding Czech citizens abroad.

The special powers of the Defender include the right to file a petition with the Constitutional Court seeking the abolishment of a secondary legal regulation, the right to become an enjoined party in Constitutional Court proceedings on annulment of a law or its part, the right to lodge an administrative action to protect a general interest or to file an application to initiate disciplinary proceedings with the president or vice-president of a court. The Defender may also make recommendations to the Government concerning adoption, amendment or repealing of a law.

The Defender is independent and impartial, and accountable for the performance of his or her office to the Chamber of Deputies, which elected him or her. The Defender has one elected deputy, who can be authorised to assume part of the Defender's competence. The Defender regularly informs the public of his or her findings through the media, the Internet, social networks, professional workshops, round tables and conferences. The most important findings and recommendations are summarised in the annual report on the activities of the Public Defender of Rights submitted to the Chamber of Deputies.

TABLE OF CONTENTS

INTRODUCTION

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

Europe is currently experiencing one of the longest periods of peace in its history. There is no doubt that European integration and the existence of the European Union (hereinafter the "EU" or "Union") has played a key role in this achievement. Despite its successes, numerous opinion polls show that the trust of Czech citizens in the EU is one of the lowest among the Member States.[1] It appears that Czechs do not fully appreciate the role the EU plays in our lives.

This publication illustrates the importance of EU law in our daily lives – from choosing a kindergarten for our children, to being hired a by company, paying admission fee in a museum while on holiday, to receiving old-age pension. The citizenship of the European Union plays an important role in all these areas. EU citizenship enables us to freely move to and reside in EU Member States and cultivates a feeling of solidarity with other European nations. We have to write about it, share experiences and remove red tape and other obstacles preventing people from fully exercising their EU citizenship rights.

EU law is binding not only on courts and administrative authorities, but also on the Public Defender of Rights (Ombudsman). The present collection of the Defender's opinions is a proof that the Defender takes EU law very seriously. The mission of the Public Defender of Rights is to protect persons from conduct of authorities if it is contradictory to law, violates the principles of the rule of law in a democratic State or does not adhere to the principles of good governance.[2] The Defender further performs her mandate in matters concerning the right to equal treatment and protection against discrimination.[3]

This publication aims to present the scope of cases involving EU law that the Defender has dealt with in the past. The collection is meant

1 Only the Slovenians and Greeks trust EU institutions less than the Czechs. European Commission. Designing Europe's future: Trust in institutions – Globalisation – Support for the euro, opinions about free trade and solidarity [online]. Special Eurobarometer 461, European Union, April 2017 [retrieved on: 2017-08-30]. Available at: http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/yearFrom/2016/yearTo/2017/surveyKy/2173

2 Section 1 (1) of the Public Defender of Rights Act; for full references to laws and regulations, see the chapter "Applicable legislation".

3 Section 1 (5) of the Public Defender of Rights Act.

to acquaint the experts as well as general public with selected legal arguments and results formulated by the Defender while inquiring into complaints. The purpose is not to provide a comprehensive presentation of the individual aspects of EU law, but rather to highlight certain specific cases the Defender has dealt with and present them in their proper context.

I also respond to the implementation of the Migrant Workers Directive in the Czech legislation. The Directive's purpose is to facilitate the exercise of rights based on the free movement of workers and other persons. Based on the Directive, each Member State shall designate bodies for the promotion, analysis, monitoring and support of equal treatment of Union workers and members of their family without discrimination on grounds of nationality.[4] From 1 January 2018, the Public Defender of Rights has been performing this responsibility.[5] I believe that I can seamlessly follow on my activities to date, drawing on the experience and knowledge my two predecessors and I have accumulated in addressing individual complaints since the Czech Republic's accession to the European Union in 2004.

I will be pleased if the Czech Ombudsman's findings are of use to European institutions and our foreign colleagues working for the national bodies promoting the rights of EU migrant workers and their family members. I am looking forward to our fruitful co-operation.

I sincerely hope this text will prove to be an inspiration to your work.

Anna Šabatová
Brno, 12 February 2018

4 Article 4 (1) of the Migrant Workers Directive.

5 Government of the Czech Republic. Government bill amending 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, and other related acts [pdf document]. Prague: Chamber of Deputies of the Parliament of the Czech Republic; 7th electorate term; 2013-2017, Parliamentary press No. 688/0 [retrieved on: 2017-08-17]. Available at: http://www.psp.cz/sqw/text/tiskt.sqw?O=7&CT=688&CT1=0

I) Rights of residence

Citizens of the European Union have the right to move freely across EU Member States. This right is naturally followed by the right of residence. In the past, the Public Defender of Rights has most often inquired into the procedure of the Ministry of the Interior (Department of Asylum and Migration Policy, Commission for Matters of Residence of Foreigners), the Ministry of Foreign Affairs and the Czech embassies in other countries.

> Right of residence for EU citizens is an essential feature of the free movement right on the EU territory.

The basic legal framework of the rights of residence is provided by the Citizens Rights Directive. It applies to all EU citizens who have exercised their right to free movement and to their accompanying family members. The Directive is transposed to the Czech legislation through the Foreigners' Residence Act.

The Citizens Rights Directive only affects the family members of those EU citizens who have exercised their right to free movement. The Czech legislation, in order to prevent reverse discrimination, thus made these family members equal to family members of Czech citizens who have not moved within the EU (Section 15a (3) of the Foreigners' Residence Act). Incidentally, this was the area where people have approached the Public Defender of Rights most often.

It should be mentioned that this alignment of rights is currently being partially abandoned. The amendment to the Foreigners' Residence Act effective from 15 August 2017 worsens the standing of family members of Czech citizens, especially when applying for a temporary residence permit. The application cannot be filed in person by those family members of Czech citizens who are staying in the Czech Republic without permit or who filed it during the term of validity of the removal order (*výjezdní příkaz*, i.e. order to leave the territory of the country).

Aside from the Citizens Rights Directive, the Long-Term Residents Directive is another important piece of legislation. This Directive specifies the conditions under which third country nationals receive the status of a long-term resident in an EU Member State.

In connection with said Directive, the Defender dealt with a complaint filed by a woman from Armenia who had lived in the Czech Republic with her mother and brother for at least five years based on a temporary residence permit as a family member of a Czech citizen.[6] After five years, she applied for permanent residence. However, her application was denied because then-applicable wording of the Foreigners' Residence Act did not cover the possibility that an applicant could meet the required five-year period by staying in the country on the basis of temporary residence as a family member of an EU citizen. The woman filed a complaint with the Defender who found incomplete transposition of the Long-Term Residents Directive into the Czech legislation. The court has eventually confirmed this

6 Public Defender of Rights' Letter to the Complainant of 15 September 2015, File No. 1158/2015/VOP/HL, available at: http://eso.ochrance.cz/Nalezene/Edit/3244.

as well.[7] Consequently, at the present time a foreign national may file an application for a permanent residence permit if he or she lived, for a period of five years immediately preceding the filing of the application, in the Czech Republic based on a temporary residence permit issued to a family member of an EU citizen.

This conflict between the Czech legislation and EU law has already been rectified by the Parliament. Since December 2015, the Foreigners' Residence Act specifically states that in some cases, the five-year period of uninterrupted residence in the Czech Republic also includes the period of temporary residence [Section 68 (2)(c) of the Foreigners' Residence Act]. Therefore, situations such as the one encountered by the complainant should not occur any more.

Another set of cases comprised complaints from citizens of the Czech Republic who have married a foreign national.[8] In some cases, the authorities considered their marriage "purpose-driven" (i.e. a marriage of convenience), which presented complications for the spouses' cohabitation in the Czech Republic. A "purpose-driven marriage" in the context of Czech foreigner law means a marriage of convenience concluded only formally in order to meet the statutory requirements for obtaining the right of residence in the country, where the spouses do not intend to continue leading and developing (real) family life, or where they only pretend to have family life.[9]

Foreign nationals who have married a Czech citizen are treated by Czech law as family members of EU citizens and are covered by EU law. This concerns chiefly the Visa Code, which stipulates the conditions for granting a visa for residence in EU Member States that does not exceed three months, and the Citizens Rights Directive. Although generally speaking, there is no legal title to being granted a visa, this principle does not apply to family members of EU citizens. As a special category of foreign nationals, they have the right to enter the territory of an EU Member State as well as to receive an entry visa.

The Defender has specifically dealt with a case of a Czech woman and Tunisian man who decided to live in the Czech Republic after marriage.[10] For this reason, the husband asked for a short-term visa as a family member of an EU citizen. However, the Czech embassy in Tunisia rejected his application due to alleged fraud, without providing additional details. The Ministry of Foreign Affairs confirmed the decision.

The Defender contacted both authorities and found that the mentioned fraud consisted in purported marriage of convenience. As evidence, they cited a large age difference between the spouses (the

7 Judgement of the Municipal Court in Prague of 8 February 2017, File No. 3 A 26/2015, www.nssoud.cz, and Judgement of the Supreme Administrative Court of 24 May 2017, Ref. No. 1 Azs 90/2017-37, www.nssoud.cz

8 E.g. report on inquiry concerning issuance of short-term visa of 6 March 2008, File No. 4537/2007/VOP/PP, available at: http://eso.ochrance.cz/Nalezene/Edit/3786 and the Defender's final statement of 26 March 2009, available at: http://eso.ochrance.cz/Nalezene/Edit/3788; report on inquiry concerning issuance of short-term visa of 15 September 2010, File No. 676/2010/VOP/PP, available at: http://eso.ochrance.cz/Nalezene/Edit/3782; report on inquiry concerning issuance of long-term visa of 20 June 2011, File No. 3452/2010/VOP/PP, available at: http://eso.ochrance.cz/Nalezene/Edit/3624; and the Defender's final statement of 7 February 2012, available at: http://eso.ochrance.cz/Nalezene/Edit/3626; report on inquiry concerning issuance of long-term visa of 29 June 2012, File No. 6312/2011/VOP/PN, available at: http://eso.ochrance.cz/Nalezene/Edit/1366 and the Defender's final statement of 3 July 2013, available at: http://eso.ochrance.cz/Nalezene/Edit/1364; report on inquiry concerning temporary residence permits of 13 November 2013, File No. 3020/2013/VOP/AT, available at: http://eso.ochrance.cz/Nalezene/Edit/3800

9 Report on inquiry concerning issuance of short-term visa of 10 May 2012, File No. 4715/2011/VOP/JŠM, available at: http://eso.ochrance.cz/Nalezene/Edit/3792 and the Defender's final statement of 1 November 2012, available at: http://eso.ochrance.cz/Nalezene/Edit/3794

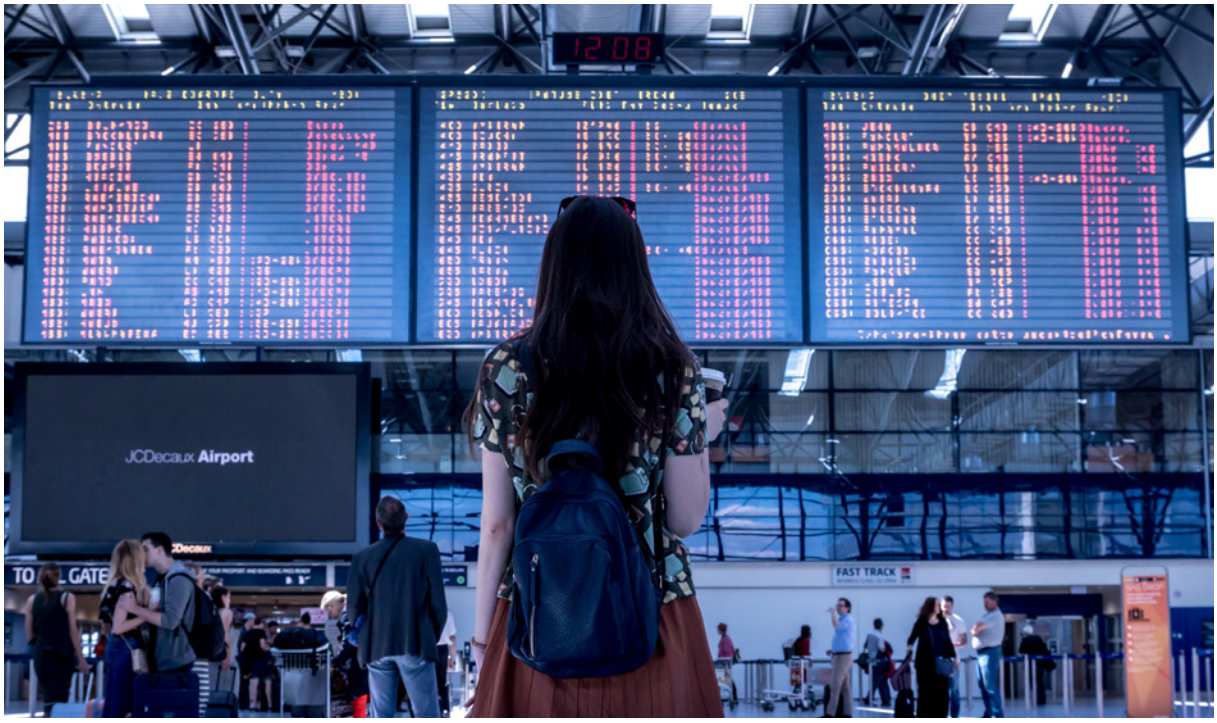
10 Report on inquiry concerning issuance of short-term visa of 12 May 2011, File No. 3754/2010/VOP/PP, available at: http://eso.ochrance.cz/Nalezene/Edit/3778 and the Defender's final statement of 7 February 2012, available at: http://eso.ochrance.cz/Nalezene/Edit/3630

wife was 43 years old, 11 years older than her husband), which allegedly cast doubt on the spouses' claim they wanted to start a family. The marriage was initiated by the complainant; the couple only knew each other shortly, there were fundamental discrepancies in their testimonies and there was a language barrier between them (both spoke only imperfect French).

The Defender first addressed the issue which laws and regulations applied to the situation. Visa proceedings are primarily subject to such interpretation of the Foreigners' Residence Act that conforms to EU law (especially the Citizens Rights Directive). Secondarily, the Visa Code applies to the proceedings as the basic procedural rule. If neither of the above covers the situation, the Foreigners' Residence Act and the Code of Administrative Procedure apply.

The burden of proof as regards the allegation that the marriage was of convenience is borne by the competent administrative authority. The Defender had doubts that the collected evidence was sufficient to prove fraudulent conduct. Firstly, a marriage cannot be considered "purpose-driven" solely on the basis of an age difference between the spouses or by pointing out the age of the wife in connection with the likelihood of conceiving a child. It can neither be conclusively stated that nine months between getting acquainted and marrying is too short a time. Furthermore, the authorities did not request additional evidence in the form of the couple's online correspondence. Consequently, the Defender concluded the inquiry with the statement that the embassy and the Ministry of Foreign Affairs had made several errors (including unlawful rejection of the application). The complainant subsequently succeeded with another visa application.

It can be concluded that as concerns rights of residence and EU citizenship, the Defender is most often approached by citizens of the Czech Republic and their family members. The Foreigners' Residence Act has put them on an equal footing (albeit with certain exceptions) with EU citizens and their family members who have exercised their right to free movement and residence within the EU.



II) Social security

In the area of social security, measures must be adopted to enable free movement of workers and eligible members of their families (Article 48 of the Treaty on the Functioning of the European Union, hereinafter the "TFEU"). Co-ordination of social security systems in the individual Member States relies on five fundamental principles: equal treatment; application of legislation of one Member State; aggregation of periods; retention of acquired rights; and assimilation of facts.

> "Conditions for entitlement to social security benefits should not impede a person's decision to live abroad."

The principle of applying the legislation of one Member State provides that persons to whom the Coordination of Social Security Systems Regulation applies shall usually be subject to the legislation of a single Member State only at a certain point of time. In the case of employed or self-employed persons, this is the Member State where they pursue their gainful activities.[11] The Regulation expressly forbids for an employed or self-employed person to be subject to payment of social security contributions in multiple Member States simultaneously; the person should only pay contributions in the Member State where he/she pursues his/her gainful activities (ban on double payment of contributions).[12] Simultaneously, a situation where a migrant worker is not subject to legislation of any Member State (i.e. does not participate in any Member State's social security system) should not occur either.

The principle of aggregation of periods means, in simple terms, that the Member States have a duty to aggregate the periods of insurance, employment, self-employment or residence completed in all Member States if they are decisive for entitlements to benefits falling under the Coordination of Social Security Systems Regulation. Migrant workers should not face a disadvantage because they have exercised their right to free movement.[13]

The principle of retention of the acquired rights is sometimes also called the principle of benefits export. According to the principle, Member States are obliged to pay benefits to beneficiaries regardless of whether they or their family members live in another Member State than the one where the institution responsible for the payment of benefits is seated.[14]

According to the principle of assimilation of facts, where, under the legislation of the competent Member State, the receipt of social security benefits and other income or facts has certain legal effects, the competent Member State will treat them as if they occurred within its territory,[15] i.e. as if the benefits or incomes were received based on the Member State's national legislation.

11 Article 11 of the Coordination of Social Security Systems Regulation.

12 E.g. judgment of the Court of Justice of 5 May 1977, Perenboom, 102/76, ECR 815, and judgment of the Court of Justice of 15 February 2000, Commission v France, C-169/98, ECR I-01049.

13 Article 6 of the Coordination of Social Security Systems Regulation.

14 Article 7 of the Coordination of Social Security Systems Regulation.

15 Article 5 of the Coordination of Social Security Systems Regulation.

For more details on the legal regime of the co-ordination are contained in the collection of the Defender's opinions concerning pensions.[16] We include two specific cases the Defender inquired into.

The Defender dealt with direct discrimination on grounds of nationality in acknowledging the periods of pension insurance.[17] The complainant was a citizen of Poland who lived his entire life in the Czech Republic. He worked only in the Czech Republic and did not acquire any period of pension insurance in Poland; he only studied secondary school there before and after reaching the age of 18. Poland did not credit this period as a period of Polish social insurance. The Czech Social Security Administration (CSSA) also refused to credit the study period, arguing that the complainant was not a citizen of the Czech Republic who had been sent for studies to Poland and that he had not paid social insurance for the period in the Czech Republic.

If the complainant was a citizen of the Czech Republic, the study period in Poland after the age of 18 (if the Polish insurance authority did not confirm it) would be treated as Czech "substitute insurance period" by the CSSA, without further considerations. Consequently, the CSSA treated a citizen of another EU Member State less favourably than its own citizens solely based on his nationality, even though there was no legitimate reason for such procedure. The Defender thus came to the conclusion that the procedure of the CSSA was at variance with EU law. Based on the Defender's inquiry, the CSSA later credited the complainant's study period in Poland as a Czech substitute insurance period and increased his Czech old-age pension.

This was not the only case involving pensions with a cross-border element. The Defender also dealt with a complaint from a woman who had worked in Ukraine, the Czech Republic and the United Kingdom

16 ŠABATOVÁ, Anna, HRUBÝ, Jiří, ČERNÁ, Jitka, MATĚJÍČEK, Pavel et al. *Důchody II (Pensions II)*. Brno: Office of the Public Defender of Rights in co-operation with Wolters Kluwer, a. s., 2016. 351 p., p. 137 et seq. ISBN 978-80-7552-329-7. Available at: https://www.ochrance.cz/fileadmin/user_upload/Publikace/sborniky_stanoviska/Sbornik_Duchody-II__eBook.pdf.

17 Report on inquiry concerning other pension according to EU coordination regulations of 18 February 2014, File No. 2535/2013/VOP/JČ, available at: http://eso.ochrance.cz/Nalezene/Edit/400

over the course of her life and considered her Czech old-age pension too low.[18] For the purposes of determining the amount of pension, the CSSA credited a pension period the complainant obtained in Ukraine, but not the insurance period from the UK. For the period when the complainant had pension insurance in the UK, the CSSA did not credit the so-called average indexed earnings[19] in the percentage assessment of pension, which resulted in reduced incomes. The Defender contacted the CSSA, which subsequently increased the complainant's old-age pension and additionally paid the owed amount.[20]

The Defender was regularly approached by people complaining against incorrect procedure of the labour offices in paying parental allowance.[21] A female complainant from the Ústí Region was granted and paid a parental allowance by the local labour office.[22] When the father of the child started commuting for work to Germany, the complainant correctly advised the labour office of the fact; the office decided that pursuant to EU law, the parental allowance should now be paid by Germany. It stopped paying the Czech allowance and advised the complainant to apply for the benefit in Germany. Since the competent German institution did not respond to her request, the complainant was left without any kind of parental allowance.

The Defender agreed with the labour office that Germany was supposed to pay the allowance in accordance with EU coordination regulations[23], on grounds of the father's place of employment. However, the Czech Republic secondarily carried the duty as well, based on the child's place of residence. This "redundant" system exists to protect families and ensure that they do not remain without any kind of assistance if the country primarily responsible fails to pay benefits. Consequently, the labour office was correct to stop payment of the allowance, but it should not have told the mother to arrange the parental allowance in Germany by herself. The labour office should have contacted its German counterpart on its own initiative and transfer the responsibility to pay the benefit. If the German institution did not respond within two months, the labour office should have started paying a provisional allowance to ensure the family did not lose financial security.[24]

Based on the Defender's inquiry, the labour office contacted the relevant German institution. The institution did not respond within two months. The Labour Office thus additionally paid to the complainant the

18 Report on inquiry concerning pension according to EU coordination regulations and benefits based on a bilateral agreement on social security of 20 November 2013, File No. 1388/2012/VOP/JČ, available at: http://eso.ochrance.cz/Nalezene/Edit/204

19 When deciding about pensions in cases with an international element, the contents of the agreement on social security is crucial for determining the way of assessing the amount of individual pensions. When determining the amount of individual pensions based on international agreements to which the Czech Republic is a party, periods of insurance in the other contracting state never include the incomes actually obtained there. The period of insurance in the other country is either excluded – it is deemed never to have passed – or it is substituted by so-called average indexed earnings. The amount of average indexed earnings is calculated from the average amount of earnings obtained in the country which decides on the amount of pension. The purpose of both aforementioned procedures is to prevent reduction of earnings that the person obtained in the country deciding on the amount of pension.

20 For more information on the case, see ŠABATOVÁ, Anna, HRUBÝ, Jiří, ČERNÁ, Jitka, MATĚJÍČEK, Pavel et al. *Důchody II (Pensions II)*. Brno: Office of the Public Defender of Rights in co-operation with Wolters Kluwer, a. s., 2016. 351 p., p. 132 et seq. ISBN 978-80-7552-329-7.

21 See e.g. Report on inquiry concerning parental allowance of 24 September 2012, File No. 3881/2012/VOP/AV, available at: http://eso.ochrance.cz/Nalezene/Edit/578; Report on inquiry concerning family benefits according to EU coordination regulations of 12 May 2015, File No. 1672/2015/VOP/AV, available at: http://eso.ochrance.cz/Nalezene/Edit/3566

22 Report on inquiry concerning family benefits according to EU coordination regulations of 17 August 2015, File No. 2331/2015/VOP/AV, available at: http://eso.ochrance.cz/Nalezene/Edit/3170

23 Coordination of Social Security Systems Regulation and the Implementing Regulation.

24 It must be noted that this no longer applies. Provisional payment of benefits was allowed by earlier methodology of the Ministry of Labour and Social Affairs. However, the Ministry changed its position, so currently a labour office can only urge the foreign authority to address the application (except in situations deserving special consideration, e.g. cases of families in extremely difficult social situations).

owed parental allowance in the amount of CZK 140,000. Even if the German institution had responded, it would have to conclude that the complainant was no longer entitled to receive benefits in Germany on account of the child's age (in Germany, the benefit is only paid in respect of children under 14 months of age; at the time when the labour office determined that Germany was to pay the benefit, on account of the father's place of employment, the child was already older). The Czech labour office, as the secondarily competent national authority, thus additionally paid the parental allowance to the complainant (up to the Czech limit in the amount of CZK 220,000, or approx. € 8,680).

In another case, it was not clear which legislation applied with regard to granting financial assistance in maternity (maternity benefits).[25] A female complainant had her place of residence in the Czech Republic, but worked close across the border in Slovakia, i.e. she was a frontier worker. She regularly returned to the Czech Republic once a week. After her employment ended, the complainant registered in the register of jobseekers in the Czech Republic, was granted unemployment benefits and obtained Czech health insurance. She subsequently applied for maternity benefits, but her application was denied both in the Czech Republic and in Slovakia. Czech authorities argued that she should receive the benefits from the country where she had worked last. The Slovak authorities claimed that since she had started receiving unemployment benefits, she was subject to Czech legislation.

The Defender applied the Coordination of Social Security Systems Regulation and came to the following conclusion. If a frontier worker applies, after the end of his or her employment, for unemployment benefits in the Member State of residence which is different from the Member State where he or she was employed and the benefits are granted, the applicable legislation in the area of social security shifts from the State of employment to the State of residence. This means that all social security benefits, including pecuniary sickness, maternity and paternity benefits, are paid by the State of residence based on its legislation, as if the worker was employed there before. The Ministry of Labour and Social Affairs agreed with the Defender and ordered the CSSA to additionally pay the maternity benefits to the complainant. The complainant eventually received CZK 110,152 (approx. € 4,400).

25 Report on inquiry concerning sickness benefits according to EU coordination regulations of 25 March 2015, File No. 3986/2014/VOP/JČ, available at: http://eso.ochrance.cz/Nalezene/Edit/2634

III) Work and employment

The fundamental rules for the area of work and employment are laid down by Article 45 TFEU, which provides for free movement of workers within the Union, with the related prohibition of discrimination. The Regulation on Freedom of Movement for Workers constitutes secondary legislation.

A worker from another Member State should be treated the same as a national worker in all areas. Workers have the right to freely move and reside within EU territory for employment, apply for jobs and have the right to the same tax as well as social advantages. Social advantages are understood broadly and include advantages of both financial and non-financial nature as well as advantages primarily meant for the worker's family members, provided that they constitute at least an indirect advantage to the worker him/herself. EU workers' family members have the same status as EU workers, even though they do not themselves work, e.g. the children of EU workers have the same access to education as the respective Member State's nationals.

The prohibition of discrimination on grounds of nationality also applies in horizontal relationships, i.e. to private labour-law relationships. For instance, the Defender dealt with the employer's conditions for granting a housing contribution to persons who moved to the vicinity of the employer's manufacturing plant.[26] The fulfilment of the conditions was verified by means of a proof of the change of the employee's permanent address. However, the conditions put at a disadvantage EU citizens who moved to the Czech Republic to work for the employer, because unlike Czech citizens they did not have permanent residence in the Czech Republic at the time of filing the application. Consequently, the contribution was neither granted nor paid.

> Workers from other EU countries have the same rights as the country's nationals.

Employers are obliged to treat national and EU workers the same.[27] Additionally, any clause of a collective or individual agreement that could put EU workers at a disadvantage is null and void from the outset and thus carries no legal effects.[28] According to the regulation, it was necessary to conclude that the contribution was not conditional on a change of permanent residence address *(trvalé bydliště)*, but only residence *(bydliště)*.

The Regional Court in Brno[29] came to a similar conclusion when it ruled that taking into consideration the principle of equal treatment of all EU citizens, the condition of permanent residence must be considered satisfied with regard to citizens of other Member States by the approval of temporary residence. Indeed, EU citizens only gain the right to permanent residence, and thus also the possibility to get permanent

26 Report on inquiry of the Public Defender of Rights of 13 April 2015, File No. 6856/2012/VOP/VP.

27 Article 7 of the Regulation on Freedom of Movement for Workers.

28 Article 7 (4) of the Regulation on Freedom of Movement for Workers.

29 Resolution of the Regional Court in Brno of 19 September 2014, File No. 64 A 6/2014, available at: www.nssoud.cz

residence address in the Czech Republic, after five years of residing in the country,[30] which puts them at a significant disadvantage compared to Czech citizens.

After obtaining permanent residence in the Czech Republic, i.e. after 5 years of residence, EU citizens would still not meet the employer's conditions for granting the housing benefit, because they would now be living close to the plant and would not fulfil the condition of having moved there. The condition of changing the permanent residence address thus in fact disqualified all employees who had moved in close to the manufacturing plant from another EU country, which constituted a disadvantage based on their nationality.

The Defender also encounters complaints against discriminatory job advertisements, where employers ask that applicants be of Czech "nationality" (in Czech: *národnost*; in this context, the legal concept of *národnost* denotes the ethnicity/national identity of the applicants). Such a requirement can constitute discrimination on grounds of národnost. However, it can also be at variance with the prohibition of discrimination on grounds of nationality in the sense of State citizenship (in Czech: *státní příslušnost*). The publishing of such advertisements can discourage applicants of non-Czech *národnost* and thus constitute an obstacle in access to the labour market. Publication of such an advertisement constitutes a violation of the Employment Act[31] and is classified as an infraction.[32]

In this context, case law of the Court of Justice needs to be mentioned. Although the case law concerns discrimination on grounds of race and ethnicity, it can be used analogously in case of a job advertisement that is discriminatory on grounds of nationality. In the *Feryn* case, the Court of Justice ruled that the very publishing of a discriminatory advertisement was discriminatory because it could have dissuasive effect on the affected persons.[33] The existence of discrimination is not dependent on the existence of a specific complainant who claims to have been a victim. The employer may rebut suspicions of discrimination by proving that the actual recruitment policy does not correspond to the statements made in advertisements.

Language requirements in employment

The required use of Czech language on the part of Slovak employees presents a specific problem.[34] No law or regulation provides grounds for such a condition. On the other hand, no legislation explicitly forbids employers from requiring that the employees use Czech language.

Generally speaking, the situation is governed by the Employment Act, which specifically regulates the prohibition to deny someone the right to employment on grounds of language.[35] This is reflected especially during the recruitment process. The Labour Code prohibits unequal treatment and discrimination

30 Cf. Section 87g (1)(a) of the Foreigners' Residence Act.

31 Section 12 (1) of the Employment Act.

32 Section 139 (1)(a) and Section 140 (1)(a) of the Employment Act.

33 Judgement of the Court of Justice of 10 July 2008, Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV, C-54/07, ECR I-05187.

34 The Public Defender of Rights addressed this issue in the report of 13 January 2011, File No. 164/2010/DIS, available at: http://eso.ochrance.cz/Nalezene/Edit/2306

35 Section 4 of the Employment Act.

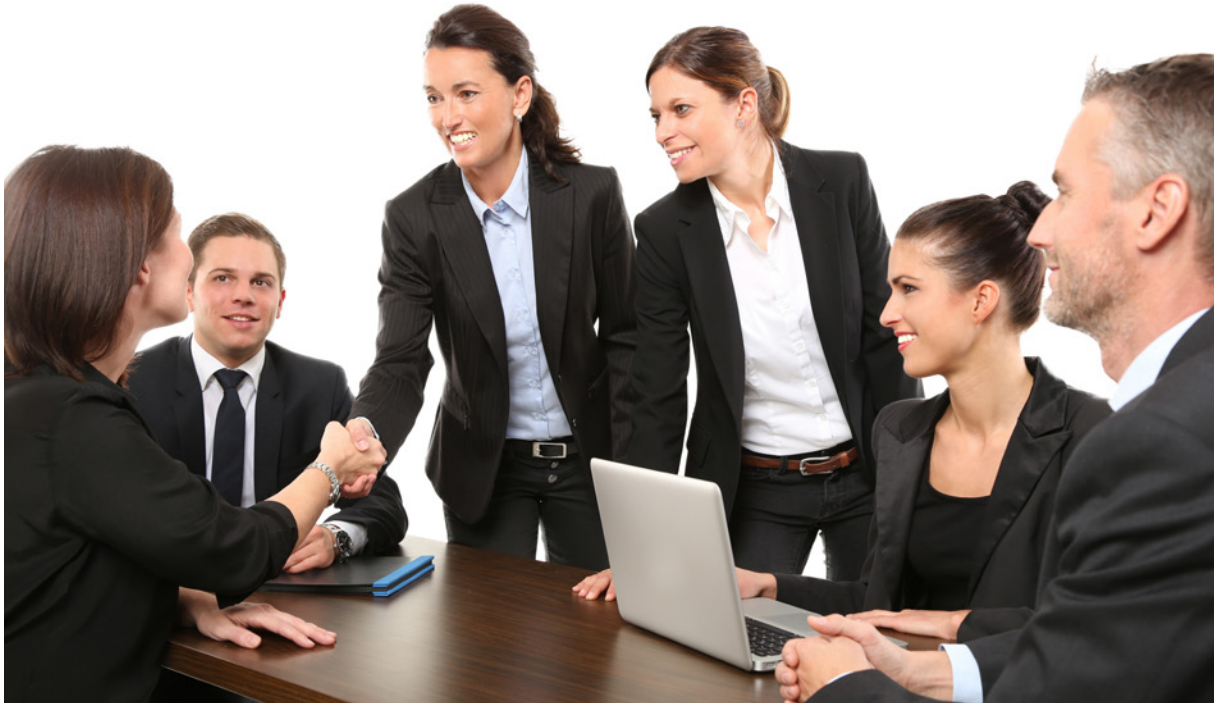
against employees during the employment relationship generally, without defining the prohibited grounds. The Labour Code refers to the Anti-Discrimination Act for a more detailed definition of discrimination.[36]

The Anti-Discrimination Act does not include language among the prohibited grounds, but bans discrimination on grounds of *národnost*. Language is one of the distinguishing elements of *národnost*, which is why language requirements could give rise to so-called indirect discrimination, i.e. application of a seemingly neutral criterion that could cause a disadvantage on grounds of *národnost*.

The Anti-Discrimination Act also punishes harassment, i.e. improper conduct related to one of the discrimination grounds that is aimed at or results in diminishing the dignity of a person and creating an intimidating, hostile, humiliating or offensive environment (e.g. ban on using a different language than Czech at the workplace without an objective justification).

EU law can also be applied to the situation, specifically Article 45 TFEU, which prohibits discrimination of workers based on nationality. The aim of the provision is to ensure free movement of workers within the Union and prevent ungrounded restrictions, which could occur for example if the use of Czech language in employment was strictly required.

The Court of Justice addressed the issue of using a foreign language in pursuing gainful activities in the case of *Salomone Haim*.[37] The Court found that the rule based on which a physician (in this case a dental practitioner) had to speak the national language of the Member State where he intended to practice dentistry, complied with EU law. The ability to reliably communicate with administrative authorities, professional bodies and patients for the purpose of ensuring health care was found to be an overriding



36 Sections 16 and 17 of the Labour Code.

37 Judgment of the Court of Justice of 4 July 2000, Haim, C-424/97, ECR I-05123.

reason of general interest suitable for securing the attainment the objective. However, the Court of Justice also reminded that the language requirement should not go beyond what is necessary to attain that objective. It also mentioned the interests of the patients whose mother tongue is not the national language that there exist a certain number of practitioners who are also capable of communicating with such persons in their own language.

In the case *Angonese*, the Court of Justice addressed the condition fixed by the province of Bolzano, Italy, according to which certain jobs could only be filled by holders of a special certificate of Italian-German bilingualism.[38] The certificate was issued only by authorities of the province of Bolzano. This put at a disadvantage both nationals of other Member States and the citizens of Italy who exercised their right to stay abroad for work or study, as was the case of Mr Angonese; as a consequence, they lacked the required certificate despite having command of both the required languages. The Court of Justice considered the requirement of bilingualism legitimate. Nevertheless, it declared the requirement to produce exclusively one kind of certificate, obtainable only in the given region, to be contrary to the principle of freedom of movement for workers.

Both EU law (prohibition of discrimination on grounds of nationality) and Czech anti-discrimination law (prohibition of discrimination on grounds of *národnost*) demand that the requirement of knowing and speaking a language be necessary and in proportion to the objective pursued. If different treatment complies with the requirement of proportionality and necessity, it can be justified and does not constitute unlawful discrimination.

The requirement to avoid using Slovak in a Czech workplace environment cannot be evaluated in general terms, but always only in the context of a given situation. On the one hand, for many Czechs the Slovak language is almost as comprehensible as the Czech language. On the other hand, it should be noted that because of lesser exposure to Slovak, especially through the media, some Czechs – especially the younger ones – are losing the ability to readily comprehend Slovak.

Consequently, there are situations where strict insistence on using Czech is disproportionate in relation to the pursued objective. On the other hand, it is legitimate to require that official documents, correspondence or e.g. medical documentation be written exclusively in Czech. It is also legitimate to require the use of Czech in communication with clients who could have difficulties understanding Slovak.

By contrast, requiring that Czech be the mother tongue of all the employees would be clearly contrary to the requirement of proportionality. An absolute ban on using Slovak at the workplace – e.g. in communication with colleagues who also speak Slovak – would constitute discrimination on grounds of *národnost* under Czech anti-discrimination law as well as discrimination on the grounds of nationality prohibited by EU law. The same applies to any requirement to speak Czech free of foreign accent, although the speech is otherwise flawless.

It is dubious to require using Czech to communicate with clients who understand Slovak equally well as Czech and to exclusively use Czech in communication with managers and colleagues or external persons. In the latter cases, such a requirement would have to be evaluated in the context of specific circumstances. The requirement to exclusively use the Czech language would have to be proportionate and necessary in relation to the pursued objective. A legitimate objective may consist especially in

38 Judgement of the Court of Justice of 6 June 2000, Angonese, C-281/98, ECR I-04139.

avoiding misunderstandings that could arise from using Slovak. On the other hand, insisting on using Czech when Slovak is accepted by others and the clients and colleagues do not have a problem with it would be frivolous.

Unemployment benefits

The area of employment is closely related to social policy.[39] Persons are entitled to receive unemployment benefits after termination of employment in another Member State (subject to conditions stipulated by national law). Provision of the benefits falls under the Coordination of Social Security Systems Regulation.[40]

The Defender has most often dealt with cases of persons who worked and lived in another EU Member State for some time and subsequently returned to the Czech Republic and applied for unemployment benefits at the labour office. Their application was denied by the labour office with the explanation that unemployment benefits should be paid by the Member State where the individual was last employed; this is a basic rule following from the Coordination of Social Security Systems Regulation. Czech authorities would be competent to provide unemployment benefits only if the persons retained their place of residence in the Czech Republic despite working abroad.[41]

39 For details see Titles IX and X TFEU.

40 The matters covered are defined in Article 3 of the Regulation.

41 Article 65 of the Coordination of Social Security Systems Regulation.

"Residence" is a specific term used by the coordinating regulations and is defined as *"the place where a person habitually resides"*. It bears no connection to registered permanent residence, citizenship of a State, *národnost* etc. The Regulation (EC) No 987/2009 of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (hereinafter the "Implementing Regulation") includes the following criteria for determining the state of residence:

> Home state of the worker is not always competent to provide social security benefits, such as unemployment benefits.

1. the duration and continuity of presence on the territory of the Member States concerned;

2. the person's situation, including:
   - the nature and the specific characteristics of any activity pursued, in particular the place where such activity is habitually pursued, the stability of the activity, and the duration of any work contract;
   - the person's family status and family ties;
   - the exercise of any non-remunerated activity;
   - in the case of students, the source of their income;
   - the person's housing situation, in particular how permanent it is;
   - the Member State in which the person is deemed to reside for taxation purposes.

As is apparent, these are objective criteria that cannot, without further considerations, be overridden by individuals' subjective perception of which Member State they consider to be their place of residence, i.e. (in commonly used terms) their "motherland", "home country", "country of origin" or a country to which the individuals have the strongest ties. The term "residence" in the aforementioned meaning has also been addressed by the Court of Justice, whose case law became the template for the above-mentioned criteria included in the Implementing Regulation.[42]

The Court of Justice came to the conclusion that the state of residence must be limited to the State where the worker, although occupied in another Member State, continues habitually to reside and where the habitual centre of his or her interests is also situated. It further inferred that whenever a worker has a stable employment in a Member State, there is a presumption that he or she resides there, even if he or she has left his family in another State. Accordingly, it is not only the family situation of the worker, but also the nature of the work and other circumstances, that should be taken into account.

In a majority of cases inquired into by the Defender, the labour offices made no error when they rejected the complainants' applications for unemployment benefits.

42 Especially judgement of the Court of Justice of 17 February 1977, Paolo, 76/76, ECR 00315. Although the decision is of older date and concerned previously applicable coordination regulations, it remains relevant given the fact that the adoption of new coordination regulations did not affect the definition of the term "residence".

IV) Health care and health insurance

The area of health care and reimbursement of its costs is very important for free movement of persons on economic and non-economic basis as well as free movement of goods and services. The Member States of the European Union have various systems of financing health care and patient payments; consequently, there is an obvious need for common rules for reimbursing health care provided abroad.

> Despite the specificities of the health sector such as financing, patients have the right to provision of health care across the EU.

Provision of health care on EU level falls under the matters covered by the Coordination of Social Security Systems Regulation, which is further supplemented by the Directive on the application of patients' rights in cross-border healthcare (2011/24/EU). The cornerstone of these legal instruments lies in the principle that EU citizens in another Member State must be provided with health care in the same quality as citizens and residents of that Member State. However, an insured person is also required to pay a share of costs in the same amount as local insured persons.[43]

EU citizens in another Member State are entitled to receive necessary health care corresponding to the nature of their illness and the expected period of stay in the given Member State, where health care must be provided to such extent that foreign insured persons are not compelled to depart for the country of insurance sooner than originally anticipated.[44] Health care must be provided after producing the European Health Insurance Card (EHIC), whose appearance in EU countries is standardised.[45] Workers, i.e. persons employed in another Member State, have health insurance in the State where they work.

Special rules apply to travelling for health care abroad. Member States may make reimbursement of health care abroad subject to prior authorisation. Member States must not refuse authorisation if the patient has the right to the requested health care in his or her State and the health care cannot be provided in the given State within a period which is usual for the given form of care, where it is necessary to take into consideration the medial condition of the insured person and the probable further progress of the illness.[46] In situations where the insurance company's approval is not required, it holds that if a person travels for health care and pays it from his or her means, he or she may request, upon arrival back in the home country, that the insurance company reimburses the costs. Reimbursement

43 For more details, see KŘEPELKA, Filip. Složité a zdlouhavé propojování zdravotnictví v Evropské unii *(Long and Arduous Road to Harmonise Health Care in the European Union)*. Časopis zdravotnického práva a bioetiky (Journal of Medical Law and Bioethics). Prague: Ústav státu a práva AV ČR, 2014(3), p. 1-43. ISSN 1804-8137.

44 Section 5 (1)(c) of the Healthcare Services Act.

45 Decision of the Administrative Commission for the Coordination of Social Security Systems No S1 of 12 June 2009 concerning the European Health Insurance Card (2010/C 106/08).

46 Article 8 of the Directive on the application of patients' rights in cross-border healthcare.

of the costs shall be provided up to the limit stipulated for reimbursement of such services provided in the Czech Republic.[47]

Concerning the area of health insurance, the Defender has most often encountered general requests for information concerning reimbursement of health care provided to Czech citizens abroad and vice versa, i.e. reimbursement of health care provided to foreign nationals in the Czech Republic. However, the Defender has also dealt with a complaint filed by parents who objected to a specific procedure of a health insurance company which refused to let their son travel for health care abroad. The Defender did not find errors in the health insurance company's procedure as the parents were requesting health care abroad despite the fact it was available in the Czech Republic as well.[48]

The Defender also dealt with the case of a Slovak woman – recipient of Slovak disability pension – who lived in the Czech Republic and was self-employed there. Given the fact that her income from activities as a self-employed person were low, the health insurance company assessed insurance premiums to her in line with the minimum assessment base. If she were a recipient of Czech disability pension (where the State would be paying her insurance premiums on this basis), she would only be paying insurance premiums based on actual income, which would be lower than the premiums assessed from the minimum assessment base. In the aforementioned case, therefore, there was an inequality between recipients of Czech and foreign pensions who pursued minor activities as self-employed persons in the Czech Republic.

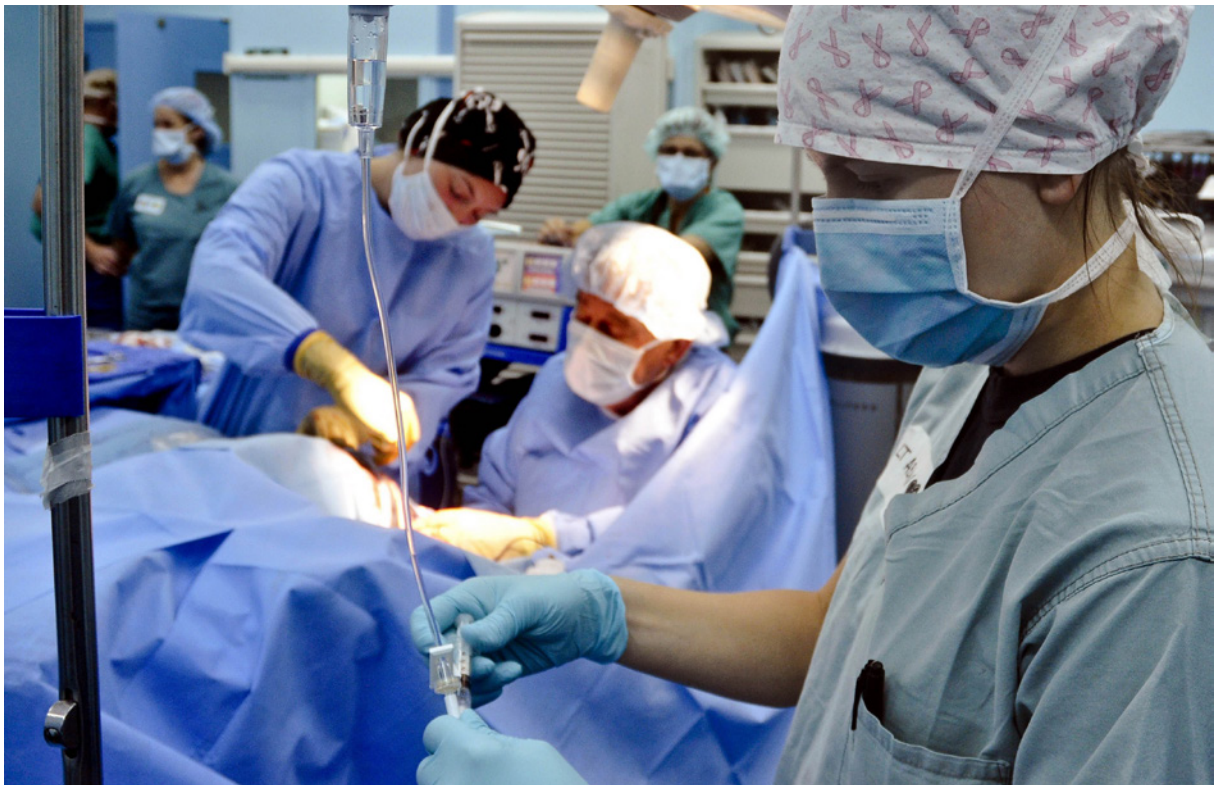
47 Section 11 (1)(m) and Section 14 of the Public Health Insurance Act; Article 7 (4) of the Directive on the application of patients' rights in cross-border healthcare.

48 Report on inquiry of the Public Defender of Rights of 4 October 2006, File No. 3658/2006/VOP/KPV.

The health insurance company's procedure was completely in accordance with the Czech laws; however, a suspicion arose whether the application of these provisions was at variance with the EU coordination regulations which establish the principles of equal treatment and assimilation of facts.[49] The Czech legislation is obviously less favourable for citizens of other countries – indeed, it is very probable that satisfying the condition (receiving pension) will be easier for Czech nationals. This could be sufficient to find indirect discrimination if the different treatment did not pursue a legitimate objective.[50]

The Defender found a legitimate objective for unequal treatment in the need to ensure a minimum funding of the public health insurance system by means of a payment of a certain basic amount for each insured person, where this payment is (may be) split among multiple payers.[51] In case of pensioners, the determination of the payer of insurance reflects, to a certain degree, their past contributions. If they are "released" from the duty to pay insurance premiums, or from the need to pay premiums based on at least the minimum assessment base in case they earn additional income, this arrangement can be justified by the fact that they were economically active for a relevant period of their lives and thus fully contributed to the public health insurance system.

However, this does not apply to recipients of pensions from foreign countries – these persons for the most part contributed to the social security system of the country which granted them the pension on



49 Articles 4 and 5 of the Coordination of Social Security Systems Regulation.

50 See e.g. Judgement of the Court of Justice of 23 March 2004, Collins, C-138/02, ECR I-02703.

51 In most categories of persons insured by the State, the rule applies that the State pays their insurance premiums, but if these persons also earn income from employment or independent business, they are required to pay additional insurance premiums assessed from these incomes (Section 7 (2) of the Public Health Insurance Act).

this basis. The Defender believes that if they were treated the same way as persons receiving pension from the Czech Republic, who are insured by the State, or if it were even inferred that the Czech Republic should in fact pay insurance premiums also for these foreign persons, this would constitute an objectively unjustified result of application of the principle of assimilation of facts within the meaning of recitals 9 to 12 of the Coordination of Social Security Systems Regulation.[52] The Defender thus concluded that the application of the Czech laws was compliant with EU law and there was no error in the procedure of the health insurance company.

The Defender also addressed the conditions for termination of pregnancy under the Abortion Act and its implementing decree.[53] [54] According to the Act, abortion cannot be carried out in the case of foreign nationals who are only staying in the Czech Republic temporarily.[55] According to the implementing decree, temporary residence does not include stay for the purposes of work, study and, further, the stay of family members of persons working in the Czech Republic as well as foreign nationals with foreigner residence permit under special legal regulations.[56]

The Defender found the relevant provision of the Abortion Act at variance with Article 56 TFEU, which prohibits restrictions on freedom to provide services within the Union and the related discrimination on grounds of nationality – EU citizens are free to travel to other Member States and use services there in the same manner as citizens of that respective Member States.[57] Already in its decision in the case *Grogan*, the Court of Justice ruled that medical termination of pregnancy, constitutes a service within the meaning of Article 56 TFEU *(originally Article 60 of the EEC Treaty)* and, consequently, cross border provision of the service must not be subject to restrictions.[58]

> Rules for provision of health care must respect the rules for the free movement of services.

On account of the direct effect of Articles 56 and 18 TFEU, the provisions of the Abortion Act which prohibit access of foreign nationals to abortions must be seen as inapplicable with respect to EU citizens. Citizens of other EU Member States thus may undergo termination of pregnancy in the Czech Republic even if their stay there is only temporary.

The newest two cases concerned the procedure of a hospital in prescribing medication to HIV positive persons (the medication was related to their diagnosis). If these persons were foreign nationals, the hospital was prescribing vital medication for a period of one month, even though it regularly prescribed them for three months to Czech citizens. The hospital justified the practice by the need to reduce financial losses which it had often incurred in the past by sudden termination of the foreign nationals' health

52 According to the recitals, the application of the principle of assimilation of facts or events must not lead to objectively unjustified outcomes or to the overlapping of benefits of the same kind for the same period.

53 Decree No. 75/1986 Coll., implementing Act of the Czech National Council No. 66/1986 Coll., on abortion.

54 Report on inquiry concerning unequal treatment ex lege in provision of health care on grounds of sex (parenthood), age and nationality of 19 August 2013, File No. 32/2011/DIS/ZO, available at: http://eso.ochrance.cz/Nalezene/Edit/1520

55 Section 10 of the Abortion Act: *"Abortion pursuant to Section 4* (abortion on request of the woman – author's note) *shall not be carried out in respect of foreign nationals who are only staying in the Czech Socialist Republic on a temporary basis."*

56 Section 10 of Decree No. 75/1986 Coll., implementing Act of the Czech National Council No. 66/1986 Coll., on abortion.

57 I.e. the "passive" aspect of free movement of services.

58 Judgement of the Court of Justice of 4 October 1991, Grogan, C-159/90, ECR I-04685.

insurance. If their policy is terminated during the three-month period of prescribed treatment, the health insurance company will not reimburse the hospital for the treatment from the public health insurance system and the hospital faces difficulties in achieving reimbursement of the amount.

The Defender came to a different conclusion in each of the two cases.

In the first case,[59] the complainant (EU citizen) had permanent residence in the Czech Republic. The Defender concluded that despite the fact that the objective the hospital pursued was legitimate, the means chosen to achieve it were neither proportionate nor necessary. The termination of participation in the public health insurance system resulting from the termination or cancellation of the permanent residence permit is not an instantaneous affair; the risk must be assessed in view of the ongoing proceedings which may result in the termination or cancellation of the permit. In the case at hand, it is therefore possible to apply a less restrictive practice in prescribing mediation for the standard period to foreign nationals with permanent residence permit, where the persons concerned may be asked to provide an affirmation as to whether such court or administrative proceedings are pending. The difference in treatment on the part of the hospital did not constitute unlawful discrimination pursuant to the Anti-Discrimination Act at that time, but it was an error constituting a violation of EU law.[60]

The second case differs in that the complainant, also an EU citizen, only had temporary residence permitted in the Czech Republic.[61] The Defender found that given the temporary nature of the residence, the guarantees of further stay – with the associated existence of health insurance – were weaker. In such a case, the participation in the public health insurance system may terminate as a result of termination of employment, which itself may occur suddenly and without warning. The risk that the hospital could suffer financial losses was thus higher. While the hospital should still take into consideration the specific circumstances of the patients (including patients with temporary residence in the country) such as the length of the stay, personal and family ties, the nature of employment and others, if the hospital lacks knowledge of the circumstances, it may enact a differentiating practice as in that case it becomes proportionate and necessary. While it was impossible to establish which information regarding the nature of the complainant's stay in the country was available to the hospital, the Defender did not find an error consisting in violation of EU law.

The Defender notified both complainants as well as the hospital of her findings and recommended to change the relevant practice. The hospital has done so and now prescribes medication in a standard manner to all EU citizens and foreign nationals with permanent residence, i.e. equally as to Czech citizens. To other foreign nationals, it prescribes medication for a period longer than one month in justified cases (e.g. a planned trip abroad) on the patient's request, on the condition the patient proves or provides an affirmation that he or she has a health insurance policy for a period equal to or longer than the period when medication is to be provided.

59 Public Defender of Rights' Report of 6 November 2017, File No. 3951/2016/VOP/KS, available at: http://eso.ochrance.cz/Nalezene/Edit/5584

60 Specifically, Article 18 of the Treaty on the Functioning of the European Union prohibits any discrimination on grounds of nationality. At the present time (since 1 January 2018), 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, considers nationality as a prohibited ground of discrimination in relation to EU citizens subject to Regulation (EU) No 492/2011 of the European Parliament and of the Council on freedom of movement for workers within the Union. Consequently, the aforementioned practice could currently be considered unlawful discrimination within the meaning of the Anti-Discrimination Act.

61 Report of the Public Defender of Rights of 6 November 2017, File No. 9/2017/VOP/KS

V) Education and study

The area of education also falls under the competence of the European Union[62] and EU citizens should thus not face discrimination in access to education. The Defender issued recommendations concerning the exercise of the right to equal treatment in access to pre-school education[63] where he emphasised the prohibition of discrimination on grounds of the child's nationality. Kindergartens often insist on the child's permanent residence in the respective municipality as an admission criterion. The criterion is legitimate if it is constructed as conferring an advantage (e.g. is not unconditional), since by establishing a school, the municipality performs one of the basic tasks of local government,[64] which include ensuring conditions for the satisfaction of its citizen's needs, including education.[65] [66] However, the criterion of permanent residence should be defined so as to comprise not just Czech citizens with permanent residence within the municipality, but also citizens of other EU countries whose registered address of residence lies within the municipality.[67]

Prohibition of discrimination on grounds of nationality also applies to granting scholarships and bursaries at institutions of higher learning. The Defender inquired into a case of a student from another EU Member State which involved non-provision of a social bursary due to the failure to meet the condition of permanent place of residence and address in the Czech Republic.[68]

> Right to equal access to education covers all levels of education from pre-school to university.

According to the Institutions of Higher Learning Act, scholarships and bursaries *(stipendium)* come in two basic types: ones provided by the State (paid on the basis of a subsidy or a State contribution within performance of delegated State administration) and ones provided from own funds of the institutions of higher learning within the exercise of academic self-governance. The Institutions of Higher Learning Act specifies the conditions under which the institution is obliged to grant a social bursary to the student: the relevant family income must not exceed the minimum subsistence level increased by 50% and the student is entitled to receive child benefits.[69] To receive a child benefit, a person must generally have permanent residence and address in the Czech Republic. The right of permanent residence is granted to EU citizens after the period of five years of continuous legal residence in the host Member State.[70] The condition

62 See also Articles 165 and 166 TFEU.

63 Recommendation of the Public Defender of Rights on exercising the right to equal access to pre-school education of 9 October 2012, File No. 166/2010/DIS/JŠK. Available at: http://eso.ochrance.cz/Nalezene/Edit/2510

64 See Section 35 (2) of the Municipalities Act.

65 The duty of the municipality to ensure education to children with permanent residence within the municipality also follows from Section 34 of the Schools Act.

66 Headteachers performing State (public) administration are not bound by the local government's tasks, but it is not the purpose of State administration to hinder the activities and tasks of local governments.

67 Pursuant to Section 93 (2) and related Section 87n (2), or Section 87r (2) of the Foreigners' Residence Act.

68 Report on inquiry concerning discrimination on the ground of nationality in the area of provision of a social bursary of 11 March 2015, File No. 253/2012/DIS/VP, available at: http://eso.ochrance.cz/Nalezene/Edit/2638

69 Section 91 (3) of the Institutions of Higher Learning Act.

70 Article 16 (1) of the Citizens Rights Directive.

of permanent residence and address also applies to persons assessed together with the recipient of the benefits.[71] The student did not meet these conditions.

Provision of social benefits and education falls under the competence of the Union, because both areas – social policy and education – are regulated by the TFEU.[72] The Court of Justice confirmed the Union's competence in these situations.[73]

The procedure of the institution of higher learning thus had to be assessed in light of EU law, especially Articles 18 and 21 TFEU and the Citizens Rights Directive. A bursary *(stipendium)* is a special form of social benefit. For the purpose of maintaining an acceptable degree of burden for public budgets, EU law enables Member States to limit the grants of such bursaries so that they are only provided to citizens of other countries with close relation to the Member State and a certain degree of integration into society of that State.[74] The degree of integration required for granting maintenance aid for studies is achieved not later than after five years of continuous legal residence after which EU citizens gain the right of permanent residence.[75] These rules were later explicitly included in the Citizens Rights Directive. The Citizens Rights Directive now explicitly enables States to refrain from granting maintenance aid for studies, meaning also bursaries, prior to acquisition of the right of permanent residence.[76] Based on the above, the Defender found the procedure of the institution of higher learning compliant with the law.

The Defender also dealt with the case of a student from Slovakia who complained against the conditions of a project offered by a faculty of a public institution of higher learning, which only allowed to confer advantages (an internship relevant within the field of study) to students with Czech citizenship or permanent residence in the Czech Republic. The institution argued that the project was offered in relation to a call for projects launched by the Ministry of Education, Youth and Sports, based on which the beneficiaries of the project advantages could only be persons with Czech citizenship or permanent residence in the Czech Republic. The Ministry said that the call for projects was launched in relation to the Convergence objective within the European Social Fund, which aims to support the least developed EU regions in order to improve conditions for growth and employment.

Under certain circumstances, the condition of permanent residence in the Czech Republic can be legitimate[77]; it must, however, always be proportionate. The Ministry offered no convincing arguments why citizenship or permanent residence permitted in the Czech Republic were listed as a limiting condition in the call for projects. The requirement of primary targeting of support to Czech population cannot be satisfactorily explained by an effort to target the Convergence aid to a specific region, because close

71 Section 3 (1) of the State Social Assistance Act.

72 Title X TFEU and Title XII TFEU, respectively.

73 Judgement of the Court of Justice of 15 March 2005, Bidar, C-209/03, ECR I-02119, paragraph 42: *". . . [I]t must be considered that the situation of a citizen of the Union who is lawfully resident in another Member State falls within the scope of application of the Treaty within the meaning of the first paragraph of Article 12 EC [now Article 18 TFEU] for the purposes of obtaining assistance for students, whether in the form of a subsidised loan or a grant, intended to cover his maintenance costs."*

74 Judgement of the Court of Justice of 15 March 2005, Bidar, C-209/03, ECR I-02119, paragraph 57.

75 Articles 16 (1) and 24 (2) of the Citizens Rights Directive.

76 Article 24 (2) of the Citizens Rights Directive.

77 A Member State may limit conferring social advantages to EU citizens by achievement of a certain degree of integration into its society, which is often documented by the length of residence. Citizens who gained the right of permanent residence satisfy this condition. Judgement of the Court of Justice of 15 March 2005, Bidar, C-209/03, ECR I-02119.

relationship to the supported region cannot be presumed only on the basis of Czech citizenship or permanent residence in the Czech Republic.

The given practice also raises suspicion of indirect discrimination on the grounds of *národnost*, since by far the largest group of foreign students at Czech institutions of higher learning are Slovak nationals and the requirement of Czech citizenship or permanent residence in the Czech Republic adversely affects them the most.

In relation to this call for projects launched by the Ministry of Education, Youth and Sports, the Defender also dealt with a case of a foreign PhD student who applied for a science work course. The organiser then informed him that he could not attend the course because of his nationality. The Defender found that the course was funded from the same project as in the previous case. In this case, too, the Defender found the conditions for attending the course following from the project discriminatory on grounds of nationality and thus at variance with EU law. After the Defender's communication with the course organiser, attendance was permitted also to students from other EU countries.

VI) Services

Dual pricing[78], i.e. setting different prices for Czech speaking persons in comparison to other persons, is not a rare case of discrimination[79] on grounds of nationality in the area of provision goods and services. Foreign tourists are asked to pay higher prices on grounds of their higher purchasing power with the argument that even the higher prices are still favourable for them. The purpose is to set the maximum price which specific consumers are willing to pay.

Dual prices often appear in hotel accommodation, restaurants, taxi services or in entrance fees to historical monuments.[80] If the higher price is not associated with any special service (e.g. a tour conducted in a foreign language), such method of pricing cannot be considered legitimate. The Czech Trade Inspection Authority monitors cases of violation of the prohibition of dual pricing. The average fine for dual pricing between 2010 and 2014 equalled CZK 43,750.[81]

> Providers of services may not treat unequally recipients who come from other EU countries.

In relation to EU citizens, setting dual prices is at variance with EU law because it creates an impermissible obstacle to free movement of services. The criterion of place of permanent residence may also serve as a concealed reason for differentiation on grounds of nationality. Within the EU, citizens of all EU Member States must be ensured the same conditions for purchasing goods and using services.

The Court of Justice has dealt with the issue of "tourist prices" on several occasions. The cases involved favourable admission fees to museums and historical monuments for citizens and residents of the States where these museum and landmarks were situated, while citizens of the other EU Member State had no such advantage.[82] The Court of Justice found that this constituted unlawful discrimination on grounds of nationality, which was at variance with current Articles 18 and 56 TFEU.

A similar case was also addressed by Czech courts. The District Court for Prague 6 heard a case concerning the admission fee for a tour of the Troja Palace, which belongs to the Prague Gallery.[83] The admission fee for Czech speaking visitors was CZK 50, while foreigners had to pay CZK 100. There was

78 The Defender dealt with this issue in detail in the Recommendation of the Public Defender of Rights on price discrimination of 23 August 2011, File No. 158/2010/DIS/JKV, available at: http://eso.ochrance.cz/Nalezene/Edit/2380

79 For more, see Czech Trade Inspection Authority. Rozdílné ceny pro cizince *(Different prices for foreigners)* [online]. Prague: 2 March 2017 [retrieved on: 2017-08-23]. Available at: https://www.coi.cz/rozdilne-ceny-pro-cizince/; or Czech Trade Inspection Authority. Diskriminace *(Discrimination)* 2016 [on-line] Prague: 24 March 2017 [retrieved on: 2017-08-23]. Available at: https://www.coi.cz/diskriminace-2016/.

80 For more information see Czech Trade Inspection Authority. Diskriminace *(Discrimination)* 2016 [on-line] Prague: 24 March 2017 [retrieved on: 2017-08-23]. Available at: https://www.coi.cz/diskriminace-2016/.

81 Public Defender of Rights. Discrimination in the Czech Republic: Victims of Discrimination and Obstacles Hindering their Access to Justice [.pdf document]. Brno: Office of the Public Defender of Rights, 2015 [retrieved on: 2017-08-25]. Available at: https://www.ochrance.cz/fileadmin/user_upload/ESO/EN_Discrimination_in_CZ_research_01.pdf, p. 119.

82 Judgement of the Court of Justice of 15 March 1994, Commission v Spain, C-45/93, ECR I-00911; and judgement of the Court of Justice of 16 January 2003, Commission v Italy, C-388/01, ECR I-00721.

83 Judgment of the District Court for Prague 6 of 13 January 1999, File No. 6 C 209/98.

no above-standard service offered or provided to foreign visitors that could justify the higher price. The entrance fee for Czech speaking persons was advertised as "preferential" or "discounted". The court ruled that dual pricing was at variance with good morals and granted damages to the complainant. The prices were adjusted already during the court proceedings. The court dealt with the case prior to the accession of the Czech Republic to the European Union and thus did not consider the issue from the standpoint of EU law.

Additionally, the Defender has dealt with the rules for distributing tickets for sports matches.[84] According to the rules, tickets for seats reserved for the fans of the visiting team were to be issued only against a proof of identity indicating Czech citizenship. The event organiser justified the rule by negative past experience with Polish fans. The rule aimed to increase security during the matches.

In the assessed case, the implementation of the rule would put persons of other nationalities at a disadvantage regarding access to a service compared to Czech nationals. In order to avoid unlawful discrimination, the differentiation would have to be reasonable and follow an objective justification – it would have to pursue a legitimate objective and the means to achieve it would have to be proportionate.[85]

However, these criteria were not met in the aforementioned case. Even if the objective of the rule was to ensure security during football matches (which would be legitimate as such),[86] the rule itself was not in proportion to the objective. It indiscriminately affected many persons who were not expected to cause any trouble during the match; it was based on the assumption that each foreign national was a potential hooligan. On the other hand, it did not affect a whole other range of potential troublemakers from the ranks of Czech citizens. The stated objective can, moreover, be achieved by other, more effective means, such as individual checks. The rules could disrupt free movement of services in the EU's single market. The application of the rules would constitute discrimination on grounds of nationality prohibited by Section 12 (1) of the Free Movement of Services Act and Section 6 of the Consumer Protection Act, which generally prohibits discrimination against consumers.

Public transport discounts

The Defender inquired into the price rules published by the Ministry of Finance according to which discounted student fare was only available to students of full-time study programmes under 26 years of age who were using train or bus to travel from their place of permanent residence (incl. a boarding house, student's hostel or youth home) to the school. The place of permanent residence had to be situated within the Czech Republic.

Student fare is a special form of discounted fare provided to students travelling from home to the school; it does not relate to provision of transport services generally. It is not a loan, bursary or any other similar benefit or allowance. The discounts on fare are compensated to the transport companies

84 Public Defender of Rights' Report on inquiry concerning access to goods and services of 24 August 2010, File No. 75/2010/DIS/JŠK, available at: http://eso.ochrance.cz/Nalezene/Edit/2330

85 Judgment of the Supreme Administrative Court of 20 December 2006, Ref. No. 1 As 14/2006; No. 443/2007 Coll. SAC, www.nssoud.cz

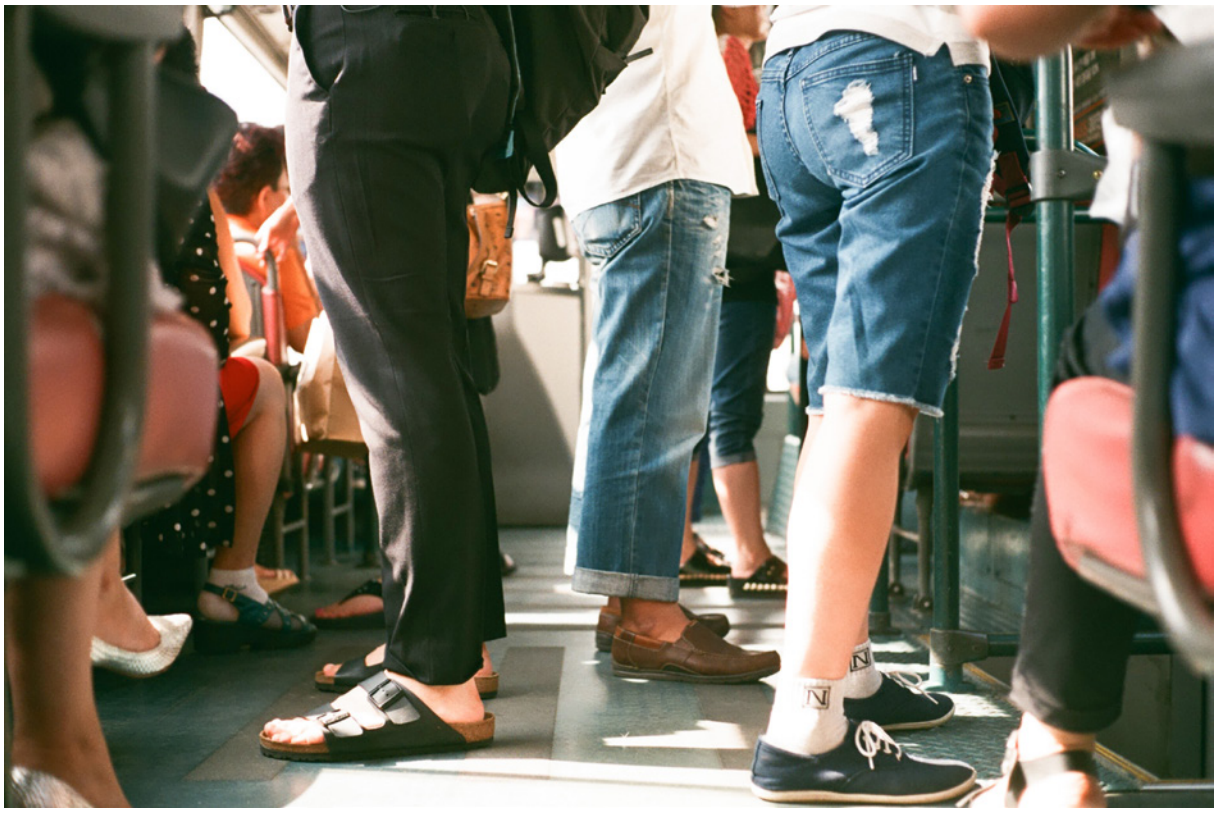
86 Cf. Section 7a (1) of the Sports Support Act: "The owner of a sports facility (hereinafter the "owner") or a person authorised by the owner to use the sports facility to organise a sports event (hereinafter the "organiser") shall adopt necessary measures to ensure security during the event if this is necessary for the safety of persons and property within the facility […]."

using public funds. For this reason, it constitutes an advantage somewhere between a student benefit and an advantage for students in the area of provision of services.

The condition of permanent residence was introduced in order to provide the discounted fare only to students with a close relation to the Czech Republic, i.e. primarily Czech citizens as well as foreign nationals with permanent residence in the Czech Republic.

Given the fact that transport companies receive compensations for the discounts provided as part of student fare, the entitlement is structured so that it only covers persons who contribute (themselves or through their parents) to public budgets from which the compensations are funded. However, the condition of permanent residence in the Czech Republic does not take into account whether the student or his or her parents are economically active in the country. Economically active persons and their family members have the right to equal social advantages even prior to acquiring the right of permanent residence.

It is true that the Court of Justice has found in many of its judgements that the condition of long-term or permanent residence is legitimate in relation to economically inactive persons,[87] but requiring residence in the Czech Republic as a condition for granting student fare lacks any purpose. Student fare is granted to students who commute to school. For this reason, the price rule of the Ministry of Finance



87 Judgment of the Court of Justice of 3 July 1986, Lawrie-Blum, 66/85, ECR 02121; judgment of the Court of Justice of 18 November 2008, Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep, C-158/07, ECR I-08507, judgment of the Court of Justice of 22 May 2008, Halina Nerkowska v Zakład Ubezpieczeń Społecznych Oddział w Koszalinie, C-499/06, ECR I-03993; and judgment of the Court of Justice of 26 October 2006, K. Tas-Hagen and R. A. Tas v Raadskamer WUBO van de Pensioen- en Uitkeringsraad, C-192/05, ECR I-10451.

was at variance with the prohibition of discrimination on grounds of nationality stipulated in Article 18 TFEU and, in relation to EU workers and their family members, also with Article 45 TFEU.

The Defender also dealt with a complaint against the terms and conditions of a mass transit system which did not offer the possibility to grant a discount to holders of the Slovak disability card (ZŤP), even though discounts were offered to holders of a similar Czech card (ZTP).[88] The Defender did not find discrimination on grounds of nationality in the case – the Slovak "severe health disability card" (ZŤP), although being a close counterpart to the Czech ZTP card (with its name in Slovak being a literal translation of the Czech designation), cannot be treated as a Czech disability card (ZTP) and confer the same advantages, as the Slovak card is issued under Slovak law. Therefore, it is up to the specific service provider to choose the discount criteria. Furthermore, citizens of other EU Member States can obtain the Czech disability card (ZTP).[89]

Financial services

The Defender was approached by an EU citizen with a complaint against discrimination on grounds of nationality concerning provision of a mortgage loan *(hypotéka)*. When inquiring into the case, the Defender found that the bank did not set different conditions for Czech and other EU citizens (e.g. a different maximum loan in relation to the real estate value). Different treatment occurred as part of the risk assessment procedure. Risk assessment and background checks in respect of foreigners are more thorough on account of the lack of international exchange of information between loan registers as regards indebtedness and loan history and due to the complicated nature of potential enforcement of receivables from foreign clients.

While it was clear that the bank's procedure in providing the mortgage loan was stricter than in case of Czech citizens, this did not constitute unlawful discrimination on grounds of nationality because the bank was able to justify the procedure and the Defender found the reasons legitimate for the purpose of risk reduction. One must also keep in mind the general duty of banks to be prudent and act in such a way so as not to put their security and stability at risk,[90] especially in the provision of mortgage loans which are typically for a long term and involve greater amounts of money. Given the fact that the bank did provide mortgage loans also to foreign nationals, albeit under a stricter assessment regime, the Defender found the practice reasonable.

The Defender inquired into a case where a hire-purchase vendor requested that foreign clients, citizens of the European Union, meet different and stricter conditions when buying goods on an instalment plan.[91] Specifically, the vendor required to see a residence permit, a copy of an identity document, and a second supporting document, i.e. wanted clients to submit three different documents. By contrast, Czech citizens only had to submit two documents. The case was also addressed by the Czech Trade Inspection Authority.

88 File No. 3294/2015/VOP/VB.

89 Section 3 of the Disability Benefits Act.

90 Section 12 (1) of the Banks Act.

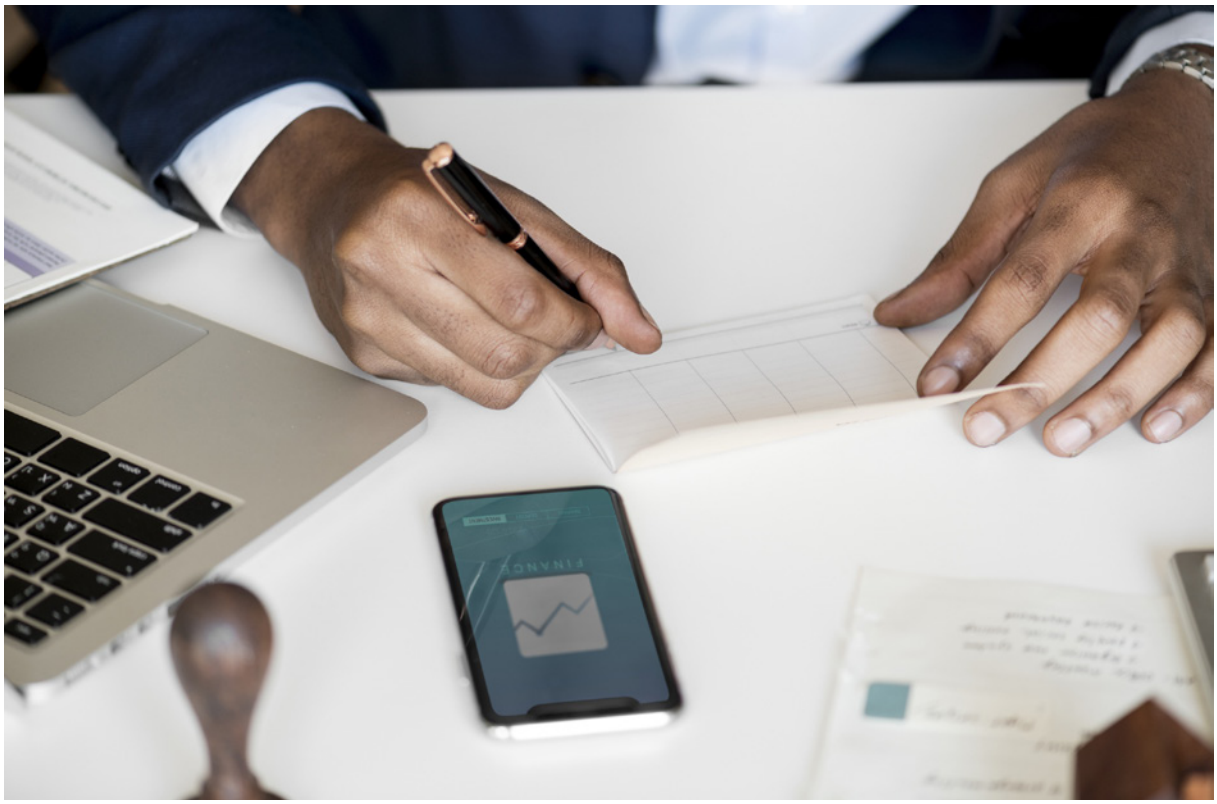
91 Report on inquiry of the Public Defender of Rights of 23 May 2016, File No. 465/2015/VOP/VP.

The Defender concluded that if citizens of other Member States are requested to provide more documents than Czech citizens in order to obtain the same consumer credit for goods, such conduct constitutes discrimination on grounds of nationality and is prohibited by Article 18 of the Treaty on the Functioning of the European Union.

This kind of discrimination is also prohibited by Section 6 of the Consumer Protection Act. The Act does not provide a list of discrimination grounds, but must be construed in accordance with Article 18 TFEU to also cover this ground of discrimination.

The vendor argued that, by stipulating stricter conditions, it tried to reduce the risk of selling goods to someone with false identity. The Defender found this objective legitimate, but did not find the measures taken to achieve it proportionate. A residence permit is a public document including the same details as an identity card.[92] A residence permit of a European Union citizen thus serves the same function as a Czech identity card. It was therefore not proportionate to the objective stated that the vendor should require double identity verification in the form of another supporting document (i.e. three identity documents), although for Czech citizens it sufficed to only submit an identity card and another supporting document (i.e. two identity documents).

The Czech Trade Inspection Authority investigated the issue on instigation of the complainant and came to the same conclusion as the Defender. The vendor was fined CZK 50,000 for violating Section 6 of the Consumer Protection Act.



92 Cf. Section 87r (2) of the Foreigners' Residence Act and Section 2 (1) of the Identity Cards Act.

VII) Housing

Municipal housing

The Defender issued recommendations on the lease of municipal flats, addressing *inter alia* the condition of Czech citizenship, which is often included in the rules for assigning municipal flats stipulated by some cities and municipalities.[93] The Defender encountered cases where the citizenship of the Czech Republic as a criterion for selection of the future tenant was used by municipalities as a condition for including an applicant in the register of candidates for assignment of a municipal flat or as a criterion for giving additional points to Czech citizens in comparison to other EU citizens.

> The need for housing is a basic human need for all people across the EU.

The right to move and reside freely within the territory of the Member States stipulated by Article 21 TFEU applies to all EU citizens. All citizens of the Union who legally reside in another Member State should benefit from the prohibition of discrimination on grounds of nationality established on the basis of Article 18 TFEU and further specified in Article 24 of the Citizens Rights Directive. EU citizens thus enjoy the same rights as Czechs in the area of housing.

The Regulation on Freedom of Movement for Workers applies to the area of housing especially in relation to EU workers. Pursuant to Article 9 of the Regulation, workers employed in another Member State enjoy all the rights and benefits accorded to national workers in matters of housing (including ownership of the housing they need). Pursuant to the same article, such workers may, with the same right as nationals, put their name down on the housing lists in the place where such lists exist, and shall enjoy the resultant benefits and priorities. EU workers, i.e. non-Czech EU citizens employed in the Czech Republic, may apply for municipal housing and must not be put at any disadvantage in comparison to Czech nationals. The Court of Justice has confirmed that restrictions on long-term lease or acquisition of real estate aimed against EU workers are at variance with EU law.[94]

Provision of municipal housing is one of the tasks of municipalities according to the Municipalities Act. Their task is to satisfy the housing needs of persons with permanent residence within the municipality,

93 Recommendation of the Public Defender of Rights on exercising the right to equal treatment of applicants for lease of municipal flats of 18 March 2010, File No. 22/2010/DIS/AHŘ. Available at: http://eso.ochrance.cz/Nalezene/Edit/2590

94 The Court of Justice ruled that certain provisions of Greek legislation preventing foreign nationals to acquire immovable property or lease for a period exceeding 3 years were at variance with Article 45 TFEU *(originally Articles 48, 52 and 59 of the EEC Treaty – trans.)* because they infringed on the free movement of workers. Judgment of the Court of Justice of 30 May 1989, Commission v Greece, 305/87, ECR 01461.

regardless of whether they are Czech citizens[95] or citizens of other EU Member States.[96] The task is based on the concept of the municipality as a self-governing community of citizens following from Article 100 (1) of the Czech Constitution and Section 1 of the Municipalities Act. It is thus legitimate, given the duty of the municipality to satisfy the housing needs of its citizens, to give certain degree of preferential treatment to its own citizens. The advantage must, however, also apply to citizens of other EU Member States with temporary[97] or permanent[98] residence permitted in the Czech Republic whose registered address of residence[99] lies within the municipality.

Non-inclusion or rejection of inclusion of an EU citizen in a register of candidates for lease of a municipal flat constitutes direct discrimination. Direct discrimination also occurs if the municipality includes EU citizens in the register, but puts them at a disadvantage in comparison to Czech nationals (e.g. by awarding fewer points in assessment of their application). The Defender recommends to avoid using criteria which put EU citizens at a disadvantage. If a municipality wants to preferentially lease its municipal flats to its citizens who are Czech nationals, other EU citizens with registered address of residence within the municipality must be accorded the same preferential treatment.

Housing in a nursing home must be treated differently than municipal housing, which is offered on a market basis. Providing a place in a nursing home by a municipality satisfies both the housing needs and the need for social assistance.

The Citizens Rights Directive indicates that the right to equal treatment in this area applies to economically active EU citizens. However, applicants for a flat with a nursing service will probably rarely satisfy this condition. The right to a treatment equal to Czech citizens is also enjoyed by those EU citizens who have the right of permanent residence in the Czech Republic.[100]

On the other hand, Member States are not obliged to confer social assistance to foreign EU nationals during the first 3 months of their stay. In the meantime, i.e. between the third month of residence and prior to acquiring the right of permanent residence after 5 years in the country, EU citizens should be treated equally to nationals. This means they also have the right to receive social assistance from the State.[101] Provision of social assistance can be made conditional on a certain degree of integration into society. In its decision making, the host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted.[102] If an economically inactive EU citizen becomes an unreasonable burden on the social assistance system of the host Member State, his or her right of residence may terminate.[103]

95 Section 16 of the Municipalities Act.

96 According to Section 17 of the Municipalities Act, foreign nationals registered for permanent residence within the municipality are accorded the same rights as the municipality's citizens (i.e. Czech nationals with permanent residence address in the municipality) if this is stipulated by a promulgated international agreement which is binding on the Czech Republic; the Treaty on the Functioning of the European Union constitutes such an agreement.

97 Section 87a et seq. of the Foreigners' Residence Act.

98 Section 87g et seq. of the Foreigners' Residence Act.

99 Section 93 (2) and related Section 87n (2), or Section 87r (2) of the Foreigners' Residence Act.

100 Article 24 (1) of the Citizens Rights Directive.

101 Article 24 (2) of the Citizens Rights Directive.

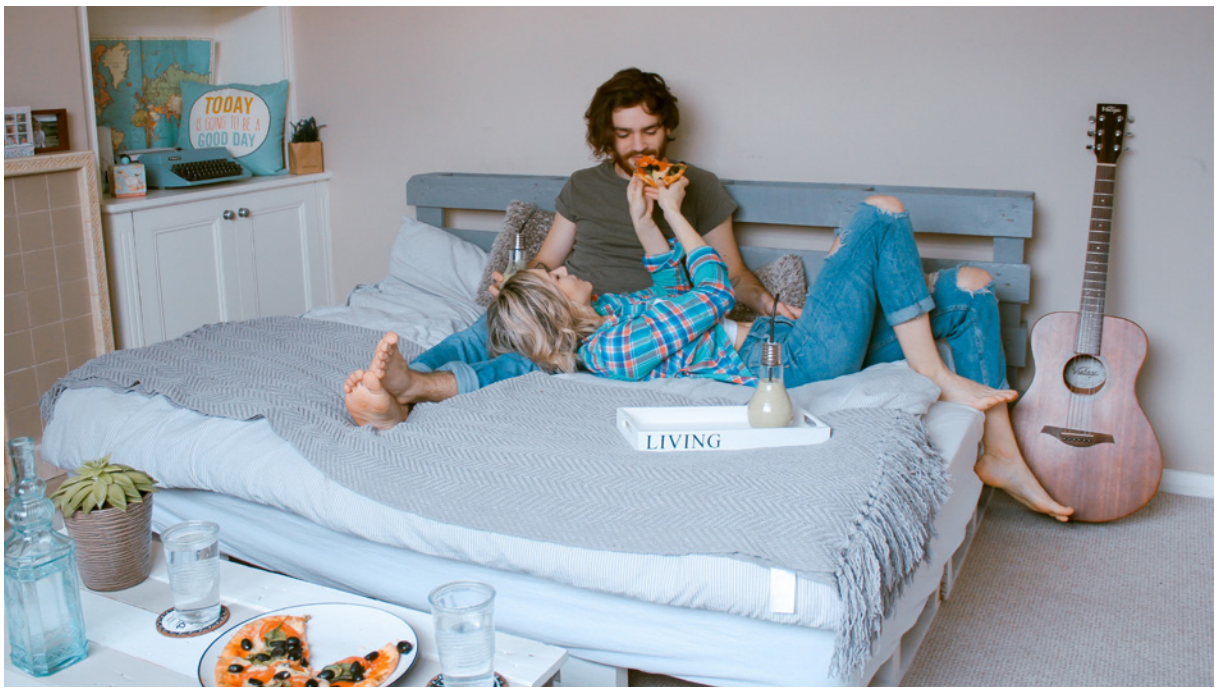
102 See also recital 16 in the preamble to the Citizens Rights Directive.

103 Article 7 (1) of the Citizens Rights Directive.

The Defender has dealt with a complaint against the rules for assignment of flats in a nursing home, which included the condition of Czech citizenship.[104] This condition was found to be contrary to EU law. In the case of employed persons, the condition may come at variance with the Regulation on Freedom of Movement for Workers; in the case of persons with permanent residence in the Czech Republic, the condition would be at variance with the Citizens Rights Directive. In the case of those EU citizens who are not employed and only have temporary residence in the Czech Republic, their degree of integration into Czech society would have to be taken into consideration. An indiscriminate exclusion of persons who are residing in the Czech Republic in the long term and are not a burden on the Czech social assistance system (typically persons receiving pension from another Member State) from the possibility to apply for a flat in a nursing home would also be contrary to EU law.

Private sector housing

The Defender also encounters discrimination in the area of private sector housing. For example, the Defender inquired into a case where a real estate agency refused a flat tour to a couple where one person was of foreign nationality. The real estate agency justified its procedure by pointing out that the flat owner did not want to lease the flat to foreigners. The term "foreigner" can be understood in terms of nationality (i.e. a citizen of a country other than the Czech Republic of any *národnost*) or in terms of *národnost* (i.e. a citizen of any country, including the Czech Republic, of non-Czech background). In the aforementioned case, there was a suspicion that the reason was a combination of both these grounds – flat tour would likely be denied to citizens of other countries as well as Czech citizens of non-Czech *národnost* (e.g. Ukrainian, Vietnamese etc.), which may be apparent from the name, physical appearance or accent.



104 Public Defender of Rights' Report on inquiry concerning Czech citizenship as a condition for assigning flats in nursing homes of 10 September 2010, File No. 84/2010/DIS/JŠK. Available at: http://eso.ochrance.cz/Nalezene/Edit/2312

The procedure of the real estate agency in such cases constitutes discrimination on grounds of národnost, which is prohibited by the Anti-Discrimination Act. Moreover, it is discriminatory vis-à-vis the nationals of other EU Member States, which is contrary to the right to free movement of workers and the freedom of residence.

State support for construction savings

State support for construction savings presents another interesting issue associated with housing. State support for construction savings is granted to Czech citizens and EU citizens with a document or confirmation of residence in the Czech Republic and assigned birth identification number or natural persons with permanent residence in the Czech Republic with assigned birth identification number.[105] Granting support to citizens of other EU Member States is thus conditional on a confirmation of residence in the Czech Republic.

To obtain a confirmation of temporary residence, an EU citizen must also submit a document on the purpose of residence, i.e. employment, business or other gainful activity, or studies. If the EU citizen is a family member of another EU citizen, he or she has to submit a document attesting to the fact that he or she is a family member of the EU citizen.[106]

Temporary residence in the Czech Republic is not subject to approval; the confirmation of temporary residence in the country only affirms the existing right to freely move and reside within the EU (in contrast e.g. to the residence permit). Citizens of EU Member States are also not required to apply for the confirmation, even if they intend to stay in the Czech Republic for a period longer than 3 months.

The Defender has inquired into a case where the State support for construction savings was only granted to an applicant after he obtained a confirmation of residence.[107] The applicant was a citizen of another EU Member State who was born in the Czech Republic to parents with long-term residence for the purpose of employment.

Taking into account the right of family members of EU workers to enjoy the same benefits as the host State nationals in matters of housing,[108] and considering the general prohibition of discrimination on grounds of nationality, citizens of other EU Member State should have the right to receive State support for construction savings during the entire duration of their residence in the Czech Republic.

Provision of State support should thus not have been associated with obtaining a confirmation of temporary residence, but rather with the date of commencement of temporary residence in the Czech Republic as indicated in the document. This applies mainly to confirmations issued to EU citizens who were born in the Czech Republic.

105 Section 4 (2) of the Construction Savings Act.

106 Section 87a of the Foreigners' Residence Act.

107 For more details, see the report on the results of inquiry concerning State support for construction savings for foreign nationals of 31 August 2011, File No. 71/2011/DIS/JKV.

108 Article 9 of the Regulation on Freedom of Movement for Workers.

VIII) Miscellaneous

The final subchapter includes some interesting cases the Defender has inquired into, which, however, cannot be easily included under some of the previous subchapters.

For example, the Defender dealt with the matter of driving licences and driver's certificates with foreign elements (including EU).[109] It turned out that the procedure of administrative bodies in matters of driving motor vehicles without appropriate driving licence and replacing foreign driver's certificates was inconsistent. The Office of the Public Defender of Rights thus organised a meeting of representatives of the Ministry of Transport, Police of the Czech Republic, regional authorities and Prague City Hall. The meeting produced a conclusion which should unite the existing practice. The Defender's conclusions were as follows:

1. Holders of driver's certificates issued by EU Member States or foreign countries or the international driver's certificate issued by foreign countries do not lose driving licence as a result of a punishment or penalty consisting in a prohibition to drive motor vehicles, or as a result of achieving the 12 point limit in the demerit point system; however, in both these cases the holders lose the licence to drive motor vehicles in the territory of the Czech Republic.

2. Holders of national driver's certificate who have lost their driving licence can obtain new driving licence in another country. The new driving licence and driver's certificate then generally allow them to drive motor vehicles in the Czech Republic.

> Right to equal treatment on grounds of nationality stretches to many areas of life.

3. If the holder presents a foreign driver's certificate during a traffic stop, then any information in the national driver register indicating that the holder has a blocked driving licence and has not yet applied for reinstatement of the driving licence does not in itself constitute a reason to confiscate the presented driver's certificate.[110]

The administrative bodies accepted the conclusions and the Defender has no reason to believe that any unjustified inconsistencies in their practice continue to exist.

In another case, the Defender dealt with the case of a Czech woman who had entered into a registered partnership (civil union) with her partner in Germany and adopted her surname.[111] Subsequently, she applied to have the registered partnership entered into the special registry and receive a new identity

109 Opinion of the Public Defender of Rights on certain matters concerning holders of driver's certificates issued by EU Member States and driver's certificates issued by foreign countries of 13 January 2016, File No. 24/2015/SZD/MK, available at: http://eso.ochrance.cz/Nalezene/Edit/3574

110 Within the meaning of Section 118b, in conjunction with Section 118a (1)(g) of the Road Traffic Act.

111 Report on inquiry concerning name and surname of 20 May 2011, File No. 5108/2010/VOP/MV, available at: http://eso.ochrance.cz/Nalezene/Edit/1912

card. There was a problem with the registration of her new surname. The Czech Registered Partnership Act does not regulate the partner's agreement on their common surname. At the same time, the complainant did not want to apply for standard change of surname, because then the document could not include her surname at birth.

The Defender considered the procedure of the special registry an obstacle to free movement of persons. The complainant was registered in Germany under her new surname, but in the Czech Republic she was registered under her surname at birth, which brought many practical problems. The special registry made an error in registering the registered partnership when it only proceeded based on national legislation, without taking into consideration Article 21 TFEU, which grants EU citizens the right to freely move and reside within the territory of the Member States. Based on the case law of the Court of Justice, an obstacle to free movement of persons can only be justified if it is based on objective criteria and is proportionate in terms of attaining a legitimately pursued objective. The Defender concluded that the interest of public policy did not prevail over the complainant's interests. The complainant subsequently brought an action against the Registry's rejecting decision concerning correction of the entry in the registry book. The court accepted her arguments based on EU law and cancelled the rejecting decision.[112]

The Defender also dealt with the matter of voting rights of EU citizens with temporary residence in the Czech Republic.[113] Before the 2014 municipal elections, the Defender pointed out that the Electoral Act was at variance with EU law. EU law stipulates that migrating EU citizens should have equal conditions as the nationals of the host Member State in voting in the European Parliament elections and municipal elections. The right to vote and to stand as candidates in elections under Article 20 TFEU is associated with residence in the Member State. While in elections to the European Parliament, this applies to migrating EU citizens with permanent or temporary residence in the Czech Republic, in municipal elections, on the other hand, only permanent residence is taken into account. This inconsistency of the Czech legislation with EU law had to be addressed by courts in individual cases prior to the 2014 municipal elections.[114] The Government wanted to amend the Electoral Act to remove the inconsistency. Unfortunately, the amendment failed to pass the Chamber of Deputies and the inconsistency between national and EU law persists.

112 Judgement of the Regional Court in Brno of 28 November 2013, Ref. No. 30 A 128/2011, www.nssoud.cz

113 Letter of the Public Defender of Rights to the Minister of the Interior of 21 July 2014, File No. 20/2014/SZD/DKR, available at: http://eso.ochrance.cz/Nalezene/Edit/5354

114 E.g. judgment of the Regional Court in Brno of 19 September 2014, File No. 64 A 6/2014, www.nssoud.cz

IX) Applicable legislation

- Anti-Discrimination Act – 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
- Coordination of Social Security Systems Regulation – Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems
- Implementing Regulation – Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems
- Regulation on Freedom of Movement for Workers – Regulation (EU) No 492/2011 of the European Parliament and of the Council on freedom of movement for workers within the Union
- TFEU – Treaty on the Functioning of the European Union
- Long-Term Residents Directive – Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents
- Migrant Workers Directive – Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers
- Cross-Border Healthcare Directive – Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare
- Citizens Rights Directive – Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC
- Code of Administrative Procedure – Act No. 500/2004 Coll., the Code of Administrative Procedure, as amended
- Visa Code – Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas
- Electoral Act – Act No. 491/2001 Coll., on elections to municipal assemblies and on amendment to certain laws, as amended
- Banks Act – Act No. 21/1992 Coll., on banks, as amended

IX) Applicable legislation

- Municipalities Act – Act No. 128/2000 Coll., on municipalities (the municipal order), as amended
- Identity Cards Act – Act No. 328/1999 Coll., on identity cards, as amended
- Consumer Protection Act – Act No. 634/1992 Coll., on the protection of consumers, as amended
- Foreigners' Residence Act – Act No. 326/1999 Coll., on the residence of foreigners in the territory of the Czech Republic and on amendment to certain laws, as amended
- Sports Support Act – Act No. 115/2001 Coll., on supporting sports, as amended
- Disability Benefits Act – Act No. 329/2011 Coll., on granting of benefits to people with disabilities and on amendment to related laws, as amended
- Registered Partnership Act – Act No. 115/2006 Coll., on registered partnership and on amendment to certain related laws, as amended
- Road Traffic Act – Act No. 361/2000 Coll., on road traffic and on amendments to certain laws (Road Traffic Act), as amended
- State Social Assistance Act – Act No. 117/1995 Coll., on State social assistance, as amended
- Construction Savings Act – Act No. 96/1993 Coll., on construction savings and on State support for construction savings, as amended
- Abortion Act – Act No. 66/1986 Coll., on medical termination of pregnancy, as amended
- Public Defender of Rights Act – Act No. 349/1999 Coll., on the Public Defender of Rights, as amended
- Public Health Insurance Act – Act No. 48/1997 Coll., on public health insurance and amending and supplementing certain related laws, as amended
- Free Movement of Services Act – Act No. 222/2009 Coll., on free movement of services, as amended
- Institutions of Higher Learning Act – Act No. 111/1998 Coll., on institutions of higher learning and amending and supplementing other laws, as amended
- Employment Act – Act No. 435/2004 Coll., on employment, as amended
- Health Care Services Act – Act No. 372/2011 Coll., on health care services and the conditions of their provision (the Health Care Services Act), as amended
- Labour Code – Act No. 262/2006 Coll., the Labour Code, as amended

X) References

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