

**Statement
of the Public Defender of Rights
on the sixth periodic report of the Czech Republic on measures
implemented
in order to perform its obligations under the Convention against Torture
and other Cruel, Inhuman or Degrading Treatment or Punishment
for the period 2009–2015**

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Article 1 – Definition of torture

Regarding paragraphs 3 and 4 of the Report¹

To date, no amendment to the Criminal Code,² through which a definition of torture encompassing all the characteristics included in Article 1 of the Convention Against Torture would be adopted, has been implemented.³

In Section 149 (1), the Criminal Code states: *“Those who by torture or other inhuman and cruel treatment in connection with the exercise of the powers of the state administration authority, local self-government, court or other public authority cause physical or mental suffering to another, shall be punished by imprisonment of six months to five years.”* The sentence may be stricter depending on the personal status of the perpetrator, increased vulnerability of the victim or the manner in which the criminal offence was committed, as the following paragraphs of this provision specify in more detail.

Currently, a draft legislation punishing ill-treatment is discussed at the level of the Committee against Torture of the Government Council for Human Rights. The draft also aims to extend the current objective criteria of the criminal offence of torture to include degrading treatment and specify two new bodies of crime – one for torture and the other for inhuman, cruel and degrading treatment. Although this change is not currently in the legislative process, I express my support for its adoption so that the Czech Republic fully meets its international obligations.

Regarding paragraph 5 of the Report

Even though some persons are occasionally prosecuted pursuant to Section 149 of the Criminal Code, ill-treatment is generally prosecuted in accordance with special bodies of crimes. It includes for example bodily harm and grievous bodily harm, cruel treatment of a person entrusted into custody, cruel treatment of a person living in a common household, deprivation of and restriction of personal freedom, rape or abuse of powers of an official. These crimes, in their qualified criteria, take suffering and anguish into account. However, their object of protection is not primarily human dignity, as is the case with Article 3 of the Convention against Torture.

1 The sixth periodic report of the Czech Republic on measures implemented in order to perform its obligations under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment for the period 2009–2015

2 Act No. 40/2009 Coll., the Criminal Code, as amended.

3 The Convention of 10 December 1984 against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

Article 2 – Inclusive education

Regarding paragraphs 6 to 10 of the Report

In 2011⁴ and 2015⁵, I informed the Council of Europe Committee of Ministers that the integration measures in education implemented in the period 2011 – 2013 had been mostly for the benefit of non-Roma children. Therefore, I welcomed the “inclusion amendment” to the Schools Act, which came into effect on 1 September 2016. While it is still early to evaluate its impact, I have been informed of certain obstacles to the implementation of the supportive measures for pupils with special educational needs in practice (lack of teaching assistants). I have long criticised the overlapping of the staff of school counselling facilities and special schools (conflict of interests). I have pointed out that municipalities do not adequately address the parents, which leads to creation of schools attended by Roma children only (the *white flight* phenomenon). I have recommended that primary schools abandon unreasonable indiscriminate testing of children upon the children’s registration for the first grade. I addressed the issue of common education in my Summary Report on Protection against Discrimination for 2015⁶ and in the Summary Report for the last year (pages 26 to 28)⁷.

School counselling centres recommend whether to educate a pupil in ordinary educational facilities or in the so-called practical primary schools. The amendment to the Schools Act introduced the option to request a review of such a recommendation. As far as I am aware, the National Institute for Education (the review authority) registers one case in the school year 2016/2017, where Roma pupils were incorrectly placed in a “practical” school for children with mild mental disabilities and were eventually correctly placed in a regular school.

In relation to the implementation of a judgment of the European Court of Human Rights in the case of D. H. and Others, the Czech Republic monitors the number of Roma pupils in practical schools. The Czech Schools Inspectorate (until 2015) and the Ministry of Education, Youth and Sports (since 2015) annually report slight improvement – decrease of the number of Roma pupils in practical schools. The data, however, show no such improvement. For example, in the school year 2017/2018, there was an inter-annual decrease in the share of Roma pupils who are educated in programmes for pupils with mild mental disabilities by 1.4%. However, in absolute number it means a decrease by 28 pupils (out of approximately 900,000 pupils in primary schools in the Czech Republic).

In July 2017, the Ministry amended the Decree on education of students with special educational needs. The correct assignment of pupils into schools for pupils with mild mental disability shall now be annually evaluated using the principles of dynamic diagnostics.

4 Available at: http://www.ochrance.cz/fileadmin/user_upload/ESO/58-2015-VOP-PPO-D-Opinion_EN.pdf.

5 Available at: http://www.ochrance.cz/fileadmin/user_upload/ESO/16-2015-DIS-PPO-D-Opinion_EN.pdf.

6 Specifically on page 35 of the 2015 Summary Report on Protection Against Discrimination which is available at: http://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Vyrocní_zpravy/2015-DIS-annual-report.pdf.

7 Specifically on pages 26 to 28 of the 2016 Summary Report available at: https://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Vyrocní_zpravy/2016-DIS-annual-report.pdf.

However, there are concerns that the employees of school counselling centres are not sufficiently trained in this method.

I have information that the political representatives deem the current form of inclusive education to be too costly. New legislative measures which may be motivated by the effort to limit the costs can therefore be expected.

Article 2 – Safeguards in case of limitation of personal liberty in the police cell

Regarding paragraphs 11 to 17 of the Report

Despite the fact that, after the visit of the European Committee for the Prevention of Torture and Inhuman Treatment or Punishment (hereinafter the “CPT”) in 2014, the Government of the Czech Republic agreed to guarantee the right to a free assistance for all persons restricted in their liberty outside of criminal proceedings,⁸ this commitment was not fulfilled. I myself have pointed out this fact during the commentary procedure for an amendment to the Act on the Bar which could have guaranteed this right. However, my proposal for an amendment to the Act on the Bar was not successful.

The Police Act stipulates an obligation of the police to inform a close person or other person indicated by the person deprived of personal liberty of the fact that such a deprivation of personal liberty has taken place. However, the police does not have this obligation in the event of serious reasons stipulated by the law.⁹ I have not encountered complaints regarding violation of this Act.

Czech legal regulations do not explicitly provide for the presence of police officers during medical examination of persons deprived of personal liberty. Section 46 (1)(g) of the Health Care Services Act¹⁰ concerns persons in remand, serving a sentence or a security detention where medical services are provided to these persons in the presence of a member of the Prison Service who is within eyeshot, but outside earshot, with exception of cases of a threat to life, health or safety of persons or a risk to property, when the member of the Prison Service is authorised to be present also within earshot of the performance of medical service. This provision only concerns prisons,¹¹ however, the Health Care Services Act does not define the procedure in case of restriction of personal liberty by a police officer during escort.

This issue is governed by internal regulation of the Police, specifically a binding instruction of the Police President.¹² The Article 7 of the above instruction specifies principles for guarding persons during escorts. It states, *inter alia*, (in paragraph f)): “*In order to prevent*

8 Response of the Czech Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment on its visit to the Czech Republic from 1 to 10 April 2014, Section 14. Available at: <http://www.cpt.coe.int/documents/cze/2015-29-inf-cze.pdf>.

9 Section 24 (2) and (3) of Act No. 273/2008 Coll., on the Police of the Czech Republic, as amended.

10 Act No. 372/2011 Coll., on medical services and the conditions of their provision (the Health Care Services Act), as amended.

11 I will address the questions regarding the privacy of medical examinations of persons in remand, serving a sentence or preventive detention individually in Article 11 – Prisons.

12 The Binding Instruction of the Police President No. 159/2009 on escorts, guarding of persons and on police cells.

the escape of a person deprived of personal liberty, who cannot be placed in a cell, the police officer assigned to guard the person; if the person is being escorted to a location outside police and prison service buildings where no special regime is determined or is already located in such locations (e.g. out-patient treatment or hospitalisation) and if the situation and the medical personnel allow guarding the person, in case the period of deprivation of personal liberty did not expire, the police officer will guard said places, especially entrances and windows or direct vicinity.”

In the second part of this Binding Instruction, which addresses cells, the Article 12 deals with medical examination. This provision states, *inter alia* that “*in medical examination or treatment of the person, at least one police officer of the same sex as the examined person shall remain in visual contact*”.¹³ Presence of police officers at medical examination of a person deprived of personal liberty remains a topical subject; I have encountered general presence of police officers during examination and treatment by a physician even in 2017.

Article 2 – Domestic and sexual violence

Regarding paragraphs 26 to 38

The law adopted in order to protect the victims of crime¹⁴ leaves something to be desired. It delimits a category of particularly vulnerable victims who are entitled to a wider scope of rights. However, it does not expressly include victims of domestic violence into this category although Directive 2012/29/EU of the European Parliament and of the Council considers victims of domestic violence to be victims in need of special protection.¹⁵ A study prepared in the framework of the AdvoCats for Women – Práve m proti násilí na ženách: Bílá místa české legislativy¹⁶ (*With Law against the Violence on Women: Grey Areas of the Czech legislation*) project states: “*Based on their position, mental and physical torment their experience and their relation towards the offender, the victims of domestic violence are increasingly threatened by secondary victimisation and certainly should be granted the status of particularly vulnerable victims so that it need not be inferred, in a complicated and ambiguous fashion, from the general and broad definition contained in Section 2 (4)(d) of the Victims of Crime Act.*”

From the above-quoted study, it follows, *inter alia*, that it is necessary to adapt the provision to implement the right to protection from secondary victimisation (by preventing contact of the victim with the offender not only in tasks involving the case but also immediately prior and following its performance). Examinations of the victims should be mandatorily (instead of optionally) conducted in specially adapted interrogation rooms (if available at the given location).

13 Article 12 (2) of the Binding Instruction of the Police President No. 159/2009 on escorts, guarding of persons and on police cells.

14 Act No. 45/2013 Coll., on victims of crime and amendment to certain laws, as amended.

15 Article 18 of Directive 2012/29/EU of the European parliament and of the Council of 25 October 2012, establishing minimum standards on the rights, support and protection of victims of crime.

16 JEŽKOVÁ, Veronika. Práve m proti násilí na ženách: Bílá místa české legislativy. (With Law against the Violence on Women: Grey Areas of the Czech legislation) Prague: proFem, o. p. s., 2016, pp. 87-97. ISBN: 978-80-904564-7-1.

Examinations should be performed in such a way that they need not be repeated. Unfortunately, repeated examinations often occur in practice (apparently due to procedural errors on the part of the prosecuting bodies), or the child/victim must give repeated testimonies concerning the event to different institutions and experts (usually, the child first speaks to a close person who subsequently reports the matter to the body for social and legal protection of children / files a criminal complaint; then the child talks to a social worker of the body for social and legal protection of children or experts co-operating with the family, and finally gives testimony to the police).

There is the option to prohibit contact between the violent offender and the aggrieved party, persons close to the aggrieved party or other persons, especially witnesses, through a preliminary injunction pursuant to Section 88c of the Criminal Code.¹⁷ In case the preliminary injunction under the Criminal Code is not ordered or expires and there is still need to limit the contact between violent person and the child, such contact can also be limited or prohibited through a preliminary injunction ordered pursuant to the Code of Civil Procedure.¹⁸ Such a measure may be initiated in court even by the relevant body for social and legal protection of children;¹⁹ however, it is necessary for it to be informed of the need for such a measure. It is therefore necessary for the competent authorities to co-operate and share necessary information. For example, I encountered a case where the prosecuting bodies did not immediately initiate criminal prosecution even though an especially serious domestic violence occurred; however, they did not even inform a body for social and legal protection of children (BSLPC) which could react and provide the children with at least civil-law protection.

Civil-law protection is not only guaranteed by Section 751 *et seq.* of the Civil Code,²⁰ but also follows from Section 907. The court should consider violence in the family also in decision-making on arrangement of care for children. Based on findings from practice, I assume that it does not happen frequently enough. At least it follows from the inquiries on the performance of social and legal protection of children performed by me.

If the BSLPC performs the function of the guardian *ad litem*²¹ within court proceedings, it is obliged to defend the best interests of the children.²² The statement of the BSLPC substantially affects the decision of a court and, therefore, it must contain all decisive facts regarding the circumstances of the family. If the BSLPC has information on violence in the family, it is obliged to inform the court which should take the information into account in decision-making on arrangement of care for the children.²³

17 Act No 141/1961 Coll., the Code of Criminal Procedure, as amended.

18 Section 76 (1)(e) of Act No. 99/1963 Coll., the Code of Civil Procedure, as amended.

19 Pursuant to Section 14 (1)(b) and (6) of Act No. 359/1999 Coll., on social and legal protection of children, as amended.

20 Act No. 89/2012 Coll., the Civil Code, as amended.

21 In accordance with Section 17 (a) of the Social and Legal Protection of Children Act.

22 The best interest and welfare of the child are the primary consideration of social and legal protection of children (See Section 5 of the Social and Legal Protection of Children Act).

23 In accordance with Section 907 (2) of Act No. 89/2012 Coll., the Civil Code, as amended by Act No. 460/2016 Coll.

Sharing and taking such information in consideration is even more necessary in cases where a criminal court sentences the parents for committing violence. I emphasise that a child is generally considered to be an indirect victim of domestic violence if he or she witnesses domestic violence between parents. A child is also considered to be a victim if he or she does not witness the individual assaults of the perpetrator of domestic violence against the direct victim of domestic violence in person.²⁴ Such a child must also be considered an endangered child in the sense of Section 6 (g) of the Social and Legal Protection of Children Act.²⁵ Children should be treated and classified as endangered by violence in the family from the beginning.

It follows from my experience that even though the Social Services Act²⁶ delimits a number of social services, *inter alia*, for families affected by domestic or sexual violence, some of them are scarce. I particularly mean the professional counselling facilities focused on the provision of assisted contact of parents with their children, which is suitable, *inter alia*, for cases of domestic violence – see also paragraph 4 on contact between the violent offender and the victim.²⁷

The Social Housing Act, which would also guarantee the right to dignified housing for low-income or socially deprived persons and families, as well as for persons facing social exclusion, is still missing. The existence of social housing would greatly aid the victims of domestic violence to gain independence of the violent offender.

A draft bill was submitted to the commentary procedure at the end of 2016. It must be noted that the final wording of the Act largely deviated from the initial ideas. In my opinion, the essential shortcomings of the draft lie in the fact that municipalities would have no duty to provide for social housing and furthermore, that two current types allowances for payment of the housing costs would be joined. Such modification would result in a number of families losing their current entitlement to the allowance. So far, this draft was not successful and it remains a question whether the future discussions on the Social Housing Act will be based on its text.

Article 2 – The mandate of the Public Defender of Rights (Ombudsperson)

Regarding paragraphs 39 to 41 of the Report

The mandate of the Public Defender of Rights was extended, however it was not extended as much as was initially expected. Effective from 1 January 2018, I exercise competence in the area of protection of persons with disabilities and, furthermore, in the area of the freedom of movement of citizens of the European Economic Area and their family members.

24 It was already defined by the World Health Organisation in 2003.

25 In accordance with the Guideline of the Ministry of Labour and Social Affairs No. 3/2010 on the procedure of the bodies for social and legal protection of children in cases of domestic violence.

Available at: https://www.mpsv.cz/files/clanky/9466/metodika_3.pdf.

26 Act No. 108/2006 Coll., on social services, as amended.

27 In some regions, for example the Karlovy Vary Region, the services for families are missing entirely.

Other originally contemplated amendments to the Public Defender of Rights Act were not accepted.

As the Public Defender of Rights in the Czech Republic, I contribute to the protection of human rights by performing my duties, i.e. by making use of my powers entrusted to me by the law for these purposes. However, I still do not have the general, broad mandate to protect human rights as required by the Paris Principles. To a certain degree and in some regards, the Public Defender of Rights serves as the national human rights institution within the meaning of the Paris Principles; nonetheless, formally, the Defender is not such an institution, both from the international and national perspective.

In this regard, I deem the insufficient scope of the Defender's mandate to be the largest problem. Pursuant to Section 1 (1) of the Public Defender of Rights Act²⁸ the Public Defender of Rights *"shall work to defend persons against the conduct of authorities and other institutions set forth in this Act where such conduct is at variance with the law or does not comply with the principles of a democratic State governed by the rule of law and good administration, as well as against their inaction, thereby contributing to the defence of the fundamental rights and freedoms."* It is apparent from the definition of the Defender's competence that my mandate is primarily to protect persons against unlawful conduct of authorities and other institutions where the protection of human rights is a "corollary" of these activities, not an objective in itself. At the same time, the ombudsman's competence does not include all fields of law, i.e. does not cover all fundamental rights and freedoms. The definition of the Defender's scope of responsibilities cannot therefore be considered to be in accordance with the requirements of the Paris Principles regarding national human rights institutions. Certain limitations also apply to the powers of the Defender, e.g. the lack of a general competence in the area of promotion of human rights, education, monitoring etc.

From the national viewpoint, the Defender lacks statutory authorisation to assume the role of the national human rights institution and request international accreditation of his/her own will. As a public authority, the Defender may only do what the law expressly allows him/her to do. Any extension of powers or competence above the scope of the law would be unconstitutional. It does not follow from the Public Defender of Rights Act that the legislature intended for the Defender to assume the role of a national human rights institution. The gradual and explicit addition of new individual competences to the Defender's mandate (for example in the area of equal treatment, protection of persons with disabilities, monitoring of expulsions etc.), on the other hand, clearly shows that the legislator did not intend to entrust the Defender with protection of human rights in general terms. Furthermore, it is obvious that new competences are always entrusted to the Defender on an explicit legal basis, something that has not yet happened in the case of designation as the national human rights institution.

²⁸ Act No. 349/1999 Coll., on the Public Defender of Rights, as amended.

Article 3 – Extradition, expulsion and diplomatic assurances

Regarding paragraph 42 of the Report

In the period from 1 January 2009 to 31 December 2015, forced administrative expulsions of 2471 persons and forced court-ordered expulsions of 2261 persons from the Czech Republic took place. The course of the selected administrative and court-ordered expulsions is monitored by authorised employees of the Office of the Public Defender of Rights since 1 January 2011 on the basis of Section 1 (6) of the Public Defender of Rights Act.

During this period, the Defender learned that in many cases, the foreigners were not adequately prepared for the expulsion and were not informed about the date and time of the expulsion. The Defender repeatedly pointed out indiscriminate handcuffing during escorts of foreigners and therefore recommended for the use of handcuffs to be always evaluated individually in relation to the specific circumstances and that the handcuffs not be used for longer than necessary. Furthermore, the Defender's reports recommended to always perform medical examinations of the expellees before the expulsion takes place to avoid possible risks during the transport, especially air transport.

The Constitutional Court commented on the manner of use of coercive measures in the performance of expulsions of foreigners to their country of origin in its judgment of 27 October 2015, File No I. 860/15 where it found violation of the complainant's fundamental right to not be subject to a degrading treatment pursuant to Article 7 (2) of the Charter of Fundamental Rights and Freedoms and Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms. In the case under scrutiny, the escorting police officers used tear gas against the person subject to expulsion because said person refused to leave the facility. The Constitutional Court came to the conclusion that if a detained person does not pose threat to others and only refuses to comply with an order, the use of tear gas is impermissible and the police officers should use different methods to handle the detained person instead.

Alternatives to detaining foreigners

Pursuant Section 178d (2) of the Foreigners' Residence Act²⁹, the Police of the Czech Republic gives the Public Defender of Rights copies of decisions on administrative expulsions, decisions on detention and also decisions on the extension of detention of foreigners staying illegally on the territory of the Czech Republic. The employees of the Office of the Public Defender of Rights record and analyse all such received decisions. However, the obligation of the Police to send copies of decisions does not apply to decisions on detention of applicants for international protection under the Asylum Act, and decisions imposing alternatives to detention of these applicants. Therefore, I do not have enough relevant information on the issue of detention in the regime of the Asylum Act³⁰; thus, the following part deals only with the detention of foreigners in the regime of the Foreigners' Residence Act.

29 Act No. 326/1999 Coll., on the residence of foreigners in the Czech Republic and on amendment to certain laws, as amended, hereinafter also referred to as the Foreigners' Residence Act.

30 Act No. 325/1999 Coll., on asylum, as amended.

The Foreigners' Residence Act allows detention of a foreigner for the purposes of his/her administrative expulsion, departure from the country, transfer pursuant to a readmission agreement / Dublin Regulation or for the purpose of transporting the foreigner through the territory. Alternatives to detention i.e. special measures for the purpose of leaving the country are laid down in Sections 123b and 123c of the same act. They were introduced into the Czech legislation by an amendment brought about by Act No. 427/2010 Coll., with effect as of 1 January 2011 due to transposition of the Directive 2008/115/EC of the European Parliament and of the Council (the Directive on Returns).³¹ The requirement on introduction of alternatives follows from Article 15 (1) of this Directive.

Until the 17 December 2015, the Czech legislation knew only two possible alternatives to detention. The foreigner could be either imposed an obligation to state the exact address of the place of residence, stay there and at the same time, regularly report his/her presence to the police in person within a set deadline, or an obligation to deposit a certain sum of money as a guarantee of leaving the country. In 18 December 2015, the amendment to the Foreigners' Residence Act (amending Act No. 315/2015 of 11 November 2015) came into effect, extending the list of possible alternatives by including the obligation of a foreigner to report in person within a deadline set by the police without having to report an address. Thus, the existing measure according to which the foreigner was obliged to report his/her address, stay there and visit a police station in person was divided into two different measures which did not have to be observed cumulatively. Having regard to the date of entry into force of the amendment (17 December 2015), the changes it brought made no actual impact in the period under review (2011-2015).

In the period from 2009 to 2015, many cases occurred in which administrative authorities did not consider imposing the alternatives at all. In this context, the Defender initiated an inquiry on his own initiative in 2011,³² during which it was found that the detention of foreign nationals was over four times more frequent than the alternatives. In the report on inquiry of April 2013, the Defender noted, in particular, errors consisting in missing reasoning or inadequate reasoning of the failure to use a special measure, especially in the cases of foreigners detained for the purpose of their handover pursuant to an arrangement on readmission / Dublin Regulation or in decision-making on extension of the period of detention. Furthermore, it was found that the institute of a financial guarantee was not used in decision-making practice of administrative authorities, not even in cases where the wording of decisions made it clear that the detained foreigners had a large sum of money. The impossibility of imposing a financial guarantee was not satisfactorily explained in these cases. The provision on financial guarantee became obsolete. Another issue associated with the use of alternatives was the finding that in very similar cases, the administrative authorities applied measures of different intensities (sometimes an alternative to detention was used, in other cases, the foreigner was detained). The representatives of the Directorate of the Immigration Police and individual Immigration Police departments of Regional Police Directorates were acquainted with detailed results of the analysis and recommendations for improving the decision-making practice at a seminar held by ASIM (NGO) and the United Nations High Commissioner for Refugees. At the same time, the Head of the Immigration

31 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008, on common standards and procedures in Member States for returning illegally staying third-country nationals.

32 Recorded under File No. 2980/2011/VOP/PN.

Police Service assured the Defender that all branches of the Immigration Police would be acquainted with the conclusions of the inquiry and that a unified procedure on decision-making on imposing alternatives to detention would be established and this procedure would also be adjusted within the framework of internal regulations.

However, the monitoring of decisions on administrative expulsion and detention of foreigners performed in the following period showed that decisions on detention in which the possibility to use alternatives to detention was not evaluated at all still regularly occur and the imposition of alternatives remains insufficient in comparison with detention (for example, 2564 decisions on detention were issued in 2015 but alternatives were used in just 19 cases: cf. table below). An alternative in the form of provision of financial guarantee remained unused.

Within the period under review, the case law repeatedly stated the impossibility to impose other alternatives to detention than those which the legislator expressly stated in the law. However, this changed in 2015 when the Supreme Administrative Court³³ designated the transfer of detained foreigners from a detention facility to a reception centre (with a less strict regime) to be an alternative to detention in fact. The case law of Czech courts also repeatedly reminded the administrative authorities (i.e. the Police of the Czech Republic) to always consider using less strict measures prior to detaining a foreign national in the case of all statutory grounds for which it is possible to detain a foreign national under the Foreigners' Residence Act.

Statistical data from the monitoring for the period of 2011-2015

year	Number of issued decision on administrative expulsion for the given year	Number of decisions on administrative expulsion in which an alternative to detention was imposed	Number of decisions on expulsion for the given year	Number of decisions in which the possibility to impose an alternative to detention was not evaluated at all
2011	1715	65	334	62
2012	2346	70	366	105
2013	1887	57	250	42
2014	2034	44	404	23
2015	2663	19	2564	87

Article 3 – Asylum seekers and foreigners in detention centres for foreigners

Regarding paragraphs 47 to 58 of the Report

Pursuant to Section 46 (1) of the Asylum Act, an applicant for international protection may not leave the reception centre until the required tasks are accomplished. The Ministry

³³ Judgment of the Supreme Administrative Court of 17 June 2015, Ref. No.: 1 Azs 39/2015-56. Available at: <http://www.nssoud.cz/>.

should perform these tasks without undue delay pursuant to Section 46 (3). If an applicant for international protection believes that the Ministry of the Interior does not perform the tasks without undue delay and that his/her deprivation of personal liberty thus became unlawful, the applicant can defend him/herself against the deprivation of personal liberty only through filing an action against unlawful intervention, instruction or coercion by an administrative authority (Section 82 *et seq.* of the Code of Administrative Justice³⁴). However, such action does not fulfil the requirements specified in Article 5 (4) of the Convention for the Protection of Human Rights and Fundamental Freedoms which establishes that every person deprived of personal liberty has the right to lodge a proposal for proceedings in which a lawfulness of his/her detention would be speedily determined by a court and, should the deprivation of personal liberty be found unlawful, his/her release would be ordered. Unlike an action against a decision on the obligation to stay at a reception centre (pursuant to the legal regulation effective until 18 December 2015) or a decision on detention of an applicant for international protection (pursuant to legal regulation following 18 December 2015) which, under Article 5 (4) of the Convention, stipulates short deadlines for issuing a decision on the action; the proceedings on action against unlawful intervention can take several months or years.

According to the legal regulation effective until 18 December 2015, a foreigner whose proceedings on international protection were discontinued due to inadmissibility of his/her application for international protection for the reason that another Member State of the European Union was competent to assess the application for international protection, was not allowed to leave the reception or residential centre until he/she was transported to the EU Member State competent to assess the application for international protection (Section 46 (6) of the Asylum Act). This legal regulation was at variance with Article 28 (1) of the Dublin III Regulation according to which Member States shall not hold a person in detention for the sole reasons that he/she is subject to the procedure established by this Regulation. In practice, applicants for international protection whose proceedings were held under the Dublin III Regulation were not released from a reception centre at all, not even after the performance of tasks pursuant to Section 46 (1) of the Asylum Act and after a decision on discontinuation of the proceedings was issued, they were held in the facility solely on the basis of Section 46 (6) of the Asylum Act without having received a decision imposing on them the obligation to remain at the reception centre. Thus, the only remedy in these cases was an action against unlawful intervention, which, as I noted above, cannot be considered a remedy compliant with the requirements of Article 5 (4) of the Convention.

The unlimited period for performance of the tasks pursuant to Section 46 (1) of the Asylum Act remains problematic and thus the Department for Asylum and Migration Policy³⁵ is not limited in time in issuing decisions on detention of an applicant for international protection. At the same time, applicants for international protection do not have an effective remedy against restriction of personal liberty until the Department for Asylum and Migration Policy issues a decision on detention. Consequently, the Department for Asylum and Migration Policy can issue such a decision for example a month after the arrival of an applicant for

34 Act No. 150/2002 Coll., the Code of Administrative Justice, as amended, hereinafter also abbreviated as the C.A.J.

35 Department for Asylum and Migration Policy of the Ministry of the Interior of the Czech Republic.

international protection into a reception centre, which also postpones review of the decision by a court.

If an applicant for international protection is detained in a facility for detention of foreigners, the maximum period of detention is 120 days; however, the applicant is deprived of personal liberty and may not freely move within the premises of the facility. The applicants for international protection are detained in the facility for detention of foreigners along with foreigners detained for the purposes of expulsion, i.e. under identical material conditions.

Foreigners who are detained in the Czech Republic in a facility for detention of foreigners for the purposes of relocation to another Member State of the European Union competent to assess their application for international protection, and those who did not apply for international protection in the Czech Republic, constitute a special category. These persons cannot apply for international protection in the facility for detention of foreigners and therefore they are not considered applicants for international protection pursuant to national law. They are deprived of personal liberty under identical conditions as foreigners waiting for the performance of expulsion. Thus, in practice, there are detentions of *de facto* applicants for international protection (even though, pursuant to national legislation, they cannot file an application in the Czech Republic, but filed it in another Member State and so far no decision was made) and, in some cases, also of refugees, since the decision on recognition of the refugee status is a declaratory act. A major difference consists in, *inter alia*, stricter conditions set out in Articles 10 and 11 of the Directive 2013/33/EU of the European Parliament and of the Council³⁶ for detention of applicants for international protection in comparison to conditions for detention of foreign nationals for the purpose of their expulsion. According to the national legislation, it must be taken into consideration in detention of applicants for international protection whether they are vulnerable persons. However, according to the national legislation, it is not taken into consideration in detention of foreigners who did not lodge an application for international protection whether such a foreigner is a vulnerable person. The failure to take vulnerability of said persons into consideration is at variance with Article 28 (4) of the Dublin III Regulation. Pursuant to the above provision, as regards the detention conditions and assurances applicable to detained persons, Articles 9, 10 and 11 of Directive 2013/33/EU shall apply in order to secure the relocation procedures to the competent Member State. Guarantees for detained applicants and conditions for detention including detention of vulnerable persons pursuant to Directive 2013/33/EU should also apply for detained foreigners who are to be relocated to a competent Member State.

At the same time it is doubtful whether the definition of an applicant for international protection by national legislation is in accordance with the European regulations. The definition of an applicant for international protection provided in Article 2 (c) of Dublin III Regulation is broader than the definition pursuant to the Czech Asylum Act. Pursuant to Dublin III Regulation, an applicant for international protection means a third-country national or a stateless person who has lodged an application for international protection in respect of which a final decision has not yet been made Article 18 of Dublin III Regulation

³⁶ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).

also differentiates between persons in the position of an applicant for international protection and other nationals of a third country or stateless persons. It designates all persons who applied for international protection as applicants if no final decision was made regarding such application, e.g. after withdrawal of the application or by rejecting the application, also in case that the person subsequently lodged an application in another Member State or if the person is located in the territory of a different Member State without a residence permit. The Directive which establishes conditions for detention of applicants for international protection also defines an applicant as a third country national or a stateless person who lodged an application for international protection in respect of which a final decision has not yet been made.

In case of detained applicants for international protection, third country nationals or stateless persons who cannot lodge an application for international protection in the Czech Republic and in respect of whom proceedings on relocation to another Member State pursuant to Dublin III Regulation are pending, a maximum period of detention pursuant to Dublin III Regulation shall apply alongside the maximum period of detention pursuant to the Asylum Act. This means that a detained foreigner is released if a maximum period of detention pursuant to any of the above legal regulations expires. For example, if a third country national who did not apply for international protection in the Czech Republic is detained for the purpose of relocation to another Member State pursuant to Dublin III Regulation, he/she is released in case the relocation does not take place within a time limit of six weeks (Article 28 (3) fourth subparagraph of Dublin III Regulation) even though he/she could remain in detention pursuant to a maximum period of detention pursuant to the national legislation (180 days).

In 2015 the administrative courts dealt with the question of whether foreigners could be detained for the purpose of their relocation on the basis of Dublin III Regulation when one of the conditions which must be fulfilled in detaining such a foreign national is the existence of a "serious risk of absconding". In Article 2 (n) the Dublin III Regulation establishes that risk of absconding means "*the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant or a third-country national or a stateless person who is subject to a transfer procedure may abscond*". However, the national legislation did not specify these objective criteria. Thus, by resolution of 24 September 2015, Ref. No.: 10 Azs 122/2015-88, the Supreme Administrative Court referred to the Court of Justice of the European Union a preliminary ruling on whether the fact alone that the law did not specify objective criteria for assessing serious risk of a foreigner absconding results in non-applicability of the institute of detention pursuant to Article 28 (2) of Dublin III Regulation. In its judgment of 15 March 2017 in the case C-528/15, the Court of Justice found that the absence of a generally binding legal regulation including objective criteria which provide reasons for which it may be believed that an applicant for international protection who is subject to proceedings on relocation may abscond, results in non-applicability of Article 28 (2) of Dublin III Regulation. It follows from the conclusion of judgment of the Court of Justice of the European Union that during the period from 1 January 2014 to 17 December 2015, all detentions of person for the purpose of their relocation pursuant to Dublin III Regulation were unlawful due to the absence of required legal basis for detention in the national legislation.

As of 18 December 2015, both the Asylum Act and the Foreigners' Residence Act specify "serious risk of absconding". It is problematic that these definitions contain only a non-exhaustive list of cases in which a serious risk of absconding may occur. The definition in the Asylum Act and in the Foreigners' Residence Act are not identical. The definition in the Foreigners' Residence Act establishes beyond the scope of the definition included in the Asylum Act that it shall be considered a serious risk of absconding if a foreign national who will be relocated to a state not directly adjacent to the Czech Republic cannot legally and independently travel to this state and cannot state the address of the place of residence in the territory.

Regarding paragraphs 59 to 61 of the Report

Pursuant to Section 27 of the Asylum Act, in the wording applicable until 17 December 2015, the Ministry of the Interior should make a decision on international protection within 90 days of the date of initiation of the proceedings. At the same time, the Act stipulated that if a decision cannot be made within this deadline due to the nature of the case at hand, the Ministry may appropriately extend the deadline. The Ministry should inform the party to the proceedings of extension of the deadline in writing and without undue delay. The legislation did not set any maximum deadline for issuing a decision on the application. In a number of cases, this resulted in a purely automatic extension of the deadline. Ministry of the Interior only informed the applicant that underlying documents he/she collected for the purpose of assessment of the case did not permit issuing a decision in due time. For this reason it extended the deadline for issuing a decision in order to further supplement the underlying documents.

Application for measures against inactivity lodged with the Minister of the Interior in case of alleged delays in proceedings concerning international protection is a potential remedy against undue extension of the deadline for a decision. As follows from the Defender's report on inquiry of 7 August 2012,³⁷ the proposal on adoption of measure against inactivity was a completely ineffective remedy as, in assessment of such a proposal, the Minister found that the applicant for international protection was not authorised to lodge the proposal. One of the conditions for adopting this application is that the statutory deadline for issuing a decision has expired. Therefore, if the Ministry extended the deadline for issuing a decision and informed the applicant of this extension, the applicant could not ensure assessment of the proposal for the application of a measure against inactivity.

It follows from the judgment of the Supreme Administrative Court of 6 February 2013, Ref. No. 1 Ans 19/2012-43, that in assessment of the existence of delays in proceedings on international protection, it must be assessed whether the repeated extensions of a deadline in the case were justified or represented arbitrary procedure on the part of the administrative authority. The Supreme Administrative Court also concluded that the deadline for issuing a decision on international protection in the sense of Section 27 (1) of the Asylum Act may only be extended in exceptional and duly justified cases. The Supreme Administrative Court stated that repeated extension of the deadline justified only by a general claim that a sufficient amount of underlying documents required to issue a decision was not collected cannot be considered justified. Furthermore, in its judgment of

³⁷ Recorded under File No. 1098/2011/VOP/JŠM.

11 January 2012, Ref. No.: 8 Ans 14/2012-35, the Supreme Administrative Court found that the Ministry's interpretation that the only requirement for extension of the deadline for issuing a decision is notification of the applicant for international protection, without any need to justify the extension of the deadline, is formalistic and would lead to absurd consequences where the Ministry of the Interior would be able to arbitrarily extend the deadlines without the need to review its procedure or activity in the proceedings. At the same time, the applicant for international protection would be denied any protection against inactivity as an action for protection against inactivity would be successful only if the administrative authority neglected to extend the deadline for issuing a decision. The Ministry of the Interior is obliged to observe the basic principles of administrative proceedings in proceedings on international protection and thus resolve matters without excessive delays within the meaning of Section 6 of the Code of Administrative Procedure³⁸. Subsequently, the Supreme Administrative Court repeated these conclusions also in its judgment of 27 August 2016, Ref. No.: 1 Ans 11/2013-51.

In the report on inquiry of 27 January 2012³⁹, the Defender pointed out the negative impact of the length of international protection proceedings on the mental state of applicants in unstable situation, in foreign environment and without prospects for a "normal life" and long-term stay in the Czech Republic. The same applicant requested satisfaction for intangible harm in money pursuant to the Act No. 82/1998 Coll., on liability for damage caused during the exercise of public authority. In its judgment of 4 July 2013, Ref. No.: 14 C 180/2012-39, the District Court for Prague 7 stated that maladministration occurred in the case and awarded a due reasonable satisfaction for intangible harm to the claimant. In doing so, the court took into account the medical condition of the claimant, who was suffering from a heart condition and diabetes, and given his financial situation, medicine became unaffordable for him.

In 2015, I initiated an inquiry⁴⁰ based on a complaint of an applicant for international protection from the Democratic Republic of Congo, who applied for international protection in the Czech Republic on 28 April 2006. Regional Court twice annulled the decision on refusal of application for international protection, for the last time in February 2012. According to the present medical report, the complainant suffers from a post-traumatic stress disorder with moderate to severe depression, with psychosomatic symptoms. According to another medical report, the complainant's uncertainty whether he would be granted international protection in the Czech Republic lead to further deterioration of the complainant's mental condition. As of yet, no decision was made regarding the complainant's application. Given the fact that he lodged the application for international protection before 18 December 2015, the maximum deadline for decision-making on an application for international protection, which was introduced into the national legislation as of that date, does not apply to the proceedings on his application.

38 Act No. 500/2004 Coll., the Code of Administrative Procedure, as amended.

39 Recorded under File No. 1191/2011/VOP/JŠM.

40 Recorded under File No. 4633/2015/VOP/HL.

Regarding paragraphs 52 to 58 of the Report

While this part of the periodic report of the Czech Republic acknowledges that the conditions in the Bělá-Jezová facility were not wholly satisfactory for several weeks during a large increase of the number of foreigners, it does not mention that several of my reports described the conditions at that time as being in variance with Article 3 of the Convention or that the ECtHR issued interim measures against the Czech Republic regarding detention of children.⁴¹ I also do not agree that such a situation would last only “several weeks” as I criticised the conditions in the facilities, especially in relation to children, already in my 2014 report,⁴² then in August 2015 and I noticed a slight improvement only in October 2015.⁴³ I request the information describing conditions in the facility to be added; see my comments on the individual paragraphs of the report below.⁴⁴ The report does not mention some problematic areas at all.

The first key question for children of a foreigner regards the determination of age of a foreigner. The legislation governing determination of age is insufficient; it is limited to that in case of doubts about age, the police is authorised to detain the foreigner as an adult until his/her real age is ascertained. The police is to commence acts aimed at ascertaining the age of the unaccompanied minor foreigner immediately after his/her detention. The Foreigners’ Residence Act does not ensure that (a) a foreigner will be treated as a minor until the examination of age (benefit of doubt), and does not provide for (b) the manner in which age is ascertained; (c) consequences should the foreign national decide not to undergo the examination of age; or (d) how to proceed in case of doubts after the performance of the

41 Decision A.O. and Others v. the Czech Republic, Application No. 52274/15 of 19 October 2015. L. P. and Others v. the Czech Republic, Application No. 61025/16 of 21 October 2016. In both cases, the ECtHR stated that the Czech Republic has to relocate families with children to an environment complying with the conditions laid down in Article 3 of the Convention.

42 Specifically on pages 6 to 8. Already at that time, I was pointing out the insufficient meals for children (missing snacks and distribution of meals only three times a day), insufficient provision of toiletries (e.g. diapers), limited operation of the child centre only for 1 to 1.5 hours a day and its closing in case of absence of the nurse, and found the conditions to be at variance with Article 3 of the Convention.

43 Quotation from page 11: *“The children at the Facility are accommodated in what amounts to a prison-like regime (roll calls, presence of security personnel in uniforms) and a lot of children, including the very young, still lack shoes other than flip-flops or crocs shoes. This is so even though the weather is already cold in October. A washing machine is not available for children’s clothes. No activities for children are scheduled on weekends.”*

44 I quote my report (page 17), what conditions were the children living under in the facility in August 2015:

“– they are afraid to bathe their children in the common bathrooms and use the common toilets due to concerns about filth and a diarrhoea outbreak;

– they call attention to the lack of baby formula, which is substituted by semi-skimmed milk;

– when children receive “snacks”, e.g. milk products, there is no suitable place to store them;

– the children lack clothing and shoes;

– there are not enough baby diapers;

– there are not enough cups for drinking;

– even very small children receive the same meals as adults (see Figures 18 and 19), merely supplemented with “snacks” (e.g. 0.5 litre of semi-skimmed milk);

– the children are afraid of the police and private security guards;

– we saw children playing at being policemen and private security guards or at escaping from prison, when they tried to dig under the 4-metre fences topped with barbed wire.”

examination of age. The only method used (TW 3 bone age assessment) is inaccurate as the bone and calendar age can differ by up to two years and results of the examination are often disputable.⁴⁵ I recommend supplementing the report with information that the legislation governing determination of age of foreigners at the brink of adulthood is insufficient and that in practice, this question is not satisfactorily resolved.

The entire part is missing any mention that, at the time, the foreigners had insufficient access to legal assistance which also worsened their awareness of their situation and the possibility to defend themselves against deprivation of personal liberty. I request this information to be added. The financial support of NGOs which provided free legal counselling to applicants for international protection and detained foreigners was stopped on 1 July 2015. Currently, the governmental authorities recognise that the legal assistance at the facility was insufficient at that time and, having regard to short deadlines for appeal, worsened the access of foreigners to an appeal.⁴⁶ In September 2015, the recommendation of the Government Council for Human Rights still contained an information that legal assistance is provided only on a volunteer basis.⁴⁷

The report is also missing an information that for a long time, the foreigners subject to the Dublin III Regulation were unlawfully charged fees for accommodation and catering for which there was no legal basis. I already included further information about this in my 2014 report; even in 2015, this shortcoming was still not remedied.⁴⁸ In October 2015, the Government Council for Human Rights also requested charging of the unlawful fee to be terminated.⁴⁹

Regarding paragraph 52 of the Report

For a long time, the Police believed that children accommodated in a facility for detention of foreigners along with their parents are not deprived of their personal liberty. I have disagreed with this conclusion for a long time⁵⁰ and the fact that such accommodation of children with parents constitutes a deprivation of personal liberty was also confirmed by the

45 See Information of the Ministry of Education, Youth and Sport regarding unaccompanied minor foreigners in facilities for institutional and protective education and preventive educational care (*Informace MŠMT týkající se nezletilých cizinců bez doprovodu v zařízeních pro výkon ústavní nebo ochranné výchovy a preventivně výchovné péče*), Ref. No.: MSMT-3839/2015-3, paragraphs 3.8 to 3.9.

46 Cf. the judgment of the Supreme Administrative Court of 30 June 2015, Ref. No.: 4 Azs 122/2015 – 23 and also my report of October 2015 in which I stated that *“The foreigners accommodated in the gym and the container units were completely unaware that free legal advice was available. This is true despite the fact that legal advice is of vital importance to foreign nationals placed in the so-called “admission parts” of the Facility (the gym), especially because of very short deadlines, e.g. to apply for international protection (asylum). Foreign nationals housed in the buildings were informed of the free legal counselling provided at the Facility (on average 3 times every two weeks) by means of a notice board (but not in Arabic or Persian languages). Although the management of the Facility claims that there is little to no interest in free legal advice among the detainees, a majority of the detainees still asked the employees of the Office to explain their situation and the meaning of the Czech text of the decision on detention to them.”*

47 See: <https://www.vlada.cz/cz/clenove-vlady/pri-uradu-vlady/jiri-dienstbier/aktualne/rada-vlady-pro-lidska-prava-schvalila-podnety-k-lepsimu-zachazeni-s-cizinci-135658/>.

48 2014 report, page 16.

49 See: <https://www.vlada.cz/cz/clenove-vlady/pri-uradu-vlady/jiri-dienstbier/aktualne/rada-vlady-pro-lidska-prava-schvalila-podnety-k-lepsimu-zachazeni-s-cizinci-135658/>.

50 Cf. report on inquiry File No. 1192/15/VOP, body C.1.1 a C.1.2.

Constitutional Court in a decision which relates to the issue period of the report.⁵¹ I request the report to be supplemented in this regard.

With respect to the statement that detention of children was used only as a last resort, this conclusion is at variance with my findings from a visit to the Bělá-Jezová Facility for Detention of Foreigners described in the report on a systematic visit of 9 September 2015.⁵² During my visit, there were 147 children, 5 of which were unaccompanied minors, located in the facility, out of a total of approximately 659 foreigners. In comparison to the total number of foreign nationals deprived of their liberty, it is a relatively high ratio of children, but the Report does not include this at all. Therefore, I request that at least a statement saying that during a certain period of time, it was not true that the detention of children was a measure of last resort, be added to the report.

Regarding paragraphs 55 and 57 of the Report

With respect to leisure time activities for children (including access to a maternity centre) and equipment of the accommodation, it followed from my systematic visits performed in August 2015 that:

(a) around fifty children accommodated in container units had no leisure time activities available to them, no suitable area and also had no access to the abovementioned maternity centre.⁵³ 10 to 15 members of the Public Order Police Service wearing helmets and face masks assisted in serving lunch, there were no tables available and there was not enough chairs, other persons were accommodated with persons infected with lice with no measures taken etc.⁵⁴

(b) in the same period, the children's centre was open for the children accommodated in a building A, which was designated for vulnerable persons, for just two hours a day; it was closed for the rest of the time. Furthermore, accommodation of some of the children was lacking in privacy, or there were eight people sharing five beds in a room, some accommodated persons were given no toiletries, the bedsheets were never changed or there was no washing machine or refrigerator available.⁵⁵

The information contrasts with what the Government states in the report. I request this to be taken into consideration in the report.

The text states that a nurse is present in the kindergarten at all times. However, at the time of my systematic visits, there was one child entertainer in the entire facility, in which there were 147 children in total.⁵⁶ The situation where the maternity centre was open for just 1.5 to 2 hours a day was not a short-term problem lasting just for a few weeks, as I already

51 Judgment of the Constitutional Court of 10 May 2017, File No. III. ÚS 3289/14, paragraphs 41 and 43.

52 Recorded under File No. 24/2015/NZ/OV.

53 Paragraphs 3 and 6.1 of the report, File No. 24/2015/NZ/OV.

54 Ibid, paragraph 3.

55 Ibid, paragraphs 4 and 6.2.

56 Ibid, paragraph 6.

pointed it out in my 2014 report,⁵⁷ then in August 2015 and I noticed slight improvement only in October 2015.⁵⁸

Regarding paragraph 56 of the Report

I expressed my concern that a medical confidentiality is not maintained as, during treatment, a security guard was either waiting in the corridor, with the door to the physician's office slightly open, or was present directly in the physician's office. I also noticed issues regarding the availability of health care following from misunderstanding of the Czech language, absence of an interpreter and a lack of psychological care. I was pointing out difficulties with understanding already in 2014,⁵⁹ the difficulties persisted even in 2015 and resulted in a lack of trust towards physicians among foreigners. For example, medication was taken from the foreigners and they were prescribed new medication, without being told what it was. They felt that their medical examinations were insufficient as they were not able to comment on the treatment procedure or diagnosis. Quick access to health care was also limited by the practice where an appointment with a physician had to be arranged through private security guards.⁶⁰

As this also constituted a lasting issue which I recorded in three of my reports, I request the paragraph 56 to be supplemented in this regard.

Regarding paragraph 57 of the Report

My findings from systematic visits do not correspond with the information given in relation to the Bělá-Jezová facility. Regarding toiletries (e.g. diapers), I have already stated above that in 2014, they were distributed in insufficient quantities of 2 to 3 pieces a day for a 1 to 1.5 year old children and, furthermore, it was not possible to buy more.⁶¹ While the report provides information on the possibility to request more frequent provision of toiletries, I pointed out in 2014 that the foreigners had no knowledge of this and even the facility staff were inconsistent in their opinions on the matter.⁶² In August 2015, the situation deteriorated so much that some foreigners did not receive toiletries at all, there were no suitable shoes or clothes available to them, there was no washing machine or a microwave oven and the bedsheets were not being changed. Although there was a kettle, it was secured in a way that prevented it from being filled with water etc.⁶³ The actual conditions in the facility described by me are at variance with nearly all information described in the report and, in some cases, it was not only related to the shortcomings found in the summer of 2015. The conditions as described by the Government are closer to conditions existing in 2016 and gradually in 2017, following my repeated criticism and preliminary injunctions ordered by the European Court of Human Rights.

57 Page 7.

58 Page 11.

59 Page 18

60 See my report of October 2015, page 26.

61 Page 15 of the same report.

62 Page 16 of the report.

63 Pages 21, 22 and 23 of the above report.

Furthermore, the information is not relevant for all facilities, e.g. the information that “bathrooms with showers are always shared between two rooms, the same applies to sanitary facilities” applied only to some buildings in Bělá-Jezová (not to building D, where men were accommodated), as follows from my report of 8 July 2015,⁶⁴ but it did not apply to the facility in Drahonice. From this report it also follows that there was a shortage of hot water in the Facility for Detention of Foreigners in Bělá-Jezová.⁶⁵

Regarding paragraph 58 of the Report

As I already mentioned, I consider the description of the situation as “not wholly satisfactory” to be an understatement; I believe that during this period, the standards in the Bělá-Jezová facility were completely insufficient and at variance with Article 3 of the Convention in relation to all detained foreigners, not only the children.

Regarding paragraph 60 of the Report

In the period of 2015, I noticed an increase in the number of decisions on administrative expulsion also in relation to some problematic countries (e.g. Iraq, Afghanistan, Somalia, Syria). Therefore, I conduct an inquiry concerning whether it was adequately assessed in these cases, whether the foreigners risked torture, inhuman or degrading treatment or punishment upon their return to the country of origin. During the inquiry, I found that assessment of the risk was completely insufficient. Although these foreigners were formally not applicants for international protection, during my inquiry, I also investigated the awareness of foreigners regarding their option to apply for international protection and also found it inadequate. In some cases, it was not demonstrable whether the foreigners were informed in their language or were sufficiently informed of the consequences of filing or a failure to file the application (for example, they said that they would like to apply for international protection in the country where their relatives lived, showing they had no information on the “Dublin system” limiting the possibility to lodge an application in other European country etc.).⁶⁶ During a certain period (see above), no free legal assistance was provided in facilities for detention of foreigners and, consequently, the foreigners had no access to lawyers who would explain to them in which cases they were allowed to apply for international protection or the consequences of filing or the failure to lodge the application.⁶⁷

64 Recorded under File No. 8/2015/NZ/OV of 8 July 2015, the report is not publicly available.

65 *“In the building D, water is heated by a storage water heater. In the washrooms and showers, there are no hot and cold water taps; therefore, only hot water is available to the clients. During shaving (due to the impossibility to regulate temperature of the water) or in case of multiple clients taking shower at the same time, the hot water is drained until the water heater heats it up again. The foreigners also claimed that warm water is also supplied to toilet flush tanks which also contributes to early draining of the hot water tank. During the visit of authorised employees of the Office, the water was already cold so it was not possible to verify this claim on site.”*

66 See e.g. my statement on proceedings before the Constitutional Court, File No. 16/2016/SZD, available at: eso.ochrance.cz.

67 Evaluation of systematic visit of 13 October 2015, File No. 24/2015/NZ/OV: The lack of information is also partly caused by the lack of legal advice, which is available to individuals at the Facility virtually at random, subject to whether they learn about it and its character. The foreigners accommodated in the gym and the container units were completely unaware that free legal advice was available. This is true despite the fact that legal advice is of vital importance to foreigners placed in the so-called “admission parts” of the Facility (the gym), especially because of very short deadlines, e.g. to apply for international protection (asylum). Foreigners housed in the buildings were informed

Some foreigners were provided with legal assistance after the seven-day deadline for filing an application for international protection (Section 3b (1) of the Asylum Act) has expired and even though they applied for a waiver of the deadline due to the lack of information, the Police did not grant their requests. In 2015, a seven-day deadline without any exceptions was introduced and only since December 2015 was there an exception to this deadline added into the law for *sur place* refugees, i.e. for persons whose situation materially changed after the deadline expired, e.g. due to a change of conditions in their country of origin (Section 3b (3) of the Asylum Act, as amended by Act No. 314/2015 Coll.).

Said lack of information was well described by the Constitutional Court in its judgment I. ÚS 630/16 of 29 November 2016 which relates to the relevant period, in paragraphs 65 to 66 where it concluded that “the used explanation informs foreigners on the consequences of expiry of the deadline in an insufficient and misleading manner. The explanation should contain information that the European law does not allow free choice of country in which the foreigner applies for international protection and if the foreigner does not apply for international protection in the Czech Republic, where he or she is currently located, he or she may be expelled to the country of origin as a result. Given that foreigners are not sufficiently informed of all aspects of the proceedings on international protection by the relevant governmental bodies, as specified above, the provision of legal advice is necessary in order for the foreigners in question to understand the situation and ensure their effective defence. In any case, if, during the seven-day deadline, a foreigner does not receive qualified legal assistance through which he or she will be able to comprehend all consequences of expiry of this deadline (including, for example, its connection to a decision on administrative expulsion which would not be enforceable), the possibility to apply for international protection within such a short deadline cannot be considered an effective remedy against possible expulsion.” (Paragraph 65.)

Foreigners with ordered expulsion could lodge an appeal only within a five-day deadline, which they also often missed due to the absence of legal assistance.⁶⁸ In just one of the cases I inquired into did the foreign national have a contact with a lawyer during the five-day period and managed to file an appeal (also with delay due to the absence of a signature). In other cases, the appeals were filed after the lapse of the period and were considered late. For this reason, there are practically no decisions by administrative courts that would concern administrative expulsion into these problematic countries. Many foreigners lost the possibility to claim review in court due to the short period. Therefore, while an action has suspensory effect based on the law, many foreign nationals could not exercise the option in the given period.

of the free legal counselling provided at the Facility (on average 3 times every two weeks) by means of a notice board (but not in Arabic or Farsi languages). Although the management of the Facility claims that there is little to no interest in free legal advice among the detainees, a majority of the detainees still asked the employees of the Office to explain their situation and the meaning of the Czech text of the decision on detention to them.” Available at: www.eso.ochrance.cz.

68 See my statement to the Constitutional Court, cited above.

Article 3 – Stateless persons

Regarding paragraphs 62 to 65 of the Report

The law of the Czech Republic does not contain a definition of stateless persons and the national legislation does not reflect the definition according to the Convention relating to the Status of Stateless Persons of 1954. The Convention is binding on the Czech Republic, but the definition of a stateless person must nevertheless be obtained directly from the wording of the Convention. Based on the Foreigners' Residence Act, stateless persons fall under the general category of a "foreigner", meaning any individual who is not a citizen of the Czech Republic (Section 1 (2) of the Act). The Foreigners' Residence Act, which governs the status of stateless persons, does not include any specific provisions reflecting the status and needs of stateless persons. Such persons thus have to use the existing types of residence permits under the same conditions as foreigners who are citizens of other countries.

During the entire period under review, the Czech legislation lacked any legal provisions that would provide for a procedure to determine who is a stateless person. An amendment to the Asylum Act effective from 18 December 2015 included a provision in Section 8 (d) of the Act, stating that the Ministry of the Interior "*decides on applications submitted under the Convention relating to the Status of Stateless Persons.*" This establishes the competence of the Ministry of the Interior to decide on applications for determination of the status as a stateless person. However, the adopted piece of legislation contains no other specific regulation, either concerning the proceedings to be held on the basis of the application and the applicable procedure (e.g. deadlines for rendering a decision), or the legal status of the person during the course of the proceedings and especially afterwards, if the proceedings conclude with a declaration that the person is indeed stateless. The adopted regulation does in no way address the often impossible situation of stateless persons and the insufficient protection of their rights. The Czech Republic is thus in violation of its obligations under the Convention relating to the Status of Stateless Persons of 1954 with respect to at least some stateless persons, because it does not guarantee their rights under the Convention and has not specified an effective mechanism for exercising their status under the Convention.

The impossibility to effectively identify stateless persons in the Czech Republic is also reflected in the absence of reliable statistics or a database of stateless persons. Their number is partially inferred from other statistics concerning the number of foreigners with permitted residence in the Czech Republic or the number of asylum-seekers; however, the data does not provide an accurate picture of the number of such persons living (often without any documents or possibility to exercise their rights and deal with their status through lawful means) in the country and the real scope of the problem.

As of 1 January 2014, the new Act on State Citizenship of the Czech Republic came into effect.⁶⁹ The aforementioned children are affected by Section 5 of the Act, which stipulates: "*State citizenship of the Czech Republic is also acquired upon birth by a child who is born in the territory of the Czech Republic and who would otherwise become a person without state citizenship (hereinafter a "stateless person"), provided that both parents of the child are stateless persons and at least one of the parents have been permitted residence in the Czech*

⁶⁹ Act No. 186/2013 Coll., on the citizenship of the Czech Republic and amendment of certain laws, as amended.

Republic for a period longer than 90 days as of the date of the child's birth."The adopted regulation excludes two groups of vulnerable children from the possibility to obtain citizenship in this way. The first group are children born as stateless persons who do not meet the requirement of both their parents being stateless persons as well. This condition does not reflect the fact that the legislation in many countries restricts the options of parents who are their citizens to transfer their citizenship to their offspring. Almost 30 countries currently do not permit women to transfer their citizenship to their children; other countries restrict this option for parents whose children are born abroad out of wedlock. A child born in the Czech Republic thus may become a stateless person even if one or even both parents are not stateless persons themselves. The Czech legislation does not take the cases of these children into account. The other restriction stipulates that one of the parents must have been permitted residence in the Czech Republic for a period longer than 90 days as of the date of the child's birth (i.e. long-term or permanent residence). In reality, this condition – especially in combination with *de facto* non-existent legal regulations to address the status of stateless person in the Czech Republic – cannot be fulfilled by many stateless persons.

For foundlings, Section 10 of the Act stipulates the possibility that *"[a] child under 3 years of age found within the territory of the Czech Republic whose identity cannot be established acquires the citizenship of the Czech Republic as of the date of founding, unless it is discovered within 6 months of the date of founding that the child has already acquired the citizenship of another country."* However, this does not clearly address the status of foundling children over 3 years of age.

Article 10 – Training aimed at detecting signs of ill-treatment

Regarding paragraphs 67 to 70 of the Report

I have no information that the nurses, medical staff, non-medical staff and other professionals receive any systematic training in detection and treatment of signs of physical and psychological harm resulting from torture and ill-treatment as described in the Istanbul Protocol.

Medical findings on ill-treatment

In its Report to the Czech Republic on the visit carried out in 2014, the CPT recommended⁷⁰ to introduce systematic recording of injuries and the provision of information to the relevant authorities by health care services as this can significantly contribute to the prevention of ill-treatment.

Preparing legislative proposals is the responsibility of the Ministry of Health, which was tasked to accomplish this by 31 December 2016 by the Government.⁷¹ I offered the Minister my assistance, but he did not respond to my offer. The Minister of Health did not accomplish the task, which was subsequently cancelled by the Government's resolution of 25 January 2017.⁷² Until present day, no draft amendment to the Health Care Services Act⁷³ responding to the CPT's recommendations was submitted.

Article 10 – Crimes of racial hatred and measures against discrimination of minorities

Regarding paragraphs 71 and 72 of the Report

The Campaign against Discrimination and Hate Violence (hereinafter the "Campaign") was implemented by the Agency for Social Inclusion of the Office of the Government of the Czech Republic (hereinafter the "Agency") with the aim of cultivating discussions and approach concerning vulnerable minorities. According to the original plan, the Campaign should have taken place between 2014 and 2016. In the end, it was prolonged until April of 2017.

As one of the main parts of the Campaign, the Agency mentioned educational activities for schools (media workshops focused on tolerance for different social groups, training of mediation as means of solving conflicts among the students) and the police, promotion of good practice in socially excluded areas (trainings on communication of topics concerning social inclusion for mayors and other municipal representatives, local organisations and

70 Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment on its visit to the Czech Republic from 1 to 10 April 2014, Section 17.

Available at: <https://rm.coe.int/168069568d>.

71 Resolution of the Government of the Czech Republic No. 609 of 29 July 2015 concerning the Response of the Czech Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment on its visit to the Czech Republic from 1 to 10 April 2014.

72 Resolution of the Government of the Czech Republic No. 59 of 25 January 2017, on the Report on Performing the Tasks Assigned by the Government with Completion Date from 1 November to 31 December 2016.

73 Act No. 372/2011 Coll., on medical services and the conditions of their provision (the Health Care Services Act), as amended.

associations), and a nationwide campaign against hate violence (HateFree Culture). The most prominent feature of the Campaign was undoubtedly the HateFree Culture media campaign implemented via a website;⁷⁴ a Facebook page was also established with a certain form of directed discussion under the posts shared, along with so-called HateFree zones.⁷⁵

I am not aware that the Campaign in any way also focused on judges or public prosecutors.

As concerns training for members of the Police, based on available information⁷⁶, they aimed to acquaint Police representatives with the issues of hate crimes, especially their legal classification and investigation procedures, as well as communication with the victims. There were training courses for members of the patrolling police, criminal and investigation police, representatives of municipal police as well as police educators. The courses were provided by In IUSTITIA⁷⁷, a non-profit organisation dedicated to helping victims of hate crimes. As part of the Campaign, the organisation also created practical handbooks on hate crimes (for use by the patrolling police, municipal police, criminal and investigation police and police spokespersons).

The Agency informed me that the media part of the Campaign (HateFree Culture) continued even after its conclusion. Other activities in the field will depend especially on the funding (obtained from the State budget or other sources).

Regarding paragraph 75 of the Report

I am not aware of any translation of the Anti-Discrimination Act into the Roma language. I also do not have any details on the translation that is being prepared according to the Government. I have recently asked a translation agency about the possibility of such translation. According to the agency, there is a major obstacle in that the Roma language lacks the special legal terminology required for accurate translation of the Act. For this reason, the agency was rather sceptical that such translation is even possible. Nevertheless, I understand the need to provide relevant sources on anti-discrimination in the Roma mother tongue. For this reason, I commissioned translation of information leaflets which I intend to use to comprehensibly inform the citizens about various problems and their potential solutions. Specifically, my website now contains Roma versions of the “Enrolment of Roma children in Primary Schools and Kindergartens” leaflet (containing important information on children’s enrolment in schools and solutions to common problems that can be encountered by parents)⁷⁸ and the “Discrimination on Grounds of Ethnic Origin” leaflet (containing stories of Roma persons who defended against discrimination and succeeded,

74 Available at: <https://www.hatefree.cz/>; a so called ‘hatebot’ was established on the website which uses statements by experts in the field to disprove the most common hoaxes (scaremongering); real stories of people from minorities, interviews, and various analyses are also published there.

75 Various places (cafés, clubs, and theatres) created a kind of a “hate free network” and declared their own rejection of towards these phenomena.

76 For example: <https://www.vlada.cz/cz/urad-vlady/poskytovani-informaci/poskytnute-informace-na-zadost/zadost-o-informace-k-hatefree-culture-152628/>.

77 Website: <http://en.in-ius.cz/>.

78 Available at: https://www.ochrance.cz/fileadmin/user_upload/Letaky/2017_letak_romske_rodice_CJ.pdf; https://www.ochrance.cz/fileadmin/user_upload/Letaky/2017_letak_romske_rodice_ROM.pdf

to inspire others not to be afraid to assert their rights).⁷⁹ The Office is preparing a translation of the “Equal Treatment and Protection against Discrimination” leaflet (providing information on what discrimination means and how to defend against it).⁸⁰

79 Available at: https://www.ochrance.cz/fileadmin/user_upload/Letaky/2017_diskriminace-romove_CJ.pdf; https://www.ochrance.cz/fileadmin/user_upload/Letaky/2017_diskriminace-romove_ROM.pdf

80 Available at <https://www.ochrance.cz/stiznosti-na-urady/chcete-si-stezovat/zivotni-situace-problemy-a-jejich-reseni/rovne-zachazeni-a-ochrana-pred-diskriminaci/>

Article 11 – The prison system

Regarding paragraphs 76 to 79 of the Report

I agree with the CPT's opinion that the problem of prison overcrowding would be better resolved by changing the State's penal policy, with imprisonment being an extreme measure pursuing the objective of rehabilitation of offenders and protection of society; greater use should be made of alternative punishments.⁸¹ I have first mentioned this issue in my summary report on visits carried out in 2014 and 2015, which is publicly available in Czech and English.⁸²

I consider it appropriate to seek to rehabilitate offenders through their assuming responsibility and voluntarily remedying unlawful acts. In this sense, the current penal policy should be revised to promote elements of restorative justice. For this reason, I recommended that the Ministry of Justice prepare a concept for adjusting penal policy with the aim of reducing the number of convicts by the end of 2017. In 2016, the Minister of Justice organised the commission for permanent reduction of the number of prisoners, which was to propose specific steps to achieve reduction in the number of prisoners. The Minister was also tasked by the Government to prepare, by 30 June 2016, an analysis of alternative punishments and the effects of the new Criminal Code on the number of convicts serving this kind of punishment.⁸³

Regarding paragraphs 80 and 81 of the Report

Tear gas is one of the coercive means which members of the Prison Service may use in situations specified by law.⁸⁴ However, I have no information of any prison guards in specific prisons equipped with pepper spray nor of its use in closed areas. I have first encountered this with police officers in police cells⁸⁵ and in a facility for detention of foreigners.⁸⁶ In these two cases, I advised the Police of the unsuitability of this kind of use of a tear-inducing measure in view of the case law of the European Court of Human Rights⁸⁷ and CPT standards.

Regarding paragraphs 82 and 83 of the Report

For each year, the Prison Service of the Czech Republic performs an analysis of suicidal behaviour of prisoners. The analysis is also provided to the Council of the Government for

81 Seventh general report [CPT/Inf (97) 10], Section 14.

82 Report on systematic visits carried out by the Public Defender of Rights: Prisons, 2016. Available at: https://www.ochrance.cz/fileadmin/user_upload/ochrana_osob/ZARIZENI/Veznice/Veznice-2016.pdf. English version available at: https://www.ochrance.cz/fileadmin/user_upload/ochrana_osob/ZARIZENI/Veznice/2016_prisons.pdf

83 Resolution of the Government of the Czech Republic No. 80 of 3 February 2016, on the submission of the Council of the Government for Human Rights concerning prisons.

84 Section 17 (2)(f) of Act No. 555/1992 Coll., on the Prison Service and judicial guard of the Czech Republic, as amended.

85 Case recorded under File No. 3/2017/NZ/MKL.

86 Case recorded under File No. 3614/2017/VOP/BM.

87 Judgement of the European Court of Human Rights of 13 February 2014, Tali v. Estonia, No. 66393/10. Available at: <http://hudoc.echr.coe.int/eng?i=001-140785>.

Human Rights at its request; formerly, this was an internal document that was not publicly available. The analysis of suicidal behaviour is accompanied by information on inter-prisoner violence and on groups of prisoners who might, for objective reasons, be not self-sufficient and in need.

This information for the Council of the Government for Human Rights for 2015 contains, aside from an evaluation of the elapsed year and comparison with the number of suicides in the preceding years, also measures proposed to reduce the number of suicides and self-harm among the prisoners. This document shows an increased number of checks in prisons (especially remand prisons) focused on preventing suicidal behaviour, psychological care for prisoners experiencing a mental crisis and the practice of placing prisoners in crisis units. In 2015, a seminar on this topic for psychologists and (remand) prison specialists was to take place; a Methodological Handbook on preventing suicidal behaviour among accused persons was also issued.⁸⁸

Prevention of inter-prisoner violence and its timely detection is one of the tasks of the prison service members.⁸⁹ A regulation of the Director General of the Prison Service of the Czech Republic was issued in 2012 pursuant to criminal law and remains in effect.⁹⁰ The purpose of the regulation is to create and ensure conditions to forestall, prevent and detect on timely basis any violence among the accused, convicts and inmates and stipulate procedures for detection, collection and evaluation of data and cases of violence in (remand) prisons and security detention institutions.

As I noted earlier, the Information for the Council of the Government for Human Rights for 2015 also includes a chapter on the issue of inter-prisoner violence. Prison overcrowding, which remains one of the chief problems of the Czech prison system, was identified as one of the main factors behind this harmful behaviour. I have no information that prison administrations installed a greater number of CCTV cameras or hired new staff to prevent inter-prisoner violence. On the contrary, lack of staff was a common problem in all seven prisons I visited in 2014 and 2015.

Regarding paragraphs 84 to 86 of the Report

The Health Care Services Act provides that health care services should be provided to persons serving a remand, a sentence or a security detention in the presence of a member of the Prison Service who has to be within eyesight, but outside earshot with exception of cases of a threat to life, health or safety of health care personnel, other professional workers or a risk to property, in which case the member of the Prison Service is authorised to be present also within earshot of the performance of medical service.⁹¹ In the past, I have called attention to the fact that the current legislation is not satisfactory and represents a standard

88 Information for the Council of the Government for Human Rights concerning prisons, 2016. Available at: <https://www.vlada.cz/assets/ppov/rfp/cinnost-rady/zasedani-rady/sebevrazdy-ve-veznicich.pdf>.

89 This is based on e.g. Section 2 of Act No. 293/1993 Coll., on remand in custody, as amended, and Section 2 of Act No. 169/1999 Coll., on imprisonment and on amendment of certain related laws, as amended.

90 Regulation of the Director General of the Prison Service of the Czech Republic No. 12(2012). on forestalling, prevention and timely detection of violence among the accused, convicts and inmates, as amended.

91 Section 46 (1)(g) of Act No. 372/2011 Coll., on healthcare services and the conditions of their provision (the Healthcare Services Act), as amended.

lower than that required by the CPT.⁹² The Directorate General of the Prison Service of the Czech Republic agreed with my legal opinion and recommendations. By the end of 2015, the offices of prison physicians were being fitted with camera surveillance systems enabling transmission of a blurred footage. In case of need, based on the physician's own assessment of the security situation, the physician should be able to use the camera to ensure the presence of a prison guard within eyeshot. Thanks to this measure, prison guards are not within earshot of the ongoing medical examination as the CCTV cameras do not record audio.

As concerns psychiatric examination using a retractable grate, my previous findings from systematic visits in security detention facilities in Brno (December 2017) and Opava (January 2018) revealed that this practice has not been discontinued and remains the standard way of examining patients.

The prison health care system requires a reform to address its problems (especially the lack of available and good care). Under current conditions, physicians lack motivation to work in prisons. Transferring responsibility for prison health care to civilian health care system could help eliminate these problems. To resolve competence issues in the area of provision of health care to prisoners, a working group was formed with the aim of identifying the necessary changes. However, the working group concluded that the competence would not be transferred from the Prison Service of the Czech Republic to the Ministry of Health. No change in this regard is currently planned or being negotiated.

Article 11 – Incommunicado detention

Regarding paragraphs 87 to 93 of the Report

The Czech legal order does not include or regulate detention of a person who has been prevented access to an attorney, independent physician and family members; or where detention has not been notified to the appropriate authorities at all. I am not aware of any (unlawful) use of this institute in the Czech Republic.

Article 11 – Disciplinary punishments during detention and imprisonment

Regarding paragraphs 94 to 97 of the Report

The legal regulation of disciplinary punishments differs for accused persons and convicts. Convicts can file a complaint against a decision to impose a disciplinary punishment. However, this complaint does not have a suspensory effect in the case of placement in solitary confinement where the punishment must be executed immediately to maintain discipline and order in the prison.⁹³ On the other hand, punishments consisting in the placement to solitary confinement and forfeiture of a thing can be subject to court review.⁹⁴

92 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). CPT Standards [online]. CPT/Inf/E (2002) 1 – Rev. 2004. Available at: <http://www.cpt.coe.int/lang/cze/cze-standards.pdf>.

93 Section 23 (6) of Act No. 293/1993 Coll., on remand in custody, as amended.

94 Section 23 (8) of Act No. 293/1993 Coll., on remand in custody, as amended.

In case of placement of an accused person in solitary confinement, this person is not allowed to take visits, with the exception of defence counsels and attorneys. Such a person is allowed to accept and sent letters, however.⁹⁵

Convicts may also file a complaint against a decision to impose a disciplinary punishment, however, only a complaint against forfeiture of a thing has suspensory effect.⁹⁶ A court review of these decisions is limited to selected disciplinary punishments.⁹⁷ Taking visits is not denied to convicts placed in a closed unit or solitary confinement.

Article 11 – Conditions in prisons

Regarding paragraphs 98 to 103 of the Report

According to the Imprisonment Rules,⁹⁸ each convict in an accommodation room for multiple person must be provided with at least 4 sq. metres of living space. A smaller area is only permissible if the overall number of convicts in Czech prisons of the same basic type exceed their capacity. On 14 October 2014, the number of male prisoners in high security prisons exceeded their capacity and the living space per convict decreased to 3 sq. metres. I noticed the negative consequences of overcrowding in many of the prisons I visited. These consequences included e.g. more frequent locking of convicts in their cells, overcrowded visiting rooms, insufficient common room capacity, long waiting times for medical treatment and very short lunch breaks. As I already noted, this problem persists and must be addressed by systematic measures, not by opening new prisons and buildings.⁹⁹ The total use of the prison capacity in September 2017 reached 106%, and in the case of the (then)¹⁰⁰ “high security” type, 119%. I addressed the issue of overcrowding in my 2016 summary report from visits to prisons.¹⁰¹

95 Section 22 (7) of Act No. 293/1993 Coll., on remand in custody, as amended.

96 Section 52 (1) of Act No. 169/1999 Coll., on imprisonment and on amendment to certain related laws, as amended.

97 Section 52 (4) of Act No. 169/1999 Coll., on imprisonment and on amendment to certain related laws, as amended. A court review is possible in the case of decisions to impose the disciplinary punishment of forfeiture of a thing; placement in a closed unit up to 28 days, with the exception of the time designated for performance of the tasks assigned under the treatment programme; all-day placement in a closed unit for up to 20 days; and placement in solitary confinement for up to 20 days.

98 Section 17 of Decree No. 345/1999 Coll., promulgating the imprisonment rules, as amended.

99 The Poštorná building, a part of the Břeclav Prison, was ceremonially opened in August 2017, increasing the overall capacity by 200 convicts.

100 Effective from 1 October 2017, Act No. 40/2009 Coll., the Criminal Code, as amended, only distinguishes two types: standard security prisons and high security prisons. The decision on imposing the specific security regime (assignment to low, medium or high security units) is made by the prison director based on individual assessment of risks.

101 Report on systematic visits carried out by the Public Defender of Rights: Prisons, 2016. Available at: https://www.ochrance.cz/fileadmin/user_upload/ochrana_osob/ZARIZENI/Veznice/Veznice-2016.pdf. English version available at: https://www.ochrance.cz/fileadmin/user_upload/ochrana_osob/ZARIZENI/Veznice/2016_prisons.pdf

Regarding paragraphs 104 to 106 of the Report

The convicts are still required to pay an incarceration fee, unless this obligation is lifted. This follows from the Imprisonment Act.¹⁰² I suggested to abolish this obligation, but my proposal lacked political backing and was subsequently rejected by the Ministry of Justice. There is currently no dialogue ongoing with respect to this issue.

Regarding paragraphs 107 to 111 of the Report

As regards steps taken to prevent inter-prisoner violence and protect especially vulnerable prisoners, I refer to my previous statement regarding paragraphs 82 and 83 of the Report.

I have repeatedly called attention to the practice where interpreting during medical examination is provided by other convicts instead of professional interpreters, which negatively affects doctor-patient confidentiality and increases risks for the patient on account of potential incorrect translation. The duty of the Prison Service to secure interpreting services follows directly from the Health Care Services Act.¹⁰³ In response to my recommendation, funding to cover the costs of interpreting was systematically allocated to each prison.

Article 11 – Conditions in police cells

Regarding paragraphs 112 to 114 of the Report

Despite repeated CPT recommendations to ensure that persons in police detention longer than 24 hours have access to outdoor exercise in the open air, this standard is still not satisfied based on my observations during systematic visits.

Fixtures for handcuffing persons are still commonly present in police cells – this continues to be possible due to the unchanged Binding Instruction of the Police President No. 159/2009.¹⁰⁴

Article 11 – Psychiatric care

Regarding paragraphs 120 to 123 of the Report

The Czech laws still distinguish cage and net beds. The use of cage beds is completely prohibited. The use of net beds was suspended in social services facilities,¹⁰⁵ but they remain a legal type of restraint in provision of health care services. The only exception are the

102 Section 35 of Act No. 169/1999 Coll., on imprisonment and on amendment to certain related laws, as amended.

103 Section 30 (1) of Act No. 372/2011 Coll., on healthcare services and the conditions of their provision (the Healthcare Services Act), as amended.

104 Section 3 (c) of Annex 1 to the Binding Instruction of the Police President No. 159/2009 on escorts, guarding of persons and on police cells.

105 Section 89 (3) of Act No. 108/2006 Coll., on social services, as amended.

alcohol detention centres where the use of net beds is prohibited.¹⁰⁶ The Ministry of Health is inactive and there are fears that net beds will only be replaced by other means of restraint.

Based on my findings from systematic visits, I must note that the use of means of restraint differs among individual psychiatric facilities. The Methodological Guideline of the Ministry of Health of 2009 concerning the use of means of restraint with respects of patients in health care facilities remains in force at the present time (January 2018).¹⁰⁷ Since 2016, an update to this guideline accentuating prevention of the use of restraints is being prepared. The new guideline will not, however, ban the use of net beds. It is also difficult to assert that certain psychoactive drugs¹⁰⁸ constitute means of restraint. Some still believe that using these drugs does not constitute the use of chemical means of restraint and claim that they merely constitute means of treatment and, consequently, that different conditions apply to their administration.

In 2017, an amendment to the Health Care Services Act¹⁰⁹ introduced the health care services providers' duty to keep central records of the use of means of restraint. The records should include comprehensive data on the number of uses of means of restraint per calendar years for each of the means of restraint. The use of a means of restraint must be recorded in the central records within 60 days of the event.¹¹⁰ A disadvantage of the system as mandated by the law is that it only provides very general statistical data without linkage to the specific cases, which could then be evaluated on the level of the provider, region or State. The records do not make it easier to inspect the use of means of restraint and, in my opinion, currently only serves to increase the administrative burden.

Regarding paragraphs 124 to 130 of the Report

The possibility to file a complaint with the Public Defender of Rights is only available to a part of the patients confined in a psychiatric facility, specifically to those undergoing protective treatment.¹¹¹

Patients may contact human rights organisations without limitation, but there are only a few such monitoring organisations. State authorities tasked with public inspection do not have the capacity nor professional expertise to effectively carry out inspections concerning the treatment of patients in psychiatric facilities.

106 Section 39 (1)(c) of Act No. 372/2011 Coll., on healthcare services and the conditions of their provision (the Healthcare Services Act), as amended.

107 The Methodological Guideline of the Ministry of Health No 37800/2009, on the use of means of restraint with respects of patients in health care facilities in the Czech Republic, published in the Bulletin of the Ministry of Health No. 7/2009.

108 Pursuant to Section 39 (1)(f) of the Health Care Services Act: *“psychoactive drugs or other parenterally administered medicinal products suitable to restrain the patient within provision of health care services, unless the patient is treated on his or her own request or in the case of long-term treatment of a psychiatric disorder”*.

109 Part Thirteen of Act No. 65/2017 Coll., on protection of health against harmful effects of dependency producing substances.

110 Section 39 (4) of the Healthcare Services Act.

111 Section 1 (2) of Act No. 349/1999 Coll., on the Public Defender of Rights, as amended.

During my visits to psychiatric hospitals in recent years, I have encountered errors in the use of means of restraint and failure to ensure reasonable accommodation to people with disabilities.¹¹² Outdoor exercise in the open air in the sense of international standards is also not sufficiently ensured. I have often voiced my disagreement with the practice of placing patients in large multi-person bedrooms, which may constitute a factor promoting ill-treatment.

Regarding paragraphs 132 to 133 of the Report

Negotiations on the first steps towards a reform have intensified in recent years. However, the status of gerontopsychiatric patients and patients requiring currently insufficiently available social services alongside health care services remains uncertain.

112 I use the term “reasonable accommodation” within the meaning of Article 2 of the Convention on the Rights of Persons with Disabilities of 13 December 2006, where it is defined as a “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”

Articles 12 and 13 – Involuntary sterilisation

Regarding paragraphs 150 to 152 of the Report

The Government neglected to respond to the CAT's question of whether victims are entitled to free legal assistance. No special piece of legislation was adopted in this regard, i.e. victims of involuntary sterilisation can only use the general mechanisms. For the purposes of civil proceedings, they may apply that a court appoints a legal counsel pursuant to the Code of Civil Procedure.¹¹³ The court appoints a legal counsel if the applicant meets the conditions for release from court fees (difficult social situation)¹¹⁴ and, simultaneously, the appointment of a legal counsel is necessary to protect the applicant's interests. In most cases, the court appoints an attorney-at-law as the legal counsel. In that case, the attorney's fee and out-of-pocket expenses incurred in relation to provision of legal services are paid by the State. A similar regulation also applies to proceedings before administrative courts.¹¹⁵

The Government stated that the Specific Health Care Services Act¹¹⁶ does not provide for any compensation mechanism. It further noted that in 2015, the Minister for Human Rights, Equal Opportunities and Legislation (hereinafter the "Minister for Human Rights") was considering the adoption of a special law that would allow extrajudicial compensation of unlawfully sterilised persons. The proposed substantive intent included two-step administrative proceedings¹¹⁷ in respect of applications for compensation and the possibility of review by administrative courts. A deadline of 3 years from the effect of the law was proposed for the filing of applications. Also, the State would not invoke the limitation period in the proceedings. The Minister justified the adoption of a special regulation for compensation of involuntarily sterilised persons by pointing out that the Czech legislation did not offer available and effective remedies for these persons to exercise their rights. He reminded that only the amendment to the Civil Code of 1990¹¹⁸ expressly gave persons whose personality rights had been violated the right to pecuniary compensation of intangible harm – up to that point, the courts had usually only awarded moral satisfaction. The actual chances of the victims to secure pecuniary compensation for intangible harm significantly decreased in 2008 on account of a change in the case law of the Supreme Court. The Supreme Court reversed its previous opinion that claims based on intangible harm are not subject to a limitation period and concluded that the right to pecuniary compensation for intangible harm constitutes a property right and as such is subject to a limitation period of 3 years from the occurrence of the harm.¹¹⁹ Based on the case law¹²⁰, the court will disregard the plea of limitation period if it is contrary to good morals, i.e. if the expiry of the

113 Section 30 of Act No. 99/1963 Coll., the Code of Civil Procedure, as amended.

114 Personal property situation must be documented.

115 Section 35 (9) of Act No. 150/2002 Coll., the Code of Administrative Justice, as amended.

116 Act No. 373/2011 Coll., on specific health care services, as amended

117 The Ministry of Health was to decide in the first instance, with the Minister of Health deciding in the second instance.

118 Section 13 (2) of Act No. 40/1964 Coll., the Civil Code, as amended by Act No. 87/1990 Coll., amending and supplementing the Civil Code effective from 29 March 1990.

119 Judgment of the Supreme Court of 12 November 2008, File No. 31 Cdo 3161/2008.

120 E.g. Judgment of the Constitutional Court of 6 September 2005, Ref. No. I. ÚS 643/04.

plaintiff's claim by operation of the limitation period was disproportionately harsh in relation to the scope and character of the rights asserted by the plaintiff and the reasons why he or she did not exercise the right in time. In practice, this means, inter alia, that the victim of involuntary sterilisation must prove that she did not cause the expiry of the limitation period to no effect.

Despite the aforementioned fact, the Government concluded that illegally sterilised persons had effective remedies at their disposal and rejected the Minister's draft. No further draft legislation was submitted in the following period that would introduce a compensation mechanism for victims of involuntary sterilisations.

Regarding paragraph 154 of the Report

The Government claims that written materials concerning sterilisations are available in the Roma language. Unfortunately, it does not indicate where they should be available.

Methodological guideline for providers of health care services and similar documents are usually published by the Ministry of Health in the "bulletins". In 2007, this is where it published the consent form for sterilisation of fallopian tubes, exclusively in the Czech language.¹²¹ It cannot be verified using publicly available sources whether the Ministry provided a consent form in the Roma language to health care services providers by other means or tasked them to translate it.

Articles 12 and 13 – Trafficking in human beings

Regarding paragraphs 159 to 171 of the Report

In the period under review, the Public Defender of Rights was approached multiple times by persons who were victims of human trafficking. In 2014, the Defender was approached by a Nigerian woman who was transported to Italy when she was 15 years old and forced to prostitution by physical and psychological pressure. After five years, when she was in an early stage of pregnancy, she managed to escape and she found herself in the Czech Republic. She was detained here for the purpose of transfer to Italy on the basis of the Dublin Regulations and placed in a facility for detention of foreigners. After the Defender's intervention, the complainant was moved from the facility to a shelter for victims of human trafficking. She was not transferred to Italy and in September 2014, she was allowed to apply for international protection in the Czech Republic.

Aside from the general issues associated with identification of victims of human trafficking, the case also documented other problematic aspects of dealing with victims of human trafficking in migration contexts outside the framework of criminal proceedings, where there are insufficient safeguards for prevention of secondary victimisation of the victims and where various units (Immigration Police, Department of Asylum and Migration Policy, Unit for Combating Organised Crime etc.) repeatedly interrogate the person and do not share information in order to avoid causing further trauma to the victim. The issue is also affected by the fact that in the period under review, the Czech Republic was not a party to the Council

121 Bulletin of the Ministry of Health No. 8/2007. Available at: https://www.mzcr.cz/Legislativa/dokumenty/vestnik_3622_1772_11.html.

of Europe Convention on Action against Trafficking in Human Beings of 2005.¹²² The lack of ratification of the Convention has negatively impacted the protection of rights and identification of victims of human trafficking, since the Convention specifies a broader scope of rights of victims of human trafficking and duties of authorities of the contracting states than that stipulated by Directive 2011/36/EU, which primarily focuses on criminal proceedings.

The inability of the Police and the justice system to deal with cases of human trafficking, infer criminal liability of the perpetrators and punish them appropriately is documented by another case that took place in the period under review – the “tree planter case”. Between 2009 and 2010, a company called Afumicata offered jobs involving planting trees in Czech forests. Dozens of Vietnamese, Romanian and Slovak nationals were performing this work without pay, lacking means to cover even their basic needs.

The situation lasted months without the victims being provided any assistance by the prosecuting bodies. This situation was only remedied by the Constitutional Court, which stated in its judgment of 16 December 2015¹²³, paragraph 25, the following: *“The Constitutional Court is of the opinion that the Police body and the public prosecutor were bound by the principle of legality and the principles governing the taking of evidence in criminal proceedings, including the search principle and the principle of material truth. These principles were violated when the authorities did not attempt, ex officio, to closely investigate suspected serious crimes against human liberty and dignity, including the crime of human trafficking, extortion, oppression and making a dangerous threat. The Constitutional Court identifies signs of arbitrary conduct in the fact that the authorities merely focused on whether the act constituted the criminal offence of fraud while a priori ignoring the more serious legal qualifications. This occurred in situation where the testimonies and statements provided by tens of persons indicated that the case could involve serious organised crime within the meaning of Section 232a and 168 of the Criminal Code. The Constitutional Court is of the opinion that the prohibition of arbitrariness in performance of public authority was violated when the Police body and the public prosecutor refused to address the complaints submitted by the complainants, who, as the aggrieved parties, claimed protection against serious criminal activities infringing on their fundamental human rights and dignity.”*

It can be concluded that identifying victims of human trafficking is problematic in practice. Without the intervention of NGOs focusing on helping the victims of human trafficking, these people often receive no attention or adequate support.

These findings raises doubts about the effectiveness of the training courses mentioned by the Ministry’s report. Their frequency and regularity is also doubtful: educational events focusing on human trafficking organised by the Judicial Academy were only conducted twice in the period under review: in March 2009 and in April 2013.

122 This was originally prevented by the absence of corporate criminal liability in the Czech legislation; however, this was introduced by the amendment to the Criminal Code effective from 1 January 2012. The Czech Republic ratified the Convention in 2017 as the last among the Council of Europe’s member states.

123 Judgment of the Constitutional Court of 16 December 2015, File No. II. ÚS 3626/13.

In 2015 and 2016, I participated as a partner in the project titled Testing EU citizenship as “labour citizenship”: from cases of labour rights violations to a strengthened labour-rights regime, which focused on victims of labour exploitation who were EU citizens working in the Czech Republic.¹²⁴ In co-operation with partners, I obtained specific knowledge on the poor position of agency workers and their discrimination compared to regular employees. Because they, unlike Czech agency workers, do not know the language and the local environment, foreign workers often get into a situation similar to exploitation, when they often work for a long time without a written contract, the required insurance and often even without pay. We identified problems such as the lack of information on the part of foreign workers, the fact that the labour inspectorates insufficiently discipline the employers and lack inspectors with foreign language skills and interpreters. In the justice system, practical obstacles often prevent the use of testimonies provided by exploited foreign workers prior to their departure to the country of origin, and limit the possibilities of these persons to claim the salary owed. It would also serve well to change the legal status of agency workers.¹²⁵

124 Available at: <http://migrationonline.cz/en/about-us/current-projects/testing-eu-citizenship-as-labour-citizenship-from-cases-of-labour-rights-violations-to-a-strengthened-labour-rights-regime>.

125 Available at: <http://migraceonline.cz/cz/e-knihovna/neprime-zamestnavani-v-cr-provazi-zasadni-porusovani-pracovnich-prav>, http://migrationonline.cz/czech_republic_country_report.pdf.

Article 16 – Surgical castration

Regarding paragraphs 181 to 186

In October 2015, the Ministry of Health submitted for inter-departmental commentary procedure a draft bill amending Act No. 373/2011 Coll., on specific health care services, as amended, and certain other laws. It included reducing the patient age limit for surgical castration from 25 to 21 years. The submitter also proposed to broaden the range of patients on whom this procedure can be conducted and include persons who have not yet committed any sex crime.

In November 2015, I raised objections against the aforementioned proposals. Among other things, I voiced my doubts that surgical castration could be considered a treatment *lege artis* – I warned the submitter that IATSO, CPT and some other European countries doubt the therapeutic effect of castration and that there is no common understanding as to whether the potential therapeutic effects justify the adverse effects. I noted that the existence of other, less invasive methods of treatment, which moreover continue to evolve, indicate that castration may be unnecessary. I also doubted that the principle of free and informed consent of the patients with the procedure of surgical castration is actually observed. I concluded that on account of the irreversible consequences of surgical castration and the existence of alternative treatment procedures (and their continuing development), I would welcome if the Czech Republic joined the ranks of countries which prohibit the procedure.

However, my suggestions and comments were not accepted. On 1 November 2017, the amendment to the Specific Health Care Services Act came into effect and introduced the above-mentioned reduction of the age limit¹²⁶ and broadening of the range of potential patients to include persons who have not committed a sex crime.¹²⁷

126 Section 17 (2) of Act No. 373/2011 Coll., on specific health care services, in the wording effective from 1 November 2017:

“Castration can be performed on patients at least 21 years old, in respect of whom:

(a) expert medical examination has proven a specific paraphilic disorder;

(b) the proven paraphilic disorder has manifested by commitment of a sex crime; a sex crime for the purposes of this Act means a violent, sexually-motivated crime and the criminal offence of sexual abuse;

(c) expert medical examination has proven a high probability that the patient might commit a sex crime in the future; and

(d) other treatment methods have not been successful or could not have been applied due to health reasons; the fact that the patient cannot be successfully treated by other treatment methods must be documented by the results of expert examinations.”

127 Section 17a of Act No. 373/2011 Coll., on specific health care services, in the wording effective from 1 November 2017:

“In particularly justified cases, castration can be performed if the conditions set out in paragraph 2 (a), (c) and (d) are met and the patient has reached 21 years of age and the proven paraphilic disorder has a significant adverse impact on the patient’s quality of life.”

Article 16 – Prohibition of corporal punishment

Regarding paragraphs 187 to 192

The Czech legislation still lacks an explicit prohibition of all forms of corporal punishment of children (including in the family). I consider this form of punishment unacceptable.

In specific cases, I inquire into the procedure of the body for social and legal protection of children in relation to parents who commit violence on children. Similarly as in cases of domestic violence, I encounter lack of information exchange between relevant institutions in cases involving disproportionate punishment of children by their parents. If the prosecuting bodies (for instance) discontinue criminal prosecution because they could not identify elements of a crime in the parent's conduct and only classified the conduct as disproportionate punishment of a child or a too strict upbringing style, they should also inform the office for social and legal protection of children to inquire into the case and ensure civil-law protection of the child (e.g. in the form of supervision over the child's upbringing, change in the upbringing style or restricting contact with the child). The body for social and legal protection of children can also admonish the parents or order supervision).¹²⁸ It should further issue recommendations to the parents or conduct administrative proceedings to order them to co-operate with an expert counselling facility, e.g. to address inappropriate upbringing methods and improve their parenting skills.¹²⁹

128 Based on Section 13 (1)(a) of Act No. 359/1999 Coll., on social and legal protection of children, as amended.

129 Based on Section 12 (1)(b) and Section 13 (1)(d) of the Social and Legal Protection of Children Act.