

# EUROPEAN SOCIAL CHARTER

NGOs information to the European Committee of Social Rights for consideration when adopting Conclusions with respect to the Twelfth report on the application of the European Social Charter submitted of by the Government of the Czech Republic

(for the period until 31 December 2013)

Articles 7, 8, 16, 17 and 19 of the European Social Charter



**FORUM**  
HUMAN RIGHTS



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## Introduction

The European Social Charter (hereafter „Social Charter“) was ratified by the Czech Republic on 3 November 1999. The Government submitted the 12th report on the implementation of, inter alia, Article 17 of the Social Charter to the European Committee of Social Rights (hereafter „the Committee“) on 13th November 2014. International and domestic NGOs would like to provide the Committee with information on the rights of children in general, more concretely rights of children with disabilities and rights of migrant families with children.

In the first section of this report we enumerate on inclusive education and the right of children with disabilities and especially children with mental disabilities to inclusive education. In the second section, we focus on situation of young offenders in the Czech Republic and provide the Committee with relevant information especially on situation of children below the age of criminal responsibility. In the third and fourth sections, we answer the questions regarding massive institutionalisation of children in the Czech Republic. In the fifth section, we inform the Committee about relevant issues around access to justice, underlying inter alia specific situation of children with mental<sup>1</sup> disabilities.

This report was drafted by League of Human Rights (LIGA), Mental Disability Advocacy Center (MDAC), Forum for Human Rights (FORUM), LUMOS and supported by other international and domestic NGOs, including SPMP, QUIP, INCLUSION Europe, Downsyndorm.cz, Poradna pro Aspergerův syndrom and Organisation for aid to refugees (OPU). We attach description of all partners in annex 1.

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<sup>1</sup> The term “mental disability” refers to people with intellectual disabilities and people with mental health issues.

# I.

## Education of children with disabilities under Article 17 European Social Charter

### ***A) Scope of Article 17 European Social Charter - Education***

Article 17 of the European Social Charter provides for social and economic protection of mothers and children. It is formulated in a general way. Amended Article 17 of the Revised Charter is more detailed, as it also provides for social, legal and economic protection. According to the explanatory report it offers protection for children and young adults outside the context of work and addresses the special needs arising from their vulnerability<sup>2</sup>, including education of children with disabilities.<sup>3</sup> Even though education is not explicitly mentioned under Article 17 of the European Social Charter, it is argued that the right to education is inherent part of **social** and **economic** protection of children as it relates inherently to the child's development and stability of the child's present and future situation.<sup>4</sup> Moreover, the term **protection** under this provision should also be read in a broad sense, since its objective is not stated in limited or negative terms (such as "to protect the child from harm"), but rather in relation to the comprehensive ideal of ensuring the child's "well-being" and development.<sup>5</sup>

Indeed education relates to social and economic situation of children with disabilities. The 2012 expert report drafted for the European Commission shows that children with special educational needs frequently leave school with few or no qualifications, before moving into specialist training which can, in some cases, impair rather than increase their job prospects. People with disabilities or special educational needs are much more likely to be unemployed or economically inactive, and even those who are relatively successful in the job market often earn less than their non-disabled counterparts, the report states.<sup>6</sup> Discrimination against people with disabilities has been a long-term and widespread problem with a number of significant effects.<sup>7</sup> Persons with disabilities have been prevented from accessing rights that are freely available to other members of society, particularly in the area of education. Failure to access education, combined with prejudice and rejection, has resulted in economic and social exclusion and marginalisation for generations of children with disabilities. **Therefore it is argued that social and economic protection of children under Article 17 of the European Social Charter covers also education of children with disabilities.**

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<sup>2</sup> European Social Charter (ETS no. 163) - Explanatory Report, para. 69, document available at:

<http://www.lex.unict.it/eurolabor/ricerca/dossier/dossier5/cap3/social-charter-explan.htm>

<sup>3</sup> *Autism-Europe v. France*, complaint no. 13/2002, decision on merits of 4 November 2003; *MDAC v Bulgaria*, complaint no. 41/2007, decision on the merits of 3 June 2008.

<sup>4</sup> UN CRC Committee, General Comment no. 14 – the best interest of the child, para. 79.

<sup>5</sup> Compare CRC Committee – General Comment no. 14 – the best interest of the child, para. 71.

<sup>6</sup> See press release of the European Commission of 10 July 2012 available at:

[http://europa.eu/rapid/press-release\\_IP-12-761\\_en.htm](http://europa.eu/rapid/press-release_IP-12-761_en.htm) . The report is available at:

<http://www.nesse.fr/nesse/activities/reports/activities/reports/disability-special-needs-1>

<sup>7</sup> ECHR, *Kiss v. Hungary*, application no. 38832/06, judgment of 20 May 2010, para. 42.

## ***B) Education of children with disabilities and its interpretation under Article 17 European Social Charter***

The European Committee of Social Rights has repeatedly stated that the Charter is a living instrument, which must be interpreted in accordance with developments in the national laws of the Council of Europe member states as well as relevant international instruments.<sup>8</sup> Moreover, a teleological approach should be adopted when interpreting the Charter, i.e. it is necessary to seek the interpretation of the treaty that is the most appropriate in order to realise the aim and achieve the object of the treaty.<sup>9</sup> With respect to disability rights, the European Committee of Social Rights has acknowledged the CRPD as the standard which “reflects existing trends in comparative European law in the sphere of disability policies.”<sup>10</sup>

The Czech Republic ratified the UN CRPD with no reservations on 28 September 2009. The CRPD recognises inclusive education as a human right under article 24, headlined “Education”. Under article 24(1) state parties “with a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels”. Under article 24(2)(a) state parties „ensure that persons with disabilities are not excluded from the general education system on the basis of disability“, and under article 24(2)(b) further state parties ensure that “persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live”. In its concluding observations on States parties, the CRPD Committee on the Rights of Persons with Disabilities has stressed the importance of establishing education policy that guarantees the right to inclusive education for everyone, including people with disabilities, and has spoken out against special schools. **The CRPD Committee has called for enhanced efforts to move away from segregated schools to an inclusive model of education<sup>11</sup>, which has been also acknowledged by the European Committee of Social Rights.<sup>12</sup>**

## ***C) Failure to ensure inclusive education of children with disabilities in the Czech Republic***

Historically, education in the Czech Republic has been provided through two parallel systems – “mainstream” and “special” education. A special education stream was created in order to provide education to children who were believed to be unable to attend mainstream schools because of their physical, sensory or mental disabilities. Up to this day, the majority of children with mental disabilities or multiple disabilities are educated in the segregated

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<sup>8</sup> See, for example, *World Organisation against Torture (OMCT) v. Greece*, complaint no. 17/2003, decision on merits of 26 January 2005, para 31.

<sup>9</sup> *Defence for Children international (DCI) v. The Netherlands*, complaint no. 47/2008, decision on merits of 20. 10. 2009.

<sup>10</sup> *FIDH v Belgium*. complaint no. 75/2011, decision on merits of 18 March 2013, para. 112.

<sup>11</sup> UN Committee on the Rights of Persons with Disabilities, Concluding Observations on Argentina, CRPD/C/ARG/CO/1, para. 38; UN Committee on the Rights of Persons with Disabilities, Concluding Observations on Tunisia, CRPD/C/TUN/CO/1, para. 32; UN Committee on the Rights of Persons with Disabilities, Concluding Observations on Paraguay, CRPD/C/PRY/CO/1, para. 58.

<sup>12</sup> *Action européenne des handicapés (AEH) v. France*, complaint no. 81/2012, decision on merits of 11 September 2013, para.71.

schooling system.<sup>13</sup> Almost three percent of children in primary schools in the Czech Republic are being educated in segregated schools, compared to 1.24 percent in England.<sup>14</sup> Long-term segregation in such schools has serious detrimental effects on the future lives and careers of the students with very few students continuing to take part in further education.<sup>15</sup> The inferior curricula seriously impact on future employability, contributing to the disproportionately higher rates of unemployment amongst people with disabilities<sup>16</sup> and ensuring their continued isolation from society in adulthood.

Recently, a number of international bodies have highlighted the barriers that children with disabilities face when attempting to access mainstream education in the Czech Republic and strongly criticised segregation. For example, in its Concluding Observations on the second periodic report of the Czech Republic, the United Nations Committee on Economic, Social and Cultural Rights presented its concerns *“that children with disabilities in the State party are still primarily schooled in specialized institutions...”*. Similarly, in a report by Nils Muižnieks, the Council of Europe Commissioner for Human Rights, following his visit to the Czech Republic from 12 to 15 November 2012 the Commissioner stated that he is *“deeply concerned at the continuing segregation in the education system of children with disabilities. A significant number of these children, particularly children with intellectual disabilities, are educated according to special programmes in mainstream schools, “practical schools” or “special schools”, segregated from their peers. (...)”*

Segregation practices against children with intellectual disabilities remain to be a norm in the Czech Republic. According to recent statistics<sup>17</sup>, in school year 2013/2014 there was 17 231 children with intellectual disability in basic education. Only 3782 were attending schools for children without special educational needs (mainstream schools). Moreover, 2395 children out of this number were educated in special classrooms and only 1387 children individually integrated. In total, 13 449 children with intellectual disability was educated in schools for children with special educational needs (special schools), which is 78%.

Legal basis for education provide Act No. 561/2004 the Education and Regulation of the Ministry of Education no. 73/2005 on education of children, pupils and students with special educational needs which are not based on inclusive education paradigm. It is striking that the law does not even recognise inclusive education and it is neither listed among basic principles of education, nor among rights of children, pupils or students. It also explicitly allows for segregation based on the presence of a disability and there is no comprehensive policy adopted which would provide for concrete measures of progressive realization of inclusive education for all children.

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<sup>13</sup> See The Concluding Observations of 23 June 2014 of the Committee on Economic, Social and Cultural Rights on the second periodic report of the Czech Republic.

<sup>14</sup> Lumos, *Segregace v základním školství v České republice (Segregation in primary schools in the Czech Republic)*, p. 2. Unpublished.

<sup>15</sup> According to the last comprehensive study regarding people with disabilities in the Czech Republic, "Disabled Persons Survey of 2007" by the Czech Statistical Office, around one third of men and two fifths of women with disabilities in the Czech Republic only achieved primary education.

<sup>16</sup> See OHCHR Thematic Study on the Work and Employment of Persons with Disabilities, A/HRC/22/25.

<sup>17</sup> Data available in Czech at: <http://toiler.uiv.cz/rocenka/rocenka.asp>

Another systemic aspect is the division into two systems – mainstream and special education and following resources issues. The two streams of education are independently administered and funded. Mainstream schools are administered and financed by the municipalities, whereas special schools are controlled by the regional authorities. Mainstream schools are not resourced, funded or equipped to provide inclusive education for all children and can reject children with disabilities on the basis of insufficient capacity or resources. The regional authority is responsible for financing the salary of pedagogical assistants, but there are no clear criteria for the allocation of resources and the decision-making of the regional authority on the extent of support provided to schools is arbitrary. This leads to a situation where parents must co-finance or fully finance the salary of assistants despite the fact that by law the provision of reasonable accommodation in primary education is free of cost.

#### **D) Conclusions – Article 17 European Social Charter implementation**

The European Committee of Social Rights recognised that the effective enjoyment of certain fundamental rights requires a positive intervention by the state: the state must take the legal and practical measures which are necessary and adequate to the goal of the effective protection of the right in question.<sup>18</sup> The Committee also held that when it is exceptionally complex and expensive to secure one of the rights protected by the Charter, the measures taken by the state to achieve the Charter’s aims must fulfil following three criteria: (i) a reasonable timeframe, (ii) a measurable progress and (iii) a financing consistent with the maximum use of available resources.<sup>19</sup> These criteria should be met cumulatively.<sup>20</sup> It also held that States Parties bear additional burden in relation to the rights of “groups with heightened vulnerabilities” and that they must also take “*practical action to give full effect to the rights recognised in the Charter*”<sup>21</sup>, while the implementation of the Charter requires State Parties not merely to take legal action but also to make available the resources and introduce the operational procedures necessary to give full effect to the rights specified therein.<sup>22</sup>

Even though there have been some developments in the past, there is currently no legal and practical measure adopted to secure that children with disabilities enjoy appropriate economic and social protection. The situation of children with intellectual disabilities is not in conformity with Article 17 European Social Charter and we understand that it would require the Czech Republic to take concrete legal steps and to adopt structured and targeted policy to shift from existing system of segregated special schools into inclusive education system.

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<sup>18</sup> *European Roma Rights Centre v. Bulgaria*, complaint no. 31/2005, decision on the merits of 18 October 2006, para. 35.

<sup>19</sup> *European Roma Rights Centre v. Bulgaria*, complaint No. 31/2005, decision on the merits of 18 October 2006, para. 37; *Autism-Europe v. France*, complaint no.13/2000, decision on the merits of 4 November 2003, para. 53, as reemphasized in *MDAC v. Bulgaria* .

<sup>20</sup> *Centre on Housing Rights and Evictions (COHRE) v. Croatia*, complaint no. 52/2008, decision on the merits of 22 June 2010, para. 82.

<sup>21</sup> *Autism-Europe v. France*, complaint No.13/2000, decision on the merits of 4 November 2003, para. 53.

<sup>22</sup> *International Movement ATD Fourth World v. France*, complaint no. 33/2006, decision on the merits of 5 December 2007, para. 61.



In concrete, the Czech Republic should amend Article 2 of the Act no. 561/2004 Coll., Education Act and introduce inclusive education as one of basic principles of education, amend Article 21 of the Act no. 561/2004 Coll., Education Act and list the right to inclusive education among other rights of children, pupils and students. Reform Article 16 of the Act no. 561/2004 Coll., Education Act on education of children with special educational needs to ensure that all children with special educational needs can be educated in mainstream schools and adequate support is provided. Furthermore, the Government should adopt concrete and targeted policy, including timeline on transformation of segregated schooling system with an aim to create inclusive education system for all children and on all levels.

## II.

### Young Offenders and their situation in the Czech Republic under Article 17 European Social Charter

#### A) General Introduction

With respect to children in conflict with the law Article 17 of the European Social Charter requires that the age of criminal responsibility must not be too low and that the criminal procedure relating to children and young persons must be adapted to their age.<sup>23</sup> In addition, an integral part of the right of children to social protection is also protection from ill treatment and abuse<sup>24</sup>, including the obligation of the Contracting Parties to establish “agencies and services designed to protect and prevent the ill-treatment of children”<sup>25</sup>.

The Committee emphasised that it has regard to the United Nations Convention on the Rights of the Child as it was interpreted by the UN Committee on the Rights of the Child when ruling on the alleged violation of any right of the child which is established by the Charter.<sup>26</sup> In particular, it considers itself bound by the internationally recognised requirement to apply the best interests of the child principle.<sup>27</sup> According to the UN Committee on the Rights of the Child (*hereinafter* “CRC Committee”) General Comment no. 10, “the protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders.”<sup>28</sup>

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<sup>23</sup> Form for the reports to be submitted in pursuance of the 1961 European Social Charter and the 1988 Additional Protocol adopted by the Committee of Ministers of the Council of Europe on 26 March 2008. Available at: [http://www.coe.int/t/dghl/monitoring/socialcharter/ReportForms/FormESC2008\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/ReportForms/FormESC2008_en.pdf).

<sup>24</sup> Information Document prepared by the Secretariat of the European Social Charter – Children’s rights under the European Social Charter. The document is available at:

[https://www.coe.int/t/dghl/monitoring/socialcharter/Theme%20factsheets/FactsheetChildren\\_en.pdf](https://www.coe.int/t/dghl/monitoring/socialcharter/Theme%20factsheets/FactsheetChildren_en.pdf)

<sup>25</sup> *Ibid.*

<sup>26</sup> *OMCT v. Ireland*, complaint No 18/2003, decision on the merits of 7 December 2004, §61.

<sup>27</sup> *Defence for Children International (DCI) v. The Netherlands*, complaint no. 47/2008, resolution CM/ResChS(2010)6 adopted on 7 July 2010, paras. 28, 29.

<sup>28</sup> CRC/C/GC/10, 25 April 2007, para. 10.

Furthermore, Article 40 (1) of the UN Convention on the Rights of the Child (*hereinafter* “CRC”) recognizes the right of children in conflict with the law “*to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society*”.

In its last Conclusions on compliance of the Czech Republic with the requirements of Article 17 of the Charter the Committee expressed its concern about the UN CRC Committee’s Observations on the Czech Republic stating that children under the age of 15 were not held criminally responsible, but could be placed even for petty offences, in institutional care prior to a legal proceedings taking place, without the guarantees connected. The Committee asked the Czech Republic to comment on these statements.<sup>29</sup> In its Conclusions preceding the cited Conclusions and adopted in 2005 the Committee asked the Czech Republic to provide *inter alia* clarification of the minimum age of criminal responsibility in the light of legal provisions in the Juvenile Justice Act no. 218/2003 Coll. authorising protective custody for children under the age of 12. Furthermore, the Committee asked under what circumstances and how many children under 15 years who had not committed criminal offence are detained, any results of the periodic review of their protective custody, and updated information on the rights of the minor in such proceedings.<sup>30</sup>

### ***B) Failure to apply individualised approach to children below the age of criminal responsibility***

The official age of criminal responsibility in the Czech Republic is 15 years of age. Criminal offence committed by a child below the age of criminal responsibility is called an *unlawful act*. Children suspected of committing an unlawful act (criminal offence) are subjects to the first stage of standard pre-trial proceedings and then to specific proceedings before the juvenile court under Juvenile Justice Act. Obligatory, the police initiate standard criminal proceedings under the Criminal Procedure Code, carry out standard investigatory acts, including repeat interrogation of suspected child (usually at the police station), blood sampling, fingerprinting, extracting DNA, reconstruction and recognition. When the collected evidence justifies the suspicion against the child below the age of criminal responsibility, the criminal proceedings are terminated by the Police and the case is brought before the juvenile court. The pre-trial stage can last from several weeks to several years.

There are approximately 1500 children below the age of criminal responsibility (15 years and younger) in juvenile justice system every year (see table no. 1) subjected to these paternalistic proceedings. Children below the age of criminal responsibility are perceived as objects of care, rather than subjects with appropriate special protection during the whole proceedings. There is number of very serious human rights concerns. *Firstly*, the pre-trial proceedings always resort to formal judicial proceedings before the juvenile court. No diversions are available. *Secondly*, these proceedings do not comply with the basic restorative justice principles since victims are not involved in the process and the sanctions are not apt to restore disturbed relationships. *Thirdly*, the alleged child offender does not

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<sup>29</sup> Conclusions XIX-4(2011).

<sup>30</sup> Conclusions XVII-2(2005).

have access to basic safeguards against ill-treatment in pre-trial stage, including the right of access to legal representation (see below, or other procedural safeguards, e.g. the right to access to police file and to submit evidence during pre-trial stage of proceedings.

Table No. 1: Number of children below the age of criminal responsibility in juvenile justice system<sup>31</sup>

	2008	2009	2010	2011	2012
Number of children BACR detected by the police	2723	2094	1584	1568	1371
Number of acts committed by children BACR detected by the police	2783	2333	1606	1636	1463
Number of pre-trial proceedings terminated on the ground that the perpetrator is a child BACR	3121	2416	1821	1757	1640
Number of cases brought to the juvenile court	3028	2438	1828	1764	1603

The Czech juvenile justice system does not allow for individualised treatment of children below the age of criminal responsibility who are in conflict with the law. Cases of children younger than 15 years of age have to be always brought before a juvenile court even for petty offences, even though it is self-evident that the court proceedings are unreasonable, unnecessary and harmful to a child (see case study no. 1).

In its General Comment No. 10 – Children’s rights in juvenile justice the CRC Committee promoted system built on, *“inter alia, the use of alternative measures such as diversion or restorative justice”*<sup>32</sup> while *“states parties should take measures for dealing with children in conflict with the law without resorting to judicial proceedings as integral part of their juvenile justice system”*<sup>33</sup>. The wide use of diversions is not only an important safeguard against stigmatization but has also *“good results for children and is in the interest of public safety”*<sup>34</sup>. However, in the Czech Republic children below the age of criminal responsibility are excessively stigmatized by formal judicial proceedings even though they regret their actions, have already been punished by their family or other informal environment (or both of them) and try to compensate the victim by all means they can.

#### Case study no. 1 – Patrik

Patrik is 11 years old boy. In September 2011, he and his friend drew several catchwords on the wall of their primary school with a black marker, for example “RHS, you smell like a death dog”, and “Pepsi is only good for dogs”. Total damage was 3,000 Czech korunas (approximately 120 Euros), and concretely Patrik was held liable for damage of 333,

<sup>31</sup> Source: As regards the number of child offenders detected by the police and the number of acts committed by children BACR detected by the police: Police statistics of the Ministry of Interior, available in Czech at: <http://www.mvcr.cz/clanek/statistiky-kriminality-dokumenty.aspx>

As regards the number of pre-trial proceedings terminated on the ground that the perpetrator is a child BACR and the number of cases brought to the juvenile court: Judicial Statistics of the Ministry of Justice. Available in Czech at:

<http://cslav.justice.cz/InfoData/prehledy-statisticky-listu.html;jsessionid=6c8eca560d30c03022b33938963e>

<sup>32</sup> CRC/C/GC/10, 25 April 2007, para. 3.

<sup>33</sup> Ibid., para. 26.

<sup>34</sup> Ibid., para. 25.

Czech korunas (approximately 12 Euros). After two months of examination, the police authority suspended the proceedings under article 159a (2) of the Criminal Procedure Code on a grounds that the offender is a child below the age of criminal responsibility. Even though any further proceedings were aimless and unnecessary, the state prosecutor, following legal obligation stipulated under section 90(1) of the Juvenile Justice Act, filed request for the juvenile court to impose specific measure. In this case the admonishment with warning under section 93(1)(c) of the Juvenile Justice Act. The law does not provide any explicit alternative (diversion) which can be used by police or state prosecutor. Thus, the juvenile court had no other option than to hear the case and decided on its merits, even though it was completely unnecessary. Eventually in January 2012, the juvenile court decided under section 93(10) of the Juvenile Justice Act, to refrain from imposing any of specific measures on a basis that the proceeding before the court itself met its educational aim.

Furthermore, the Czech juvenile justice system does not ensure the healing power accompanying full victim participation throughout proceedings against children below the age of criminal responsibility. Unlike proceeding against juveniles, the proceedings against younger children do not require active victim participation and also do not offer any real procedural possibility for the victim to take active part at any stage of the proceedings.

Table no. 2: Overview of imposed measures<sup>35</sup>

	2008	2009	2010	2011	2012
Refraining from imposing measures <sup>36</sup>	1450	1535	867	547	453
Educational duties (since 1/1/2010)	X	X	X	59	66
Educational restrictions (since 1/1/2010)	X	X	X	7	9
Admonishment with warning (since 1/1/2010)	X	X	X	352	441
Supervision by probationer officer	597	633	375	265	246
Assignment to upbringing programme in educational care centre	139	194	152	136	108
Institutional protective custody	81	88	90	59	41
Institutional forensic treatment (since 1/11/2011)	X	X	X	No data	No data

The 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power recognised victims' rights of access to justice and fair treatment. The UN General Assembly moreover emphasised that where appropriate, like in a juvenile justice system, the *"informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized [...] to facilitate conciliation and*

<sup>35</sup> Source: Judicial Statistics of the Ministry of Justice. Available in Czech at:

<http://cslav.justice.cz/InfoData/prehledy-statistickyh-listu.html;jsessionid=6c8eca560d30c03022b33938963e>

<sup>36</sup> That means that the child is found responsible for the unlawful act but the juvenile court finally decide not to impose any measure. These statistics clearly indicates that extremely high number of children below the age of criminal responsibility is subject to formal trial even though they committed petty offences.

*redress for victims.*<sup>37</sup> Also the CRC Committee in its General Comment no. 10 on juvenile justice recommended the state parties to acknowledge different forms of victims' participation based on restorative justice principles, including mediation and conferences.<sup>38</sup>

In the pre-trial stage, the victim is not officially involved in the proceedings and there is no legal possibility for the police or probation service to put together the perpetrator and the victim, e.g. in a form of mediation or conference. The child and the victim cannot benefit from any form of reparatory mediation. During the trial stage, the victim is not recognised under the Czech law as a concerned party, has no official standing and cannot take an active part. Thus, the victim is fully excluded from the proceedings before the juvenile court. Finally, there is no measure available under the Czech law which would facilitate reparation of damaged relationships between the perpetrator and the victim and their communities (see table no. 2 above).

### ***C) Failure to provide children below the age of criminal responsibility with fundamental safeguards against ill-treatment during the proceedings***

The law does not provide children below the age of criminal responsibility with fundamental safeguards against ill-treatment during the proceedings. Especially problematic is a failure to ensure the right to legal assistance. Children below the age of criminal responsibility do not benefit from this right as they are left without appropriate legal assistance of a lawyer. On the other hand children over 15 have the right for an obligatory defence counsel, whose presence can prevent any abusive tactics and practices from state authorities and help them to prepare their defence, counsel them during the interrogations and support them in the course of the pre-trial proceedings.

We understand that inherent part of "special protection" of children in the course of proceedings before penal authorities is their qualified legal protection. Very clear on legal assistance as part of special protection of children is the CRC Committee. In its General Comment no. 10, the Committee recommends the state parties to "[...] provide as much as possible for adequate trained legal assistance, such as expert lawyers or paralegal professionals".<sup>39</sup> The right to legal assistance in the context of specific social protection of minors has been also stipulated in number of UN and CoE documents related to juvenile justice. The Beijing Rules provides that "*Throughout the proceedings the juvenile shall have the right to be represented by a legal adviser or to apply for free legal aid where there is provision for such aid in the country*". Other documents, for example a guidance note by the Secretary General of the United Nations on the UN Approach to Justice for Children suggests that "*Basic procedural safeguards as set forth in relevant national and international norms and standards shall be guaranteed at all stages of proceedings in state and non-state systems, as well as in international justice. This includes, for example, the right to privacy, the right to legal aid and other types of assistance and the right to challenge decisions with a higher judicial authority.*"

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<sup>37</sup> A/RES/40/34, 29 November 1995.

<sup>38</sup> CRC/C/GC/10, 25 April 2007, para. 27.

<sup>39</sup> CRC/C/GC/10, 25 April 2007, para. 49.

The same standards apply also on the level of Council of Europe. According to the European Court of Human Rights the domestic authorities are required to deal with children suspects with due regard to their vulnerability and to take steps to reduce as far as possible their feeling of intimidation and inhibition. The particular vulnerability of children suspects at the initial stages of police questioning can only be properly compensated for by the assistance of a lawyer.<sup>40</sup> The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (*hereinafter* “the CPT”) lists the right to access to a lawyer together with the right to inform a close relative or a third person of one’s own choice and the right to a doctor as three fundamental safeguards against ill-treatment when the person is detained by the law enforcement authorities. In its 21st General Report<sup>41</sup>, the extract of which was then incorporated into the CPT Standards<sup>42</sup>, the CPT explicitly states that “*the existence of that possibility [access to a lawyer] will have a dissuasive effect upon those minded to ill-treat detained persons. Further, a lawyer is well placed to take appropriate action if ill-treatment actually occurs.*”<sup>43</sup> The right of the child to access to legal assistance is guaranteed also by the Recommendation Re(2003)20 of the Committee of Ministers to member states concerning new ways of dealing with juvenile delinquency and the role of juvenile justice<sup>44</sup> and by the Guidelines on Child-friendly Justice<sup>45</sup>.

Thus, according to UN and CoE human rights standards domestic authorities are required to provide children with effective access to legal assistance whenever they in fact start treating them as a suspect of unlawful act under the penal law. Only early access to qualified assistance by a lawyer would constitute appropriate safeguard against ill-treatment of vulnerable children.

#### **Case study no. 2 – Dominik**

At the time of interrogation Dominik was 14 years old. He suffers from ADHD syndrome. The police heard from local sources that he might have taken part in a group allegedly responsible for burglary in a small cabin in nearby forest. In the afternoon, the police came to Dominik’s home and took him to police station to interrogate him. At that time he was alone, his mother was still at work. At the police station, he was interrogated approximately for four and a half hours, only in the presence of several police officers and child welfare officer, and without being provided with any legal or any other expert assistance. Firstly, he refused to testify but then he succumbed to pressure from police officers and especially the child welfare officer who threatened him by placing him into a closed educational institution. There was no lawyer who could inform him properly about his right to remain silent and who could complain against an abusive way of interrogation and Dominik eventually confessed to everything. The following morning he had a nervous breakdown at school. Despite this, in the afternoon, the police officers

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<sup>40</sup> See, *inter alia*, *Blokhin v. Russia*, judgment of the European Court of Human Rights of 14 November 2013, application no. 47152/06, paras. 157, 159.

<sup>41</sup> 21st General Report of the CPT 1st August 2010 – 31st July 2011, adopted on 10 November 2011, CPT/Inf (2011) 28.

<sup>42</sup> CPT Standards, Strasbourg: December 2013, CPT/Inf/E (2002) 1 – Rev. 2013.

<sup>43</sup> *Ibid.*, chapter I., para. 15.

<sup>44</sup> Recommendation Re(2003)20 of the Committee of Ministers to member states concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, para. 15.

<sup>45</sup> Guidelines of the Committee of Ministers of the Council of Europe on Child-friendly justice, adopted on 17th November 2011, para. 28.

and the child welfare officer came for him again and took him to the police station for interrogation about the very same incident. However, this time he was interrogated as a witness against his alleged adult accomplices. Dominik repeated what he had said the day before. Even though he was in completely different procedural position, this testimony was used as evidence against him.

#### ***D) Conclusions - Article 17 European Social Charter implementation***

**The Czech juvenile justice system does not provide children below the age of criminal with individualised treatment and restorative measures, and there is evident lack of fundamental procedural safeguards against ill-treatment, especially the right to prompt access to a lawyer. Proceedings against children below the age of criminal responsibility cannot qualify for procedures adapted to the child's age. The situation of children below the age of criminal responsibility is thus not in conformity with Article 17 of the Charter.**

### **III. Children in public care**

#### ***A) General Introduction***

The rights of children in public care falls within the scope of Articles 16 and 17 of the Charter. While Article 16 of the Charter requires the States to put in place a system of preventive and remedial measures in order to help families where a child has been removed or may be removed from the family, Article 17 of the Charter obliges the States to ensure that the institutional care is used only as a measure of the last resort and that it is organised on community basis and low capacity model.<sup>46</sup>

The Czech Republic has been criticised on many occasions not only for extremely high number of children being placed outside their family<sup>47</sup>, fourteen children per thousand are placed in alternative care in the Czech Republic, compared to six per thousand in England.<sup>48</sup> Chi Children are placed outside their family even for purely material and financial reasons<sup>49</sup>, and are still placed in the institutional care. This type of care is taking place in large and remote educational institutions, many of them operate closed and strict regime (see table no. 3).

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<sup>46</sup> Secretariat of the ESC, Children's Rights under the European Social Charter, p. 8. The document is available at: [http://www.coe.int/T/DGHL/Monitoring/SocialCharter/Theme%20factsheets/FactsheetChildren\\_en.pdf](http://www.coe.int/T/DGHL/Monitoring/SocialCharter/Theme%20factsheets/FactsheetChildren_en.pdf).

<sup>47</sup> See, *inter alia*, UN Committee on the Rights of the Child, Concluding Observations on the Czech Republic, CRC/C/CZE/CO/3-4, para. 45(a).

<sup>48</sup> Lumos, Péče o ohrožené děti v České republice (*System of care for vulnerable children in the Czech Republic*), 2014, p. 9. Unpublished.

<sup>49</sup> See, *inter alia*, UN Committee on the Rights of the Child, Concluding Observations on the Czech Republic, CRC/C/CZE/CO/3-4, para. 45(a).

Table no. 3: Number of children placed in institutional facilities falling within the competence of the Ministry of Education<sup>50</sup>

	2008/ 2009	2009/ 2010	2010/ 2011	2011/ 2012	2012/ 2013	2013/ 2014
The number of children placed in institutional facilities falling within the competence of Ministry of Education	7820	7878	7397	7150	6941	6549
Children's homes	4739	4704	4628	4451	4442	4253
Children's homes with school	742	787	760	761	713	697
Closed educational institutions	1546	1534	1415	1395	1269	1146
Diagnostic institutions <sup>51</sup>	713	853	564	543	517	453

There are practically two different types of institutional facilities for children. First, the open-ones, designed for children without significant behavioural problems, who attend ordinary schools with other children (children's homes). Second, the closed-ones, designed for children with behavioural problems or children in conflict with the law who attend school within the facility (children's homes with school for children up to 15 and closed educational facilities for children over 15). The maximum capacity of children's homes, children's homes with school and closed educational institutions is 48 children.<sup>52</sup> Residential settings of this size have been proved to be ineffective as a solution to problem behaviours<sup>53</sup>. Moreover it has been shown that children and young people who have committed serious crime offences are being placed in the same institutions with children with only minor behavioural problems (such as school truancy) in the Czech Republic<sup>54</sup>, putting the latter at significant risk of harm and making the stay ineffective in preventing future problem behaviours since children who showed less serious problem behaviours before placement are likely to be "introduced" during their stay in the institution into more serious criminal practices by those with history of more serious delinquent behaviours.

<sup>50</sup> Statistical Yearbook of Education – performance indicators for school years 2008/2009, 2009/2010, 2010/2011, 2011/2012, 2012/2013 and 2013/2014. Available at: <http://toiler.uiv.cz/rocenka/rocenka.aasp>.

In addition to the institutional facilities falling under the competence of the Ministry of Education, children may be placed also in social care homes (children with disabilities) or in facilities for children requiring emergency help both falling within the competence of the Ministry of Labour and Social Affairs. The Table thus does not include the total number of children living in institutional care.

<sup>51</sup> The diagnostic institutions used to functions as „gateway“ to the system of institutional care since when the court decided on placing the child in institutional care the child usually went first to the diagnostic institution for the maximum period of 8 weeks and the diagnostic institution then decided on the concrete institution where the child would live, including whether the institution would be open or closed-one. Since the new civil code came into force on 1st January 2014 the concrete institution is decided on by the civil courts. But the civil court can still place a child for a temporary period into the diagnostic institution. In addition, the diagnostic institutions offer also so-called „voluntary stays for children“ usually on request of the parents. That is why there is still certain number of children living in diagnostic institutions.

<sup>52</sup> Act no. 109/2002 Coll., on Preventive Educational Care and Institutional and Protective Upbringing, § 4.

<sup>53</sup> See e.g. Greenwood, Peter W.; Rand, Susan Turner, Evaluation of the paint creek youth center: a residential program for serious delinquents. *Criminology*, 1993, vol. 31. no. 2, pp. 263-279.

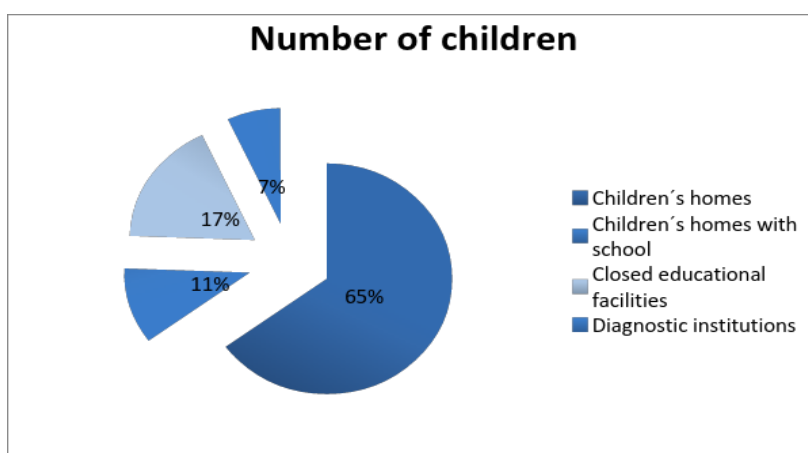
<sup>54</sup> See Kuchařová, Věra a kol., Zhodnocení a optimalizace řízení systému sociálně-právní ochrany (ohrožených) dětí a rodin ve vybraných regionech, Praha, Výzkumný ústav práce a sociálních věcí, 2010, p. 284.



Following long-term criticism by international bodies as well as two judgments of the European Court of Human Rights<sup>55</sup>, the Czech Republic adopted the National Action Plan of Transformation and Unification of care of Children at Risk for the period 2009 – 2011 (*hereinafter* “the National Action Plan”). Nevertheless, the goals of the National Action Plans have not been achieved in the anticipated term and several activities, including development of methodologies and pilot transformation of institutional facilities have been included in later National Strategy to Protect Children’s Rights<sup>56</sup> for the period 2012 – 2018 (*hereinafter* “the National Strategy”).

The aim of National Strategy is to implement the last Concluding Observations of the UN Committee on the Rights of the Child adopted in August 2011 and transform the current child protection system into more supportive rather than restrictive with an emphasis on preventive and remedial services rather than institutional care. However introduced transformation does not to include all categories of children at risk. Especially children who are, due to their behavioural problems, placed in closed educational facilities (children placed in children’s homes with school and closed educational institutions), seem to have no benefit from the ongoing activities. Those children represent approximately one third of all children placed in institutional facilities as described above (see diagram no. 1). This situation is a consequence of several reasons which will be addressed below.

Diagram no. 1: The percentage of children placed in closed educational institutions<sup>57</sup>



### ***B) Failure to put in place one coordinating authority with real powers for the process of transformation***

The child protection system is fragmented. Responsibility is divided among several ministries and other bodies. There is lack of one concrete authority responsible for both implementation of children rights in general and process of transformation in particular.

<sup>55</sup> *Wallová and Walla v. the Czech Republic*, judgment of the European Court of Human Rights of 26 October 2006, application no. 23848/04; *Havelka and others v. the Czech Republic*, judgment of the European Court of Human Rights of 21 June 2007, application no. 23499/06.

<sup>56</sup> Public Defender of Rights, Report of Systematic Visits to Institutions for Children, 2011, p. 17. The Report is available at: [http://www.ochrance.cz/fileadmin/user\\_upload/ochrana\\_osob/2012/2012\\_skolska-zarizeni.pdf](http://www.ochrance.cz/fileadmin/user_upload/ochrana_osob/2012/2012_skolska-zarizeni.pdf)

<sup>57</sup> Statistical Yearbook of Education – performance indicators for school years 2008/2009, 2009/2010, 2010/2011, 2011/2012, 2012/2013 and 2013/2014. Available at: <http://toiler.uiv.cz/roценка/roценка.aasp>

Absence of specific authority which would bear the responsibility was also identified as one of the major obstacles to effective transformation with the adoption of National Action Plan in 2009.<sup>58</sup> Topics and issues concerning children at risk are dealt by three different ministries. First, the Ministry of Labour and Social Affairs bears responsibility for social services and social care homes, Child Protection Authorities and facilities for children requiring emergency assistance. Second, the Ministry of Education is responsible for institutional facilities for children, special preventive centres, diagnostic institutions, children homes and closed children homes. And third, the Ministry of Health is responsible for institutional facilities for children up to 3 years of age. Among the mentioned ministries, the Ministry of Labour and Social Affairs (*hereinafter* „MoLSA“) has been mandated to monitor the implementation of the UN Convention on the Rights of the Child.

The National Action Plan adopted in 2009 delegated the responsibility for the realisation and coordination of the transformation process to the Ministry of Labour and Social Affairs. Nevertheless, this type of coordination could be considered as purely “horizontal” since MoLSA has no superior position and powers with respect to other competent ministries. Also the UN Committee on the Rights of the Child expressed its concern that the State party’s sectorial approach to the Convention led to fragmentation of its implementation<sup>59</sup> and recommended the Czech republic “*to establish an effective mechanism or substantially strengthen its existing mechanism, under the Ministry of Labour and Social Affairs, for coordinating the implementation of child rights policy amongst all the relevant bodies and institutions and at all levels*”<sup>60</sup>. It is worth noting that in the Slovak Republic which has the same historical and legislative background also in the area of child protection system shifted responsibility for institutional facilities from the Ministry of Education to the Ministry of Labour and Social Affairs already in 1998 and this legislative change is widely considered as one of the most important factors facilitating the transformation process.<sup>61</sup>

Unification of childcare system is one of the objectives of current National Strategy (the objective no. 12). One of key activities within this objective was to make the legislative changes that would lead to unification of the system of protection of children rights and care of vulnerable children, and strengthening the coordination role of the MoLSA by the end of 2014.<sup>62</sup> However, not only that there have been no legislative changes in this regard, but it seems that the Ministry of Education, which is currently responsible for institutional facilities for children, is reluctant to support unification of the system. Moreover, it does not support the idea of potential transfer of its competences to the MoLSA and the transformation process in general.<sup>63</sup>

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<sup>58</sup> The National Action Plan of Transformation and Unification of care of Children at Risk for the period 2009 – 2011. The Plan is available at: <http://www.mpsv.cz/files/clanky/7440/NAP.pdf>.

<sup>59</sup> UN Committee on the Rights of the Child, Concluding Observations on the Czech Republic, CRC/C/CZE/CO/3-4, para. 14.

<sup>60</sup> *Ibid.*, para. 15.

<sup>61</sup> Lýdia Marošiová (ed.), Transformácia náhradnej starostlivosti o deti na Slovensku po roku 1989 – Report of qualitative research with context analysis (Návrat, 2012). Available at:

<http://www.nadacesirius.cz/soubory/prilohy/transformace-nahradni-pece-na-slovensku-po-roce-89.pdf>

<sup>62</sup> The National Strategy is available at: <http://www.mpsv.cz/files/clanky/13456/strategy.pdf>

<sup>63</sup> This position of the Ministry of Education is apparent even from the Intention of Concept of Management and Development of Institutional Facilities Founded by the Ministry for 2014 – 2020, the Ministry adopted in 2014.

Since children with behavioural problems fall especially within the competence of the Ministry of Education (see below) the fragmentation of competences within the child protection system may be considered as a significant barrier to the effective implementation of Articles 16 and 17 of the Charter.

### ***C) Failure to take steps in order to transform the institutional care for children***

Article 17 of the Charter does not exclude the use of institutional care but strictly requires that it is used only exceptionally and that it is adequate. According to the European Committee of Social Rights the adequate institutional care is such care that is organised in small units and should be as close to a family setting as possible.<sup>64</sup> In its Conclusions with respect to Hungary<sup>65</sup> the Committee further emphasised that in order to be considered as adequate institutions should provide a life of human dignity for the children placed and shall provide conditions promoting their growth, physically, mentally and socially. The Committee noted: *“A unit in a child welfare institution shall resemble the home and shall not be larger than 10 children”*.<sup>66</sup>

The immediate obligation<sup>67</sup> deriving from Article 17 of the Charter is to take steps in order to progressively achieve the full realization of the rights it guarantees. These steps shall not consist only in **legal action**, but also in **practical action** to give full effect to the rights recognized by the Charter.<sup>68</sup> The Czech Republic is thus obliged to at least take legal and practical steps in order to transform the big institutional settings accommodating high number of children into smaller and community-based units. In addition, such a transformation shall include all institutions for children.<sup>69</sup>

In the Czech Republic, the open institutions for children (children’s homes) are founded and funded by regions, the closed-institutions accommodating children with severe behavioural problems (children’s homes with school and closed educational institutions) are founded and financed directly by the Ministry of Education.<sup>70</sup>

As mentioned above the transformation process has been initiated and is realised and coordinated by the MoLSA while the Ministry of Education does not really participate. In order to promote transformation the MoLSA realises so-called “individual project”, designed for regions or organisations founded by regions within which the beneficiaries of funding

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<sup>64</sup> Secretariat of the ESC, Children’s Rights under the European Social Charter, p. 8. The document is available at: [http://www.coe.int/T/DGHL/Monitoring/SocialCharter/Theme%20factsheets/FactsheetChildren\\_en.pdf](http://www.coe.int/T/DGHL/Monitoring/SocialCharter/Theme%20factsheets/FactsheetChildren_en.pdf)

<sup>65</sup> ECSR, Conclusions VII-2 (Hungary).

<sup>66</sup> According to the Statistical Yearbook of Education for the school year 2013/2014 from the total number of 59 children’s homes with school and closed educational institutions there was only one not founded by the Ministry of Education but by a private body. The Yearbook is available at:

<http://toiler.uiv.cz/rocnka/rocnka.aasp>

<sup>67</sup> UN Committee on economic, social and cultural rights, General Comment no. 3 – The nature of State parties obligations, para. 2.

<sup>68</sup> International Association Autism-Europe (IAAE) v. France, collective complaint no. 13/2002, Resolution ResChS(2004)1 adopted on 10 March 2004.

<sup>69</sup> Appendix to the European Social Charter – Scope of the European Social Charter in terms of persons protected.

<sup>70</sup> See the Statistical Yearbook of Education for school year 2013/2014. The Yearbook is available at: <http://toiler.uiv.cz/rocnka/rocnka.aasp>

should, *inter alia*, prepare a pilot transformation plan.<sup>71</sup> Transformation of the children's homes can be supported from this project since they are founded by the regions. Unfortunately the regional authorities in the Czech Republic have showed little interest in transformation of children's homes so far. Only two regional authorities from fourteen regional authorities in the Czech Republic reacted positively to an offer by MoLSA of significant financial support to the transformation. Thus transformation of only 6 out of the total number of 144 children's will be planned.

The closed institutional facilities accommodating children with behavioural problems are not founded by the regions but by the Ministry of Education, therefore they stand out of the reach of the project and thus out of the whole transformation process. The Ministry of Education itself has adopted so far the Intention of Concept of Management and Development of Institutional Facilities Founded by the Ministry for 2014 – 2020 (*hereinafter* "the Intention").<sup>72</sup>

Adopted Intention is vague in formulating its goals and does not stipulate any concrete actions except for closing down 4, resp. 5<sup>73</sup>, closed institutions, especially due to long-term low number of children placed there and high costs for building operation and founding 2 preventive educational centres. According to the Intention further steps will be taken after having analysed the needs for institutional and preventive educational care in different regions. Furthermore, it seems that the Intention does not assume to transform the current facilities, often situated in remote areas and inadequate buildings, but rather plans to still use them for preventive educational care. Nor does it plan to reduce their maximum capacity. Further, even though the Intention mentions multidisciplinary approach, it does not really reflect the process initiated and supported by the MoSLA and has purely departmental nature.

Therefore, it can be concluded that steps taken in order to transform the child protection system with respect to children living in closed educational institutions are formal and vague rather than practical and effective and does not seek to achieve the objectives of the Charter as defined above, i.e. system of care on community basis and low capacity model. On the contrary, they seem to preserve the current institutional facilities while redefining the residential services they should provide.

***D) The system fails to ensure adequate, accessible and affordable community-based services which would prevent institutionalisation of children such as family support, housing support, street-work and ambulatory services for children and families at risk***

As mentioned above, the Committee emphasizes that „*any restriction or limitations of parents custodial rights [...] should not go beyond what is necessary for the protection and rehabilitation of the family*“.<sup>74</sup> Removal of the child from his or her family is one of the most

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<sup>71</sup> The MoLSA, Metodika zpracování plánů transformace pobytových zařízení v oblasti péče o ohrožené děti [Methodology of Processing the Transformation Plans of Institutional Facilities for Children], 2014. The Methodology is available at: [http://www.mpsv.cz/files/clanky/18291/priloha\\_7.pdf](http://www.mpsv.cz/files/clanky/18291/priloha_7.pdf)

<sup>72</sup> The Intention is available at: [http://www.msmt.cz/file/34169\\_1\\_1/](http://www.msmt.cz/file/34169_1_1/)

<sup>73</sup> Closure of the 5<sup>th</sup> closed institution has not yet been decided definitely.

<sup>74</sup> Secretariat of the ESC, Children's Rights under the European Social Charter, p. 8. The document is available at: [http://www.coe.int/T/DGHL/Monitoring/SocialCharter/Theme%20factsheets/FactsheetChildren\\_en.pdf](http://www.coe.int/T/DGHL/Monitoring/SocialCharter/Theme%20factsheets/FactsheetChildren_en.pdf)

restrictive measures and significantly restricts parents' custodial rights thus must comply with the criterion of necessity for protection and rehabilitation of the child and his or her family. Therefore, even institutional care shall be eligible to bring some benefit for the child as regards his or her safety and development<sup>75</sup>. Children may be placed in institutional care only if the institutionalisation can objectively help them to solve their problems. On the contrary, the institutional care shall not be ordered for the only reason that there are no appropriate community-based services available and have for its only purpose to isolate the child from society. In addition, even if the institutional care was eligible to ensure the child's safety and development, it should be still used only as a measure of the last resort.<sup>76</sup>

The child protection system anticipated by the Charter should be thus built primarily on community-based services, such as family and housing support, street-work and ambulatory services which are **adequate, accessible and affordable for all children and their families**, including children with behavioural problems. However, in the Czech Republic there is significant lack of community-based services for vulnerable children and families. Both children without and with behavioural problems are very often placed in institutional care, even though it is not appropriate and strictly necessary. The only reason for adopting such a measure is that there are no other measures and services which would be more appropriate, e.g. community-based family and housing support which could prevent placements of children without behavioural problems into children's homes, or street work, child psychologists and therapy programs, probation programs, programs for coping with aggression, programs to tackle drug addiction etc. which could prevent institutionalization of children with behavioural problems.

The main pillar of the child protection with respect to children without behavioural problems and the most important type of community-based services which can prevent placements in children's homes are so called "social-activation services for families with children" (*hereinafter "activation services"*). According to the law the task of the activation services is to provide support to vulnerable families with children at risk with the aim of preventing institutionalization. Where they are available, the activation services have been effective in preventing placements in children's homes. Admissions of new children to children's homes are significantly lower in the regions with good accessibility of activation services.<sup>77</sup> Unfortunately accessibility of activation services is very poor in many regions. A family support worker from an activation service can support maximum of eight vulnerable families at the same time. In some regions of the Czech Republic, there are up to eighty vulnerable families per one support worker.<sup>78</sup> A study found that no support was provided to the family in almost eighty percent of cases of children placed in institutional care.<sup>79</sup>

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<sup>75</sup> See Article 6 § 2 of the UN Convention on the Rights of the Child, requiring State parties to ensure to the maximum extent possible the survival and development of the child.

<sup>76</sup> UN Committee on the Rights of the Child, Concluding Observations on the Czech Republic, CRC/C/CZE/CO/3-4, para. 46(a).

<sup>77</sup> According to Lumos calculations based on Statistical Yearbook of Education two children per ten thousand children were admitted to children's Pardubice region where activation services are well accessible compared to national average of six children per ten thousand and nine to ten children per ten thousand in regions with poor accessibility of activation services.

<sup>78</sup> Lumos, *Péče o ohrožené děti v České republice (System of care for vulnerable children in the Czech Republic)*, 2014, p. 9. Unpublished.

<sup>79</sup> *Ibid.*, p. 8.

Furthermore, housing support is often not accessible to families in need in the Czech Republic. More than a half of all children placed in institutional care are still being placed there because their families don't have adequate housing and are not provided with any housing support.<sup>80</sup>

In result, numbers of children placed in children's homes in the Czech Republic remain very high. There were even more children per ten thousand children in the child population placed in children's homes in 2013 than in 2001.<sup>81</sup>

According to the law, the main pillar of the child protection system with respect to children with behavioural problems are so-called educational care centres (*hereinafter* "the centres"). The task of the centre is to facilitate preventive educational care for children with behavioural problems, drug addiction or to children who have committed unlawful acts. They provide services also to the parents and schools. The National Action Plan from 2009 and the Framework Concept relating thereto and adopted by the Ministry of Education for its area of competence anticipated to analyse the individual needs of regions, to create a concept of the centres including unification of methodologies and expansion of their activities for children and their families. These activities should have been followed by redirection of financial flows in order to create available, accessible and affordable net of the centres.<sup>82</sup> However the only step taken was the adoption of amendment to the Act on Preventive Educational Care and Institutional and Protective Upbringing no. 109/2002 Coll. in 2012 with an aim to promote availability of centres as well as services they may provide to children and their families, including street-work services.<sup>83</sup> The Office of the Public Defender of Rights stated in his report of 2013 that there are regions where centres and their services were practically unavailable.<sup>84</sup> According to the registry administered by the Ministry of Education there are currently only 17 centres while none out of them provides street-work services.<sup>85</sup> Furthermore, nine out of the 17 centres are joined to institutional facilities for children, mostly children homes with school and closed educational institutions.<sup>86</sup>

Another issue emerges from the financing of the stay in these centres. Although the preventive educational care for children with behavioural problems is provided for free, the family of the child must provide payment for accommodation and food. Therefore, the financial burden of payment for stay represents another impediment in access of this type of service for financially weak families. Taken into account that social reasons in combination

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<sup>80</sup> *Ibid.*, p. 11.

<sup>81</sup> There were 28 children per ten thousand placed in children's homes in 2013, compared to 26 in 2011 according to Lumos calculations based on Statistical Yearbook of Education.

<sup>82</sup> Public Defender of Rights, Report of systematic visits to preventive educational centres, 2013, para.

<sup>83</sup> *Ibid.*, § 16/3(d).

<sup>84</sup> Public Defender of Rights, Report of systematic visits to preventive educational centres, 2013, p. 12 – 13. The Report is available at: [http://www.ochrance.cz/fileadmin/user\\_upload/ochrana\\_osob/2013/NZ-27\\_2012-strediska-vychovne-pece.pdf](http://www.ochrance.cz/fileadmin/user_upload/ochrana_osob/2013/NZ-27_2012-strediska-vychovne-pece.pdf)

<sup>85</sup> See the Statistical Yearbook of Education for school year 2013/2014. The Yearbook is available at: <http://toiler.uiv.cz/rocenka/rocenka.asp>

<sup>86</sup> Ministry of Education, the Registry of Schools and School Facilities. The Registry is available at: <http://www.msmt.cz/ministerstvo/odkazy/rejstrik-skol-a-skolskych-zarizeni?lang=1>

with other problems represent the most frequent cause for institutional care<sup>87</sup>, this means that this type of services is inaccessible for the most vulnerable children because they are unaffordable for their families.

#### ***E) Conclusions - Article 17 European Social Charter implementation***

In 2009 and 2012 the Czech Republic introduced strategies on transformation of the child protection system, however there have been no legal and practical measures adopted in order to include all children who are at risk. **Even though the legislative amendments in order to unify the system should have been adopted by 2014, the state failed to achieve this goal and the system still stays significantly fragmented. As a consequence, children with behavioural problems living in closed educational facilities are deprived of their rights guaranteed under Articles 16 and 17 of the Charter, since the Ministry of Education which still bears responsibility over these institutions, does not participate in the transformation process coordinated by the Ministry of Labour and Social Affairs. Moreover, the measures the Ministry of Education anticipates to adopt cannot be considered as legal and practical. Therefore, the Czech Republic is not in conformity with Articles 16 and 17 of the Charter with respect to children with behavioural problems.**

## **IV.**

### **Immigration detention of families with children**

#### ***A) Situation in the Czech Republic***

The Czech Republic routinely detains families with underage children for immigration purposes, mostly for the purpose of deportation or their transfer under the EU Regulation No 604/2013 (*hereinafter* „Dublin regulation”). Families with children can be detained for up to three months awaiting their deportation or transfer under the Dublin regulation.

In the Czech Republic, they are held in the detention centre for foreign nationals in *Bělá Jezová*. It is the only detention centre for foreign nationals in the Czech Republic and used to detain foreign nationals as well as asylum seekers. It is located in a remote area, surrounded by woods, approximately 80km from Prague. The detention centre has capacity to accommodate 270 persons. Majority of its population are males awaiting deportation or so called “Dublin” transfer. Families with children are accommodated in a separate part A designated for women and families. The accommodation units are surrounded by fence with barbed wire, the centre is guarded 24 hours by uniformed private security forces. Families has no means to prepare their own food, children are served the same food as adults. The daily allowances for milk are limited to one glass a day. The social and outdoor activities are also limited, often to one hour a day upon disposal of the staff responsible for the activities. The centre employs one doctor and one nurse who are present on working days. Health care is very problematic, as detained persons, including children are entitled only to urgent care.

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<sup>87</sup> Public Defender of Rights, Report of Systematic Visits to Institutions for Children, 2011, para. 62. The Report is available at: [http://www.ochrance.cz/fileadmin/user\\_upload/ochrana\\_osob/2012/2012\\_skolska-zarizeni.pdf](http://www.ochrance.cz/fileadmin/user_upload/ochrana_osob/2012/2012_skolska-zarizeni.pdf)

Children in school age (6-14) attend local school, the rest of them stay the whole day in the detention centre.

Leaving aside the question of necessity of such detention, the detention centre *Bělá Jezová* is **absolutely inappropriate to detain families with children**. It affects substantially their family life. Detention has very negative psychological effect on child's development and well-being. The detention has also financial implications on families as the costs of accommodation and meals are to be paid from their savings. Moreover, there are available alternatives to accommodate families with children, namely the closed reception centre in *Zastávka* or one of the two refugee camps in *Kostelec nad Orlicí* or *Havířov*. The law also enables the alternative to detention in the form of private accommodation combined with regular reporting at the police station or financial guarantee. Neither alternative is used in practice.

#### **Case study no. 1 – M.K. with J. K.**

Single mother with three years old daughter were detained for the purpose of deportation for 36 days. The child had health problems during detention and was traumatized by the transfer to the centre and conditions in detention. No child psychologist was secured. After filing an appeal with the court, they were released on the ground that police failed to consider the alternative to detention in the form of private accommodation with regular reporting obligation.

#### **Case study no. 2 – Afghan family with 9 children**

The family of two parents with nine underage children has been detained for almost two months for the purpose of their transfer to Hungary under the Dublin regulation. They complained of the length duration of the Dublin transfer, conditions in detention and the fact that all their savings in the amount of ca. 1000 euros has been consumed for accommodation and food at detention centre. This is in fact reality for a number of refugee families with underage children, coming from Syria, Afghanistan, Chechnya and Kosovo. Currently over 10 families with children are detained in the centre, pending their transfer under Dublin regulation.

### ***B) International standards regarding immigration detention of families with children***

The UN Committee on the Rights of the Child maintains that *„children should not be criminalized or subject to punitive measures because of their or their parents' migration status. The detention of a child because of their or their parent's migration status constitutes a child rights violation and **always contravenes the principle of the best interests of the child**. In this light, States should expeditiously and completely cease the detention of children on the basis of their immigration status.“*<sup>88</sup> The same principle is contained in the UNHCR Detention Guidelines: *„Overall an ethic of care – and not enforcement – needs to govern*

<sup>88</sup> UN Committee on the Rights of the Child, Report of the 2012 Day of General Discussion, *The Rights of All Children in Context of International Migration*, para. 78.



*interactions with asylum-seeking children, including children in families, with the best interests of the child a primary consideration. The extreme vulnerability of a child takes precedence over the status of an “illegal alien.”*<sup>89</sup>

European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) takes similar approach towards immigration detention of families with children. The CPT considers that every effort should be made to avoid resorting to the deprivation of liberty of an irregular migrant who is a minor. Following the principle of the “best interests of the child”, as formulated in Article 3 of the United Nations Convention on the Rights of the Child, detention of children, including unaccompanied and separated children, is rarely justified and, in the Committee’s view, can certainly not be motivated solely by the absence of residence status.<sup>90</sup>

The UN Committee on the Rights of the Child in its concluding observations **regarding the Czech Republic** maintained that it *“remains seriously concerned about the continuing practice of detaining asylum-seekers, including children. While noting the State party’s ongoing efforts to improve the situation, the Committee is concerned at the situation of detained asylum-seeking families and guardians with minors at the specialized detention centre in Bela-Jezova which does not meet the required standard for asylum-seeking children’s well-being and their best interests.”*<sup>91</sup> The Committee recommended that the State party consider all possible alternatives, including unconditional release, prior to detention and emphasizes that this should not be limited to unaccompanied or separated minors, but extended to **all cases involving children**.

The European Court of Human Rights in cases of *Muskhadzhiyeva and others v. Belgium*<sup>92</sup> and *Popov v. France*<sup>93</sup> strongly condemned immigration detention of families with children. The Court in *Popov* maintained that, in spite of the fact that children were accompanied by their parents, and even though the detention centre had a special wing for the accommodation of families, the children’s particular situation was not examined and the authorities did not verify that the placement in administrative detention was a measure of last resort for which no alternative was available.<sup>94</sup> The Court found in both cases that the immigration detention of families with children had violated their rights to protection of family life, and in case of children also Article 3 a 5 of the Convention. In *Popov*, where a family with two children has been detained for two weeks in immigration detention, the Court held, that the conditions in which the children were held, for fifteen days, in an adult environment, faced with a strong police presence, without any activities to keep them occupied, added to the parents’ distress, were manifestly ill-adapted to their age. The two children, a small girl of three and a baby, found themselves in a situation of particular

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<sup>89</sup> UNHCR, *Detention Guidelines*, 2012, para. 52.

<sup>90</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *CPT Standards*, December 2013, para. 97.

<sup>91</sup> UN Committee on the Rights of the Child, *Concluding observations: Czech Republic*, 4 August 2011, CRC/C/CZE/CO/3-4, para. 63-64.

<sup>92</sup> *Muskhadzhiyeva and other v. Belgium*, application no. 41442/07, judgment of 19 January 2010.

<sup>93</sup> *Popov v. France*, application nos. 39472/07 and 39474/07, judgment of 19 January 2012.

<sup>94</sup> *Ibid*, para. 119.

vulnerability, accentuated by the confinement. Those living conditions inevitably created for them a situation of stress and anxiety, with particularly traumatic consequences.<sup>95</sup>

### ***C) Conclusions – Article 17 European Social Charter Implementation***

**The immigration detention of families with children is not used as a measure of last resort. The Czech Republic uses immigration detention of families with children as a routine measure, without conducting necessary individual assessment and without using available alternatives of detention in practice. The conditions of detention are not adequate for accommodating families with children. The situation of immigrant and refugee families with children is thus not in conformity with Article 17 of the Charter.**

## **V.**

### **Access to justice for children**

#### ***A) Right of the child to access to justice under the Charter***

The Committee has not yet had the occasion to comment whether Article 17 of the Charter covers the issues relating to access to justice for children. Nevertheless, it has been emphasised that *“national legislation must provide a possibility to lodge an appeal against a decision to restrict parental rights, to take a child into public care or to restrict the right to access of the child’s closest family. Further a procedure must exist for complaining about the care and treatment in institutions.”*<sup>96</sup> Since Article 17 of the Charter as well as the whole Charter should be interpreted with due regard to the UN Convention on the Rights of the Child as well as other binding international documents<sup>97</sup>, including the European Convention on the Exercise of Children’s Rights (*hereinafter* “the ECECR”), it is appropriate to argue that Article 17 of the Charter also guarantees children **the right to access to justice** while this right should be understood in a broad sense in order to cover family proceedings as defined by Article 1 § 3 of the ECECR as well as complaint mechanisms for children in institutional care.

#### ***B) Failure to provide children with practical and effective representation in family proceedings***

Article 17 of the Charter reflects the fundamental right that children, as people, must be able to access justice when their rights have been violated. Article 17 also stipulates that, for the right to be adequately implemented, it must be **practical and effective**. This means mechanisms must be put in place to make justice systems accessible to children and to ensure those justice systems provide meaningful remedies.

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<sup>95</sup> *Ibid*, para. 102.

<sup>96</sup> Secretariat of the ESC, Children’s Rights under the European Social Charter, p. 8. The document is available at: [http://www.coe.int/T/DGHL/Monitoring/SocialCharter/Theme%20factsheets/FactsheetChildren\\_en.pdf](http://www.coe.int/T/DGHL/Monitoring/SocialCharter/Theme%20factsheets/FactsheetChildren_en.pdf).

<sup>97</sup> Defence for Children International (DCI) v. The Netherlands, collective complaint no. 47/2008, Resolution CM/ResChS(2010)6 adopted on 7 July 2010, paras. 28, 29, 35.

The Guidelines on Child-friendly justice stipulate that “as bearers of rights, children should have recourse to remedies to effectively exercise their rights and act upon violations of their rights. The domestic law should facilitate where appropriate the possibility of access to court for children who have sufficient understanding of their rights as well as of the use of remedies to protect these rights, based on adequately given legal advice.”<sup>98</sup> Children, due to their immaturity, may require support to enable them to take part in judicial proceedings above that usually provided to adults. In judicial proceedings this support is most typically provided by a guardian *ad litem*. The guardian *ad litem* has specific legal obligations in order to ensure that the child can participate in the proceedings in a way that is proportionate to his or her age, maturity, special needs and, to the greatest extent possible, in accordance with his or her wishes.

These obligations are particularly formulated in Article 10 § 1 of the ECECR which require the special representative of the child to:

- a) provide all relevant information to the child;
- b) provide explanations to the child concerning the possible consequences of compliance with his or her views and the possible consequences of any action by the representative; and
- c) determine the views of the child and present the views to the judicial authority.

According to Article 10 of the ECECR these obligations do not apply only if it is manifestly contrary to the best interest of the child.

In the Czech Republic the guardian *ad litem* is, in the majority of family proceedings, a representative of the Child Protection Authority (*hereinafter* “CPA”).<sup>99</sup> The CPA is the State authority responsible for the public protection of the child. To fulfil its duties the CPA is required to occupy two roles: the first role is the promoter and supporter of the rights of children and the family; the second role is the policer of the rights of children and the family. In our experience this role duality often results in CPA representatives undermining the rights of the child, rather than upholding them.

For example, even though Czech law<sup>100</sup> stipulates that a child has the right to information about the judicial proceedings concerning them, CPA appointed guardian *ad litem* routinely fail to inform children about the dates of judicial hearings, the decisions issued by the civil court (*including those resulting in placement of the child in institutional care*) or about their right to appeal decisions made about them.<sup>101</sup> Furthermore the CPA appointed guardian *ad litem* is habitually served with the court’s decision instead of the child. The guardian *ad litem* then usually decides whether to appeal the decision without even consulting the child on that matter. In our experience the CAP does not appeal decisions, even where it is decided to place children into institutional care and remove them from their family.<sup>102</sup>

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<sup>98</sup> Guidelines of the Committee of Ministers of the Council of Europe on Child-friendly justice, adopted on 17th November 2011, para. 34.

<sup>99</sup> Act no. 292/2013 Coll., on Special Civil Procedures, § 455/1.

<sup>100</sup> UN Committee on the Rights of the Child, Concluding Observations on the Czech Republic, CRC/C/CZE/CO/3-4, para. 34.

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*

The CPA representatives therefore fail to understand that when acting as a guardian *ad litem* the procedural rights still belong to the child. The CPA (as a State authority) does not hold the child's right in substitution through guardian *ad litem*, rather guardian *ad litem* must promote every child's procedural rights and ensure their full participation and inclusion. We therefore conclude that CPA appointed guardian as *ad litem* guardian too often impede access to justice for children when they are mandated to promote it.

A further complexity presented by the mandate of the CPA, and reflective of its' dual role, is that proceedings concerning the removal of the child from their family are often initiated by the CPA itself. Even where the CPA has initiated such a case the law still sets forth that the CPA should be appointed to represent the child as a guardian *ad litem*.<sup>103</sup>

This conflict has been criticised both by international bodies, especially by the European Court of Human Rights in case *Havelka and other v. the Czech Republic*<sup>104</sup>, as well as by national human rights and children's rights bodies including the Ombudsperson's office<sup>105</sup> and the government's Committee on the rights of the child<sup>106</sup>.

The new Act on Special Civil Procedures no. 292/2013 Coll. (effective since 1<sup>st</sup> January 2014) should have brought, as a reaction to the mentioned criticism, significant changes in this regard. According to the new Act, children or their families have the right to request a replacement of the CPA representative for another guardian *ad litem* if the proceedings have been initiated by the CPA. However, this mechanism still cannot be considered as effective procedural safeguard for the child. The law should prohibit the child being represented by a CPA representative in such cases since there is obvious conflict of interests.

### Case study no. 3 - Nikola

Nikola 15 was years old when the court decided, upon an application of the CPA, to issue a preliminary order and place her in closed regime institutional facility (diagnostic institution). The reason was that Nikola's mother had serious drug related issues and Nikola herself manifested behavioural problems. The court provided Nikola with a CPA appointed guardian *ad litem*. According to the law the preliminary order should last one month but its duration may be repeatedly prolonged, on each occasion for not more than one month. Nikola's preliminary order was prolonged twice. Nikola has never had the opportunity to read the decisions on the prolongation and has never been consulted by the CPA on whether she wished to appeal against it despite raising her disagreement about her removal from her mother and her placement in the diagnostic institution resulting in her deprivation of liberty. The court's decision to prolong the preliminary orders was unlawful because of their absence of reason. Nevertheless, even though

<sup>103</sup> Act no. 292/2013 Coll., on Special Civil Procedures, § 455.

<sup>104</sup> *Havelka and others v. the Czech Republic*, judgment of the European Court of Human Rights of 21 June 2007, application no. 23499/06, para. 62.

<sup>105</sup> Public Defender of Rights, Report of Systematic Visits to Institutions for Children, 2011, paras. 83 - 84. The Report is available at: [http://www.ochrance.cz/fileadmin/user\\_upload/ochrana\\_osob/2012/2012\\_skolska-zarizeni.pdf](http://www.ochrance.cz/fileadmin/user_upload/ochrana_osob/2012/2012_skolska-zarizeni.pdf).

<sup>106</sup> Government's Committee on the Rights of the Child. Incentive to adopt legislative amendments in the area of representation of the child in judicial proceedings, adopted 18 August 2011. The Incentive is available at: <http://www.vlada.cz/assets/ppov/rlp/vybory/pro-prava-ditete/Prijata-usneseni-vyboru-pro-prava-ditete-18-8-2011.pdf>.

confronted by such unlawful decisions, the CPA guardian *ad litem* did not consider the need to appeal them.

### **C) Failure to provide children with effective access to a lawyer in family proceedings**

Representatives of the CPA are social workers, not lawyers and have no legal background or training. Article 5 of the ECECR provides children with the right to apply themselves, or through other persons or bodies, for the appointment of a separate representative, in appropriate cases a lawyer. The European Guidelines on Child-friendly Justice (*hereinafter* “the Guidelines”) are even more specific when stipulating that children should have the right to their own legal counsel and representation, in their own name, in proceedings where there is, or could be, a conflict of interest between the child and the parents or other involved parties.<sup>107</sup> This right is accompanied by the right to access free legal aid under the same or more lenient conditions as adults<sup>108</sup>. In addition, the Guidelines set forth that lawyers representing children should be trained in and knowledgeable on children’s rights and related issues, receiving ongoing and in-depth training and be capable of communicating with children at their level of understanding.<sup>109</sup>

In practice the appointment of a representative of the CPA as a child’s guardian *ad litem* is done in substitution of, rather than in addition to, the appointment of a lawyer for children. A further practical problem concerns the right to apply for a legal counsel if the applicant cannot afford one.<sup>110</sup> In light of the particular vulnerability of children, especially in family proceedings, it is hardly probable that the child would be aware of this right and would be able to submit the application. Moreover, even if, theoretically, the child did so, it is not clear whether such an application would be accepted by the court since the child cannot perform his or her procedural rights independently if they have been appointed a guardian *ad litem*.

### **D) Failure to ensure effective complaint mechanism for children placed in institutional facilities**

As mentioned above, Article 17 of the Charter requires complaints procedures to be implemented in institutional settings so children can complain about any rights violations they suffer therein. In practice the right of children living in institutional facilities to complain or to file an appeal against a decision of the director is superficial at best.

The law regulating institutional care<sup>111</sup> provides children living in institutions with a number of rights such as the right to be placed with his or her siblings<sup>112</sup>, to maintain contact with family<sup>113</sup> and to leave the institution for recreational time if the child is over 7 years old<sup>114</sup>.

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<sup>107</sup> Guidelines of the Committee of Ministers of the Council of Europe on Child-friendly justice, adopted on 17th November 2011, para. 37.

<sup>108</sup> *Ibid.*, para. 38.

<sup>109</sup> *Ibid.*, para. 39.

<sup>110</sup> Act no. 99/1963 Coll., Civil Procedure Code, § 30.

<sup>111</sup> Act no. 109/2002 Coll., on Preventive Educational Care, Institutional and Protective Upbringing.

<sup>112</sup> *Ibid.*, § 20/1 (d).

<sup>113</sup> *Ibid.*, § 20/1 (n).

<sup>114</sup> *Ibid.*, § 20/1 (p).

These rights can, however, be restricted by the director of an institution as a sanction or punishment. In cases where a child does not, for example, comply with the intern order and/or obey orders and instructions of the pedagogical staff, the director may prohibit them from seeing friends except for family members and from enjoying recreational time outside the institution.<sup>115</sup> Contact with friends can be denied for up to 30 days within 3 months<sup>116</sup> despite this law being in contravention of the right to family life. In contrast recreational time outside an institution can be subject to unlimited restrictions at the decision of each individual facility. Not only are these restrictions in contravention of international and European laws<sup>117</sup> they also highlight the punitive nature of a child's internment in such facilities when such placements should, in fact, be a protective and rehabilitative measure—these children have committed no crime.

Since none of these restrictions are recognised in formal decision making processes, it follows that there is also no formal or meaningful way to challenge them. The only way children can object is on the legal grounds of unlawfulness or disproportionality via the general complaint mechanism for children in institutional care (i.e. they must address a complaint to the CPA, the public prosecutor or the Ombudsperson's office and request a monitoring visit).

However, this complaint mechanism is neither accessible nor effective for children living in institutions since it is not adapted to specific needs of children. The basic principle on which it operates is that the child himself or herself has to actively submit a complaint. However, children and particularly young children and children with disabilities are unlikely to complain about the staff on whose care they depend on. They tend to solve their problems in a different way; typically they try to hide themselves, run away from the facility<sup>118</sup> etc. Therefore they need a trustworthy and independent easily accessible monitor.

The Public Defender of Rights has reported that those CPA workers who carry out the monitoring visits of children in institutions are not trusted by the children they visit.<sup>119</sup> As regards public prosecutors who are also obliged to monitor the institutions the Public Defender of Rights also observed that they were often not experienced in talking with children and were not granted the opportunity to properly inspect life in the institution, “from the other side”, during their monitoring visits.

The Public Defender of Rights reported one account of finding children placed in isolation (or solitary confinement). Not only can such treatment be inhuman, degrading and very

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<sup>115</sup> *Ibid.*, § 21/1.

<sup>116</sup> *Ibid.*, § 21/1 (e).

<sup>117</sup> Such as article 8 of the European Convention on Human Rights (the right to respect for private and family life) and article 31 of the United Nations Convention on the Rights of the Child (right to play and to recreational and leisure time).

<sup>118</sup> Findings from research collated as part of a project, co-funded by the Fundamental Rights & Citizenship Programme of the European Union, on "access to justice for children with mental disabilities", coordinated by the University of Leeds and Mental Disability Advocacy Center, Data Gathering Report for the Czech Republic, 2013-2014. More detailed information about the Project is available at: <http://www.law.leeds.ac.uk/research/projects/securing-access-to-justice-for-children-with-intellectual-and-or-psycho-social-disabilities>.

<sup>119</sup> Public Defender of Rights, Report of Systematic Visits to Institutions for Children, 2011, para. 58. The Report is available at: [http://www.ochrance.cz/fileadmin/user\\_upload/ochrana\\_osob/2012/2012\\_skolska-zarizeni.pdf](http://www.ochrance.cz/fileadmin/user_upload/ochrana_osob/2012/2012_skolska-zarizeni.pdf).

damaging for children (especially those with disabilities),<sup>120</sup> the public prosecutor who monitored the institution was not informed about this practice. The reason was that he talked only with the director of the institution and the staff and not with children.<sup>121</sup>

The Office of the Public Defender of Rights operates as the national preventive mechanism required under the Optional Protocol of CAT and has a mandate to monitor all facilities where people are restricted in their personal liberty. It therefore cannot concentrate solely on institutional facilities for children and does not have the capacity to be in regular contact with all children placed in institutional facilities at all times. If children in institutions cannot access this complaints mechanism they are therefore, in all reality, cut off from the protection of the Public Defender of rights. Since the number of complaints submitted by children living in institutional facilities remains low<sup>122</sup> we can extrapolate that children living in institutions are not adequately protected.

As well as the punitive restrictions referred to above, directors of institutions are also authorised to make administrative decisions relating to the child's private and family life. For example, a director can decide whether to accept or reject an application for a several-day stay of the child outside the facility (usually with the child's natural family or host-family)<sup>123</sup> and even whether to grant or reject a child's long-term stay outside the facility<sup>124</sup>.

Directors are not systematically educated in human rights law or administrative law; rarely are they therefore aware that they have an obligation to issue a formal administrative decision in such cases. Without a formal administrative decision children cannot appeal.

If a formal administrative decision were to be provided the child (or the family/guardians) would need to lodge their appeal with the Regional Office (an administrative body). As also mentioned above, it is not clear if a child could lodge such an appeal in their own right because of their legal standing as minors. Practically they would most certainly require legal assistance to compile their appeal and to request exemption from the court fee (3000 CZK approximately 112 EUR).

#### **Case study no. 4 - Lucie**

Lucie is 16 years old. At the age of 14 she was placed in institutional care because of truancy and other behavioural problems. The reason for placing her in institutional care, according to the court's decision, was to ensure that she finish compulsory education. After entry into the institution Lucie agreed to attend school regularly if she were

<sup>120</sup> See account of the United National Rapporteur on Torture, Juan E. Mendez on the damaging effects of placing adults in solitary confinement in prisons:

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13655>

<sup>121</sup> Public Defender of Rights, Report of Systematic Visits to Institutions for Children, 2011, para. 297. The Report is available at:

[http://www.ochrance.cz/fileadmin/user\\_upload/ochrana\\_osob/2012/2012\\_skolska-zarizeni.pdf](http://www.ochrance.cz/fileadmin/user_upload/ochrana_osob/2012/2012_skolska-zarizeni.pdf).

<sup>122</sup> Findings from research collated as part of a project, co-funded by the Fundamental Rights & Citizenship Programme of the European Union, on "access to justice for children with mental disabilities". More detailed information about the Project is available at: <http://www.law.leeds.ac.uk/research/projects/securing-access-to-justice-for-children-with-intellectual-and-or-psycho-social-disabilities>.

<sup>123</sup> Act no. 109/2002 Coll., on Preventive Educational Care, Institutional and Protective Upbringing, § 23/1 (a).

<sup>124</sup> *Ibid.*, § 23/1 (d).

allowed to live outside the institution with her mother. The Director of the institution permitted this arrangement and Lucie returned to living with her mother and attending secondary school. When Lucie's attendance at school was again found to be unsatisfactory, the Director terminated Lucie's the arrangement and Lucie had to return to living in the institution. According to law, this decision should take the form of an administrative decision as defined by the Administrative Procedure Code, Act no.500/2004 Coll. However, the director failed to comply with this requirement. When Lucie and her mother lodged an appeal, the Director told them that there was no right to appeal and refused to transmit their wish to appeal to the appellate body. The Ombudsperson's conclusions show that Lucie's case is not an exception.<sup>125</sup>

### ***E) Specific vulnerability of children with disabilities***

In addition to above-mentioned barriers in access to justice faced by all children in general, specific attention should be paid to children placed in institutions for babies, children with mental health problems and children with disabilities, particularly children with mental disabilities. Children with mental disabilities are even more vulnerable as regards the practical realisation of their participatory rights in judicial and administrative proceedings since they face not only the paternalism prevailing in the Czech Republic with respect to children<sup>126</sup> but also with respect to persons with disabilities.

The qualitative research collated as part of a project, co-funded by the Fundamental Rights & Citizenship Programme of the European Union, on "access to justice for children with mental disabilities" coordinated by the Mental Disability Advocacy Center and the University of Leeds<sup>127</sup> showed that the actors of the child protection system, including the representatives of the CPA, family law judges, public prosecutors etc. did not have experience in working and communicating with children with mental disabilities not are they provided with any such training. Children with mental disabilities routinely fall between the gap of protection afforded under the children's rights and protection framework and the disability rights and protection framework when, in fact, they require intersectional support and protection from both.<sup>128</sup>

An example of this gap is the practice of 'voluntary' institutionalisation of children, especially of children with mental disabilities. In the Czech Republic children (including those under the

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<sup>125</sup> Public Defender of Rights, Report of Systematic Visits to Institutions for Children, 2011, paras. 173. The Report is available at:

[http://www.ochrance.cz/fileadmin/user\\_upload/ochrana\\_osob/2012/2012\\_skolska-zarizeni.pdf](http://www.ochrance.cz/fileadmin/user_upload/ochrana_osob/2012/2012_skolska-zarizeni.pdf).

<sup>126</sup> UN Committee on the Rights of the Child, Concluding Observations on the Czech Republic, CRC/C/CZE/CO/3-4, para. 34.

<sup>127</sup> More detailed information about the Project is available at:

<http://www.law.leeds.ac.uk/research/projects/securing-access-to-justice-for-children-with-intellectual-andor-psycho-social-disabilities>.

<sup>128</sup> Findings from research collated as part of a project, co-funded by the Fundamental Rights & Citizenship Programme of the European Union, on "access to justice for children with mental disabilities", coordinated by the University of Leeds and Mental Disability Advocacy Center, Data Gathering Report for the Czech Republic, 2013-2014. More detailed information about the Project is available at:

<http://www.law.leeds.ac.uk/research/projects/securing-access-to-justice-for-children-with-intellectual-andor-psycho-social-disabilities>. See also the Alternative Report to the UN Committee on the Rights of Persons with Disabilities compiled by Czech NGOs in 2011, section 22. Available at: <http://www.inkluzi.cz/upload/alternativni-zprava.pdf>.



age of 3) may be institutionalised on a voluntary basis by their parents or guardians. Children, by law, cannot be placed into children's homes or institutions for children with behavioural problems for an infinite or lengthy period without judicial intervention. However children may be placed for lengthy periods into institutional facilities for children up to 3 years of age<sup>129</sup>, psychiatric hospitals or disability care homes only on the basis of a voluntary arrangement. In disability care homes the voluntary arrangement is formalised by the execution of a contract for social services between the parents/guardians of a child and the social care provider, i.e. the institution.<sup>130</sup>

Thus in disability care homes, institutions for children up to 3 years of age and psychiatric hospitals there are therefore two groups of children: one group placed 'voluntarily' under a private contract, the other via a court decision.<sup>131</sup>

In the latter case where the institutionalisation is ordered by the court, law grants the children greater legal protection consisting in:

- a. the obligation of the CPA to adopt an effective individual plan for the child;<sup>132</sup>
- b. The obligation of the CPA to visit each child every 3 months;<sup>133</sup>
- c. The obligation of the CPA to visit and provide support to the family of the child;<sup>134</sup>
- d. The obligation of the CPA to place the child on the list of children for foster care and to search for appropriate foster family for the child (where appropriate);<sup>135</sup> and
- e. The obligation of the court to review, every 6 months, whether the institutionalisation is still justified.<sup>136</sup>

Conversely, children institutionalised on a voluntary basis are not afforded these same protections even though they, as children living in institutional settings, fall within the competence of the CPA and the CPA should thus provide them and their families with the same support and protection.<sup>137</sup> In practice, our experience is that CPA workers are reluctant to get involved in monitoring and protecting children who have been placed voluntarily, frequently we are told these children don't fall within their remit when we know that they do.

The CPA has also shown unwilling to offer support and assistance to institutionalised children when requested by a social care provider or NGO working with institutionalised children. The main argument of the CPA in such cases is that the child is not at risk.<sup>138</sup> These

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<sup>129</sup> Institutional facilities for children up to 3 years of age fall under the competence of Ministry of Health and are regulated by Act no. 372/2011 on Health Services, § 43, § 44. The professionals taking care for children in these institutions are nurses.

<sup>130</sup> Act no. 108/2006 on Social Services, § 90.

<sup>131</sup> *Ibid.*, § 48/4.

<sup>132</sup> Act no. 359/1999 Coll., on Social and Legal Protection of the Child, § 10/3 (d), 5.

<sup>133</sup> *Ibid.*, § 29/2 (a).

<sup>134</sup> *Ibid.*, § 29/2 (b).

<sup>135</sup> *Ibid.*, § 21/1.

<sup>136</sup> Act no. 89/2012 Coll., Civil Code, § 973.

<sup>137</sup> Act no. 359/1999 Coll., on Social and Legal Protection of the Child, § 6.

<sup>138</sup> Findings from research collated as part of a project, co-funded by the Fundamental Rights & Citizenship Programme of the European Union, on "access to justice for children with mental disabilities", coordinated by the University of Leeds and Mental Disability Advocacy Center, Data Gathering Report for the Czech Republic, 2013-2014. More detailed information about the Project is available at:

children therefore find themselves without any legal protection or support and facing long-term institutionalisation without the opportunity to appeal.

The UN Committee on the Rights of Persons with Disabilities has expressed their concern about the high number of children with disabilities in institutional care in States.<sup>139</sup> It has also criticised states for not taking into account the opinions of children with disabilities on the quality of care they receive and for the lack of services available for their full development and social protection.<sup>140</sup> It has recommended that States prevent institutionalisation of children with disabilities through the setting up of community services and assistance<sup>141</sup> to enable children with disabilities to live with their families.<sup>142</sup>

#### ***F) Conclusions - Article 17 European Social Charter implementation***

**The Czech Republic does not provide children with an effective and practical access to justice in matters concerning their private and family life and their personal liberty. Judicial proceedings determining the restriction of parental rights and the removal of the child from his or her family do not offer the child necessary safeguards since children are represented by a state authority which is often in conflict of interest, instead of a lawyer.**

**Children living in institutional care are denied access to an effective complaint mechanism. They are also denied access to children's rights monitoring and judicial remedies due to the lack of a children's ombudsperson. Children with mental disabilities are particularly vulnerable to justice barriers because of their propensity to being institutionalised because of their disability. Children with mental disabilities who are 'voluntarily' institutionalised (through a contract entered into by their parents/guardians and their institution) remain completely outside the formal child protection system because their entry takes place outside the procedural safeguards, and subsequent monitoring obligations, of the court and state. Therefore, there is non-conformity with Article 17 of the Charter as regards the right of the child to access to justice.**

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<http://www.law.leeds.ac.uk/research/projects/securing-access-to-justice-for-children-with-intellectual-andor-psychosocial-disabilities>.

<sup>139</sup> E.g. UN CRPD Committee, Concluding observations on the initial report of El Salvador, adopted on 8 October 2013, para 19.

<sup>140</sup> UN CRPD Committee, Concluding observations on the initial report of Spain, adopted on 19 October 2011, para 23-24.

<sup>141</sup> UN CPRD Committee, Concluding observations on the initial report of China, adopted on 15 October 2012, para 14.

<sup>142</sup> UN CRPD Committee, Concluding observations on the initial report of Hungary, adopted on 22 October 2012, para 22.

## **ANNEX: INFORMATION ON NON-GOVERNMENTAL ORGANISATIONS SUBMITTING ALTERNATIVE REPORT**

**League of Human Rights (LIGA):** LIGA is a non-governmental human rights organization established in 2002 and headquartered in Brno, Czech Republic. LIGA's vision is fair, free and engaged society for all. Since 2002, LIGA has been systematically promoting human rights, including children rights. LIGA is a member organization of *Fédération Internationale des droits de l'Homme* (FIDH).

**Mental Disability Advocacy Center (MDAC):** MDAC is an international human rights organisation that uses the law to secure equality, inclusion and justice for people with mental disabilities worldwide. We operate at the global level as well as regional and domestic levels in Europe and Africa. MDAC is headquartered in Budapest, Hungary and was registered as a foundation by the Budapest Capital Court (registration number 8689) in November 2002. The Open Society Foundations (OSF) founded MDAC and continues to be one of its donors. We have participatory status with the Council of Europe and is entitled to lodge collective complaints under the Revised European Social Charter. It has special consultative status with ECOSOC. MDAC was long-listed by the Parliamentary Assembly of the Council of Europe for its 2013 Vaclav Havel European Human Rights Prize.

**Forum for Human Rights (FORUM):** Forum for Human Rights is a Central European legal non-governmental organisation focusing on international human rights litigation and advocacy in Central Europe. Forum works to ensure that human rights are respected, protected and fulfilled in accordance with relevant international human rights standards, using litigation and advocacy to promote human rights before national and international courts and domestic and international human rights bodies.

**Lumos:** Lumos is international children rights charity, established in UK with country offices in Czech Republic, Moldova, Bulgaria, Ukraine and USA. Lumos works in partnership with governments, professionals and carers, communities, families and children, to transform outdated systems that drive families apart. Together with partners Lumos replaces institutions with community based services that provide children with access to health, education and social care tailored to their individual needs.

**Inclusion Europe:** Inclusion Europe is an association of people with intellectual disabilities and their families in Europe. We started in 1988. We fight for equal rights and full inclusion of people with intellectual disabilities and their families in all aspects of life.

**Společnost pro podporu lidí s mentálním postižením v České republice (SPMP):** We are an association of people with intellectual and multiple disabilities, their families and other professionals. SPMP is national non-governmental organisation active at national, regional and local levels. We have currently more than 8000 members. SPMP is organisation defending the rights and interests of people with intellectual or multiple disabilities and their families. Our vision is a society for all: People with intellectual disabilities and their families have the same opportunities as anyone else in the society.

**Quality in Practice (Quip):** The civic association Quip was founded in 2003 to support the development of quality and good practice in social services, promote education in this area and encourage awareness and rights of social service users, especially of people with learning difficulties and complex needs. Quip is engaged in dealing with legal problems and education in legal issues related to providing of social services from the point of view of providers as well as social service users and their rights.

**Organization of Aid to Refugees (OPU):** Mission of Organization for Aid to Refugees is to assist immigrants, above all asylum seekers who request asylum in the Czech Republic due to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, as well as recognized refugees and persons under the temporary protection regime.