

Reflections on the Czech Republic's Law on Foreigners

Pavel Uhl

Abstract:

The policy concerning foreigners and the legal framework of this policy represent a specific area of law which regulates migration within a country's territory. Because of the general public's heightened sensitivity when it comes to migration, the inherent interests of the state and the interests of the migrants themselves, this area of law is subjected to manifold, intensive pressure from a variety of interest groups. The Czech Republic's policy on foreigners developed in a number of phases, with the past six years being marked by a bureaucratic and formalistic concept of migration control. This approach has diminished the actual capability to control the phenomena of migration and proved to be prone to corruption. Apart from that, the law on foreigners is not living up to a number of constitutional obligations and is systematically belittling the human dignity of foreigners. Last but not least, the existing policy of foreigners cannot fulfill the goals in the area of migration that the Czech Republic vows to fulfill. It would be desirable to subject the country's migration policy to a critical review within a few years and consider whether the current conceptual situation is favorable and whether there are different, more rational paths to follow.

The Czech Republic as any other country establishes and utilizes legal tools to regulate the entry and the residence of foreigners. Consequently, the Czech Republic differentiates between citizens of the state and those who are not citizens and are therefore viewed as foreigners. Modern democratic countries usually do not regulate the migration of their own citizens and typically consider it legal and permissible for them to settle anywhere within the country's borders and also to freely leave the country. If democratic countries were to establish rules regulating such behavior, these rules would, for the most part, deal with record keeping/registration or would institute *ad hoc* restrictions, such as prohibiting an individual from leaving the country if prosecuted for a crime. However, the principle governing migration of people perceived as foreigners is completely reversed. Because most countries follow the general constitutional principle of "that which is not prohibited is allowed," they have established, for the purpose of regulating migration, a special general rule stating that entry and residence is permissible only with government-issued permits.

The term "policy" means many things to many people. One doctrine defines it as a set of general and concrete measures, steps, and actions aimed at attaining a certain goal. Like other nations, the Czech Republic has its own policy on foreigners. In democratic societies, foreigners policy is usually just one of many focal points of public discourse, as it is closely connected to policies of employment, population growth, and recently security policy. For a significant number of people, including elites, foreigners policy is one of the reference indicators of the value system of a society, as a whole, much like its attitude towards minorities, children or the handicapped. Because the Czech

Republic is not very different from other comparable countries, issues related to foreigners policy are now an integral part of the public discourse. It is the objective of this text to consider select aspects of the Czech Republic's foreigners policy.

Initial development of Czech (Czechoslovak) foreigners policy after 1989

Starting from November 1989, when the political and social environment began to move towards the facilitation of democratic control, the Czech (Czechoslovak) foreigners policy made great progress with at least one breaking point. At the outset, visa requirements for citizens of western European countries were eased, and the policy on foreigners was liberalized. The old Residence of Foreigners Act of 1965 (which was never amended) was replaced in 1992 by a new act, which was in place until 1999 when the current act entered into force; since then, it has been amended many times. While at the dawn of the country's foreigners policy, the general public, as well as experts, focused primarily of visa-related matters, which had a mirror effect on cooperating countries and had an immediate impact on the freedom of movement of Czech citizens, the political focus later gradually shifted to the legal framework covering long-term residence on Czech territory. Laws regulating possible ways of subsistence and the decision-making of government bodies within this framework were enacted. The reasons for this shift were to be found in the need to regulate this phenomenon, which began to increasingly influence the public interest in the Czech Republic.

Up until 1999, the Czech government dealt with any need to change the legislation dealing with foreigners by amending the fairly liberal act. The act itself was based on the assumption that it was not necessary to regulate issues related to foreigners in a way that would dramatically differ from the general norms of administrative law. Judging by today's standards, the then-valid residence permit regulations were considerably more liberal. No obstructions were imposed on foreigners other than requirements that served directly to the attainment of goals related to the activities of government authorities. Furthermore, the legislation did not impose any unreasonable sanctions for failing to meet requirements prescribed by law. The legislation brought about conditions for the execution of powers with respect to foreigners on the level of normal relations between neighbors. The legislation contained virtually limitless possibilities of various administrative considerations, exceptions, and other similar procedures.

Unfulfilled expectations and unexpected consequences of the 1999 act

In 1999, the Czech Parliament passed a new Residence of Foreigners Act, marking a breakthrough in the existing practice. The language and the passage of act stemmed from

the desire to resolve certain alleged or real problems inherent in the Czech foreigners policy. These problems arose from the following needs: 1) the need to regulate more intensively the issuance and the prolonging of residence permits; 2) the need to harmonize foreigners law with European standards, not only with respect to legal standards of the EU, but above all, with respect to security and migration practices in western Europe; 3) the need to diminish as much as possible, room for corruption, which is perceived as a problem. These three needs led to the passage of the new act, which brought about an entirely different concept of foreigners policy. Paradoxically, however, none of the three original goals were attained through the original wording of the act or the subsequent amendments aimed at redressing some of the shortcomings of the act's original wording.

The new piece of legislation employed a rather casuistic and pedantic arrangement of legal relations and, for the most part, abandoned administrative law and administrative traditions in the process. The authors of the act, believing that they were approximating Czech and European legal standards, were particularly inspired by Austrian legislation, for which they took as a methodical example of current European trends. However, this proved to be a mistake as the Austrian law, as a result of re-codification carried out in the mid-1990s, was essentially a formalistic, casuistic, and excessively bureaucratic piece of legislation, which, to some extent, contradicted European trends moving in the direction of conceptual and managed immigration policy.

The main objective of the Czech act was to clearly set the criteria that a person must fulfill in order to be granted residence status. These criteria were set in a very clerical way so as to determine whether or not they have been met by the applicant. For all practical purposes, the act ruled out any possibility of discretionary weakening of the criteria. Furthermore, the criteria were set in a way so as to make their fulfillment difficult, with the barriers to fulfillment being far removed from the legitimate interests of the public administration. An example of this is the requirement to submit several applications to an embassy abroad, even if the applicant resides in the Czech Republic legally. In addition, in order to objectively evaluate the application, the authorities require the applicant's file, which is not physically located abroad. One of the act's objectives was to minimize as much as possible administrative discretion in order to eliminate the possibility for corruption. Another goal was to create a barrier functioning as a natural regulating element for unchecked migration into the country, with the Aliens Police playing the role of a neutral administrator. The law went so far as to put in place a fairly strict regime for foreigners settled in the Czech Republic. As penalty for non-compliance with this regime, the loss of residence status and a forced transfer back to the beginning of the procedure to obtain an initial residence permit, or possibly even an administrative deportation were instituted.

It is important to note that the new law has failed to achieve the desired objectives. Because adapting to the new conditions is a long-term process, the first and major development was the occurrence of a large portion of foreigners living in the Czech Republic becoming illegal aliens.¹ This development shifted a large number of migrants into an unchecked zone and forced Czech authorities to cope with a growing amount of unchecked and unrecorded migration, instead of monitored migration in line with rules set by the Residence of Foreigners Act. The original intention to boost control actually weakened control. Another unintended development was the increased demand on asylum, as it seemed to be a convenient way out for many people who were not able to find recourse in the new conditions. The intention to strengthen control therefore bore no fruit. A second equally important intention was to rule out corruption by preventing situations that made corruption more likely through the limitation of administrative discretion. In this respect too, the attempt to enhance the legal framework by strengthening control proved to be a mistake. The oppressive pressure on individuals to meet the conditions set by the law had the opposite effect: it fostered an environment where it was even more tempting to engage in corruption. Corruption was not primarily a problem for normal decision-making processes, but rather the police force. It was used by individuals who wanted the Aliens Police to either grant clemency or to look the other way. Because it was impossible to engage in corruption to buy residence status, the only other thing to gain was an omission from checking an ID or other documents. This resulted in foreign residents who had resorted to corruption being left out of official administrative records. This shift in focus of corruption led to the shift of many persons from the legal, on-the-record sphere into the illegal, off-the-record sphere.

With the continuing integration of the European Union, the intended europeization, in the general meaning of the word, is no guarantee for the compatibility of the Czech legal order with European standards; nonetheless, some repressive features of the foreigners law had to be revised in connection with the country's accession into the EU in an extent that was larger than usual compared to other EU member states. A good example is the granting of residence permits to relatives of EU citizens, a process governed by *acquis ommunitaire*. The then-valid Czech regulations covering the issuance of residence permits to members of Czech citizens' families were much stricter, and the recognition of European standards significantly improved the position of such family members. Also in other areas, the amendments to the Residence of Foreigners Act passed prior to the country's entry into the EU, resulted in the softening of the fairly strict rules.

¹ At that time, most of the countries feeding work migrants into the Czech Republic enjoyed a visa waiver program. Illegal residence of people from these countries was quite easy to attain as entering the country was legal and only work and subsequent longer-than-permitted stay were illegal. The patterns of illegal existence, which were already in place, survived the introduction of visas without problems.

Formal, content-related, and factual shortcomings of the Residence of Foreigners Act

Apart from failing to meet initial expatiations, the act revealed other general weaknesses stemming from its uniqueness within the Czech Republic's legal order. These weaknesses can be essentially divided into formal (related to procedure), content-related (related to rights subject to the procedure), and factual (related to effects, intentions, and political aims).

Formally speaking, the act is an especially strict norm which, in many ways, does not reflect the constitutional requirement demanding adequacy of interference with particular rights. Simply put, any legal regime based on zero tolerance for an omission, including a formal one, is not and can not be fully conforming to the Constitution. Formal aspects of the act do not bring about the environment of legal certainty, which alone is problematic from the constitutional point of view. It is undeniably troublesome from the point of view of good governance. The act's complex structure and its frequent amendments produce uncertainty on the part of recipients and executors of the law. It is often the case that a person seeking answers to questions related to the interpretation of the act approaches those who are most competent (i.e. members of the Aliens Police). However, the answer (if there is a willingness to provide one) is usually "submit the application and we will see."

Moreover, the legal environment is not helped by the fact that the act, in many respects, excludes the force of the administrative order without putting in place an alternative schedule of rules regulating the ways in which an administrative body functions and the rights available to applicants. This often brings discomfort even to people from the Aliens Police and, as a result, the concrete exercise of rights in many cases depends on the arguments used by the applicant or his representative. Such inconsistent decision-making on the part of various government bodies does not ensure certainty – a prerequisite of any decision-making process for a country where the rule of law prevails, including the Czech Republic – or the principle of predictability and the principle of doing things "the same way in same cases, a different way in different cases."

Apart from these formal weaknesses, the act also has a number of content-related shortcomings that contradict the Constitution and other higher-order norms. An example is the wide range of cases where the police are deciding matters of deportation or termination of residence without the possibility of judicial review, despite the guarantees given in the Charter of Fundamental Rights and a number of international documents. Similarly, in cases when a person should be granted a certain right, the act explicitly excludes the possibility of granting the right to such a person (this is true especially for forms of international protection, other than asylum). Finally, the Residence of Foreigners Act does not provide the possibility of allowing particular cases when –

considering all other legally conceivable, set or acknowledged, criteria – it is obvious that this particular case should be a certain way but the act itself states that it is “impossible.” An example is a situation in which a child who is entitled, under the Convention on the Rights of the Child, to such treatment from the government that respects his or her needs, including those pertaining to education and family, is forced to leave the country and submit an application abroad for reasons beyond his or her control. Therefore, this results in the child waiting for the application to be processed in conditions that guarantee the child nothing for a relatively long period of time.

The most flagrant shortcomings are those that are factual and can not be substantiated using legal arguments – those of a sociological or demographic nature. Like all nations, the Czech Republic has the sovereign right to decide who will be allowed to settle in its territory. However, if it considers itself to be a democratic country governed by the rule of law, it must meet all constitutional and international obligations (see above). In addition to the above-mentioned, it is always useful to consider the expediency of what is being done and how it is being carried out by the government in cases where there can not be any doubt about the legality of a certain procedure. Immigration policy is a policy that can control certain behavior and shape them to a certain degree; just like in any other area, it is expedient if the way of doing so is as effective as possible. If the Czech Republic’s goal is to prevent unchecked immigration, it must clarify in what phase it is most economical to erect barriers to immigrants and what barriers are to be erected. The current situation exerts practically identical demands on long-term foreign residents in the Czech Republic and people wishing to enter the country for the first time. The existing barriers are of an administrative nature and are not related to the needs the Czech Republic might have with respect to structuring migration. The current situation favors those who are administratively competent and lets them pass the migration screening, which is in direct contradiction with migratory demographic requirements. If the Czech Republic wants a certain type of migrants, it is persons capable of exercising a creative and inventive approach to dealing with all problems. Administrative studiousness and adaptability to the requirements of the Aliens Police are, statistically speaking, negative correlates of those qualities that migrants should possess in order to enrich the economy and culture of the Czech Republic. It is for this reason that the focus of our policy regarding foreigners is factually erroneous.

Also rather absurd is the constant reviewing of an individual’s fulfillment of essentially invariable requirements for the issuance of a residence permit when the person already resides in the country. Applications are submitted frequently and the permits are issued only for a period of up to one year. This situation puts an unnecessary burden on the whole Aliens Police system and means unreasonable exclusion for persons already residing in the country. The momentary inability of these persons to prove a certain measure does not substantiate refusal of residence.

It is precisely for these reasons that the entire system, which gravitates towards a paper-intensive concept of foreigners policy, is extremely overloaded. This leads to a number of unintended consequences that only further illustrate the shortcomings of the foreigners policy described above. Due to administrative strenuousness, people working for the Aliens Police must process all paperwork in spite of the uselessness of a significant portion of the process. The whole system is overburdened and capable of only meeting those demands that stem from routine work. The deficit in capacities also results in a major emotional deficit in the work of the Aliens Police, which is often portrayed as the epitome of inhumane oppression and complete negation of the purpose for which the institution was founded. The police often err significantly in tasks that are out of the ordinary and fail to fulfill the requirements of the administrative order – minimum legal obligations, as well as the principles of good governance.

What should be the basis of immigration policy?

There is no debate underway today about significantly modifying the existing legal framework. Nevertheless, there may be one in the near future due to the likelihood of the EU further examining the existing European regulations and the Czech Republic's integration into the Schengen system. If this is the case, we must carefully consider how to structure the Czech Republic's policy regarding foreigners. It is the author's humble opinion that the following principles should be observed.

First, it is well-known that persons already residing in the country show a much higher level of adaptation than non-residing persons, and the review of the current situation should reflect this in the legal framework. Second, selection criteria should not be based on fulfilling administrative formalities but rather on assessing predispositions for social integration and adaptation to Czech society, as well as potential contributions to the country. It is clear from the above statements that the main and cardinal migration screening process must take place when permitting a foreigner's initial entry into the country, not in the course of the given foreigner's residence in the country, as is the case now. The assessment must be based on the criteria of qualification and contribution. In other words, instead of forcing people to submit applications in places that benefit no one, the act should create conditions for such assessment of applications to reflect the real interests of the Czech Republic. Furthermore, it is not necessary to require foreigners to present a large number of documents certifying sufficient funding, which is especially true in cases where it is safe to assume that the foreigner in question wishes to enter the country specifically to improve his material situation. It is completely useless to repeat these procedures later on in the same extent as in the beginning. The proposed system would be much less expensive and would allow funds to be channeled towards higher quality staffing and improved execution of administrative tasks. Persons already residing

in the country should enjoy a minimum legal certainty that unless they seriously violate the rules of life in the Czech Republic, as defined by its laws and regulations, they will be allowed to remain for a longer period of time. The new act should be transparent, and the same goes for the decision-making process within the Aliens Police. There certainly can not be such disproportions as exists today between sanctions imposed on foreigners and sanctions imposed on Czech citizens for identical misconduct. The act must steer clear of irresolvable situations, like any other piece of legislation. With regards to corruption, it is necessary to put in place such guarantees of legality and review so as to limit opportunities for corruption. Transparency of the system, as a whole, is yet another prerequisite. If exceptions are to be allowed, there must be mechanisms to prevent their use, except for legal purposes. For example, exceptions could be decided by an independent government body separate from the one that usually decides in the given matter.² There are many aspects of the Czech legal framework that entail wide-ranging administrative discretion, but there is little or no corruption involved. The introduction of special residence regimes should be considered for foreigners who do not wish to settle permanently in the Czech Republic but are seeking rather to simply earn money and leave.³

It remains, by and large, true that legal and illegal migration present an indispensable well of resources for the Czech economy and for the public coffers. It would therefore be courteous to devote to issues related to foreigners as much effort as called for by their human dignity.

² Such a mechanism presupposes that corruption will not be organized, which today most likely will not be. Distribution of decision-making powers will limit individual cases of corruption.

³ The number of such foreigners will grow with the ongoing political and economic transformation of Ukraine.