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The detention of minors in the Czech Republic

Zuzana Jeřábková

Abstract:

The article describes the practice of detaining migrant minors in the Czech Republic. Minors are divided into those who are accompanied by parents or other legal guardians and those who are not. The article addresses the main shortcomings of the legislation on the detention of minors in the Czech Republic and it also deals with the detention of minors with regard to the protection of human rights.

The detention of minors in general

Minors who are foreign nationals are among the most vulnerable groups of foreigners. They come to the Czech Republic both accompanied by their parents or other legal guardians, as well as unaccompanied by such persons. Their reasons for entering the country vary. For accompanied minors, the reasons for entering correspond with the reasons of their parents or other legal guardians. For unaccompanied minors, the situation is often more difficult; frequently at the time of their arrival their parents are no longer alive, and it was strangers who decided to send them to the CR. These children then find themselves completely alone in the CR and there is a higher risk of them becoming victims of human trafficking or other illegal practices. Minor aliens who are classified by the Czech authorities as unaccompanied are, in line with a preliminary court injunction, usually entrusted to the care of the Facility for children of foreign nationals. In some cases, however, unaccompanied minors are not placed directly into the Facility for children of foreign nationals, but they are initially detained in detention centers for foreigners. Alien minors who are accompanied by their parents or legal guardians can be placed in a detention center together with them.

The issue of detaining foreigners in general is governed primarily by Act No. 326/1999 Coll. "On the Residence of Aliens in the Czech Republic and on the Amendment to Some Other Acts" (hereinafter the Aliens Residence Act). The existing legislation provides three types of detention – detention for the purpose of administrative expulsion [1] for the purpose of

leaving the country [2] and for handover or transit [3]. In practice, foreigners are mainly detained for administrative expulsion and for handover.

To gain a better understanding of the detention of alien minors, it is necessary to distinguish unaccompanied minors and such *migrant minors* who are in detention facilities for foreigners from those who are *accompanied by parents or other legal guardians*. The following passages are therefore dealing with these different groups of minors individually.

Unaccompanied Minors

Given that each alien over 15 years of age who is capable of expressing their will and acting independently is, pursuant to § 178 of the Aliens Residence Act, in possession of legal capacity, the law does not distinguish between the detention of adults and that of unaccompanied migrant minors [4] over 15 years of age. Only unaccompanied minors under 15 years are not detained and, in line with a preliminary court injunction, placed directly into the care of a specialized Facility for children of foreign nationals. Unaccompanied minors aged 15 and over may be detained under the same conditions as an adult foreigner. The only difference according to the Aliens Residence Act is the maximum detention time of unaccompanied minors. According to § 125 Section 1 of the Aliens Residence Act, for a migrant under 18 years, the detention period shall not exceed 90 days (for adults it is 180 days). Under the current Police interpretation, the reduced period applies only to unaccompanied minors detained due to administrative expulsion. Such unaccompanied minors are released within 90 days of being detained and, in line with the preliminary injunction, entrusted to the Facility for children of foreign nationals. Unaccompanied minors detained for the purpose of being handed over in line with international agreements, however, do not qualify for the shorter period of 90 days according to the interpretation of the Foreign Police and these minors can be detained for up to 180 days. So there is de facto discrimination against one group of minors on the basis of their country of origin, since this exception typically applies to the nationals of Vietnam, Russia, or Ukraine, as these are the countries with which the Czech Republic (EU) established a readmission agreement.

A certain level of protection of unaccompanied minors should be ensured by introducing a guardian as envisioned by § 124 Section 4 of the Aliens Residence Act. The task of an appointed guardian is to protect the interests and rights of the minor. Mainly, the guardian shall participate in legal actions related to administrative procedures, such as assisting the minor with filing appeals etc. Mostly NGO workers are appointed to this position. In practice, however, when it comes to the actual defense of the rights of detained minors instituting a guardian seems very problematic mainly due to the imperfect formulation of the law. According to § 124 Section 4 of the Aliens Residence Act: *If the detained alien is an unaccompanied minor (Section 180c), the Police will appoint a guardian. The Police shall immediately inform the unaccompanied minor about this and instruct him or her as regards the tasks of a guardian.* However, the law does not specify the time period within which the guardian shall be appointed. Thus under the existing legal framework, it is entirely at the discretion of the Police. In practice, there were cases when the Police appointed a guardian to

a minor only after several weeks or months of detention. The deadline for filing an appeal against a decision on administrative expulsion [5] as well as for bringing action against a decision on detention [6] had already expired in those cases. Another drawback of the effective legislation is that, for the Police, the obligation to appoint a guardian arises only at the moment the alien is detained, not when the proceeding on administrative expulsion is launched or when a decision is made. Thus, at the time the expulsion proceeding is launched, the unaccompanied minor is not represented by a guardian. This often leads to the fact that a minor who, for obvious reasons, does not fully understand the Czech law, signs a document of major importance, such as one waiving the right to appeal against administrative expulsion. A guardian initially appointed at a later stage can not reverse such decisions, and therefore his or her options are limited to requesting the release of the foreigner from detention, under the Civil Procedure Code [7], or filing a proposal for a preliminary injunction under the Civil Procedure Code [8]. The former applies especially when the minor signs a waiver of appeal, or if the time-limit for filing an appeal against the decision on administrative expulsion expires without any action having been taken. Therefore instituting a guardian under the existing legislation appears to be only a formality and its effect is rather questionable.

The return and expulsion of unaccompanied minors is in itself problematic. In practice, such cases occur when the Police carry out administrative expulsion and when unaccompanied minors are handed over to their countries of origin without the Czech authorities ensuring an adequate reception and care of the minor upon return. This approach of the Police is in direct conflict with Article 10, Section 2 of Directive 2008/115/EC [9], which concerns the return and expulsion of unaccompanied minors, and which reads: *Before removing an unaccompanied minor from the territory of a Member State, the authorities of that Member State shall be satisfied that he or she will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the State of return.* Given the current non-compliance of the Aliens Residence Act with this Directive, a situation may occur in which an unaccompanied minor will arrive in the country of origin without any care and support provided there. Due to a recently adopted amendment to the Aliens Residence Act, this situation should change at least to a certain extent, as it shall be newly required for the Police to examine whether the reception of the minor in the country of origin is adequate. [10]

Accompanied minors

Migrant minors accompanied by parents or other legal guardians are placed into facilities for the detention of foreign nationals together with their parents if a detention order was issued to them. The placement of these alien minors in detention is not limited by age, in practice a case is known of a newborn, who was brought together with his mother to a facility for the detention of foreigners directly from the maternity hospital. The shorter detention period pursuant to § 125, Section 1 of the Aliens Residence Act does not apply to alien minors accompanied by parents or other guardians. Their period of stay at the facility for detention of foreign nationals corresponds with the detention time of their parents or guardians and can take up to 180 days.

Detention of minors and human rights protection

Placing migrant minors in facilities for the detention of foreign nationals can be regarded as a major problem and a breach of the international commitments of the Czech Republic. A detention which lasts up to three months in the case of unaccompanied minors and up to six months for accompanied alien minors, and which presents a significant limitation to their freedom and the all-round development of their personality, cannot be viewed as a decision that upholds the best interests of the child (this is in contradiction with Article 3, Section 1 of the Convention on the Rights of the Child [11], according to which: *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*. Also, detaining a migrant minor for an offense against the Aliens Residence Act cannot be considered a measure of last resort, nor can the maximum detention time, stipulated by the Aliens Residence Act, be considered the shortest appropriate period within the meaning of Article 37 point b) Convention on the Rights of the Child, according to which: *the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time* (Kholová, 2009 [12])).

The detention of minors is also in contradiction with the Convention on the Protection of Human Rights and Fundamental Freedoms [13] (hereinafter: the Convention), which has been repeatedly held by the European Court of Human Rights (hereinafter: the ECHR). In the case-law of the ECHR we can find two significant rulings concerning the detention of alien minors [14]. Both ECHR decisions concern events which occurred in Belgium and as these are decisions addressed to a specific country in a specific case they are binding for the country. The legal opinion, represented by the ECHR in these cases, however, is applicable to the situation in the Czech Republic, therefore the national courts should take the judgments of the ECHR into account.

The first of the above mentioned cases is "*Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*" [15]. The complainants were *Mubilanzila Mayeka and Kaniki Mitunga*, mother and daughter, both citizens of the Democratic Republic of Congo. *Mubilanzila Mayeka* entered Canada in 2000, where she was granted refugee status and where in 2003 she received a residence permit of indefinite duration. After Ms. *Mubilanzila Mayeka* was granted asylum in Canada, she asked her brother, a Dutch national, to try to get her daughter Tabitha, who was five years old at that time, to Europe. The mother had been forced to leave her daughter in their country of origin. Her brother was to take care of her daughter until she could be reunited with her mother in Canada. On August 18th 2002, shortly after her arrival at the airport in Brussels, Tabitha was detained, as she did not have the documents necessary for entering the country. During the two months of detention, Tabitha - through the lawyer provided - filed an asylum application. Her application was rejected by the Belgian authorities. On October 16th 2002 the chambre du conseil of the Brussels Court of First Instance held Tabitha's detention as non-compliant with the Convention on the Rights of the Child and ordered her immediate release. On the same day, the United Nations High Commissioner for

Refugees filed an application to the Alien Authority for Tabitha's residence permit in Belgium until her application for a Canadian visa is processed. The Alien Authority was also informed about the fact that Tabitha's mother was granted refugee status by the Canadian authorities. One day later, however, the girl was deported to her country of origin, without an adequate reception having been ensured there. The girl was allowed to travel to Canada to be with her mother only after the intervention of the Belgian and Canadian Prime Minister in late October 2002. The ECHR found this girl's treatment to be in breach of Article 3 (prohibition of torture, inhuman or degrading treatment), Article 5 (right to liberty and security) and Article 8 (right to respect for private and family life) of the Convention. The ECHR emphasized the extreme vulnerability of the girl due to her young age and the fact that she was an unaccompanied minor whose stay in Belgium was illegal. Among other things, the Court stated that for almost two months she was held in a facility that was designed for adults and which was in no way adapted to the needs of a child. The girl was not even assigned a qualified person who would be able to provide her with educational and other assistance. Furthermore, the ECHR noted that the girl's detention contributed to significant delays in the process of reunification with her mother. Given that in this case there was no threat that she would try to avoid checks by the Belgian authorities, her detention in a facility for adult foreigners staying illegally served no purpose, and other measures could have been taken that would truly correspond to the interests of the child within the meaning of Article 3 of the Convention on the Rights of the Child.

The ECHR confirmed its ruling on "*Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*" in an appeal from January 2010: *Muskhadzhiyeva and others v. Belgium* [16]. This time, however, the court's findings were extended to children held in detention facilities together with their parents. The complainant, Ms. *Muskhadzhiyeva* and her four children aged 7 months, 3.5 years, 5 years and 7 years, entered Belgium on October 11th 2006 from the Chechen city of Grozny, as asylum seekers. However, since they had spent some time in Poland on their way, in accordance with the so-called Dublin Regulation (Council Regulation (EC) No. 343/2003) the decision was made to hand them over to Poland. On December 22nd 2006, the family was placed in a closed detention facility near the Brussels airport, where they waited for more than a month for the transfer to Poland.

The ECHR found this in breach of Article 3 (prohibition of torture, inhuman or degrading treatment) and Article 5 (right to liberty and security) of the Convention for the Protection of Human Rights and Freedoms. The court noted that the extreme vulnerability of minors should be a decisive factor and should prevail over the illegality of the migrant's residence when deciding whether or not to take action. In this case, children of a very low age were held for more than a month in a closed facility, which was not adapted to accommodate children. The Court relied on the medical opinions of the organization Doctors Without Borders, according to which the children exhibited severe psychological and psychosomatic symptoms as a result of the traumatic stay in the detention facility. The court held that the mere fact that children were not separated from their mother does not exonerate the authorities of their obligation to protect minors. The ECHR further justified its verdict by the fact that the complainant's

children were kept in an enclosed center which was designed for adults, and that they were kept in the same conditions as adults, without any tailoring to their extreme vulnerability.

Summary

The amendment to the Aliens Residence Act considered at present should bring about some positive changes with regard to the detention of minors. Newly, the Foreign Police will be obliged to acknowledge the cases of unaccompanied minors and families with children when determining detention time, and it will be obliged to appoint guardians to unaccompanied minors "immediately". Also, with the new amendment, the maximum length of a detention shall change in favor of families with children and shall no longer exceed 90 days, just as with unaccompanied minors.

However, the question remains whether to detain children at all. An answer may be found in a report by the organization called Save the Children [17]. The report examines, among other things, the effects of a stay in a detention facility on the personality of children. The report is based on research conducted in the UK that consisted of visits to detention facilities, interviews with experts and detained children, etc. The study describes three types of impact a stay in detention can have on the personality of the child. In particular, there is a negative impact on the child's state of mind. According to the reports by the organization, detained children suffer from depression, behavior changes, etc. Another problem is the negative impact detention has on the physical health of the child; sleep disturbances and loss of appetite were reported. Finally, the report describes the negative impact on children's education, as the normal education of the child is disrupted and at the same time, given the overall impact of the stay in detention, the child loses his or her will and willingness to learn.

As the EU has repeatedly declared, promoting and protecting children's rights is a priority of the EU human rights policy. The EU explicitly recognized children's rights in the EU Charter of Fundamental Rights, specifically Article 24 [18]. One of the EU guidelines on promoting and protecting the rights of children is: *Pursue the promotion and protection of the rights of the child in full conformity with relevant international instruments and standards, in particular the Convention on the Rights of the Child, by adopting all necessary legislative, administrative and other measures, in particular the cross-cutting measures identified as "general measures of implementation" by the Committee on the Rights of the Child.* [19] In order to fulfill this principle in practice as soon as possible, progress must be made towards finding an alternative solution to detaining minors. Discontinuing this practice can be considered a minimum effort in order to protect children's rights.

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Translation: Olga Richterová

[1] § 124 of Act No. 326/1999 Coll. "On the Residence of Aliens in the Czech Republic and on the Amendment to Some Other Acts"

[2] § 124b of Act No. 326/1999 Coll. "On the Residence of Aliens in the Czech Republic and on the Amendment to Some Other Acts"

[3] § 129 of Act No. 326/1999 Coll. "On the Residence of Aliens in the Czech Republic and on the Amendment to Some Other Acts"

[4] According to § 180c of the Aliens Act No. 326/1999 Coll. "On the Residence of Aliens in the Czech Republic and on the Amendment to Some Other Acts": *For the purposes of this Act, an unaccompanied minor alien is understood to be an alien between the ages of 15 and 18 who arrives in the Territory unaccompanied by an adult responsible for him/her as provided for in the legal code that is valid in the minor alien's (country) state of citizenship, or in the case of a stateless individual, the country wherein he/she last held residence, for as long as he/she is not actually taken into the care of such a person; an unaccompanied minor alien is also considered to be an alien younger than 18 years of age who is left unaccompanied after his/her arrival in the Territory.*

[5] According to § 169, Section 6 of the "Act on the Residence of Aliens in the Czech Republic and on the Amendment to Some Other Acts", the time-limit is 15 days.

[6] According to § 172 Section 1 of the "Act on the Residence of Aliens in the Czech Republic and on the Amendment to Some Other Acts", the time-limit is 30 days.

[7] § 200o of Act No. 99/1963 Coll., Code of Civil Procedure

[8] According to § 76a Section 1 of Act No. 99/1963 Coll. Code of Civil Procedure: *"If an underage child is found without any care or if his or her life or positive development are seriously threatened or disturbed, the presiding judge orders injunction to hand the child over to the care of a person designed in the court order.* In line with a preliminary injunction, an unaccompanied minor alien is dismissed from detention and placed in a Facility for children of foreign nationals before the expiry of the maximum detention time.

[9] Full title: *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals*

[10] The recently discussed amendment to the Aliens Residence Act, more specifically to its § 128 Section 3, is to be enhanced with this text: *(3) In the case of an unaccompanied alien minor, the Police carries out its actions in accordance with Sections 1 and 2 only after the country where the unaccompanied alien minor is to be deported to says that the unaccompanied minor will be received in a way appropriate to his or her age.* The text of the

draft amendment of the Aliens Residence Act is available on <http://www.psp.cz/sqw/text/tiskt.sqw?O=6&CT=70&CT1=0>)

[11] The Communication of the Federal Ministry of Foreign Affairs No. 104/1991 Coll.

[12] Petra Khollová, *Nezletilí cizinci bez doprovodu* (Unaccompanied migrant minors), 2009, available at: <http://www.helcom.cz/view.php?cisloclanku=2010051401>

[13] The Communication of the Federal Ministry of Foreign Affairs No. 209/1992 Coll.

[14] The following description of these judgments was used as a supporting argument by the Czech Organization for Aid to Refugees (OPU) when reacting to the amendment of the Aliens Residence Act (Parliamentary Document 70 of 2010), which was under the name "A brief overview of the planned amendment to the Aliens Residence Act and the detention of Aliens" (Parliamentary document 70) published for example here: <http://www.mezikulturnidialog.cz/Informace/organizace-pro-pomoc-uprchlikum-se-ohratilana-poslance-kvuli-detenci-cizincu.html>

[15] The European Court of Human Rights: "*Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*", Appeal No. 13178/03, Judgment of January 26th 2006

[16] The European Court of Human Rights: "*Muskhadzhiyeva and others v. Belgium*", Appeal No. 13178/03, Judgment of January 19th 2010

[17] The report by the Save the Children Organization: *No Place for a Child*, available at http://www.savethechildren.org.uk/en/docs/no_place_for_child_summ.pdf

[18] The Charter of Fundamental Rights of the European Union, OJ C 364, of December 18th 2000

[19] EU Guidelines for the Promotion and Protection of the Rights of the Child, the EU Council, 2007, available at <http://www.consilium.europa.eu/uedocs/cmsUpload/16031.07.pdf>

About author

Zuzana Jeřábková works as a lawyer in the Organization for Aid to Refugees (OPU).