THE CHARACTER OF THE SERVICE RELATIONSHIP OF MEMBERS OF THE SECURITY FORCES OF THE CZECH REPUBLIC IN LIGHT OF JUDICIAL CASE LAW AND RELATED CURRENT ISSUES

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ABSTRACT

The paper provides an insight into the issue of the legal regulation of the service of members of the security forces. Within the content of the historical legislation of the service of security forces through the theoretical background and basic elements of Act 361/2003 Coll., the author analyses in more detail the current practical issues existing in the application practice. A comprehensive explanation specifically concerns the relation between Act 361/2003 Coll., and Act 500/2004 Coll. Considerable attention is also paid to the issue of compensation for damage caused by an unlawful decision or maladministration. These questions are analyzed with an accent on the public character of the Act on the Service Relationship of members of the security forces and the principle of the subsidiarity of the Administrative Code. The argumentation is based on the case law of the Constitutional Court and the Supreme Administrative Court. The benefit of this paper is the elaboration of a topic that has been missed in the current professional literature so far, as well as the potentiality of raising a discussion on the future direction of the interpretations of the individual aspects of the service relationship.

Keywords: *security forces, case-law, administrative law, public service; liability for damage; administrative proceedings*

INTRODUCTION

In the modern history of Czechoslovakia and subsequent Czech Republic, the legal regulation of service of members of the security forces developed in a way that is significantly different from the legal regulation of other employment relationships. Even after the expiration of the validity of the legal rules regulating public service in the pre-war Czechoslovak Republic, existing practically in the form it was developed during the era of the Austro-Hungarian Empire, such regulation of service relationship kept official service elements even during the period of socialism, albeit that it was affected by a tendency to unify the legal nature of the employment relationship, in particular after the codification of labour legislation in the 1960s. The legislation has not succeeded in removing such burden by the time the current legislation came into effect, represented by Act No. 361/2003 Coll., on Public Service of Members of the Security Forces (hereinafter referred to only as the "Public Service Act"). Besides the unification of the service relationship of members of the security forces under one act, this legislation aimed to suppress contractual elements of the service relationship and to create a standard public administration relationship, resulting in a definitive and complete legislative division of public service from private employment relationships, regulated by the Labour Code of the Czech Republic. The members of the Security Forces, as well as the other public servants, have reinforced disciplinary responsibility for their professional activities. [1] The state, as a specific employer, requires from the members of Security Forces, compliance with a legal order, impartiality and apolitical attitude, when exercising their duties. Coercive powers are vested to public officers to regulate

the conduct of citizens. In many countries, members of the police and other security forces are authorized to carry arms in the discharge of their duties. Ultimately, the Security Forces are at the service of the state. Citizens and the large public expect that in their dealings with the police they are confronted with politically neutral officers who are detached from the political fray. This standpoint was and still is extremely important for countries transiting from non-democratic regimes to a democratic state governed by the rule of law. [2] However, this does not mean that the Public Service Act regulates the entire complexity of the relations created between the state and members of Probably the mostly recent discussed issue, related to the nature of public service and proceedings thereabout, was the use of Act No. 82/1998 Coll., on Liability for Damage Caused by Illegal Decision or Improper Administrative Procedure (hereinafter referred to only as the "Act on Liability for Damage").

The legal analysis forms the basis for exploiting the above-mentioned issues. We consider the relevant legislation and related consulting and expert literature, focusing on the interpretation of the respective provisions of the act and on the assessment of their complexity with regards to general regulation from the perspective of judicial case-law. For the extension and verification of identified information in the area of official procedures, practitioners were interviewed. These interviews were executed within the courses of lifelong learning at the Police Academy of the Czech Republic in Prague. The synthesis method and the method of generalization of experiences were applied for the formulation of conclusions

THEORETHICAL BACKROUND AND MAIN ISSUES

The key for understanding the relations between the legislation regulating the service relationship and the Act on Liability for Damage and solution of issues relation to this relationship lies in the understanding of the legal nature of the service relationship.

In relation to the nature and characteristic aspects of the service relationship, besides historical relations of development of this specific employment relation, it's worth pointing out, in particular, the break-even decision that has resolved the uncertainties present in the application practice in the Czech environment and related to the nature of this relationship and resulting competence disputes between civil and administrative courts when providing judicial protection against the decision of a superior service officer, more specifically against the resolution of a special plenum according to Act No. 131/2002 Coll., on the Decisions in Certain Competence Disputes, File No. Conf 26/2005 - 9 from December 13, 2007, where it's stated: "*Issues based on the service relationship of members of the Police of the Czech Republic, set by Act No.186/1992 Coll., (Act No. 361/2003 Coll., now), may not be considered as private due to their nature. The service relationship is and was characterized as an institute of public law.* Within the decision-making activities of Czech courts, further argumentation related to the public nature of the service relationship may be identified e.g. in the Finding of the Constitutional Court, File No. III. ÚS 2428/13 - 1 from June 13, 2014, where: "*the service relationship of policeman, created, and in the assessed case also terminated, on the basis of a decision as an act of authority of a respective service officer, is a public act by its nature, differing markedly from an employment relationship that is, conversely, a private law relationship*." [2] In compliance with the stance of the administrative courts, stated above, the Constitutional Court also concludes that the service relationship is of a public law nature, stating directly as well that the decision-making in cases of a service relationship represents an execution of public power.

These conclusions could also be supported fully from the past by the judicial case law of the European Court of Justice, considering the issue of disputes of public administration

employees, related to their hiring to a service relationship, career or termination of their service relationship, if it should be solved by a procedure for "civil rights and obligations" set by the European Convention on Human Rights,(Convention). in the case Pellegrin v. France from December 8, 1999, or in case Frydlender v. France from July 27, 2000. [3] In these two cases, the European Court concluded that if such a participant to a dispute related to the establishment, duration or termination of service takes part on the execution of public power and public office, whose purpose is the protection of the general interests of the country, the respective article of the European Convention is not applicable. European judicial case law did not include the issues of establishment, changes and termination of the service relationship of members of the security forces under the term "civil rights." However, this interpretation was subsequently reassessed in the decision of the large plenum of the European Court of Human Rights in the case Vilho Eskelinen v. Finland from April 19, 2007, with a related decision in the cases Fiume vs. Italy from July 30, 2009, and Cudak v. Lithuania from March 23, 2010. [4] Therefore, in these days, according to the European Court, proceedings on the issue of a service relationship are subject to the application range of art. 6 par. 1 of the Convention, i.e. under the term "civil rights and civil obligations."

Within this context, in relation to the Czech legislation we may state that it follows the social relationship it regulates as well as the time of its formation. The subject of the regulation of the service relationship are the relations between individuals performing service in security forces and the Czech Republic that such persons are in a service relationship to. This is a specific employment relationship, regularly designated as a state-employment relationship. However, not even this designation should motivate us to suppress the employment aspect automatically. It's an expression of a private element, or stated in a different way, an expression of the partially employment nature of the service relationship, given by the pure basis of the relationship between a participant, as an employee, and the state, as an employer, of a traditional understanding of the legal status of the employment subject and the historical connection of the legislation of the service and employment relationship. Between the employer and, in particular, a person deciding on the rights and obligations on its behalf, a completely different relationship is established as between a citizen and an administrative body when deciding on legal relations between the state and citizen. This is a relationship that's not very different from the relationship of an employee and employer within an employment relationship. In the issues of service relationship, a completely different area of rights and obligations is decided on as in the event of a standard administrative proceeding. In this area, we may not ignore the fact that the Public Service Act contains substantive law provisions, almost identical to the provisions of the Labour Act, e.g. the regulation of service period, rest time, provision of income for service, late payment interest and also damages, etc. These areas suppress the public law nature of the service relationship markedly. The fact that the legislation of the service relationship is of a strictly mandatory nature, and that a public officer decides on the rights and obligations within formalized proceedings, the nature of subjects' status is modified, but not changed in substance. Legal relations, their establishment, development and termination are somewhat different within a service relationship when compared to the standard relations of administrative law. Based only on these reasons, the administrative nature of the service relationship should not be overestimated when interpreting legal provisions.

Compared to the judicial case law of the administrative courts and of the Constitutional Court above, the stance of the Supreme Court of the Czech Republic towards this aspect of a service relationship is relatively perceptual, stating in one of its decisions as follows: "*The legal regulation of the service relationship of a policeman is of a comprehensive nature, where the private and public law elements are mixed here to a different extent and it's always necessary to conclude by an analysis of valid legal rules, if the relationship is of an employment nature or*

a different one." So, the Supreme Court considers the service relationship as a hybrid relationship (mixed). Part of the expert literature is of a similar opinion – e.g. Tomek, author of a consulting paper for the Public Service Act [5], states: "*the purely employment nature of the substantive provisions of legislation in relation to a service relationship is modified by procedural provisions having a nature typical for administrative law. Therefore, a service relationship is neither employment, nor an administrative relationship, but only a relationship of a hybrid nature*." Kadlubiec [6 provides a similar statement: "*A service relationship (as well as an employment one) is such a comprehensive relationship and important from a social and economic perspective that it'll always stay between private and public law from the perspective of institutes used during its regulation. However, at the end, the public or private concept must prevail and it's very important that it does not happen prematurely, but after thorough and objective consideration."*

When solving the issue of the mutual relationship of the Public Service Act and of the Act on Liability, the approach of the Supreme Court is decisive as the claims under the Act on Liability for Damage belong to the competence of civil courts and primarily their decision-making activity has an important impact on the practical application of law in this issue. Judicial case law of the Supreme Court has experienced a relatively interesting development.

In fact, by 2018, an opinion was held in the judicial case law of the Supreme Court that when taking decisions on claims for damages, caused by an illegal decision or incorrect administrative procedure, the Act on Liability for Damage shall not apply. E.g. in the decision from January 9, 2013, File No. 30 Cdo 2470/2012, published in a case related to the claims of a policeman based on the breach of the obligation for equal treatment, the Supreme Court stated: "*Where the state does not act in a position of power, but enters a legal relationship as a participant equal to the others, such acting may not be considered as a performance of state (public) power. In case of claims, where the state acts as an employer, employment liability shall apply. Also, the specific service relationships are similar, representing employment relationships by their nature with certain modifications that may evoke certain aspects of public power apparently. […] The requirement of the plaintiff for damages (harm) is based on the breach of legal obligations by an employee of the defendant, (not) acting on behalf of her during the change of a service relationship, therefore, this is not a liability relationship of a public nature, based on the decision of the defendant during the execution of her superior public power, which the competence of Act No. 82/1998 Coll. could be related to."* The Superior Court used the same interpretation then in e.g. a resolution from June 21, 2017, File No. 30 Cdo 120/2017. [7]

Albeit an execution of the public legal nature of a service relationship and interpretation on the execution of public power were stated within the judicial case law of the Supreme Court and of the Constitutional Court above, the Supreme Court made a different conclusion within its decision-making activity, corresponding to the mixed (hybrid) nature of a service relationship. In a reaction to this approach, courts of lower instance started to decide on claims for damages caused by an illegal decision or incorrect administrative procedure in issues of a service relationship negatively.

A certain shift (reassessment, or specification of existing judicial case law) could be seen following the resolution of the Supreme Court from March 21, 2018, File No. 30 Cdo 1405/2016, when the court primarily emphasized that the decision cited above, File No. 30 Cdo 2470/2012, was not solving the issue of harm caused by an incorrect administrative procedure arisen during the proceeding held in case of a service relationship, but on the basis of the decision of a public service body or other activities performed in these proceedings. Then, considering the specific

situation, it concluded the following: "*In spite of the cases stated above, in the issue being solved now, plaintiffs do not request adequate satisfaction for illegal decision or activities of public service officers against them as members, but for an incorrect administrative proceeding based on the inappropriate period of an administrative proceeding that is the proceeding in the issue of a service relationship […], where a public service officer acts as an administrative body, as the Supreme Administrative Court concluded repeatedly within its judicial case law… The issue in consideration is about a liability for the process of sole administrative procedure or also of a following procedure held at an administrative court, based on its inadequate period of time, so a liability based on a public law relationship, as this is a relationship between a member of an administrative proceeding and a deciding administrative body, albeit it's a member of the security forces and a public officer as well as the subject of the proceeding are the rights and obligations based on a service relationship…* and concluding that the claim for compensation of intangible harm, arisen as a consequence of a breach of the obligation to a public decision within a mandatory period, or as a consequence of inadequate duration of the proceeding in the issue of a service relationship, it's necessary to consider it under the Act on Liability.

On one hand, by this decision, the Supreme Court accepted the public law nature of proceedings held in the issue of a service relationship, thus accepting the judicial case law of the administrative courts stated above, preventing "pro futuro" primarily negative approach towards the claims for damages for proprietary or intangible harm, initiated in these cases by the Ministry of Interior or courts deciding in compensation proceedings. On the other hand, it kept its existing opinion that the service relationship is not of a purely public law nature and in accordance with its existing judicial case law also the approach that the Act on Liability may not be applied in case of harm caused on the basis of a decision of a public service body and other tasks performed in proceedings in the issues of a service relationship, so incl. the harm caused by the illegal decision eventually.

So, it's visible that the main issue of the Public Service Act is the fact that its regulation does not reflect the needs and specific aspects of respective proceedings adequately, often oscillating towards the employment relations by their nature, while the situation is complicated at least in terms of the administratively demanding nature by the fact that it's a regulation based on the principles of public law.

The deficit of legislation we pointed to above, leads in respective types of compensation proceedings to the fact that institutes and principles apply, whose use is deducted by the use of analogy. At the same time, practice in this area is cultivated, as stated above, by a relatively high number of continually developing judicial case laws, as a consequence of proceedings for service relationship issues becoming more formalized, bringing necessarily increased requirements for organizational, technical, human resources and material (financial) security of this agenda with a direct impact on the quality of decision-making and public budgets.

RESULTS AND DISCUSSION

Therefore, based on the content of the legislation and the cited judicial case law of the Supreme Court it's clear that the Public Service Act contains a comprehensive regulation of damages or liability of security forces for a proprietary harm, expressed in money, caused to any member during service performance, in a direct connection to him/her or for service performance, including the damage caused by publishing an illegal decision. For the comprehensive nature of respective legislation in the Public Service Act, the application of the Act on Liability for Damage is excluded. Conversely, regarding the absence of regulation of liability for intangible harm, arisen out of inactivity or the inadequate duration of a proceeding

in the issue of a service relationship, it's necessary to consider these issues under the Act on Liability for Damage. Certainly, the stated conclusions are positive for those members of the security forces, who claim that they suffered harm due to an incorrect administrative procedure in a proceeding, based on non-publishing of a decision within a mandatory period or the total inadequate duration of this proceeding. However, the question remains, to what extent it's possible to apply the Act on Liability according to the actual supplemented legal opinion of the Supreme Court in the event of another kind of incorrect official procedure, when the Supreme Court stated expressly in the resolution from March 21, 2018, File No. 30 Cdo 1405/2016, in relation to the existing judicial case law, excluding the applicability of this act, expressly that the legal opinion there was adopted "in relation to an intangible harm caused to a member of security forces: *by the decision on reassignment to another service position or by a disciplinary proceeding, by the dismissal from service or any other acts performed within these proceedings or by a public scandalization caused by police."* However, the issues related to proceeding duration or its continuity are not the main subject of the uncertain term "incorrect administrative procedure," but conversely, the number of activities of bodies leading this proceeding.

On the other hand, to a certain extent, these conclusions may be regarded as relatively negative for those members who feel the harm caused as a consequence of an illegal decision of a body deciding on its rights and obligations within a proceeding held for the issues of a service relationship if such issues remain outside of scope of the Act on Liability according to the Supreme Court, so security forces that caused such damage, decide on any such potential damages, while the question is if the legal opinion of the Supreme Court within the context of judicial case law of the Supreme Administrative Court and of the Constitutional Court, considering such decisions as correct decisions through which public power is executed, is the correct one.

A separate question is, if the duration of an administrative proceeding in the issue of a service relationship and the duration of the following administrative judicial proceeding should be considered within the context of Czech legislation as one. The key element for the assessment of this issue is the fact if legal relations, based on the service relation within the context of Czech legislation, may be seen as civil obligations in terms of art. 6, par. 1 of the Convention. According to the introductory part of the stated judicial case law of the European Court of Human Rights it should apply that if a claim for damages, caused by an inadequate duration of a proceeding on the issues of a service relationship, is applied, it would be necessary to consider the entire time period, during which such proceeding on a specific issue is held, from the perspective of the Act on Liability. On the other hand, certain interpretative issues could be caused again by a different approach and point of view on the nature of a service relationship and on the proceeding thereabout at the Supreme Administrative Court and at the Supreme Court.

CONCLUSION

The topical situation related to the perception of the nature of a service relationship, proceeding thereabout as well as of issues related thereto with the application of the Act on Liability for Damage to the service relationship, is not unified.

The Supreme Administrative Court of the Czech Republic is of the opinion that the service relationship is of a public law nature (decision-making, related thereto, represents performance of public power) and the proceeding on the issues of a service relationship is an administrative proceeding, where a public officer acts as an administrative body (in a superior position of power). The theory is of the same opinion, stressing the principle of legality, ie. that the public

officer is empowered by law and by the same law her power to act is limited to such activities that are in conformity with the rule of law. [8] The Supreme Court of the Czech Republic, responsible for the determination of judicial case law in the issues of the application of the Act on Liability, agrees with this approach only partially, when it accepts that the proceeding on the issues of a service relationship represents an administrative proceeding, but at the same time it considers the service relationship as a relationship not having only the nature of public law (or rather being of a private law nature). For this reason, the Supreme Court on one hand considers the claim for damages, caused by an incorrect administrative procedure, based on the inadequate duration of a proceeding on the issues of a service relationship (or on non-publishing of a decision in the mandatory period), as being the subject of the Act on Liability, while on the other hand, it does not consider the claim for damages, caused by an illegal decision of a public service body or by any other acts performed within a proceeding on the issues of a service relationship, as a claim subjected to the competence of the Act on Liability.

With regard to the existing dispute between the highest judicial instances and considering the judicial case law of the European Court of Human Rights, the question arises if such stated conclusion is the final one or if there are changes expected in the future, focused on the extension of the conclusion on the applicability of the Act on Liability even in other issues related to the questions connected to a service relationship. Public service in a broad sense is the service of the state to its citizens. Its main features are legality and legitimacy, impartiality, timeliness, cogency, and transparency [9]. Proper administration of public matters shall include the following: respect to human rights, principles of rule of law-based country, active participation of citizens in control activities, effective public sector, access to knowledge, information and education, as well as the values which support reliability, solidarity and tolerance [10]. Public servants, including the members of security forces, are the necessary and main part of it. Especially members of security forces are in a very sensitive position. Exposed to the daily public performance, they are responsible for executing the demands of the rule of law and they have to withstand criticism for many of their actions and behaviour. That is why the state shall not just require compliance with their obligations but must provide them with the respective and effective protection.

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