

Civil Service Reform in the Czech Republic and Protection of Civil Servants' Rights in Light of European Courts' Case Law

J. Janderová, M. Skřivánková

Abstract—Czech Civil Service Act adopted in 2002 has not become effective yet apart from several provisions. A reform of civil service is currently under preparation mainly due to EU strong criticism. New act, or rather a mere amendment to the mentioned Civil Service Act, either of them based on public law regulating method, is expected to be adopted soon. Once the new legislation becomes effective, new rights of civil servants will be protected and a court review of administrative decisions related to recruitment, remuneration, disciplinary and dismissal from service will be granted. The article analyzes recent case law of the European Court of Human Rights and demonstrates on selected recent cases that major tendency in those decisions is extending the scope of judicial review, and thus granting the right of a fair trial to civil servants. Those decisions shall serve as a basis for the Czech administrative courts, when developing their own new case law. The same tendency of extending standards of court review may be detected when analyzing EU Civil Service Tribunal case law. Although its decisions concern only EU staff, the article argues, that the Czech administrative courts will have a chance to use the EU Civil Service Tribunal decisions at least as support when reasoning their judgments. This is so because the main principles of civil service, such as no unfair discrimination, are common to the whole of Europe.

Keywords — Administrative Justice, Civil Service, Protection of Rights, Public Administration.

I. INTRODUCTION

IT is characteristic for civil service, as a body of public officials who are employed in civil occupations that are neither political nor judicial, that agents of the public power provide services on which law, public order and public health, funds, assets and other important values depend [2]. Public officials may thus exercise considerable powers. Therefore, civil service should be governed by legal rules which ensure loyalty, political neutrality and impartiality of public officials and make sufficient restraints to any abuse of such powers for personal interests on one hand, and on the other, compensate

J. Janderová is with the University of Pardubice, Faculty of Economics and Administration, Institute of Administrative and Social Sciences(e-mail: jana.janderova@upce.cz).

M. Skřivánková is a former student of the University of Pardubice, Faculty of Economics and Administration and currently works with a business company..

public officials' greater responsibility and accountability for their decisions by specific rights granted to them. As such, the rules should ensure stable, efficient and professional administration service. Although such rules vary state from state, it is common to most European countries that principles based on career system (although modernized and in many variations) apply to civil service predominantly.

Lately, civil servants are not only burdened by stricter obligations stemming from the state expectations as described above. On the other hand, they also enjoy rights that consist in transparent recruitment, reasonable remuneration, promotion upon merits, dismissal under limited circumstances strictly governed by law, etc., and the protection of such rights is granted. Failures to meet their obligations are assessed in disciplinary hearings which may lead to pecuniary or other sanction and termination of service in the worst case. As such, the decision may have a serious impact on their rights. Especially, if the disciplinary proceedings take place within administration, they might be easily abused. However, the answer to the question whether right to a fair trial and review of disciplinary decisions by an independent and impartial tribunal shall be granted has evolved through time. Finally it has been set in favor of civil servants.

The aim of this article is to explain the reasons for a deep reform in applicable civil service law in the Czech Republic, particularly regarding the protection of rights of civil servants and their access to courts, and to analyze trends in recent case law of European Court of Human Rights and also the EU Civil Service Tribunal. It seeks an answer to a question to which extent is a protection of rights granted to civil servants and whether European Courts' case law might serve as a basis of the future Czech administrative courts' review of administrative decisions taken in any sort of disciplinary proceedings.

II. SPECIFIC SITUATION OF THE CZECH REPUBLIC CIVIL SERVICE

Civil service remains a sovereign domain of individual states. It is subject to long-term development and is strongly influenced by the historic experience, traditions, public sensitiveness and other specifics of each country. Yet, a process of gradual convergence of individual state legal

regulations supported by various comparative studies, treaties and recommendations produced by numerous international organizations can be indisputably recognized since the beginning of this century. Especially, “the states from Eastern Europe have as characteristic trend the return to statutory regulations which transform public position into a profession.” [8]

However, some of the countries are rather behind the European standards in this field, namely the Czech Republic. It has been recently strongly criticized by the EU officials for a weakly implemented reform, as the Civil Service Act of 2002 has not become effective yet apart from several provisions. Legal rules applicable to all employees regardless of whether they work for state or business companies thus apply to public officials, with only few special provisions introducing just limited number of stricter obligations. Those special provisions do not cover any specifics of recruitment, promotion and dismissal from service. Such situation leads to a set of negative consequences, high rate of corruption and misuse of public funds dominating.

Yet, it has been shown that the existence of civil service reform is associated with lower levels of public sector corruption in post-communist countries [9, p. 331]. This is due especially to “the disciplinary measures seeking to constrain irresponsible behavior in the public sector”, ... “the increase of accountability” and “meritocratic principle of recruitment together with the prospect of long-term careers based on individual competence and performance, which in turn was expected to discredit the short-term benefits of corrupt practices” [9, p. 331].

Further, specific civil service legislation not only imposes stricter obligations, but compensates those by broader rights of civil servants compared to private sector workers. Those contribute to employee satisfaction. If the work satisfaction is low, it has a negative impact on the services provided. “Not only because less motivated workers will deliver services of a lower quality, but also because it will make the public sector less attractive as an employer.” [1, p. 273] This results in a less qualified staff being appointed.

All these deficiencies are the reason for the EU criticism. As the deadline set by EU for making proper reform of the Czech civil service is set for 31st December 2013, it is currently undergoing a process of change with still two different concepts supported by different political parties to choose from. The first of them is based on private law approach and the second on public law approach.

Elections are planned to take place in the end of October 2013 and the prospect is that they will end with a strong victory of left-wing parties, namely the Social democratic party. Such result would very probably lead to a mere amendment of the 2002 Civil Service Act, as this was already proposed by a bill drafted by Social-democratic members of Chamber of Deputies submitted in July 2013. This bill was not approved due to lack of time as the Chamber of Deputies was dissolved on 28th August 2013 by the President of the Czech

Republic. It is thus most probable that the new government, once in place, will build on this proposal, and that the legal rules governing civil service will thus be based on public law method of regulation.

Nevertheless, according to recent doctrine, the public service is considered an institution on the border line between administrative law and labor law. [5] Consequently, there will necessarily be both public law and private law elements present in any civil service legislation and the only question is, which shall prevail.

Further, the common core of principles applicable to civil service shared throughout Europe builds on common grounds and stems from the historic experience common also to Central Europe. Hence, we can expect that the Czech legislation will not ignore them whatever concept is finally adopted.

Moreover, the principles are used by courts when interpreting law and overcoming loopholes in individual law cases. Civil service cases generally concern the rights or obligations deriving from a statutory employment relationship. The cases imply a review of legality either of an act adopted in regard of a person employed under such employment relationship. With the new legislation which will probably be based on public law method of regulation, and as will be shown below even in some specific cases where private law method is chosen, the Czech administrative courts will soon be faced with necessity not only to apply new law, but with the challenge to refine it by way of its interpretation. Courts' decisions, if strong in their arguments, can significantly help to speed up the positive behavioral change.

The aim of this article is thus to show the major tendency in European Courts' case law and identify the potential of exploiting conclusions drawn from recent case law of the European Court of Human Rights and the Civil Service Tribunal of the European Union concerning the status and rights of civil servants or employees of EU institutions in the Czech Republic in the absence of previous Czech cases (apart from those relevant to police officials). Anyway, first a summary of historical and recent state of civil service and further applicable law is included to make the overall picture more complex.

III. CIVIL SERVICE IN THE CZECH REPUBLIC - HISTORICALLY AND CURRENTLY

Historically, the Czechoslovakian civil service was based on a career system inherited from the Austro-Hungarian monarchy. Tenure and progressive promotion were some of the most important aspects the system was built on. This system continued after the World War I. in Czechoslovakia with respective legislative grounds worked out into further detail by decisions of the Czechoslovak Supreme Administrative Court.

A uniform labor law status of all employees regardless of their job nature with no exceptions for civil servants was enacted and stressed as the best for not favoring white collars

during the communist era. Such uniformity and egalitarianism was very strong even in comparison to other Central and East European countries such as Poland, Hungary or Bulgaria [4, p. 26]. Due to this fact, and the lack of legal theory in the field of civil service which was not formulated as it had been suppressed before, almost no experience to draw new legislation from was present in 1990ies [4, p. 26]. The issues was politically sensitive, and any draft law was criticized for lack of conception, its content or for legislative errors. Finally in 2002, it seemed that the obstacles were overcome, as new legislation was adopted.

Unfortunately, the reform was not only late, but also weakly implemented. As described below, the only law governing the status of local and regional government officials, is effective since 2003, the status of other public servants still being governed by Labor Code.

Absence of specific civil service specific legal regulation has a negative impact especially on central levels of public administration. Lack of conceptual management, instability of the professional bureaucracy, zero responsibility for the apparent failures of management or other work tasks, lack of transparency in the allocation of responsibilities, and essentially zero horizontal cooperation and coordination at the central level significantly affect the quality of public administration. This especially applies to senior staff. Yet, the leaders should motivate and support the institution's personnel through attitudes and activities in conformity with generally accepted values acting as models for the less senior staff. They are the communication interface between the institution and the politicians and they should be the ones who motivate the staff to carry out the everyday tasks in line with the adopted policies. [11, p. 119]

Thus, the current status is unbearable, the necessity of change is obvious and the deadline set for the end of 2013 is approaching. Therefore, it is most probable that new law will become effective during 2014. With the fall of the government in June 2013 it is open which approach will triumph in the end. As the new applicable civil service legislation is not adopted yet, it is still soon to judge what changes it will finally bring about, whether those will be rather cosmetic, or, hopefully, will help to reduce the rate of corruption, nepotism and other negative phenomena of the current state of Czech public administration. However it can be summarized that, there have appeared basically two major approaches recently, which are in question. First, to draft a new law based on private law method. The second, to merely amend the 2002 Civil Service Act based on the public law method, in order to reduce the high costs it would bring about, if it were to become effective in the current wording. The first approach preferred by the government which fell in June, was widely criticized for not complying with the EU requirements and not being compatible with national traditions. The second approach seems more probable to be adopted for the reasons explained above.

A. *Applicable law*

The grounds of civil service can be found in the Czech Constitution which lays down, since 1993, in its Article 79 par. 2 that the legal status of government employees in ministries and other administrative authorities shall be defined by law. The Constitution therefore, even though being rather laconic and not specifying any principles of civil service at all, strictly requires that the status of civil servants be enacted in the form of a law. Such general law was adopted ten years later, in 2002, as Act. No. 218/2002 Sb., on Service of Civil Servants in Administrative Offices and Remuneration of such Employees and Other Employees in Administrative Offices (the Civil Service Act).

The concept of the law is based on public law method of regulation. It is focused on professionalism, political neutrality, loyalty and stabilization of civil service and recognizes equal access to service, no unfair discrimination, job security, and participation of civil servants as the main principles of it. It also provides for disciplinary hearings and acknowledges right for court review of administrative decisions taken in relation to civil service, which shall be important for the further discussion of judicial review further below in the article.

However, the Civil Service Act has not become effective yet, as its date of effectiveness of most of its provisions has been deferred several times, currently being set on 1st January 2015. The deferral is officially reasoned by enormous costs which can't be borne by the state budget in the current poor condition. Unofficially, it is clear that all political parties benefit from situation when selection for service or promotion is not based on merits, education, experience and capacities of individuals, but rather on their connections with politicians. Cases of practical nepotism, with the most senior public officials being selected by respective minister or other politicians are unfortunately not rare. This even leads in some cases to corruption, misuse of public funds, and let's say public power generally.

Further, aside from obviously illegal activities, deficiencies lie in the fact it is not determined for the respective positions what specific education is required. Thus, when requiring only generally any university degree (sometimes even for positions where such education is obviously not necessary) and not specifying the relevant field, it may happen that construction issues or environment protection issues may be decided upon by a person with a degree in a totally different field such as art, education, economy etc. We could continue on naming deficiencies, but it is not the purpose of this article.

As mentioned already above the European Union has criticized this situation, most recently in Council's recommendation: "The 2012 country-specific recommendation on public administration specifically mentioned the need to increase the efficiency of public administration and step up the fight against corruption. However, only limited progress has been made in adopting the priority legal acts under the Czech anti-corruption strategy for 2011-12. A new anti-corruption

strategy for 2013-14, adopted by the government in January 2013, needs to be followed up by the urgent adoption of outstanding priority acts, such as the Public Servants Act. New legislation will need to adequately separate political appointees from non-political staff, guarantee independence of state officials and create a well-functioning career system to reduce high staff turnover" [3].

1) *Ethical Code of Officials and Public Administration Employees*

Despite the lack of rules set by the Civil Service Act, there are at least rules applicable to civil servants stemming from Ethical Code of Officials and Public Administration Employees in place. It was adopted in 2012, replaced the previous code from 2001, and its aim is to develop and promote desirable standards of behavior for public officials. It shows significant similarities to the European Council recommendations cited below, although some of the main principles were not incorporated in it.

Apart from stressing the principle of legality, impartial service for public the most important seem to be the parts dealing with conflict of interest, corruption and use of public funds and further speed and efficiency as those are currently viewed generally as the most common defects that need to be prevented. Yet, whistleblowing was not included, due to a negative historical experience.

It is important, that fundamental breach of the set obligations is regarded as breach of Labor Code provisions with the respective consequences, such as making the public official redundant.

2) *Law applicable to specific categories of civil servants*

Together with the Civil Service Act, another law governing the relationships of officials working for local and regional governments was enacted as Act. No. 312/2002 Sb., on Local Government Officials and amending certain Acts. This act is effective since 2003, contrarily to the Civil Service Act. It is special to the Labor Code which applies only when Act. No. 312/2002 Sb. does not contain its own special provisions. The concept is based on private law and thus different from the Civil Service Act. Still, specific nature of public officials' recruitment, promotion and rights is acknowledged. The experience with this act is rather good and representatives of cities and regions prefer no amendments to that act to be adopted.

Further, a special act, based on public law method of regulation, applies to individuals working for police, customs authorities, fire brigades and to members of other security corps. It is the Act No. 361/2003 Sb., on Service of Members of the Security Corps, as amended. For the purpose of this article it is important to mention that several court decisions of Czech administrative courts in this field are available. Those might be used as a limited ground, due to the specificity of a separate and different act, on which the courts could decide the future civil servants' cases. .

B. *Czech Administrative Courts*

Administrative justice in the Czech Republic has undergone a reform with a new law, the Code of Administrative Justice, effective from 1st January 2003. Unlike the civil service reform, which was being prepared in the same time period, the administrative justice reform was successfully completed. The decisions of the Supreme Administrative Court form a valuable source of enlightenment to the administrative authorities and the court itself is praised as one of the best working institutions in the Czech Republic. Therefore, it can be expected, that once the new civil service legislation becomes effective, the litigations stemming from legal relationships governed by it, will result in administrative courts' decisions elucidating this in the Czech law theoretically unexplored area. Court decisions will then enable the reform to become effective.

Generally, it may be said that administrative courts, which constitute of special administrative senates or sole judges of regional courts and the Supreme Administrative Court, are entrusted with the review of most of the administrative decisions produced by Czech administrative authorities. However, some of the administrative decisions may be questioned before civil courts. Administrative justice provides under art. 2 in connection with art. 4 par. 1 point. a) of the Code of Administrative Justice protection to public subjective rights where those were affected by a decision in the administrative authority. The civil courts, on the other hand, decide cases in civil proceedings where the Administration has decided in litigation or on another legal matter, which arises from civil, labor, family or business relationships. This is in short the basic concept of the review system, as set in 2002, which led to a split of judicial review of public administration into two units that have separate procedural rules, each of which features a slightly different level of review. The aim was certainly to achieve the possibility of a deeper review of decisions to be subject to the full jurisdiction under Article 6 par. 1 of the European Convention of Human Rights. However, the split is questioned as the mentioned goal could have obviously been met even by the administrative branch of courts solely.

The border between public and private law was thus set as the elected dividing line. When the subjective rights of the complainant had were infringed by the administrative authority's decision are under public law, the legality of such administrative decision shall be assessed by administrative courts under Act No. 150/2002 Sb., the Code of Administrative Justice (hereinafter CAJ). If there is interference in the subjective rights of private character, then judicial review takes place along the line of general (civil) courts in accordance with the rules contained in Part 5 of the Code of Civil Procedure. Private nature of things is according to Sec. 244 par. 1 of the Code of Civil Procedure in conjunction with Sec. 7 par. 1 things that result from civil, labor, family and business relationships.

Thus, as currently the relationship of public officials to state is governed by rules of labor law and the decisions related to selection, remuneration, promotion, retirement etc. are even often not regarded as administrative decisions at all, the administrative courts do not have legal authority to decide over any potential claims. However, this will very probably change soon with new civil service legislation. If it will involve a mere change of the Civil Service Act based on the public law regulation method as discussed above, their authority will be apparent from the public / private law dividing line.

IV. GENERAL PRINCIPLES APPLICABLE TO THE STATUS OF PUBLIC OFFICIALS IN EUROPEAN COUNTRIES

The most important principles governing the status of public officials in European countries are summarized in two documents drafted by the Council of Europe. Those are Recommendation No. R (2000)6 of the Committee of Ministers to Member states on the status of public officials in Europe, and further Recommendation No. R (2000)10 of the Committee of Ministers to Member states on codes of conduct for public officials. Both recommendations set European standards for civil service based on either of the two models – the contractual or the career system. Thus the Czech Republic shall follow them in any future legal acts. They have already been the base for the yet non-effective Civil Service Act as enacted in 2002.

Most importantly, the principles of good practice very strictly prohibit any unfair discrimination and lay down equality. There should be no discrimination on the basis of, *inter alia*, age, disability, gender, marital status, sexual orientation, race, colour, ethnic or national origin, community background, political or philosophical opinion and religious beliefs, especially concerning the access to public posts and promotion.

Among the other essential principles that should be applied by courts most frequently due to the nature of cases that appear before courts, are the principles related to recruitment, remuneration, promotion, disciplinary actions and termination of service.

Recruitment of public officials should be defined by equality of access to public posts and selection based on merit, fair and open competition systems and absence of discrimination. The selection procedures should be not only open but also transparent, and their rules should be clear, to allow for the best candidate that meets specific requirements of the department or organization concerned to be appointed. However, some pre-conditions may exist for accessing public posts. In addition, general requirements and specific requirements may exist for recruitment. In so far as they constitute exceptions to these principles, they should be admitted only if lawfully justified.

A legal remedy for applicants to public positions against the decision of the competent authority regarding the

(non)appointment shall be granted.

Once being appointed to a position of a public official, the person should not be transferred without his or her consent to a different position unless it is required in public interest and, in particular, of a good public administration. As such transfer may not ever be used as a disguised sanction; the public officials shall have a granted legal remedy against any possible unlawfulness of such a measure.

Promotions implying a higher level of responsibility should be based on merit. Therefore those should not be decided upon arbitrarily or with respect to any other hidden reason such as friendship with the person having the authority to decide upon promotion or as a return service.

The remuneration should be adequate and commensurate with the responsibilities and function of the public official. It should also be sufficient so as to ensure that public officials are not put at risk of corruption or engaging in activities incompatible with the performance of public duties.

Failure by public officials to fulfill their duties, whether intentionally or through negligence on their part, may lead to the institution of disciplinary proceedings which must be adversarial and the officials concerned should be entitled to be assisted by a representative of their choice. Public officials should have a legal remedy against disciplinary action.

A legal remedy should be available also in all cases of termination to protect public officials against misuse of authority. Termination is limited only to cases and reasons provided for by law. For the protection of the public officials rights in relation to their employer to be effective, the legal remedy granted should consist in a petition filed with a court or other independent institution.

It can thus be summarized that should the principles be effective, there needs to be a legal remedy in place for any event those principles might be circumvented. This legal remedy, in the Czech context, will be provided by the administrative courts, once civil service will be governed by an act based on public law as reasoned above. However, such judicial review may not be regarded as axiomatic. It has only been recently that the European Court of Human rights developed its theory towards a wider approach in favor of judicial control.

V. EUROPEAN COURT OF HUMAN RIGHTS

It has become a question, whether the right to a fair trial enshrined in Article 6, paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the "Convention") applies to civil servants and their claims. Article 6 par. 1 of the Convention reads: „In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” Thus, it embodies a right of access to court, i.e. to institute proceedings before courts in civil matters. This right is not absolute as it may be subject to limitations. The question is do such limitations

apply to civil service cases?

The less the text of the Convention regulates the right to a fair trial, the more work was left to the European Court of Human Rights (hereinafter "ECHR") and its case law. ECHR's interpretation has completed the content of concepts and thus a range of cases to which Article 6 par. 1 must be applied, as well as the content of the rights that result from it. The key terms of Article 6 par. 1 are "civil rights and obligations" and "criminal charges" (for purposes of this article the later term may be disregarded), and their substantive scope.

ECHR uses the autonomous and evolutive interpretation, when working with the Convention. The interpretation shall be crucial for understanding whether rights stemming from a civil service relationship might be regarded as civil rights, and Article 6 par. 1 is applicable at all.

Autonomous interpretation means in essence that the Convention cannot be interpreted using the national rules of law applicable in the state which is sued before the ECHR. The Convention must be interpreted so as to set the same standard of protection of the rights guaranteed by it in all Member States, regardless of differences in their national legislation. National law, as will be shown, is not completely ignored, but only in terms of its effects on the rights of persons and not in terms of its legal qualification. For example, in *König v Germany* the ECHR states: "Whilst the Court thus concludes that the concept of "civil rights and obligations" is autonomous, it nevertheless does not consider that, in this context, the legislation of the State concerned is without importance. Whether or not a right is to be regarded as civil within the meaning of this expression in the Convention must be determined by reference to the substantive content and effects of the right - and not its legal classification - under the domestic law of the State concerned. In the exercise of its supervisory functions, the Court must also take account of the object and purpose of the Convention and of the national legal systems of the other Contracting States." [19, § 89]

The evolutive method of interpretation reflects the ECHR's will to admit the development of rights and not to stagnate in its case-law.

A. Case Law Relevant to Public Service

To decide whether Article 6 par. 1 of the Convention applies to a certain case, the ECHR always examines whether two criteria are met. The first criterion is whether the case relates to a dispute regarding a right. Secondly, if the answer to the first question is positive, the ECHR checks whether such disputed right is of a civil character.

Court's case-law concerning the first criterion, as to whether there was a "contestations" within the meaning of Article 6 par. 1 was summarized in the *Bentham* judgment of 23 October 1985:

(a) Conformity with the spirit of the Convention requires that the word "contestations" (dispute) should not be construed too technically and should be given a substantive rather than a formal meaning.

(b) The "contestations" (dispute) may relate not only to the

actual existence of a right but also to its scope or the manner in which it may be exercised. It may concern both questions of fact and questions of law.

(c) It must be genuine and of a serious nature.

(d) The expression "disputes over civil rights and obligations" covers all proceedings the result of which is decisive for such rights and obligations. However, a tenuous connection or remote consequences do not suffice for Article 6 § 1 (art. 6-1): civil rights and obligations must be the object - or one of the objects - of the "contestations" (dispute); the result of the proceedings must be directly decisive for such a right [14].

The ECHR's view on the applicability of Article 6 par. 1 to civil service cases has undergone a significant change in time. When there was no doubt that a right was concerned, it stayed questionable whether the right related to civil service was of a civil character, or not.

First, ECHR concluded, that the legal systems of the Council of Europe member states distinguishes fundamentally between the civil servants and the employees working in private sector. From that, the ECHR draw that disputes relating to civil servants' appointment, rights and duties related to their career and termination of their service were generally outside the scope of Article 6 par. 1. On the other hand, claims related to a "purely economic right" (e.g. payment of salary) which simultaneously did not mainly call in discretionary powers fell in the scope of Article 6 par. 1, and the member states therefore had to guarantee a fair trial and court review. As an example the cases of *Francesco Lombardo v. Italy* as decided on 26th November 1992 [17] and *Massa v. Italy* as decided on 24th August 1993 [21] can be mentioned. In the first case, the application concerned a request for revision of the amount of an invalidity pension of a former policeman. The ECHR noted the absence of a uniform European notion as to the juridical nature of the entitlement to insurance benefits under social security schemes. However, even though disputes relating to the recruitment, employment and retirement of public servants were as a general rule outside the scope of Article 6 par. 1, State intervention by means of a statute or delegated legislation had not prevented the Court from finding the right in issue to have a civil character. It found that notwithstanding the public law aspects, the cases essentially concerned the State's obligation to pay pensions in accordance with the legislation in force. In performing these obligations the State was not using discretionary powers, and could be compared with an employer who was a party to a contract of employment governed by private law. Consequently, the right of a policeman to receive an "enhanced ordinary pension" was to be regarded as "civil right" within the meaning of Article 6 par. 1, which was therefore applicable.

The second case concerned an obligation of the State to pay reversionary pension to the husband of a public servant in accordance with the legislation in force. The Court held that applicant's right to a reversionary pension is a "civil" one within the meaning of Article 6 par. 1 of the Convention. The

reasoning was the same as in the Francesco Lombardo case.

According to other decisions of the ECHR (*De Santa v. Italy* [16], and *Nicodemo v. Italy* [22]) Article 6 par. 1 of the Convention applied in the civil service cases where pecuniary aspect of what was at stake in the proceedings was decisive. The domestic proceedings had a bearing on the applicant's economic rights when those affected namely the level of salary laid down in the collective agreements and no discretionary powers could be exercised.

As such case-law based on a prevailing non-proprietary nature of the dispute brought a higher degree of uncertainty to states regarding their obligations; the ECHR later in 1999 changed its approach in case of *Pellegrin v. France*. In this judgment the ECHR defines civil service to assure same treatment throughout Europe to the same group of people irrespective of the country they work in and what is more important irrespective of the legal system and legal method of legal regulation. It introduced a functional criterion based on the actual job responsibilities of the individual claimant. The holders of posts involving responsibilities in the general interest or participation in the exercise of powers conferred by public law wielded a portion of the State's sovereign power. The State therefore had a legitimate interest in requiring of these officials a special bond of trust and loyalty and Article 6 par. 1 did not apply [23, §§ 66 - 67]. Examples of such activities were armed forces and police. Contrarily, where this exercise of State's power element was not present, Article 6 par. 1 was applicable. The only exception from the general rule of the exclusion of Article 6 par. 1 was pension claims. ECHR held that the special bond between the state and its former employee was broken when the employee retired.

In 2007 the ECHR moved further to a wider approach in favor of judicial control when it held in *Vilho Eskelinen and others v. Finland* case that the functional criterion itself may lead to anomalous results. To ascertain the status of the claimant's function is not always an easy task. Therefore ECHR further developed the functional criterion. It held that *Pellegrin* case was a first step to partial application of Article 6 par. 1 rather than making it inapplicable as the cases that followed allowed bringing claims not only for salary, but also allowances, dismissals and recruitment on similar bases as other employees with no special bond to the State. The *Vilho Eskelinen* case brought a new test, when two conditions have to be fulfilled so Article 6 par. 1 remains inapplicable to civil servants. Firstly, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State's interest [24, §§ 57, 62].

From 2007 on, the ECHR has kept on refining the above conditions with an emphasis on granting the broadest possible judicial review and applicability of Art. 6 par. 1.

For example in the case *Cudak v Lithuania* which concerned a Lithuanian national who was hired as a secretary and switchboard operator by the Embassy of the Republic of Poland in Vilnius. Her duties corresponded to those habitually

expected of such a post, and were stipulated in her employment contract. In 1999, Ms Cudak complained to the Lithuanian Equal Opportunities Ombudsperson that she was being sexually harassed by one of her male colleagues as a result of which she had fallen ill. The Ombudsperson held an inquiry and recognized that she was indeed a victim of sexual harassment. Ms Cudak was not let in the building of her employer when she tried to return after two months of sick leave. Later, she was informed that she had been dismissed for failure to come to work. When she complained and brought an action for unfair dismissal before the civil courts, in the last instance the Lithuanian Supreme Court found in particular that she had exercised a public-service function during her employment with the Polish Embassy in Vilnius and established that, merely from the title of her position. It thus could be concluded that her duties facilitated the exercise by the Republic of Poland of its sovereign functions and, therefore, justified the application of the State immunity rule. However, the ECHR's view was different. She had not performed any particular functions closely related to the exercise of governmental authority. She had not been a diplomatic agent or consular officer, nor a national of the employer State, and, lastly, the subject matter of the dispute had had to do with the applicant's dismissal. The ECHR held that: "the mere allegation that the applicant could have had access to certain documents or could have been privy to confidential telephone conversations in the course of her duties is not sufficient to fulfill the objective grounds in the State's interest condition." [15, § 72]. Her dismissal and the ensuing legal proceedings had arisen originally from acts of sexual harassment that had been established by the Lithuanian Equal Opportunities Ombudsperson. Such acts could hardly be regarded as undermining Poland's security interests.

Further, in *K.M.C. v Hungary* the ECHR held that when the note of dismissal of a civil servant did not have to state any reasons according to applicable state law any court review would thus be limited to such extent that it cannot be considered to be an effective judicial review under Article 6 par. 1, as "this legal constellation amounts to depriving the impugned right of action of all substance." This is due to the fact that in absence of justification, it is almost impossible to prove that the dismissal was ill-founded. Furthermore, the Hungarian courts could do nothing else than to apply the provisions in force, which made such dismissals without a justification lawful. [19, § 34].

In *G v Finland* the ECHR held that there can in principle be no justification for exclusion from the guarantees of Article 6 of ordinary labor disputes on the basis of the special nature of the relationship between a civil servant and the State in question, subject to the fulfillment of the two conditions of the *Vilho Eskelinen* case. There will, in effect, be a presumption that Article 6 applies. It will be for the respondent Government to demonstrate, first, that a civil-servant applicant does not have a right of access to a court under national law and, second, that the exclusion of the rights under Article 6 for the

civil servant is justified [18, § 34].

It can thus be concluded, that according to the ECHR's case-law the exceptions from the applicability of Article 6 par. 1 and fair trial in civil service cases should be based on an explicitly expressed legal exclusions justified on objective grounds in the State's interest which is to be interpreted restrictively.

B. Reflection of ECHR case law in the Czech Supreme Administrative Court's Decisions

First, it needs to be stressed that Czech law allows for a court review of administrative decisions in the civil service cases due to the broad general clause enshrined in Article 36 par. 2 of the Charter of fundamental rights and freedoms: "Unless a law provides otherwise, a person who claims that her rights were curtailed by a decision of a public administrative authority may turn to a court for review of the legality of that decision. However, judicial review of decisions affecting the fundamental rights and freedoms listed in this Charter may not be removed from the jurisdiction of courts."

The Supreme Administrative Court has used the above mentioned ECHR's cases, especially Pellegrin and Vilho Eskelinen, in its own decisions as a support for the broad judicial review as enshrined in Art. 36 par. 2 of the Charter. As the civil service legislation is not effective yet, the cases did not involve public officials in state administrative authorities (as argued above those are currently labor law cases decided upon by civil courts), but rather police officers, security forces employees, and further e.g. in cases of prosecuting attorney's dismissal, case of a candidate whom the president refused to appoint in judge position [25] and another of a candidate for dean not appointed by rector [26]. However, it can be expected that the same approach will be applied to other public officials, once the civil service legislation becomes effective.

In the case concerning appointment into judge position [25] the court assessed the conditions set in the Vilho Eskelinen case which were not met. The court further stressed that the Convention and thus ECHR case-law form only the minimum threshold standard that needs to be satisfied by all European states which means that national law may provide for a more robust protection.

In the case of non-appointment of the candidate for dean [26], the court dealt with the public - private law borderline between administrative courts and administrative courts' jurisdiction. It explained that the relationship between the state (or public corporation such as university) and its "servant" does not necessarily need to be governed by public law as a whole so that the act of appointment may be regarded as an administrative act which may be subject to a court review. Even if the once appointed candidate's relationship with its employer is governed by labor law, it is decisive whether the act of appointment itself is of public law nature. It lacks such nature when the reason for it is just to install the selected individual into a specific position. Here the court used the Pellegrin case arguments. If it is expected that the appointed

person will participate in the exercise of powers conferred by public law as a portion of the State's sovereign power, the appointment is of public law nature. As such it may be reviewed by administrative courts.

It can thus be argued that the Supreme Administrative Court observes the tendency in ECHR's case law to make to court review more accessible and robust. Can it also draw experience from the other important European court, working at the EU level, specific in its jurisdiction which encompasses only specific civil service cases?

VI. EUROPEAN UNION CIVIL SERVICE TRIBUNAL

European Union does not prescribe any civil service system to its member states. Nevertheless, it demands that the civil service in each state is based on common principles forming the European administrative space. This is crucial as all countries need to cooperate, coordinate their work when preparing common EU policies and implement and enforce *acquis communautaire*.

Contrarily, EU has created a rather sophisticated system for its own officials including an open and transparent procedure of recruitment, promotion in service, training and other rights and duties regulated mostly by EC Staff Regulations [32]. It is based on principles of no unfair discrimination, equal treatment in appointment, promotion and rights and duties related to career. Further principles correspond to those in the Council of Europe recommendations described above.

A considerable number of law cases are brought before court by the abounding EU staff. In December 2005 a new specialized judicial body for staff litigation, the Civil Service Tribunal (hereinafter the "CST"), was established. It took over the cases of Court of First Instance, which has then become a second instance in staff cases. Decisions of the CST are obviously of a rather limited impact as they do not apply to a person from outside the institutions. [6]

However, they may bring some inspiration in the overall tendencies and further wherever they are based on the general principles common to civil service and legal status of the EU public officials.

Similarly to ECHR, extending the scope of judicial control and together with it the standards of control are the major tendencies which can be distinguished with the case law of CST [6]. Kraemer summarizes that the extension of scope first concerned the types of acts challengeable as in case *Violetti a. o. v. Commission* [27], the three months' time limit for bringing an action, and also loosening the formal requirements of an application. The extending of standards can be seen in pleas in law raised by the court of its own motion and more importantly in references to labor law [6]. CST has in several cases assessed the questioned act using the rules applicable in the field of labor law as an additional standard of judicial control alongside the EU administrative law. The most recent case law shows that directives adopted by the institutions with regard to member states could to some extent be applied to those institutions as well. This can be demonstrated on case

Strack v Commission [28] in which the court held that the Commission had to ensure requirements of the Directive 2003/88/EC of the European Parliament and of the Council which lays down minimum safety and health requirements for organization of working time by virtue of Article 1e(2) of the Staff Regulations.

As regards the common principles, cases related to discrimination seem to be the most important source of inspiration for national court bodies. Just to select some of the important recent decisions, the following cases can be mentioned. In the case of *Barbin v. Parliament* [29] CST applied mechanism for reversal of the burden of proof applicable in situations when individual covered by Staff Regulations considers himself wronged because the principle of equal treatment has not been applied to him. Further, in the same case, it was held that where an official exercises a right granted to him, such as the right to parental leave, the administration may not take the view that the position of such official is different to the position of another official, who has not exercised the same right. Regarding the recruitment procedure CST found in the case of *Bancale and Buccheri v Commission* [30] no discrimination when access to selection procedure was narrowed to candidates whose professional experience was more valuable because of the fact that it had been acquired after graduating and because it was related to the gained university degree. CST further stressed the transparency of selection procedures as a necessary barrier to discrimination. According to the CST's decision in case of *Cuallado Martorell v. Commission* [31] breach of obligation to react to a candidate's request for additional information in a month period may result not only in that the candidate will bring in action without sufficient information to ground it on, but it may constitute maladministration and the corresponding obligation to pay damages.

The above mentioned cases are not meant to show the complexity of the CST case law, but are shown only with the intention to demonstrate that its case law, even though being of limited nature as it regards the individual EU officials, can in some cases serve as a valuable source of understanding the common European idea of principles applicable to civil service. The Czech administrative courts may thus inspire themselves not only by the ECHR's cases, but to some limit by the CST's cases as well.

VII. CONCLUSION

Despite the process of European integration public service remains in various European countries heterogeneous. However, common principles apply. Out of the general principles those that prohibit any unfair discrimination and lay down equality, which apply from the very start when an applicant files his application to become a civil servant, throughout the whole service till its termination seem to be most important ones. Furthermore, it has become a rule that a legal remedy must be in place for any event those principles might be circumvented.

Thus, the decisions of European Court of Human Rights based on respect to the common principles may become a valuable source of inspiration for national courts where they are applied and refined. Especially the Czech administrative courts which will soon with new effective legislation need to develop their own approach to civil service of public officials. Their case-law will need to comply with the major tendency seen in European courts' decisions which is extending the scope of judicial review and its standards.

The Supreme Administrative Court has already used ECHR's arguments as a support for a broad and efficient judicial review in cases similar in their nature to civil service. Therefore, it is foreseeable that it will continue in doing so in the field of civil service as well.

Even though the decisions of the EU Civil Service Tribunal are obviously of a rather limited impact as they do not apply to a person from outside the EU institutions, where those concern the common principles, such as no unfair discrimination and equal treatment, they also may be used as a useful source. It will be interesting to watch whether the CST growing tendency to use labor law standards, will appear in the Czech courts' decisions as well.

The newly developed case-law, if strong in its arguments, can help to improve the overall political culture, lower the rate of corruption and increase the confidence of individuals in administration. Let us hope for it!

REFERENCES

- [1] ANDRONICEANU Armenia, SORA Simona, PAUN Diana, JIROVEANU Daniel> Employee satisfaction in the public sector. Proceedings of the 5th WSEAS International Conference on Economy and Management Transformation (Volume I), ISSN: 1792-5983.
- [2] civil service." Encyclopædia Britannica. Encyclopædia Britannica Online Academic Edition. Encyclopædia Britannica Inc., 2013. Web. 14 Jun. 2013. <<http://www.britannica.com/EBchecked/topic/119404/civil-service>>.
- [3] Council Recommendation on the Czech Republic's 2013 national reform programme and delivering a Council opinion on the Czech Republic's convergence programme for 2012-2016 COM(2013) 353.
- [4] Čebišová, T.: Veřejná služba na prahu 21. Století, in *Vybrané otázky správního práva AUC Juridica* 2001, pp.9 -39.
- [5] GORUN Adrian, GORUN Horatiu Tiberiu, MARES Petre, NECULAESCU Sachi: The Institution of Mobility (or how Public Officials are Subordinated to the Discretionary Will of the Prime-minister/Government in Romania. Recent advances in business Administration. ISSN: 1790-5109.
- [6] Kraemer Hannes, The European Union Civil Service Tribunal: A New Community Court Examined after Four Years of Operation, *Common Market Law Review*, No. 46, 2009, pp. 1873-1913.
- [7] Lacina Karel, Několik poznámek k systémům státní služby v členských státech Evropské unie, *Scientific Papers of the University of Pardubice. Series D Faculty of Economics and Administration*, No. 9, 2004, pp. 106-111
- [8] MIHALACHE Carmen – Mariana: Inconsequence of administrative policies and criminal responsibility of public officers, determinant factor on the evolution of economy. Recent researches in Economics. ISBN: 9781-61804-061-9
- [9] NESHKOVA Milena I., KOSTADINOVA Tatiana: The Effectiveness of Administrative Reform in New democracies, *Public Administration Review*, Vol. 72, Iss. 3, 2012, pp. 324-333
- [10] POMAHAČ, Richard and Jakub HANDRLICA. *Evropské správní právo*. Vyd. 1. V Praze: C.H. Beck, 2012, pp. 54-59. ISBN 978-807-4004-377.

- [11] TODORUT Amalia Venera, DICU Maria Camelia> An Efficient Administration via Promoting Some modern Mechanisms to Improve Quality. *Advances in Fiscal, Political and Law Science*. ISBN: 978-1-61804-191-3.
- [12] Recommendation No. R (2000) 6 of the Committee of Ministers to Member states on the status of public officials in Europe (Adopted by the Committee of Ministers at its 106th Session on 11 May 2000)
- [13] Recommendation No. R (2000) 10 of the Committee of Ministers to Member states on codes of conduct for public officials (Adopted by the Committee of Ministers on 24 February 2000 at the 699th meeting of the Ministers' deputies)
- [14] *Bentham v the Netherlands*, no. 8848/80 [1985] ECHR 11, § 32
- [15] *Cudak v Lithuania* [GC] no. 15869/02, ECHR-2010, § 72
- [16] *De Santa v. Italy*, judgment of 2 September 1997, no. 25574/94
- [17] *Francesco Lombardo v. Italy* judgment of 26 November 1992, Series A no. 249-B
- [18] *G v Finland*, no. 33173/05, ECHR-2009, §34
- [19] *K.M.C. v Hungary* [GC] no. 19554/11, §§ 34-35, ECHR-2012
- [20] *König v Germany* [GC] no. 6232/03, ECHR-1978, §§ 88 – 92
- [21] *Massa v. Italy* judgment of 24 August 1993, Series A no. 265-B.
- [22] *Nicodemo v. Italy*, judgment of 2 September 1997, no. 25839/94
- [23] *Pellegrin v. France* [GC] no. 28541/95, ECHR 2007-II, §§ 64-67
- [24] *Vilho Eskelinen and others v. Finland* [GC] no. 63235/00, ECHR 2007-II, §§ 57, 62
- [25] Czech Supreme Administrative Court's decision of 21st May 2008 No. 4 Ans 9/2007
- [26] Czech Supreme Administrative Court's decision of 24th November 2011 No. 7 As 66/2010
- [27] Judgment of the Civil Service Tribunal of 28th April 2009 in joined cases F- 5/05 & F – 7/05, *Violetti a. o. v. Commission*
- [28] Judgment of the Civil Service Tribunal (Second Chamber) of 15 March 2011 in case F-120/07 *Strack v Commission*
- [29] Judgment of the Civil Service Tribunal (Third Chamber) of 15 February 2011 in case F-68/09 *Florence Barbin v. Parliament*
- [30] Judgment of the Civil Service Tribunal (Second Chamber) of 1 February 2012 in case F-123/10 *Giovanni Bancale and Roberto Buccheri v Commission*
- [31] Judgment of the Civil Service Tribunal (Second Chamber) of 18th September 2012 in case F-96/09 *Eva Cuallado Martorell v. Commission*
- [32] Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29th February 1968 laying down the Staff regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission (O.J. 1968, L 56/1) as amended