

THEORY AND PRACTICE OF RETURNING IRREGULAR MIGRANTS IN THE CZECH REPUBLIC

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ABSTRACT

Irregular migration is an extremely dynamic area, and it is difficult to predict its development. At the same time, it is a phenomenon that can fundamentally threaten internal stability and security in destination countries. The central question of the present article is what the authorities in the Czech Republic do with migrants or expelled (rejected) asylum seekers who are irregularly present in the territory of the Czech Republic. Thus, the actual practice of deportation is the central question of this study.

This article focuses on readmission agreements that are binding in the Czech Republic and analysis, the issue of irregular transit migration and its consequences.

Additionally, this article highlights deportation proceedings, starting from the least to the most repressive practices. The least repressive forms of deportation are the the commonly called departure order, the decision on the obligation to leave the territory, and the commonly called voluntary returns. Considering the repressive methods of deportation in the Czech Republic, the most frequently applied form of deportation is based on administrative law and related to detention facilities. Finally, the case law of the Constitutional Court of the Czech Republic is analysed, as it plays a significant role in the field of irregular migration and deportation.

KEYWORDS

*irregular migration
readmission agreements
detention facilities
voluntary returns
departure order
Dublin III Regulation*

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1. Introduction

Irregular migration is an extremely dynamic area with little possibility of estimating development. It requires a flexible and consistent approach, both in relation to combating irregular migration and the return of foreigners irregularly residing in the territory of the Czech Republic. Thus, irregular migration can fundamentally threaten the internal stability and security of destination countries. Therefore, measures in the field of irregular migration are a fundamental topic addressed within the migration policy of the Czech Republic, and the area of irregular migration falls under the jurisdiction of the Czech Republic's Foreign Police.²

The central question of the present article is what the authorities in the Czech Republic do with migrants or expelled (rejected) asylum seekers who are irregularly present in the territory of the Czech Republic. Thus, the actual practice of deportation is the central question of this study. In addition, the closely related practices of the Constitutional Court of the Czech Republic and its most relevant case law within this field are analysed. Please, consider that this article applies only to irregular migrants from third countries, that is, migrants coming to the territory of the Czech Republic from countries outside the Schengen area.

The article will first outline readmission agreements that are currently binding for the Czech Republic, how these readmission agreements are applied, and what their problematic aspects might be. Of course, countries for which the Czech Republic does not have readmission agreements are interesting and will also be mentioned (Chapter 2).

Furthermore, we discuss irregular transit migration and its consequences will be presented. Irregular transit migration represents a significant part of the irregular migration in the Czech Republic, especially because of its geographical location and proximity to the strongest European economies (Chapter 3).

Deportation itself will be analysed gradually, starting from the least repressive practices to the most repressive ones. The first among the least repressive forms of deportation is the so-called departure order, to which a foreigner staying irregularly in the territory of the Czech Republic voluntarily submits after it has been decided that he/she must leave the territory of the Czech Republic (Chapter 4).

Voluntary returns can still be considered a non-repressive method of deportation. Non-profit organisations also play an important role (Chapter 5).

The next chapter deals with the repressive methods of deportation. In the Czech Republic, the most frequently applied form of deportation is based on administrative law and relates to the restriction of personal freedom in detention facilities (Chapter 6).

2 | Arts. 163-164 of Act No. 326/1999 Coll., on the residence of foreigners in the territory of the Czech Republic (hereinafter 'ARF').

This study does not address deportation from the perspective of criminal law. Criminal punishment for deportation is considered the most repressive form of deportation. According to the Czech Criminal Code, this punishment (as a separate punishment or in addition to other punishment/s) is imposed on foreigners who have committed criminal offences in the territory of the Czech Republic, for which the foreigners were finally convicted by a court.³ As such, deportation from the viewpoint of criminal law does not (usually) concern irregular migrants and does not fall under the definition of irregular migration or fall within the scope of this article.

However, the case law of the Czech Republic's Constitutional Court plays a significant role in the field of irregular migration and deportation. In general, it can be declared that the Czech case law within the field of irregular migration is rich and covers a number of problematic aspects.⁴ However, I address only two specific cases (Chapter 7). Those cases had an impact on the interpretation of certain legal provisions of the Act on the residence of foreigners in the territory of the Czech Republic (hereinafter 'ARF'). ARF can be considered the most relevant legislation (together with the Act on Asylum⁵) within the research area and will be further analysed in the present article.

Regarding the sources that will be used in writing this article, I consider it necessary to explain that the Czech Republic suffers from a lack of monographs and professional sources.

Professional publications devoted to general foreign law, migration, and asylum law do exist; however, many were published at least 10 years ago (some even 20 years ago).⁶ Therefore, it cannot be claimed that these sources are up-to-date, since the legislation within this area has undergone many changes that have had great consequences and impacted the understanding and rules of (irregular) migration.⁷ Therefore, this article will mainly analyse legislative sources – the Czech and EU legislatures – as well as jurisprudence – national, CJEU, and ECHR case law.

3 | Art. 80, paras. 1-3 of Act No. 40/2009 Coll., Criminal Code.

4 | See: Judgement of the Supreme Administrative (2018), case No. 9 Azs 361/2017-33 (administrative deportation of a stateless person), judgement of the Regional Court in Prague (2018), case No. 49 A 3/2018-75 (a purposeful request for international protection), and others.

5 | Act No. 325/1999 Coll., on Asylum.

6 | See: Čižinský, 2012; Vlčková, 2003; Balga, 2012; Kosař, 2010; Pítrová, 2016; Chmelíčková and Votočková, 2016.

7 | The asylum law (Act No. 325/1999 Coll., on Asylum) has been amended many times over the last 20 years, basically it is amended every year. The last amendment is effective since October 2023. The ARF (Act No. 326/1999 Coll., on the residence of foreigners in the territory of the Czech Republic) is also frequently amended, most recently the Ministry of the Interior on April 2023 submitted a draft of a new act to the external comment procedure, which is to replace the existing act. The general effectiveness of the new act is proposed as of 1 January 2026.

2. Readmission agreements application in the Czech Republic

| 2.1. General overview

Readmission agreements can be defined as international treaties governing the transfer of persons who reside irregularly in the territory of a certain country to the country of origin or to another state.⁸ Currently, readmission agreements are not only negotiated at the EU level but also at the Czech Republic level, leading to the Czech Republic concluding bilateral readmission agreements with 16 countries.⁹ In addition to these bilateral agreements, readmission agreements negotiated by the European Union also bind the Czech Republic.¹⁰ The European Union has concluded readmission agreements for 17 countries.¹¹ The Czech Republic also negotiated bilateral implementation protocols for some of these agreements, which regulated the technical details of the readmission procedure.

The negotiating position of the European Union in relation to third countries is certainly stronger than the position of the Czech Republic itself; thus, negotiations at the union level might be preferable. Interestingly, the Czech Republic has also concluded bilateral agreements with other EU member states.¹² These bilateral agreements remain in force although an increased regime of police and judicial cooperation is applied between EU member states,¹³ and some of them were signed and entered into force even after the Czech Republic joined the European Union.

The situation regarding irregular migrants coming from other countries (such as Syria, Afghanistan, Iran, and Morocco) with which readmission agreements do not exist is much more complicated, as there is no legal regulation enabling states of origin to take over their citizens. Countries of origin often do not show a willingness to take an active approach towards taking over their own citizens. Nevertheless, recent success in this area shows that the effort paid off; in 2021, the readmission agreement with Mongolia was concluded, which entered into force after almost ten years of negotiations.¹⁴

8 | Holá, 2010.

9 | Namely with Armenia, Bulgaria, Croatia, Canada, Kosovo, Hungary, Moldova, Germany, Poland, Austria, Romania, Slovakia, Slovenia, Switzerland, Vietnam and Kazakhstan.

10 | The Czech Republic has been a member state of the European Union since 1 May 2004.

11 | Namely with Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Montenegro, Georgia, Hongkong, Cape Verde, Macao, Macedonia, Moldova, Pakistan, Russia, Serbia, Sri Lanka, Turkey, and Ukraine.

12 | Germany, Poland, Croatia, Hungary, Austria, Slovakia, Slovenia, Bulgaria and Romania.

13 | Arts. 87-89 of the Treaty on the Functioning of the European Union, *OJ C 326*, 26.10.2012, pp. 47-390.

14 | Communication of the Ministry of Foreign Affairs No. 9/2021 Coll.

| 2.2. *Problematic aspects of readmission agreements in the Czech Republic*

The Czech regulations related to readmission agreements were included in a single article on ARF.¹⁵ Foreigners are not given any special readmission decision against which they can defend themselves (either in a separate proceeding or later in front of an administrative court). Foreigners are issued only detention orders. As some authors have mentioned, there are at least two problematic aspects of the Czech legislation related to this issue.¹⁶

The first is that Czech legislation deals with the application of the readmission agreement only in relation to detention. Paradoxically, foreigners whose countries of origin and the Czech Republic have concluded a readmission agreement (such as Ukrainians, Russians, and Moldovans) are at a disadvantage compared to those irregularly staying foreigners who come from countries with which the Czech Republic (or the European Union) did not conclude any readmission agreement. Foreigners from a country with which a readmission agreement is not concluded can issue a departure order for irregular entry and stay in the territory of the Czech Republic, but they do not have to be automatically detained for this purpose.¹⁷ In other words, the Foreign Police can issue a departure order for such foreigners but still allow them to travel to their country of origin independently.¹⁸ Although it might be possible to impose a deportation order and permit independent travel even in the case of irregular migrants covered by the readmission agreement, in practice, this usually does not happen.

Processing a return based on a readmission agreement, especially for people without any documents, takes weeks (or even months), and the person's personal freedom must be restricted, as they are forced to stay at the detention facility. At the same time, foreigner detention makes it impossible to carry out the necessary actions before departure, such as packing all belongings or terminating the accommodation contract, not to mention the high financial costs of the entire procedure, which the Czech Republic has to cover.

The second problem is that individual readmission agreements do not contain any procedural guarantees that would ensure the protection of the human rights of the transferred persons. Readmission agreements generally remind us that international obligations in the field of human rights protection are not affected by their applications.¹⁹ The method of ensuring such obligations is no longer specifically addressed by any readmission treaty, and the EU does not pressure the harmonisation of individual national regulations in this direction. An example of the Czech deportation practice also shows that a general reminder of the need to respect the dignity of persons (and other international obligations within the field of human rights protection) may not be sufficient.²⁰

15 | Art. 129 of the ARF.

16 | Holá, 2010.

17 | Art. 24 of the ARF.

18 | *Ibid.* 50 and Art. 118 of the ARF.

19 | In particular the Convention for the Protection of Human Rights and Fundamental Freedoms or the Convention on the Legal Status of Refugees from 1951.

20 | Judgement of the Czech Constitutional Court of 27 October 2015 No. I ÚS 860/15 (see subchapter 7.2.).

3. Irregular transit migration and its consequences

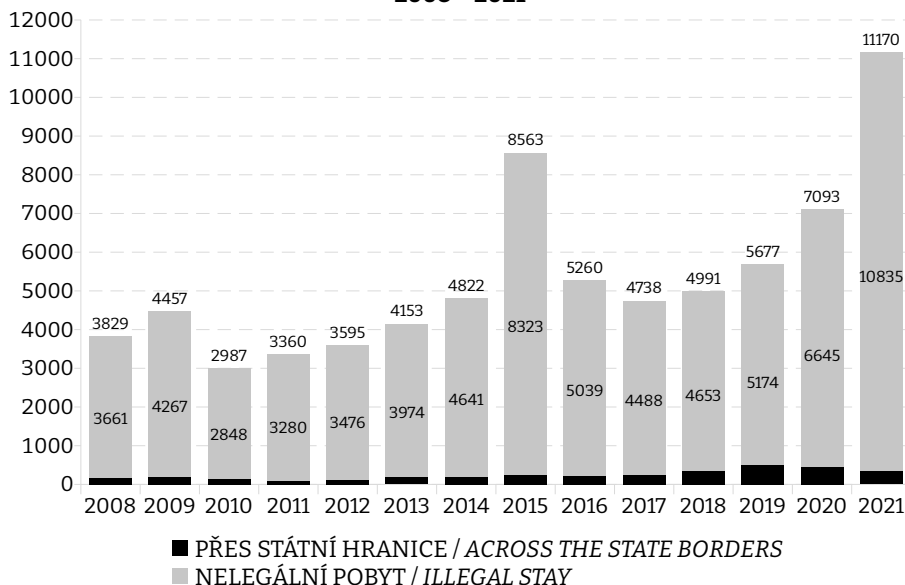
While unauthorised entry, stay, or even departure from the territory of the Czech Republic must be regarded as irregular migration, the so-called irregular transit migration is defined as transit through the territory of the Czech Republic without the requirements necessary to enter and stay legally. The purpose of irregular transit migration is not to remain in the territory, but to move to another destination country.

The concept of irregular transit migration in the Czech Republic is mainly associated with the arrival of irregular migrants from neighbouring states of the European Union through the state borders of the Czech Republic, that is, through internal Schengen borders.

As previously mentioned, irregular transit migration represents a significant part of irregular migration in the Czech Republic, especially due to its geographical location and proximity to the strongest European economies neighbouring the Czech Republic, such as Germany and Austria.

The highest number of foreigners detected during irregular transit migration was recorded in the 3rd quarter of 2015 (during the so-called great wave of migration, which headed mainly from the Middle East and Africa to Western Europe). Another sharp increase is observed in 2021.

NELEGÁLNÍ MIGRACE CIZINCŮ
ILLEGAL MIGRATION OF FOREIGNERS
2008 – 2021



Source: Directorate of the Foreign Police Service of the Ministry of the Interior of the Czech Republic

Monitoring and analysis of irregular transit migration in the territory of the Czech Republic are mainly carried out by the Foreign Police of the Czech Republic and within statistics; irregular transit migration is reported as part of irregular residence. Therefore, it is not easy to look up data reliably. Statistics from the Czech Statistical Office show that the number of irregular migrants in the Czech Republic (from 2008 to 2021) is increasing every year.

Evaluating the development of irregular migration in the Czech Republic from 2008 to 2021, it was evident that the number of irregular migrants increases slightly but steadily. An anomaly occurred during 2015–2021 when there was a large influx of refugees, especially from Middle Eastern states.²¹ Nevertheless, the recent numbers of irregular migrants (considering the Russian military aggression that has been ongoing in Ukraine since February 2022) may also be different. However, as far as the number of irregular migrants is concerned, the Czech Republic belongs to countries with low numbers of irregular migrants and cannot be compared with countries such as Germany or Italy, which tend to be ‘traditional’ destinations for irregular migrants.

The number of migrants caught illegally crossing the border is significantly lower than the number of migrants staying illegally in the Czech Republic. From the results in the table, it can be concluded that a large number of irregular migrants who only pass through the territory of the Czech Republic will not be caught by Czech authorities. Border checks are carried out randomly, but it is impossible to consistently protect every kilometre of the Schengen area.²²

21 | The migration crisis in 2015 and 2016 caused an influx of millions of refugees to EU countries. Refugees were coming from Syria, Afghanistan and some African countries. Although the standard European asylum policy is based on solidarity between member states and a fair distribution of refugees (Art. 67 of the TFEU), the Central European member states refused to accept refugees, mainly the so-called refugee quotas and relocations. Politicians and the public were mostly against solidarity and acceptance of more refugees. As a result of the increased number of asylum seekers registered in Greece and Italy in 2015, as well as for the general high migratory influx, the Council adopted two Decisions introducing a mechanism to relocate asylum seekers to other Member States (Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, OJ L 239, 15.9.2015, pp. 146–156 and Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248, 24.9.2015, pp. 80–94). Despite the fact that Decisions were binding upon Member States, the Czech, Hungarian and Polish governments decided not to participate in the relocation mechanism. Together with Slovakia, Hungary unsuccessfully challenged the Council Decision at the CJEU. The relocation scheme was also heavily used and ‘abused’ in the CEE government’s domestic discourse on migration. The European Commission referred Czechia, Hungary and Poland to the CJEU for non-compliance with the Council Decision on 7 December 2017. The CJEU delivered its judgment in April 2020. Therein, it established that Czechia, Hungary and Poland had breached the Council Decision by failing to relocate asylum seekers from Italy or Greece (Joined cases C-715/17, C-718/17 and C-719/17, 2 April 2020, ECLI:EU:C:2020:257).

22 | The Czech Statistical Office regularly publishes statistics regarding foreigners and irregular migration [Online]. Available at: https://www.czso.cz/csu/cizinci/2-ciz_nelegalni_migrace (Accessed 15 June 2023).

| 3.1. *Practical consequences of irregular transit migration*

The practical consequences of irregular transit migration have the following implications: First, irregular transit migrants are usually detained in the Czech Republic. For those purposes, the majority of readmission agreements also allow the transfer of irregularly staying citizens of third countries (i.e., citizens of a state that is not a party to the readmission agreement at all; the required condition is 'just' the residence of persons in the requested state, but also the mere fact that the person entered the territory of the requesting state from the territory of the requested state).

Second, if an irregular migrant is detained in the Czech Republic and states that or she is coming to the territory of the Czech Republic from another EU member state (where or she also applies for international protection), the Dublin rule will be applied. Based on my personal experience,²³ the Dublin III. Regulations²⁴ were applied in most cases.²⁵

In terms of Czech legislation related to transit, one specific article on the ARF²⁶ deals with foreign transit to another state, including EU member states. The above-mentioned article states that police shall secure for the necessary time a foreigner who entered or stayed in the territory of the Czech Republic irregularly, for the purpose of handing him over (in accordance with an international agreement negotiated with another EU member state or in accordance with the Dublin III. Regulation).

If it is not possible to complete foreign transit within 48 hours (and in the case of transit by air within 72 hours), the police may issue a decision that is the first step in the proceedings. Appeals and review proceedings were not allowed in these cases.²⁷ At the same time, the article stipulates the condition that the police will decide to detain a foreigner for the purpose of transit only if there is a serious risk of escape. A serious risk of escape is considered a situation when a foreigner has been staying in the territory of the Czech Republic irregularly, has previously avoided relocation, attempted to escape, or had previously expressed an intention to disobey a final decision on relocation (or such intention is evident from foreigners' behaviour). Serious risk of escape is also considered a situation when a foreigner cannot travel to the state of relocation independently, and at the same time does not have any place of residence in the territory of the Czech Republic. The

23 | I provided regular legal advice in Czech detention facilities during 2018 and 2019 in the position of lawyer, employee of OPU.

24 | EU Regulation No. 604/2013 of 26 June 2013 establishing the criteria and procedures for determining the Member State responsible for assessing an application for international protection submitted by a third-country national or a stateless person in one of Member States (hereinafter 'Dublin III. Regulation').

25 | E.g., in 2022, according to Ministry of the Interior of the Czech Republic (Department for Asylum and Migration Policy) in relation to Dublin transfers from the Czech Republic; the largest number of persons were from Afghanistan (15 persons), Tunisia (13 persons), Syria (12 persons) and Moldova (10 persons).

26 | Art. 129, paras. 1-8 of the ARF.

27 | Art. 129, para. 3 of the ARF.

Constitutional Court also commented on the adequacy of detention and the interpretation of the term ‘serious risk of escape’ in its decisional practice.²⁸

As far as time scope of transits is concerned, according to ARF, the police is obliged to act in such a way that the foreigner’s transit to another country is completed as soon as possible from the date of foreigner’s arrest.²⁹

4. Departure order and decision on the obligation to leave the territory

| 4.1. *Departure order*

A departure order is issued to foreigners who stay irregularly in the Czech Republic. This is a document issued by the police, most often during the administrative deportation of foreigners from the Czech Republic.

However, a departure order can be issued by the Ministry of the Interior of the Czech Republic, mainly after the cancellation or expiration of a long-term visa or upon the expiration of various types of residence permits. A departure order entitles a foreigner to temporarily stay in the territory of the Czech Republic for the time necessary to carry out urgent actions and to travel out of the Czech Republic.

In general, the period of temporary stay of foreigners on a departure order may not be longer than 60 days, but the length of stay is determined and indicated in each departure order by the Czech Police or the Ministry of the Interior based on the individual circumstances of each foreigner.

The departure order takes the form of a label marked by the Czech Police or the Ministry of the Interior in the foreigners’ travel documents; in justified cases, the departure order may be marked outside of the travel document.

The departure order contains data on the identity of foreigners, number of travel documents, and time at which foreigners are obliged to leave the territory. In cases of protecting the security of the state, public order, or public health, foreigners’ departure may be subject to special conditions, such as crossing a particular border point during their departure from the territory of the Czech Republic.³⁰

| 4.2. *Decision on the obligation to leave the territory*

The decision on the obligation to leave the territory of EU member states was issued by the Czech Police to foreigners over the age of 15 who did not choose the option of voluntary return or did not leave the country within the period specified in the departure order.

In the decision on the obligation to leave the territory of EU member states, the Czech Police specify the period of departure, starting from seven to 60 days.

28 | Judgement of the Constitutional Court of 10 May 2017 No. III. ÚS 3289/14 (see subchapter 7.2.).

29 | Art. 129, para. 8. of the ARF.

30 | Art. 50 of the ARF.

In specific cases, foreigners could request a new (longer) departure time during a set period. If the police comply with this request, a new decision is issued (in accordance with all administrative regulations³¹), and the police set a new time for departure, taking into account the duration of the stated reasons. However, the new period can be set to a maximum of 180 days. In general, if foreigners are already detained in the detention facility, this period starts from the day the detention ends. Simultaneously, the initiated procedure for administrative deportation is also a procedure for the obligation to leave the territory, about which the police must inform foreigners without unnecessary delay.³²

5. Voluntary returns regime

Irregular migrants can voluntarily leave the Czech Republic in a completely non-repressive manner. In such cases, migrants usually make the journey back home alone, without the escort of police or other state authorities, and without informing their country of origin about their return. Nevertheless, state authorities (Ministry of the Interior of the Czech Republic through the Department of Asylum and Migration Policy and the Administration of Refugee Facilities), international organisations (IOM³³), and Czech non-profit organisations (SOZE³⁴, OPU³⁵, etc.) are involved in the preparation of voluntary returns.

Voluntary returns are the preferred option, which is why the Czech Republic is trying to support it mainly through informational awareness and financial contributions.³⁶

The obvious advantage of voluntary returns is their speed, particularly if foreigners have valid travel documents. In such cases, it is possible to implement the return immediately after the completion of all residence matters or after issuing a decision on administrative deportation. The Ministry of the Interior attempts to ensure the fastest connection with the country of origin.

Another advantage is the provision of financial assistance. The Ministry of the Interior will buy a plane ticket to the foreigners' country of origin, which means

31 | Art. 101 of Act No. 500/2004 Coll., Administrative Code.

32 | Art. 50 a, paras. 1-2 of the ARF.

33 | IOM provides assisted voluntary return programs worldwide, in a more or less similar way, but in the Czech Republic IOM became involved in this issue in 2001 by signing the Agreement on Assisted Voluntary Returns with the Czech Ministry of the Interior.

34 | During 2013-2015 SOZE supported the return to the country of origin of young migrants between the ages of 17 and 25. The program targeted asylum seekers, refugees, irregular migrants and migrants. SOZE cooperated its activities with the IOM within the assisted voluntary return programs.

35 | In recent years (2016-2020), OPU implemented several projects helping returnees. As part of these projects, counselling was provided throughout the entire return process. The program was intended for persons from third countries who entered or stayed in the territory of the Czech Republic irregularly and who had been issued a decision on the obligation to leave the territory, administrative deportation or a decision on relocation.

36 | Art. 54a Act No. 283/1991 Coll., Act on Asylum and Art. 123a AFR.

that foreigners can travel even if they do not have enough financial resources to buy the flight ticket.

Voluntary returns are the most dignified form of return because foreigners do not travel back to their country with the assistance of the police or another employee of the state authorities but as ordinary tourists. When using a voluntary return program, there is also the possibility of shortening the stay-ban period.

The number of voluntary returns increased significantly during the COVID-19 pandemic period, as it was used by hundreds of foreigners, mainly from Ukraine and Moldova (according to statistics published by the Ministry of the Interior, these two nationalities use voluntary returns the most).³⁷

If irregular migrants do not choose the option of voluntary return, a forced return usually takes place with the assistance of the Czech Republic police. The country to which the foreigners had returned was also informed.

It can be said that irregular migrants and their approach are key players in the success of the voluntary return policy. If they avoid returning, they will not accept the voluntary form or return to the Czech Republic after being returned or deported (in some cases, even repeatedly), and the effectiveness of the voluntary return policy is significantly reduced.

	2013	2014	2015	2016	2017	2018	2019	2020	2021
Number of foreigners with issued decision on administrative deportation	2020	2149	3009	3539	5119	5713	7067	6385	4987
Number of administrative deportations actually implemented	185	175	172	207	460	444	394	729	389

Source: Directorate of Foreign Police Service of the Czech Republic

As can be concluded from the table above, the number of foreigners who issued decisions on administrative deportation was significantly higher than the number of administrative deportations actually implemented. This rule applies to each monitoring year.

Therefore, it can be concluded that the majority of migrants to whom a decision on administrative deportation is issued will voluntarily comply with it and leave the territory of the Czech Republic, either independently or with assistance within the framework of the so-called voluntary return regime. This is advantageous

37 | The Ministry of the Interior of the Czech Republic issues quarterly reports on migration [Online]. Available at: <https://www.mvcr.cz/migrace/> (Accessed: 15 June 2023).

for the Czech Republic, especially because the implementation of administrative deportation costs considerable effort and money.

However, foreigners who do not plan to leave the Czech Republic are subject to administrative deportations. Administrative deportation refers to the termination of a foreigner's stay in the territory of the Czech Republic, which is associated with the determination of the period for departure from the territory and the period during which foreigners cannot be allowed to enter the territory of EU member states of the European Union. The period during which foreigners cannot be allowed to enter the territory of EU member states of the European Union is determined by the Czech police within the decision on the administrative deportation of foreigners. In justified cases, the decision can determine a specific border-crossing point for departure from the Czech Republic.³⁸ For each administrative deportation, the so-called binding opinion of the Ministry of the Interior must also be issued regarding whether deportation is possible. If foreigners' deportation is not possible, they are granted a visa for more than 90 days (the so-called tolerance visa).³⁹ Another option may be to apply for international protection.

As such, the consequence of the administrative deportation of a foreigner is firstly the determination of the period of the ban on residence (usually for several years) and, above all, the automatic entry of the identification data of the foreigner into the database of undesirable persons (ENO) and the Schengen database (SIS). This significantly interferes with foreigners' rights as it prevents them from staying legally in any EU member state for several years.

6. Restriction of personal freedom in detention facilities

The facilities for the detention of foreigners are primarily used for foreigners who have been issued a decision on administrative deportation or for persons who are about to be transferred to other EU member states. People who had entered and resided in the Czech Republic were also secured at those facilities.

The Czech Republic has three of such facilities. Two of them are intended for men (in Vyšní Lhoty and in Bálková), the third one is intended mainly for women and families with minors (in Bělá-Jezová).

The ARF regulates all conditions for security enforcement.⁴⁰ The operation of facilities for the detention of foreigners was ensured by the Administration of Refugee Facilities of the Ministry of the Interior of the Czech Republic. Police mainly provide external security to the facility, whereas the security inside the facility is provided by private security agencies.

Foreigners may not leave a facility without the consent of the police. Detention facilities are divided into those with moderate security modes and those with strict security modes. The section with a moderate security mode can be further

38 | Art. 118 of the ARF.

39 | Art. 33, para. 1 of the ARF.

40 | Title XI, Arts. 124 and the following of the ARF.

divided into subsections (e.g., for families with children and women) into which other foreigners are not allowed to enter.⁴¹

In the security mode,⁴² it is possible to place foreigners who are aggressive, require increased supervision for another serious reason, or repeatedly violate the internal regulations of the facility in a serious manner.

The police will make a record of the placement of foreigners in a section with a strict detention regime, which they will introduce to the foreigners in the language they understand. This record must include instructions regarding the possibility of filing a complaint against the placement of the Ministry of the Interior. It is also possible to contact public defenders of these rights.

If the duration of placement in the strict detention regime exceeds 48 h, the police issue a special decision. If a foreigner believes that the legal conditions for issuing a decision to place him/her in a strict detention regime have not been met, he/she can demand its cancellation by an administrative action filed within 30 days from the date of the issuance of the decision.⁴³

Each foreign person can be visited by a lawyer at the facility. Non-governmental and non-profit organisations that focus on foreign issues (e.g., OPU and SOZE⁴⁴) may also provide free legal assistance in the facilities.⁴⁵

Health services are provided to all uninsured foreigners, but only for urgent care. Urgent care for conditions that are immediately life-threatening can lead to sudden death or deepening of the disease, cause permanent disease changes without the prompt provision of health services, cause sudden suffering and pain, and cause a change in the behaviour and actions of the detained person. If such health services cannot be provided directly within a facility, the Ministry of the Interior is obliged to provide them outside the facility.⁴⁶

The police are authorised to conduct a personal search for foreigners and their belongings, not only when the foreigners are placed in the facility but also during their stay.⁴⁷

The aim of the searches is to determine whether foreigners have items that are not allowed to be brought or kept in the facility. A personal search must be conducted by a person of the same sex and must be carried out with respect to human dignity. Inspections of belongings and rooms must also be carefully carried out to maintain the criterion of reasonableness. Searches during which objects were broken or scattered around a room were not permitted. It is possible to complain about police procedures during searches for the police unit that conducted the search. In the case of dissatisfaction with the handling of the complaint, it is possible to contact the superior police department.⁴⁸

41 | Art. 130, para. 3 of the ARF.

42 | Art. 135, paras. 1-5 of the ARF.

43 | Art. 131, para. 2 of the ARF.

44 | More information on non-governmental and non-profit organisations that focus on foreigner issues are available in Chapter 5.

45 | Art. 144, para. 3 of the ARF.

46 | Art. 134, para. 2 of the ARF.

47 | Art. 137, para. 1 of the ARF.

48 | Art. 137, paras. 1-5 of the ARF.

Foreigners have the right to be provided with a bed, chair, and lockable cabinet for storing personal belongings, basic hygiene products, and continuous eight-hour sleep during night rest.⁴⁹ Foreigners are allowed to receive and send written messages (i.e., letters) without restrictions. Foreigners are allowed to receive packages of food and personal items once a week.⁵⁰

| **6.1. Special regime for families with minor children**

The fact that foreigners who are placed in the detention facility are accompanied by a minor cannot lead the police to proceed differently than in the case of detaining foreigners who travel alone and shall be placed in detention alone. Different treatments and approaches have led to discrimination against migrants who are not accompanied by minors. However, each patient must be assessed individually.⁵¹

Families with children or single adults accompanied by minors can only be detained for a maximum of 90 days (compared to the standard period of 180 days).

Joint placement of family members in detention facilities is usually ensured; as mentioned above, there are reserved sections for families with children within the facility.

It should be highlighted that children under the age of 15 years can never be detained; if they have to stay in a detention facility together with their parents, they can freely leave the facility accompanied by another adult. Temporary separation of a family within a facility is permitted only if a family member is placed in a section with a strict security regime.⁵²

7. Relevant case law

The decision-making practices of the Czech Republic's Constitutional Court play a significant role in the fields of migration, detention, and deportation. This is why I focus on two specific cases that impact the interpretation of certain legal provisions.

First, the issues of the adequacy of detention, the interpretation of the term 'serious risk of escape' and the detaining of a family with minor children will be analysed (Subchapter 7.1).⁵³ Second, the Constitutional Court of the Czech Republic commented on the issue of dilemmas related to legal certainty and the transparency of deportations (Subchapter 7.2.).⁵⁴

49 | Art. 145, para. 1 of the ARF.

50 | Art. 134, para. 1 of the ARF.

51 | See the case law in subchapter 7.1. for more details.

52 | *Ibid.* Art. 139.

53 | Judgement of the Czech Constitutional Court of 10 May 2017 No. III. ÚS 3289/14.

54 | Judgement of the Czech Constitutional Court of 27 October 2015 No. I ÚS 860/15.

| **7.1. Adequacy of detention and defining the term ‘serious risk of escape’**

The constitutional complaint was filed by a father and his two children, who were three and six years old at the relevant time, respectively, all citizens of Kosovo. According to their testimony, applicants were transferred from Serbia to Hungary, where they were detained in February 2014 and applied for international protection. In March 2014, they travelled by train to Germany, but on the way, they were stopped by the Police of the Czech Republic, and the father was detained according to the ARF for the purpose of extradition back to Hungary.

The decision of the police set the detention period to 60 days, and the justification stated that there was a serious risk of the complainant escaping because of his previous actions. According to the police, a milder coercive measure was out of question and detaining the family was the only possibility. The family was placed in Bělá-Jezová detention facility together, and in May 2014 the applicants were transferred to Hungary, which (according to the Dublin III. Regulation) was responsible for assessing their application for international protection. The patient’s family member was detained for a total period of 50 days.

The applicants filed constitutional complaints stating that their fundamental rights had been violated. Taking into account the children’s age and the best interest of child, they should not have been detained and placed in Bělá-Jezová detention facility.

The Court concluded that the constitutional complaint was partially justified. The deprivation of applicants’ personal freedom actually occurred even though it was clear that the applicant broke the law and left the country in which he applied for international protection without any serious reason. According to the Constitutional Court in this particular situation, any solution was already ‘wrong’, as the applicant decided that the children have to stay with him in the detention facility, which is understandable in his situation.

The Dublin III Regulation,⁵⁵ which governs the mechanism of extradition of foreigners, requires the existence of a ‘serious risk of escape’ on a case-by-case basis, but the grounds for suspicion of a ‘serious risk of escape’ must be based on objective criteria defined by law. However, the Czech law did not define the criteria for the existence of a ‘serious risk of escape’ during the relevant period (from March to May 2014).

The defining features of the existence of a ‘serious risk of escape’ were later established by an amendment to the ARF with effect from 18 December 2015, to which this decision of the Constitutional Court significantly contributed.

Doubts about whether the absence of objective criteria established by law constituted a sufficient legal basis for security led the Supreme Administrative Court to ask a preliminary question to the Court of Justice of the European Union in a similar case. Therefore, the Constitutional Court waited for the outcome of this proceeding, and in March 2017, the Court of Justice of the European Union issued

55 | EU Regulation No. 604/2013 of 26 June 2013 establishing the criteria and procedures for determining the Member State responsible for assessing an application for international protection submitted by a third-country national or a stateless person in one of Member States (Dublin III. Regulation).

a decision stating that the absence of objective criteria established by law is not a sufficient legal basis for the detention of foreigners.⁵⁶

The Constitutional Court therefore states that the detention of a foreigner with minor children, for the purpose of their return to Hungary in accordance with the Dublin III Regulation, in a situation where the objective criteria of 'serious risk of escape' are not clearly, comprehensibly and definitely defined by law, is contrary to Art. 5, para. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms⁵⁷ which establishes prohibition of unlawful restrictions of personal freedom. In the case of minors, this is contrary to Art. 37, letter b) of the Convention on the Rights of the Child.⁵⁸

Such detention of a parent with minor children is also a violation of the right to family life guaranteed in Art. 8 of the Convention for the Protection of Human and Fundamental Freedoms which establishes the right to respect family and private life. In the case of minor children, it is also a violation of Art. 16 para. 1 of the Convention on the Rights of the Child.

The decision of the Constitutional Court stated that applicants' rights, namely the right to family life, were violated. If interference with the right to family life is permissible, it must have a legal basis that the contested decision lacked (as well as the Czech legislation at the time).

Regarding the length of detention (50 days), although the Constitutional Court does not find the length of detention of children in the Bělá-Jezová detention facility to be optimal, it could in no case confirm the claim of the complainants that they faced the inhumane, cruel or degrading treatment. The case of detained children was closely related to the visit of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which took place in the facility at the time of their detention and was directly mentioned in its report. Although the committee addressed certain criticisms of the detention facility, the report did not indicate any conditions that could be assessed as mistreatment.

| **7.2. Legal certainty and transparency of deportations**

The complainant is a Cameroon citizen. He resided irregularly in the Czech Republic from February 2010 until his deportation in the summer 2014. The police imposed administrative deportation on the applicant for one year and issued a departure order for 30 days to leave the territory of the Czech Republic.

The applicant stayed in the Czech Republic without a valid visa or other authorisation. At the same time, he had no ties in the Czech Republic (apart from his girl), and all his family lived in Cameroon, which is why the police decided to detain him for 30 days for administrative deportation. The applicant was placed in a detention facility in Bělá-Jezová.

56 | 'Al Chodor' (2017) CJEU, case No. C-528/15.

57 | Communication of the Federal Ministry of Foreign Affairs on the negotiation of the Convention on the Protection of Human Rights and Fundamental Freedoms and Protocols connected to this Convention, No. 209/1992 Coll.

58 | Communication of the Federal Ministry of Foreign Affairs on the negotiation of the Convention on the Rights of the Child No. 104/1991 Coll.

In the detention facility, the complainant wanted to take his personal belongings which had been kept outside his room, but he was told by a social worker that his personal belongings were already packed and ready for deportation. On the day of the deportation, four police officers entered the complaint room. The complainant refused to leave the room voluntarily and was undressed. The two intervening police officers were unable to overcome the complainant's resistance; therefore, they used tear gas. The use of gas caused the complainant to become disoriented, and the police managed to handcuff him and remove him from the building. Since the complainant was naked, they covered him with a sheet that he allegedly threw off during the transfer to another detention building. After exiting the medical examination and dressing, the police took him to a car and drove him to the airport in Prague. Complaints were handled at all times.

The Constitutional Court evaluated the case in terms of the prohibition in humans and degrading treatment. Inhumane treatment is one that causes either 'direct bodily harm' or 'intense physical and psychological suffering'.⁵⁹ Treatment is considered 'degrading' if it humiliates an individual, does not show sufficient respect for his or her human dignity, or reduces the dignity or causes feelings of fear, anxiety or inferiority capable of breaking the person's moral and physical resistance.⁶⁰ Degradation treatment is closely related to the requirement of respect for human dignity, which does not allow public authorities to treat a person as an object.⁶¹

In addition, the ECHR has consistently judged that persons in detention, or persons against whom members of the security forces are acting, are in a vulnerable position; therefore, any use of physical force that is not necessarily forced by their own behaviour diminishes human dignity and is fundamentally a violation of a person's rights.⁶²

Mistreatment must exceed a certain minimum level of seriousness. Assessment of the seriousness of mistreatment is inherently relative; it depends on all circumstances of the case, such as the duration of the treatment, its physical and psychological effects on the victim, and, in some cases, the sex, age, and health of the victim.⁶³

The question of whether the treatment was intended to humiliate the victim is another factor that must be considered. However, the intention to be subjected to any form of inhuman or degrading treatment is not a necessary condition.⁶⁴

The Constitutional Court commented on the complainants' individual objections individually:

59 | 'Ireland v. the United Kingdom' (1978) ECHR, case No. 5310/71 and 'Gäfgen v. Germany' (2010) ECHR, case No. 22978/05.

60 | 'M.S.S. v. Belgium and Greece' (2011) ECHR, case No. 30696/09.

61 | 'Bouyid v Belgium' (2015) ECHR, case No. 23380/09.

62 | 'Ribitsch v. Austria' (1995) ECHR, case 8896/91 and 'Bouyid v Belgium' (2015) ECHR, case No. 23380/09.

63 | 'Ireland v. the United Kingdom' (1978) ECHR, case No. 5310/71.

64 | 'Farbtuhs v. Latvia' (2004) ECHR, case No. 4672/02 and 'V. v. the United Kingdom' (1999) ECHR, case No. 24888/94.

a) Lack of preparation and not informing the complainant about upcoming deportation

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment addressed the issue of the dignified treatment of deported persons in detail within its standards. Any intervention involving the deportation of detained foreigners must always be preceded by measures aimed at helping people organise their return, especially with regard to their families, employment, and psychological support. It is very important that detained foreigners are informed sufficiently in advance about the deportation itself to be able to cope with it psychologically, and to inform those who should know about the deportation and prepare their personal belongings. The constant threat of forced deportation hanging over detainees who have not received prior information about their deportation dates can lead to a state of anxiety that can culminate in aggression and agitation.⁶⁵

b) Use of force and tear gas

In similar cases, any use of physical force that is not strictly necessary as a result of a person's own behaviour reduces human dignity and constitutes a violation of the law in principle.⁶⁶ The ECHR recently decided that even a 'mere' slap against a detained person is humiliating treatment, even if the police officer was provoked by the disrespectful behaviour of this person, who was not physically aggressive and did not pose a danger to other persons. At the same time, the Court stated that 'in a democratic society, mistreatment is never an adequate response to the problems faced by public authorities.'⁶⁷ Any coercive means must be used only to the extent necessary to achieve a legitimate purpose. In no case must coercive means serve as retaliation or penalty for disobeying police officers' summons. Although members of the escort of deportees are sometimes forced to use force and coercive means to effectively carry out deportation, force and coercive means should be used only to the extent necessary and the legality, reasonableness, and appropriateness of their use should be examined.⁶⁸

c) Use of handcuffs, the way of transporting to the airport and the behaviour at the airport

The use of handcuffs is usually not problematic if it is used in connection with a lawful arrest or detention and is not accompanied by the use of physical force or by exposing the person to the public in a manner that cannot reasonably be considered necessary and reasonable according to the circumstances of each case. In this respect, it is important to determine whether there is reason to believe that a

65 | Judgement of the Czech Constitutional Court of 27 October 2015 No. I ÚS 860/15, paras. 57-68.

66 | 'Ribitsch v. Austria' (1995) ECHR, case 8896/91 and 'Kummer v. Czech Republic' (2013) ECHR, case No. 32133/11.

67 | 'Bouyid v Belgium' (2015) ECHR, case No. 23380/09.

68 | Judgement of the Czech Constitutional Court of 27 October 2015 No. I ÚS 860/15, paras. 69-77.

person will resist an arrest or want to escape. Therefore, it is necessary to consider the specific circumstances of each case.⁶⁹

8. Conclusion

The Czech Republic, as an EU member state of the European Union, has emphasised the importance of an effective return policy for over two decades, although it has not been able to fully ensure an effective return policy.

Obstacles to an effective return policy are of a legal nature; for example, the absence of readmission agreements, the application of the principle of non-refoulement, or respect for the right to private and family life. Other obstacles may relate to the approach of irregular migrants who are reluctant on the part of irregular migrants to cooperate with the administrative and police authorities of the Czech Republic. Another reason may be the absence of financial and information resources.

In my opinion, the Czech Republic should support the negotiation of readmission agreements (mainly at the level of the European Union) with countries from which a large number of irregular migrants are heading to Europe. The Czech Republic should negotiate bilateral agreements in cases in which pan-European procedures are unlikely.

Furthermore, the Czech Republic should be more active in fulfilling existing readmission agreements and insist on their fulfilment by other states, whether they are states of origin or transit. At the same time, the Czech Republic must be fully ready to accept irregular migrants who cross its territory, typically to Germany or other Western European countries.

However, it must be highlighted that the Czech Republic must consistently ensure compliance with the principle of non-refoulement and the protection of the human rights of irregular migrants. Returning irregular migrants to a country where they would face the threat of serious harm is beyond the scope of this question. On the other hand, returning them to countries of transit, if they are safe, is the most appropriate solution for the Czech Republic. Simultaneously, a country's security needs to be regularly assessed according to its current situation, which may change.

Finally, the most important point is support for the regime of voluntary returns. Adequate financial, material, human, informational, and other resources must be allocated for these returns. In the case of irregular migrants who cannot be returned to any country and who simultaneously have the will to stay in the Czech Republic, the possibility of their gradual integration into Czech society should be considered, and everything should be done to ensure that their integration into the Czech society is successful in the long term.

69 | Judgement of the Czech Constitutional Court of 27 October 2015 No. I ÚS 860/15, paras. 78-81.

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