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Expulsion of aliens, non-refoulement and issues related to (administrative) discretion¹

T E R E Z I E B O K O V Á * - R A D I S L A V B R A Ž I N A *

Abstract: One of the outcomes of the 2015–2016 migration crisis in the EU is the urgent need perceived to enhance the effectiveness of forced return procedures, including administrative expulsion. However, given the core human rights obligation of non-refoulement, the push for effectiveness needs to be balanced against procedural safeguards preventing “overly effective” proceedings. The example of the Czech Republic shows that an institutional arrangement could significantly undermine the effectiveness of the proceedings when paired with undue conduct of the administration, such as the improper risk of a refoulement assessment. The article argues that the key to effectiveness does not necessarily lie with speedy procedures, but rather with a pragmatic design of the procedures, as can be concluded from a comparison of the Czech and German approaches.

Keywords: expulsion, non-refoulement, administrative discretion, forced return, migration

The so-called “migration crisis” of 2015/2016 constitutes a significant series of events that changed the discourse on migration in Europe and transformed the political landscape in many countries.² Populist voices on the right, centre and left of the spectrum claimed they would *take back* control of migration issues.³ The post-crisis discourse is dominated by safety issues (see e.g. Nagy, 2016)

and clearly shows a reduced willingness to retain legal possibilities for immigration of any kind, clearly emphasising the effectiveness of return procedures.⁴ With this emphasis, since 2016 EU bodies have been trying to strike a common compromise on a new package of migration legislation that will replace the “failed” current system centred on the Dublin III Regulation (Regulation 604/2013). Due to the lack of common ground, the Common European Asylum System reform has stalled for months, and now, in the midst of yet another crisis caused by a pandemic, it seems to be forgotten. While they are not making headlines any longer, the problems of the migration policies persist.

Faced with staggeringly low numbers of successful return operations, one of the key demands to be incorporated into the reform is the effectiveness of return operations. This requirement should not be understood as an easy equation: the more returnees, the bigger success. The growing demand for (forced) returns of irregular migrants, or migrants who, for some reason, have lost their permit to stay, must be squared with respect for human rights and international refugee law. Both do not cease to apply just because of public senti-

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ment.⁵ The core of the human rights' obligation, when it comes to forced returns, is the prohibition of *non-refoulement* as a principle stemming from right to life and freedom from torture, inhuman and degrading treatment, thereby governing who can be and who must not be expelled from a state's territory. Therefore, we could alter the equation: the more returns performed with due respect of human rights, the better the effectiveness of the return procedure. Arguably, such a view was incorporated into the EU secondary legislation (cf. recitals 8, 11 and 24 of the Return Directive 2008/115/EC) and should be further strengthened by the reform.

From a different point of view, the principle of *non-refoulement* forms a formidable barrier for a state's free discretion in migration matters that is claimed by states in international fora. (This is, in itself, a kind of paradox. States claim to have absolute discretion. Yet many would like to take back control of immigration matters from the EU. By doing so they do not realise states are considerably limited by another set of obligations – respect for human rights.) The fact states are bound by this principle with little leeway for discretion makes it a suitable object for analysing the effectiveness of the return procedure, focusing on how a state can ensure the smooth conduct of administrative expulsion proceedings in a way that would at the same time fulfil the *non-refoulement* guarantee. In part 1 of the article, we outline the normative content of the said principle (1.1) and follow its “absolute” character and its implication for expulsion proceedings (1.2). We argue that fully executing the principle of *non-refoulement* in administrative practice depends not only on its implementation in the legal system (part 2), but it might also be circumvented by the institutional arrangement of authorities that should guarantee its application in individual cases and by the regulatory design of administrative proceedings (part 3). We conduct a case study of the Czech Republic, relying on its national law and national courts' case-law. Due to EU-wide legal bases, some of the legal issues bear cross-border relevance. However, we include a comparative standpoint and try to assess whether German law

suffers from the same shortcomings, or if it might offer some inspiration (part 4).

1. NON-REFOULEMENT IN EXPULSION CASES: CORE BACKSTOP

1.1. NON-REFOULEMENT AS AN INTERNATIONAL HUMAN RIGHTS CONCEPT

In this part of the paper, we attempt to outline the relevance and content of the *non-refoulement* principle, as developed in the case-law of the European Court of Human Rights (ECtHR) by interpreting the European Convention on Human Rights (ECHR). The concept of *non-refoulement* is linked to case-law dealing with expulsion of aliens. This term needs further explanation. When using the term expulsion in this part of the paper, we follow a definition of the ECtHR embedded in its case-law and adopted on the basis of the Explanatory Report to Protocol no. 7 to the ECHR: expulsion is “any measure compelling the departure of an alien from the territory but does not include extradition” (European Treaty Series no 117). However, it is important to bear in mind that the ECtHR's definition is far reaching and autonomous, independent of national definitions; its aim is to cover return procedures of many kinds, following a range of proceedings (See e.g. *M.A. and others v. Lithuania*, no. 59793/17, 11 December 2018). Yet, apart from this general discussion, we limit ourselves to expulsion in the narrower meaning anchored in Czech national law: by expulsion we mean an act of voluntary departure or, more often, forced removal of an alien and an entry ban for a specified period that is based on an administrative decision on return issued in administrative proceedings. In other words, the narrower meaning of expulsion refers to the Return Directive (2008/115/EC).

The ECtHR adopted an attitude of deference to states' migration policies in expulsion cases. "A state is entitled, as a matter of international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there" (*Üner v. Netherlands*, no. 46410/99, 18 October 2006, § 54). This approach is mirrored in other case-law of international courts, case-law of national courts and doctrine (see ICJ's *Liechtenstein v. Guatemala*, Read, J., dissenting, pp. 46-47; Czech Constitutional Court [CCC] Ruling no. Pl. ÚS 10/08, 12 May 2005).⁶ Despite the fact that the entry, stay and departure (termination of stay) of aliens remains a matter of a state's jurisdiction, or the exercise of its free, sovereign powers, it seems impossible to overestimate the impact of the "subject to its treaty obligation" condition. States are still obliged to secure the full range of ECHR rights and freedoms to everyone under their jurisdiction. As the body of the ECtHR case-law has shown, the expulsion of an individual might be blocked if it breaches a right or freedom protected under the ECHR. That could occur both in the country that expels, as well as in the country of return. However, not all ECHR rights and freedoms have the intrinsic, fundamental value for democratic society that leads to the prohibition of *refoulement*. In fact, the ECtHR takes a pragmatic approach declaring that states do not have a duty to provide the ECHR rights to everyone, making use of other provisions in relation to *refoulement* very scarce.⁷

A prominent ECHR provision to be considered when assessing compliance of expulsion with the human rights obligation is found in Article 3, or respectively Articles 2 and 3 considered together. Starting with the ruling *Soering v. UK*, the ECtHR takes the stance that *extradition* "may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country" (*Soering v. UK*, no. 14038/88, 7 July 1989, § 91). Therefore, in order to prevent liability for breach of Art. 3 in the receiving state, states must assess the con-

ditions in the receiving country against Art. 3 of the ECHR, and allow for extradition only when no real risk of a breach exists. The applicability of the same approach for cases concerning expulsion was confirmed in *Cruz Varas v. Sweden* (no. 15576/89, 20 March 1991) and *Vilvarajah v. UK* (13163/87, 30 October 1991). Hence, the ECHR, to a large extent, echoes Art. 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment (UNCAT; refers only to *torture* as a reason against *refoulement*), as well as Art. 6 and 7 of the International Covenant on Civil and Political Rights (ICCPR), as interpreted by the Human Rights Committee (e. g. *A. B. v. Canada*, no. 2387/2014, 16 March 2017). The scope of the "expanded non-refoulement" principle⁸ based on these instruments of international human rights law does differ in scope and applicability from the principle of *non-refoulement* based on international refugee law, in particular Art. 33 of the Convention Relating to the Status of Refugees.⁹

A state has an obligation not to expel when there are substantial grounds to believe that an individual, if deported, would face a real risk of treatment contrary to Art. 3 of the ECHR. To qualify specific treatment as ill-treatment contrary to Art. 3 of the ECHR, it must attain a minimum level of severity as described by ECtHR case-law (*F.G. v. Sweden*, no. 43611/11, 23 March 2016, §§ 111–127). Such assessment is relative and takes into consideration all the individual circumstances of the case (see *Tarakhel v. Switzerland*, no. 29217/12, or cf. *R.H. v. Sweden*, no. 4601/14, and *K.A.B. v. Sweden*, no. 886/11). The real risk of breach could emanate both from the individual situation of the respective person, from the fact that they belong to a particular vulnerable group, or from the general situation of violence in the receiving country. However, only cases of "extreme general violence" would give rise to an Art. 3 of the ECHR issue (see *Sufi and Elmi v. UK*, no. 8319/07 and 11449/07, 28 June 2011). A wide body of case-law has developed what qualifies as ill-treatment (*X v. Switzerland*, no. 16744/14, *J.K. and others v. Sweden*, no. 59166/12, *S.K. v. Russia*, no. 52722/15, *A.L. (X.W.) v. Russia*, no. 44095/14, *Paposhvili v. Belgium*, no. 41738/10, and *A.S. v. Switzerland*, no. 39350/13). Despite referring to Art. 3 of

the ECHR as a whole, the ECtHR has not given an answer to whether all three “stages” of ill-treatment, i.e. torture, inhuman treatment and degrading treatment, have the equal effect of creating an obstacle to expulsion; it is presumed that mere degrading treatment would not prevent expulsion.¹⁰ The question of substantial grounds requires rigorous, *ex nunc* assessment, and the state authorities have the obligation to assess information known to them of their own volition (*ex officio*).

1.2. ABSOLUTE OBLIGATION

V. DISCRETION OF STATE

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The principle that no one should be extradited, removed or made to leave for a country in which they would face risk of treatment contrary to Art. 3 of the ECHR does not allow for any exceptions or derogation in the time of national emergency. It “enshrines one of the fundamental values of the democratic societies” (*Soering v. UK*, § 88). The Court insists that “it is not possible to make the activities of the individual in question, however undesirable or dangerous, a material consideration, or to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of the State is engaged under Article 3” (*Trabelsi v. Belgium*, no. 140/10, 4 September 2014, § 118). That means the so-called absolute character of Art. 3 of the ECHR fully applies to the principle of *non-refoulement* as a derived Art. 3 right. The ECtHR emphasised this fact in the *Soering* judgment, and since then, despite being “acutely conscious of the difficulties faced by States in protecting their populations against terrorist violence”, it repeats the same position (see *X v. Netherlands*, no. 14319/17, 10 July 2018, § 71). In the Court’s view, the ECHR does not allow states to somehow “measure” competing rights and interests when Art. 3 of the ECHR is on the scale – there is no margin of appreciation. The ECtHR has confirmed such conclusion in a number of its judgments: we can trace it back to the landmark decision *Chahal v. UK* (no. 22414/93, 15

November 1996), *Saadi v. Italy* (37201/06, 28 February 2008), and up to relatively recent decisions *X v. Sweden* (no. 36417/16), *X v. Netherlands* (no. 14319/17) and *M. A. v. France* (no. 9373/15). Naturally, such an uncompromising approach of the Court is not applauded by the State parties to the ECHR in times when the national security narrative dominates political discussion.

Thus, the practical effect of the absolute character of the *non-refoulement* principle should be that an individual is completely immune from expulsion that would put him or her at risk of a breach of Art. 3 of the ECHR. States, on the other hand, have a positive obligation to ensure they respect that freedom by exercising their powers concerning the entry, stay and termination of stay of aliens with due regard to the material limit of *non-refoulement*. Therefore, states have to ensure procedures entailing the adequate scrutiny of permissibility of expulsion under Art. 3 of the ECHR in light of the respective alien’s individual circumstances. Failing to ensure a proper procedural arrangement ensuring rigorous scrutiny would amount to a breach of Art. 3 of the ECHR (*X v. Sweden*, no. 36417/16, 9 January 2018, or *Amerkhanov v. Turkey*, no. 16026/12, 5 June 2018). Moreover, Art. 1 of Protocol 7 to the ECHR enshrines procedural guarantees for the expulsion of regular migrants, and Art. 3 in connection with Art. 13 secures the right to effective remedy in all expulsion cases. Thereby, states’ sovereign powers are substantially limited by their obligation to respect human rights.

What consequences does the absolute character of Art. 3 of the ECHR on *non-refoulement* have for the regulation concerning expulsions and the use of discretion within it? Human rights obligations prescribe the issue (risk of breach of Art. 3 of the ECHR upon return), a course of action (to establish if there is such a risk) and outcome (not to expel if there are substantial grounds to believe serious risk exists) of any expulsion proceedings in an unequivocal manner. That rules out the possibility of entrusting the relevant state authority with discretion.¹¹ Even if it can make its own consideration and judgment about many questions related to the expulsion proceedings or its outcome (e.g. whether to initiate the

proceedings, whether the expulsion would be proportionate to interference with the right to private and family life, how long the entry ban should be, if there are compelling reasons to lift the entry ban because of its unduly harsh impact), the question of the risk of *refoulement* lies beyond any margin of discretion. The law has to be written in a way that makes the principle of *non-refoulement* a clear obligation to be fulfilled, without exception.

Having said that, the practical effects of “absolute prohibition of refoulement” could fall short of the promise of always securing protection. Firstly, “absoluteness” relates to a concept that is, essentially, a court interpretation of what the terms “torture, inhuman and degrading treatment” refer to. These terms are open definitions; from a public administration perspective – “indefinite terms” with all their features, implications, but also specific limits, as mentioned below; without the binding interpretation of the ECtHR, they remain unclear and open to be construed in different ways, ascribed to treatment of different severity. In fact, the ECtHR’s margin for discretion of what falls within and outside the scope of Art. 3 of the ECHR makes *non-refoulement* a relative concept over time. This follows from the evolutive interpretation of the ECHR (“a living instrument”), a concept that was adopted by the ECtHR and used especially in connection with the qualification of treatment as contrary to Art. 3 of the ECHR (*Selmouni v. France*, no. 25803/94, 28 July 1999, § 101). The ECtHR admitted there is an evolving standard of what is seen as torture, inhuman or degrading treatment in society, which has to be reflected in the legal interpretation of the terms. Therefore, what is now regarded as a breach of Art. 3 of the ECHR might have been acceptable treatment a few decades ago. A prime example of these changes is the willingness to take into account the situation of general violence, such as civil wars, as relevant for the risk of *refoulement* assessment. The court moved from a position that mere general violence would not suffice unless the applicants are able to show some distinguishing features making them more vulnerable to violence (*Vilvarajah v. UK*, § 111), to a more “humanitarian” approach that accepts that in most extreme cases, no “higher vulnerability” needs to be shown (*N.A. v. UK*, no. 25904/07, 17 July 2008,

§§ 114–117, as confirmed in *Sufi and Elmi v. UK*, §§ 217–219). Additionally, the ECtHR is not the only international body interpreting these terms, so states could be under another international obligation to follow a possibly different interpretation. In the European context, the case-law of the Court of Justice of the EU is naturally of prime importance.

The previous argument implies that the concept is relative over time, but we might still argue that at a specific point in time it provides absolute protection in relation to its current interpretation. However, there is another issue that could weaken it. ECtHR case-law provided for an interpretation of treatment contrary to Art. 3 of the ECHR on a case-by-case basis. It is up to the national authorities who conduct the administrative proceedings, or later judicial proceedings, to establish the facts of the case and qualify them against Art. 3 as interpreted by the ECtHR. They themselves qualify what counts as ill-treatment. Therefore, despite having the common reference standard in ECtHR case-law, practices could diverge. Such a possibility (or potential risk?), in fact, lies in the very nature and substance of indefinite terms. Even practice concerning “smaller” issues, like the extent to which proven personal experience of ill-treatment suggests future ill-treatment or a standard of proof could thus play a key role in the overall risk assessment. In summary, it is possible to reflect on the ECHR standard of what is understood as ill-treatment, and yet come to an opposite outcome during the risk examination.

2. NATIONAL IMPLEMENTATION OF THE PRINCIPLE OF NON-REFOULEMENT: PROGRESSIVE ALIGNMENT OF NATIONAL REGULATION TO HUMAN RIGHTS STANDARDS

Each of the statements above hides a number of problematic legal issues that would deserve thorough

analysis. For the purposes of this paper, however, let us now outline how the requirement of the *non-refoulement* principle is implemented in a specific national legal system (Czech law) that is to be considered further in the procedural effectiveness analysis.

An EU Member State's national migration law is, in fact, the implementation of EU secondary law from the field of the common EU asylum and migration policy (Art. 77–80 Treaty on the Functioning of the EU). EU law adopts the *non-refoulement* principle in its primary law via Art. 19 (2) of the Charter of Fundamental Rights of the EU. Besides this constitutional guarantee, it finds its expression in secondary law, more specifically, in the Returns Directive (see i.a. Recital 24 and Art. 5). Its national implementation in Czech law could be found in Act No. 326/1999 on the residence of foreigners (hereinafter “Act No. 326/1999”).

The Czech stipulation of *non-refoulement* underwent significant changes over time, reasoned by the progressive harmonisation of the pre-1989 regulatory framework to international human rights' obligations and EC/EU legislation. Comparing three statutes regulating expulsions effectively in the last three decades, it is obvious that migration issues have become much more complex. Starting with Act No. 68/1965, effective until 1992, we see the regulation falling short of fundamental human rights standards (the whole statute contains only nine provisions in total, whereas the current law spans well over 200 provisions), while Act No. 123/1992, effective until 1999, did include the “obstacles to expulsion” provision. That was a significant yet insufficient development. It precluded expulsion in cases where an individual's life or personal liberty would be at risk for specified reasons (race, religion, ethnicity, belonging to a particular social group or political opinion). Nevertheless, it allowed exceptions when “an alien is a threat to national security or committed an egregious crime”, therefore clearly failing the ECtHR standards: the court does not make room for any “specific reasons for risk”, whereas other sources of risk would be irrelevant. The provision is also too restrictive when referring only to risks to right to life (Art. 2 ECHR) and personal liberty (Art. 5 ECHR).

The *non-refoulement* provisions in the current statute – Act No. 326/1999 – were amended three times; the new act itself and its first amendment widened the scope of *non-refoulement*. Most importantly, its language from the beginning included a reference to treatment contrary to Art. 3 of the ECHR, and even a reference to a war conflict (as a situation of general violence), exceeding the ECtHR requirements at the time (cf. the ECtHR's ruling in *Sufi and Elmi v. UK*). It kept the exception clause, but modified it in a way that made it relative, so in effect, not undermining the absolute character of the provision.¹² The first amendment (2006) aligned the applied terminology to the (second generation of) EU secondary migration law (using the language of “serious harm” with an exhaustive list of what qualifies as this) and also ECtHR case-law (“substantial grounds to believe there is serious risk” instead of the previous language “would be endangered”) (§ 179 of Act No. 326/1999, as amended by Act No. 136/2006). The second amendment, on the other hand, elaborated solely on the grounds for use of the exception clause. Finally, from August 2019, the provision refers directly to “real danger” which leads to “return contrary to Art. 3 of the ECHR” (§ 179 of Act No. 326/1999, as amended by Act No. 176/2019).¹³

Overall, we see that the principle of *non-refoulement* has a regulatory basis in Czech law that eventually came into compliance with ECtHR case law. Now, it positively *is* in compliance with Art. 3 of the ECHR, since the law only refers to that provision as such. A closer look, however, reveals that the grounds for qualifying as “serious harm” that prevented authorities from removing a person were defined as open definition terms. The terms needed to be interpreted, and the specific facts of the case needed to be assessed against this interpretation in order to decide if they are to be qualified as falling within the scope of “serious harm”. The situation is very similar even under the current wording, which eventually leads to open definition terms of “torture, inhuman and degrading treatment”. Therefore, the state authorities have to deal with the terms in line with ECtHR and CJEU case law, which means the individual officers and judges have to bear in mind that they

are dealing with essentially European (ECHR and EU), and not national concepts. Moreover, even if they properly reflect the European nature of the national law provisions, there is always room for misinterpretation. That could result not only from a “different legal opinion”, but also a mistake.

Let us briefly mention one example of such errors from the case-law of the Czech Supreme Administrative Court (SAC). The case (no. 7 Azs 85/2016, 17 August 2016) concerned an applicant who claimed his expulsion to Libya could not be enforced because of his medical condition. After kidney failure, he attended dialysis a few times a week and was on a kidney transplant waiting list. The Supreme Administrative Court overruled the court of the first instance decision that a medical condition could not be taken into account at that stage of the proceedings; for context, the court of first instance merely stated it was too late to raise the issue. The Supreme Administrative Court, however, did not consider that a serious decline in health due to lack of medical care could fall within the scope of “serious harm” caused by “inhuman treatment”, thereby creating an obstacle to expulsion. Instead, it ruled that the claim should be considered during the examination of proportionality of interference with the right to private life (Art. 8 of the ECHR). In summary, the court provided protection for the fundamental rights of the applicant (the expulsion would be enforceable only if necessary in a democratic society, according to Art. 8 of the ECHR), but it stripped the applicant of the “absolute protection” of Art. 3 of the ECHR and it did not explain why the suffering the applicant could face would not reach the threshold of Art. 3 of the ECHR (see *Paposhvili v. Belgium*, no. 41738/10, 13 December 2016).

3. NON-REFOULEMENT ENFORCEMENT: PROCEDURAL AND INSTITUTIONAL ARRANGEMENT MATTERS

In this part, we argue that despite having flawless legislation on the material aspects, *non-re-*

foulement fulfilment depends heavily on adequate procedural and institutional arrangements of the expulsion proceedings. We identified two relatively separate, but closely inter-connected issues in the Czech regulation of expulsion that we consider potentially threatening to the proper conduct and outcome of expulsion proceedings. Firstly, the more general question of who conducts the examination and how its results are reflected in the final decision on expulsion. Secondly, a more specific question of waiving the right to effective remedy and its impact on proper examination.

3.1. WHO MAKES THE CALL – AND HOW?

When we look at the legislative history of answers to the questions in the headline, we see the matter was repeatedly at the centre of attention for the government, the Parliament and the Constitutional Court. It was constantly transformed from very weak, almost absent procedural safeguards in search of the most cost-effective arrangement. The key is what we consider to be effective.

In the current state of affairs, decisions on expulsion are issued in administrative procedures conducted by the Alien Police inspectorate (an integral part of the state police forces). The fact that proceedings are conducted by the police might have some rationale – it is the police who work in the field, make the initial examination on the regularity of the immigration status of an alien, have the power to detain an alien pending a decision on expulsion and actual removal, and if an enforceable decision is issued, the police perform the forced removals. But in order to conduct expulsion proceedings as a whole, the Alien Police Inspectorate also has to examine the risk of *refoulement*.

That would require creating a trained workforce with specific expertise as well as ensuring the flow of recent information about foreign countries relevant for risk assessment. However, as the administrative courts repeatedly concluded, the Alien Police Inspectorate “is not in the position to conduct

a thorough assessment of the risk of breach of Art. 3 of the ECHR were the person to be removed” (see SAC no. 4 Azs 66/2018, 23 January 2019). Act No. 326/1999 outsources the assessment of the risk of *refoulement* by transferring the duty of performing an adequate examination to a different body, the Ministry of the Interior, which has a number of experts working on other migration-related issues, especially international protection. Put simply, the police are obliged to ask the Ministry, in every individual case, whether there is any relevant risk. If the answer is affirmative, the expulsion cannot go forward. The Ministry’s answer to the request takes the form of a so-called binding opinion: an act that is not an administrative decision *per se* but is decisive for the actual administrative decision (on the rights and duties of an individual), because its result cannot be questioned by the body which issues the final decision.

Scrutiny of the Ministry is of key importance, since no other body performs a sufficiently deep examination of the same issue. The depth of the scrutiny is essentially the same as when assessing an international protection request, even though the law makes a clear distinction between granting international protection and finding that there are obstacles to expulsion when it comes to legal consequences (see Ruling of the CCC no. IV.ÚS 553/06, 30 January 2007, upholding the decision not to grant asylum despite the fact the applicant showed there were barriers to his expulsion due to *non-refoulement*). The obligation to perform a risk assessment could not be waived by arguing that the alien should have applied for international protection (SAC no. 9 Azs 28/2016, 14 April 2016).

A closer look from the procedural perspective, provided by research of the Public Defender of Rights (Czech ombudsperson; report no. 6610/2015/VOP/HL, 30 August 2016) conducted in 2015/2016, revealed several interesting features of the procedural and institutional arrangements that raised some issues concerning proper examination. We included her findings in order to provide a vivid picture of the possible disparities between rules and their implementation, even though we have to stress they do not necessarily depict the current situation.

It is up to the Ministry to conduct a rigorous examination of its own volition; the alien does not bear any burden of proof or burden of claim (SAC no. 5 Azs 3/2017, 29 November 2017). Nevertheless, obtaining information about personal circumstances is vital. The Defender’s research showed that during expulsion proceedings, individuals whose own risks were being evaluated were never interviewed directly by officials of the Ministry of the Interior. The Ministry confirmed the only material they usually relied on was an interrogation report from the Alien Police Inspectorate (report of the Public Defender of Rights, p. 33). All relevant information on personal circumstances is obtained by officers of the Alien Police Inspectorate, who, on the other hand, might miss some parts of the story. Then, information is shared with the Ministry (the file stays at the Alien Police Inspectorate). Therefore, if a piece of information does not look important enough to the police officer, it might not reach the ministry official performing the assessment.¹⁴

Surprisingly, the expulsion order could even be issued in cases where the binding opinion declared that there are obstacles to the expulsion. In such a case, the expulsion decision does not include any deadline for return. So there are decisions on the expulsion of aliens who were found to be in real danger of persecution or torture. Such a decision is not enforceable in practice, but still binding. If the situation changes and a return is no longer impossible, the Ministry can issue a new binding opinion and the Alien Police Inspectorate issues a new decision laying down a deadline for return. Courts recognised that such unenforceable decisions on expulsion could cause significant uncertainty and stress, possibly resulting in disproportionate interference with private and family life (in breach of Art. 8 ECHR) of the foreigner.

The fact that the assessment takes place without the direct involvement of the persons in question must not affect their right to effective remedy against a flawed outcome. However, the transparency of the whole process is diminished to some extent. The binding opinion is not an administrative decision, so there is no appeal. Its content

could be challenged with the final decision on expulsion; after an unsuccessful appeal, the decision could be challenged by action brought before the court, invoking arguments against the binding opinion (its content, relevance, reliability) (SAC no. 6 Azs 114/2015, 27 January 2016). Therefore, the courts require the binding opinions to be reasoned in the way an administrative decision would be, so that one can learn which facts were taken into account and why the Ministry reached its conclusion (ibid.). The opinion should be supported by evidentiary materials accessible to the alien and to the court (ibid.).

Interestingly, the current regulation of access to effective remedy is a great improvement from the situation under earlier legislation. Previously, the law did not contain any explicit provision on what the procedural outcome of the assessment was; there was no requirement to issue a separate decision. Later, the law required the decision on expulsion to state explicitly whether the obstacles to removal exist or not, so that such declaration could be directly challenged on appeal (Act no. 326/1999, as amended by Act no. 428/2005). The most restrictive was the situation under Act No. 123/1992, which provided for *no remedy* if the state completely neglected to make any examination (CCC no. Pl. ÚS 27/97, 26 May 1998). Such a situation amounted to a clear breach of Art. 3 in conjunction with Art. 13 of the ECHR.

Access to effective remedy seems to be crucial because of repeated complaints about the quality of the Ministry's assessment. Courts repeatedly reminded the Ministry about the importance of making the assessment on the basis of materials that are relevant to the issue of the proceedings, come from multiple and reliable sources, and reflect complete individual circumstances as well as recent developments (e.g. rulings of the SAC no. 1 Azs 105/2008, 4 February 2009, and no. 6 Azs 114/2015, 27 January 2016). The SAC expressly criticised situations when an alien was not even questioned properly by the Alien Police Inspectorate, so the assessment missed important facts and led to an incorrect outcome.¹⁵ Courts also stressed the assessment must not be outdated. But

the most damning critique of the Ministry's performance was expressed by the Public Defender of Rights, based on her research of a sample of 35 administrative expulsion decisions in 2015/2016.

Concerning material reflecting the individual circumstances of the person concerned, the Defender criticised in her report that the alien is sometimes asked just a simple question "Are you aware of any obstacles preventing you from leaving the Czech Republic?", which has a fundamentally different meaning than asking about obstacles of return to a specific country, usually a country the foreigner had fled. Other times, the Alien Police Inspectorate did not provide a full transcript of information provided by an interrogated foreigner. In a number of the Ministry's opinions concerning foreigners from Somalia, Afghanistan, Iraq and Syria (countries that would require extra rigorous scrutiny at the time), the Defender found that the Ministry had not made its conclusion on a sufficiently factual basis. The Defender even expressed her suspicion that two foreigners had been expelled after "summary proceedings" not distinguishing sufficiently between their individual cases, raising the issue of possible collective expulsion (the Report, p. 63).

Most importantly, the Research showed that the Ministry fulfilled its duty to issue binding opinions "without any delay" very well, as required by law. Perhaps too well; in 33 out of 34 cases, the Ministry issued the binding opinion the very same day (the Report, p. 60). The Defender notes the sample included foreigners from *prima facie* problematic countries, who provided specific information on the danger they would likely have faced upon return (ibid.). She logically suggested that it was impossible to comprehensively study all relevant material (up to dozens of pages of reports), examine the reliability of claims made by the foreigner, and elaborate a reasoned opinion on the very same day, sometimes within less than 30 minutes. The Defender's conclusions were acknowledged by the Constitutional Court in ruling no. I.ÚS 630/16 of 29 November 2016, where the court *obiter dictum* stated the binding opinion in that case *prima facie* failed the required rigorous scrutiny, contrary to Art. 2 and 3 of the ECHR, reminding that "the re-

quirement to issue a binding opinion without delay does not relieve the Ministry of the obligation to respect fundamental rights and freedoms”.

3.2. RIGHT TO EFFECTIVE REMEDY: A PROCEDURAL SAFEGUARD TOO EASY TO WAIVE

Despite reasons to treat risk of *refoulement* evaluations carefully, one might claim that provided there is an effective remedy, flawed administrative decisions could be reversed either on appeal or based on a motion to an administrative court. However, there is another controversy that showed, in some cases, the right to effective remedy might be illusory. It concerns cases of foreigners who waived their right to file an administrative appeal against a decision on expulsion (an appeal is a precondition for a court action to quash an administrative decision). The possibility to waive one’s right to effective remedy does not have to be problematic *per se*; but given its serious consequences, it is to be used only when one positively knows what he or she is doing and with what consequences, acting out of one’s free, serious and error-free will.

Most significantly, the issue was raised in a series of proceedings, in which dozens of foreigners (illegal workers) were expelled in proceedings lasting only one or few days. Relying on SAC judgments in those cases (i.a. no. 2 Azs 340/2017, 14 August 2018), we might conclude that despite *formally* meeting minimum requirements for a waiver of the right to appeal, the court grew suspicious of what was the true course of events. It started to distinguish between cases on the basis of individual circumstances. We do not have to assume the police officers used threats or duress, even though the possibility of such failings could never be ruled out. Let us assume a less serious conclusion: the proceedings as a whole are not always conducted in a way that would allow foreigners to fully enjoy their rights, including the right to effective remedy. Such conclusion becomes

worrisome when we connect it with the previous problem, freedom from treatment contrary to Art. 3 of the ECHR, which arises from an unsatisfactory quality of risk assessment concerning *refoulement*.

Imagine a case that seems to be clear-cut. It was established that there is no permit of stay, the facts concerning personal circumstances are gathered and transferred to the Ministry for assessment. The reply comes within a few hours. The decision on expulsion could be completed within the next few hours. The foreigner could be detained (up to 48 hours just on the basis of probable irregular status without any formal proceedings or decision, according to Act no. 273/2008). Access to legal aid is poor, especially for detained foreigners (CCC no. I. ÚS 630/16, 29 November 2016). The pressure upon the foreigner must be severe, and as they are informed about the decision on expulsion, some forms are signed. Only once it is over does the individual look for legal advice and means to challenge the decision. Now, let us imagine the worst-case scenario. The foreigner is in real danger of torture or inhuman treatment but made statements that were too general and were not properly examined. They end up facing expulsion, having no remedy to prevent it, apart from trying to institute another set of proceedings, such as by applying for international protection.

3.3. PARALLEL EXPULSION AND ASYLUM PROCEEDINGS: DOUBLE THE WORK

Implementation reports concerning the current EU legislation suggested that one of the major obstacles EU-wide is insufficient co-ordination or the diminished functional link between the asylum system and the management of forced returns [cf. Explanatory memorandum to Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), 12 September 2018]. The Czech legal situation is one such case.

The risk of *refoulement* is evaluated separately in both sets of separate proceedings, conducted by different administrative bodies (Police and Ministry of Interior). Their actual coordination (not really cooperation) depends on the exact moment when a foreigner subject to expulsion proceedings applies for international protection. When the application is made during or after the proceedings, it is usually seen as dilatory tactics, but the enforcement of the expulsion decision depends on the outcome of the latter proceedings, which includes a separate *refoulement* risk assessment.

Additionally, the fact the expulsion decision is unenforceable due to the conclusion of the binding opinion on the existing risk of *refoulement* does not automatically translate into international protection recognition. A separate set of proceedings could be started by the applicant, but only within a strict time limit of seven days. Failing to keep to this deadline or being denied status of international protection, the foreigner is left with the lowest permit to stay (“toleration of stay”).

4. A LOOK ABROAD: SAME ISSUES, DIFFERENT SOLUTIONS?

Section 50 of the German Law on the Residence of Aliens imposes on all foreigners who do not have a residence permit, or have lost it, the duty to leave the territory of the Federal Republic of Germany (*die Ausreisepflicht*).¹⁶ This obligation may be an immediate or a duty obligation, or a deadline may be set for its fulfilment. To impose or enforce an administrative expulsion, the obligation for the foreigner to leave the Federal Republic of Germany must be enforceable. This obligation is enforceable for example if the foreigner enters the territory of Germany illegally, if they do not apply for the relevant residence permit, or if the application for a residence permit is rejected. Thus, German legislature primarily assumes that foreigners who are in Germany illegally can leave the territory voluntarily, without the need for an administrative decision ordering them to do so, or perhaps even without its enforcement.¹⁷

The German regulation is based on the premise of the general obligation of a foreigner to leave Germany and allows foreigners to remain there only if they fulfil the prerequisites for staying in Germany.¹⁸ Administrative expulsion thus takes the form of an individual administrative act in terms of the forms of public administration activity, and in some cases, it can be described as an “execution act” through which a statutory duty is performed. In our opinion, the German legislation points more clearly to the consequences of illegal residence. For example, it is positive as regards the German legislation that issuing an administrative expulsion (and the related negative consequences of the ban on entry into the territory) is not necessary in the case of an alien whose residence permit has expired and who, at the same time, voluntarily leaves Germany. In other words, not all foreigners found to be staying illegally are necessarily expelled (as in the Czech Republic), but there is leeway for the foreigners to fulfil their obligation voluntarily, and thus avoid the negative consequences associated with administrative expulsion (*ibid.*). Such legal provision enables a more appropriate response to “negligent” and minor infractions (breaches of law) of foreigners. In the Czech Republic, such an alien cannot avoid an administrative expulsion relating to the prohibition of residence, which, as we have indicated above, might not always be appropriate and proportionate to the misconduct.

In terms of the topic of this paper, the key finding is that the German law on the residence of foreigners directly draws attention to the impossibility of expelling a foreigner when it would violate their rights guaranteed by the ECHR, or the Convention Relating to the Status of Refugees.¹⁹ Thus, the German authorities cannot expel a person who, in the country to which he is to be expelled, can suffer serious harm or degrading conduct. Interesting, and at the same time different, is the way to ensure that such expulsion does not occur.

In order to ensure compliance with the principle of *non-refoulement*, the Act on the Residence of Aliens provides for two ways. Firstly, if the alien requests not to be expelled on the grounds that the principle of *non-refoulement* may be violated *because* they qualify as a refugee, the matter should

be examined by the Federal Office for Migration and Refugees in a separate asylum procedure.²⁰ The assessment of the “refugee story” will thus be taken over by the specialised asylum authority. From the Czech point of view, this regulation is interesting in that the threat of granting administrative expulsion may lead to international protection proceedings, which in the Czech Republic is often seen merely as an obstructive means of preventing administrative expulsion. In Germany, on the contrary, the law expressly foresees such a procedure (§ 60 par. 1 Law on the Residence of Aliens). A significant positive aspect of such an arrangement is that in handling “refugee objections” the matter is taken over by a specialised body, which can consistently assess relevant facts in personal contact with a foreigner in a separate procedure and not restrict its activity to issuing (more or less a regular file) of the binding opinion.

Furthermore, the German Act on the Residence of Aliens excludes the expulsion of foreigners if this would interfere with their rights guaranteed by the ECHR. This covers situations where a foreigner does not necessarily claim to be a refugee, but on the other hand there are other reasons to prevent their expulsion.²¹ Compared to the Czech Republic, the assessment of whether the principle of *non-refoulement* guaranteed by the ECHR is not violated is assessed directly by the administrative body that decides on the matter. Such an approach seems both pragmatic and effective. The decision is taken by the authority that has the most information on the matter, has a file available, and is in contact with the foreigner. By contrast, in the Czech legislation the Ministry of the Interior expresses its opinion on the issue by means of a binding opinion, which, although in possession of deeper professional knowledge, it nevertheless decides without proven documentation and regularly in a more formal way. We believe that the German legislation could be an inspiration for the Czech Republic, as the Czech Police could undoubtedly have the necessary information (access to the necessary databases, etc.), and thus assess the question separately and in more detail, taking into account the circumstances of the case. However, it is evident that in view of previous criticism from the courts, fundamental organisa-

tional changes would have to take place, including personnel and professional reinforcement of the Police of the Czech Republic itself.

5. CONCLUSION: IN BETWEEN (BUREAUCRATIC) EFFECTIVENESS AND DUE PROTECTION

In this paper, we wanted to highlight how central the principle of *non-refoulement* is to expulsion proceedings. It determines its outcome when substantial reasons are found to believe an individual would face serious risk of torture or inhuman treatment contrary to Art. 3 of the ECHR, or in extreme cases would face possible death (in breach of Art. 2 of the ECHR). It also shapes the procedural design of the proceedings, since states have to ensure a procedure that ensures the principle is observed. It has to be observed in all circumstances, as prescribed by the absolute character of Art. 3 of the ECHR.

However, we find issues that make the absolute character a more relative one. One of them is that terms such as “torture, inhuman or degrading treatment” are open to the interpretation of the ECtHR, and then to interpretation and application by national authorities. The latter could be less sensitive to the meaning or importance of *non-refoulement*, or could simply err in their judgment. We used the example of the Czech Republic to show that despite having a regulation that fully complies with the ECHR and EU law when it comes to the obligation to respect *non-refoulement*, the procedural setting is of prime importance for its real enforcement. The Czech procedural and institutional arrangements themselves, while maybe not optimal, are not inherently flawed either. We tried to depict that what matters is how the law is turned into practice. The experience stemming from national courts’ case-law and The Public Defender of Rights’ research suggest the true fulfilment of the obligation in many cases relies heavily on the conduct of individual officers who handle the case, and their commitment. It again supports the vision that training and

professional ethics must work hand-in-hand, even where those implementing policy/law have little margin of discretion to guide their conduct.

When speaking of effectiveness, often we only consider one criterion: *time*. Of course, time is of the essence; unreasonably lengthy proceedings conducted without due care leading to delays would not meet the standards of good administration. Still, acting *speedily* must not equate to acting *hastily*. And both opinions on risk of serious harm formed within a few hours as well as a focus on “shortening” the procedural pathway by avoiding appellate review suggest taking a shortcut at

the expense of rights of the individuals concerned. This brings us back to the recent emphasis on control and safety in immigration issues. A focus on effective return procedures is commonly understood to be one of the challenging issues the current system is facing. Nevertheless, it would be a mistake to welcome every development that leads to shorter procedures on forced returns. Common sense dictates there must be a link between time spent with examining the risk of *refoulement* and the achievable quality of the assessment. Effectiveness should not be measured without regard to fundamental rights and freedoms.

Notes

- 1 The research is funded by Masaryk University; project MUNI/A/1337/2018, *Správný vyhoštění s důrazem na správní uvážení a neurčité právní pojmy* (Administrative expulsion with emphasis on administrative discretion and undefined legal terms).
- 2 Brubaker, R. (2017). Why Populism? *Theory and Society*, 46(5), 357–385. <https://doi.org/10.1007/s11186-017-9301-7>
- 3 Czech politics is an illustrative example. Tomio Okamura, a leader of the far-right Czech party SPD (scoring 10.64% in 2017 Parliamentary elections), built his political programme around “zero tolerance for migration” and “complete closure of EU “borders”, supporting “Czexit” as the only way to prevent the “dictate of Brussels” which “imports terrorists to the Czech Republic”. Based on Okamura’s Facebook posts. Compare language used by centrist populist ANO party (“I insist, we don’t want refugees in Czechia”, A. Babiš, 2016), conservative right ODS (“We accept those refugees who are able to integrate fully”, M. Kupka, 2015) or social democrat CSSD (“Irregular migrants need to be detained, that is the way forward for Italy”, M. Chovanec, at the time Minister of Interior, 2017).
- 4 See significant efforts of the Commission since 2015 to step up effectiveness of return procedures that it deems unsatisfactorily low (in 2018, 150,000 returns were performed out of 478,000 orders to leave, EU-wide; according to Eurostat figures) despite being “an essential component of the European Agenda on Migration” (COM(2015) 240 final). To this end, see Commission Communication on the Common Return Handbook (September 2017, C(2017) 6505), Commission Recommendation on making returns more effective when implementing Directive 2008/115/EC of the European Parliament and of the Council (March 2017, C(2017) 1600 final) and Proposal for a directive of the European Parliament and Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast) as of September 2018 (COM/2018/634 final).
- 5 According to polls, 63% of the Czech population would accept no refugees fleeing military conflict whatsoever, with 84% seeing them as major threat to European safety. Data of CVVM from May 2019. <https://cvvm.soc.cas.cz/en/press-releases/political/international-relations/4971-attitude-of-czech-public-to-accepting-of-refugees-may-2019>. Accessed 23 July 2019
- 6 Goodwin-Gill, G. (1978). *International law and movement of persons between states*. Clarendon Press. pp. 3-4.
- 7 den Heijer, M. (2008). Whose Rights and Which Rights? The Continuing Story of Non-Refoulement under the European Convention on Human Rights. *European Journal of Migration and Law*, 10(3), 277-314. <https://doi.org/10.1163/157181608X338171>; Battjes, H. (2009). The Soering threshold: Why Only Fundamental Values Prohibit Refoulement in ECHR Case Law. *European Journal of Migration and Law*, 11(3), 205-219. <https://doi.org/10.1163/138836409X12469435402693>
- 8 Hathaway, J. C. (2005). *The Rights of Refugees under International Law*. Cambridge University Press. p. 363.
- 9 Duffy, A. (2008). Expulsion to Face Torture? Non-refoulement in International Law. *International Journal of Refugee Law*, 20(3), 373–390. <https://doi.org/10.1093/ijrl/een022>
- 10 Battjes, H. (2009). The Soering threshold: Why Only Fundamental Values Prohibit Refoulement in ECHR Case Law. *European Journal of Migration and Law*, 11(3), 205–219. <https://doi.org/10.1163/138836409X12469435402693>, pp. 208-209.
- 11 Migration issues, on the contrary, often allow for a broader margin of discretion of policy implementors, as was illustrated in the case of Canada by Bouchard, G., & Carroll, B. W. (2002). Policy-making and administrative discretion: The case of immigration in

Canada. *Canadian Public Administration*, 45(2), 239–257. <https://doi.org/10.1111/j.1754-7121.2002.tb01082.x>

12 The exception clause stated two reasons for derogation from *non-refoulement*: 1) the individual can travel to another state where he or she faces no risk, or 2) if the individual poses a threat to national security, was convicted of an egregious crime or it is required by international obligations, they are a given 60-day period to establish the right to enter another state. Only after proving they could not leave would the police grant a visa as a permit to stay.

13 An interesting issue is how to reflect on other provisions of the ECHR that might give rise to non-refoulement (esp. Art. 6 of the ECHR), when the national law points solely to Art. 3 of the ECHR. If such a situation occurred, the way forward would be through a general constitutional obligation to respect human rights.

14 Compare one case recalled by the Defender, in which an address provided showed the person is in particular danger, but without in-depth orientation in the Syria conflict, the information looked unimportant (the Report, p. 36).

15 See SAC's Ruling no. 9 Azs 2/2016, 14 April 2016, in which the Ministry concluded there was no obstacle to expulsion due to the fact that the alien could have found an internal flight alternative by resettling in another part of Iraq, without asking which part of Iraq he had come from in the first place.

16 Bergmann, J., & Dienelt, K. (2020). *Ausländerrecht: Aufenthaltsgesetz, Freizügigkeitsgesetz/EU und ARB 1/80 (Auszug), Grundrechtecharta und Artikel 16a GG, Asylgesetz: Kommentar* (13. Auflage). C.H. Beck. p. 1086.

17 Kluth, W., & Heusch, A. (Eds.). (2016). *Ausländerrecht: AufenthG, AsylG, FreizügG/EU, ARB 1/80, AEUV, EMRK: Kommentar*. C.H. Beck. p. 736.

18 Hofmann, R. M. (Ed.). (2016). *Ausländerrecht: AufenthG, AsylG (AsylVfG), GG, FreizügG/EU, StAG, EU-Abkommen, Assoziationsrecht* (2. Auflage). Nomos. p. 534.

19 Bergmann, J., & Dienelt, K. (2020). *Ausländerrecht: Aufenthaltsgesetz, Freizügigkeitsgesetz/EU und ARB 1/80 (Auszug), Grundrechtecharta und Artikel 16a GG, Asylgesetz: Kommentar* (13. Auflage). C.H. Beck. p. 1088.

20 Hailbronner, K. (2017). *Asyl- und Ausländerrecht* (4., überarbeitete Auflage). Verlag W. Kohlhammer. p. 305.

21 Kluth, W., & Heusch, A. (Eds.). (2016). *Ausländerrecht: AufenthG, AsylG, FreizügG/EU, ARB 1/80, AEUV, EMRK: Kommentar*. C.H. Beck. p. 738.