SDRUŽENÍ ASSOCIATION
PRO INTEGRACI FOR INTEGRATION
A MIGRACI AND MIGRATION

Implementation of the Employers` Sanctions Directive in the Czech Republic

Prague 2014

Network of European Foundations

Epim
European Programme for Integration and Migration

Table of Contents

1. General overview of the domestic migration policy

The Czech Republic had to react to the relatively new phenomenon of migration immediately after 1989. Migration policy responded to changing migration flows, needs of the labour market and completely new legal framework due to accession to the European Union in 2004. It is possible to determine five periods of migration policy since 1990. The first one, so called „liberal" or „laissez faire" lasted from 1990 to 1996. In this period, new structures of migration management were built with no integration policy but migration issues were not in the focus of the government yet. The second period from 1996 to 1999 started restrictive approach to migration influenced by the economic situation, growing numbers of migrants and candidacy of the Czech Republic to enter EU. The first Act No. 326/1999 Coll. on the Residence of Foreign Nationals in the Territory of the Czech Republic[1] (hereinafter referred as FORA) was adopted. In the third so called „consolidation" period between years 2000 – 2006 stricter rules, stronger institutions and implementation of EU law were realised. In 2003 the Czech government adopted Principles of the governmental policy in the field of migration[2] that is still the only strategy of the migration policy of the Czech Republic. In years 2006 – 2008, low unemployment and substantial economic growth resulted in a lack of the work force at the labour market. During this neo-liberal period low qualified migrant workers entered the labour market to be heavily hit by the economic crisis in 2008. Since 2008 the migration policy is considered to be neo-restrictive, implementing laws and policies intending to reduce number of migrants coming or already residing at the territory through legal and policy tools pushing migrants into irregular situations and participation in informal economy.[3]

In 2008 there were about 400 000 legally residing labour migrants in the Czech Republic. In the first three months of 2009 about 12 000 migrant workers lost their jobs and about 68 000 work permits were not prolonged during the first six months of 2009.[4] The government addressed the situation by adopting several legal and policy measures with long-term and short-term effects. Through the amendment of FORA a 60 day protection period for those workers, who were dismissed because of negative economic situation of their

1 Act No. 326/1999 Coll. on the Residence of Foreign Nationals in the Territory of the Czech Republic and on changes to some Acts, as amended.

2Resolution of the Government of the Czech Republic No. 55/2003, available at http://kormoran.vlada.cz/usneseni/usneseni_webtest.nsf/0/D376DFB23057E7E6C12571B60070FBF3

3 Kušniráková, T., Čižinský, P. (2011): *Dvacet let české migrační politiky: Liberální, restriktivní, anebo ještě jiná?* Geografie Vol. 116, No. 4, p. 497–517.

4 Rozumek M., Tollarová B., Valentová E.: *Migration and the Economic Crisis: Implications for Policy in the European Union – case study Czech Republic*, IOM 2010, http://www.labourmigration.eu/research/report/12-migration-and-the-economic-crisis-implications-for-policy-in-the-european-union

employer,[5] was introduced. The amendment of the Act on Employment[6] introduced the possibility to prolong work permit for two years and stricter sanctions for irregular employment.[7]

The Ministry of Interior prepared, at the policy level, a concept of security issues reflecting decreased demand for migrant workers. Government approved the concept titled "Ensuring the security of the Czech Republic after dismissal of foreign workers due to economic crisis" in February 2009. The report is based on combination of voluntary return program for released workers and regulation of migration flows through stricter policy on issuing visa for the purpose of employment and self-employment and stricter immigration control at the territory.[8] Furthermore, the Ministry of Interior adopted "voluntary return programs" for migrants. The first one launched in February 2009, lasted 8 months and within the program migrant third country national workers with residency status, who were unemployed, were offered a voluntary return to their countries of origin including emergency accommodation before departure, free transport and allowance of 500 EUR to cover after arrival costs. 1, 871 migrant workers participated at the first phase of the program mostly from Mongolia. In July 2009 the second phase was launched offering 300 EUR for adults and 150 EUR for children under 15 years. There was a substantial drop of interest, only about 200 migrants participated in the second phase.[9] The Ministry of Interior extended the program for three months from September to December 2009 to migrants in irregular situation. The program targeted on those dismissed workers who lost their residency permits due to the economic crisis. They were offered shorter period of bans from the territory for irregular stay under FORA. Irregular migrants got covered travel cost, but should they bear the costs themselves, they received a shorter ban on entry. Only 169 migrants applied mostly from Ukraine, Viet Nam and Mongolia.[10]

During 2010 the protection measures in the area of labour market continued. Ministry of Labour and Social Affairs issued on 12 March 2010 instruction to labour offices to prioritise Czech and EU/ES nationals over third country nationals irrespective of the length of their stay at the territory when filling vacant jobs as well as to issue work permit to third country nationals only in exceptional cases.[11] This restrictive approach was

5 Section 46 part 8 of the Act No. 326/1999 Coll. on the Residence of Foreign Nationals in the Territory of the Czech Republic and on changes to some Acts, as amended
6 Act No. 435/2004 Coll. on Employment, as amended
7 The maximum limit of fines was raised from 2 000 000 CZK to 5 000 000 CZK.
8 Rozumek M., Tollarová B., Valentová E.: *Migration and the Economic Crisis: Implications for Policy in the European Union – case study Czech Republic*, IOM 2010, http://www.labourmigration.eu/research/report/12-migration-and-the-economic-crisis-implications-for-policy-in-the-european-union
9 Ibid.
10 Ibid.
11 Faltová M.: Studie MIPEX III v kontextu novely zákona o pobytu cizinců, in *Státní politika integrace migrantů do společnosti*, MKC, 2011

further developed in the new amendment of FORA that came into force on 1 January 2011. New FORA introduced a number of important changes at the institutional level as well as in relation to the conditions for entry and stay of foreigners on the Czech territory such as new personal attendance requirements, forthcoming biometric residence permits and more stringent housing and health insurance requirements. The legislation implements several EU directives, including Sanction Directive. Regarding to the institutional development, as of 1 January 2011, the Ministry of the Interior took over the responsibility for the management of long-term residence permits and long-stay visas, which pertained previously to the Foreign Police Service. The Ministry of Interior followed the trend of 2009 when it extended its influence over the migrant integration, permanent residence and green cards agendas, earlier administered by other state authorities. Since the transfer of agendas the decision making process about residency permits has been substantially delayed and in the violation of procedural rights of migrants. Legislative changes effective as of 2011 have not significantly reduced the bureaucratic formalism of the Czech immigration law, which remains, similarly to the recent years, moderately restrictive putting an immense burden of proof on the migrant. Furthermore, in the residence permits granting, values such as state sovereignty, national security, public order and strict formal legality applied to the detriment of foreigners, strongly prevail to the character of the state administration as a public-friendly and transparent service under the Administrative Code.[12]

Furthermore, the Government reacted at the policy level to the situation at the labour market and adopted a proposal of the *New System of Economic Migration to the Czech Republic* (NSEM) a baseline for the future immigration law.[13] The proposal sets up new rules for labour migration to the Czech Republic promoting an active approach to the economic benefits of high qualified migration. The material focuses the responsibility of employers for irregular residence of their former migrant workers. Ministry of Interior also aimed to hinder the status of self- employed workers in order to circumvent restrictions to labour migration. In particular, the proposal defined new models of circular migration, which should be preferred to the permanent migration, especially for low-skilled migrants and could (as claimed) help in fighting irregular migration. The most important draft proposal of the new act for entry and residence of foreigners in the CR (FORA), prepared by the Ministry of Interior, was approved by the Government on 29 February 2012.[14] This crucial material implies recodification of the Czech immigration law and the Government is currently preparing a draft law to be passed on to the Parliament in 2013.

12 Act No. 500/2004 Coll., the Administrative Code, as amended

13 Government of the Czech Republic: *New System of Economic Migration*, available at: http://migration4media.net/wp-content/uploads/2011/03/NSEM-vlada.pdf

14 Czech Republic, MV (2011b) *Věcný záměr nové právní úpravy vstupu a pobytu na území České republiky, volného pohybu občanů Unie a jejich rodinných příslušníků a ochrany státních hranic*, 2/12, 28 July 2011.

During 2012 the restrictive approach and protective measures of the Czech labour market continued to be a serious hindrance for migrants to enter and even stay at the legal labour market. As of 25 January 2012, MPSV issued a directive limiting access of third country nationals to the labour market introducing several new measures – requirement of recognition of education, non-issuance and prolonging of work permits to low-skilled migrants and limiting duration of these permits to migrants with secondary education.[15] The directive was changed on 8 March 2012[16] after public criticism from employers, migrants and NGOs. Representatives of 27 civic associations submitted to the MPSV a Declaration against the current restriction of granting work permits to migrants at low-skilled job positions[17] on 10 May 2012 during a happening titled "We don´t work against each other, we work together". The Declaration was supported by several public personalities such as Vladimír Špidla (ex-Prime Minister and EC Commissioner) and others. On 17 August 2012, the directives were again changed by the directive of the director general of the Labour offices providing more detailed guidelines concerning employment of migrants.[18] The directives are considered unlawful by professionals and this opinion was supported by the Committee for the Rights of Foreigners.[19] These measures have been pushing migrants into shadow economy and irregular employment resulting into irregular stay at the territory.

2. Current legal framework concerning migrant workers

Source of law	**Field of Regulation**	**Remarks/Content**
Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006, establishing a community code on the rules governing the movement of persons across	Relevant in case *of less-than-3-month stay* (No employment is allowed under this regulation for third country nationals)	According to the Code, persons willing to enter the EU shall possess a valid travel document and a visa and shall justify the purpose and conditions of their stay as well as shall have sufficient means to cover

15 Ministry of Labour and Social Affairs: *Metodické pokyny k realizaci politiky zahraniční zaměstnanosti*, 25 January 2012 (unpublished).

16 Ministry of Labour and Social Affairs: *Metodické pokyny k realizaci politiky zahraniční zaměstnanosti*, 8 March 2012 (unpublished).

17 Consortium of NGOs working with migrants (Konsorcium nevládních organizací pracujících s migranty): *Stanovisko k nové strategii MPSV zásadně zpřísnit vydávání pracovních povolení cizincům na pozicích s nízkou kvalifikací*, Prague, 9 May 2012, www.konsorcium-nno.cz.

18 Labour Office of the Czech Republic: *Směrnice č. 19/2012 Postup a pokyny k realizaci politiky zaměstnanosti*, 17 August 2012.

19 Resolution of the Committe for the Rights of Foreigners from 22.10.2012, available at http://www.vlada.cz /cz/ppov/rlp/vybory/pro-prava-cizincu/ze-zasedani-vyboru/zasedani-vyboru-dne-22--rijna-2012-100160/

borders.		the costs of their stay and subsequent return.
Act No. 326/1999 Coll. on the Residence of Foreign Nationals in the Territory of the Czech Republic and on changes to some Acts, as amended (FORA)	Access to the territory, short-term visa, visa over 90 days, residency of third country nationals; entry and residency of EU nationals and their family members	Complex immigration law including administrative detention, sanctions for breaches of law etc.
Act No. 435/2004 Coll. on Employment, as amended	Contains regulation of access of migrant workers to the labour market, obligation of employers when employing migrants, sanctions for illegal work.	Complex law regulating employment including definition of illegal work, sanctions for employers and employees
Act No. 262/2006 Coll. Labour Code, as amended	Contains regulations concerning employments and rights of workers.	Complex labour law – includes rights and duties of employers and employees, obligation to have a written contract etc.
Act No. 99/1963 Coll., Code of Civil Procedure, as amended	Contains regulation concerning civil procedure.	Specifically in §24 part. 5 allowing foreigners in labour disputes to be represented by NGOs active in the field of the protection of the rights of foreigners.
Act No. 500/2004 Coll., the Administrative Code, as amended	Contains regulations of administrative procedure.	Administrative procedure is relevant for most procedures under the Act on the Residency of the Foreign Nationals, Act on Employment etc.
Act No. 40/2009 Coll., the Criminal Code, as amended	Complex regulation of criminal law containing list of crimes committed by individuals as well as legal entities.	Specifically crimes related to the irregular migration: § 168 – human trafficking; § 340 – organizing and facilitating irregular crossing of a state border; § 341 – abetting unauthorised residence in the territory of the Czech Republic; § 342 – unauthorised employment of foreign nationals.
Act no 418/2011 Coll., on Criminal Liability of Legal Entities and Proceedings against Them	Regulation of criminal liability of legal entities newly introduced to the legislation as of 1.1.2012	Specifically relevant concerning the crime of unauthorised employment of foreign nationals.
Act no. 251/2005 Coll., on the Inspection of Labour, as amended.	Legal regulation defining the scope of rights of labour inspectors in performing controls in the field of employment relations.	

2.1 Access of migrants to the labour market

The Act of Employment in the Section 3 states that individuals who are not the citizens of the Czech Republic are entitled to access the labour market under the specific conditions set by this Act. There are two categories of foreigners:

- Foreigners with unrestricted access to labour market. In compliance with the EU legislation - EU nationals and their family members together with holders of permanent residency permits.
- Foreigners – third country nationals with limited access to labour market.

Ad 1. In compliance with the EU legislation those are especially:

- EU nationals
- Family members of EU nationals
- Permanent residency holders
- International protection holders in the form of asylum or subsidiary protection.

These migrants have unrestricted access to labour market; they can work without work permit. There is obligation of the employer in the section 87 of the Act on Employment to report an employment of these migrants to the Regional Labour Office and in the section 107 to keep records of the employed migrants with unrestricted access to labour market – copies of their residence permit or any other documents proving they fall under the category of migrants with unrestricted access to labour market.

Ad. 2. Migrants with restricted access to the labour market are third country nationals who need work permit. The system of employment of the third country nationals in the Czech Republic is based on the dual permit – permit to stay and work permit, while using the work permit as the tool of protection of the labour market. According to the Section 89 and following of the Act on Employment defines the work permit as a protective tool. It can be issued only if an employer registered vacancy at the Labour Office and this vacancy cannot be filled by a worker without restricted access to the labour market (Czech, EU national, permanent residence holder etc.). When issuing a work permit a Labour Office is obliged to assess the situation at the labour market.[20]

20 The Highest Administrative Court ruled in the case 6 Ads 139/2011 the there is an obligation of the Labor Office to issue an work permit if both conditions are fulfilled – an employer registered vacancy at the Labor Office and it is not possible to fill the vacancy otherwise.

A work permit can be issued to a foreigner for maximum of two years. It is issued to a specific vacancy at the specific employer and for a specific place of work and type of work. In case of the change of employer or type of work or work position, employee has to apply for a new permit. Work permit has to be issued for all activities performed under type of contracts specified in the Labour Code including short term contracts, part time contracts or seasonal workers. There are several exemptions for categories of the third country nationals who do not need work permit[21] as spouses of holders of permanent residency or students, or those who need work permit however the Labour Office is not testing the labour market[22], i.e. international protection seekers after 12 months of residency.

The requirement of having the permit to stay means that migrants in irregular situation do not have access to the labour market at all. Only those migrants with any form of regular (legal) permit of stay can apply for the work permit, if the Act on Employment does not stipulate otherwise. There are several types of visas and permits with a purpose of Employment that can be issued to labour migrants according to the Act No. 326/1999 Coll. on the Residence of Foreign Nationals (FORA). The most frequent and accessible permit for the purpose of employment to any profession irrespective of qualification or country of origin are visa over 90 days issued for maximum of six months followed by the long term resident permit for the purpose of employment that can be issued for the maximum of two years. Applicant has to apply for the work permit in different administrative procedure at the Labour Office. The permit of stay is issued for the same length as the work permit. There are two single permits, green card[23]and blue card[24], permit to stay and work permit issued in one document within the single procedure. These permits allow employment of highly qualified workers and key personnel requiring specific level of qualification and income under the work contract. As stated above any foreigner with a permit to stay can apply for work permit and if it is issued to legally work, he/she must however, fulfill the purpose of the stay of the permit, i.e. study if he/she has student visa or permit.

2.2 Irregular employment of migrants

As explained in part 3.1. irregular migrants do not have access to the work permit and therefore they cannot access legal labour market. However, it is reasonable to assume that most of migrants in irregular situation in the Czech Republic need to earn money for living and therefore they work illegally.

21 Section 98 of the Employment Act
22 Section 97 of the Employment Act
23 Section 42g of the FORA
24 Section 42i of the FORA

There is a definition of illegal work in the Section 5 letter e) of the Act on Employment according to which an illegal work is:

- *If an individual perform any dependant work outside the scope of labour law relations;*
- *If a migrant works in contrary to the issued work permit or without any work permit, if the work permit is required by the law; or in contrary to blue or green card;*
- *If a migrant works for employer without the permit to stay if it is required according to the FORA.*

Performing of illegal work is a breach of law that has its consequences in sanctioning of the employer as well as employee. However, labour law relations arising from the employment no matter if it is illegal work, are governed by the Labour Code as a part of private law. Therefore, all migrants working in the Czech Republic are protected within the scope of Labour Code when employed. Irregular migrants can enforce their rights at the courts or by submitting a complaint to the Labour Inspectorate or Trade Unions. However, they risk especially in case of Labour Inspectorate that their irregular residence will be revealed (see section 3.2.2 for more information about Labour Inspectorates).[25]

Sanctions for illegal work

The public law deals with the sanctions for illegal work within two different legal frameworks – administrative and criminal law. Both systems however sanction employers employing migrants illegally, criminal law does not criminalize migrants illegally working.

Administrative Law

There are two key legal regulations dealing with irregular employment of migrants – Act on Employment and FORA. Sanctions including administrative deportation imposed under these two laws can be combined and has severe impact on the situation especially of migrants/employees.

Act on Employment and sanctions for illegal work

Sanction for illegal work are applied under the Act on Employment when the conditions of Section 5 of the Act on Employment are fulfilled. Sanctions are applied to individuals as well as legal entities, both

25 In majority of cases we have dealt with while providing legal aid, when an irregular migrant seeks help at a non-governmental non-profit organisation, the employer is usually contacted by phone and asked to pay the owed wage. The employer may also be informed about the process (submitting a complaint to particular authorities) in case he/she does not meet the obligation. In some cases, the employer fulfils the obligation and pays the owed wage. But when such a process does not help the foreigner to get his/her money, he/she usually gives up enforcing his/her rights due to the fear of being cought by the immigration authorities.

employers and employees. As of 1.1.2012 the sanctions for illegal work were raised due to the transposition of the Sanction Directive.

According to the Section 139[26] a foreigner who performs illegal work may receive a fine up to CZK 100 000. An employer (individual) who enables illegal work of foreigner without work permit can face a sanction up to 100 000 CZK, enabling illegal work of irregular migrant is sanctioned up to 5 000 000 CZK fine. According to the Section 140 an employer – legal entity will be given fine for allowing illegal work up to 10 000 000 CZK, the minimum being 250 000CZK.

Act on the Residence of Foreign Nationals in the Territory of the Czech Republic

Under the FORA sanctions for illegal work has serious impact on the situation of the migrant and may lead to losing a permit to stay and/or decision of deportation and ban to re-entry.

The sanctions are:

- Administrative expulsion and ban to re-entry for up to 5 years under Section 119, 1b), Part 3 of the FORA;
- Detention of a foreigner for the purpose of expulsion, which can last up to 180 days or issuing a decision about alternatives to detention (reporting to the police or monetary guarantee) according to Paragraph 124 and following paragraphs of FORA.

Administrative deportation of foreigners from third countries (not family members of EU citizens) for illegal employment (*"if a foreigner is employed in the Czech Republic without a residence permit or without a work permit, when such permit is required for performing the particular employment"*) is easily often imposed by the police. Very often joined controls of Labour Inspectors and Immigration police are conducted leading into issuing two decisions two a migrant – first one under the Act on Employment imposing fine for illegal work followed by the decision of administrative expulsion und the FORA. Administrative deportation may be imposed after quite a long time since the foreigner has quit the illegal work.[27]

Criminal Law

In the Section 342 of the Criminal Code there is a regulation of the crime of unauthorised employment of foreigners. It states that the crime is committed by a person:

26 Act on Employment

27 For more information see: HRADEČNÁ, Pavla a kol. *Řešení otázek neoprávněného pobytu cizinců: situace v ČR a ve vybraných zemích*, Praha: Linde, 2011. ISBN 80-7201-869-7

- *who, repeatedly, consistently and under exploitative conditions or at a significant level, employs foreigners or facilitates employment for foreigners who reside in the Czech Republic without permit to stay or do not have a work permit;*
- *who employs or facilitates employment of underage foreigner in irregular situation.*

A person has the criminal liability for employing irregular migrants if it is done at a "significant level". The legal interpretation of the significant level has not been provided by the courts yet. As the guidance on interpretation of this term the Section 251 of the Criminal Code can be used. Crime of conducting an unauthorised business is committed by a person, who "without an official permission offers service at a significant level." The court determined that "at a significant level" means a period longer than 6 months.[28] Similarly, the unauthorised employment of foreigners that lasts more than 6 months might be considered a crime. The personal scope of the criminal liability is rather broad, not only directs employers but as well facilitators of employments might be liable. Facilitators are not only those defined by the Act on Employment but rather any person involved in the criminal action. Under the Act on Criminal Liability of Legal Entities and Proceedings against Them, which became effective as of 01/01/2012, legal entities can be liable for this crime as well. The sanctions are up to 6 months of imprisonment, forfeiture of property or prohibition of activity.

Labour Controls

As explained in the previous section migrants performing illegal work can be sanctioned under the Act on Employment as well as under FORA. Therefore, there are several state authorities involved in labour controls.

According to the Section 125 and following of the Act on Employment, the State Labour Inspection Office and Labour Office has the authority to perform controls within the scope of the Act on Employment. The State Labour Inspection Office has eight regional branches. Its main purpose is to control obligations resulting from labour law including safety regulations or illegal work. Labour inspection offices perform controls based on yearly plans and on individual complaints or information from the fieldwork. Labour inspections as well provide free of charge consultation concerning labour law, employees' rights etc. The scope of the authority of Labour inspection is enacted in the Act no. 251/2005 Coll., on the Labour Inspection. In case of illegal work of migrants the Custom Administration has as well as the authority to

28 Cf. commentary on Paragraph 118 of the Criminal Code valid until 31.12.2009 in Šámal/Púry/Rizman, Trestní zákon, Komentář II., 6. edition, Prague, 2004, p.764.

perform work. Compared to the Labour inspections Custom Administration does not have the authority for sanctioning subjects under the Act on Employment and therefore only prepare evidence and facts and if it finds out a breach of law the case is referred to the Labour inspections.

Labour inspection imposes in the administrative procedure sanctions on employers and migrant workers. Labour inspectors, Custom Administration and Immigration Police perform complex controls focused on illegal work of migrant workers. The cooperation is based on the formal agreement on cooperation between the State Labour Inspection Office and Custom Administration containing obligation of mutual cooperation on performing controls in the area of the employment of migrants increasing effectiveness of administrative procedures and providing feedback. It focuses mainly on following activities: performing common controls, coordination of controls, exchange of experience concerning application of relevant legal provisions, its interpretation and unification of procedures during controls, education and training of employees, providing feedback on finished procedures and on collecting financial sanctions. The cooperation with immigration police is not formalised and it is based on the need of Labour inspectors and capacity of the Police. However, complex controls with all the control authorities present are often realised.

Since Act on Employment and FORA both impose harsh sanctions on irregular migrant workers for illegal work, irregular workers do not report violation of their rights to authorities. Labour inspections have the legal obligation to start the procedure for sanctioning illegal work and it has obligation to report such situation to immigration authorities. This practice is based on Paragraph 58, Article 1 of the Offences Act that says: “The police, governmental and local authorities should report the offences they learned about to the particular administrative authority, if they are not competent to tackle the offences themselves. The report must contain the description of the type of offence that has been committed, proofs which the authorities have gathered proving that the offence has been committed by a particular person.” The Act no. 552/1991 Coll., on the State Control contains similar provision. Irregular migrants then in practice do not have access to the protection provided by the Labour Inspection.

3. Other fundamental rights of irregular migrants

3.1 Access of irregular migrants to healthcare

The scope of healthcare provided to irregular migrants in the Czech Republic is limited to the emergency care. The Act no. 20/1966 Coll. on Public Health Care[29], states the duty of every medical worker to provide necessary help to everyone in a life-threatening condition or showing signs of a serious disorder. If the emergency care is provided to the migrant in irregular situation who is not participating in the public health insurance system or has a private health insurance or the person's country of origin has no bilateral agreement with the Czech Republic ensuring free health care, all three situations are very unlikely to occur, then the migrant has to bear the cost of his/her treatment.

An irregular migrant can participate at the public health insurance system only based on his/her employment. So in theory even an illegal employment should guarantee participation in the public health insurance. However, the experience from the practice does not support this theory. There is no jurisprudence available to support the theory.

Migrants without a resident permit may buy a contractual commercial health insurance. This service is provided by only few insurance companies. However, some of these companies are providing the insurance only to those migrants with valid visa or residency permits; others are not very clear on their policy towards irregular migrants.[30]

Irregular migrants have an access to health care system and there is no legal obligation of health personnel to report irregular migrants to authorities for their irregular stay. Moreover, the article 55, section 2 letter d) of the Act no. 20/1966 Coll. on Public Health Care stipulates that: "*Every health worker is obliged to maintain silence about the facts; he/she learned during its employment, when performing his/her duty, except for the cases when he/she reports something with the patient's approval. The duty to report particular information that is given in a special decree is not affected by this provision. The duty of silence may be broken in order to defend oneself in a criminal case, in a court or some other authorities, if the*

29 Paragraph 9, Section 4 b) of the Act no. 20/1966 Coll. on Public Health Care
30 HRADEČNÁ, Pavla a kol. *Řešení otázek neoprávněného pobytu cizinců: situace v ČR a ve vybraných zemích*, Praha: Linde, 2011. ISBN 80-7201-869-7.

lawsuit concerns a conflict between him/her, or the employer, and the patient, or other person, enforcing the patient's rights to compensation for damage or to protect privacy in providing healthcare." The confidentiality clause is part of several ethical codes of healthcare personnel: the Code of Ethics for Doctors, Code of Ethics for Healthcare Professionals and also in the Patients' Rights Charter. The Czech Medical Chamber specifically issued Statement concerning the doctors' duty of silence about patients' illegal residence in the Czech Republic[31], in which strengthened that the confidentiality between patient and doctor includes the information about irregularity of their status. The only, possible exception from the duty of silence is a situation when the police launch a search for an irregular migrant and asks for the date, time and place of the treatment. In other cases, a doctor must maintain silence about providing healthcare to an immigrant without a residence permit.[32]

3.2 Access of irregular migrants to education

Migrant children in irregular situation have a right to the elementary education in compliance with Child rights convention.[33] It is farther stipulated in the Act no. 561/2004 Col. on Preschool, Elementary, Secondary, Specialised Tertiary and Other Education (hereinafter referred as Act on Education), Paragraph 20, Section 2 letters a) and b). They may access other related services provided together with the elementary education as access to school canteens and after school activities provided by a school institution as a part of regular basic education. However, the law states that children staying in the Czech Republic in irregular situation do not have access to preschool, secondary and specialised tertiary education. If they want to access some of these types of education, he/she must document legality of his/her stay. Similarly as health care personnel[34], administrative authorities and providers of public services in education do not have the duty to report irregular migrants to authorities.

Elementary schools gather in the register information about their pupils and contact information about their parents or other legal guardians. The residence status of a foreign child is documented using one of the following options: without nationality, permanent residence, EU citizen, temporary residence, asylum or

31 This attitude formulated by Milan Kubek, president of the Czech Medical Chamber, is available at http://www.migraceonline.cz/e-knihovna/?x=2239968

32 HRADEČNÁ, Pavla a kol. *Řešení otázek neoprávněného pobytu cizinců: situace v ČR a ve vybraných zemích*, Praha: Linde, 2011. ISBN 80-7201-869-7.

33 This provision has been valid since 1.1.2008 when the Act no. 343/2007 Coll. came into force changing the Act no. 561/2004 Col. on Preschool, Primary, Secondary, Tertiary and Other Education (the School law) as amended by later provisions, and some other laws

34 For more on this, see the article *Děti školou nepovinné* by Hradečná and Rozumková, available at http://www.migraceonline.cz/e-knihovna/?x=2038715

asylum seeker, did not tell. This means that the (ir)regularity of the stay is always documented. The register may be accessed not only by the teachers but also by the police in authorised cases, for example when the child is suspected of a crime. However, the child's guardian must be informed and if a questioning is needed, a social officer must be present. Therefore, the access of police to the register is very limited and it is unlikely to misuse information about irregular migrant children.

3.3 Access of irregular migrants to Justice

A right to judicial and other legal protection is one of the key fundamental human rights. Article 36 of the Charter of Fundamental Rights and Freedoms[35] states: *"everyone may assert, through the prescribed procedure, her rights before an independent and impartial court or, in specified cases, before another body"*. Article 37 Part 2 further states that: "*In proceedings before courts, other State bodies, or public administrative authorities, everyone shall have the right to legal assistance from the very beginning of such proceedings."* And in Part 4 that *"anyone who declares that she does not speak the language in which a proceeding is being conducted has the right to the services of an interpreter".* It guarantees to irregular migrants access to justice within the scope of civil, administrative, criminal courts and constitutional court, ensuring as well right to legal representation and interpreting to the language he/she understands. In practice irregular migrants do not use judicial protection when dealing with breach of their rights because they are afraid of being reported to immigration authorities.

There is however no legal obligation of the court to inform any state authorities about irregularity of the stay of participants of the procedure. Even though, the legal representation is guaranteed by the Charter access to justice is limited due to the lack of the Law on Free Legal Aid for people without sufficient financial means. Different procedural laws contain the right to the free legal representation. There is stated the right of the participant to have appointed legal representative if he/she applies for it at the court in the Section 30 Part 1 of the Code of Civil Procedure. It can be attorney, notary or employer of a NGO or Unions depending on the assessment of the judge. Specifically as a result of transposition of the Sanction Directive, foreigners may be represented in labour disputes by third parties active in the field of the protection of the rights of foreigners.[36] Administrative Code does not contain any provisions on free legal representation. Similar regulation as in the Code on Civil Procedure is included in the Code on Administrative Procedure in the Section 35 part 8.

35 Constitutional Act no. 2/1993 Coll., Charter of Fundamental Rights and Freedoms
36 Section 24 part. 5 of the Code od Civil Procedure

Free legal aid is regulated in the Section 33 part 2 of the Code on Criminal Procedure. Accused without sufficient means for self- defence has a right to have an attorney appointed by the court. Only attorney can become legal representative in the criminal procedure. Victims have right to have legal representative appointed as stipulated in the Section 51 of the Code of Criminal Procedure.

Access to free legal aid is regulated in the Act No. 85/1996 Coll.,. on the Legal Profession. It is the only legal provision providing access to the legal aid before the court procedure is started. However, the application procedure is rather complicated. If the requirements are fulfilled the Bar Association appoints an attorney specifying the scope of services and conditions of services.

There are several non-governmental organisations providing free legal aid to migrants irrespective of their legal status thus enabling migrants to seek protection within the judicial system.

3.4 Labour Exploitation

Protection of migrants - victims of trafficking is ensured by the Section 42e of FORA in the form of the long-term residence permit for the purpose of protection at the territory. The residence permit is granted to victims of trafficking if they cooperate with law enforcement agencies at the criminal procedure. Victims of trafficking are provided one month waiting period to decide if they want to cooperate. In 2004 the crime of human trafficking was extended to cover situations of forced labour by the amendment of the Criminal Code.[37] However, until 2012 there was no case that would result into the final sentence in the matter of labour exploitation.

According to the U.S. Ministry of Foreign Affairs country report for the Czech Republic on human rights practices in for 2011,[38] ‚*the [Czech] law prohibits forced or compulsory labour, but there were reports that men and women, including migrant workers, were subject to conditions of forced labour in the country*.' This information related merely to the most extensive case of labour exploitation to have been exposed in the Czech Republic in the last twenty years – the "Tree workers case". Since 2009, at least 2.000 workers, mainly from Vietnam, but also from Romania, Bulgaria, Hungary, Slovakia and the Ukraine have been forced to

37 Section 232a of the former Criminal Code No. 140/1961 Coll., Section 168 of the current Criminal Code No. 40/2009 Coll.

38 USA, Department of State, Bureau of Democracy, Human Rights and Labor (2012) *Country Reports on Human Rights Practices for 2011*. Czech Republic, p. 23, www.state.gov .

work under very harsh conditions in the state forest of the Czech Republic. It is always the same names and dubious employment agencies that keep surfacing in this case. Police, ministries and other authorities say that their hands are tied and that they cannot do anything. However, a group of people – lawyers and members of NGOs in Prague – have joined forces to investigate this case and win compensation for the forest workers. The case files include more than 150 former forest workers with their stories of fraudulent work contracts, harsh work conditions, no pay, bad food, dreadful accommodation and threats of violence[39]. For over two years now, the attorneys have been fighting for the official recognition of this case. Sadly, despite the evidence supporting the case, the authorities still refuse to get involved. „*Police coordinated investigations […] to track cases of exploited workers [...]. Licenses of some of the smaller labour agencies in the country were suspended, but authorities filed no formal charges during the year*, "continues the U. S. report.[40] "*Due to inactivity of the prosecutors and the police, the case […] may be whenever administratively closed without any judicial review in accordance with the Criminal Procedure Code*, "doubt Czech activists.[41] The major labour agency is in the meantime operating under a new name, and a number of workers have returned to their countries of origin.[42]

The U.S. Ministry of Foreign Affairs report on trafficking in persons for 2011 addressed this particularly serious problem by stating: "*Through its failure to adequately control or regulate employment agencies recruiting low-skilled labourers for work in the Czech Republic, the government has tolerated an enabling environment for the exploitation and forced labour of migrants, including on state land, "*[43] similarly as the Report on the state of human rights in the Czech Republic.[44]

On the other hand, some progress has been reported in the field of labour exploitation when, in the last two years, the first three cases were sentenced for the crime of trafficking in human beings for labour exploitation. In total, up to ten cases were submitted to the Czech criminal courts in this matter since 2004. The major problem for defining the trafficking in human beings lays in the burden to prove that migrant

39 Do Duy Hoang (2011) *Pokračování kauzy „Stromkaři"*, migraceonline.cz, Prague, 2 December 2011, www.migrationonline.cz/stromkari ; Křížková, M., Čaněk, M. (2011), see also: http://www.migrationonline.cz/e-library/?x=2283092.

40 USA, Department of State, Bureau of Democracy, Human Rights and Labor (2012) *Country Reports on Human Rights Practices for 2011*. Czech Republic, p. 23, www.state.gov .

41 *Ibid*. Footnote no. 20.

42 The case has been documented in the documentary „The Tree Workers Case", produced by INTER/AKTION (February 2012), which is available at http://thetreeworkerscase.com/.

43 US Government (2011), p. 142.

44 Government of the Czech Republic (2011).

workers were exposed to extended threat or use of violence and/or exposure of the migrants to an extreme social situation.[45]

The biggest sentenced case, known as the "Asparagus cases", involved human trafficking and labour exploitation of 23 Romanian workers who were lured in 2008 by Romanian and Ukrainian labour agencies for legal work at the asparagus fields in the Czech Republic. The workers were promised of work contract and a monthly wage of 1.600 EUR per month but once they covered their travel and accommodation costs from their first earnings they got no further pay and were threatened by violence form the part of armed middlemen who locked the workers in the dormitory at nights and provided them with very poor food. After three months of forced labour several workers succeeded to flee and sought for help at the Romanian embassy in Prague, which contacted organisation La Strada and helped some of them to return to their country. The case was first opened by the Romanian police who detained and brought before the court three persons engaged in the hiring procedure of workers. All of them were sentenced to seven years in prison. Six months later, the Czech police detained and brought to the court three Ukrainian nationals who were sentenced in September 2012 to five years in prison.[46]

4. Directive 2009/52/WE – the details of transposition

The transposition process of the directive No. 2009/52/EC as of 18 June 2009, Sanction Directive, into the Czech legislation was realised in three stages. The deadline of 20 July 2011 for compliance of the national regulations and laws was not met by the Czech Republic thus failing its obligation under the EU legislation. The full implementation process was finished by the 1 January 2012 from the position of the Czech government, while there are concerns of NGOs that few articles were implemented incorrectly or insufficiently as explained below.

45 Interview with workers of La Strada Czech Republic, 3 December 2012.

46 Interviews with workers of La Strada Czech Republic, 3 December 2012. See also: http://www.strada.cz/cz/aktuality/112-druhy-pravomocny-odsuzujici-rozsudek-ve-veci-obchodovani-s-lidmi-mimo-sexbusiness.

Stages of implementation

- **Act on the Residency of Third Country Nationals** was amended by the Act No. 427/2010 Coll. coming into effect on 1 January 2011. There were implemented among others new provisions:
- **The liability for costs of return** to be held by the employer/ subcontractors in case of illegal work;
- **A special liability of employers for costs of healthcare** provided to the irregular migrants in case of precipitated termination of the labour relation until the return;
- **Duty of police to inform irregular migrants in process of deportation about his/her rights** to start procedures to receive wages owed by employers.

The major implementation of the directive was realised through the amendment No. 1/2012 Coll., of the Act on Employment, effective as of 1 January 2012. It consisted of following changes (among others):

- **New definition of illegal work** in the Section 5 letter e). Work of migrants without permit to stay was added into the definition (Article 3 of the directive);
- **Higher sanctions imposed to the employers** for administrative offense of illegal employment and introduction of liability of subcontractors as well as sanctions related to the ban of subventions and other state benefits, etc.;
- **Additional obligation of the employer/subcontractor to pay to the illegally employed migrant** any outstanding remuneration;
- **Obligation of employers to keep at the workplace all documents** proving the legality of work performed by migrants and to inform Labour Offices about employment of migrants.

The criminal liabilities of employers as legal entities were implemented into the Czech legislation in a form of the new Act on Criminal Liability of Legal Persons, effective as of 1 January 2012 and act No. 418/2011 Coll., amended definition of the crime of unauthorised employment of foreigners in the Criminal Code (see part 3.2.1).

By the amendment of the Civil Procedure Code, effective as of 1 January 2013, which implemented in its Section 26 part 5 the Articles 6(2)(a) and 13(2) ESD by providing the legal persons - defenders of migrants' rights to represent migrants as claimants in the labour law related proceedings before civil courts.

4.1 Employer's Obligations

The obligations on employers within the scope of the Article 4 were transposed into the Act on Employment. Obligation to inform was transposed into the Section 87 part 1 stating that employer has an obligation to inform Regional branch of Labour Office about employment of a foreigner on the first day of employment the latest. The personal scope of the information duty applies to all foreigners irrespective of the legal status – EU nationals, family members of EU nationals, work permit holders, blue and green card holders, third country nationals who do not need work permit. Employers are obliged to keep copies of permits to stay at the Czech Republic through the duration of employment and at least 3 years after the termination of the employment according to the Section 102 part 3 of the Act on Employment. Furthermore, employers are required to have available copies of permits to stay, contracts and work permits at the actual workplace of a foreigner as stated in the Section 136 of the Act on Employment. Breaches of these obligation are sanctioned for up to 100 000 CZK.

Article 5(2)(a) was implemented into the Act on Employment by establishing new administrative offence in the Section 139-140 of enabling illegal work.[47] Provision of increasing fine according to the number of illegally employed third country nationals was not implemented; however, it is reasonable to assume that authorities might be following this provision since the fine in the referred Sections 139-140 is provided in a range.

Article 5(2)(b) was transposed into the Section 123 part 2 of the FORA. Employers employing migrants without work permit or permit to stay are obliged to cover costs of procedure of expulsion and cost of deportation itself. There is a subsidiary responsibility of subcontractors if costs are not covered by employers. If employers or subcontractors undertake due diligence and prove that they did not know and could not have known that the permit to stay is forged, they are not liable under FORA.

4.2 Back payments

The requirement of the directive in the Article 6(1)(a) that employers are liable to pay any outstanding remuneration to the irregularly employed third country nationals was transposed into the Section 141b of the Act on Employment. It states employer's obligation to pay the remuneration in case that the

47 For more information see Part – Sanctions for illegal work

administrative authority found out in the administrative procedure that an employer committed offense of illegal work and the authority issued enforceable decision imposing the for the offense. The requirement of enforceable decision goes beyond the scope of the directive and limits access of employees to their wages. Further, it states that if it is not proved otherwise, employee is entitled to at least 3 months of minimum wage. Employer is, in compliance with the directive, liable to pay the same payments including penalties into the system of public health insurance and social security insurance as required if an employee is legally employed. The employer has to bear costs of sending back payments to the employee to the country of origin. However, there are no practical mechanisms and tools implemented, so that the process of sending backpayments could be facilitated.

To fully implement Article 6 the member states are obliged to put in place effective procedures for irregular migrants to access their rights to back payments even if returned to the country of origin. To at least partly meet the requirement of the directive, the Code of Civil Procedure was amended as of 1.1.2013 containing the new provision of Section §24 part. 5. It allows foreigners in labour disputes to be represented by NGOs active in the field of the protection of the rights of foreigners. This implementation can hardly be considered as effective procedure since there are no subsequent policy measures ensuring access of NGOs to finances for this legal representation. Therefore, irregular migrants can access justice and be represented even after return in compliance with the Article 13, however in practice without financial support of NGOs the protection of rights of migrants is not ensured and the effective mechanism is non-existent.

The obligation of employers is in compliance with the directive art. 8 supported by the obligation of the contractor or any intermediate subcontractor to pay any financial sanctions imposed under the Section 136 and due backpayments under the Section 141b of the Act on Employment. According to the Section 141a of the Act on Employment the main contractor of any intermediate subcontractor bears the obligation of the employer in case that they knew or could have known about the illegal employment of the employee. Contrary to the directive, the provisions states farther conditions on main contractors to impose the liability. According to the Article 8(2) only subcontractor can avoid its responsibility for not knowing about illegal employment. Therefore, the directive is not fully implemented.

4.3 Further sanctions against employers

The Article 7(1) was implemented as follows:

1) Exclusion from some or all public benefits was implemented into the Section 78 part. 4 of the Act on Employment stating that the employer sanctioned for illegal work cannot be granted any financial support under the Act on Employment for three years i.e. – subsidy for employing employee with disabilities, subsidy to create new jobs etc. It includes the recovery of any such subsidies for 12 months preceding the enforceable decision on illegal work.

2) Exclusion from participation in a public contract[48] was transposed into the Section 53 part 1 letter k) of the Act no. 137/2006 Coll., on Public Contract. It excludes any legal entity or individual to participate on public contracts if the preceding 3 years there was imposed an effective penalty for facilitating the performance of illegal work under separate legal regulation (Act on Employment).

3) Possibility of permanent or temporary closure of establishment for illegal work was not implemented into the Czech legislation.

4.4 Liability of legal persons

The criminal liability of legal persons was implemented into the Czech legislation by the Act no 418/2011 Coll, on Criminal Liability of Legal Persons that fully implements provisions of Article 11 of the Directive.[49]

4.5 The obligation of notification

According to the Section 120a part 10 of FORA Police is required to inform irregular migrant in the procedure of administrative expulsion for performing illegal work about his/her right to obtain from the employer any unpaid wages including cost for sending it to the country of return, thus implementing Article 6 of the Directive. Migrants are farther informed that they can contact labour inspection to report the breach of law of the employer. Police fulfills its obligation through dissemination of written document to the migrant during the administrative procedure on expulsion. The document contains detailed information about illegal work and its consequences for employers and employees and obligations of employers under

48 As defined in Directive 2004/18/EC
49 For more detailed information on the scope of the crime of unauthorized labor see Section 3.2.1 of the report.

the legislation concerning back payments. It mentions possibility to bring the case to the court, contact information to the courts and labour inspectorates through website links. There is one sentence about accessing legal help, it states: *"To discuss the issues described above, you have the option of selecting and authorised representative."*[50] The document is provided in several languages. Migrants are however not provided with list of NGOs providing free legal help, about possibility to be represented by NGO lawyer in labour law disputes under the Code of Civil Procedure or about any other access to free legal help within the existing schemes. Therefore, the actual impact of Article 13 is not covered by the obligation of notification within the materials provided to irregular migrant workers by Police.

4.6 Residence permits

Notwithstanding the requirements set up in the Article 6(5) and Article 13(4) of the directive, the Czech national law provides for residence permits to the irregular migrant workers only in an ambiguous and insufficient manner.

At first, Article 13(4) of the directive has not been directly implemented into the FORA. It is assumed that the extremely exploited or minor irregular migrant workers should be granted a long-term residence permit for protection purposes under the existing Section 42e of the FORA, which is by origin applicable to the third country nationals falling under the scope of Directive 2004/81/EC. This type of residence permit is foreseen for victims of trafficking in human beings and is limited for the duration of criminal proceedings lead in this matter provided the victim cooperates with criminal authorities. However, as the Section 42e of the FORA foresees that such a type of residence permit should be granted to foreigners in cases of criminal proceedings held for crimes and other intentional criminal offenses, prosecution of which is given by an international treaty, such regulation remains inexplicit towards cases foreseen in the Article 13(4) of the Sanction Directive. Czech non-governmental organisations working with migrants unsuccessfully requested for extension of the personal scope of this section in accordance with the Sanction Directive during the transposition process.

At second, the Article 6(5) of the Sanctions Directive was implemented into the Section 43 part 2 of the FORA. This section allows to grant the residence permit for tolerated stay to holders of the residence permit for protection under the Section 42e FORA provided the criminal proceedings against their employer have been closed but a civil procedure for back payment of the outstanding remuneration is still pending. Thus,

50 Information for Foreign National provided by the Headquarter of the Foreign Police on 6.6.2013

FORA assumes that exploited and minor migrants may first apply for residence permit for protection and afterwards, such a residence permit may be prolonged in form of the permit for tolerated stay. However, it is not clear whether this type residence could be granted also to the cases of execution proceedings.

5. Assessment of the implementation of the Directive and its impact

When considering the implementation of the Directive, it is necessary to note that the primary role of the Directive is the protection of labour market from illegal labour and sanctioning any conduct allowing illegal labour. Its primary purpose is not protection of rights of irregular migrants and providing them effective tools to seek justice and compensations. Noting what has been said above the Directive still contains a set of certain minimum rights of irregular migrants that are required to be transposed into the national legislation.

NGOs find the implementation of ESD insufficient in various aspects regarding the rights of migrants in the Czech Republic. Several Articles concerning the protection of the rights of irregular migrants were implemented only in limited scope as Article 13 when amending Code on Civil procedure cannot be considered by itself an effective complaint mechanism. In other provisions there were additional requirements above the scope of the Directive for reaching the rights of migrants as Article 6 implemented in the Section 141b of the Act of Employment that provides for the obligation of employer to pay any outstanding remuneration to the illegally working migrant solely in the case the decision on imposing a fine to the former came into force. Moreover, the act assumes in the article 141a.2 the liability of subcontractors for payment of outstanding remunerations only upon issuance of a decision of the Labour Office thereof, whereas such a condition goes beyond the requirements of the Directive.[51] Furthermore, the Directive and its transposition into the Czech legislation provide rights (especially concerning back payments) only to irregular migrant workers performing illegal work. It does not protect migrant workers with permit to stay working without permit to work and it does not provide any protection to the national workers working in the system of so called undeclared work. Such approach of granting specific rights only to specific group of workers creates discriminatory situations.

51 Jelínková, M. et al. (2011) ´Letter to the members of the Chamber of Deputies of the parliament of the Czech Republic regarding the implementation of the Employers Sanctions Directive, legislative file no. 444´, 17 October 2011 (unpublished).

From the point of impact of the implementation on the employers it is still preliminary to draw any conclusion. The Directive was transposed in its majority into the Amendment of the Act on Employment effective as of 1 January 2012. Therefore, any procedures on back payments or liability of main contractors and intermediate subcontractors are still pending. There are no judicial decisions yet concerning any obligation of the employers arising from the Directive. From the experience of NGO providing free legal advice to migrants the impact of the implementation lays in the area of shadow employment. Due to the higher financial sanctions and wider liability of the employers, employers tend to be more open to settle the disputes with migrant workers out of court or out of reach of any state authority and are more likely to pay some of the owed wages. To get more objective information it is necessary to wait for administrative decisions of Labour inspection and court decisions of the challenged cases.

Network of European Foundations Epim European Programme for Integration and Migration	This paper is part of the project **For Undocumented Migrants` Rights in Central Europe** supported by the European Programme for Integration and Migration (EPIM), a collaborative initiative of the Network of European Foundations

Association for Integration and Migration
CZECH REPUBLIC
E-mail: poradna@refug.cz
Author: Magda Faltová