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Specifics of Administrative Judicial Protection in Cases of Non-grant of International Protection in the Czech Republic

ABSTRACT: *The Ministry of the Interior, a state administration body, of the Czech Republic decides regarding granting asylum or international protection. The procedure is single-instance, without the possibility of a proper remedy. However, an unsuccessful applicant can defend himself within the framework of administrative justice, where he has two related means of protection at his disposal. First, a lawsuit against the decision of the Ministry of the Interior, which is decided by the regional courts; and second, a cassation complaint against the decision of the regional court, which is decided by the Supreme Administrative Court. Although several specifics apply to judicial protection in matters of international protection (e.g. in relation to deadlines, priority hearing or ex lege suspensive effect), the most significant specific is the unacceptability of a cassation complaint. In a situation where the cassation complaint does not significantly exceed the complainant's (foreigner's) own interests, the Supreme Administrative Court will reject it without dealing with the merits of the case. Therefore, this is a significant limitation of access to judicial protection. This study deals with the essence and reasons for the introduction of this institute, its suitability in asylum law, as well as its conformity with constitutional and international legal standards in this area.*

KEYWORDS: asylum, international protection, procedure for granting international protection, administrative justice, action against the decision of the Ministry of the Interior, cassation complaint, unacceptability of cassation complaint

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1. Introduction

In the Czech Republic, the procedure for granting asylum (international protection) is a single-instance administrative procedure. Therefore, a judicial protection has an important position in these proceedings. This is provided to unsuccessful applicants for international protection within the framework of administrative justice, first in the form of a lawsuit against the negative decision of the Ministry of the Interior, and thereafter in the form of a cassation complaint to the Supreme Administrative Court. In addition to the specifics of judicial protection, the chief focus is on analysing the unacceptability of the cassation complaints. If the cassation complaint does not significantly exceed the complainant's own interests (i.e. the unsuccessful asylum seeker), the Supreme Administrative Court will reject it without dealing with the merits of the case and substance of the complaint.

This article addresses the essence of the institute of an unacceptable cassation complaint, its consequences, and its introduction within the framework of the decision to grant international protection. Further, it analyses the meaning of the institute of unacceptability in the broader context of administrative judicial protection and whether its anchoring specifically for matters of international protection is appropriate and justified. Furthermore, it examines whether this significant limitation of judicial protection curtails the rights of applicants for international protection; that is, whether it is a procedure compatible with constitutional and international legal standards in this area.

2. Proceedings for the granting of international protection in the Czech Republic – basic characteristics

The Charter of Fundamental Rights and Freedoms, which is part of the Czech Republic's constitutional order, stipulates that the Czech Republic provides asylum to foreigners persecuted for exercising political rights and freedoms.[1] However, asylum may be denied to those who act in violation of basic human rights and freedom (Article 43). Based on the Charter of Fundamental Rights and Freedoms, the Asylum Act[2] regulates the granting of asylum and its procedures. In this field, Czech legislation fully respects international obligations, particularly the Geneva Convention on the Legal Status of Refugees and European asylum acquis. The Asylum Act includes both substantive and procedural legislation.

1 For more details see Odehnalová, 2017, pp. 162–169, or the judgement of the Constitutional Court of January 30, 2007, No. IV. ÚS 553/06 [Online]. Available at: https://www.usoud.cz/vyhledavani-rozhodnuti-us (Accessed: 1 September 2023).

2 Act No. 325/1999 Coll., On Asylum.

Although the basic legislation is called the 'Asylum Act,' the subject of its regulation is international protection, which is a broader term.

International protection includes asylum and supplementary protection. Asylum is granted to foreigners who prove that they are persecuted for exercising political rights and freedoms, or have a well-founded fear of persecution owing to race, gender, religion, nationality, belonging to a certain social group, or for holding certain political opinions in a state in which they are citizens (in the case of stateless persons, in the state of their last permanent residence).[3] Another reason for granting asylum is reunification with a family member who has already been granted asylum (this form of asylum implements Directive 2003/86/EC on the right to family reunification). The last reason for granting asylum is humanitarian. However, there is no legal right to humanitarian asylum, and it is purely at the discretion of the Ministry of the Interior of the Czech Republic to whom it will be granted, and what reasons it finds worthy of special consideration for granting it. As stated by the Supreme Administrative Court of the Czech Republic,[4]

> the purpose of the institute of humanitarian asylum can be seen in the fact that the decision-making administrative body has the possibility to grant asylum even in situations where none of the precautions envisaged by the exhaustive lists of provisions of Section 12 and Section 13 of the Asylum Act apply, but in which it would still probably be "inhumane" not to grant asylum.

If the asylum seeker does not meet any of the aforementioned reasons, but proves that in the event of his/her return to the homeland, he/she would be in danger of being imposed or executed the death penalty, torture or inhumane or degrading treatment or punishment, or if he/she would find himself in serious danger to life or human dignity in situations of international or internal armed conflict by returning to the homeland, or if his/her departure would be in conflict with the international obligations of the Czech Republic, he/she may be granted additional protection. This protection can also be granted because of reunification with a family member who has already been granted additional protection. Unlike asylum, this protection is granted for a certain period, after which it is reviewed whether the reasons for which it was granted continue. If the reasons persist, its validity is extended. Additional protection is regulated in Article 14a of the Asylum Act, and foreigners have been able to obtain it since 2006, owing to the transposition of the qualification directive[5] into the Czech Asylum Act.

3 In more detail Kosař et al., 2010, pp. 76–145.

4 Judgement of the Supreme Administrative Court of 11 March 2004, No. 2 Azs 8/2004, or the judgement of the Supreme Administrative Court of April 14, 2005, No. 2 Azs 290/2004 [Online]. Available at: www.nssoud.cz (Accessed: 1 September 2023).

5 Council Directive 2004/83/EC.

The procedure for granting international protection is an administrative procedure, which is conducted by the Ministry of the Interior of the Czech Republic. The Ministry of the Interior proceeds in accordance with the Asylum Act and the Administrative Code,[6] which is a general procedural regulation of the procedures of administrative authorities. The proceedings initiate with the submission of an application for international protection by foreigners. It must be clear from the application that they seek protection from persecution or serious harm in the Czech Republic. Foreigners are obliged to appear within 24 hours of submitting the application (except in exceptional cases) to the reception centre, where the applicant will provide the Ministry with more detailed information on the submitted application and where the police will perform identification and other acts provided for by law.

In the procedure for granting international protection, the reasons that led the foreigner to leave the country are determined, and whether the foreigner meets the conditions for obtaining asylum or supplementary protection. After all the necessary steps have been taken, the applicant for international protection is usually transferred to a residence centre, where he/she awaits a decision on the application for granting international protection. The Ministry of the Interior decides on the matter no later than six months from the date of providing the data for the submitted application (however, the deadline may be extended). If it finds that the grounds for granting asylum or at least supplementary protection are fulfilled, it will grant the applicant an appropriate type of international protection. Otherwise, the foreigner's application will be rejected. In cases where the application is 'manifestly unfounded,' it is rejected in an expedited procedure. The reasons for establishing the obvious unfoundedness of the application are, for example, economic reasons, a state of general emergency, incorrect data in the application, or their concealment, and others.[7] If the applicant withdraws the application, acquires Czech citizenship, dies, or, for example, if his application is inadmissible,[8] proceedings are stopped.

Table 1: Number of applications by foreigners for international protection in the Czech Republic from 2001–2022[9]

2001	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**
18,094	8,484	11,400	5,459	4,021	3,016	1,878	1,656	1,258	833	756
2012	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**	**2020**	**2021**	**2022**
753	707	1,156	1,525	1,447	1,450	1,702	1,922	1164	1,411	1,694

6 Act No. 500/2004 Coll., Administrative Code.
7 See Art. 16 of the Asylum Act for more details.
8 Art. 10a of the Asylum Act for more details.
9 Ministry of the Interior of the Czech Republic [Online]. Available at: https://www.mvcr.cz/clanek/statisticke-zpravy-o-mezinarodni-ochrane-za-jednotlive-mesice-v-roce-2022.aspx (Accessed: 1 September 2023).

Table 1 demonstrates that the number of applications from foreigners for international protection was disproportionately high at the turn of the millennium. This was also reflected in the burden on the courts approached by unsuccessful asylum seekers. However, since 2005, the number of applications has decreased, and since 2007, the number of applicants for international protection has not exceeded 2,000. Thus, the situation has stabilised and no longer poses a threat of overloading the courts, as it was in the past.

3. Possibilities of legal defence of an unsuccessful applicant for international protection in the Czech Republic

Generally, administrative proceedings in the Czech Republic are based on the principle of hearing a case in two instances. A participant in the proceedings who is not satisfied with the results of the proceedings—that is, with the issued administrative decision—can file a proper appeal against it. Therefore, with exceptions, administrative proceedings are conducted 'in two stages' (the 1st stage body decides on the matter and then the 2nd stage body hears the matter as the appeals body). As stated by the Supreme Administrative Court of the Czech Republic,[10]

> the principle of two-instance administrative proceedings expresses the subjective right of the participants in administrative proceedings to basically challenge every decision issued in the first instance by a proper remedy, that is, by appeal; the exceptions to this principle are cases where either such right is excluded by law or when the participant waives the right to file an appeal.

Nevertheless, proceedings for granting international protection represent an exception to the traditional principle of two-instance administrative proceedings. It is not possible to file a proper remedy against the decision of the Ministry of the Interior in the matter of international protection, and the 'first-instance' decision of the Ministry acquires legal force on the day it is delivered to the party to the proceedings (to the applicant for international protection). Therefore, it is a single-instance administrative proceeding.

Regarding the constitutional consequences of this exclusion, it is consistently judged that the principle of two-instance administrative proceedings is not constitutionally guaranteed, but guaranteed as a right. The Constitutional Court of the Czech Republic states that neither the Charter of Fundamental Rights and Freedoms nor the Convention for the Protection of Human Rights and Freedoms

10 Judgement of the Supreme Administrative Court of 20 July 2004, No. 5 A 69/2001 [Online]. Available at: www.nssoud.cz (Accessed: 1 September 2023).

'guarantee the fundamental right to two- or more-level decision-making in administrative proceedings....'[11] Moreover, it adds that if the law were to concentrate the administrative procedure on one level (which is precisely the case with the procedure for granting international protection), it would not be possible to consider such a regulation in itself unconstitutional. The principle of two instances is not even among the basic principles of the activity and decision-making of administrative bodies,[12] which is also confirmed by the Supreme Administrative Court of the Czech Republic, which states: 'The basic principles of decision-making on the rights and obligations of natural or legal persons by administrative bodies do not include decision-making at two levels.'[13] In my opinion, the single-instance procedure for granting international protection is appropriate because the applicant is able to access judicial protection more promptly.

It follows from the above that it is not possible to request a review of the decision within the public administration, and foreigners must seek protection in proceedings before the courts, specifically within the administrative judiciary. Thus, the primary means of defence for an unsuccessful applicant for international protection, is a lawsuit against the decision of an administrative body filed with the regional court in accordance with the Code of Administrative Justice,[14] followed by a cassation complaint to the Supreme Administrative Court. However, as pointed out below, even judicial protection in matters of international protection demonstrates significant specificity.

An unsuccessful applicant for international protection may first file a lawsuit against the decision of the Ministry of the Interior, which is decided by the administrative courts in proceedings according to Article 65 et seq. of the Code of Administrative Justice. Even if the general legal regulation of this action is contained in this code, the Asylum Act provides some specifics for this procedure, which as *lex specialis* take precedence over the general regulation. Substantive jurisdiction is imposed on the regional courts. However, local jurisdictions are specifically regulated. Locally competent is the regional court where the applicant for international protection was registered to reside on the day of the decision. If the plaintiff submitted an application for international protection in the transit area of an international airport, the Regional Court in Prague has local jurisdiction. The plaintiff is a foreigner—an applicant for international protection—and the defendant is the Ministry of the Interior.

11 Decision of the Constitutional Court of 19 October 2004, No. II. ÚS 623/02 [Online]. Available at: https://www.usoud.cz/vyhledavani-rozhodnuti-us (Accessed: 1 September 2023).

12 Arts. 2 to 8 of the Administrative Code.

13 Judgement of the Supreme Administrative Court of 27 October 2005, No. 2 As 47/2004 [Online]. Available at: www.nssoud.cz (Accessed: 1 September 2023), or Frumarová et al., 2021, pp. 315–316.

14 Act No. 150/2002 Coll., Code of Administrative Justice.

One of the most important elements of a lawsuit is the presentation of claims, from which the factual and legal reasons for which the plaintiff considers the challenged statements of the decision of the Ministry of the Interior to be illegal or void must be evident. The explicit presentation of the contested statements of the decision in connection with the formulation of claims is essential from the perspective of a review of the contested decision by the court.[15] In administrative justice, proceedings are governed by the principle of disposition. Therefore, it is always up to the plaintiff to challenge the decision of the administrative body through a lawsuit in court. Simultaneously, it is up to him

> in the event that he seeks the protection of his rights by means of a lawsuit, to clearly define in this lawsuit which statements of the administrative decision he is challenging, and then specify in the points of the claim, for which factual and legal reasons he considers the challenged statements of the decision to be illegal or void.[16]

Nevertheless, the Asylum Act 'breaks through' this principle to guarantee the highest possible protection to applicants for international protection. Indeed, it stipulates that the court, when assessing a claim in matters of international protection, will also consider new important facts that have arisen after the issuance of the Ministry's decision. If these are facts that relate to possible persecution or the threat of serious harm, the court is not bound by the claims. Another important element of the lawsuit is the presentation of evidence proposed by the plaintiff to prove his claims. The plaintiff is obligated to prove his claims. Therefore, he must state in the lawsuit the specific means of evidence the court is to realise for this purpose. As part of the evidence, the court may repeat or supplement the evidence provided by the administrative body (the Ministry of the Interior). As the Czech administrative judiciary is built on the principle of cassation, the plaintiff (an unsuccessful applicant for international protection) demands annulment of the negative decision of the Ministry of the Interior.

The Asylum Act sets its own deadlines for filing lawsuits (therefore, the general regulations in the Administrative Code do not apply). Depending on the type of decision that foreigners face, the deadline for filing a lawsuit is 15 days, 1 month, or 2 months. In this sense, it is more about 'shortening' the deadlines (since the general deadline for filing a lawsuit according to the Code of Administrative

15 'Judicial review of administrative decisions always takes place within certain and precisely defined limits; it is up to the plaintiff to establish them. The Code of Administrative Justice does not allow the courts to carry out any kind of "general review".' Judgement of the Supreme Administrative Court of 14 February 2006, No. 1 Azs 244/2004 [Online]. Available at: www.nssoud.cz (Accessed: 1 September 2023).

16 Judgement of the Supreme Administrative Court of 29 December 2004, No. 1 Afs 25/2004 [Online]. Available at: www.nssoud.cz (Accessed: 1 September 2023).

Justice is 2 months). Therefore, the plaintiff must be careful not to miss the deadline. Another element associated with time in this procedure is that claims are heard with priority. Furthermore, an important aspect of judicial protection is that the filing of a lawsuit in matters of international protection has *ex lege* a suspensive effect (with exceptions provided by law, but even within them, a suspensive effect can be requested together with the filing of the lawsuit). This is a specific matter arising from the Asylum Act, because in general (according to the Code of Administrative Justice) a lawsuit does not have a suspensive effect by law. If the lawsuit has a suspensive effect, the foreigner is in the position of an applicant for international protection for the duration of the proceedings on the lawsuit against the decision of the Ministry of the Interior, and cannot, among other things, be deported from the Czech Republic until the end of the court proceedings. I consider the aforementioned specifics and deviations from the general regulation of court proceedings to be appropriate, as they reflect the need for greater protection of the position and rights of the asylum seeker and the need to decide on the matter as promptly as possible.

Table 2: Number of lawsuits and decisions of regional courts in matters of international protection from 2022–2018[17]

	Number of pending actions from previous years	Number of new actions brought in a given year	Number of regional court decisions in a given year	Of which: proceedings discontinued	Of which: negative decisions	Of which: case returned to the Ministry of the Interior
2022	752	708	868	131	446	291
2021	701	963	939	201	598	140
2020	1,004	1,015	1,019	210	703	106
2019	799	1,154	847	175	543	129
2018	679	1,051	808	145	584	79

Table 2 presents that approximately 1,000 unsuccessful applicants for international protection defended themselves against negative decisions annually. Regional courts decide on 800–900 lawsuits each year. Approximately two-thirds of lawsuits are rejected. Only the year 2022 represents a certain deviation, when relatively many decisions of the Ministry of the Interior were annulled by the court and returned for further proceedings. This situation could have been caused by the large number of refugees from Ukraine when it was necessary to stop considering

17 Ministry of the Interior of the Czech Republic [Online]. Available at: https://www.mvcr.cz/clanek/mezinarodni-ochrana-253352.aspx?q=Y2hudW09NQ%3d%3d (Accessed: 1 September 2023).

Ukraine as a safe country of origin and thus, re-evaluate decision-making in these situations.

Foreigners subsequently have the right to submit a cassation complaint to the Supreme Administrative Court of the Czech Republic against the decision of the regional court regarding the lawsuit. Even regarding the general regulation of cassation complaints, the Asylum Act provides for several differences. Cassation complaints are wide-open and extraordinary remedies can be used to seek redress in both substantive and defective processes. Therefore, it can be filed against a decision on the merits and against several procedural decisions, but always only for specific reasons that are exhaustively calculated and precisely defined by the Code of Administrative Justice.[18] Simultaneously, the Code of Administrative Justice also defines situations in which a cassation complaint is inadmissible (e.g. if it is directed only against the justification of the decision, or if the decision contested is of a temporary nature). The Asylum Act formulates two additional reasons for inadmissibility (Article 32). The deadline for filing a cassation complaint is two weeks. As with the lawsuit described above, the emphasis is placed on the priority hearing of the case and the granting of *ex lege* suspensive effect in relation to the cassation complaint.[19]

Furthermore, since 2005, cassation complaints in matters of international protection have been characterised by significant specificity compared with cassation complaints filed in all other areas. In addition to the admissibility of a cassation complaint, the acceptability of a cassation complaint is also examined in matters of international protection. It is a specific institute with significant legal effects that between 2005 and 2021 applied only to matters of international protection within the framework of the Czech administrative judiciary. It was not until April 2021 that its applicability was extended to cassation complaints in some other matters.[20]

The subject of the following analysis is primarily the meaning of the institute of unacceptability and whether its anchoring in matters of international protection is appropriate and justified. The author also focuses on the question whether this limitation of judicial protection of asylum seekers is in accordance with constitutional and international legal obligations.

18 Art. 103 of the Code of Administrative Justice.

19 The filing of a cassation complaint has a suspensive effect if the filing of a lawsuit against the Ministry's decision in the matter of international protection had one. However, the filing of a cassation complaint does not have a suspensive effect if the applicant for granting international protection is at the time of the filing of the cassation complaint in a facility for the detention of foreigners or if he is not allowed to enter the territory.

20 For the extension of the unacceptability of a cassation complaint to cases other than the granting of international protection, see Potěšil, 2022, pp. 129–132, or Jílková, 2019, pp. 140–144.

4. Institute of "unacceptability" of cassation complaints in matters of international protection

The Code of Administrative Justice, which came into force on 1 January 2003 did not originally provide for the unacceptability of cassation complaints. However, Act No. 350/2005 Coll. amended the Code of Administrative Justice in October 2005. This amendment introduced the concept of 'acceptability of an application' for the first time in the Czech legal order. *Sedes materiae* of this new regulation included in the new Article 104a of the Code of Administrative Justice, according to which 'if a cassation complaint in asylum cases (since September 2006 in international protection cases) does not substantially exceed the complainant's own interests in terms of its importance, the Supreme Administrative Court shall reject it for unacceptability.'[21] The chief consequence of the unacceptability finding is that the Supreme Administrative Court does not deal with the merits of the case and dismisses the cassation complaint by resolution.[22] As of April 2021, the unacceptability of a complaint regarding cassation was extended to other cases (beyond international protection).[23]

■ *4.1. The essence of the principle of unacceptability and its application in practice*

Until April 2021 (when the applicability of this institute was extended), Article 104a of the Administrative Procedure Code reads as follows: If a cassation complaint in international protection matters does not substantially exceed the complainant's own interests, the Supreme Administrative Court shall reject it for unacceptability. The hypothesis of this legal norm contains two key terms which need to be clarified, 'matters of international protection' and 'exceeding the complainant's own interests.'

The Supreme Administrative Court of the Czech Republic has interpreted the first term as meaning that unacceptability applies only to cassation complaints against decisions of regional courts which terminate proceedings against decisions of the Ministry of the Interior in the matter of international protection within the meaning of Article 2 Paragraph 15 of the Asylum Act, that is, against decisions to grant asylum or additional protection, not to grant international protection, to discontinue proceedings, to reject an application for international protection as manifestly unfounded, and to withdraw asylum or subsidiary protection.[24] *A contrario*, we can conclude that the procedural decisions of regional courts in

21 Šimíček, 2006, p. 201.
22 See Potěšil, 2021, pp. 74–81.
23 In more detail Staněk and Dvořáková, 2021, pp. 146–153.
24 Decision of the extended senate of the Supreme Administrative Court of 21 January 2015, No. 9 Azs 66/2014 [Online]. Available at: www.nssoud.cz (Accessed: 1 September 2023).

international protection cases cannot be rejected on grounds of unacceptability. The Supreme Administrative Court reasoned that procedural decisions are not abused by asylum seekers, their number is negligible and they do not have *ex lege* suspensive effect. Another argument for not applying unacceptability to cassation complaints against procedural decisions of the regional courts is that those decisions do not deal with issues to which the criterion of 'unacceptability,' that is, the overlapping of the complainant's own interests, could well be applied.[25]

The dissenting opinion of one of the judges of the Supreme Administrative Court (Kühn) was critical of this conclusion.[26] He indicated the absurdity of such a conclusion, where a 'higher' procedural standard is granted to something that is less important and essentially preliminary in relation to the merits (a procedural decision in the matter of international protection), while a 'lower' procedural standard is paradoxically applied to a matter of incomparably greater importance (the final outcome of the proceedings before the regional court, whether in the form of a merits decision or in the form of a procedural decision, nevertheless formally concluding the judicial proceeding). This view can be accepted because the above, inter alia, contradicts the traditional legal argument *a maiori ad minus*.

Another key concept is 'overriding the complainant's own interests.' This is a typical example of a vague legal concept widely used in Czech administrative law. Legislators' use of this legal instrument in the context of such a significant limitation of judicial protection in asylum cases caused considerable uncertainty at the outset, as it was not clear which cassation complaints in international protection cases would be found acceptable.[27] However, the Supreme Administrative Court has interpreted this concept precisely;[28] from the outset, it was necessary, in relation to practice, to establish in a predictable manner what considerations and criteria the Supreme Administrative Court would follow when assessing acceptability.

The overriding of the complainant's own interests is a fundamental and intense situation in which (in addition to the protection of an individual's public subjective rights) it is also necessary for the Supreme Court to express a legal opinion on a certain type of case or legal question. In practice, this means that the complainant's interests overlap only if the legal question at issue has a discernible impact beyond a specific case. The primary task of the Supreme Administrative Court in these proceedings is not only the protection of individual public subjective

25 Ibid.

26 Dissenting opinion of Judge Z. Kühn on the justification of the decison of the extended senate of the Supreme Administrative Court of 21 January 2015, No. 9 Azs 66/2014 [Online]. Available at: www.nssoud.cz (Accessed: 1 September 2023).

27 Kosař et al., 2010, p. 549.

28 Resolution of the Supreme Administrative Court of 26 April 2006 No. 1 Azs 13/2006.

rights, but also the interpretation of the legal order and unification of the decision-making of regional courts.[29]

To elucidate the cases in which 'overlapping of the complainant's own interests' can be expected, the Supreme Administrative Court has modelled several typical cases which fulfil this concept in practice.[30] Cassation complaints in international protection cases are acceptable, particularly in the following cases: (1) The cassation complaint concerns legal issues which have not been fully addressed by case law of the Supreme Administrative Court. (2) The cassation complaint concerns questions of law which have been dealt with differently in case law. A divergence in case law may arise at the regional court level and within the Supreme Administrative Court. (3) The cassation complaint will also be acceptable in a situation where a case law diversion is to be made. This means that in exceptional and justified cases, the Supreme Administrative Court finds it appropriate to change the interpretation of a certain legal issue uniformly addressed by administrative courts. (4) Another reason for the acceptability of a cassation complaint will be given if a fundamental error is found in the contested decision of the regional court, which could impact the substantive legal position of the complainant. In a specific case, this can be a fundamental legal error, particularly if: 4a) in its decision, the regional court did not respect the established and clear case law and it cannot be ruled out that this disregard will not occur in the future. 4b) in an individual case, the regional court grossly erred in the interpretation of substantive or procedural law.[31]

However, with respect to the fourth reason, it should be emphasised that the Supreme Administrative Court is not called upon to review any misconduct of the regional court within this category of acceptability, but only misconduct of such a significant intensity that it can reasonably be assumed that it had not occurred; the substantive decision of the regional court would be different. Therefore, insignificant errors (primarily of a procedural nature) will generally not be of such intensity to establish the acceptability of a subsequent cassation complaint.

It clearly follows that the institute of acceptability significantly limits and restricts the possibility of an unsuccessful applicant for international protection to defend himself with a cassation complaint against a rejection decision. It is necessary to logically enquire what serious reasons led the Czech legislature to introduce this institute into the legal system.

29 Decision of the Supreme Administrative Court of 26 April 2006, No. 1 Azs 13/2006 [Online]. Available at: www.nssoud.cz (Accessed: 1 September 2023).

30 According to these criteria, the Supreme Administrative Court proceeds even now, that is, after unacceptability is also applied to cases outside of international protection. See the decision of the Supreme Administrative Court of 16 June 2021, No. 9 As 83/2021 [Online]. Available at: www.nssoud.cz (Accessed: 1 September 2023).

31 Decision of the Supreme Administrative Court of 26 April 2006, No. 1 Azs 13/2006 [Online]. Available at: www.nssoud.cz (Accessed: 1 September 2023).

■ ***4.2. Reasons for the introduction of the institute of unacceptability – retrospective or prospective court decision making?***

The reasons for this can be seen both on a purely pragmatic and conceptual level.[32] The first group of reasons is clearly explained in the explanatory report on the aforementioned amendment to the Code of Administrative Justice No. 350/2005 Coll. This report states:[33]

> The unacceptability of a cassation complaint against the decision of the regional court in the proceedings on the action against the decision of the Ministry in matters of asylum is introduced. This measure is prompted by the critical development of the asylum agenda at the Supreme Administrative Court in 2003 and 2004. It turned out that court proceedings in asylum cases have become a mere pretext for applicants who cannot legalize their stay in the Czech Republic in any other way to submit applications for the granting of asylum. In the vast majority of cases, however, these are economic migrants (in 90% from Russia, Ukraine, Moldova, Vietnam, Slovakia), for whom the reasons for asylum are clearly not given, and in many cases the applicants do not even claim it themselves. Nevertheless, they use all procedural options in administrative and judicial proceedings, in particular they also abuse cassation complaints in order to make the proceedings before the court last as long as possible, because during this time they can legally stay on the territory of the Czech Republic.[34]

Therefore, the purely practical reason for introducing unacceptability was to drastically reduce disproportionately high amounts of the asylum agenda to the Supreme Administrative Court,[35] which was overloaded.[36]

32 Šimíček, 2006, p. 201

33 See explanatory report to Act No. 350/2005 Coll.

34 In 2003, 1,502 cassation complaints were filed with the Supreme Administrative Court; of which 409 (27%) were of asylum seekers. In 2004, 4,722 cassation complaints were already challenged; of which 3,124 (66%) were asylum seekers. The success rate of cassation complaints in asylum cases was low, not even 6%. See explanatory report to Act No. 350/2005 Coll.

35 On the issue of the congestion of the Supreme Administrative Court see Piatek and Potěšil, 2021, pp. 20–32.

36 The average administrative and judicial proceedings in asylum cases lasted about 27 months at that time, while this time was practically equally divided between proceedings before administrative authorities, the regional court and Supreme Administrative Court. See Kosař et al., 2010, p. 548.

Regarding conceptual or ideological reasons, the question arises whether a retrospective or prospective model of court decision making is more appropriate.[37] Limiting the access of parties to the highest judicial instances (the prospective model) is a custom, particularly in countries with a common law legal tradition.[38] However, it is increasingly gaining ground in the continental legal culture. It is based on the idea that the task of the highest court in the country is to unify jurisprudence and generally provide interpretative guidelines for lower courts (and therefore, for public administration), not to revise for the umpteenth time a case that has already been solved once or more. Such a system of regulation of the supreme courts is generally oriented prospectively, not retrospectively, for individual cases.[39]

The arguments in favour of this model limiting access to high courts are as follows: the role of the case law of these courts is different from that of the courts of lower instances. While the task of lower courts is to arrange justice in a specific case, the purpose of the highest courts is to resolve the most important legal issues and create an established case law that will guide administrative authorities and lower courts in their application practice. In this context, Molek and Bobek ask themselves:[40] 'How can justice be better served at the highest courts in individual cases?' Thousands of similar decisions that no one reads, or by guiding decision-making with important cases that are known and respected by administrative authorities and lower courts? What is better for protecting individual rights? Is it a time-limited and sketchy review of each case or a real and deep analysis and conjecture of key cases performing a governing function?

The institute of the (un)acceptability of a cassation complaint strives for a balance between two (sometimes conflicting) interests: the interest in justice in each individual case and the interest in the effectiveness of objective law. The purely formal emphasis often placed on achieving a fair outcome of the proceedings in its consequences significantly weakens legal certainty and thus

37 Retrospective judicial decision-making is focused on the past. The impact of the case law is limited only to a specific case; for example, cassation complain annuls a specific decision of a lower court, and a lower court is only bound to follow the legal opinion of a higher court in this case. It attempts to retroactively negotiate justice in a specific individual case and correct any mistakes made by lower courts.
Prospective judicial decision-making focuses more on the future. The initial floor plan remains the individual case and the decision in it. However, the case is selected and discussed not only with a view to the past, but also to the future and the impact on future case laws. The final definition of prospective decision-making follows from the above: the court's decision has a more general impact beyond the scope of the given case.

38 Bobek and Molek, 2006, p. 205.

39 The institute of acceptability is primarily inspired by the Anglo-American concept of "leave to appeal" or "writ of certiorari," which is based on the fact that it is up to the discretion of the court, which is to decide on the remedy, whether it will deal with it substantively or not. See Lavický and Šiškeová, 2005, p. 693.

40 Bobek and Molek, 2006, p. 205.

the effectiveness of the law.[41] However, as the Constitutional Court of the Czech Republic succinctly and repeatedly stated,

> no legal order is and cannot be built ad infinitum from the point of view of the system of procedural means to protect rights, as well as from the point of view of the system of organization of review instances. Every legal order brings and necessarily must bring a certain number of errors. The purpose of the review, or of review procedures, it may realistically be possible to approximately minimize such errors, and not eliminate them completely. The system of review instances is therefore the result of measuring the effort to achieve the rule of law on the one hand, and the effectiveness of decision-making and legal certainty on the other. From the point of view of this criterion, the introduction of extraordinary remedies, i.e. the prolongation of proceedings and the breaking of the principle of the immutability of decisions that have already acquired legal force, is adequate only in the event of exceptional reasons.[42]

Thus, for the sake of the functionality and efficiency of the activities of the highest courts and the fulfilment of their roles in the state and society, it is necessary to limit the number of cases that they will review.[43]

■ *4.3. Assessment of the acceptability of a cassation complaint by the Supreme Administrative Court as part of the proceedings on this complaint*

The acceptability of a cassation complaint must be distinguished from the admissibility of a cassation complaint and reasonableness.[44] The admissibility of a cassation complaint is determined by the fulfilment of legal procedural prerequisites, such as the filing of a cassation complaint within the statutory period, proper representation of the complainant by a lawyer, and the absence of other legal reasons for inadmissibility.[45] However, the rationale for the complaint is a matter

41 Decision of the Supreme Administrative Court of 26 April 2006, No. 1 Azs 13/2006 [Online]. Available at: www.nssoud.cz (Accessed: 1 September 2023).

42 Decision of the Constitutional Court of 31 October 2001, No. Pl. ÚS 15/01; similarly, the decision of the Constitutional Court of 6 November 2003, No. III. ÚS 150/03 [Online]. Available at: https://www.usoud.cz/vyhledavani-rozhodnuti-us (Accessed: 1 September 2023).

43 More details on the "instance dilemma" Pomahač, 2020, pp. 267–272.

44 For more details see Jemelka et al., 2013, pp. 937–942.

45 Decision of the Supreme Administrative Court of 16 February 2006, No. 8 Azs 5/2006: 'In the case of a cassation complaint filed against a regional court's decision in asylum matters, the Supreme Administrative Court first deals with the question of admissibility of the cassation complaint. Only in the case of an admissible cassation complaint is an examination of its acceptability possible.' [Online]. Available at: www.nssoud.cz (Accessed: 1 September 2023).

of a factual assessment of the cassation grounds stated by the complainant[46] and reflected in the possible (un)success of the cassation complaint.

Therefore, acceptability is an 'intermediate step' in the Supreme Administrative Court's assessment of cassation complaints in matters of international protection. Thus, it is possible to perceive acceptability as a certain 'filter': if the cassation complaint meets the legal conditions of procedural admissibility, then the overlap of the complainant's own interests, that is, its acceptability, is examined in the manner indicated above. Thus, if the complainant presents objections on which the Supreme Administrative Court has already expressed its opinion and published its decision, it is neither necessary nor effective for this court to act and decide again on a similar matter, when the result would undoubtedly be the same conclusion. If the cassation complaint is admissible and acceptable, the Supreme Administrative Court will assess and decide on the merits.

It follows from the above that it is in the interest of the unsuccessful applicant for international protection (i.e. the complainant) not only to fulfil the conditions for the admissibility of a complaint, but also to base the complaint on one of the grounds for a complaint, set out in Article 103 of the Code of Administrative Justice. The complainant is also interested in stating what he sees as an overlap of his own interests in his specific case and for what reason the Supreme Administrative Court should consider the submitted cassation complaint substantively.

The legislature was aware that the unacceptability of a cassation complaint is an institute that by its very nature is highly dependent on judicial discretion. Therefore, it was necessary to ensure that complainants filing a cassation complaint in matters of international protection were sufficiently legally protected against possible arbitrariness when deciding the unacceptability of such a complaint. Therefore, a rule was incorporated into the Code of Administrative Justice, according to which the consent of all members of the Senate was required for a decision on unacceptability (the principle of unanimity).

Therefore, if even a single member of the Senate disagrees with the conclusion about the unacceptability of the cassation complaint, the case cannot be rejected, and its merits must be discussed. As a second safeguard, the legislature intended to increase the number of members of the Senate that decided on matters of international protection at the Supreme Administrative Court. Along with the introduction of unacceptability, special five-member Senates of the Supreme Administrative Court were created. However, this was a somewhat unusual step, as the agenda of international protection is decided at the regional court level only by a specialised single judge (not by a senator), which, in simple terms, means that the legislature considers it simpler and does not see the need for it to be resolved by a senator. Ultimately, these five-member Senates were (by amendment No. 303/2011 Coll.) cancelled, and the classic three-member Senates of the Supreme

46 Art. 103 of the Code of Administrative Justice.

Administrative Court decided on these cases. The aforementioned principle of unanimity in decision-making, not the number of members of the Senate, is thus considered a much more important element of the protection of the applicant for international protection, which is reasonable.

A more problematic aspect associated with unacceptability was that the resolution rejecting the cassation complaint did not need to be justified. This rule was cancelled by amendment No. 77/2021 Coll., which came into force on 1 April 2021 extending the use of the institute of unacceptability even outside the sphere of international protection. The fact that the Supreme Administrative Court did not have to justify its decision regarding the unacceptability of the cassation complaint was considered inappropriate by the public.[47] This was based on the complainant's substantial uncertainty regarding his legal status and the possibility of the court's discretion in assessing the acceptability of the complaint. References were also made to the case law of the Constitutional Court of the Czech Republic, which, for example, in its decision of 20 June 1995, No. III. ÚS 84/94 stated:

> One of the principles, representing part of the right to due process, as well as the concept of the rule of law (Article 36, Paragraph 1 of the Charter of Fundamental Rights and Freedoms, Article 1 of the Constitution of the Czech Republic) and excluding arbitrariness in decision-making, is also the obligation of the courts to justify their judgements.[48]

Another argument was that a brief justification cannot burden the Supreme Administrative Court so much as to significantly affect the total length of court proceedings.[49]

However, there were also experts who considered the option of the Supreme Administrative Court not to justify the resolution, rejecting the cassation complaint for unacceptability as a transparent solution included in the selection of cases.[50] They were based on the assumption that if the Supreme Administrative Court were to have the opportunity to select cases, it would also be correct to do so based on its own consideration. If the Supreme Administrative Court was forced to justify the unacceptability of a complaint in each individual case, it would mean, in their opinion, a *de facto* denial of the meaning of the institute of unacceptability. However, concerns about the (non) justification of the decision were eventually

47 Potěšil et al., 2014, p. 1019; or Kučera, 2005, pp. 7–11. The authors Lavický and Šiškeová consider this unconstitutional – see Lavický and Šiškeová, 2005, pp. 693–703.

48 Similarly, the decison of the Constitutional Court of 11 February 2004, No. Pl. ÚS 1/03 [Online]. Available at: https://www.usoud.cz/vyhledavani-rozhodnuti-us (Accessed: 1 September 2023).

49 Ibidem.

50 Šimíček, 2006, pp. 201–205.

unfounded. The Supreme Administrative Court did not justify the resolution of the rejection of the cassation complaint on grounds of unacceptability, except for exceptions, but instead justified the resolutions on unacceptability.

In conclusion, it can be added that the subsequent judicial review of the resolution of the Supreme Administrative Court on the unacceptability of a cassation complaint by the Constitutional Court is relatively limited. As stated by the Constitutional Court, 'assessing the significance of the complaint from the point of view of the overlap of the complainant's own interests is a matter of independent judicial decision, which is fundamentally not subject to review by the Constitutional Court.'[51] The Constitutional Court considers called upon to intervene only in cases in which the Supreme Administrative Court would abuse judicial discretion or its decision would be a manifestation of arbitrariness.[52]

■ *4.4. Unacceptability: yes or no – constitutional and international legal conformity of the institute of "unacceptability" in matters of international protection*

After a detailed analysis of the essence, consequences, and reasons for the introduction of the unacceptability of cassation complaints into the Czech legal system, the question arises whether it is a suitable institute in the field of asylum law and whether it conforms with constitutional and international law. For example, Kučera considered the introduction of the unacceptability of cassation complaints in asylum cases to be an unreasonable and unsystematic intervention for which there are no legally defensible reasons. The author further states[53] that

> the right of asylum is an important right guaranteed both at the constitutional and international level, however, the Constitution of the Czech Republic and the Charter of Fundamental Rights and Freedoms do not guarantee a multi-level judiciary as a fundamental right in non-criminal matters, as well as the Convention on the Protection of Human Rights, rights and fundamental freedoms or the International Covenant on Civil and Political Rights, the current scheme of hearing asylum cases before the court cannot be considered an abuse of the procedural rights of the participants of administrative proceedings. On the contrary, the Supreme Administrative Court represents a necessary corrective for asylum proceedings, both in relation to the decision-making practice of regional courts, where in future only a single judge should decide in all matters, and in relation

51 Decision of the Constitutional Court of 31 October 2007, No. III. ÚS 778/07 [Online]. Available at: https://www.usoud.cz/vyhledavani-rozhodnuti-us (Accessed: 1 September 2023).

52 Similarly, the decision of the Constitutional Court of 19 December 2007, No. III. ÚS 2937/07 [Online]. Available at: https://www.usoud.cz/vyhledavani-rozhodnuti-us (Accessed: 1 September 2023).

53 Kučera, 2005, pp. 7–10.

to the decision-making practice of the Ministry of the Interior, which cannot be considered an independent body.

The authors Bobák and Hájek are also critical of the effectiveness and constitutional conformity of this institute. Based on a detailed analysis of the decision-making activities of the Supreme Administrative Court in matters of international protection, they stated that inacceptability has not fulfilled the expected goals and that it is not a suitable institute for judicial review of the asylum agenda.[54]

However, it should be emphasised that at the time of its introduction, unacceptability respected the European standards of review in the given area. Article 6 of the European Convention recommends a two-stage trial only for criminal proceedings and not for non-criminal cases. As Molek and Bobek point out,[55] the right to fair trial and effective judicial protection is often confused with the right to discuss matters at all stages, which is incorrect. The right to effective judicial protection (at least in the jurisprudence of the European Court of Human Rights according to Articles 13 and 6, Paragraph 1 of the European Convention), does not mean the obligation of the parties to the Convention to establish a system of appeal or extraordinary remedies. In the context of asylum law, the only obligation of contracting parties is to allow access to national courts for all persons within their jurisdiction (Article 1 of the Convention) effectively (Article 13) and on a non-discriminatory basis (Article 14). However, this does not necessarily mean establishing systems of appeal or extraordinary remedies that are fully within the autonomous competence of a contracting party. The ECtHR repeatedly stated that the right to a fair trial does not include the right to appeal. However, in states that allow appeals to a higher court, the rights arising from Article 6(1) of the Convention must be respected, even in appeal proceedings.[56]

In the context of asylum law, these conclusions are confirmed by the Recommendation of the Committee of Ministers of the Council of Europe No. R (81)16 of 5 November 1981, on the harmonisation of national procedures relating to asylum, which states in Article 5 that the Contracting Party shall provide for the review of asylum decisions by appealing to a higher administrative authority or to a judicial authority. The explanatory memorandum of this article states that both procedures are perceived as alternatives; that is, they fully depend on the legal system of the contracting party, whether the decision on asylum will be reviewed within the framework of the state administration or the judiciary. Thus,

54 Bobák and Hájek, 2015, pp. 47–76.

55 Bobek and Molek, 2006, pp. 205–215.

56 For example, ECtHR, *Delcourt v. Belgium* (Application No. 2689/65), judgment, 17 January 1970, Series A No. 11, para. 25; ECtHR, *Monnell and Morris v. the United Kingdom* (Application No. 9818/82), judgment, 2 March 1987, Series A No. 115, para. 56; ECtHR, *Helmers v. Sweden* (Application No. 11826/85), judgment, 29 October 1991, Series A No. 212-A, para. 31; ECtHR, *Tolstoy Miloslavsky v. the United Kingdom* (Application No. 18139/91), judgment, 13 July 1995, Series A No. 316-B, para. 59.

the contracting state has no obligation to allow a judicial review of the decision on asylum. *A fortiori*, if it allows it, then it is "above the standard". Moreover, the Explanatory Memorandum expressly states that judicial review does not require an appeal system.[57]

Table 3: Numbers of cassation complaints and decisions of the Supreme Administrative Court on them in matters of international protection from 2022–2018[58]

	Number of pending cassation complaints from previous years	Number of new cassation complaints filed in a given year	Number of Supreme Administrative Court decisions on cassation complaints in a given year	Of which: proceedings discontinued	Of which: negative decision	Of which: case returned to the Ministry of the Interior/ Regional Court
2022	471	256	386	41	241	79/25
2021	495	547	571	40	438	51/34
2020	313	671	567	38	480	30/19
2019	232	478	440	40	359	32/9
2018	162	449	435	28	363	24/20

Table 3 demonstrates the decision making of the Supreme Administrative Court on cassation complaints in matters of international protection in the last five years. The number of newly filed cassation complaints is approximately 500, except in 2022, when it is lower. Simultaneously, unfortunately, the number of cases that have not been settled by the court is increasing, which may be owing to the court's higher workload in other agendas. Similar to regional courts, it is clear that most cassation complaints are unsuccessful, demonstrating the quality of decision-making on this agenda, particularly by regional courts.

5. Conclusion

At the time of its introduction, the institute of unacceptability of cassation complaints raised a number of questions and uncertainties as to whether the rights of applicants for international protection would be curtailed. Although the primary impetus for its adoption was the effort to reduce the enormous burden on the Supreme Administrative Court and related delays in proceedings, its meaning and functions should be evaluated more at a conceptual level. More judicial instances do not necessarily imply a higher level of judicial protection. Further review

57 Bobek and Molek, 2006, pp. 205–215.

58 Ministry of the Interior of the Czech Republic [Online]. Available at: https://www.mvcr.cz/clanek/mezinarodni-ochrana-253352.aspx?q=Y2hudW09MQ%3d%3d. (Accessed: 1 September 2023).

does not necessarily increase the effectiveness of legal protection; contrarily, it can lead to delays in proceedings and the negation of effective legal protection, which, among other things, should mean speed. Unacceptability lies in the selection of cases with jurisdictional overlap. This unacceptability is left to the Supreme Administrative Court to assess the cassation complaints it will deal with meritoriously.

Kühn states:[59]

> However, unacceptability is not here for judges to make their job easier. It is here for all participants in the proceedings and ensures that the judges of the Supreme Administrative Court will spend their energy on matters that are truly jurisprudentially significant, on matters with a general impact. Only in this way the Supreme Administrative Court will truly fulfil its role, i.e. to unify the case law of regional courts and provide the addressees of legal norms with answers to complex questions of legal interpretation.

This is a logical and reasonable opinion, in which unacceptability can be considered a legal tool that maintains a balance between the interest in justice in each individual case and the interest in the effectiveness of objective law. This is also evidenced by the fact that from 2021, the unacceptability of a cassation complaint was significantly extended outside the area of international protection. Article 104a of the Code of Administrative Justice provides: If a cassation complaint in matters in which a specialised single judge decided before the regional court does not substantially exceed the complainant's own interests, the Supreme Administrative Court will reject it as unacceptable. Therefore, it is an institute that has its justification and future within the concept of administrative justice in the Czech Republic. From *de lege ferenda* viewpoint, it is an institute that has its justification and future within the broader concept of administrative justice in the Czech Republic (not only within the framework of the asylum agenda). Thus, the prospective decision-making model of higher courts should continue to be reflected in the Czech judiciary. The Czech judiciary is multi-instance, therefore, there is no reason why the activities of the highest courts should not primarily focus on ensuring the uniformity of decision making and the interpretation of key legal problems and issues.

It also follows from the above that the institute of unacceptability is in accordance with constitutional and international standards in the areas of asylum and international protection. The Constitutional Court of the Czech Republic has never found Article 104a of the Code of Administrative Justice governing the

59 Kühn et al., 2019, p. 964.

unacceptability to be unconstitutional in its decision-making activities.[60] The constitutionally guaranteed right to a fair trial does not *a priori* include the right to a two-instance trial; this right cannot be derived from the Convention on the Protection of Human Rights and Fundamental Freedoms. Therefore, it is up to each state whether, in a specific case, the parties are allowed to review the decision of the court of first instance and, if so, to what extent and for what reasons. A cassation complaint is classified as an extraordinary remedy, and therefore, it is the legislator's legitimate right to define not only the reasons for which it can be filed but also to determine its acceptability.[61] Therefore, it can be concluded that the unacceptability of a complaint violates the basic rights of applicants for international protection and does not lower the standard of their protection. From the perspective of *de lege ferenda*, this article can be concluded by stating that inacceptability is a suitable and functional tool within the decision-making activity of the highest courts and should continue to be preserved both for the judicial review of the asylum agenda and other public administration agendas.

60 Decision of the Constitutional Court of 9 November 2006, No. I. ÚS 597/06, decision of the Constitutional Court of 29 March 2007, No. III. ÚS 529/07; decision of the Constitutional Court of 15 October 2009, No. IV. ÚS 1850/09; or the decision of the Constitutional Court of 3 January 2017, No. I. ÚS 2334/16 [Online]. Available at: https://www.usoud.cz/vyhledavani-rozhodnuti-us (Accessed: 1 September 2023).

61 Šimíček, 2006, p. 201.

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