

**CITIZEN
RIGHTS**

**CLAIM YOUR
RIGHTS**

European Alternatives (EA) is a transnational civil society organisation and citizen movement promoting democracy, equality and culture beyond the nation state.

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- > Hungarian Europe Society
- > Insitutul European din Româna
- > Krytyka Polityczna
- > Move BG
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CITIZENRIGHTS
EUROPEAN ALTERNATIVES



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INTRODUCTION

A vast gap exists between the rights guaranteed by the EU and the exercise of these rights. Unclear laws, disempowerment or fear of reprisal can prevent people from knowing and enjoying their rights.

In the Citizen Rights project we want to look at how, when and where people in the EU can individually and collectively protect and advance rights. We also want to see where they are limited from exercising their rights and how transnational collaboration can imagine and build a future where rights are actively protected.

This eBook represents part of the research generated by this project into the role of the EU in protecting citizen rights and highlights areas where legal rules are in place to protect the rights of citizens, as well as gaps in that protection. It also draws out cases where the courts have taken decisions affecting the rights of people living in the European Union.

Through the topics and cases highlighted within this eBook we can clearly see that while the EU has a legal framework in place that goes some way in protecting citizenship and fundamental rights, the limitations on where the EU can and cannot act with regards to rights protection limits the ability of the EU to fulfil its founding values of “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.”

This eBook is designed for those who are new or seeking to get reacquainted to the topic of citizen rights in Europe and would like to know more. It is designed to be used for educational purposes and can be read with the educational toolkit, also produced by European Alternatives within this project and found on our website. Each topic includes a summary (Know), a more detailed explanation (Understand) and a case study illustrating the topic.

AUTHORS

This material was produced based on research conducted by the Centro di Eccellenza Altiero Spinelli, Consiglio Nazionale delle Ricerche and the Institutul European din Româna and summarised by staff members of European Alternatives.

The full case studies are available online at citizenrights.euroalter.com and in a forthcoming academic eBook.

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**DIGITAL
PRIVACY**

TOPIC 1: DIGITAL PRIVACY

Know

The dramatic expansion of the internet over the past twenty years has presented us with new challenges regarding human rights, specifically the balancing of the rights to freedom of the media and freedom of expression on the one hand, and the rights to privacy and data protection on the other.

Typing one's name into a search engine, however unknown we may consider ourselves to be, can wield a range of results about ourselves, from social media pages to news and other forms of information. Most of us have a digital identity made up of fragments of the past and present, which persist over time. This digital identity is knowingly or unknowingly used by other actors on the internet for purposes we may not be aware of.

Edward Snowden's revelations in 2013 about the surveillance programmes operated by the US' National Security Agency and the UK's GCHQ¹ have heightened concern about the protection of our right to privacy and data protection in Europe.

Both the right to a private life and the right to data protection are protected under EU law and the European Convention on Human Rights. Neither are absolute though – your right to privacy and data protection may be limited in certain circumstances. Making use of these exceptions, government surveillance programmes have relied on national security to justify intrusions into privacy. These restrictions have been made all the more difficult to question as information on these limitations is kept secret. The development of the right to be forgotten also raises serious questions over the role of private companies in deciding when a right has been violated

Understand

The right to privacy and the right to data protection are protected under the EU's Charter of Fundamental Rights in Articles 7 and 8 respectively. The right to a private life is also protected in the European space and in all EU countries under Article 8 of the European Convention on Human Rights. Data protection is regulated throughout the EU under the Data Protection directive, passed in 1995, which required EU member states to pass national laws on data protection.

The 1995 Data Protection Directive ensures that individuals have strong rights over the processing and controlling of data concerning them, including the right to object to the processing of data and the right to access data. The "controller" of the data must ensure that information is collected for "specific, explicit and legitimate purposes," and must make every effort to ensure that the data is accurate, and rectify or erase it if it is not. The Data Protection Directive does however impose the obligation of Member States to provide a number of exceptions in cases of public interest, for example the same data protection standards do not apply in instances of journalistic or artistic or literary expression.

Recent rulings by the European Court of Justice have stated that, "the right to data protection is not ... an absolute right but must be considered in relation to its function in society," and should be measured using the principle of proportionality. Freedom of expression in particular often comes into conflict with the right to data protection, given its nature as another fundamental right which, in contrast to the prohibition of torture or slavery say, is not absolute and instead has to be "viewed in relation to its social purpose."

The EU's data protection regime is also going through a process of revision. In 2012 the European Commission proposed a new data protection regulation, which would seek to harmonise the way member states deal with data protection, explicitly include the right to be forgotten and obliging non-European firms offering services to Europeans to conform with EU data privacy rules.²

When can my data be collected?

> Your data can only be processed if it is based on one of the following criteria: your consent, necessary for a contract, in your vital interests, in the legitimate interests of others (but only so long as your fundamental rights do not override this legitimate interest), or where it is in the public interest.

> Sensitive data has a stricter requirement for consent to be explicit and does not allow collection of data solely for a contract. Sensitive data includes information on your racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership or information on health or sex life.

1 <http://www.theguardian.com/world/interactive/2013/nov/01/snowden-nsa-files-surveillance-revelations-decoded#section/1>

2 <http://ec.europa.eu/justice/data-protection/>

> It must be lawfully collected, which means not only that a specific law exists which allows the governmental body or company to collect your data, but that the law must be for the one of the purposes listed in the Directive or for the rights and freedoms of others. It must also be necessary in a democratic society, which means that the data collection corresponds to a pressing social need and the way is proportionate to the purpose.

> The purpose of collecting the data must be specifically and visibly defined before data is collected. Collecting data for an unspecified purpose is unlawful. Transferring data to a third party requires a legal basis.

> Only data that is adequate, relevant and not-excessive for its purpose should be collected and data must be chosen based on the declared aim. The person collecting the data must also check that it is accurate and up-to-date. Importantly, data must not be kept in a way that allows persons to be identified for longer than is necessary for the purposes of the data collection. It can however be kept for longer if anonymised.

> People holding your data must keep you informed about how your data is being used and as far as possible, must act in a way which promptly complies with your wishes towards your data.

> Persons holding your data have an obligation to protect the security and confidentiality of that data. Telecommunications providers are obliged to tell you if your data security has been breached.

What rights do I have under the data protection directive?

You have the right to:

> be informed if any person or company is holding your personal data in their files (websites, databases, service providers, etc.)

> correct or delete your data if it is incomplete or inaccurate

> be fully informed and give your agreement if a website wishes to store and retrieve information from your computer or to track you when you're online

> confidential online communication (e.g. e mails)

> be notified if your personal data held by a service provider has been lost, stolen or otherwise disclosed, and your privacy is likely to be adversely affected

> not be sent unsolicited advertising (spam).

Case Study 1:

The Right to be Forgotten

Background

Very few people can claim to lack a digital footprint. This can often be a mix of social media and information about us from events we've participated in, things we've accomplished and, on occasion, news reports about us. All of this information can be easily found through search engines.

It was Mr Costeja González's dissatisfaction with his digital identity, which led to the European Court of Justice ruling that we have a right to be forgotten.³

Case

Mr. González objected to the fact that using Google to search for his name led to the appearance of two notices for the auction of his house, which was being sold to cover his social security debts. These notices had been listed on a Spanish newspaper more than 10 years before his complaint and the debts had been settled. However due to their prominence on Google, these notices were causing him professional problems.⁴

Process

Mr. González made two requests to the Spanish Data Protection Authority in 2010. Firstly to take down the notice from the newspaper's website, the second to require Google Spain and Google Inc. to take down the link from their search engine.

The Spanish Data Protection Authority refused his request to order the newspaper to delete the notice, as it had been posted lawfully, but agreed with him that the links should be deleted from the Google search. Google Spain and Google Inc. appealed the case to Spain's highest court, which asked the European Court of Justice to rule on the issue.⁵

Decision

On the 13 May 2014, the European Court of Justice firmly ruled that we have a right to be forgotten and agreed with the Spanish Data Protection Agency that Google Inc. and Google Spain should delete the links of Mr. González.

The judges did not require that data is deleted automatically after a certain time, but instead that we each have a right to have links to information deleted when that information is "inadequate, irrelevant or no longer relevant, or excessive."

In practical terms, the Google case led the company, and several others like Bing, to launch a new de-listing request system. An online form has been made available to individuals of the 28 EU Member States where Internet users can request the removal of a link to certain information they consider "inadequate, irrelevant or no longer relevant." Google has appointed a team of legal experts to assess the validity of each individual case, depending on criteria such as age of the material and the interest of the public to access the content. If the request is approved, then Google sends a notice to the Webmaster for the site informing them that the article will be de-linked to a person's name in Google. The information remains online and may still be found through a search engine based on a different query. For example, a document entitled "Alexander Dalkirk questioned over burglary at 94 Old Road" may be removed as a result under "Alexander Dalkirk" but would still appear under a search for "burglary at 94 Old Road." Contrarily to what the name suggests, therefore, an article is not "forgotten," it is just made a little more difficult to find. So far, Google has had over 230,000 requests to remove information, of which around 60% have been rejected.⁶

3 <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1427291304831&uri=CELEX:62012CN0131>

4 <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1427291304831&uri=CELEX:62012CN0131>

5 <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1427291304831&uri=CELEX:62012CN0131>

6 <http://www.google.com/transparencyreport/removals/europeprivacy/?hl=en-US>

Assessment

This decision proved to be controversial⁷ and was criticised not only by search engine providers, but also freedom of expression⁸ and human rights advocates in general.⁹

Legal criticism¹⁰ has focused around the lack of clarity of the ECJ ruling with regard to the “right to be forgotten”, which creates many uncertainties when enforcing the ruling. The Court’s overly broad definition of “data controllers” and the court’s balancing test, which seems to prioritize- and not “balance”- the right to privacy over other fundamental rights, have been highlighted as areas of concern.

The ruling is also unclear about the obligations of search engines and intermediaries other than Google. What exactly constitutes a “search engine”? Google currently controls almost 90% of the market place for search operators but the ruling is sufficiently broad that it could affect other smaller companies, sometimes with a more specialized search focus, who have fewer resources to deal with the “right to be forgotten”. Similarly, the ruling asserts that the “right to be forgotten” may be limited “according to the role played by the data subject in public life,” but again this boundary between a public and private figure is difficult to ascertain.

Beyond legal criticism, the criticisms focus on the potential negative impact of the ECJ ruling. Critics fear that the ECJ’s ruling will lead to “silent encroachment.”¹¹ The ability of individuals to request delisting has raised concerns that this might lead to an airbrushing of information which is of interest to the public, for example inconvenient facts relating to public officials. Since anyone is entitled to request information to be de-linked, fears of auto-censorship and the re-writing of history have been raised.

The difficulties associated with the implementation of the “right to be forgotten” have also been highlighted, from dealing with the avalanche of potential requests to determining a coherent stance with rest of the world on the “right to be forgotten”.¹² With the Court’s decision, the role of search engines has been substantially redefined to become adjudicators of fundamental rights. Google has ceased to be a mere “intermediary” immune from data protection obligations, and instead has to play an active role in ensuring that individuals can have some control over their digital identity.

On the other hand, the decision was welcomed by individuals who have been critical of the way the internet magnifies part of our lives through search engines, at the expense of other parts of our lives. It has also been welcome by NGOs and the European Commission¹³ for the role it could play in enabling teenagers to control their digital identity.

7 <http://www.theguardian.com/commentisfree/2014/jul/02/eu-right-to-be-forgotten-guardian-google>

8 <http://www.telegraph.co.uk/technology/wikipedia/11015901/EU-ruling-on-link-removal-deeply-immoral-says-Wikipedia-founder.html>

9 <http://www.bigbrotherwatch.org.uk/2014/05/ecj-ruling-provide-right-forgotten/>

10 <http://hrir.oxfordjournals.org/content/14/4/761.full>

11 <http://www.economist.com/news/leaders/21602219-right-be-forgotten-sounds-attractive-it-creates-more-problems-it-solves-being>

12 <http://www.nytimes.com/2014/05/15/opinion/dont-force-google-to-forget.html>

13 http://europa.eu/rapid/press-release_SPEECH-12-26_en.htm

2

**LGBTQI
RIGHTS**

TOPIC 2: LGBTQI RIGHTS

Know

The Charter of Fundamental Rights and the EU's Directive 2000/78 explicitly prohibit discrimination on the basis of sexual orientation in certain circumstances. Article 21 of the Charter states that: "Any discrimination based on the grounds of... sexual orientation shall be prohibited." Trans persons are less explicitly protected in EU law – trans discrimination¹⁴ is prohibited under the grounds of 'sex' under the Charter of Fundamental rights, with the 2006 Gender Equality Directive prohibiting discrimination in employment on the grounds of gender reassignment.¹⁵

All EU member states have made it illegal to discriminate on the basis of sexual orientation in the workplace, as well as in implementing EU rights and laws. As of 2014, 24 EU member states¹⁶ had prohibited discrimination on the basis of sexual orientation beyond just in the workplace.

EU laws do not however extend to prohibit discrimination against trans persons or on the basis of sexual orientation beyond the field of employment. Many countries in Europe¹⁷ require transgender persons to be sterilised to change their gender, while some countries in Europe do not legally recognise the gender identities of transgender persons. Same-sex marriage and adoption is not possible in all EU member states and they do not have to recognise same-sex marriages conducted in other EU countries.¹⁸

Violence and discrimination¹⁹ against persons identifying as LGBTQI occurs across the EU. A number of EU member states do not include sexual orientation and gender identity as grounds for hate crimes.

Understand

Alongside rights such as freedom of movement, the Treaty on the Functioning of the European Union (TFEU), through Article 19 paragraph 1 also includes the right to non-discrimination on the grounds of sexual orientation. It allows the European Union to adopt legislation aimed at combating sexual orientation discrimination, as long as it falls within its areas of responsibility.

Directive 2000/78/EC (2000) established a general framework for equal treatment in employment and occupation. This directive aims to protect European workers from any form of discrimination resulting from sex, age, race, sexual orientation etc. This was strengthened by the Lisbon Treaty, which elevated the Charter on Fundamental Rights to the same status as the other treaties and which prohibits 'any discrimination based on the grounds of... sexual orientation.'

Directive 2000/78/EC represented an important step in the prohibition of discrimination on sexual orientation in the workplace, as many European states did not at the time have adequate anti-discrimination laws. Directive 2006/54/EC further extended this to cover discrimination based on sex in the workplace, explicitly stating that this covers discrimination arising from gender reassignment.

The Commission's report on Directive 2000/78/EC²⁰ and Directive 2006/54/EC²¹ state that to date all member states have for the most part implemented both Directives. Nevertheless the report on Directive 2000/78/EC points out that some difficulties remain in implementation, while the report for Directive 2006/54/EC highlights that only four member states have explicitly prohibited discrimination on the grounds of gender reassignment, with other states relying on broader terms.

These Directives however only cover discrimination relating to the workplace and do not require member states to prohibit discrimination on the grounds of sexual orientation or gender identity in other fields.

A 2012 LGBT survey²² conducted by the European Union's Fundamental Rights Agency found that many LGBTQI persons face discrimination and violence.

¹⁴ http://fra.europa.eu/sites/default/files/fra-2014-being-trans-eu-comparative_en.pdf

¹⁵ http://fra.europa.eu/sites/default/files/fra-2014-being-trans-eu-comparative_en.pdf

¹⁶ <http://fra.europa.eu/en/speech/2014/tackling-sexual-orientation-and-gender-identity-discrimination-next-steps-eu-and-member>

¹⁷ <http://tgeu.org/trans-rights-europe-map-2015/>

¹⁸ http://europa.eu/youreurope/citizens/family/couple/marriage/index_en.htm

¹⁹ <https://www.amnesty.org/en/countries/europe-and-central-asia/report-europe-and-central-asia/>

²⁰ http://ec.europa.eu/justice/discrimination/files/com_2014_2_en.pdf

²¹ http://ec.europa.eu/justice/gender-equality/files/gender_pay_gap/com-2013-861-final_en.pdf

²² <http://fra.europa.eu/DVS/DVT/lgbt.php>

> Between 1/5 and 3/5 trans people reported that they felt that had been discriminated or harassed due to being perceived as transgender.

> In some countries, 2/5 people surveyed reported that they avoid being open about themselves as LGBT out of fear of harassment or violence

> Across the EU between 36% and 79% of people surveyed avoid holding hands with their same sex partner in public out of fear of being assaulted, threatened or harassed.

A proposed directive on equal treatment²³ between persons irrespective of religion or belief, disability, age or sexual orientation outside of the workplace has been under discussion since 2008, but has not yet been passed.

Case Study 2:

The right to non-discrimination in employment

Background

European Union rules require national parliaments to pass laws that prohibit discrimination on the grounds of sexual orientation. While national courts should then enforce and interpret the laws passed by the national parliament, because the laws originate from the European Union rules and it has a duty to make sure that its rules are applied consistently, cases can be referred to the European Court of Justice when the original rules are considered unclear.

It was due to a lack of clarity on rules prohibiting discrimination on the grounds of sexual orientation involving a football club, that this case was referred from the Romanian courts to the European Court of Justice²⁴

Case

The case was brought by Accept, a Romanian NGO that works to protect and promote the rights of LGBT people against the Romanian National Council against Discrimination (CNCD).

The case began with the comments of Mr Becali, shareholder and manager of FC Steaua football club, who during an interview referring to the possibility of transferring a professional footballer of alleged homosexual tendencies to his team, announced that he would never allow his team to hire a homosexual player. Mr Becali justified his argument by claiming that it was not about discrimination and that no one could force him to hire a specific person.

The football team did not disassociate itself from these comments and the player in question never signed the contract.

Process

Mr Becali's comments were referred to the CNCD by Accept, who alleged that there had been direct discrimination based on sexual orientation.

The CNCD investigated the case and determined that the case in question did not fall within the scope of an employment relationship since Mr Becali was not an employer nor was he in charge of hiring players at FC Steaua. They did however find that Mr Becali had issued statements that could cause harassment, but taking into account that the events had occurred six months previously, they just issued him with a warning.

Accept appealed this decision to the Bucharest Court of Appeal, who referred the case to the European Court of Justice. The main questions it asked were:

> Can the equal treatment directive be applied in cases where statements come from a shareholder of a football team who, despite being perceived as the "main leader", does not legally have the right to decide who to hire and who not to?

> To what extent can Mr Becali's statements be considered a form of direct or indirect discrimination?

²³ <http://www.socialplatform.org/news/state-of-play-of-the-blocked-equal-treatment-directive/>

²⁴ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62012CJ0081:EN:HTML>

> To what extent does FC Steaua have to prove there was no discrimination?

> How does the time period affect the decision?

Decision

On the 25 April 2013 the European Court of Justice ruled on a number of points:

> The player in question did not need to bring the case himself. Accept had a legitimate interest in bringing the case, as discrimination does not need to be directed at a specific person

> The facts of the case indicate direct discrimination took place. Direct discrimination is where one person is treated less favourably than another is, has been or would be treated in a comparable situation on the grounds prohibited in the EU directive

> The status of Mr Becali as the 'patron' of the club, even though he didn't have hiring power, means that the anti-discrimination rules apply, especially as the football club did not distance itself from the remarks

> An employer is required to show that it does not discriminate on the basis of sexual orientation when a complaint is raised

Assessment

This decision made it clear that the European Union rules prohibiting discrimination on the grounds of sexual orientation in employment apply even when if a statement is made only at the abstract level, which prevents or makes it more difficult access to employment.

An example of the results of this is a case brought to the Italian Court of Bergamo, Employment Division, of August 6, 2014 by the Association Advocacy for LGBT Rights Rete Lenford.²⁵ In this case, a lawyer made a statement on a radio show that he would never hire homosexual workers in his firm. In the proceedings, he claimed that this statement was 'purely abstract' and he had uttered the statements as a private citizen and not as an employer. The judge used the *Asociația Accept* case to help clarify EU law and found that the lawyer's statement was direct discrimination in access to employment and against EU rules on discrimination. The judge reiterated that discrimination is not affected by the lack of a person and that the lawyer's arguments were not enough to prove his innocence.

²⁵ <http://www.altalex.com/download.php?idnot=68849&idstr=0&n=0&t=pdf>

3

LABOUR AND SOCIAL RIGHTS

TOPIC 3: LABOUR AND SOCIAL RIGHTS

Know

The Treaty on the Functioning of the European Union and Treaty on European Union, the two core EU treaties, list a number of requirements with respect to labour and social rights, including the overall objective to protect social rights and the obligations to improve working conditions, public health and to combat social exclusion.

The European Charter of Fundamental Rights²⁶ includes the rights to social security, unemployment assistance, pensions, social and housing assistance and healthcare, in certain circumstances. The European Convention on Human Rights does not cover social rights, however the European Court of Human Rights has given a number of judgements where social rights are related to other rights, such as the rights to family life and the prohibition on torture²⁷.

EU law mostly leaves the determination of who can apply for social protections and benefits to national rules however and focusses on trying to harmonise and ensure equal treatment for EU citizens accessing social rights outside their country of nationality.²⁸

In the wake of the financial crisis and the austerity measures introduced in many European countries since 2009, social rights and protections have been negatively affected in many European countries.

In 2015 a report²⁹ prepared for the European Parliament found that austerity in the EU is having a fundamentally negative effect on the protection of both economic, social and cultural, and civil and political rights.

In Cyprus, Greece, Ireland, Italy, Spain and Portugal it found there was an increase in job losses, part-time and temporary employment and working hours, and a decrease in unemployment protection and wages. All of these affected the right to engage and remain in employment under fair conditions, particularly for women, young workers, people with disabilities, migrants, Travellers, low-paid workers, retired and single people.

It also found that measures such as the reduction in the number of teachers and schools, and the restriction of some services for vulnerable groups, such as children with disabilities, Roma children and children of migrants, had negatively affected the right to education.

Austerity measures in the same countries had affected the right to healthcare, particularly in Greece and Cyprus, according to the report. These measures led to reduced access to healthcare, including preventative medicine, increased costs and waiting times, and shortages in supplies of medicine. The report found that a number of groups were disproportionately effected by the measures, including: poor and homeless people, older people, people with disabilities and their families, women, and undocumented migrants.

Pensions have also been negatively affected, according to the report, particularly in terms of decreased state spending on pensions and decreased living standards for pensioners.

Understand

Art. 3 of the Treaty on European Union (TEU) states that the Union should combat social exclusion and discrimination, promote social justice and protection, equality between women and men, and solidarity between generations.

Art. 151 of the Treaty on the Functioning of the European Union (TFEU) sets out that the Union and its Members shall have as their objectives the promotion of employment, improved living and working conditions, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment, and the combating of exclusion.

The European Charter of Fundamental Rights includes recognition of an entitlement to social security and social assistance benefits, including maternity leave, unemployment assistance and pensions, for EU citizens, wherever they live, according to EU and national laws. It includes the rights to social and housing assistance for all who lack sufficient

²⁶ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12010P&from=EN>

²⁷ http://www.echr.coe.int/Documents/FS_Health_ENG.pdf

²⁸ <http://ec.europa.eu/social/main.jsp?catId=850&langId=en>

²⁹ [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510021/IPOL_STU\(2015\)510021_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510021/IPOL_STU(2015)510021_EN.pdf)

resources, of access to preventative health care and to benefit from medical treatment.³⁰

Despite the treaties and charter articles listed above, EU regulations and directives (laws) have not translated these into detailed rules that are binding on EU member states. Rather these are left to the national governments, with the EU focussing on ensuring that there is no discrimination based on nationality in employment and when member states provide social protections and on policies and actions to promote the protection of these rights.

Decent working conditions and unemployment protection

Art. 153 of the TFEU sets specific obligations for the Union to implement Art. 151, including improving working conditions and social security, improving the conditions for non-EU passport holders and combatting social exclusion. Arts. 27-31 and 34 of the Charter of Fundamental Rights contains a number of workers' rights, including the rights to information and consultation in the workplace, to collective bargaining, to protection from unfair dismissal and to fair and just working conditions, including maximum working hours, daily and weekly rest and annual paid leave. It includes recognition of the entitlement to social security assistance in cases of loss of employment.

Under EU rules, if you move from one EU country to another, you are entitled to the same unemployment benefits³¹ as persons with the nationality of that country. While the rules are not the same in each country for how long you should work to qualify for unemployment benefits and often there are different time periods that people must work before qualifying for those benefits, the country you move to must consider the time you have worked in other EU countries as part of that time period. EU rules also allow citizens to continue receiving unemployment benefits for 3-6 months in another EU member country, while they look for a job in that country.

EU rules, however, are not aimed at taking measures to address unemployment, precarious employment and low paid work across the EU, all of which represent challenges to the right to fair and just working conditions.

In May 2015, Eurostat³² estimated that the unemployment rate in the EU-28 was at 9.6 % and 10.3% in the Eurozone. Youth unemployment (under 25) stood at 20.6% in the EU-28 and 22.1% in the Eurozone. In Greece however, youth unemployment stood at 49.7 %, in Spain at 49.3 %, in Croatia at 43.6 % and in Italy at 41.5 %.

A 2012 report³³ prepared for the European Commission noted a rise in precarious work – particularly involuntary part-time work and fixed term contracts across the 12 member states it assessed, which included both older and newer EU countries. It also highlighted that informal work appears to be growing in Greece, Spain, Italy, Latvia and Bulgaria. The use of temporary agency work, creating an intermediary between the employer and employee also appeared to be increasing, with hospitality, construction, agriculture, retail and cleaning the sectors most perceived to employ people precariously and undocumented migrants, women and young workers most at risk of precarious employment.

Healthcare

Art. 168, TFEU requires the Union to take action directed towards improving public health and Art. 35 of the Charter of Fundamental Rights includes the right of access to preventative health care and the right to benefit from medical treatment under conditions established by national laws and practices.

The EU doesn't directly intervene to set national healthcare policy, rather it takes a coordination role³⁴ in ensuring that EU citizens exercising the right to freedom of movement are protected under the same conditions of nationals when they move to a different member state.

In 2014 the European Council³⁵ noted with concern that the financial crisis was affecting the ability of EU countries to provide access to healthcare and social protections, particularly in light of Art. 168 of the Treaty on the Functioning of the European Union. In addition to the issues highlighted in the report to the European Parliament (above), a 2014 report by EuroFound³⁶ highlighted that austerity measures are introducing new groups who are vulnerable to poor healthcare due to increased unemployment, changes in the system and increased discrimination and xenophobia. It also found that cuts of services in one part of healthcare systems were leading to strains on other parts – such as increased use of inpatient care as families become increasingly unable to care for family members at home and increased use of emergency care as a cheaper or more available option than a GP visit.

³⁰ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12010P&from=EN>

³¹ <http://ec.europa.eu/social/main.jsp?catId=862&langId=en>

³² http://ec.europa.eu/eurostat/statistics-explained/index.php/Unemployment_statistics

³³ <https://www.google.de/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=>

³⁴ <http://ec.europa.eu/social/main.jsp?catId=859&langId=en>

³⁵ http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/lsa/143283.pdf

³⁶ https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1442en.pdf

Education

Article 165(1), TEU states that the Community shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity. Art. 14 of the Charter of Fundamental Rights states that everyone has the right to education and to have access to vocational and continuing training.

As in the other areas discussed here, the EU has not introduced rules within the field of education that would influence national policy, rather it has focussed on coordinating education mobility and developing education policy³⁷ across member states, this includes areas such as the ERASMUS programme, ensuring that member states do not discriminate on the basis of nationality in education for EU citizens and addressing recognition of qualifications between member states.

In addition to the problems mentioned with realising the right to education in the European Parliament report (above), funding for universities³⁸ in many EU member states has been cut since 2008, while tuition fees have risen.

Pensions

Art. 34 of the Charter of Fundamental Rights recognises the entitlement to social security benefits and social services providing protection in old age. The EU has introduced rules to set out how persons who have worked in multiple EU countries can claim their pensions and how people can claim their pensions when retiring in another EU country, however does not directly intervene in national pension rules.

Case Study 3: Religious education in schools

Background

There is no EU obligation to provide religious education in schools, however with the exception of one member state, all EU countries do provide classes on religion. The EU's Charter on Fundamental Rights does guarantee everyone's right to freedom of thought, conscience and religion, but it can only be used in education when the EU acts in the field of education and currently it does not have the competence to intervene in national educational curricula.

All EU member states are required however to be a member of the Council of Europe and to join the European Convention on Human Rights, which does apply to national education policy. It was therefore the European Court of Human Rights that applicants turned to when they felt that their freedom of religion had been violated in the case of *Grzelak v Poland*.³⁹

Case

The Grzelak family, composed of spouses Urszula and Czesław, and their son, Mateusz, lived in Sobótka, Poland, at the time the application was lodged with the European Court of Human Rights. In 1998, when he was seven, Mateusz Grzelak began at his primary school and, according to the option expressed by his parents, who were agnostics, he did not attend "religion" classes.

The Grzelak spouses submitted repeated requests for their son to follow the classes of the subject "ethics" instead – which was an option, but their applications were dismissed on the grounds that Mateusz was the only child in his class who had submitted such a request. Since it was impossible for Mateusz to follow the alternative course and religious education classes were scheduled in the middle of the school day, between other compulsory courses, he had to wait during that time in the corridor without any supervision or to spend his time in the school library or in the school club.

The Grzelak's maintained that their son was subjected to discrimination because of this: he received a dash instead of a mark in his transcript for religion and was subject to physical and psychological harassment by other pupils for not attending religious education classes. For that reason, the child was repeatedly moved to other schools in the same town.

After several unsuccessful requests addressed to the headteachers of the schools, the Grzelak's sent a letter to the

³⁷ http://ec.europa.eu/education/policy/index_en.htm

³⁸ <https://www.timeshighereducation.com/news/how-is-austerity-impacting-on-europes-universities/2016464.article>

³⁹ hudoc.echr.coe.int/eng?i=001-99384

Ministry of Education. The Ministry replied that ethics classes were organised at the parents' request and where they did not take place, it was for organisational reasons only, due to the low numbers of students wanting to take ethics classes.

Process

The Ministry however referred the question on whether the dash instead of a mark in the transcript was constitutional to Poland's constitutional court, which found that it did not breach the right to freedom of religion in Poland's constitution.

The Grzelak's were unhappy with this and took the case in 2002 to the European Court of Human Rights, claiming that the Polish state had violated their rights to freedom of religion and non-discrimination.

Decision

On the 15 June 2010, the European Court of Human Rights ruled that Mateusz Grzelak's right to non-discrimination and freedom of religion had been violated.

They stated that freedom of religion also means freedom not to have a religion and not to have to reveal whether one has a religion or not.

They decided that the absence of a mark in the religion/ethics class line and the fact that ethics was crossed out from his final certificate, would lead people to believe that he did not have a religion and restrict his religious freedom and therefore was not compatible with the European Convention on Human Rights.

Assessment

On 25 March 2014, Poland amended its education rules. The amendment provided for a new rule, obliging the authorities of a school to organise a religion/ethics course, even if there was only one request to this effect. Pupils who reached the age of majority or parents of minor pupils (on behalf of their children) were required to submit a written request mentioning that they wished to attend such a course, avoiding any requirement to opt out of a religious or ethics class.

Beyond Poland, this judgement reaffirmed that European countries have an obligation to not only allow passively for freedom of religion and freedom to not have a religion, but also are obliged to take measures to ensure that persons are not forced to reveal their religious beliefs and to take positive steps to avoid situations where those with or without a religion are treated differently in education.

4

MIGRATION

TOPIC 4: MIGRATION

Know

Migration is an area where the EU sharply divides persons who have an EU passport (a passport of one of the EU member states) and those who do not.

Under the EU treaties, those with an EU passport⁴⁰ have the right to freedom of movement and residency in any other EU country under certain conditions, to vote for and stand as a candidate in EU and municipal elections even when living outside one's country of origin, to protection from the embassies of other EU countries when outside the EU and to petition the European Parliament and complain to the European Ombudsman.

The rights contained in the Charter of Fundamental Rights only apply when the EU is acting or when a member state is implementing EU rules. However, when the rights apply, they apply to everyone living in the EU.⁴¹ This means that whether or not someone has an EU passport, the EU institutions, including the three main institutions; the Commission, Parliament and Council, but also other institutions, such as Frontex⁴² (responsible for EU border security), the European Asylum Support Office (responsible for coordinating common European asylum policy) and Europol⁴³ (responsible for coordinating police actions), must be in compliance with the Charter.

Freedom of movement is perhaps the most well-known right in the EU. Under the EU treaties, this provides everyone with an EU passport with the right to move from their home country to another EU country for up to three months and to remain there indefinitely if they are employed or self-employed, students or can support themselves financially, under the same conditions as nationals of that country. This also includes the right for to bring family members with you to the new country, including family members who do not hold an EU passport (for students this right is limited). It also means that you can also claim social assistance, should you become unemployed in the country, under the same conditions as nationals. This right to social assistance is limited by a requirement not to become an unreasonable burden on the social assistance system. The Schengen Zone⁴⁴ has extended freedom of movement to include the ability to travel without having to show travel documents between some EU member states.

Outside of this, the largest area of EU level cooperation in the field of migration is on asylum. Beginning in 1999, the Common European Asylum System is primarily built around:

- > the Dublin Regulations⁴⁵, which state that persons seeking asylum should apply in the first EU state they enter and include a common European fingerprint identification system for asylum seekers,
- > the Qualification Directive⁴⁶, which lays down common minimum grounds for EU member states to grant refugee protection,
- > the Reception Conditions Directive⁴⁷, which includes rules on when it is possible to detain asylum seekers, rights to legal assistance to challenge detention, rules on access to food, health care, housing and employment, as well as medical and psychological care for asylum seekers,
- > the Temporary Protection Directive⁴⁸, which is designed to give immediate and temporary protection in times of humanitarian emergency. The EU has never used this mechanism.

This system has faced criticism. The Dublin Regulations⁴⁹ have been criticised for causing delays in assessing asylum claims, excessive use of detention to return asylum seekers, and increasing pressure in states at the EU's borders. There is also still a large difference in acceptance⁵⁰ rates between EU countries, despite the Qualification Directive, and in many EU member states asylum seekers are not provided with an acceptable standard of living and adequate housing⁵¹.

⁴⁰ <http://ec.europa.eu/justice/citizen/>

⁴¹ <http://fra.europa.eu/en/about-fundamental-rights/frequently-asked-questions>

⁴² <http://frontex.europa.eu/>

⁴³ <https://www.europol.europa.eu/>

⁴⁴ http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/index_en.htm

⁴⁵ http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/examination-of-applicants/index_en.htm

⁴⁶ http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/refugee-status/index_en.htm

⁴⁷ http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/reception-conditions/index_en.htm

⁴⁸ http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/temporary-protection/index_en.htm

⁴⁹ <http://www.ecre.org/topics/areas-of-work/protection-in-europe/10-dublin-regulation.html>

⁵⁰ <http://www.ecre.org/topics/areas-of-work/protection-in-europe.html>

⁵¹ <http://www.ecre.org/topics/areas-of-work/protection-in-europe/36-reception-conditions.html>

Fundamentally, the system has been criticised for focusing on preventing irregular entry to the EU ⁵²over facilitating asylum claims, with at least 3,500 people drowning ⁵³ while trying to cross the Mediterranean Sea in 2014.

Undocumented migrants are also subject to EU wide coordination. Under the Returns Directive⁵⁴, persons who enter the EU without the proper papers and who do not qualify for asylum, are banned from re-entry to the EU within 5 years – even if their circumstances change, and allows for the detention of undocumented migrants for up to 18 months without a crime being committed. The EU also has a number of readmission agreements ⁵⁵with states on the EU border to facilitate the speedy return of undocumented migrants and failed asylum seekers when they have used the non-EU state as a transit country.

Understand

Free movement of persons is a fundamental principle of the EU, established under Article 45⁵⁶ of the Treaty on the Functioning of the European Union. The Charter of Fundamental Rights in Articles 15 and 45⁵⁷ also include the right for EU citizens to work in another EU member state under conditions equivalent to nationals of that member state. Article 18⁵⁸ of the Charter includes the right to asylum, in accordance with the Refugee Convention⁵⁹.

Freedom of movement

Freedom of movement, as mentioned above, is a right for EU citizens who comply with specific conditions, including to search for employment, to take up employment, to study and when the person can afford to live from their own resources.⁶⁰

When you move to another country to live under one of these conditions, this activates a number of other rights and these rights still apply when you return to your home country. This includes the right to have a family member⁶¹ who does not have an EU passport to move with you and for them to live and work under the same conditions as EU passport holders, including having the right to permanent residence after 5 years and under certain conditions to stay if your family circumstances change, for example through divorce.

Member states however have retained the right to set their own migration policies for non-EU citizens where no EU freedom of movement rights are involved. This means that each country can set its own criteria for non-EU passport holders to receive a work visa in their country and can set the rules allowing their own citizens to bring a family member who doesn't hold an EU passport to their country. As an example, Danish citizens are only allowed to bring their non-EU spouse to live in Denmark if they have the financial means to support them and Denmark is the country where both spouses combined have the strongest ties⁶². This high threshold has led to a number of Danish citizens with a non-EU spouse moving to Sweden to bring into play the less strict EU and Swedish migration rules.⁶³

Common European Asylum System

The most visible parts of the Common European Asylum System are often the Dublin Regulations, which set out the rules for where an asylum seeker should apply for refugee status in the EU, and actions taken by EU member states to police the EU border.

The basic rule of the Dublin Regulations is that the country in which an asylum seeker enters the EU should be the one responsible for processing their asylum claim. This system has been criticised for encouraging excessive detention of asylum seekers to deport them back to the country in which they entered the EU, the separation of families and pressure on member states in the south of Europe.

Frontex⁶⁴ is the EU agency responsible for coordinating the policing of the EU's borders. Since 2013, there has been a large increase in the number of asylum seekers attempting to cross the Mediterranean to reach the EU, with 3,419 people

⁵² <http://www.ecre.org/topics/areas-of-work/introduction/35-access-to-europe.html>

⁵³ <http://www.bbc.com/news/world-europe-32376082>

⁵⁴ <http://www.ecre.org/topics/areas-of-work/introduction/40-returns.html>

⁵⁵ <http://ecre.org/component/content/article/70-weekly-bulletin-articles/619-eu-turkey-readmission-agreement-endorsed-by-european-parliament-raises-concerns-amongst-ngos.html>

⁵⁶ <http://ec.europa.eu/social/main.jsp?catId=457>

⁵⁷ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>

⁵⁸ idem

⁵⁹ <http://www.unhcr.org/4ec262df9.html>

⁶⁰ <http://ec.europa.eu/social/main.jsp?catId=457>

⁶¹ http://europa.eu/youreurope/citizens/residence/worker-pensioner/non-eu-family-members/index_en.htm

⁶² https://www.nyidanmark.dk/en-us/coming_to_dk/familyreunification/spouses/spouses.htm

⁶³ <http://www.thelocal.se/20110914/36128>

⁶⁴ <http://frontex.europa.eu/>

dying while trying to enter via this route in 2014.⁶⁵ The EU has undertaken a number of coordinated measures to rescue – and increasingly – prevent those attempting to make the crossing. This coordination⁶⁶ has come in the form of providing some search and rescue operations in the Mediterranean, along with a 2015 plan to use force against persons organising the transport of asylum seekers and migrants across the sea. Several EU member states have recently begun building or re-enforcing walls and fences, ostensibly to prevent irregular migration but which have the effect of also preventing asylum seekers from accessing the EU, including Bulgaria⁶⁷, Hungary⁶⁸ and the UK⁶⁹.

Qualification Directive

The Qualification Directive⁷⁰ requires EU member states to grant refugee status to persons who are suffering certain and defined conditions equivalent to severe human rights abuses based on a particular or perceived characteristic or opinion of them. It also requires member states to grant a form of protection and not return asylum seekers, when there is a real risk of suffering serious harm, such as torture, the death penalty and a threat to their life. For persons claiming asylum, it gives a number of rights.

Acceptance of asylum claims however remains extremely variable across the EU⁷¹. In 2014, asylum approval rates varied from Bulgaria, which accepted 94% of all asylum claims, to Sweden, which accepted 77%, the UK that accepted 39%, Croatia that accepted 11% and Hungary, which accepted only 9% of all claims. The origin of asylum seekers also affected acceptance rates differently in 2014 across the EU: Cyprus, Germany, Sweden, Poland, Bulgaria and the Czech Republic accepted 100% of all Syrians claiming asylum, while Hungary only accepted 65%, Italy 64% and Greece 60%. At the same time Italy approved 94% of all Afghan asylum claims, while Bulgaria and Romania only approved 19%. In other cases, there are extreme outliers. For example, most EU member states approve most Eritrean asylum claims, while France accepts only 15% of Eritreans claiming asylum.

Reception conditions

The Reception Conditions Directive⁷² requires that asylum seekers are provided with material support during their application period, including housing, food, medical care and education. Conditions however can be extremely poor for those seeking asylum. In Italy⁷³ for example, first accommodation centres are often overcrowded and in remote locations., while housing for asylum seekers was attacked in Germany throughout 2014 and 2015⁷⁴.

Detention centres

Detention centres⁷⁵ are being increasingly used for asylum seekers, which limits their rights set out in the Reception Conditions Directive⁷⁶. Conditions within these detention centres have also often been heavily criticised. In the UK for example, the Yarl's Wood detention centre⁷⁷ has faced on-going and official criticism for its poor conditions and excessive detention of asylum seekers.

Access to detention centres is limited in many EU countries, causing concerns about a lack of media and civil society oversight.⁷⁸

⁶⁵ <http://www.independent.co.uk/news/world/europe/the-most-lethal-route-in-the-world-3419-migrants-died-crossing-mediterranean-this-year-9916436.html>

⁶⁶ http://ec.europa.eu/priorities/migration/index_en.htm

⁶⁷ <http://www.nytimes.com/2015/04/06/world/europe/bulgaria-puts-up-a-new-wall-but-this-one-keeps-people-out.html>

⁶⁸ <http://www.theguardian.com/world/2015/jun/22/migrants-hungary-border-fence-wall-serbia>

⁶⁹ <http://www.bbc.co.uk/news/uk-33729024>

⁷⁰ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l33176>

⁷¹ <http://newirin.irinnews.org/dataviz/2015/7/21/playing-the-eu-asylum-lottery>

⁷² http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/reception-conditions/index_en.htm

⁷³ <http://www.asylumineurope.org/reports/country/italy/reception-conditions/access-forms-reception-conditions/forms-and-levels>

⁷⁴ https://www.washingtonpost.com/world/europe/germany-unnerved-by-scores-of-xenophobic-attacks-against-refugees/2015/08/16/ead9284-3fb1-11e5-b2c4-af4c6183b8b4_story.html

⁷⁵ <http://www.ecre.org/topics/areas-of-work/protection-in-europe/82-detention.html>

⁷⁶ http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/reception-conditions/index_en.htm

⁷⁷ <http://www.bbc.com/news/uk-33871283>

⁷⁸ <http://www.euroalter.com/projects/open-access-now>

Undocumented migrants and failed asylum seekers

Those who enter the EU without a valid visa or remain after a valid visa has expired and have not applied for or are not eligible for asylum are entitled to the protection of their fundamental rights and EU action with respect to undocumented migrants must be in compliance with the Charter of Fundamental Rights.

A 2013 report⁷⁹ of the Fundamental Rights Agency however found that the Returns Directive lacked detailed guidance for guaranteeing the rights of those not returned, leading to residence classifications that give wide variation in access to fundamental rights. It also found several gaps in the protection of the fundamental rights of undocumented migrants across EU member states, with enforcement measures taken by states having a negative effect on undocumented migrant rights, abuses of labour rights, and insecure and precarious housing situations. It also found very different approaches on healthcare and education across member states, with some member states restricting healthcare to emergencies and others providing full health coverage, and with varying degrees of access to education for children in law and in practice.

EU coordinated action on irregular migration and returns however focuses primarily on action against those who assist in undocumented migrants crossing borders, sanctioning of persons who employ persons without a valid visa and border control coordination.⁸⁰

Case Study 4: Sexual orientation as a ground for refugee protection

Background

EU Directives are one of way in which the EU legislates. An EU Directive needs to be translated into national legislation by each Member State within a given time frame. When that is achieved, the EU Directive can be considered adopted.

When a national court has questions concerning the meaning or extent the Directive is applicable, it can refer the case to the European Court of Justice for an assessment.

In this case, the Directive⁸¹ in question was from April 2004 “on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted” (2004/83/EC) – otherwise known as the Qualification Directive, which lays out the minimum criteria that EU countries should have for accepting people as refugees.

The Qualification Directive sets out the reasons why someone can claim to be a refugee, such as persecution due to their actual or perceived race, religion and nationality. It also includes the criteria of persecution due to ‘belonging to a particular social group’, which does not have a strict definition.

Case

The case concerned⁸² the granting of refugee status to three homosexual citizens of Sierra Leone, Uganda and Senegal, who were living in the Netherlands. In Sierra Leone, Uganda and Senegal there were criminal laws against homosexuals, which foresaw a punishment up to - respectively - life imprisonment, the death penalty and five years in prison.

All three persons had applied to the Dutch authorities for refugee status but had been rejected and the parties had argued over whether the criminalization of homosexuality was covered as a grounds for claiming refugee status under Dutch law implementing the Qualification Directive.

They appealed the case and the Dutch Council of State (the highest court for challenging public decisions) referred the case to the European Court of Justice in order to understand:

> whether third country nationals who are homosexual can be considered as forming a “particular social group”?

⁷⁹ http://bookshop.europa.eu/en/fundamental-rights-of-migrants-in-an-irregular-situation-in-the-european-union-pbTK3012815/?CatalogCategoryID=_kaep2OwrVMAAAE8WAtiz3EK

⁸⁰ http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/irregular-migration-return-policy/index_en.htm

⁸¹ eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:133176

⁸² eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62012CJ0199

> if so, to what extent should persons be expected to conceal their sexual orientation or show restraint in expressing their sexuality publically to avoid persecution?

> whether criminalization of an act constitutes persecution under the Directive?

Decision

In making its decision on the Directive, the European Court of Justice looked at both international, national and EU law. In particular the 1951 Refugee Convention, international human rights law, the Charter of Fundamental Rights of the European Union and national legislation in the Netherlands and in other member states.

In November 2013, the Court decided that, under the Qualification Directive, sexual orientation can be grounds for claiming refugee status in the EU. It stated that to be a 'particular social group' you need to fulfil two conditions:

> Share innate characteristics: a common background which is not changeable, and

> Possess a distinct identity in the relevant country of origin.

The court recognised that a person's sexual orientation is something extremely fundamental to their identity and that, in countries where criminal laws condemn and punish homosexuality, persons identifying or identified as homosexual must be seen as being part of a particular social group.

The judges also stated that sexual orientation is so fundamental to the identity of a person that they could not be required to hide it or act discreetly to avoid persecution.

Assessment

This decision of the European Court of Justice required EU member states to amend their rules on who qualifies for asylum under the Qualification Directive, making it possible for persons to qualify based on sexual orientation and in cases when criminal law is applied that restricts their ability to express their sexuality.

It also importantly removed any possibility of people being denied asylum on the grounds that they could hide their sexuality to avoid prosecution, which had been the practice in a number of EU member states.⁸³

⁸³ <https://www.boell.de/en/2014/03/11/ecj-recognises-homosexuality-grounds-asylum>

5

**ROMA
RIGHTS**

TOPIC 5: ROMA RIGHTS

Know

More than 10 Million Roma live in Europe, making the Roma Europe's largest minority group.⁸⁴ The centuries following the Roma people's migration from northern India to Europe saw their culture suppressed in the countries they lived in, while under Nazi rule⁸⁵, as well as during communism in Eastern Europe⁸⁶, many Roma experienced physical maltreatment and death.

While formal protection of Roma rights exists in Europe today, through regulations for minority protection and against discrimination, Roma are still victims of exceptionally high levels of physical violence, social exclusion, discrimination and poverty.⁸⁷ Despite their citizenship, Roma are often portrayed as separate to the wider population, are frequently used as scapegoats in times of political or economic crisis, and are blamed for taking jobs and committing crimes. Although an EU plan and financial means to enhance the integration of Roma people are in place, national governments often contribute to an anti-Roma climate through their policy measures.⁸⁸

For example, in some countries Roma pupils have to attend segregated schools for children with mental and physical disabilities. In other cases access to education is limited by Roma children living in isolated camps with very long distances to the nearest school. Partially as a consequence of this, the rate of Roma pupils who leave school before turning 16 is very high. Poor education or lack of it is also one of the reasons contributing to very high unemployment rates among Roma.

Likewise, Roma face serious obstacles⁸⁹ in the realisation of their fundamental rights, such as geographic isolation, lack of health insurance and language and communication barriers. This causes major differences in health, with Roma people suffering from poorer health compared to the majority populations.

In addition to these inequalities in access to basic services, there are many cases in which national governments also take action against Roma people that impacts their rights. For instance, the French government has deported more than 11.000 people back to their country of origin since 2012.⁹⁰ In many cases Roma are sent back to Romania and Bulgaria, which are both member states within the European Union and whose citizens have the right to free movement within the EU.

Reasons for the lack of protection of Roma people's fundamental rights vary from obstacles that prevent the exercising of rights to overt violations of rights. In some cases national law is also not in compliance⁹¹ with European law, but these cases are only identified when a Roma person brings a case to the European level. This, however, requires knowledge of one's rights as well as resources such as time and money. In other cases it is difficult for the judges to understand where a violation is related to a Roma person's ethnicity due to insufficient evidence⁹².

Understand

There are a number of legal instruments at the EU level for the purpose of safeguarding the rights of Roma persons. The EU Charter on Fundamental Rights⁹³ prohibits any form of discrimination based on the grounds of race, colour, ethnicity, sexual orientation or social origin (Art.21). The article on freedom and solidarity includes the right to education (Art.14) as well as access to health- and medical care (Art.35). The Charter also requires "a decent existence for all those who lack sufficient resources" (Art. 34).

In addition, there is one directive specifically dealing with discrimination based on ethnicity. This directive is legally binding for all EU member states and requires them to pass a national law to include its provisions.

Directive 2000/43/EC ⁹⁴protects Roma against discrimination based on being part of an ethnic group in the fields of

⁸⁴ <http://fra.europa.eu/en/theme/roma>

⁸⁵ <http://www.errc.org/cms/upload/file/roma-holocaust-factsheet%20%283%29.pdf>

⁸⁶ <https://romediafoundation.wordpress.com/2013/02/07/forced-sterilization-of-romani-women-a-persisting-human-rights-violation/>

⁸⁷ <http://www.amnesty.org/en/documents/EUR01/007/2014/en/>

⁸⁸ http://ec.europa.eu/justice/policies/discrimination/docs/com_2011_173_en.pdf

⁸⁹ <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3282005/>

⁹⁰ <http://www.euractiv.com/sections/social-europe-jobs/france-evicts-300-roma-week-311839>

⁹¹ <http://www.errc.org/article/ostrava-case-dh-and-others-v-the-czech-republic/2945>

⁹² http://www.era-comm.eu/oldoku/Adiskri/10_Race_Roma/2011_04_Willers_EN.pdf

⁹³ http://www.europarl.europa.eu/charter/pdf/text_en.pdf

⁹⁴ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:en:HTML>

employment, social protection and social security, social benefits, education and access to the supply of goods and services. The Directive requires the establishment of Equality Bodies in Member States, able to process individual complaints concerning discrimination on the grounds set out in the Directive.

Moreover no right exists in isolation and rather has to be seen in connection with other rights and regulations. For example, Roma persons, like other EU citizens, have the right to free movement⁹⁵(Directive 2004/38) and the right to stay in any EU member state unconditionally for up to three months. After this time period, they have to prove employment or sufficient resources to live (Articles 6 and 7). If they fail to do this they can be classified as an “unreasonable burden on the social assistance system” (Article 14). This can include losing residency rights and along with it rights to any social benefits. This, however, will most of the time effect the poorest in society.

Under the Council of Europe’s Framework Convention for the Protection of National Minorities, states are also obliged to adopt specific policies for the explicit protection of minorities and the creation of conditions enabling the development of their culture. This is the first legally binding document devoted to the protection of *minority* rights. Other than individual rights, these are rights that explicitly recognize and protect specific communities.

These are communities that have a smaller number of people than the rest of the population of that state, who are citizens *of that state* and who have ethnic, linguistic or other cultural features different than that population (UN definition⁹⁶). Yet, whereas minority rights protection has become an EU membership criterion for countries such as Romania and Bulgaria, some European states have not signed or ratified the recommendation of the Council of Europe, including France, Greece and Luxembourg⁹⁷. In other countries pro forma implementation has taken place; however, de facto rights are often not sufficiently protected by the executing institutions.

Case Study 5: Sterilization and Roma Women

Background

Some women have gynecological complications that can cause serious health risks or even death. In these cases sterilization is a medical necessity. However, throughout history forced sterilization has also been used to prevent religious or ethnic groups from reproducing.

Because sterilization is an intervention in one’s bodily integrity and has consequences for one’s family life, forced sterilization breaches several rights protected under the European Convention of Human Rights.

A young Slovakian national of Roma origin, who was sterilized during a Caesarean section, not only saw her right against the prohibition of torture and right to respect for private and family life violated, but also claimed that she had been sterilized because of her Roma origin.

Case Study

When a woman of Slovakian nationality and Roma origin gave birth, the doctors found her reproductive organs in such a poor state that any future pregnancy would constitute a serious health risk. The doctors verbally informed her about their findings right away and suggested a sterilization to which she agreed. After the procedure was completed, she was shocked to discover she would not be able to become pregnant again. She claimed that she had not fully understood what the word “sterilization” meant, because the information was presented under pain and not in her mother tongue. She not only suffered serious psychological and medical after-effects but also claimed that she has been the subject of racial discrimination because of her Roma background. She believed this was the case because Roma have a history of discrimination in Slovakia and her medical record explicitly mentioned her Roma origins.

Process

The women appealed her case through the Slovakian national court system. In each court, her case was rejected on the basis of a national regulation on sterilization, which stated that such a procedure can be performed in cases of danger to a person’s life even if the person refuses the procedure herself. In other words, the national courts concluded that the sterilization had been compliant with national law.

Dissatisfied with the proceedings, the women lodged a complaint with the European Court of Human Rights.

⁹⁵ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:EN:PDF>

⁹⁶ <http://www.ohchr.org/EN/Issues/Minorities/Pages/internationalaw.aspx>

⁹⁷ <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=157&CM=&DF=&CL=ENG>

Decision

The European Court of Human Rights found that the Slovakian law breached several important international documents such as the Convention on Human Rights and Biomedicine, which states that a patient must obtain detailed information regarding the consequences of the procedure as well as alternative solutions. Therefore the court found that Article 3 (prohibition of torture) and 8 (Right to respect for private and family life) of the European Convention on Human Rights had been violated.

In order to assess the claim that she had been discriminated against on the basis of her Roma origin, the Court sought assistance from the Council of Europe Commissioner for Human Rights. The Commissioner recognized that there is a widespread negative attitude toward the high birth rate of Roma and that it could not be excluded that this attitude might have led to the sterilization. Yet, due to a lack of comparative reports between the number of Roma woman and of ethnically Slovakian women who had been sterilized, the Court ruled that there was not enough evidence to find racially motivated sterilization.

Assessment

This case shows how difficult it is to establish evidence for discrimination. There are several reports, such as one from Human Rights Watch from 1992 as well as more recent ones (2003-2013), which document that a large number of Roma women have undergone sterilization without their full or informed consent. The reports highlight that medical personnel had often provided misleading information or spoken in a non-comprehensible way.

Yet, as there was no comparison to Slovakian women who had been sterilized available in this case, the evidence was too vague for the court to use as a basis for their judgment. Highlighting the difficulty in identifying cases of discrimination against Roma persons.

6

CITIZENSHIP

TOPIC 6: CITIZENSHIP

Know

Although the European project started in the 1950s and although the introduction of a European form of citizenship with precisely defined rights and duties was considered as long ago as the 1960s, European citizenship became a reality only with the Maastricht Treaty in 1992. Since 1993 every citizen of an EU Member State is also considered a citizen of the Union i.e. an EU citizen. This citizenship is provided directly via the Treaty on the Functioning of the European Union and is something additional - EU citizenship does not replace national citizenship.

As an EU citizen, each person is entitled to enjoy the rights included in the EU treaties. In particular the following rights are explicitly mentioned in the text:

- > the right to move and reside freely within the Union;
- > the right to vote and to stand as candidate in elections to the European Parliament and in municipal elections in the Member State of residence;
- > the right to consular protection from the embassy of another EU member state, when outside the EU;
- > the right to petition the European Parliament, to apply to the European Ombudsman (a complaints mechanism of the EU), and to address the EU institutions (including the European Parliament, Commission and Council) and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

There are also other rights EU citizens are entitled to, for instance:

- > the right to access the registers of European Parliament, European Commission and Council documents;
- > the right of equal access to the EU Civil Service.

Since the entry into force of the Lisbon Treaty in 2009 a new mechanism, the European Citizens' Initiative⁹⁸ (ECI), has existed, which allows EU citizens to request the Commission to legislate in one of its areas of competence, once enough signatures have been gathered from a range of member states and a number of further conditions have been satisfied.

Understand

The rights to which each EU citizen is entitled to are listed in the Treaty on the Functioning of the EU⁹⁹ (Art 20 - 24 of the TFEU); at the same time since the entry into force of the Lisbon Treaty¹⁰⁰ in 2011 they have also been given constitutional status under Article 9 of that Treaty.

A Eurobarometer Flash Survey published in February 2013¹⁰¹ showed that EU citizens were becoming more and more aware of and acquainted with the concept and the rights of EU citizenship: 81% of respondents said that they were familiar with the term, although less than 50% knew what it meant (in both cases an increase from the 2007 Survey). However, another Eurobarometer publication¹⁰² from late that same year showed that the sense of European citizenship had become somewhat weaker than in previous surveys - only 59% of the respondents saw themselves as citizens of the European Union and only 20% felt that they were "definitely" citizens of the EU.

In September 2015 a public consultation on EU Citizenship was launched by the European Commission. The consultation is an EU-wide online survey thought of as a chance for EU citizens to express their points of view and opinions on how they experience the protection of their rights in the EU, as well as on their perceptions of shortcomings and/or limitations. It is open to everybody and available in all the official languages of the Union online. The Consultation will be accessible until December 7th 2015, while its results are expected in spring 2016.

⁹⁸ ec.europa.eu/citizens-initiative/public/welcome

⁹⁹ eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12012E/TXT

¹⁰⁰ eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12007L/TXT

¹⁰¹ ec.europa.eu/public_opinion/flash/fl_365_en.pdf

¹⁰² ec.europa.eu/public_opinion/archives/eb/eb80/eb80_citizen_en.pdf

Right to move and reside freely

As stated in Article 21 of the Treaty on the Functioning of the EU, each citizen of the Union has the right to move and reside freely in any other Member State under certain conditions. A Commission Directive from 2004¹⁰³ defines in a more detailed manner the specific rules applied, which include the right to move to search for work, to study, to work and to permanent residence after five years of residence in another member state.

According to the latest data available from the European Commission¹⁰⁴, there are more than 14 Million EU citizens residing in another member state on a stable basis. Since the establishment of EU citizenship there have been temporary restrictions to this for nationals of new member states in some cases, for example there are restrictions currently (as of 2015) applying to Croatian EU citizens¹⁰⁵.

Right to vote and to stand as candidate (electoral rights)

If you are an EU national living in another EU country, you have the right to stand as a candidate and vote in municipal and European Parliament elections held in that country, under the same conditions as nationals. However, there may be restrictions on voting in national elections of that member state and in referendums. For the European Parliament elections, you may only vote in one country. These rights are regulated by an EU Directive from 1993.¹⁰⁶

The last European elections of 2014 were characterised by a concrete effort to increase public participation in the European political debate. However overall electoral turnout remained low, at 42.6%¹⁰⁷.

Right to enjoy diplomatic and consular protection

Under the treaties, citizens of one Member State can access the diplomatic and consular services of another Member State when their home country does not have an embassy or similar in that country, when the representation from an Honorary Consul is inaccessible, and on the condition of producing an identity document.

More information can be found on the Consular protection for European Union citizens abroad¹⁰⁸ website.

Right to petition the European institutions and the right to apply to the Ombudsman

Article 24 of the TFEU allows citizens to directly petition the European Parliament and the European Ombudsman.

The right to petition, according to Article 227 TFEU and Article 44 of the Charter of Fundamental Rights is possible when the matter related to one of the EU's fields of activity and it affects the petitioners directly. This last requirement is understood very broadly. The European Parliament receives on average 3 petitions each day. Both the absolute number of petitions submitted and the ratio of those considered admissible grew over the last decade. Between 2009-2012¹⁰⁹, petitions concerning fundamental rights represented the relative majority of the petitions submitted. An example of a petition to the European Parliament which is still ongoing as of 2015 is the one concerning the residents of the Susa Valley¹¹⁰, backed by the local authorities, who filed a petition expressing their concerns about the impact on the environment and public health of the construction of the high-speed Lyon-Turin railway line.

¹⁰³ eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:en:PDF

¹⁰⁴ europa.eu/rapid/press-release_MEMO-14-9_en.htm

¹⁰⁵ ec.europa.eu/social/main.jsp?catId=1067&langId=en

¹⁰⁶ eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:31993L0109

¹⁰⁷ www.europarl.europa.eu/elections2014-results/en/turnout.html

¹⁰⁸ ec.europa.eu/consularprotection/content/home_en

¹⁰⁹ www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuid=FTU_2.1.4.html

¹¹⁰ <https://www.opendemocracy.net/michele-monni/italian-politics-and-no-tav-movement-resiliency-or-failure-of-citizen-activism>

EU citizens can apply to the European Ombudsman in cases of maladministration, such as administrative irregularities, unfairness or discrimination; abuse of power; a lack or refusal of information or an unnecessary delay. The petition can be sent either electronically, by mail or by e-mail; it can be addressed either directly to the Ombudsman or via a Member of the European Parliament.

The European Ombudsman has the power to¹¹¹ assess whether a case of maladministration needs further investigation and clarification and can refer the matter to the institution concerned, seek a solution, and draft recommendations to that institution, if necessary.

Right to contact and receive a response from an EU institution

Through the network of Europe Direct each EU citizen can ask questions to and about the EU institutions in a number of ways, both via telephone in all the languages of the Union, as well via mail, chat or via the network of information centres, documentation centres and speakers in every EU country.

Right to access the Registers of the Parliament, the Commission and the Council

As stated in Article 15 of the TFEU, citizens and residents of EU countries have a right to access the documents of the three main institutions of the European Union. A register is to be understood as a database of documents and information covering the activities of an institution and comprises of information such as agendas and minutes of meetings, draft documents and similar.

The right allows EU Citizens to access a number of documents from the European Parliament, the European Commission and the Council via their respective registers. There are limitations on the kind of documents which are accessible. An example on the limitations of access to the registers is represented by the ongoing restrictions of access to the draft proposals of the Transatlantic Trade and Investment Partnership (TTIP¹¹²). The process of negotiation has involved a broad lack of transparency and has been heavily critiqued by many European organisations, initiatives and interest groups. The European Commission committed to more transparency in the negotiations in 2014. The negotiating texts have been partially released by the European Commission but that has only slightly diminished criticism that the TTIP is a treaty negotiated behind closed doors. Complaints have also been addressed by the European Ombudsman.

European Citizens' Initiative

Every citizen is able, under Article 24 of the TFEU to start a European Citizens' Initiative. This is a procedure that allows individuals to petition the European Commission with a request (or proposition) for them to legislate in one of the areas where the Commission can act. A number of conditions are listed which need to be fulfilled in order for the initiative to be admissible: a committee needs to be formed of at least seven citizens from seven EU member states and, within one year, they must gather one million signatures, with representation from at least seven different EU member states and a minimum number of applicants¹¹³ from each of these states.

As of 2015, three ECIs¹¹⁴ have met the criteria and received a formal answer by the European Commission; respectively on water and sanitation as a human right, on the right to life of embryos and on a halt on vivisection and experiment on animals. All three were registered between May and June 2012. However, the European Commission has not initiated legislation on any of them. Others that have not managed to meet the criteria include the European Initiative for Media Pluralism¹¹⁵ and Let Me Vote¹¹⁶ on voting rights.

The ECI on water as a public good collected almost two millions signatures and received wide media coverage, both before and during the last election for the European Parliament and since then. On the one side this initiative received the backing of the Economic and Social Committee¹¹⁷, a consultative body giving representation to the social and economic

¹¹¹ www.ombudsman.europa.eu/atyourservice/whocanhelpyou.faces#/page/4

¹¹² www.euractiv.com/sections/trade-society/ttip-dummies-311161#group_extlinks

¹¹³ ec.europa.eu/citizens-initiative/public/signatories

¹¹⁴ ec.europa.eu/citizens-initiative/public/initiatives/finalised/answered

¹¹⁵ www.euroalter.com/projects/european-initiative-for-media-pluralism

¹¹⁶ ec.europa.eu/citizens-initiative/public/initiatives/obsolete/details/2012/000006

¹¹⁷ www.eesc.europa.eu/?i=portal.en.about-the-committee

interest groups of the EU; on the other side 4 out of 5 candidates to the Presidency of the European Commission committed to implementing the principle of the initiative in their statements during the 2014 electoral campaign. Finally, in September 2015 the initiative registered the official backing of the European Parliament, which supported the initiative via a vote in the plenum¹¹⁸ and asked the European Commission, among other points, to “take the concerns and warnings expressed by citizens in such petitions seriously and to act on them.”

Criticisms of the European Citizens Initiative include that the European Commission has the power to decide whether an initiative is accepted or not¹¹⁹ and that, as of 2015, no European Citizens’ Initiatives have been officially adopted as legislation, although the latest development on the water as a public good initiative shows the growing legislative impact that such a right can have on the European level.

On October 28 2015 the European Parliament approved by a vast majority a report¹²⁰ by MEP György Schöpflin on the ECI. The report acknowledges that “whatever the success criteria, (the ECI) has not so far reached” its goal, also given the fact that “not a single initiative has yet been followed by legislation”. The ECI remains nevertheless the first instrument for transnational participatory democracy, enabling citizens to engage directly with the EU institutions.

Case Study 6: Loss of Citizenship

Background

In general, national governments have the right to decide the process for gaining and losing the citizenship of their country. In the European Union however, this is complicated by the fact that each citizen of a member country also holds European Union citizenship.

It was this difference that led to Mr. Rottmann¹²¹ bringing a case to the European Court of Justice, when he faced the possibility of losing his German citizenship.

Case

Mr Rottmann was born in Austria as an Austrian citizen. In 1995 he moved to Munich, Germany, after the authorities in Austria began investigating him over allegations of fraud. Two years later they issued a warrant for his arrest.

Later that year Mr Rottmann applied for German citizenship, which he was granted in 1999. During the application procedure Mr Rottmann concealed the fact that there was an existing warrant for his arrest. Under Austrian Law, as soon as a person acquires another citizenship, they automatically lose Austrian nationality. Mr. Rottmann therefore became a German citizen and lost his Austrian citizenship.

The authorities in Bavaria, the regional government where Mr Rottmann lived, were then informed by the Austrian authorities about the proceedings in Austria against Mr. Rottmann. Due to the fact that he had concealed this information during his application for citizenship, the German authorities cancelled his citizenship and Mr. Rottmann became stateless - meaning he had no legal citizenship in any country.

At that point Mr Rottmann appealed the decision to the Administrative Court of Bavaria, which agreed in 2005 with the government. Mr. Rottmann then appealed to the German Federal Administrative Court, which referred the case to the Court of Justice of the EU.

Process

Two main questions were asked by the German Court to the EU’s Court of Justice:

> Are EU member states restricted in any way from deciding on the gaining and loss of national citizenship, due to the fact that eventual statelessness would also imply a loss of EU citizenship? And if yes:

> Should member states refrain partially, temporarily or totally from withdrawing citizenship, when it would also imply the loss of citizenship of the European Union?

¹¹⁸ www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0294+0+DOC+XML+V0//EN&language=EN

¹¹⁹ ec.europa.eu/citizens-initiative/public/how-it-works/registration

¹²⁰ www.citizens-initiative.eu/wp-content/uploads/2015/10/AFCO_report_final.pdf

¹²¹ http://ec.europa.eu/dgs/legal_service/arrets/08c135_en.pdf

Decision

In March 2010, the Court of Justice stated the following:¹²²

- > It is not illegal under EU law for EU member states to withdraw citizenship from individuals where it was obtained through deception or hiding of relevant information, even though this may affect EU citizenship
- > However, withdrawal of citizenship that leads to statelessness does fall within EU law, as the person loses their EU citizenship
- > For that reason, EU law requires that when an EU citizen would become stateless as a result of a loss of citizenship, national governments must only do so if it is in the public interest and if the decision to do so is proportionate.
- > In deciding whether it is proportionate to withdraw someone's citizenship, the national authorities must take into account the potential consequences in terms of the person's and their family's loss of EU rights, the gravity of the offence, the time between naturalization and withdrawal of citizenship and whether it is possible for that person to recover their original citizenship.

The case was then referred back to the German Federal Administrative Court to decide if the proportionality and public interest tests had been met. The full text of the judgement is available [here](#).¹²³

Assessment

This judgement shows that the Court of Justice is increasingly willing to intervene in areas formerly thought of as core to the nation state – in this case that of deciding who does and does not qualify for citizenship. However, it also highlights the limits to which the Court is willing to go – leaving it open for the national authorities to still withdraw citizenship, if the public interest and proportionality tests are met.

It also shows that EU citizenship is more than just rhetoric. As the Court of Justice stated, it is a citizenship including rights and these rights must be taken into account before a national level citizenship is withdrawn.

¹²² http://eudo-citizenship.eu/docs/Rottmann_case.pdf

¹²³

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=75336&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=395939>



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