

REMEDIES OF UNION CITIZENS VIS-À-VIS DISCRIMINATION

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Abstract

Prohibition of discrimination on the base of nationality is at the core of Union citizenship - but does Community law guarantee any tool to enforce this right? I state in my paper that there is at least three of such kind of remedies: to bring an action directly or indirectly before the Court of Justice, to submit a complaint to the European Ombudsman and to address a petition to the European Parliament. In my paper I give a comparative analysis of these instruments.

Key words

Citizenship of the European Union – Article 17 EC – Prohibition of discrimination on the base of nationality – Court of Justice – Preliminary ruling – Article 234 EC – Action for annulment– Locus standi – Article 230 EC – Action against a Member State – Articles 226, 227 and 228 EC – Complaint to the European Ombudsman – Maladministration – Right to petition to the European Parliament – Lisbon Treaty

1. Prohibition of discrimination as core of Union citizenship

Prohibition of discrimination on the base of nationality is at the core of the dispositions governing Union citizenship. Although it is not enumerated amongst their rights in Part II of EC Treaty,¹ the Court of Justice of the European Communities (hereafter: the Court) reinforced it at several occasions that a citizen of the European Union who resides lawfully in the territory of an other Member State can rely on prohibition of discrimination (now, after amendment, Article 12 EC) in all situations that fall within the scope *ratione materiae* of Community law². This twofold requirement of lawful residence and scope of Community law

¹ EC Treaty enumerates the following rights: right to free movement (Article 18 EC), right to vote and to stand as a candidate in municipal elections (Article 19 (1) EC), right to vote and to stand as a candidate in European Parliament elections (Article 19 (2) EC), right to address a petition to European Parliament (Articles 21 and 194 EC), right to address a complaint to European Ombudsman (Articles 21 and 195 EC), access to documents (Article 255 EC), right to diplomatic and consular protection in the territory of third countries (Article 20 EC).

² See Case C-85/96 Maria M. Sala v. Freistaat Bayern [1998] ECR I-2691

were broadly interpreted by the Court. Thus, it held in several cases that even a Union citizen not possessing a residence permit can be a lawful resident in the host State³, and even such situations, which do not fall under the exclusive competence of Community law, must be exercised with due regard to Community law⁴.

It means that Union citizenship is not a symbolic institution at all, not an ‘empty shell’,⁵ it has real power. In case Grzelczyk the Court reinforced this ruling:

“Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.”⁶

Union citizenship grants broader rights than the former status of ‘citizen of the Member States’ or ‘Community citizen’. It must be noted, however, that the simple status of Union citizenship does not place the person into the absolutely same situation as nationals of a Member State. Where are its limits? According to the findings of the Court, a citizen coming from another Member State and applying for a social allowance must have an established link with the host country. This link can be based either on belonging to the labor market⁷ or on the period of residence and integration into the host society.⁸ Without these factors the host Member State can refuse the right of residence from Union citizen.

In this article I am going to give a comparative presentation of Community tools to combat against discrimination on the base of nationality. I will merely focus on the method of use of these instruments, on their advantages, disadvantages and possible interaction between them. I

³ See case Sala, cited above.

⁴ See cases concerning child raising allowance (case Sala, cited above), student loan (C-209/03 Bidar [2005] ECR I-2119), direct taxation (case C-224/02 Pusa [2004] ECR I-5763, C-403/03 Schempp [2005] ECR I-6421), right to use maternal language before administrative and criminal courts (C-274/96 Criminal proceedings against Horst Otto Bickel and Ulrich Franz [1998] ECR I-7637), determination of surnames (C-148/02 Garcia Avello [2003] ECR I-11613) and allowances for civil war victims or prisoners of war (cases C-192/05 Tas-Hagen and Tas [2006] ECR I-10451 and C-386/02 Baldinger [2004] ECR I-8411).

⁵ Groenendijk, Kees: *Citizens and Third Country Nationals: Differential Treatment or Discrimination?* In: Carlier, Jean-Yves – Guild, Elspeth (eds.): *L'avenir de la libre circulation des personnes dans l'UE – The Future of Free Movement of Persons in the EU*. Bruylant, Bruxelles, 2006, pp. 94-95

⁶ Case C-184/99 Grzelczyk [2001] ECR I-6193, para 31

⁷ See cases C-224/98 D’Hoop [2002] ECR I-6191, C-413/01 Ninni-Orasche [2003] ECR I-13187, C-138/02 Collins [2004] ECR I-2703

⁸ See cases Sala, Grzelczyk and Bidar, cited above.

will not deal, however, with the question of achievements attained by them, since this topic is worth a further independent essay.

In spite of the fact that two of these instruments, the right to petition and the right to complaint to European Ombudsman, were established in the circle of instauration of Union citizenship, all of these tools are available not only for Union citizens but for every natural or legal person having a residence in the territory of a Member State⁹. Although Community law guarantees in a few special situations certain benefits for third country nationals (e.g. for family members of Union citizens or for citizens of acceded States), generally it does not require equal treatment on the base of nationality, so they can use these instruments only for other purposes.

First of all, I will focus on the most obvious instrument given by Community law since the entry into force of the EEC Treaty, the possibility of judicial review by the European Court of Justice. Then I will briefly examine the right to address a complaint to the European Ombudsman and the institution of petition to the European Parliament. Finally I reveal some interactions between these instruments. In my closing remarks I give some guidance on the near future: I take a look at the changes bringing by the Lisbon Treaty with the probable effect of 1st of January 2009.

2. Judicial review by the Court of Justice

It is indisputable, that the Court of Justice has an outstanding role in guaranteeing equal treatment on the base of nationality for Union citizens. This role arises from Article 220 EC according to this disposition “the Court of Justice [...] shall ensure that in the interpretation and application of this Treaty the law is observed”. This provision implies that it guards over the respect of prohibitions involved in the EC Treaty, amongst other over the respect of prohibition of discrimination¹⁰.

It was the Court of Justice who interpreted the notion of prohibition of discrimination and right to equal treatment. This role appears mainly in two proceedings: in one hand, in

⁹ Right to petition and to bring an action is open for an even wider circle, for non resident third country nationals and enterprises also.

¹⁰ Király Miklós: *A diszkrimináció tilalma az Európai Bíróság joggyakorlatában*. Akadémiai Kiadó, Budapest, 1998, p. 73

proceedings seeking to establish the failure of a Member State to comply with Community law, and, in the other hand, in proceedings aiming to interpret Community law dispositions or to establish their validity, in preliminary rulings¹¹. It is quite rare when individuals go before the Court of Justice seeking the protection of their right to equal treatment via a direct claim, usually via claim for annulment, and it is even less frequent that the Court accepts these claims.

Right to equal treatment under Community law can be invoked against dispositions of national law and, on the other hand, against dispositions of Community law.

2.1. Prohibition of discrimination v. Community law

As I mentioned above, it is a very rare occasion when – natural and legal – persons, including Union citizens, bring a direct action before the Court of Justice in the alleged violation of their right to equal treatment by a disposition of the Community law. One of its reasons is that their right to bring an action before the Court is quite limited. Under fourth paragraph of Article 230 EC, they can institute proceedings only against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former. This condition of ‘direct and individual concern’ is still interpreted strictly by the Court in spite of the propositions of Advocate Generals and the Court of First Instance¹².

The present situation is that if a person considers that a Community action violates his right to equal treatment on base of nationality, it is more useful to bring a proceeding before a national court, and to ask the national judge to suspend the proceeding and to refer questions to the Court on the interpretation or on the validity of Community law. Although the parties of the main proceeding cannot enforce the preliminary ruling, since, according to fourth paragraph of Article 234 EC, it is only a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, is under the obligation to bring the matter before the Court of Justice; preliminary ruling has more advantages compared to action for annulment. The main advantages are the followings:

¹¹ Király, *op.cit.*, p. 75

¹² See conclusions of Advocate General Jacobs delivered in case C-50/00 *Union de Pequeños Agricultores (UPA) v. Council* [2002] ECR II-3357, and judgement of the Court of First Instance in case T-177/01 *Jégo-Quéré and Cie SA v. Commission* [2002] ECR II-2365.

- In preliminary ruling, the circle of contestable actions is wider: this indirect proceeding can be brought not only against decisions and, in exceptional cases, against regulations (which ones were adopted in the form of a regulation, but essentially decisions), but every legal actions of the institutions;
- The circle of *locus standi* also wider: it must not to be the person to whom the act was addressed or to justify direct and individual concern for the referring the question to preliminary ruling, it is enough that the question has a link to the matter of the main proceeding, and it fulfils the general conditions of preliminary ruling: the question is not too general, the dispute has not a hypothetic nature and legal and factual background is clear;
- The time limit of referral is not connected with the two months delay for opening an action for annulment. A question on the validity of a Community act can be referred to the Court of Justice even after years of the adoption the act;
- Legal effect of constitution of invalidity of a Community act goes back to the date of the entry into force of the act in question, as wall as in action for annulment. The Court limits this effect only in exceptional cases, taking into consideration the principle of legal certainty and serious economical interests of Member States;
- If a national court adjudicating at last instance fails its obligation to make a reference for preliminary ruling and causes damage to individuals, Member States are obliged to make good this damage¹³. In this way, an individual has a minimum protection in that case if he or she cannot enforce preliminary ruling in the national proceeding.

The third possibility for an individual to contest a Community action before the Court is to bring an action for damages under Article 288 EC. Although it is generally noticed that this

¹³ Case C-224/01 Köbler [2003] ECR I-10239

possibility is obviously conditioned by the occurrence of damage and, furthermore, there is a little chance of such proceedings against acts of general nature¹⁴.

2.1. Prohibition of discrimination v. national law

In this case an individual has not the possibility of a direct action to the Court of Justice, his or her only chance to bring a matter before the Court of Justice is preliminary ruling.

For Member States or for the Commission of the European Communities it is possible to bring an action for the establishment of the infringement of the Community law under Articles 226 and 227 EC, if they consider that a national rule is not compatible with the prohibition of discrimination on base of nationality. An individual can inform the Commission of an infringement, but in this case the latter institution has not an obligation to bring a procedure against that State¹⁵, it has a wide discretion whether it does or not. Following several complaints and an own-initiative inquiry of the European Ombudsman on the possibilities of improving the quality of the Commission's administrative procedures for dealing with complaints from citizens about infringements¹⁶, the Commission adopted a communication¹⁷ in which it acknowledged "the vital role played by the complainant in detecting infringements of Community law" and their procedural rights, such as their right to be informed in writing of the decision taken by the Commission in connection with their complaint and any subsequent Commission decisions on the matter, data protection, access to documents under Regulation 1049/2001 and review by the European Ombudsman where a complainant considers that, in handling his or her complaint, the Commission has been guilty of maladministration.

Prior to the procedure before the Court of Justice there is a pre-litigation stage for the establishment of the facts and for trying to make a friendly solution. If only this phase is unsuccessful that a procedure can be brought before the Court. It is more frequent that the

¹⁴ Söderman, Jacob: *The Citizen, the Administration and Community Law*. General Report for the 1998 FIDE Congress, Stockholm, Sweden, June 3-6, 1998, 1998.05.18., p. 30 <http://www.euro-ombudsman.eu.int/fide/pdf/en/fide.pdf> (30.11.2005)

¹⁵ Cases 48/65 Lütticke v. Commission [1966] ECR 19, 87/89 Sonito v. Commission [1990] ECR I-1981 and 247/87 Fruit Star v. Commission [1989] 291

¹⁶ Case 206/27.10.95/HS/UK et al. (complaint 'Newbury Bypass') and own-initiative inquiry OI/303/97/PD

¹⁷ Commission communication to the European Parliament and the European ombudsman on relations with the complainant in respect of infringements of community law [COM (2002) 141 final]

Commission brings this proceeding and it is quite rare that a Member State takes this action against another Member State.

The purpose of this proceeding is establishing whether a Member State has infringed its obligation under Community law. Under Article 228 EC, if the Member State concerned fails to take the necessary measures to comply with the Court's judgment, the Commission may bring the case before the Court of Justice again, and if the latter finds that the Member State concerned has really not complied with its judgment, it may impose a lump sum or penalty payment on it. The two types of financial sanctions can be applied simultaneously, as the Court stated¹⁸.

This separation of proceedings seeking the possible establishment of infringement of Community law and imposing a penalty does not incite Member States to the respect of Community law. Thus, the Treaty of Lisbon amends the dispositions of the EC Treaty and makes possible that if the Commission considers that a Member State has failed to fulfill its obligation to notify measures transposing a directive adopted under a legislative procedure, it may propose that the Court would impose a financial sanction right in the first proceeding, at the establishment of the alleged violation of Community law.

3. Complaint to the European Ombudsman

A non-judicial tool for Union citizens is to submit a complaint to the European Ombudsman. Comparing to the action to the Court of Justice or to a national court or tribunal, it is an alternative way of solution of a debate, and it does not alter the time limit open to bring an action. So, where an individual decides to turn to the European Ombudsman, it normally excludes an action before the Court, because if he decides to open an inquiry, its procedure always lasts for more than two months. The opposite situation is also excluded, since the European Ombudsman cannot investigate the judicial activities of the Court of Justice and the national courts, because is not an appeals body for decisions taken by these entities.

The power of the Ombudsman is wider than solely discrimination cases; it investigates cases of maladministration in the activities of the Community institutions and bodies.

¹⁸ In case C-304/02 Commission v. France [2005] ECR I-6263

Maladministration occurs if an institution fails to act in accordance with the law, fails to respect the principles of good administration, or violates human rights, in the case of administrative irregularities, unfairness, discrimination, abuse of power, failure to reply, refusal of information or unnecessary delay.

The European Ombudsman in its individual redress function complements the Union and Member State courts and the parliamentary petitions committees¹⁹. As the Court of First Instance put it: “in the institution of the Ombudsman, the Treaty has given citizens of the Union, [...] an alternative remedy to that of an action before the Community Court in order to protect their rights. That alternative non-judicial remedy meets specific criteria and does not necessarily have the same objective as judicial proceedings.”²⁰ Ombudsman proceedings are flexible, swift and no cost for the parties. They may in some instances be quasi-judicial by the review of legality both in substance and procedure, but generally they display typical features of mediation: win-win types of solution, consensual settlement, broader standard of review, non binding solutions, no enforcement or follow up procedure²¹.

The European Ombudsman emphasizes however, that his functions does not include mediation within the meaning of assisting the parties involved in a dispute to settle their differences, without examining the merits of the dispute. In fact, the European Ombudsman can only propose a friendly solution for the purpose of eliminating an instance of maladministration, he dose, however, actively seek to encourage the Community institutions and bodies to use mediation to resolve disputes²².

There is no express *locus standi* restriction in the EC Treaty nor in the Statute of the Ombudsman, so it means, that it is not necessary for a citizen to show any specific interest in order to complain to the Ombudsman. *Actio popularis* is also admissible.

The European Ombudsman is vested with broad powers of inquiry on one hand, but more limited powers to undo the maladministration on the other hand, he cannot quash an administrative decision. Apart from proposing a friendly solution, he can issue draft

¹⁹ Peters, Anne: *The European Ombudsman and the European Constitution*. Common Market Law Review (2005) 42: p. 711

²⁰ Case T-209/00 Frank Lamberts v. European Ombudsman and European Parliament [2002] ECR II-2203, para 65

²¹ Peters, op.cit., p. 711 and pp. 715-716

²² Annual report of the European Ombudsman, 2006, p. 38

recommendations to the authority concerned, in the case the authority does not comply with these draft recommendations, the European Ombudsman can submit a special report to the European Parliament. He also makes public critical remarks in decisions closing an inquiry. It usually does not remedy the maladministration occurred, but helps to promote better administrative behavior in the future.

This can be the most powerful instrument of the Ombudsman: on the base of individual complaints he can identify general instances of maladministration and he can give a general guidance for better administrative practice. His most important achievement in this field is the Code of good administrative behavior which serves as a useful pattern for each institution and body in contact with public.

The work of the European Ombudsman is under judicial review also. This means that he himself must comply with the requirements of good administration. Although his findings in a case should not be subject to citizens' actions for annulment or to failure to act, an action for damages is admissible in principle, in the case of 'sufficiently serious breach of law'.²³ Since the Ombudsman enjoys a very wide discretionary power, only in very exceptional circumstances will a citizen be able to demonstrate that the Ombudsman has committed a sufficiently serious breach of Community law in the performance of his duties likely to cause damages.

4. Petition to the European Parliament

The subject matter of a petition addressed to the European Parliament is wider than the remit of the Ombudsman, as well as a petition may concern any matter which comes within the Community's fields of activity²⁴. Another important difference is that most of the work of the Committee on Petitions of the European Parliament concerns the application of Community law by authorities of the Member States.

²³ Case Lamberts, cited above.

²⁴ Article 194 EC. It must be mentioned that this condition is contradictory, since according to Article 190 (1) and (4) of the Rules of Procedure of the European Parliament, it is enough if the subject matter of the petition concerns any matter which comes within the *Union's* fields of activity. However, this difference between formulations of texts will not have any importance after the entry into force of Lisbon Treaty.

Where the Committee on Petitions and, consequently, the European Parliament considers, that it should be appropriate to bring an action against a Member State who infringed their obligations under Community law, it has no more power than to inform the Commission. It is up to the latter institution to decide whether it brings an action in the alleged case of violation of obligation or not.

While the work of the Ombudsman with citizens' complaints has no political implications in principle, it is generally assumed that the form of petition is more appropriate for political issues²⁵. Judicial review on the decisions of the Committee on Petitions is excluded. An alleged maladministration of the Committee could be, in principle, subject of the review of the European Ombudsman; however he refuses to conduct inquiries on petitions, because he does not consider himself as investigator of the European Parliament²⁶.

Although, according to Article 194 EC, a matter addressed to the European Parliament must affect the petitioner directly, this condition does not restrict the circle of petitioners in practice, contrary to similar condition of bringing an action for annulment before the Court. The Committee on Petitions considers that this conditions fulfils if a matter comes within the field of activity of the European Union, it is not necessary for the petitioner to prove exclusive material or moral personal interest such as in action for annulment. This is very true of matters related to environmental pollution, social matters or transplantation of organs where many people are affected simultaneously and directly. This *locus standi* is interpreted generously²⁷.

5. Interaction between the three instruments

There is a strong interaction between the three instruments. On one hand, it appears on practical level: the Committee on Petitions transfers, with the consent of the petitioner, any petition containing an allegation of maladministration in the activities of the Community institutions and bodies to Ombudsman, to be dealt with it as a complaint. Similarly, when appropriate, the Ombudsman transfers complaints to the Parliament, with the consent of the complainant, to be dealt with it as a petition. If direct transfer is not possible or suitable, the

²⁵ Peters, op. cit., p. 714

²⁶ Ibidem.

²⁷ Marias, Epaminondas: *The right to petition the European Parliament after Maastricht*. European Law Review (1994) 19 p. 179

European Ombudsman advises to the complainant to turn to the competent Community or national institution or body, including the Court of Justice²⁸.

It must be noted that the European Ombudsman has not a right to bring an action before the Court, and the Parliament's similarly right is also limited; it cannot bring an action against a Member State, only against another Community institution under Articles 230 and 232 EC.

The other level of interaction is more theoretical. The European Ombudsman, as well as the Court of Justice, became a novel source of law, especially, a source of soft law in the European Union²⁹. In individual cases he adopts a soft law discourse simply to avoid legalistic counter-arguments by the administration's legal services. Within this role, he follows the case law of the Court. In Söderman's words, "the jurisprudence of the Courts in Luxembourg [...] will safely guide the Ombudsman's ship on the heavy seas of good and bad administration."³⁰ This 'administrative soft law' of the Ombudsman may be 'crystallized' into hard law via legislation or via judicial case law.

6. Closing remarks

Principle of non-discrimination is at the core of the fundamental rights of Union citizens. The Lisbon Treaty will reinforce it, since it takes into one unit, into Part Two of the EC Treaty the provisions governing prohibition of discrimination and Union citizenship, under the title of 'Non-Discrimination and Citizenship of the Union'. Afterwards, it will not be possible to argue for that this provision must be interpreted that it extends to non-Community nationals also³¹.

The Lisbon Treaty will expand the circle of contestable acts in the way of action for annulment before the Court of Justice. New Article 230 EC will provide that any natural or legal person may institute proceedings against *an act* addressed to that person or which is of direct and individual concern to them. But the requirement of justifying a legal interest will be

²⁸ In fact, the number of transfers is quite low: less than 1 percent of the complaints received is transferred year by year (in 2006, only 22 complaints of 3 830). The importance of advice is greater, since the European Ombudsman gives an advice to contact an other institution or body in half of the cases.

²⁹ See Bonnor, Peter: *The European Ombudsman: a novel source of soft law in the European Union*. European Law Review (2000) 24 pp. 39-56

³⁰ Peters, op. cit., p. 717.

³¹ Groenenedijk, op.cit., pp. 84-85

still in force, and it shall be continue that it can be only the Court who could change this situation and give a broader meaning of ‘individual and direct concern’.

In the field of reinforcement of protection of fundamental rights, a further innovation of the Lisbon Treaty is the decision on accession to European Convention for the Protection of Human Rights and Fundamental Freedoms. It will not be true anymore, that Union citizens do not have any possibility to invoke their fundamental rights against the Community law on European level.

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