

To Be a Citizen?

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In 2001, the European Court of Justice in Luxembourg stated:

“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 the exceptions as are expressly provided for.”²

This concept is based upon a set of ‘Citizenship’ provisions in the Treaty establishing the European Community in 1957, (Articles 17 – 22 EC). This article explores some of the legal issues that Citizenship status provokes and how it may affect the rights of Roma in the EU.

The legal core of citizenship

Article 17 EC proclaims that:

- “1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.
2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.”

The legal core of Citizenship rights is comprised of a mixed bag of *ad hoc* rights: The right to move and reside within the EU (Article 18 EC); the right to

vote and stand as a candidate in European and municipal elections in the Member State of residence (Article 19 EC); the right to diplomatic and consular protection in third countries (Article 20 EC); the right to petition the European Parliament; and the right to apply to the Ombudsman (Article 21 EC).

Before the introduction of Treaty-based ideas of Citizenship, the European Court of Justice had indicated that people who were economically active and moved between the Member States of what is now the EU were exercising “citizenship” rights. However, the number of people actually moving between Member States was small and the right to free movement was given only to nationals of the Member States. In some situations, such citizens were able to move with their families who were non-EU nationals (Third Country Nationals, or TCNs), but the family’s rights were based upon the primary mover who had to be an EU national. Thus, if the family broke up or the primary right holder (the “economically active citizen”) left the Member State, TCN family members found themselves in a vulnerable position and at the mercy of national law (tempered by European Court of Human Rights (ECtHR) law, for example the right to family life), rather than EU law.

Citizenship may now be useful for Roma in asserting a right to a cultural or ethnic identity. In *Garcia Avello*,³ a Spanish-Belgian couple wanted to have the family/surname of their children determined according to Spanish custom concerning family/surnames (which is a combination of the father and mother’s last name) and registered the birth leave with the Spanish Embassy. The children

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² Case C-184/99 *Gryzelczyk* [2001] ECR I-6193.

³ Case C-148/02 [2003] ECR I-11613.

had been born in Belgium and thus the Belgian authorities had registered the names according to Belgian law. The Court noted that if the children returned to Spain they would be at a disadvantage if denied a normal Spanish surname. Here, the Court cited Article 17 EC in conjunction with Article 12 EC. Strikingly, the Court also reasoned that the right to non-discrimination encompassed the right to be treated differently, as the situation of the Spanish children was different from the situation of Belgian children. Thus, in moving to another Member State it may be possible for Roma to assert rights to a cultural identity although such rights are not normally recognised by the host state.

The Treaty establishing the European Community provided a core set of limited Citizenship rights. The most fundamental of these is contained in Article 18 EC: It provides for the right to free movement between the Member States and the right not to be discriminated against (essentially, the right to receive equal treatment). This has decoupled the right to free movement within the EU from the exercise of an economic activity. However this right to free movement is only granted to *nationals* of one of the Member States of the EU (Article 17(1) EC). The Member States retain the right to determine their own nationality laws, although they must exercise this right in conformity with EU law. Thus, there are problems within the EU where Member States have refused to grant nationality to some people residing within its territory. Of particular significance is the Russian-speaking minority in Estonia and Latvia who are classified as “non-citizens” and the so-called “erased persons” in Slovenia, which includes a number of Roma. For Roma, there may be difficulties in obtaining citizenship or proving birth status where the authorities of the Member State refuse to recognise their status or refuse to issue the correct documentation. These groups then fall under a double disadvantage: They are denied citizenship rights in the Member State of their birth and denied the complementary right to free movement granted under EU law. More recently, the situation has arisen in which a Member State is willing to extend citizenship to nationals of another country on the basis of their membership

in an ethnic community. Some Member States are reluctant to recognise this extended nationality.

At the political level, the EU has attempted to ameliorate some of the harshness of national law. For example, the 1999 Tampere European Council endorsed “the objective that long-term legally resident third country nationals should be offered the opportunity to obtain the nationality of the Member State in which they are resident.”⁴

This was followed by the EU Council adopting the Common Basic Principles on Integration in 2004. In 2005, the Commission adopted *A Common Agenda for Integration*. Behind these measures is the idea of supporting “participative citizenship” as a means of integrating TCNs into the Member States of the EU, and leading to greater naturalisation of TCNs where they form a close relationship with the state of migration. A theme behind this policy and the concurrent development of the Citizenship provisions of the EU is to give long-term residents greater rights within the host State. This may disadvantage Romani communities who may not settle for long periods within one Member State and who may not be able to adduce the evidence from the authorities certifying their legal residence within a Member State.

Most significant for the development of Citizenship rights at the EU level is the right contained within Article 18 EC. In a number of judgments, the European Court of Justice has confirmed that the right to reside in the territory of a Member State is conferred directly on every EU Citizen by Article 18 EC and that this right must be interpreted in light of the fundamental rights, particularly the right to protection of family life and the principle of proportionality. This applies to entry to another Member State, the right to residence and also to expulsion from another Member State. The links between citizenship and the right to residence have been reinforced by the adoption of Directive 2004/38 which simplifies the right to residence of citizens of the Union and their families, codifying the Court’s case law. The Directive came into force on 30 April 2006.

⁴ Tampere European Council. “Presidency Conclusions.” http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/ec/00200-r1.en9.htm.

Article 18 EC has been closely linked to the non-discrimination on grounds of the right to nationality found in Article 12 EC.

The Italian policy that led to the fingerprinting of Roma and conducting a census in camps for Roma has been condemned as an act of direct racial and ethnic discrimination. The Citizenship dimension to this practice has not yet been adequately explored since Roma who can prove that they have the nationality of one of the Member States of the Union may also rely upon Article 18 EC to challenge the legality of the Italian measures, especially the proportionality of the government's actions in this case.

Thus, EU Citizenship has assumed an important dimension by increasing individual rights, not only in terms of giving access and the right to residence in a Member State, but also in providing a universal right to non-discrimination in access to public welfare benefits provided by the State. The Court has, however, added a rider to the right to equal access to welfare benefits by stating that the residence in the host Member State must be lawful. The most significant case showing how the new citizenship can reverse a national welfare policy is seen in the case of *Bidar*.⁵ In this case, a French student, lawfully resident in the United Kingdom, was able to claim eligibility for a student loan on the same basis as UK nationals or EU migrant workers.

The ability of nationals of the Member States to move freely and gain access to public welfare benefits has given rise to fears of "welfare tourism". In fact, the number of migrants who move between the Member States seeking such benefits is small. Because the right is based upon

non-discrimination, a Member State is in a position to lower or even withdraw certain welfare benefits that it supplies to its own nationals and thus, there is no guarantee of quality or basic minimum welfare rights in EU law. These will continue to be governed by national laws.

One idea which emerges from the development of citizenship rights is the issue of reverse discrimination. Under EU law, the rights normally attached to free movement only apply when a person crosses an internal EU border. If the free movement provisions are not triggered, then the situation is considered "purely internal" and the Member State retains the right to regulate the position of its own citizens. This may result in a migrant being able to assert a greater range of rights than nationals of a Member State who are "static" citizens, and may have very limited legal means to challenge State conduct; which is discriminatory.⁶ This form of "reverse discrimination" is manifested most harshly in relation to the rights of family members to join a national who has never left her State of nationality/residence. Or it may impact where a TCN loses the right to residence, for example, during family breakdown. The rights granted under Article 18 EC are triggered by a migrant crossing an EU border. This idea is central to this particular Citizenship right and it may result in the migrant being able to assert rights against her own Member State by moving to another EU State and then returning home.

It can be argued that the language of *Grzelczyk* is sufficiently broad to cover reverse discrimination. In a later case, the Court appears to go even further:

"[...] a citizen of the union must be granted in all Member States the same treatment in law as that accorded to nationals of those

⁵ *Case C-209/03 [2005] ECR I-2119.*

⁶ *However, the link to free movement may be quite tenuous. For example, it can be seen in case C-60/00 Carpenter [2002] ECR I-6279. This is a controversial case which has attracted criticism but provides a good example of the legal and political space created by EU law if a person can bring herself within its cloak of protection. A Philippine wife of a British businessman who provided services in other EU Member States was able to resist deportation under British law because it was argued that she provided care for his children (from a previous marriage). If she was deported, her absence would impair her husband's ability to provide services in other Member States. See also Case C-403/03 Schempp [2005] ECR I-6421, in which a German national found that his tax position was negatively affected because his former wife had moved to Austria. Although he had not moved, his former wife's move to another Member State enacted the provisions of Article 18 and 12 EC, and therefore the situation was not purely internal.*

Member States who find themselves in the same situation. It would be incompatible with the right to free movement were a citizen in the Member State of which he is a national, to receive treatment less favourable than he would enjoy if he had not availed himself of the opportunities offered by the Treaty.”⁷

When linked to the development of fundamental rights in the EU, migrants who use the Citizenship provisions may find themselves in a significantly better position to assert rights – especially those concerning non-discrimination and increased access to welfare benefits and services from the state – than nationals of that State who have not triggered the free movement provisions.

Other Citizenship rights are not dependent upon triggering the free movement provisions, but upon holding the nationality of one of the Member States. It may not be easy to exercise any of these rights unless a person can show that he/she is lawfully resident in one of the Member States. Article 19 EC provides for EU citizens the right to vote and to stand for election in municipal and European Parliament elections in a Member State other than their own. Detailed measures for realising this right were provided in two Directives: Council Directive 93/109/EC and Council Directive 94/80/EC. This right has far-reaching consequences, enabling groups such as Roma to organise transnational political representation extending beyond the political boundaries of the Member States. However, in *Spain v United Kingdom*,⁸ the Court confirmed that the definition of the persons entitled to vote and to stand as a candidate in elections to the European Parliament falls within the jurisdiction of national, not EU law. Nevertheless, some inroads have been made with respect to this right. If a Member State systematically denies voting rights to a certain group, human rights issues emerge. For example, the UK was found to be in breach European Convention on Human Rights by the European Court of Human Rights by failing to organise elections

for the European Parliament in Gibraltar in *Matthews v the United Kingdom* [GC].⁹ Similarly in the *Aruba* case, the European Court of Justice confirmed that Member States retain the ability to define voting eligibility, but they must exercise that right in compliance with EU law. The government of the Netherlands failed to present objective reasons for denying a group of Dutch nationals resident in the overseas territory of Aruba from voting eligibility in the EP elections. In particular, the Court ruled, “[...] it must be observed that the principle of equal treatment or non-discrimination [...] requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is not objectively justified.”¹⁰

The remaining Citizenship rights, the right to diplomatic and consular protection in third countries (Article 20 EC), the right to petition the European Parliament and the right to apply to the Ombudsman (Article 21 EC), do not have particular residence or nationality requirements attached to them. They bring some hope that members of the Romani community in the EU (and indeed outside of the EU when diplomatic and consular protection is at issue) may be able to rely upon States other than their own to assert rights and offer the opportunity for the European Parliament and the Ombudsman to scrutinise actions by the Member States and the EU institutions.

Within the EU, other ideas of citizenship have emerged. For example, the idea of “consumer-citizenship” in relation to the rights of consumers provided under EU law, especially in relation to the right to core public services, originally provided by the State but now provided by non-State bodies as a result of liberalisation and privatisation. These forms of essential basic services are called “public service obligations” in EU law. This new set of consumer-citizenship rights are an important set of new rights for Romani communities since they set out a minimum or basic set of rights for access to

⁷ *Case C-224/98 D’Hoop* [2002] ECR I-6191, para 30.

⁸ *Case C-145/04* [2006] ECR I-7917.

⁹ No. 24833/94, ECHR 1999-I.

¹⁰ *Case C-300/04 Eman and Sevinger v College van burgemeester en wethouders van Den Haag* [2006] ECR I-8055.

utility services, postal services, telecommunications and transport services. Within the minimum rights standard, there also exists the idea of rights relating to continuity and quality of these basic services. Conceptually, this is an important element in building a basic set of consumer rights, without the precondition of discrimination involved. This may be relevant for Roma from other EU Member States living in the camps created by the Italian government, wherein the provision of basic services such as water or electricity may be insufficient.

One limitation of this new form of “citizenship” is that it presumes that a person, or a family, possesses a residence to which the essential public services can be provided. It also assumes that “citizens” are given adequate information concerning how to assert their rights. Thus, I have argued that the new form of consumer-citizenship should be linked to securing basic social and economic rights such as, the right to housing, education and health-care.¹¹ The current EU approach to consumer citizenship results in a fragmentation of rights since the different procedures and principles necessary to assert such rights are dependent upon national laws and procedures and offer the option of using different legal mechanisms, like the ECtHR or the European Social Charter’s monitoring mechanism to deal with Member State’s failure to fulfil human rights obligations. These “rights” and “principles” are also recognised in the Charter of Fundamental Rights of the Union, but may be difficult to enforce as independent or directly effective rights. Some political commentators even argue that these social and economic standards are merely “principles,” not enforceable “rights”. Contrary to this understanding, the European Court of Justice has recently begun to refer to the Charter in its judgments.¹² Still, it may be some time before the idea of free standing social and economic rights filters through into EU law.

The EC Commission has also introduced a “Citizen’s Agenda”, the aim of which is the involvement of citizens in policymaking and the creation of a

stakeholder’s agenda. This initiative is distant from everyday life as the discussion locations tend to be advertised on the EU website and meetings often take place in Brussels. For some time, the EU has been making efforts to involve “civil society” within policy and legislative consultations. However, this has created umbrella movements, such as the European Network Against Racism (ENAR). These movements may represent a wide range of interests and alliances across Europe, like the disability alliance or the social housing alliance. In turn, they can lose the specificity of particular demands, especially those asserted by racial or ethnic groups with unique needs and priorities.

Conclusion

The common theme behind Citizenship in the EU is the creation of the concept and a layer of citizenship stemming from EU law and *complementary* to national laws. The new Citizenship aims to create a closer link between ordinary people and the European integration project. However, for many citizens of Europe the Citizenship agenda remains distant and, for many groups, inaccessible.

The concept of EU Citizenship is rapidly taking shape, providing a new layer of consumer rights alongside a range of political rights and substantive rights, especially the right to residence in another Member State and access to welfare benefits and services. While some rights may afford immediate benefit to Roma by providing new forms of consumer rights not dependent upon proof of discrimination, those requiring proof of nationality and extended residence periods may be much harder for the Romani community to access, especially if there are obstacles to supplying the appropriate documentation from the State and local authorities.

Significantly, and paradoxically, Citizenship is of a huge benefit for individuals and groups who travel across borders allowing for new forms of transnational solidarity to be created

¹¹ Szyszczak, Erika “Legal Tools in the Liberalisation of Public Services.” In *Integrating Welfare Functions Into EU Law- from Rome to Lisbon*, edited by R. Nielsen et al. Denmark: CBS Press, 2009.

¹² This may not always have positive outcomes since many of the EU fundamental rights are based upon the ECHR wherein the Member States are given a margin of discretion. This is seen in a recent judgment on the right to strike in Case C-438/05 Viking [2007] ECR I-10779.

between static communities and travelling communities. Unfortunately, citizenship also mirrors and reinforces traditional boundaries between belonging and not belonging. The requirement of nationality in one of the Member States, while

there is little recourse to challenge denial of this status or failure to recognise ethnic identity independently from national identity, emphasises the difference between being a Citizen and being a non-Citizen in the EU.