

Onoufriou - Ombudsman Cyprus

Introduction

I would first like to thank, on behalf of the Ombudsman, the organizers of this seminar for their invitation.

The Ombudsman's Office receives a large number of complaints from third country nationals (TCN), members of family of European citizens concerning mainly their entry and residence rights. In this presentation I will try to focus on the obstacles TCN face in those aspects, based on the Office's experience. I will also address the issue of reverse discrimination against TCN members of families of Cypriots and discrimination on the ground of sexual orientation of same sex couples.

The Anti Discrimination Body was founded in line with EU anti-discrimination Directive 2000/43/EC (the 'Racial Equality Directive', art. 13) which assigned the institution of the Ombudsman as the anti-discrimination specialised body (The Combating of Racial and Some Other Forms of Discrimination Law No. 42(1)/ 2004)

The entry of Cyprus to the EC legal order has established a wider and multifaceted framework of protection of the rights of third-country nationals. The principle of free movement of European citizens and their family members in combination with migration, confer to the principle of family unification an added importance and an evolving character. There is now, with the transposition of the community Directive 2004/38/EC and 2000/86/EC, a comprehensive normative framework on the basis of the *acquis communautaire* which allow the entry and residence in Cyprus of EUN and TCN, members of family of EU nationals who reside legally in the country. However, in practice there are many bureaucratic and other obstacles, mainly related to social stereotyping, inhibiting these rights, leading many times to discrimination of third-country nationals.

1) Administrative obstacles concerning the entry and residence of TCN, members of families of EUN

These obstacles mainly involve delays in the issuing of residence permits and until recently, differentiation in the duration validity of these permits.

Delays in the examination of applications may amount to two years and no information is given on the status of the application. These delays are due to the great number of applications but mostly due to the investigation that takes place simultaneously concerning the genuine character of the marriage. The consequences of this practice is that, until the issuing of the residence permit, the applicants cannot exercise rights related to their status as members of families of EU citizens, e.g. the right to work, access to health care and other social benefits (public allowance) or traveling abroad and returning back without the need to obtain an additional visa.

Delays were also noted concerning the registration and issuing of residence permits of European citizens. The delays concerned applications made under the previous law 92 (I) 2003 which was put into force after the entry of Cyprus in the EU and required the issuing of residence permit to European citizens 6 months at the latest after the submission of the application. In February 2007 this law was replaced by L. 7 (1) 2007 which transferred in the Cypriot legal order the community Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. According to the new legislation, EU citizens are not required to obtain a residence permit but should register to CRMD (Civil Registry and Migration Department) and after submitting all necessary documents, they should be provided with a registration certificate.

The Ombudsman noted that these delays constitute unjustified violation of the national and community legislation and referred to the relevant decision of ECJ (C-2003/157) which condemned Spain for failing, in breach of Community law, to issue a residence permit as soon as possible and in any event not later than six months from the date on which the application was submitted. The lack of staff in the CRMD cannot be considered as a sufficient reason for the delays, and in any case cannot turn in the detriment of the citizens.

In addition, after the entry into force of the new legislation, the Ombudsman was informed that EU citizens are given appointments for registration 6 months after they visit the CRMD. Given that Directive 2004/38/EC provides for the equal treatment of EU citizens moving in EU territory, irrespective of their nationality, the fact that EU nationals are impeded from enjoying a number of vital public goods and services (due to the delays in the issuing of their registration certificate) constitutes an indirect discrimination on the basis of their nationality and violates in practice their freedom of movement and residence.

Also, the Ombudsman received a number of complaints from TCN married to EUN concerning the different time validity of their residence permit depending on whether their marriage took place in Cyprus (1year validity) or abroad (5 years), As known, law 7 (I) 2007 provides for the granting of residence permits of 5 years unless the duration of stay of the EU national is less than 5 years. The CMRD considered that TCN that got married in Cyprus with an EUN did not fall within the application of Law 7 (1) 2007 and the respective Community Directive but they were treated under the provisions of the Aliens and Migration Law.

In her intervention the Ombudsman referred to the recent decision of the ECJ which clarified two important issues concerning the application of the Directive 2004/38/EC¹. Firstly, the Court stated that the said Directive precludes legislation of a MS which requires prior lawful residence of the TCN spouse of a EUN, in a member state other than the one they reside (host ms), in order to benefit from the provisions of that Directive.

Secondly, the Directive applies also to the spouse of the EU citizen irrespective of when and whether the marriage took place and of how the TCN entered the host member state.

¹ Case C-127/08, Judgment of the Court (Grand Chamber), 25 July 2008 (Metock)

Considering that the approach of the CRMD directly contradicts the community *acquis* expressed by the abovementioned ECJ decision, the Ombudsman suggested the amendment of the practice and the examination of all applications on the basis of L. 7 (I) 2007. The Director of the CRMD finally proceeded to a modification of the practice with a circular issued on 14 January 2009.

2) Family unification, members of family of Cypriots and same sex couples

Marriages between EU nationals and third country nationals are faced with an *a priori* feeling of mistrust. Problems mainly arise in cases when the spouse, third country national has resided illegally in Cyprus either before or at the time of marriage (often in cases of rejected asylum seekers). In such cases, often the third country national is asked to leave Cyprus, without considering the fact of marriage (with the assumption that the marriage is false) or even pregnancy of the spouse. With numerous interventions of the Ombudsman, deportations have been cancelled, although after arrest and detention of the third-country national.

There are also times when the EU national (including Cypriots) follows his/partner (who has been deported or departed from Cyprus due to illegal stay) to his country of origin in order to get married. These cases are also problematic because deportation or departure due to illegal stay result to the inclusion of their names to the so called “stop-list”. Therefore, if the TCN wishes to return to Cyprus (even with his EU national spouse), he faces the possibility of denial to entry to Cyprus. Requests of removal of names from the ‘stop list’ often remain unanswered or take long time to be resolved. As a result, EU nationals have to either move to their spouse’s country of origin or visit them very often, with all the practical difficulties this “arrangement” entails.

Recently, the Ombudsman dealt with the issue of marriages between Cypriot citizens and third country nationals. Given that law 7 (I) 2007 excludes the Cypriot citizen from the definition of the European citizen, the status of the spouse of a Cypriot citizen is handled under the Aliens and Migration Law. The status normally given is that of a “visitor”, with or without the right to work and normally with a permit of one year validity. Apart from the practical difficulties this approach involves, the legal status given is extremely ambiguous and confusing and its determination depends on the discretionary power of the Migration Officer. This legal paradox, which is mainly due to the absence of a concise normative framework but also to feelings of suspicion and mistrust, leads to unequal treatment of TCN married to Cypriots (in relation to those married to other EU nationals) and creates an insecurity concerning their legal status in Cyprus.

The Ombudsman in her intervention made a thorough analysis of ECHR cases, which illustrate an ongoing widening of the protection attributed to family life. Concerning issues of deportation, requests for family reunification and generally issues pertaining to aliens’ law, the Court underlined that states retain the power to control the entry and residence of aliens in their territory, but this power is limited by their international obligations. Measures taken against aliens should be necessary for a democratic society and respect the principle of proportionality. Personal circumstances, ties with the host country and the country of origin and

the genuine character of the marriage should be taken into account before every decision of deportation. In addition the Court recognised that often it is very difficult for the whole family to settle in the TCN country of origin, due to linguistic and cultural differences and that such obstacles may amount to an unjustified intervention to family life (except in cases of serious criminal acts).

Through a dogmatic application of the Law 7 (I) 2007, it results that if a Cypriot citizen married to a TCN, moves and resides to another EU Member state, his spouse acquires rights of residence to that member state but not in Cyprus. This differential treatment of TCN cannot be considered as fully harmonised with the normative framework safeguarding the right to family life. It also constitutes an unjustified discrimination against Cypriot citizens and deprives them of the actual benefits their European citizenship entails.

The Minister of Interior, with a recent and very important circular referred to relevant decisions of the Supreme Court and, having regard the obligations to protect and respect family life, asked for the proportionate application of the provisions of the L. 7 (I) 2007 to Cypriot citizens married to TCN in order to avoid their discriminatory treatment, in relation to other European nationals, in their own country. Unfortunately, the Office continues to receive a number of relevant complaints, an indication that the CRMD fails to follow the Minister's recommendations.

The Ombudsman welcomed the said Ministerial Circular as a step towards the appropriate direction, suggesting on the same time the examine the setting up of concrete measures which will safeguard also to Cypriot citizens married with TCN all the guarantees for the protection of family life. Such development will realise the purpose of the Minister's regulatory intervention and lead to a comprehensive protection of the right to family life.

Another subject that has been recently addressed is the issue of discrimination on the ground of sexual orientation and the respect of private life of same sex couples within the framework of application of Directive 2004/38/EC.

The Ombudsman encouraged the state to adopt effective measures in order to ensure the equal treatment of homosexual couples and to fully respect their private life, without the need to recognize marriage or any other form of legal relationship between gay couples.

The dynamic mobility in the European level forbids discrimination and provides for the respect of persons with a different sexual orientation. These developments reflect the influence of *acquis communautaire* on the Cypriot legal order and society. In particular, the issues pertaining to the free movement of European citizens take the form of a non-reversible legal process which cannot be ignored by the Cypriot public administration on the basis of any stereotypes or established practices.

These developments create the need to regulate the rights of homosexual couples according to the principle of non-discrimination. It is vital to underline that the necessity to regulate the consequences of the recognition of civil partnerships (or

marriages) between same sex couples in other member- states, from which Cyprus is affected due to the freedom of movement of European citizens, is clearly a different issue from the legalization, as such, of civil partnership or marriage between homosexuals.

The approach of the Cypriot administration to handle the issue through the application of the Aliens and Migration Law, presents a problem of compatibility with the community Directive on the rights of EU citizens and the members of their families to move and reside freely in the territory of Member States. This directive provides that member states should include in the definition of “family members” the “registered partner”, if the legislation of the host state recognizes civil partnership as equal to marriage. It is also stated that, when applying the directive, member states should not discriminate against any person on the ground of his/her sexual orientation. The relative national legislation (Art. 4 of the Law 7 (I) 2007) which transposed the directive in the national legal order provides for the possibility to facilitate the entry and stay in Cyprus of the person, with whom the EU citizen has a stable relationship, according to the Aliens and Migration Law.

It is a fact that the directive does not provide for the identical treatment of same or different sex couples in civil partnership, but the further regulation of the issue is given to the member states. Nevertheless, the spirit of the directive and of the Cypriot legislation, reflect the need to facilitate the entry and stay of these couples in a manner which corresponds to the treatment of the European citizens and the members of their families.

The justification of the responsible authority limits itself to the argument of non-recognition of same sex marriage in Cyprus. The lawful, in other respects, protection of marriage should not imply or entail limitations on freedom of choice in partnership in private relations or any unjustified discrimination against same sex couples who move within the Union.

However, such an indiscriminate and prohibitory stance, together with the *a priori* exclusion of a gay partner who is a European citizen from his/her rights provided by the *acquis communautaire*, on the sole basis of non-recognition of same sex marriages in Cyprus, introduces an unjustified discrimination that is irreconcilable with the letter and spirit of Directive 2004/38/EC as well as the fundamental principles of community law.

The particular community directive imposes an obligation on member states to recognize the freedom of movement to all citizens of the Union (same sex couples included) without imposing a similar obligation to recognize same sex marriage. Consequently, the responsible authority, should reconsider its approach on the matter, in the line of facilitating, on a practical level, the exercise the rights of free movement and establishment of gay partners in Cyprus. The current practice with regard to facilitating these rights on the basis of the Aliens and Migration Law is at odds with the provisions of the relevant community directive and amounts to an unjustified discrimination against European citizens who chose this particular type of partnership. It further implies a number of practical and other difficulties during their stay in the host country (e.g. unsettled status of a “visitor”, employment rights in the absence of special normative provisions).

Conclusion

The transposition of community directive 2004/38/EC in the Cypriot legal order has been a top-down approach and has brought about significant changes in the way EU nationals and their family members are treated. Apart from the said directive, the transposition of community directives related to migration and asylum (2003/86/EC-Family Reunification, 2003/109/EC Long Term Residence Status, 2003/09/EC Reception Conditions, 2004/83/EC Qualification Directive) have completely changed the way migrants and asylum seekers were treated in the Republic of Cyprus. Nevertheless, even if the fundamental principles of community law and in particular the free movement and residence are respected, in the first place, in practice there are many obstacles that endanger their full implementation. It can be argued that both the legal order and Cypriot society was not completely ready to accept these changes which were inhibited to a large extent by legal ambiguities and social stereotypes.

Despite the positive developments that have taken place, there is still a great margin of improvement in order to ensure equal treatment for European citizens and their family members and fair treatment for other third country nationals. Still, mixed marriages, especially in cases when the TCN has already been in Cyprus under a different status (asylum seeker, employment, student) are faced with feelings of mistrust and suspicion. There is indeed an issue with marriages of convenience, but each case should be examined individually, on its substance and through the application of clear and concrete criteria.

As mentioned in my presentation, the issue of reverse discrimination of Cypriot citizens (and members of their families who are TCN) creates the need for the setting up of a concise normative framework which will ensure the full enjoyment of the right to family life. This right does not solely require from the state to abstain from any intervention but also imposes the positive obligation to take appropriate measures that will safeguard family unity. The Cypriot legislation, though the implementation of the *acquis communautaire* should raise the standards of protection and interpret, meanwhile, any ambiguity, to the direction of protecting the right to family life.