

Migrants and Educational Rights: a European Response

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Education is both a human right on itself and an indispensable means of realising other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities¹

I. Introduction

This article aims to provide an overview of the fundamental and human rights in education applicable to migrants in the European Union territory. It summarises the basic educational rights guaranteed within three different legal frameworks: the European Union (EU), the Council of Europe (CoE), and the international human rights treaties.

Section one analyses the set of educational rights granted by the EU level legal framework. It focuses particularly on the protection in the field of education accorded to migrants by the EU Charter of Fundamental Rights, which since acquiring a legally binding status with the entry into force of the Treaty of Lisbon in December 2009, has become the key instrument for the protection of fundamental rights for migrants within the EU legal order.

Section two focuses on the legal framework pertaining to the educational rights of migrants developed at regional level within the system of the Council of Europe. It examines the two primary instruments of this protection regime – the European Convention on Human Rights (ECHR) and the European Social Charter – to which every EU member state is a contracting party.

Finally, section three sets out the framework of protection accorded to migrants with respect to their educational rights at international level. It presents the most relevant provisions of the universal human rights instruments UN.

Each section analyses the extent to which the examined texts are applied to migrants and the mechanisms for the legal enforcement of rights.

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1 UN, ESCOR, ESC Committee, 21st Session, *General Comment No. 13, The right to education (Art. 13)*, UN Doc. E/C.12/1999/10 (1999), paragraph 1

II. The European Union framework for the protection of educational rights of migrants

A. The EU Charter of Fundamental Rights

The Charter of Fundamental Rights of the EU (hereinafter ‘the Charter’) is the core instrument for the protection of fundamental rights in the EU.² It draws together in a single text the range of civil, political, economic and social rights applying to everyone, regular and irregular migrants, unless explicitly stated otherwise.

Article 14 of the Charter deals specifically with the right to education granted to European citizens and all persons resident in the EU. It provides in its first sentence (‘everyone has the right to education and to have access to vocational and continuing training’) for non-discriminatory access of everyone to education and vocational training. Everyone refers to migrants, among other categories of people. The first sentence of Article 14 is phrased in positive terms, and guarantees a positive right to education. Such wording indicates Member States’ obligation to not only refrain from interfering with the migrants’ human right to obtain an education, but to facilitate it through positive action. This interpretation receives support from the second sentence of Article 14 which grants the possibility of free and equal access to compulsory education. Moreover, equal access to education as stipulated in the first sentence of Article 14 which, in accordance to the ECJ’s decision in *Casagrande*³ entitles the student with a migrant background to attend school ‘under the best possible conditions’ including access to any ‘general measures intended to facilitate educational attendance.’⁴ *Casagrande*, the son of a deceased migrant worker, was denied an allowance to attend school in Germany because of his Italian nationality. The ECJ referred to Article 12 of Regulation 1612/68, which stipulates that a worker’s child may receive education on the same conditions as nationals’ children,⁵ including receiving financial support in the form of a grant.

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The third sentence of Article 14 also guarantees respect for the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions. The wording is framed on the basis of the second sentence of Article 2 of Protocol 1 to the ECHR, which states that contracting states shall respect the right of parents ‘to ensure ... education and teaching in conformity with their own religious and philosophical convictions.’ While Article 14 does not expressly mention children’s rights in choosing the kind of education they receive, the Convention in its *Explanations relating to the Charter* states that parental rights as stipulated in the third sentence of Article 14 must be interpreted in conjunction with Article 24 of the Charter, which discusses ‘The rights of the child.’⁶ Accordingly, in deciding the nature of the child’s education, the child’s best interest must form the primary consideration. Moreover, pursuant to Article

24(1), children’s views ‘shall be taken into consideration on matters which concern them in accordance with their age and maturity.’

2 With the coming into force of the Treaty of Lisbon (Lisbon Treaty) in December 2009, the Charter has become directly enforceable by the EU and national courts. Art. 6(1) of the Treaty on the European Union (TEU) provides that “the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights”. There is no direct incorporation of the Charter in the Lisbon Treaty but the Charter is given the same legal status.

3 ECJ, Case 9/74, *Casagrande v. Landeshauptstadt München*, [1974] ECR 773 (judgment of 3 July 1974)

4 ECJ, Case 9/74, *Casagrande v. Landeshauptstadt München*, [1974] ECR 773 (judgment of 3 July 1974), paras. 8-9

5 Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

Article 12 reads:

The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State’s general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.

Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions.

6 See Updated Explanations relating to the text of the Charter of Fundamental Rights by the Presidium of the European Convention of 18 July 2003, CONV 828/1/03 REV 1.

Finally, the third sentence of Article 14 guarantees the freedom to found educational establishments ‘with due respect for democratic principles and ...in accordance with the national laws...’ It thus imparts the freedom on persons and entities other than the state to establish schools, while leaving it to the discretion of Member States to set minimum standards as to, for example, school curricula and methods of teaching, including discipline. Private schools may pursue religious, philosophical or pedagogical aims of their choice. However, it is imperative that both Member States and private educational institutions observe ‘democratic principles.’ This means that private schools must provide instruction in an objective, critical and pluralistic manner, on the same lines as public institutions.⁷ For Member States, it involves a duty to regulate both public and private schools so that the fundamental rights and freedoms of all students are protected.

While Article 14 grants a right to private education, it does not entail an obligation on the part of Member States to fund or subsidise private schooling. This follows from the fact that the regulation of education systems, including funding and the distribution of subsidies, falls entirely within the jurisdiction of Member States. The European Court of Human Rights in the *Belgian linguistics* case,⁸ as well as the European Commission of Human Rights,⁹ confirmed that states’ need not subsidise private educational establishments. The UN Human Rights Committee held that preferential treatment given to public sector schooling is reasonable since parents are free to take advantage of public sector schooling, or to choose private schooling for their children.¹⁰

B. The EU Secondary Legislative Instruments

Several of the recently adopted EU directives have a bearing on the education of migrant children. While most EU legislative acts and proposals dealing with migrants adopt a largely instrumental approach, several directives discussed below pay attention to a rights-based perspective. Generally, discrimination on the grounds of race and ethnicity in education is prohibited by Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.¹¹ Article 3(1g) states that direct and indirect discrimination of all persons, as regards both the public and private sectors, including public bodies, in relation to education is not permissible in the EU territory.

Directive 2003/109/EC¹² on long-term resident status lays down an ambitious set of rights of long-term resident third-country nationals, granting them in most areas equal treatment with EU citizens. In connection with education it states in Article 11 (1b) that long-term residents shall enjoy equal treatment with nationals as regards ‘education and vocational training, including study grants in accordance with national law’. The same article does accord some leeway to Member States to restrict the application of non-discrimination by stipulating in part 3(b) the option of restricting access to their educational system by requiring proof of language proficiency.

Directive 2003/9/EC¹³ refers to minors who have applied for asylum or who are children of *asylum seekers*, i.e. of third country nationals or stateless persons who have made applications for international protection in respect of which a final decision has not yet been taken. It provides through Article 10

7 Eur. Ct. H.R., *Kjeldsen, Busk Madsen and Pedersen v. Denmark* (Appl. No. 5095/71), judgment of 7 December 1976, Ser.A, No. 23, para. 53. In this case, a group of parents complained that sex education in Danish public schools violated their convictions as to how their children should be educated.

8 See Eur. Ct. H.R., *Case relating to certain aspects of the laws on the use of languages in education in Belgium v. Belgium* judgment of 23 July 1968, Ser. A, No. 6, para. 7

9 See Eur. Comm. H.R., *Family H. v. United Kingdom* (dec.), No. 10233/83, 6 March 1984, (1984) 37 D.R. at p. 105

10 See Human Rights Committee, Views on Communication No. 298/1988, *G. and L. Lindgren and L. Holm v. Sweden*, 7 December 1990, (CCPR/C/40/D/298/1988), para. 10.3.

11 Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin 2000, O.J. (L180) 22.

12 Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, 2004 O.J. (L 16) 44.

13 Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, 2003 O.J. (L 31) 18.

for access to the education systems of the EU Members under conditions similar to those applicable to nationals of the EU Members for so long as an expulsion measure against their parents is not actually enforced.

Finally, the EU Return Directive¹⁴ provides minimum common standards and procedures for member states' removing irregular third country nationals from their territory. The Directive does provide a number of safeguards for irregular persons pending removal, including among others, the right to access education. If a Member State decides, for whatever reason, to postpone a removal it shall be ensured that, inter alia, minors are granted access to the basic education system subject to the length of their stay. (Article 14).

III. The Council of Europe framework for the protection of educational rights of migrants

As we are discussing the situation in EU Member States, regional European law should be taken into consideration as well. Two of the Council of Europe's instruments will be given attention, namely the European Convention on Human Rights (ECHR) and the European Social Charter – to which every EU member state is a contracting party.

A. European Convention on Human Rights

Although mainly concerned with civil and political rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) also provides for a right to education. The first sentence of Article 2 of the First Protocol to the ECHR stipulates unequivocally that “no person shall be denied the right to education”. The reading of this provision should be linked with Article 14 of the ECHR which enshrines the right to freedom of discrimination on the grounds of, inter alia, national origin or “other status”. This can result in a ban on differentiation on these grounds in the context of social security, and in the context of education in particular. As the European Court of Human Rights (ECtHR) has ruled in *Gaygusuz*,¹⁵ a different treatment of national citizens and foreigners violates the non-discrimination rule of Article 14 if it is not grounded on objective and reasonable justification. This is the case if not a legitimate aim is pursued or there is no reasonable relation between the interests of the persons affected on one hand and the aim of the measure on the other. The states enjoy a certain margin of discretion in deciding if and how far differences justify a different treatment. But they must show good cause if a difference in treatment based solely on the nationality shall be compatible with the ECHR. This approach was developed further in *Poirrez*,¹⁶ where the Court held that a differentiation in the treatment with respect to social benefits between nationals of State Parties to the ECHR on one hand and nationals of other states on the other is not justifiable. This argumentation can, *mutatis mutandis*, be applied to schooling as well.

Hence, read in conjunction with the non-discrimination provision in Article 14, Article 2 of the First Protocol to the ECHR clearly applies on a non-discriminatory basis to both nationals and non-nationals whether in a regular or irregular situation who are within the territory of a contracting party unless there is an objective and reasonable justification for the differential treatment. It may thus be argued that no children of non-nationals present within the jurisdiction of Council of Europe member states, which have ratified this protocol, may be denied their right to receive an education, even if their parents are unlawfully resident in the country. If a state stipulates school attendance to be compulsory for children being his nationals he must also recognize the right of migrant children to education. As some authors rightly pointed out:

14 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals

15 ECtHR, Decision of 16/09/1996 – No.39/1995/545/631 (*Gaygusuz vs. Austria*).

16 ECtHR, Decision of 30/09/2003 – No. 40892/98 (*Poirrez vs. France*). See also later decisions of 25/10/2005 (No. 58453/00 - *Niedzwiecki vs. Germany* – and No. 59140/00 – *Okpiz vs. Germany*

Denying to foreigners who, although not legally residing ... are likely to stay in a Contracting State for an indefinite period of time (for instance because they cannot be expelled for humanitarian reasons) the possibility to receive primary education has such far-reaching consequences, that the fact that they do not legally reside in a Contracting State is not a reasonable justification for this differential treatment, which therefore is contrary to Article 2 (independently or in conjunction with Article 14¹⁷)

B. European Social Charter

The European Social Charter (ESC) is relevant for the present discussion of educational rights of migrants as it supplements the ECHR in the field of economic and social rights and lays down various fundamental rights and freedoms which encompass among other things education and non-discrimination. Article 17 paragraph 2 of the Revised ESC calls on States “to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools”. The European Committee on Social Rights has repeatedly stressed that States need to ensure a high quality of teaching and to ensure that there is equal access to education for all children, in particular vulnerable groups.¹⁸ Article 10§1 of the Revised Charter encourages the countries under its jurisdiction to promote all kinds of higher education (initial training, i.e. general and vocational secondary education, university and non-university higher education, as well as continuing training).¹⁹

Furthermore Article E of the Revised Charter, contains a non-discrimination clause which reads that the enjoyment of the rights set forth in the Charter ‘shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.’ At the same time the Appendix to the Charter spelling out the scope of Article 17 states that it is limited to ‘foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned’. It would thus mean that for the Charter (in as far as educational right is concerned) to apply to irregular migrants a dynamic interpretation of the provision would be required by the European Committee on Social Rights. The Revised Charter also addresses language rights of migrants in education. On the one hand, the Charter stresses in Article 19 (para.11) the importance of learning the language of the host country as a way of facilitating migrants’ integration and that of their families.²⁰ The European Committee on Social Rights has urged the Parties to facilitate teaching of the national language both to school age children and to migrant workers and members of their families who are no longer of school age. In the first case, although the receiving country’s language is taught automatically to primary and secondary school pupils throughout the school curriculum, this is not sufficient to satisfy the obligations laid down by Article 19§11. The Committee considers that states must make special effort to set up additional educational support to the children of immigrants who have not attended primary school right from the beginning and as a result have fallen behind their native-born fellow students. In the latter case, the Committee has considered that the Revised Charter requires states to encourage employers and voluntary organisations, or public bodies such as universities, to organise national language classes. It has been deemed essential by the Committee to make such services free of charge, to ensure that migrant workers are not placed at a further disadvantage in the labour market.²¹

On the other hand, under Article 19 the Charter entitles the State parties to promote and facilitate the teaching of the migrant workers’ mother tongue to the children of the migrant worker. As the Explanatory report makes it clear an objective has nothing to do with the cultural aspects but rather

17 P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3rd ed. (The Hague: Kluwer, 1998), p. 654. 102. PICUM, *Book of Solidarity*, Vol. 1, p. 45.

18 See among others, the conclusions of the European Committee on Social Rights with respect to Bulgaria, for example. European Social Charter revised - Articles 8, 11, 14, 17, 18, 23, 25, 27, 30 and 31 (including Articles 2, 3, 4 and 10 for Cyprus, Estonia, Ireland, Lithuania, Moldova and Norway) , p.40

19 European Social Charter revised - Articles 8, 11, 14, 17, 18, 23, 25, 27, 30 and 31 (including Articles 2, 3, 4 and 10 for Cyprus, Estonia, Ireland, Lithuania, Moldova and Norway) , p.76

20 Explanatory report to the Revised Charter, para.79

21 See among others, the conclusions of the European Committee on Social Rights with respect to France, Italy for example. European Social Charter revised - Conclusions 2002 - Articles 1, 2, 5, 6, 7, 12, 13, 16, 19, 20

an objective of providing migrant children ‘with a possibility of reintegration if and when the migrant worker returns home.’²²

IV. International framework for the protection of educational rights of migrants

Universal human rights standards proclaim that everyone has the right to education and that, at a minimum, access to primary or elementary education should be free to all children without any distinction whatsoever. Article 26 of the Universal Declaration of Human Rights, for example, provides that “Everyone has the right to education”. The United Nations Convention on the Rights of the Child recognizes in Article 28 “the right of the child to education”. This is also reflected in Article 13 of the International Covenant on Economic, Social and Cultural Rights which stipulates that the right to education is to be enjoyed by “everyone”. Notable in this respect Article 3(e) of the UNESCO Convention against Discrimination in Education, which explicitly requires state parties “to give foreign nationals resident within their territory the same access to education as that given to their own nationals.” Furthermore, UNESCO Convention against Discrimination in Education stipulates in Article 4 that the States Parties shall formulate, develop and apply a national policy which ‘will tend to promote equality of opportunity and of treatment in the matter of education and in particular: (a) To make primary education free and compulsory; make secondary education in its different forms generally available and accessible to all; make higher education equally accessible to all on the basis of individual capacity; assure compliance by all with the obligation to attend school prescribed by law.’ There are no qualifications preventing non-nationals from benefiting from this right. Notable in this respect Article 3(e) of the forenamed Convention, which explicitly requires state parties “[t]o give foreign nationals resident within their territory the same access to education as that given to their own nationals”. In its General Comment on the right to education, the ESC Committee confirms that “the principle of non-discrimination extends to all persons of school age residing in the territory of a State party, *including non-nationals, and irrespective of legal status*”²³ The UN Convention on Migrant Workers is written in the same vein and makes reference to migrants and even those of them who find themselves in an irregular position. It reads in Article 30:

Each child of a migrant worker shall have the basic right of access to education on the basis of equality of treatment with nationals of the State concerned. Access to public pre-school educational institutions or schools shall not be refused or limited by reason of the irregular situation with respect to stay or employment of either parent or by reason of the irregularity of the child’s stay in the State of employment.

V. Conclusion

This paper has briefly outlined the international and regional legal provisions for educational rights of migrants in the European context. The presented documents indicate that there is a clear move across the globe and in Europe in particular towards ensuring that education systems are inclusive, respect diversity, and promote a learning environment where all students are encouraged and assisted to achieve their potential. The position in international human rights law and the regional instruments analysed is clear, namely that children of migrants have a right to education. This right extends as a minimum to free of charge education up to primary school level and also to secondary level in those countries where such schooling is compulsory. This refers on most occasions to migrants generally and irregular migrants in particular. However, even with an advanced legal system protecting educational rights of migrants there may be problems in accessing these rights in practice, in particular for irregular migrants. Obstacles may include fear of being reported and expelled as being irregular migrants if

22 Explanatory report to the Revised Charter, para.80

23 UN, ESCOR, ESC Committee, 21st Session, *General Comment No. 13, The right to education (Art. 13)*, UN Doc. E/C.12/1999/10 (1999), paragraph 34

they attend school, ‘the possibility that they be placed in separate schools (for example pending their return to their country of origin), the lack of recognition given to the studies of irregular migrants in certain countries where certificates are not issued for irregular migrant children, the lack of appropriate intercultural education, and the lack of appropriate language education and also the problem of recognition of education when they return to their country of origin.’²⁴

24 PACE Doc. 10924. 4 May 2006. ‘Human rights of irregular migrants’. Report Committee on Migration, Refugees and Population Rapporteur: Mr Ed van Thijn, Netherlands, Socialist Group