

Can administrative formalities justify disenfranchisement?

By Vasiliki Poula

During the recent European Parliament elections, non-British EU citizens were turned away from polling stations after being told they were not registered to vote in the United Kingdom for the EP election. The main reason given by polling station workers was that the would-be voter's UC1 form had not been processed in time. The right to vote might be qualified – yet its qualification in this case is problematic on the grounds of discrimination proportionality, calling for the electoral authorities' immediate action.

Scope of the right to vote of EU citizens in the UK for European Parliament elections

The right to vote is recognised as a fundamental human right in a range of international and regional human rights instruments, including Article 21 UDHR, based on the principle of universal suffrage (covering EP elections, per *Mathieu-Mohin and Clerfayt v Belgium*, §45-54). In addition, EU law directly addresses the voting process for EP elections, as articles 20(2)(b) and 22(2) TFEU and Article 39(1) of the EU Charter of Fundamental Rights, securing the right of EU citizens residing in a Member State other than their own to vote in EP elections 'under the same conditions as nationals of that State.'

Nevertheless, European human rights do not always guarantee absolute rights. The non-absolute, i.e. qualified, nature of European human rights can be understood through the case of *R (on the application of Begum v Headteacher and Governors of Denbigh High School)*, where it was held that ECHR Article 9 protects both the right to hold a belief, which is absolute (section 1), and a right to manifest belief, which is qualified (section 2). Drawing an analogy, the right to vote is not an absolute right, as both the Convention and the Charter allow for limitations of this right, according to the proportionality test, which requires a) that limitations pursue a legitimate aim prescribed by law in order to protect the interests of a democratic society or the rights of others and b) that the means chosen to achieve the stated aim are necessary and proportionate (*Hirst v the United Kingdom*). For instance, Article 4 of Directive 93/109/EC specifies a limitation to the right to vote: 'no person may vote more than once at the same election'. Yet, the limitation is justified as proportionate, because it pursues a legitimate aim: equal universal suffrage, namely that each vote counts as one, and no vote should count more than others.

Is the limitation of the right to vote on the basis of the UC1 form discriminatory?

While it is open to the United Kingdom to allow EU citizens of only some nationalities to participate in national elections, the same is not true for elections to the European Parliament, and indeed for any other area of application of the Treaties (*Spain v UK*). The protection against discrimination and, particularly, discrimination on grounds of nationality, has a privileged status in EU law (*Ruckdeschel*), and is specifically prohibited by Article 18 TFEU and Article 21(2) EUCFR. Since the UC1 form is only applied to certain groups of voters eligible to vote twice and specifically excluded EU citizens with the nationality of three Member States (Malta, Ireland, and Cyprus), we can safely conclude that EU citizens are discriminated on the grounds of nationality. Since the measure explicitly differentiates between nationalities which are similarly positioned in their ability to vote twice, it constitutes *direct* discrimination on grounds of nationality, which generally cannot be justified (*Dekker*).

Is the limitation of the right to vote on the basis of the UC1 form disproportionate?

The characterization of the exclusion as discriminatory might be rebutted by the claim that it was designed to compensate for the already existing imbalance in the electoral process due to the historical links between the United Kingdom with Malta, Ireland, and Cyprus, which entitle citizens of these countries to participate in national elections, unlike citizens of other EU Member States.

Yet, even if such an argument stands, another objection against the exclusion can be risen, this time on the basis of proportionality; such a 'compensation' albeit intuitively fair, is not necessary in order to propel the legitimate aim listed in the Directive, i.e. the protection against double voting.

Firstly, according to Article 9 of the Directive, necessary measures must be taken 'in order to have [an EU citizen's name] entered on the electoral roll', only mentioning the need for 'a formal declaration' against double voting, alongside regular registration documents. The UC1 seems to be more than necessary, because the normal registration already required disclosure of the compulsory information (nationality and intention to exercise the right to vote in the UK, rather than the state of origin), while the additional UC1 form demanded to be sent by post, unlike the normal registration, which could be completed either online or by post. Therefore, the administrative requirement seems to be cracking a nut with a sledgehammer when a nutcracker would do, against the EU proportionality standard.

Secondly, according to Articles 11 and 12 of the Directive to notify EU citizens about decisions concerning their registration on the electoral roll, they need to be informed 'in good time and in an appropriate manner of the conditions and detailed arrangements for the exercise of the right to vote'. The UC1 seems again to violate the communication requirements: an EU citizen who had registered to vote but not completed a UC1 form was entered into the electoral roll in the UK and notified of their registration, but this did not entail the ability to exercise the right to vote. Such an interpretation of the Directive sounds linguistically straining due to the unusual dissociation of registration from the exercise of the right to vote, if not deliberately misleading. Having in mind the ECJ's commitment to ensuring that the rights associated with the 'fundamental status' of EU citizenship are meaningful and effective (recently restated in *Wightman*), the UC1 form would fall short of the proportionality requirements established in EU law. In this field in particular, whereas Member States enjoy a degree of discretion as to how they organise their electoral system, they may not impose conditions that 'curtail the right to vote to such an extent as to impair its very essence and deprive it of effectiveness' (*Spain v UK*). Therefore, using the additional authority of *Aziz v Cyprus*, which ensures not only the effective exercise of the right to vote, but also to ensure that its operation is based on the principle of equality, the exclusion under the UC1 emerges as unfair and arbitrary.

What next?

A key question that follows is how the authorities should address possible violations of the right to vote, such as the ones identified above. The European Court of Human Rights might offer some insight, unlike the European Court of Justice, which has not yet concluded on the effective remedy for breaches of electoral rights.

Every vote must 'count', in the sense that it must in principle be capable of 'influencing the make-up of the legislature', per *Riza and Others v Bulgaria*. Assuming that the exclusion has prevented such a state of affairs, does this mean that fresh elections should be held? A clear answer has not been given yet, but cases such as *Dupré v France* and *Davydov and Others v Russia*, have emphasised that in order to challenge an electoral outcome, the extent to which the affected votes should have a significant bearing on the overall composition of the legislature. As a result, there is a recognized obligation to form a domestic system for effective

examination of individual complaints and appeals, per *Uspaskich v Lithuania*, to establish the extent to which the inability of EU voters duly registered by May 7th to cast a vote could have resulted in a different allocation of seats.

After all, a qualified right cannot be meaningful if we interpret it as a right that can be breached – instead, it should be interpreted as a right, which cannot be breached, except for specific well-defined circumstances, in order to uphold the rule of, rather than by, law.