Introduction

The European Court of Human Rights and Immigration: Limits and Possibilities

This special issue of European Journal of Migration and Law asks the question of how the universalistic values of western liberal tradition, as exemplified by the European Convention of Human Rights (the Convention), relate to present day national immigration policies. This question has been subject to some academic debate in recent years. Some scholars express a strong belief in the growing impact of international human rights law upon immigration policy. Yasemin Soysal, for example, argues that a reconfiguration of citizenship has taken place; from a more particularistic one based on nationhood, to a more universalistic one based on individual rights. She argues that rights which used solely to belong to nationals are now being extended to foreign populations. Increasingly, in her view, claims of individuals are legitimated by ideologies grounded in a transnational community. She particularly refers to the jurisprudence of the European Court of Human Rights (Court) to substantiate this assertion.1

By contrast, other scholars point out that international human rights law, like any other form of law, can only be effective to the extent that it is implemented within a concrete national context. Linda Bosniak has illustrated that national immigration law regimes have recently become more rather than less restrictive, curtailing the human rights of immigrants rather than extending them. Although Bosniak does not deny the significance of international human rights for debating the legitimacy of such measures in the national context, she is less convinced than Soysal of the inevitable triumph of the universalistic principles of international human rights law over nationalism as a political factor. Rather, she signals the enduring tension that exists between the exclusionary and universalistic commitments that the concept of citizenship implies.2 Moreover, her analysis suggests that this tension cannot simply melt away in an evolutionary progression towards universal citizenship. For the benefits that citizenship has to offer are determined, in part at least, by how citizens are distinguished from non-citizens.

The purpose of this special issue is to provide a critical evaluation of the jurisprudence of the Court in the field of migration law with a focus on questionable assumptions that may underlie the Court’s case law as well as possible structural or doctrinal shortcomings. The intention is not to weaken the position of the Court or to underestimate its merits, but to broaden the academic debate regarding the outcomes of the Court’s case-law in migration issues and to provide new insights for migration lawyers who bring complaints before the Court. Rather than foster false hopes with a too facile analysis of international law, we believe a more promising approach is to critically examine international law in practice so as to gain more insight into both its limits and its possibilities.

In this introduction, we, the authors of this special issue, will briefly set out our shared perspective on the jurisprudence of the Court. Unless otherwise indicated, all quoted sources are from this issue.

1. The European Court of Human Rights and Migrants

The European Court of Human Rights (the Court) has evolved considerably since it was first established in 1959. Its initiators had anticipated that its primary task would be to adjudicate between states, and not in individual cases. There was considerable resistance, moreover, among a number of member states, to the idea of human rights adjudication. Initially, States who were party to the European Convention could choose not to subject themselves to the Court’s jurisdiction. From the 1980’s on, however, the road to Strasbourg became increasingly popular among the citizens of the member states, and following the implementation of the Eleventh Protocol in 1998, all member states of the Council of Europe were required to accept the Court’s jurisdiction. These developments, together with the expansion of the Council of Europe, have led to a dramatic growth in the Court’s case law. Between 1976 and 1996 the number of judgements the Court delivered in a year had increased from 5 to 72.3 Another twenty years later, in 2006, it had increased to 1,560.4

Nowadays it would be hard to deny the impact of the Court’s jurisprudence on family law, penal law, property law and due process – to name just a few areas. For immigration law the work of the Court has also been significant, and a number of its landmark judgements in this field will be dealt with, in depth, in the following contributions.

Arguably, the rights protection offered by the Court is even more significant for migrants than for the citizens of the member states. Not entitled to vote in their countries of residence, migrants can openly debate the validity of the laws of those countries before the Court. In particular, they may challenge immigration

3) R. Lawson, 50 jaar EVRM in vogelvlucht, NJCM-bulletin, 2000/1, p. 11.