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REPORT

on the adoption of measures concerning the repatriation of mortal remains
(2003/2032(INI))

Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

Rapporteur: Michael Cashman

PR_INI

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PROCEDURAL PAGE

At the sitting of 10 April 2003 the President of Parliament announced that the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs had been authorised to draw up an own-initiative report under Rule 163 on the adoption of measures concerning the repatriation of mortal remains.

The committee had appointed Michael Cashman rapporteur at its meeting of 10 December 2002.

It considered the draft report at its meetings of 9 July, 7 October and 21 October 2003.

At the last meeting it adopted the draft resolution unanimously.

The following were present for the vote: Jorge Salvador Hernández Mollar (chairman), Johanna L.A. Boogerd-Quaak (vice-chairman), Giacomo Santini (vice-chairman), Michael Cashman (rapporteur), Mary Elizabeth Banotti, Giuseppe Brienza, Kathalijne Maria Buitenweg (for Alima Boumediene-Thiery), Carmen Cerdeira Morterero, Carlos Coelho, Thierry Cornillet, Gérard M.J. Deprez, Giuseppe Di Lello Finuoli, Adeline Hazan, Margot Keßler, Timothy Kirkhope, Eva Klamt, Alain Krivine (for Fodé Sylla), Jean Lambert (for Pierre Jonckheer), Baroness Sarah Ludford, Marjo Matikainen-Kallström (for Charlotte Cederschiöld), Claude Moraes (for Sérgio Sousa Pinto), Bill Newton Dunn, Arie M. Oostlander (for Hartmut Nassauer), Marcelino Oreja Arburúa, Elena Ornella Paciotti, Paolo Pastorelli (for Marcello Dell'Utri), Hubert Pirker, Bernd Posselt, Heide Rühle, Ole Sørensen (for Francesco Rutelli), Patsy Sørensen, Joke Swiebel, Anna Terrón i Cusí and Christian Ulrik von Boetticher.

The report was tabled on 23 October 2003.

DRAFT EUROPEAN PARLIAMENT RESOLUTION

on the adoption of measures concerning the repatriation of mortal remains (2003/2032(INI))

The European Parliament,

- having regard to Rule 163 of its Rules of Procedure,
- having regard to the report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (A5-0362/2003),
- A. whereas there is at present no EU-wide provision uniformly governing the repatriation of mortal remains from one Member State to another,
- B. whereas in the absence of any such provision, cross-border transportation of mortal remains is governed by two instruments of international law (the 1937 Berlin Agreement and the Strasbourg Agreement concluded in 1973 under the auspices of the Council of Europe), to which only some of the Member States have acceded and which are in many respects obsolete,
- C. noting that, on account of the above agreements, the death of a Community citizen in a Member State other than his country of origin results in more complex procedures, a longer period of time before burial or cremation takes place and higher costs than if the death had occurred in the deceased person's country of origin,
- D. whereas, in view of the growth in intra-Community tourism, the increasing numbers of retired people who choose to live in a country other than their own and, more generally, greater intra-Community mobility which is actually encouraged, the number of Community citizens who die in a country other than their country of origin is bound to increase,
- E. whereas the Commission has recently stated once again that 'Union citizens should, *mutatis mutandis*, be able to move between and reside in Member States in similar conditions to nationals of a Member State moving around or changing their place of residence in their own country', and that exercising the right to freedom of movement and freedom of residence should be facilitated to the utmost 'by reducing administrative formalities to an absolute minimum'¹,
- F. noting that, as things stand at present, it is still far from true that a Community citizen who dies in a Member State other than his own is treated in the same way as a national who dies in his home country, as has been pointed out by a number of MEPs who, in questions to the Commission and the Council, have drawn attention, for example, to the fact that a zinc coffin is required for the repatriation of a corpse from Salzburg to Freilassing (a distance of 10 km) but not for the transfer of a body from Ivalo to

¹ Amended proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (COM(2003) 199).

Helsinki (a distance of 1120 km)¹,

1. Points out that freedom of movement and residence is a fundamental right within the EU, that that right exists within a wider context (that of the internal market, within which borders cannot exist and within which such freedom cannot be curtailed), and that that right is furthermore enshrined in the European Charter of Fundamental Freedoms, which the Convention is planning to incorporate into the new Constitution;
2. Considers that the repatriation of mortal remains without excessive cost or bureaucracy in the event of the death of a Community citizen in a country other than the one in which either burial or cremation is to take place may be regarded as a corollary of the right of each EU citizen to move and reside freely within the territory of the Member States;
3. Considers the provisions of the Strasbourg Agreement, which impose strict rules on the cross-border transfer of mortal remains, to be the source of indirect discrimination stemming from the fact that they apply essentially to 'non-nationals' and hence run counter to the Community scheme of things;
4. Calls upon the Commission, in its capacity as guardian of the Treaties, to ascertain whether or not the above instrument of international law is compatible with Community law and, if necessary, to take whatever action is required in order to ensure that Community law is upheld;
5. Calls furthermore upon the Commission to see that the standards and the procedures applied in the cross-border transportation of corpses are harmonised throughout the EU and to endeavour to ensure that, as far as possible, Community citizens are treated in the same way as nationals in their home country;
6. Instructs its President to forward this resolution to the Council and Commission, and the European Federation of Funeral Services.

¹ See in particular Written Questions E-0935 and E-0210/02

EXPLANATORY STATEMENT

1. Introduction

Mr X, a British national on holiday in Greece with his wife, tragically drowned while swimming in the sea. Without consulting his family, the Greek authorities carried out an autopsy on the body of the deceased and concluded that he had died from a heart attack. When the body was repatriated to the United Kingdom, the family of the deceased, surprised at the verdict of the Greek authorities, asked for a second autopsy to be carried out. It was at that juncture that it appeared that the deceased's organs had been removed and, as soon became apparent, destroyed immediately after the first autopsy. Although that procedure was in line with Greek law, it nevertheless caused serious distress to the deceased's next of kin who had to cope with a situation which added a dimension of horror to their grief¹.

Although this is a particularly tragic case, it remains none the less true that, when a Community citizen dies in a country other than his country of origin, procedures are more complex, periods required for burial or cremation lengthier and charges higher.

Given increased (and encouraged) intra-Community mobility, grounds do exist for wondering whether the provisions currently in force in the Member States which apply in the event of the death of a non-national are in line with Community law – or at least with the thinking behind it – and whether there is a case for seeking to harmonise standards in this field.

2. State of play

At present, the cross-border transport of corpses is governed by two international law instruments: the 1937 Berlin Agreement on the Conveyance of Corpses, which was updated by the Strasbourg Agreement on the Transport of Corpses concluded under the auspices of the Council of Europe on 26 October 1973, i.e. well before the establishment of the internal market. Those instruments have not been ratified by all the Member States of the European Union², and that results in a certain degree of disparity between the measures applied.

Inter alia, the Strasbourg Agreement provides that, during any international transfer, the corpse must be accompanied by a special document (known as a '*laissez-passer* for a corpse') issued by the competent authority of the State of departure³. Before issuing the *laissez-passer*, the competent authority must ascertain that all the medical, health, administrative and legal requirements of the regulations in force in the State of departure relating to the transfer of corpses and, where appropriate, burial and exhumation have been complied with⁴. Accordingly, it is the national provisions which govern the issuing of the *laissez-passer* and not any provisions harmonised by the Agreement. The technical requirements to be met by

¹ The incidents set out here were reported to Mr Cashman.

² Denmark, Germany, Ireland, Italy and the United Kingdom have not signed the Strasbourg Agreement. By contrast, the Agreement has been in force since: 11 August 1978 in Austria; 26 October 1981 in Belgium; 15 March 1989 in Finland; 10 June 2000 in France; 8 May 1983 in Greece; 22 November 1983 in Luxembourg; 25 December 1975 in the Netherlands; 8 August 1980 in Portugal, 19 April 1992 in Spain; 5 November 1982 in Sweden.

³ Article 3 of the Strasbourg Agreement on the Transport of Corpses of 26 October 1973.

⁴ Article 5 of the said Strasbourg Agreement.

coffins are laid down in Article 6 of the Strasbourg Agreement. In particular, that article provides that, if the competent authority of the State of departure considers it necessary, the coffin must be provided with a purifying device to balance the internal and external pressures.

The application of this international law instrument on the territory of the Union raises various questions, connected in particular with the principles of proportionality and mutual recognition, so that its compatibility with Community law seems doubtful.

Accordingly, the Commission recently presented a proposal for a directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, a proposal in which it called for Community citizens to be treated, to the greatest possible extent, in the same way as nationals in their home Member State.

As things stand, the situation of Community citizens who die in a foreign country is very different from that of nationals who die in their own country. For example, as various Members of the European Parliament have pointed out in written questions to the Commission and Council, a zinc coffin is required for the transport of a corpse from Salzburg to Freilassing (10 km) but not for similar transport from Ivalo to Helsinki (1 120 km)¹. In the event, no consideration of hygiene or safety stands up to analysis. This constitutes nothing more than a barrier to the free movement of persons, and on several counts at that.

Firstly, in the Cowan judgment, the Court recognised that ‘when Community law guarantees a natural person the freedom to go to another Member State, the protection of that person from harm in the Member State in question, on the same basis as that of nationals and persons residing there, is a corollary of that freedom of movement’². That notion of ‘corollary’ may be properly invoked here in the sense that every Community citizen must be able to be sure that, in the event of death on the territory of a Member State other than the Member State of origin, the treatment of the deceased will, as far as possible, be equivalent to the treatment afforded to nationals. In that respect, we may take the view that the procedural and material costs (special coffin) arising in the event of death occurring in a Member State of the EU other than the Member State of origin might well deter especially elderly or sick people from travelling. However, consistent case-law holds that anything which hampers freedom of movement is in breach of the Treaty.

Furthermore, with not all the Member States having signed the Strasbourg Agreement on the Transport of Corpses (see above), the fact that the Member States do not all apply the same standards for the cross-border transport of mortal remains poses a problem of the admissibility of the criteria laid down by that Agreement in the light of Community law. It is generally agreed, following what is famously known as the ‘Cassis de Dijon’ judgment³, that the principle of mutual recognition, which requires every Member State to allow every product lawfully produced in another Member State to move freely on its territory, applies not only to goods but also to services and persons. In the light of that principle, which informs Community thinking, we may question the compatibility with Community law of the

¹ See Written Questions E-0935 and E-0210/02.

² Case 186/87, judgment of 2 February 1987, Cowan v Trésor public.

³ Case 120/78 of 20 February 1979, Rewe v Bundesmonopolverwaltung für Branntwein (ECR [1979] 649).

Strasbourg Agreement which imposes strict conditions on the signatory States with regard to the transport of corpses.

While the specific circumstances of death may entail certain additional administrative or other constraints, they should, as the Commission points out in the proposal for a directive referred to above, be kept to the bare minimum required by the fact that the person in question is a “non-national”. We may, therefore, wonder whether the requirement to use a special coffin for the transport of mortal remains - whatever the distance to be covered - **simply because the journey involves the crossing of a frontier**, corresponds to the principle of proportionality and is justified from the point of view of public order or public health, the only derogations approved by the Court and, even then, only with serious reservations.

3. The Commission's position

Despite having been asked on many occasions, via parliamentary questions, to take action with a view to simplifying or harmonising the procedure for the repatriation of corpses, the Commission has consistently refused to tackle this subject. Acceptance of the arguments which it has put forward to justify its lack of action seems to require quite a large pinch of salt.

In an answer dated 11 October 2000 to Mrs Mary Banotti, Mr Byrne said that ‘the Commission, following extensive consultations with all parties concerned¹, concluded that the detailed harmonisation of national rules in this area over and above what already exists is neither desirable nor necessary ...’². If that is indeed the case, we might well wonder why the European Federation of Funeral Services – the obvious federation concerned by the type of problems referred to here – has, for years, been seeking the simplification of the procedure for the transport of corpses. On 21 November 2001, for example, the ‘European Report’ ran an article stating that the Federation’s Vice-President, Mr Jean Neveu, was shortly going to submit to the Commission a proposal seeking to simplify procedures and avoid additional costs for the next of kin. It would be interesting to know what the Commission did with that proposal, if it did anything at all.

In the same answer, the Commission states that ‘detailed harmonisation of national rules ... would not be justified from the point of view of subsidiarity or proportionality’. What we want to know here is how the Commission can be so dogmatic and, above all, how, other than through action taken at Community level, the Commission imagines that the application of uniform rules governing the transport of corpses – rules which are in conformity with Community law - may be ensured in all the Member States. In its answer, the Commission specifically refers to the Council of Europe Agreement on the Transfer of Corpses, thereby implying that there is no reason to regulate an issue which is already covered by an international agreement. However, as we have already seen, that Agreement has not yet been ratified by all the Member States, and, furthermore, its compatibility with Community law seems doubtful.

¹ It seems that these consultations were held in 1995 and have not been renewed, not even after the entry into force of the Treaty of Amsterdam.

² Answer published in OJ C 136 E, 8.5.2001, p. 40, to Written Question E-2465/00 tabled by Mrs Mary Banotti.

In a joint answer to several written questions concerning this same issue of the repatriation of mortal remains¹, the Commission tersely concluded its comments as follows: ‘In any event, it should be recalled that Member States which regulate the transport of deceased persons must, in conformity with the case-law of the Court of Justice, apply any requirements on a non-discriminatory basis.’ However, that statement fails to take into account the fact that, pursuant to that same case-law, ‘Provisions which, even if they are applicable without distinction, preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom’². It is, therefore, not enough for the rules governing the international transport of corpses to be applied in a non-discriminatory manner for them to be compatible with Community law.

What is more, as the Court of Justice recently expounded the principle: ‘A provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and there is a consequent risk that it will place the former at a particular disadvantage and if it not justified by objective considerations independent of the nationality of the workers concerned and proportionate to the legitimate aim pursued by that law’³. In the instance under consideration, even if we cannot speak properly of ‘workers’, it is hard to see why the same thinking should not apply here. Obviously, national legislation governing the cross-border transport of corpses applies primarily to non-nationals. That clearly involves a form of indirect discrimination.

4. Conclusion

Freedom of movement and residence is a fundamental right in the European Union. That right forms part of a much broader canvas, that of the internal market, where no frontiers may exist and where that freedom may not be restricted.

Your rapporteur takes the view that the arrangements for the transport of mortal remains from one Member State to another create an obstacle to freedom of movement, an obstacle which the Commission is asked to abolish.

It does, indeed, seem regrettable that, while every sinew is being strained in the EU to create a European awareness, to promote a feeling of belonging to a community, to consolidate the concept of citizenship and to give it flesh, Community citizens should be obliged, as was the case recently, to apply to an outside court – in this instance, the ECHR – for an acknowledgement that the fact of having had to wait for six months for the repatriation of the body of their daughter who had died in another Member State constituted a violation of their fundamental rights⁴.

¹ OJ C 309 E, 12, 12 2002, p. 61.

² **Case C-190/98**: judgment of 27 January 2000, *Graf v Filzmoser Maschinenbau*, ground 23.

³ **Case C-195/98**: judgment of 30 November 2000, *Österreichischer Gewerkschaftsbund v Republic of Austria*, ground 40.

⁴ *Pannullo and Forte v France*, judgment of 30 October 2001 of the European Court of Human Rights.