

Decision of the European Ombudsman closing the inquiry into complaint 565/2012/ER against the European Union Agency for Fundamental Rights

Decision

Case 565/2012/ER - **Opened on** 28/03/2012 - **Decision on** 02/04/2014 - **Institution concerned** European Union Agency for Fundamental Rights (No maladministration found) |

The background to the complaint

1. This case concerns the decision of the European Union Agency for Fundamental Rights (FRA) to reject the application of a civil society organisation for membership in one of the Agency's consultative bodies.
2. The complainant is a Romanian association. Its declared aim is to promote Christian family values and morality.
3. In early 2010, the complainant applied for membership in the Fundamental Rights Platform (the 'Platform'). The Platform is a network for cooperation and information exchange set up in accordance with Article 10 of Regulation 168/2007 establishing the Fundamental Rights Agency of the European Union (the 'FRA Regulation') [1] . The Platform aims at involving civil society in FRA activities and ensuring cooperation between the Agency and relevant stakeholders. Participation in the Platform is open to all interested stakeholders. The FRA has however laid down a set of criteria and minimum requirements which applicants for membership in the Platform need to fulfil.
4. On 13 April 2010, the FRA contacted the complainant and asked for additional information in relation to certain statements published on the complainant's website. In particular, the FRA referred to the following statement: "*so-called alternatives, 'families' constituted of persons of the same sex, are nothing but expressions of human degeneration* " (henceforth referred to as the 'statement'). The FRA considered this statement to be incompatible with conducting a fundamental rights dialogue as required by the FRA Regulation. Following an exchange of correspondence and telephone conversations with the FRA, the complainant made it clear that it did not intend to withdraw the statement.
5. On 2 June 2010, the FRA rejected the complainant's application. In its letter, the FRA



underlined that the Draft Code of Conduct for the participants of the Platform required that all participants refrain from any conduct in breach of the fundamental rights recognised by the Charter of Fundamental Rights of the EU and/or endangering a "*structured and fruitful dialogue*" within the Platform. The FRA argued that qualifying other persons' sexual orientation as an expression of "*human degeneration*" is not an acceptable basis for "*creating a structured and fruitful dialogue*" and that "*attitudes such as the text on the complainant's website can easily result in hate speech*". The FRA pointed out that the complainant could re-apply for membership in the Platform, provided that it complied with the relevant criteria.

6. On 11 June 2010, the complainant requested the FRA to review its decision, which it considered to be discriminatory and wrong. The complainant reiterated its refusal to remove the statement from its website, since it considered it unacceptable to be obliged to surrender its freedom of expression and of religion in exchange for membership in the Platform. It also requested the FRA to inform it of any possible means of appeal against the FRA's decision or, alternatively, to consider its letter to constitute an appeal.

7. On 26 July 2010, the FRA informed the complainant that it had the right to lodge a complaint with the European Ombudsman.

8. On 3 November 2011, the FRA adopted the 'Code of Conduct for the participants of the Fundamental Rights Platform'. The Code details the criteria for participation in the Platform and the rules that participants must abide by.

9. On 8 March 2012, the complainant turned to the Ombudsman.

The subject matter of the inquiry

10. The complainant submitted the following allegation and claims.

Allegation

The FRA's decision to reject the complainant's application for membership in the Platform is arbitrary, unjustified and discriminatory.

Claims

(1) The FRA should reconsider its decision to reject the complainant's application for membership in the Platform.

(2) The FRA should publicly apologise to the complainant.



The inquiry

11. On 28 March 2012, the Ombudsman requested the FRA to submit an opinion on the complainant's allegation and claims. The FRA's opinion was forwarded to the complainant with an invitation to make observations, which it sent on 16 August 2012.

The Ombudsman's analysis and conclusions

Preliminary remarks

12. In its observations, the complainant asked to be granted access to all the FRA's internal documents relating to the rejection of its application for membership in the Platform.

13. The Ombudsman points out that Article 2(4) of the Ombudsman's Statute requires complaints to her to be preceded by appropriate administrative approaches to the institution concerned. In cases concerning access to documents, this condition also means that complainants must exhaust the administrative procedures foreseen by Regulation 1049/2001 [2]. In order to do so, an applicant must first make a request for access to the institution concerned. If the applicant considers that its request has not been dealt with satisfactorily, it may submit a confirmatory application. Given that it appears that the complainant has not yet made use of these possibilities, the Ombudsman cannot take cognisance of this aspect of the complaint.

14. In its observations, the complainant also argued that it had been a victim of discrimination, given that the FRA has admitted to the Platform associations which have used expressions comparable to the statement. There is nothing to suggest that the complainant has, to date, brought this argument to the FRA's attention. Once more, the Ombudsman therefore cannot take cognisance of this aspect of the complaint. The Ombudsman considers it useful to add, however, that even if the complainant's statement were to be proven correct, this would only mean that the decisions to admit those associations could be called into doubt. It would not necessarily follow that the decision concerning the complainant was incorrect.

A. Allegation that the FRA's decision was arbitrary, unjustified and discriminatory and related claims

Arguments presented to the Ombudsman

15. In support of its allegation, the complainant put forward the following arguments:

(i) The statement has been misinterpreted by the FRA, which failed to consider it in its broader context [3] ;



(ii) The statement reproduces the biblical understanding of homosexuality and therefore constitutes an exercise of the rights to freedom of religion and expression, as clarified by the case-law of the European Court of Human Rights [4] ;

(iii) The statement cannot be represented as resulting in 'hate speech', which is not recognised in the EU legal order and, in any case, would have to be reconciled with the rights to freedom of expression and religion;

(iv) The right to same-sex marriage has not been recognised by legislation at the EU level or by the case-law of the European Court of Human Rights;

(v) Family and marriage matters fall within national, not EU, competencies, and therefore the FRA has no right to take a position on the issue.

16. In its opinion, the FRA explained that the selection of the members of the Platform was made in accordance with the FRA Regulation, which requires the Platform to be a "*mechanism for the exchange of information and pooling of knowledge*" that ensures "*close cooperation between the Agency and relevant stakeholders*" who are "*interested and qualified [to participate]*" in a fruitful fundamental rights dialogue.

17. More specifically, the FRA pointed out that the call for participation in the Platform identified a set of basic criteria for participation "*for ensuring structured and efficient work*". One of these criteria explicitly required applicants "*to be unreservedly committed to respecting fundamental rights and to working for their advancement, protection and promotion*". The FRA processed the complainant's application in accordance with a pre-established procedure that was applied to all applicants in the same way. The FRA emphasised that in carrying out its responsibilities in this domain, it enjoys a margin of discretion.

18. The FRA considered that describing other peoples' sexual orientation as an expression of "*human degeneration*" (i) called into question the complainant's solid commitment to engage in a fruitful dialogue with all the other participants in the Platform, and (ii) risked violating the dignity of several of them. In particular, the FRA pointed out that if in the initial stages of a dialogue one of the participants qualifies the views, beliefs, orientations or practices of any other participant as an expression of "*human degeneration*", there is a real risk that the discussion will deteriorate and result in the violation of the dignity and fundamental rights of some of the participants and that no useful result could be achieved.

19. The FRA also argued that the decision to reject the complainant's application was not discriminatory and, in particular, did not attempt to exclude organisations that expressed views which were different from those endorsed by the Agency. It underlined that, naturally, the views of the Platform's members may diverge and differ from those officially expressed by the Agency. The FRA also stressed that various organisations with an explicit Christian background had applied for participation in the Platform and were admitted as members. In the complainant's case, the rejection was not based on the fact that the complainant held a particular political



opinion or religious belief but exclusively on the consideration that the statement seriously undermined the credibility of the applicant's claim that it was interested in engaging in a fruitful dialogue.

20. As regards the complainant's first supporting argument, the FRA denied having misunderstood the statement. It conceded that the statement did not explicitly make reference to people's sexual orientation, but only to "*families constituted of persons of the same sex*". However, according to the FRA, describing a certain form of family as an "*expression of human degeneration*" amounted to considering the individuals making up those families to be equally degenerate.

21. As regards the complainant's second supporting argument, the FRA pointed out that the fact that the statement was made on the basis of a religious belief did not change its potential impact on the functioning of the Platform.

22. The FRA also denied having represented the complainant's statement as amounting to hate speech (the third supporting argument). Instead, it had pointed to the risk that certain attitudes could result in hate speech during the discussions of the Platform, where frank and confrontational exchanges could take place among participants.

23. As regards the complainant's fourth supporting argument, the FRA stressed that it never claimed the existence of a right to same sex marriage and reiterated that its decisions on applications are based on an assessment of the applicant's potential to contribute to a structured and fruitful dialogue with the other members of the Platform.

24. Finally, the FRA stressed that, when exercising its discretion in assessing the suitability of an applicant for participation in the Platform, it is fully entitled to take into consideration the applicant's views, regardless of whether or not they concern matters that fall within the EU's competence.

25. In its observations, the complainant emphasised that the FRA acknowledged that its decision was not based on the complainant's views on homosexuality but on the wording of the statement expressing those views. Thus, it appeared that the FRA's decision was entirely based on the seventeen words composing the statement. The complainant argued that its position should have been assessed more fairly, on the basis of its correspondence with the FRA, in which it reasserted its commitment to a fruitful dialogue [5] .

26. The complainant finally claimed that the FRA's decision resulted in discriminatory treatment on the ground of religious belief. According to the complainant, this was confirmed by (i) comments made by an FRA staff member during the meeting of the Platform of 14 April 2011 when the complainant's case was discussed, and (ii) the fact that other NGOs were admitted to the Platform despite having publicly expressed their ideas in a way that could equally be considered incompatible with the conduct of a fruitful dialogue within the Platform. The complainant included in its observations a number of statements of members of the Platform that it considered to be equivalent to the one it had published on its website.



The Ombudsman's assessment

27. The Ombudsman notes that the FRA Regulation provides for the setting up of the Platform with a view " *to creating a structured and fruitful dialogue and close cooperation with all relevant stakeholders* " [6] . According to Article 10 of the FRA Regulation, the Platform shall be composed of " *non-governmental organisations dealing with human rights, trade unions and employer's organisations, relevant social and professional organisations, churches, religious, philosophical and non-confessional organisations, universities and other qualified experts of European and international bodies and organisations* ". It follows that, in setting up the Platform, the Union legislator aimed at granting the widest possible representation of different interests, ideas and beliefs, while at the same time securing the conditions for a structured and fruitful dialogue.

28. In assessing applications for membership in the Platform, the FRA enjoys a wide margin of discretion. It is not the Ombudsman's task to substitute her assessment of the complainant's application for that made by the FRA. Instead, the Ombudsman's role is to check whether, in carrying out the selection process, the FRA acted lawfully, in accordance with principles of good administration, and did not commit a manifest error of appreciation [7] .

29. The Ombudsman notes that the FRA's decision not to admit the complainant was based on the inclusion of the statement in the complainant's website. The FRA argued that (i) describing other persons' sexual orientation as an expression of " *human degeneration* " is not an acceptable basis for " *creating a structured and fruitful dialogue* " and (ii) " *attitudes such as the text on the complainant's website can easily result in hate speech* ". In its complaint, the complainant challenged the FRA's decision on the basis of the supporting arguments set out in paragraph 15 above.

30. As regards the complainant's first supporting argument, it is true that the statement quoted by the FRA in its decision formed part of a longer text. However, the Ombudsman is not convinced that, even if one takes this background into account, the FRA misinterpreted the statement. In fact, the rest of the text does not withdraw or qualify the statement. The Ombudsman considers that the FRA's view that the statement could endanger the dialogue aimed at by the Platform is plausible. It is true that the complainant argued that, in its correspondence with the FRA, it repeatedly reasserted its commitment to a fruitful dialogue. The Ombudsman points out, however, that the complainant refused to withdraw or modify the statement. Given the content of the statement, the Ombudsman considers that the FRA did not commit a manifest error of assessment when deciding not to admit the complainant to the Platform on the basis of the statement.

31. As regards the complainant's second supporting argument, the Ombudsman notes that the FRA's decision was based on the impact the statement could have on the " *fruitful dialogue* " which the Platform aims at. However, the FRA did not call into doubt the complainant's right to freedom of religion and expression and, in particular, did not take a position on the substance



of the complainant's beliefs. It is true that, in the course of the inquiry, the complainant also argued that the attitude adopted by a staff member of the FRA during a meeting of the Platform of 14 April 2011 evidenced a discriminatory attitude towards the views held by it. In this regard, it should however be noted that the meeting referred to by the complainant took place almost one year after the rejection of the complainant's application and that the complainant did not put forward any arguments to show how the comments made at that meeting, if indeed made, could have influenced the FRA's decision.

32. As regards the complainant's third supporting argument, the Ombudsman notes that the FRA did not qualify the complainant's statement as 'hate speech' but instead pointed out that "*attitudes such as the text on the website of the complainant can easily result in hate speech*" during the discussions of the Platform. The fact that there appears to be no definition of 'hate speech' in EU law therefore cannot call into doubt the FRA's decision which, as seen above, is based on the Agency's intention to ensure a "*fruitful dialogue*".

33. Finally, as regards the complainant's fourth and fifth supporting arguments, namely the lack of (i) recognition of the right to same-sex marriage and (ii) competence of the EU in matters relating to marriage and family, the Ombudsman considers that none of these arguments can affect the validity of the FRA's view that the statement could endanger the dialogue aimed at by the Platform.

34. In light of the above considerations, the Ombudsman concludes that the complainant's allegation cannot be sustained. Consequently, its claims cannot succeed either.

B. Conclusion

On the basis of the inquiry into this complaint, the Ombudsman closes it with the following conclusion:

There has been no maladministration.

The complainant and the FRA will be informed of this decision.

Emily O'Reilly

Done in Strasbourg on 2 April 2014

[1] Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ 2007 L 53, p.1

[2] Regulation (EC) No 1049/2001 of the European Parliament and Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001



L145, p. 43

[3] In its entirety, the relevant passage of the website reads as follows: "*The family consisting of one man and one woman constitutes the most appropriate environment for the psychological development of children. The so-called alternatives, 'families' constituted of persons of the same sex, [are] nothing but expressions of human degeneration. They cannot contribute to social development and their negative impact on children is considerable. In this respect, the [complainant] backs legislative initiatives intended to protect marriage, the family and the normal development and upbringing of children. The [complainant's] project 'Hope and healing for homosexuals offers information related to the controversial subject of homosexuality and 'alternatives' to the true family. According to current scientific information, the main ideas are that homosexuality is not innate but can be changed (a homosexual can become heterosexual). The project's site contains sections related to scientific research, society and personal testimonials of former homosexuals*".

[4] The complainant quoted the judgment of 30 June 2009 in Case *Verein gegen Tierfabriken Schweiz (VgT) v Switzerland* (n.2), application number 32772/02.

[5] In its letter of 11 June 2010 requesting a review of the FRA's decision rejecting its application, the complainant declared that "*like the FRA, the [complainant] believes in human rights and dignity for all, in diversity and mutual respect. We believe in civilized dialogue and robust debate on issues of wide social impact and importance*".

[6] Recital 19 of the FRA Regulation.

[7] Decision of the European Ombudsman closing her inquiry into complaint 1966/2011/(EIS)LP against the European Banking Authority of 7 November 2013, paragraph 21 and following.