PODCAST LITI-GATE:

Collaborate, Innovate, Advocate for Disability Rights

Episode Transcript

Rita Crespo Fernandez:

Good morning, good afternoon, good evening, or whatever time of the day it is where you are. I am your host. I am the human rights coordinator at the European Network on Independently in the European Network on Independent Living, which is also known as ENIL, is a user led network and a forum for all disabled people and their allies on the issue of independent living.

Today, we will be discussing a case on the topic of European Union funds under misuse to Finance institutions. This particular case took place against Bulgaria and was carried out by the European Network on Independent Living, the Validity Foundation and the center for Independent Living in Sofia against the European Commission. It was taken over by the European Court, the General Court in this case at the European Court of Justice, and if you would like to look it up, the reference is case 613 19 and it was decided on the 2nd of September in 2020.

The misuse of EU funds is one of the main topics we work on at INL, because we have observed throughout the years multiple investments into institutions, small group homes, sheltered workshops, special school, etc. we have tried many avenues to tackle this issue. We have tried complaining to the European Commission. We have tried discussing stop the investments and then country level. Nothing has worked so far. We have always run into wolves. So one of the avenues we took at one point was strategic litigation. In this particular case, we wanted to challenge the use of the European Regional Development Fund in Bulgaria that was aimed to support the institutionalization in the country. Instead, we observed that the money was going to be used to invest in institutions, in particular in small group homes, in the transition from bigger institutions into smaller institutions, which, according to the Committee on the Rights of Persons with disabilities, is not an appropriate form of institutionalization.

At the time, Validity and ENIL and the center for Independent Living in Sofia tried different avenues to stop these investments from happening. They requested the managing authorities, which are the ones in charge of managing the funds at the country level, to suspend the funds. This was rejected. Then, this was addressed to the European Commission, as the European Commission is in charge of monitoring the use of funds again rejected.

So the organizations took the case to the General Court. However, as we will learn from our speakers today, the court declared this case inadmissible and our speakers today will tell us why and why. Is still this decision important? How can we address it again in the future, and what other avenues we may need to, and also what is not tragic litigation? And why would you like to do strategic litigation, maybe in your context?

So today we will have two guests speaking to us about this topic. We will first hear from Bart Van Vooren, which works for Covington and Burling in Brussels as a partner, and from Steven Allen, who is the executive director at the Validity Foundation, which again was one of the partners in this case. And Bart was one of the lawyers involved in representing the two different organizations.

Co-funded by the European Union

I'm sitting here in Brussels today with Van Vooren, partner at Covington and Burling, a law firm here in Brussels. Where can you tell us a bit more about the work of Covington and Burling first?

Bart Van Vooren

Covington is a US headquartered law firm, but we are here in the Brussels office. In Brussels, we focus on, four areas of law antitrust, competition, life sciences, technology, and then, policy and EU policy and law. And, I am in the life sciences team. So EU regulatory lawyer quite background.

Rita Crespo Fernandez

And how did you come then to get involved into the case? We're discussing today?

Bart Van Vooren

There's a bit of a story I guess. Also in terms of my personal background, I regularly joke that I wanted to be a human rights lawyer. I specialize in human rights law. So in my other time during my degree, I did a PhD in EU and international law. I was even a law professor for a while, but I did not like teaching. And, all my students were usually on social media while I was speaking to them in class. So that was frustrating. And then so I decided I, I thought that through teaching in academia, one could have a lot of impact and it was a bit too much ivory tower for me. So I went into private practice. But this background, this, this interest in international law and human rights law never really went away. And so then at Covington, we do have, a very strong pro bono practice.

So there is a, a strong incentive for every lawyer that that is here across any office in the world to, try to at least give 50 hours of pro bono, time away, if not more. So, for instance, the case that we talked about took a whole lot more time. And so it's, yeah, for me, a personal interest, background, interested, and also our associates and other lawyers who who want to do it, get to have fun with pro bono and the strategic litigation topic of the day.

Rita Crespo Fernandez

So, yeah, regarding strategic litigation here in this case, we were trying to redress the misuse of EU funds. Why did we choose the path of strategic litigation in this particular case?

Bart Van Vooren

I remember so I first joined in ENIL's office in 2018. And, so with your colleagues in, on this public policy team, and I was at the time not really familiar with the UNCRDP, the right to independent living.

And so that, it was, you and then also the colleagues at solidity who explained to us, like, here's the problem. You have EU funds and they go to, in essence, segregated communities at national level. How can we challenge this?

And so what we initially did is, we said, okay, so we are an EU regulatory team. Like I said, we do pharma and food law and biodiversity law and everything, but we know EU law quite well. And EU court procedures. So we together with, with with your team looked at okay, how does this money actually go from the EU to national level. And then we actively sought out means through which to challenge this. Now it's a very frustrating EU mechanism called shared management, whereby basically the EU and the member states eat each excuse me, have part of the responsibility of managing the money. But as you can imagine, when two people are responsible, those two levels are responsible. No one is ever responsible. So EU says it's national nationalist says it's EU. So that's something that we had to navigate. And so what we did is we was you said okay, what if we invite the commission explicitly to take a position on in that specific call for funding to suspend the money? And we provided the legal arguments to say, well, you, the Commission, have the power not to give the money to the member state, in this case Bulgaria, but it could be Hungary or whomever. And you have that legal power now. We already between us, we discussed, is it going to be easy to challenge this have, you know, procedurally? no, but it will be a starting point.

So the essence of strategic litigation was we actually triggered the case thinking in advance by basically, compelling, government authority in this case, the commission to take a certain position that we could then attack later in court. And so that's what we did. We invited the commission. They took a position, they said, no, we cannot suspend. It's up to, the member states to how they spend the money. And then they also made comments on, as long as the initial program is in line with human rights, it's not up to us to look at individual calls. So there were some technical details, involved, and they said, no, we can't act. And that was then the, the, let's say, the legal decision that we, went to court against. So we created the case in a sense,

Rita Crespo Fernandez

To our listeners that maybe are not very familiar with the European Court of Justice, can anyone go the to claim in the sense that do you need to have some certification? How does it work? Is it like any other court? How do you go about this?

Bart Van Vooren

Okay. So that's a that's a very good question. So the Court of Justice has two levels. In the first is the General Court where you can file what is called direct actions, where essentially you, me, person with disabilities, anyone who is individually, indirectly concerned by a legal act can file an action. There is actually somewhere also barred from voting versus European Commission. That's another funny story.

Anyway, and then there is also the Court of Justice whereby if you are before a national court, and an issue of EU law, comes up, then you as a, as a litigant can ask that national court to ask questions to the EU Court of Justice. So those are the two biggest avenues.

And for this case, we were in in the first scenario, we filed a direct action, for the European Network for Independent Living and Validity against that commission decision.

Rita Crespo Fernandez

Did you also try to refer a question? I believe this is a very common strategic litigation, um, strategy.

Bart Van Vooren

Yes. And I think, we've we've worked on other areas, for instance, in voting rights for persons with disabilities. But unfortunately, I am the slightly not a Belgian qualified lawyer. I've done a lot of EU court litigation, but I haven't really seen the inside of a national court. So the way that works is we would then work with with national lawyers. And I have a colleague who is Bulgarian qualified, for instance, so she can help in Bulgarian courts. And then what we do is, for instance, we've done a big case on, gay rights in Poland, where we worked with the Polish law firm and we handled the case before the Court of Justice and won. Yay!

Rita Crespo Fernandez

Congratulations. So you're a bit of a special lawyer. Let's say you need to be a certified to be able to go to the European Court.

Any, any EU qualified lawyer can do it. But it does help to have it's it's to have an area of specialization because it's a, it's a court that many lawyers across Europe don't usually see. And so that's why, we often help and we stand there alongside national lawyers. And also we don't speak all languages of the European Union. So a case that comes out of Bulgaria will typically be in Bulgarian. So then we help with the legal arguments and as simple as here's the court and that's where you enter and that's where you stand and all this kind of basic things. But then on the substance, our, our colleagues at National will help.

Rita Crespo Fernandez

To go back to the arguments, you mentioned. First, the continental notion of shared management, which is already a big monster to tackle. There is, I guess, a second monster, which is, what is the place of the convention on the Rights of Persons with disabilities in the European Union? Because, as many of our listeners may know, the European Union has ratified the convention, but the European Union is not a regular state.

Bart Van Vooren

No.

Rita Crespo Fernandez

And the decision in which the European Union looked at what, how do we apply the convention was not so clear cut. So how do you take how did you take this question when you were preparing for this case?

Bart Van Vooren

Yeah. So we went. The the fun thing, being a lawyer, in strategic litigation for non-governmental organizations such as yourself is that you can take very principled stances. So we said, look, there is the right to independent living in the convention and there is access to justice in the convention. You have those two articles and you the court must enforce this and the European Commission must comply with it. You're a party to it now. And I don't know if this is the place here, but then the enforceability of international law before EU courts or even national courts, is a is a big issue of debate. Can you actually invoke an international treaty or not?

We said yes. Now and to my big frustration then, and for the record, we didn't win the case in in. Well, we can talk about defining winning, but then you'll think "Ügh, this lawyer" [Laughter] So actually we went even on appeal and we for instance because I mentioned earlier, if you file a direct action, you need to be directly and individually concerned, right? You need to prove that somehow the decision of the EU, affects you. And, and in essence, the General Court had said in its first judgment, look, and you are not affected by this. You are, an NGO representing the rights of persons with disabilities, but this doesn't affect you. We made the argument: Look, one, in this Bulgarian case, we know that there will be thousand and 20 places for persons with disabilities. So we know clearly that there will be a group of clearly defined people. Second, people are often under guardianship, and they may fear reprisals in case they, let's say, come out of the woods and stick their name to a case, such as this one. And third, we are sometimes talking to persons with mental disabilities who may not have the capacity to grasp the intricacies of, of human rights and the rights that they have.

And so on that basis, we said, you, Court of Justice, as an entity of the European Union, you also have a right, sorry, obligation to enforce the CRPD and the right to access to justice, to which they said, absolutely not.

And so, look, did I expect them to change? No. Was I slightly hopeful? Yes. Because especially the argument if you simply because of your disability cannot stand up and defend yourself, what other mechanism can there be then a third party, an entity defending your rights. And then they said, and I'm looking here at that language from the judgment that still makes me angry to this day that they basically said, any difficulties, however serious faced by persons with disabilities, cannot warrant an action being brought against that measure by a third party. So they basically said any difficulties, however serious, cannot warrant an action brought by a third party.

So to my mind, that is actually and this is going to be controversial. That is a violation by the Court of Justice of the provision on access to justice under the CRPD. Can you do anything about it? This is the highest court, so it stops there, unfortunately.

Rita Crespo Fernandez

Well, we can only try again. I guess.

Bart Van Vooren

well, the door isn't entirely closed and we have been looking with you for individual applicants who would perhaps not fear reprisals or be in individual circumstances where they can, prove standing. So that is something that we are still working on with you. If there are and this is maybe a call to our listeners, if there are people who feel that they might be, in certain circumstances where their personal safety or personal happiness or personal circumstances

would not be negatively affected by litigation. Happy to have that conversation. Explore what we can do.

Rita Crespo Fernandez

Yeah, and I think I work a lot on your answer. I think sometimes people feel like this is very distant from their lives because maybe a directive or a regulation feels very distant from people's daily lives. EU funds are very close to everybody's life. You may go to, I don't know, cultural center that has been funded by EU funds. Maybe the metro in your state is funded by EU funds. And for many people, the institution in which you live is funded by EU funds. So it's a very direct action that they use doing in breach of fundamental rights. So going back to this shared management, notion, how was this to challenge the fact that the European Commission keeps saying, oh, this is not me? Is the member states choosing to spend the money? It's not. It's not us.

Bart Van Vooren

Yeah. And and you you just mentioned it. The the money has a direct effect on people. And we made that argument as well. We said, look, this money goes to those institutions. And they are well they were called group homes. So they we took all the mini institutions basically.

And we said, well you are because you are not blocking or suspending the money, enabling them to be built. To which the argument was then, well, but if we don't get give them the EU money, then the country can just decide to put their own national budget in them and hence we are not responsible and the court aligned with them. We were like, well, but no [laughter] I mean, you still giving it your money, so you shouldn't just because somebody else might pay for it as well. That just doesn't does not make sense. That's not particularly logical in my view. And the same with, you know, I mean, it's very technical, but shared management, there's like multiple phases, there's the initial review phase and then the actual calls and then saying as long as it's compliant during the actual review phase, we don't look at the later stage anymore.

Well, you can hide behind procedural, processes. And that that's what happens often in shared management, I think. I'm not an expert. You probably know this better than I did, but that's what we've experienced in that case.

Rita Crespo Fernandez

Something that the European Court of Justice loves to say is we're not a human rights court. What is your reaction to this idea that the European Court of Justice is not a human rights court? Therefore, they don't need to look into human rights.

Bart Van Vooren

Isn't every court to some degree a human rights court? Especially if you look at, at some of the discourse that comes out of the court and in and, and the European Union in general, as being we are a value based legal order. It just makes me think about The Economist article recently beat the Europe as the last land of the free, especially with the current geopolitics. Yeah, I disagree respectfully.

Rita Crespo Fernandez

And on this case, you said there are other things that frustrated we discussing before. Do you want to address any of the frustrations you had with this particular case? What things when you read it, you went like, this doesn't sound so reasonable.

Bart Van Vooren

Yeah, in in, in this case, I think I've highlighted highlighted the one where, where basically. But look, I know that the court very actively manages its case law better than the cases that they, they get. And, the rules on standing and who can bring litigation against EU acts is one of those. And that's not exceptional. Many supreme courts around the world will actively manage the cases that come in or not.

And they must have thought of it from a broader perspective. They must have thought, well, if we now allow one NGO for persons with mental disabilities and give them standing, then we are opening the floodgates. Sure, I can understand that. But then one is there something wrong with that? And then two I, I truly believe that persons with mental disabilities are a unique circumstance where they should have made an exception, because there are other cases, few and far between. For instance, there is a case where persons with disabilities and it's a case already 20 years old, and that proved that they were direct recipients of funds. And if they were involved in that procedure, they would have standing. And to my mind, this was another example they have. Yeah. I don't think that the the big precedent, the floodgates would have been opened by doing the right thing. So that that's a deeply frustrating one.

Another frustration that and that's maybe more broad from an EU litigation perspective. As a lawyer, I've acted for companies, for governments and for NGOs. I'm the same person. But depending on who stands before the court to treatment is very different. If you are there for an EU institution or a member state, you just feel that you are taken more seriously than if you are a private actor.

Now NGOs are still taken slightly more seriously than companies. So at least in my view, from what I see. So that's at least something. But that's another, frustration of mine.

Rita Crespo Fernandez

That is interesting.

Bart Van Vooren

I can continue venting.

Rita Crespo Fernandez

I'm happy for you to vent. If you want to take another thing of the case that you found, well…

Bart Van Vooren

Maybe not another set of cases that we've done for Validity is on transparency and access to documents. And, so what regularly happens, of course, for you as, as a, as an organization, you want to understand, especially in this context of shared management, the conversations that the European Commission is having with the member states. So there is something that, is called freedom of information requests. So, so you as an organization and actually any citizen can go to the EU institutions and submit, hey, I want to see documents on this topic from that date.

Now as NGOs, you regularly do that. And then there is a set of procedures and time limits within which, the EU has to reply. And, we have basically seen a, let's say, a structural failure of replying in time and replying complete, giving complete replies or partial replies. And, we've litigated that as well. It was, it was a case relating to documents, from, from Hungary, where initially the European Commission partially refused. We filed, a direct action and the case went on and informally, we actually had heard also from conversations with, with, public officials that we were likely going to win. And what the commission then did is they released those documents anyway right before a judgment. And then we argued, well, this is a part of a pattern. So you the courts still need to adjudicate and still say that the European Commission acted unlawfully. But they said no, you now have access to the documents so we don't have to rule anymore. What we also did is we submitted them a whole raft of document requests that were failed or too late or partial, and they refused to accept it because it didn't demonstrate anything part of that specific case. So, procedural arguments to kind of wriggle out of, of having to give an answer, even though in my mind it was quite obvious what is happening. So a sense of, College of Europe graduates protecting each other.

[Laughter]

I see people eye rolling.

I hope I can still act before the court after this podcast.

Rita Crespo Fernandez

You will tell me we will keep this thing and think about it for a few days. [Laughter] But, maybe to give a bit of background to our listeners about why was this important, this request for information, the way EU funds are structured is, is not a clear cut process in which the, the EU gives money to each member state and they can put it in their pockets and see what they do with it.

There is a lot of planning that gets involved, and a lot of conversations between the Commission and the member states, and this is what at the time was interesting to know. If I understood correctly, what had been going on.

Bart Van Vooren

Exactly.

Rita Crespo Fernandez

in the conversations related regarding Hungary, because we knew that investments into institutions were planned. So the, the other problem here is that there is no good moment,

apparently, to challenge these investments because when before they are allocated, they say there's still no violation.

It's just a plan.

Bart Van Vooren

Yeah. And and and and the big discussion in the Hungary case was and this is actually being litigated now between Hungary and the European Commission. The documents that the European Commission refused to provide this were in Hungarian and allegedly from the Hungarian government. And so what we got was the one side. So this be the documents from the commission, but not the replies from Hungary or in Hungarian.

So obviously you wanted to see the full dialog with the full discussion so that you could understand and then also advocate as appropriate. And so, so we we litigated against not seeing the Hungarian documents. And what then happened, as I mentioned, was the Commission agreed close to the judgments, to release the documents that came from Hungary. But then Hungary litigated against the commission, to do to, release those documents against us.

Now, that case, eventually the commission actually won. So Hungary was put in the wrong. But January 25th this year, they filed an appeal. And so, you know, maybe going back to, to what is a win, did we win that case on transparency? Not per se, but did you get to see the documents? Yes. So that's a win.

And is there now still a discussion on going before the court of Justice? Yes. About the fact that, even in this context of a dialog, the commission can release those documents. So for the future, when, NGOs like Validity and, you know, request documents, they are more likely to see the full picture. So these are, you know, drops on the hot plate, maybe, or small baby steps.

But there are steps nevertheless. So that that's strategic litigation. It's rare that you you'll get the huge big win. Although sometimes you also do but it's still, it makes a difference.

Rita Crespo Fernandez

And for us, it is important to hear we can continue asking for these documents until we have basis to say you have to keep them to us.

Bart Van Vooren

Exactly. Also also if they're from Bulgaria or Hungary.

Rita Crespo Fernandez

Or any of our members in the from member states can also or even accession countries can also maybe start requesting. So that may also lead to more publicity and transparency.

Bart Van Vooren

Yeah, exactly.

Rita Crespo Fernandez

That would be very interested. And that's transparency goes both ways. Right? I mean and I mentioned it earlier, there is a there's actually, Covington and Von Vooren versus commission. And that's also a transparency case. That's where the commission refused to disclose to us how the member states had voted on a certain implementing act. And we want to check whether they had properly counted the vote because it was close to a blocking minority. And for the listeners, that basically means that if a small number of member states that have sufficient weight, a certain act can be stopped, that it's not not adopted. And informally, we had heard that an abstention was probably counted as a yes. So we wanted to check and that the commission refused to disclose, how individual member states had voted. And it's so happened that I had filed that request in my personal, name. And so I yeah, no, I thought transparency goes both ways in a democratic society. I want to know who voted how and how you counted it. So that's now still pending on appeal.

Rita Crespo Fernandez

Well, we can we can maybe up date in not long. And I guess that's also always a difficult question regarding human rights. How do we go from theory to practice? Of course. State, state party to a convention should be enforcing the convention.

How do we get that in practice? As you were saying before, if an individual cannot invoke the convention in court, if, the in in places where the needs to be transposed, it hasn't. I believe the UK still has not transposed the the UK. It's not it's not a EU member states [Laughter] But how how do we make human rights a reality.

Bart Van Vooren

Yeah. You need to you need to have a willingness from the legislature to provide these mechanisms. And if you look at the global level, it's it's it's not looking good right now. So in a way, you'd, you'd hope that if the EU is the value based act that it purports to be, that even in the most difficult of times we stand behind their principles, we'll see.

Rita Crespo Fernandez

I will ask you a bit about, the field I'm working in this field for, maybe any listeners that are feeling inspired. So maybe if anybody is studying law and thinking, I actually want to work in human rights, I like the topic. I want to be a lawyer and work on this. How do you go about it?

How do you work in places like Covington? Maybe that do pro bono or also as a human rights independent lawyer, is this something that can pay your bills, which is obviously the first concern.

Bart Van Vooren

that's a very I mean, when you start your career, how do you I listened to an interesting podcast recently and and something that stuck with me was find your front line and what is your front line?

I think that's where you need to start. And I was exploring my front line. I was a stagiair in the Belgian embassy to the United Nations after I graduated in international law from NYU. That was 2006, actually. Funnily enough, as a trainee, I worked on the negotiations in the CRPD that were going on at that time. But and that was very fun. There were EU coordination meetings in New York and these kind of things, and I thought that's what I wanted to do. But I saw that international diplomacy was not my thing. Especially maybe for a small country. I, I felt like I was writing reports and sending them to the head court to Brussels and what happened? Nothing. Because that was also when when when, the, the, the Israel had just invaded Lebanon and it was a difficult period and I thought the I know that I won't be a good diplomat back then I thought, okay, I'll, I'll do it through publications and teaching and writing. That's another path. And that I explored.

I did publish a couple of books and, but maybe it's the ADHD talking out a couple of years. I was like, okay, what's next? What else can I do? So then I went into private practice. That was honestly more in the because, also, I had the family to take care of and and like you say, you need to pay the bills.

I don't think that going into private practice, the big corporate law firms should be your first choice if you want to be a human rights do. Think you can probably talk a little bit about going into NGO. But when you do, when you are in private practice, then it's also still about choosing your area of law and, and, and also choosing your firm.

If you look at, what's going on in the world, you can see that there are firms taking a stance and that there aren't. And so you should also find an employer that fits your own wishes, your, priorities.

I think, another area where you can go that I wanted to do, but it was to slow the hiring process was the commission legal service. So after all these years and I did the Concorde and I'm still on the list, I think you can probably make it make a difference. There. Yeah. Lots of avenues for graduates out there.

Rita Crespo Fernandez

Maybe, question. I should have probably asked me for the first one better. But now is that, so we know that in this particular case, the Darian case, we said will when talking about winning is difficult. We talked about it, we said it, but we could say we didn't win. We've been we we sell it in Bulgaria. There was no win. How how does that go also as a lawyer, how is the frustration of maybe put in an effort in a case that you feel a lot of value to and then not seeing the results?

Bart Van Vooren

Well, you get used to it [Laughter]

I've, I, I regularly joke that I have more inadmissible cases than I have admissible cases. And then amongst them, like I mentioned earlier, if if I want to win more, I should represent the government rather than the, individual companies or persons. But yeah, like I said, you look

at the judgment, you get frustrated, with parts of it you see a silver lining and you need to move on. Can't win them all.

Rita Crespo Fernandez

And why do you keep going?

Bart Van Vooren

Because it's also fun [Laughter]

Litigation before the EU court is fun, especially if you're a bit of, EU law nerd. It's it's, it's an interesting court. An interesting place to be in you.

Yeah, I find it still has more impact than writing lots of articles about it. So, especially also when, when when you are in EU litigation or in litigation generally, there are the cases that you actually see in the judgment, but there's a whole lot of cases that never made it to court or that you settled or all the processes beforehand or around it.

So you get to see a lot of the action. So that's interesting. Yeah, I like, I like, like I said, sometimes you do win. For instance, for the ALJ, the International Lesbian Gay Association, we did this case in, in, in basically for persons who are not employees but who are self-employed, who were discriminated. And we essentially got, confirmation that EU law that protects employees also protects self-employed people against non-discrimination. So sometimes you do win. Yeah. And in Dutch we have the saying the bumps against the dents and they make you still an equal.

Rita Crespo Fernandez

Thank you so much Bart. I think this has been a very interesting conversation and I hope our listeners enjoy it.

Bart Van Vooren

Hope so too

Rita Crespo Fernandez

We've learned that winning or losing a case is a difficult question, where we're talking about a strategic litigation in this case that we are discussing today.

The case of Bulgaria. Yeah, we did not win court. But what can happen now? What can we do with this case? What steps should we take afterwards to discuss this question? We interviewed also **Steven Allen**, executive director of the Validity Foundation.

We have here with us today, **Steven Allen**, who is an executive director at the Validity Foundation.

Hi, Steven, could you tell us a few words about the Validity Foundation?

Steven Allen

Hey, Rita it's good to be with you. And thank you for the invitation today to have a chat. So, I'm Steven, and yes, I work for the Validity Foundation, calling in from Budapest today, which is where we're based in Hungary. Validity is a legal advocacy organization that works to promote the rights of people with intellectual disabilities and people with psychosocial disabilities, primarily in Europe and in Africa. And one of the main things we do, is try to take strategic litigation, take cases essentially, to enforce the rights of people with disabilities under the CRPD.

Rita Crespo Fernandez

Thank you. So in the case we were discussing today, in Ireland, Validity took this case in front of the European Court of Justice. And at the core of, of, this legal case is the fact that EU funds were used to build institutions despite the fact that the Convention on the Rights of Persons with Disabilities does not allow for such investments. How is this possible? How are EU funds regulated to make sure that these investments do not happen? And how is it happening?

Steven Allen

I think these are really good questions, Rita. To and I suppose, without being too much of a lawyer, I want to take a step back and, and explain, like, why is this even a problem in the first place? How did this happen? Because, the European Union, of course, is made up of 27 countries, right. And one of the fantastic things is that the EU, all of those 27 members, plus the EU itself, ratified or signed up to the CRPD. And the CRPD does say, as we know very clearly, that all people with disabilities have the right to live independently and be included in all communities.

Now, the CRPD doesn't say specifically in words in the text, stop putting money in institutions. However, that obligation flows from the objective. And the objective here, of course, is so that everyone can live in their homes, in the community with the support they need. So the legal argument under the CRPD is that if you keep putting money into institutions, you're actually preventing people from living in the community and having their own independence.

So this is why government should stop it, and this is why the EU should also stop it, because, they've agreed to do so under international law, and they've voluntarily agreed to ensure that people with disabilities, all the citizens of Europe, can have good lives in the community with the support they're require.

Now, in the EU, the other part of it is the there's differences across the 27 countries, which means that the EU wants to try and promote greater equality between countries that historically richer and poorer, with different kind of populations. And so the way one of the ways they do that is with this funding that comes from, the European Union to various countries. And one of the things that should happen with that funding is to invest in projects and programs that can help people. Live in the community, that can help them, for example, access support they might need, like personal assistance programs or accessible housing, which are the things that essentially allow you to live in the community, with dignity.

The problem is, under, with this money, there's that there is, there is there's relatively weak oversight after the money leaves Brussels or Belgium, and when it lands in somewhere like Sofia in Bulgaria, because at that point, although there are agreements in place about how the country will use the money, the country itself chooses a lot of the time what projects are going to get investment.

And, and sadly, many, many countries, Bulgaria included, continue to use a lot of this money, for institutions. So to fund, big old institutions or even small institutions, that they are building with this money.

Now in EU law, really what should happen is that the in Brussels, the EU representatives should say to Bulgaria, stop doing that because it's against the right to independent living. Unfortunately, the, the European Commission, which is responsible for this, doesn't do this very well. They don't monitor very well. And even when they hear of problems, they very rarely take strong action. Like when governments such as, Bulgaria in this case, decide to use the money for the wrong things. And I think that's the big problem that we all face in the disability rights community here in Europe.

Rita Crespo Fernandez

Thank you. I would even say regarding Bulgaria, that Bulgaria has been put us exemplary regarding the institutionalization. How come how do you feel about this?

Steven Allen

I think Validity or and we wouldn't agree with that. But it's true, that a lot of people think that Bulgaria has made some good progress. One of the reasons for that is because during the 2010s, so 2010 to 2015, there was a big plan in Bulgaria to end the institutionalization of children.

That was the first step. And one of their ways they wanted to, achieve this was by getting children out of those old big orphanages, and they thought that the right way to go was to create what we now call small group homes. So smaller, institutions that would help children eventually progressively move on to life in the community. That was the big idea at the time.

Except now, where like ten, 15 years later, we know that many of those children never left those smaller institutions. And actually, a lot of those children, of course, became adults in the same institutions, and they didn't actually change. So whilst at the time the idea of these small group homes was a positive one, moving people progressively, so that they can get back into the community, the truth is that very few people have ever actually left and gone back to the community. And so we argue that that that was, a failed strategy. And because it was a failed strategy, we say that it's important to stop putting money in these places because they haven't worked. They then use that same model of small group homes, for adults with disabilities. So they use exactly the same approach. And so it became quite a famous approach. And, you know, some big children's organizations were involved with this. And certainly Validity. I know maybe for you guys, and we don't necessarily agree that was the right thing to do. And so now we need to see some change.

Rita Crespo Fernandez

And how did EU funds play a role in this process? Did they support the small group homes. Did they invest in also in larger institutions for adults, or did they fund any community based services, personal assistance services that could have impacted positively regarding independent living?

Steven Allen

Yeah. So, I think EU funds, were used for all of those things that you've mentioned in different ways. The problem is, that a lot of the funds were still going and are still going, unfortunately, to segregated settings.

So a big chunk of the money that could be used to get people into their homes is actually going to the wrong place. So it's taken away the chances of many people. But some governments, including Bulgaria, have used some of the money to start good projects. And some of these good projects include things like personal assistant schemes, in home support for people that they might need to live in their own home. So some of these things have happened, but unfortunately, a lot of EU money has been used, actually not just for the small group homes to build them, for example. But we also know now that the governments have even been using it in the bigger old institutions, which is very clear that it can't be defended anyone under the CRPD.

And that's because of the way EU funds work. EU funds often are about financing infrastructure. And infrastructure, when you talk to a lot of governments, what they the first thing they think of is institutions and hospitals. Right? This is the things they think about. And unfortunately, we still have a long way to go to get decision makers to understand that social infrastructure is more important for persons with disabilities.

That means, you know, people in the community who can support you if you need support. That means ensuring you've got information to access public services. So quite simple things, but it's not always in the mind of the decision makers as the priority.

Rita Crespo Fernandez

And I guess you would say two wrongs don't make a right. And that's also true for human rights.

Supporting things that are positive does not erase human rights violation and invest in an institution is a human rights violation. And we need to still learn that lesson, it seems. And when you decided that you wanted to then take legal action regarding Bulgaria, why did you make this choice? Or trying strategic litigation, did you try other avenues before you went into strategic litigation?

Steven Allen

Yeah. So so we did try some other avenues before taking a case basically. And what happened was in Bulgaria, and with our partners and your members, we were looking carefully at what projects were being planned, for financing with EU funds. And we found that one of these projects, was clearly going to be investing in segregated settings, right, in residential care and I think even sheltered workshops for people with disabilities. And the first thing we did is we actually told the government, this is the wrong thing to do under the CRPD, and this

is the wrong thing to do under EU law, and you really shouldn't be using EU money for this. We actually did tell them we complained about it.

And so in in Sofia, the capital in Bulgaria, the replies we got were simply dismissive. They just disagreed with us. They were happy that the project they wanted to fund, was, in their view, acceptable and agreeable. And they really ignored our concerns that building these places is going to create new human rights violations. So that was the where it started and we didn't get very far at the national level.

After that, because we knew that this was a wider problem. We also told some people in the European Parliament, okay, about this issue. And we say in the European Parliament, have you looked at this because, you know, EU money is being used clearly in a way that is going to prevent people actually from having their freedom, when it could be used for much better goals.

And so the European Parliament did look a bit at this, but we didn't get very strong action. So the final thing then we decided, was that we had to go to the decision makers who, providing the money in Brussels and this is the European Commission. And we told them about the situation, we explained our concerns that the money was going to create segregation, and we asked them to prevent this.

And, and actually, the European Union can prevent these projects if they have good evidence and they can say to Bulgaria or to any country in Europe they can say, please don't do this. Stop it. It's going to violate EU law; it's going to violate international law. But I have to say that when we complained to the European Commission, they refused to stop the money being used in this way. They simply refused.

They also kind of disagreed with the arguments we were making. At the beginning, I mentioned that the CRPD text doesn't say, stop putting money in institutions. It doesn't say those words. And often at the European Commission, they have made arguments saying we still have to put some money to make the places liveable so that people are not in a terrible condition. So this is kind of what they did. And essentially they refused to take action in this case. That was well, that was the final thing really. That meant we had nowhere else we could possibly go. And we decided it was time, to take a case. And, and this case actually was against the European Commission. For refusing to take action, in this, in this situation. And that was at the Court of Justice of the European Union.

Rita Crespo Fernandez

We know that at the end, the European Court said that there was no admissibility regarding the legal standing, as an email could not represent the people directly affected. Could just plain a little bit about this. Why was this decision and do you think in the future things could change and there could be a decision in favour of Validity or of, you know...

Steven Allen

Yeah, this is a really excellent set of questions because, it was very frustrating that at the court, the European Court, we also couldn't get a positive judgment. And you mentioned why and that's because of this kind of legal concept called admissibility and standing. These words mean essentially who has the right to take a case, under EU law. And in this case, and in this in this area, EU law has very restrictive criteria for people who can go to that court.

To break it down, to That court you can only really go to if you yourself are regarded as a direct victim of something that has happened because of the EU. Right? So you have to be able to prove that you, directly or very closely affected by that. Now, the problem in Bulgaria was that the people under this project, who were going to be affected by this project from the EU, a large number of those people are under guardianship in that country. What that means is when you're under guardianship, you don't exist for the law. You don't have the right even to go to the courts on your own name. Someone else has to do that for you. This is also a human rights violation. And we explained this to the Court of Justice. We explained that the people affected cannot directly access justice and ENIL and Validity we are organizations who are dedicated to fighting for the rights of people with disabilities. It is even in our organizational charters and mandates that this is our reason for existing. And although the court did look carefully at what we said, and they did hear arguments about why we should be allowed to represent, the people in these cases, they still rejected, rights to represent this group. And what that meant in reality was that the court closed its eyes to a serious set of human rights issues in Bulgaria, in this case, where there was no other mechanism possible for those people to go, to have their rights protected.

And in my opinion, it shows a serious problem, when the European Court is refusing to look at the rights of people with disabilities, especially those who are kept in institutions and under guardianship, perhaps one of the most profoundly segregated communities in Europe today.

And it is shocking to me, really, that the court didn't want to hear this case in full. But I am hopeful, Rita, that eventually we will get through those doors and we will include courts accountability. Thanks.

Rita Crespo Fernandez

Thank you. Steven. I think, if I start writing down all of the articles of the conventions that were breached here, I may be written 5 or 6. We were looking at the right to legal capacity, the right to access to justice, the right to independent living, where the long list of, human rights have been breached really.

So what is needed to continue strategic litigation regarding EU funds? Do we need to modify the laws that permit access? Do we need to take other legal avenues? Do we need to instead of maybe focus on advocacy? What is your view on this?

Steven Allen

I think that we're going to need to do all of those things, Rita, and others probably as well, to improve the situation. Just kind of last week, you might remember that the UN looked at the European Union. So the United Nations looked at this problem in Europe, and how Europe is doing, implementing the rights of people with disabilities. And they said, yes, you need to improve access to justice. And I think to do that in Europe is going to require some big changes, for example, about how the European Court operates. So we need to think about how we would change the rules about, the court so that it will listen to cases, as you say, that are coming from people who may not have legal capacity or have their legal capacity removed from them by guardianship. So, yes.

We also have other strategic litigation going for Liberty, which is about fighting against guardianship laws in these countries. And so I think that's another important part of the picture, is that we're taking other cases, including in Bulgaria, which is highlighting the problems of

guardianship, to try and get rid of that. But the advocacy, I think is crucial as well and one of my favorite events, I always say every couple of years is coming to your freedom at ENIL because you are making the topic of independent living invisible to the public, it's not just about something that is happening in a faraway place. You know, that people are, less familiar with this is showing really in the European Parliament to the European Commission that there that citizens with disabilities are demanding something changes. And I think that we have to keep that pressure up. I think that's really, really important.

We also have to do a better job, honestly, listening to people who have to live in these institutions, because often it's me talking about them or no one talking about them or, you know, but actually, I think what can really make a change is understanding from the experience of people who have lived in these institutions what it's really like, and what it's really like to have your freedom restricted and to be separated from your families and from your community and from your friends. I think that's powerful. And we should do as much as we can to get those people's voices out there. And I hope you're going to get to talk to some of the people we worked with. Rita. And, these are the people who are the real experts who can get us on the right track, and they should be respected for that.

Rita Crespo Fernandez

You're absolutely right. And I'm really looking forward to having them on our podcast. I also just want to maybe raise one last question that came to mind while you were speaking. It is something that the European Court of Justice often says they are not a human rights court. That is there, that is something that they have said on multiple occasions. This case was about EU funds, is not about it is about human rights for us. But it's not only about human rights, but how do you perceive this idea that the European Court of Justice is not a human rights court?

Steven Allen

I find it a strange argument. I know that they say this. I find it strange because the one thing I think we all have to understand about human rights is that they're universal.

Universal means they apply everywhere, all the time. And you can't just say we don't do human rights in this court because, if you are dealing with cases that involve people, you are definitely dealing with issues related to their human rights. It's undeniable. And an independent living is a perfect example of this. It's, about the rights of dissidents in the community, which is a human rights. It's a human right that the European Union has agreed to. It's also a human rights that is, being violated with EU money. So we cannot separate the issues and nor can we accept, I think this, this quite circuitous argument, almost from the European Court of Justice, that we don't do human rights, we do do other law, but we can not listen to persons with disabilities as if they're not citizens of the European Union.

To me, that's, it's a mistake for the court to take that approach, because it means that people start to lose trust in the EU as being beneficial in their lives. And it means that people stop, start. I think, to lose trust that they have real access to justice. So I don't think we should accept that from the court of Justice. We should be having a discussion with them about how they need to do a better job in defending the rights of people with disabilities, but also defending EU law, because what they must do and that and the court is the place to do this, is step in when EU money is being used in a way that is damaging people's lives, violating the law and violating the EU's obligations under international human rights law.

Courts shouldn't be trying to close their eyes to those topics. They should be opening the door to justice.

Rita Crespo Fernandez

I think there's a very good quote to end, because we know ourselves, and we know we could speak on this topic for a few hours if we could. So thank you so much, Steven. Thank you for your remarks and your explanations and, yeah, have a good day.

Steven Allen

Thank you too. It's been a great chat.

Rita Crespo Fernandez

Opening the doors to justice. That is why we do strategic litigation, to make sure that those that cannot be represented there cannot act for themselves because of the laws in their countries, can access the justice they need, then get reparations and remedies for the injustices they experience. This is how we will keep working, and we will also be reflecting about how do the next regulations for the EU budget can make sure that people can access the justice they need, but that there would also be no more investments into institutions and any other form of segregation.

It is important that we work together. Pro-bono lawyers, disability organizations and the victims to make sure that justice is accessible and that we together achieve our goals to implement the UN CRPD and that the institutionalization can become a reality.

[Music]

Host

Thank you for tuning in! We hope you'll join us again next time as we continue to advocate, collaborate, and innovate for disability rights!

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