Monitoring migrants or making migrants 'misfit'? Data protection and human rights perspectives on Dutch identity management practices regarding migrants

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Karolina La Fors-Owczynik *

Tilburg Institute for Law, Technology and Society (TILT), Tilburg University, Tilburg, The Netherlands

ABSTRACT

Record numbers of migrants and refugees fleeing violence and poverty in parts of Africa and the Middle East present the European Union with unprecedented challenges, including in determining their identity as well as status. In recent years problems of identifying immigrants have been addressed in order to fight identity fraud and illegal entry of migrants. As a result, a wide variety of digital systems have been introduced to orchestrate an effective, preventative modus of identification of migrants. Digital systems are in particular geared towards spotting those migrants who (are about to) commit identity fraud or who enter the territory of EU member states illegally. Although the key aim of the digital systems is framed to protect the administrative, geographic and legal borders of the member state and the safety of its population, empirically based studies demonstrate that these systems bring new risks for migrants themselves. This article intends to contribute to the discussion on the use of digital systems for managing the movement of migrants by analysing identification and risk assessment systems from the perspective of the new European data protection regime and the European Convention on Human Rights. For this purpose, two identification systems – the so-called INS console within the Dutch immigration and border sector, and the PROGIS console within the law enforcement sector – are analysed. A third is the Advanced Passenger Information system operated at Schiphol Airport by border control and immigration services. Against the background of the position of many migrants finding themselves at risk in their home country and of the two legislative frameworks mentioned above, this article addresses two issues. First, the analysis focuses on how migrants are perceived by digital monitoring practices: are they themselves at risk, non-risk or do they pose a risk? In the EU, migrants must prove that their case is worthy of asylum status because they are 'at risk' from political unrest or other life-threatening circumstances in

* Tilburg Institute for Law, Technology, and Society (TILT), Tilburg University, P.O. Box 90153, 5000 LE Tilburg, The Netherlands. Tel.: +31 621403891.
  E-mail address: K.LaFors@uvt.nl

their home country. Yet, empirical data gathered through semi-structured interviews show that simply abiding by the standards during an enrolment process of the INS console, rather than being 'at risk', a migrant can easily be categorised as 'posing a risk' (La Fors-Owczynik & Van der Ploeg, 2015). Second, this article aims to investigate what the capacity of the new data protection regime is in protecting migrants from being framed as 'a risk' or a 'misfit' stemming from the use of digital systems. Given this second aim, the following discussion also intends to explore the extent to which the European Convention on Human Rights can provide an additional legal remedy for migrants being digitally categorised in a manner that is detrimental to them.

1.   Introduction

Refugees and migrants across Libya face rape, torture and abductions for ransom by traffickers and smugglers, as well as systematic exploitation by their employers, religious persecution and other abuses by armed groups and criminal gangs. . .[1]

Seventy years after the end of the Second World War, with tens of thousands of immigrants having ventured across the oceans in the hope of a better life, Europe's southern and eastern borders are now more than ever sites of mass immigration from Syria, Iraq, Libya and the southern corners of Africa where migrants are reportedly putting their lives at risk every day. As the above quote from a recent Amnesty International report demonstrates, the incomprehensibly horrific cruelties that migrants have become exposed to in traditional – yet since 2009 lawless – transit states such as Libya exacerbate the risks of crossing the Mediterranean Sea. No matter what the dangers of the traumatising boat disasters are, or how abusive the circumstances of the human trafficking can be, migrants embark daily on a journey with the desperate hope of sanctuary within the EU borders. The International Organization for Migration (IOM) described about these immigrants' journey to Europe as the 'most deadly route for irregular migrants'.[2] Such extraordinary and clearly negative circumstances these immigrants find themselves in has prompted discussion on their human rights and the mechanisms that can be established to protect them from being at risk, not least from the cruel practices of those who take advantage of their position.

However, the situation also provides ammunition for those who advocate stricter quotas for immigrants ('Germany presses for quota system for EU migrant distribution, 2015) and tighter controls on identity fraud and the status of migrants. In the Netherlands, the discussion is focused among other things on the opportunities as springboards that large Dutch harbours such as Rotterdam could offer migrants travelling to the UK, similarly to the situation in the French city of Calais. The

rhetoric therefore also shapes the current discourse in EU member states on how migrants[3] and refugees are seen. The unprecedented challenges that the flood of migrants constitute both for the EU and the Netherlands increasingly evokes a tendency by which immigrants are framed and categorised as posing a risk rather than being at risk (see also La Fors-Owczynik and Van der Ploeg, 2015).

Bearing in mind the enormous human as well as political challenges that Europe currently faces, the prime goal of this article is to outline some less visible challenges behind the broader theme of people immigrating to or travelling in Europe. Key themes are the developments in and consequences of the use of digital tools in border controls, and immigration and law enforcement practice. The analysis, based on practices in the Netherlands, will also show that there is a subtle interaction between how migrants are digitally categorised or framed and the use of digital technology in border controls, and immigration and law enforcement practices. To demonstrate this interaction, three identity management systems[4] are assessed: two identification systems and one risk assessment system employed by the Dutch authorities. The analysis of this interaction and the empirical findings show that the use of these monitoring systems has the effect of framing migrants as 'a risk' or making them viewed as a 'misfit' in the hosting society. Given this finding, the analysis subsequently aims to contrast this effect with the relevant provisions (such as those with respect to profiling) of the new European data protection regime. In doing this, the analysis aims to shed light on whether the design and use of the systems used for migrant control is in accordance with the new EU data protection rules. Also, it offers the opportunity to reflect on whether the new data protection regime can indeed act as an instrument to address certain negative effects stemming from the ways in which digital technologies are used to categorise migrants. Finally, the article explores the extent to which a human rights

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[1] *Libya: Horrific abuse driving migrants to risk lives in Mediterranean crossings* – <https://www.amnesty.org/en/articles/news/2015/05/libya-horrific-abuse-driving-migrants-to-risk-lives-in-mediterranean-crossings/> Retrieved on 12 May 2015.

[2] *IOM: journey to Europe, most deadly route for migrants* – <http://www.ecre.org/component/content/article/70-weekly-bulletin-articles/844-iom-journey-to-europe-most-deadly-route-for-irregular-migrants.html> Retrieved on 5 May 2015.

[3] When I refer to *migrants* in this article, I consider both immigrants and regular travellers who want to cross the Dutch border or pass an identification check-point for immigration or law enforcement and therefore are required to undergo assessments by any of the three systems discussed in this paper.

[4] *Identity management systems* serve to establish 'identities' (defined as personal datasets). This includes the identities of persons subject to the system, in this case migrants, as well as those professionals (e.g. technicians, security agents, border guards, etc.) who interact with this system on a regular basis. These systems serve to both determine identification and allow for differing levels of access control in the process.