



Links between migration and discrimination



European Commission

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Reggie | 1989

Executive Summary

Overview

This report aims to describe the links between nationality and protection from discrimination under EU and international law as well as in the domestic legal systems of EU Member States. Its purpose is to identify whether third-country nationals are protected once they enter the European Union from discrimination on grounds of nationality and from discrimination on grounds of race, ethnic origin or religion in situations where nationality is used as a proxy for these grounds. Article 3(2) common to both the Racial Equality and the Employment Equality Directives states that these instruments 'do [...] not cover difference of treatment based on nationality'. However, this clause does not imply that all differences of treatment on grounds of nationality are permissible, particularly since they may result in indirect discrimination on grounds of race, ethnic origin or religion, or be in violation of other rules of EU law, including the general principle of equal treatment which applies in the field of application of EU law.

The integration of immigrants can succeed only if these individuals are adequately protected from discrimination. Yet the position of nationals of EU Member States is much more advantageous than that of third-country nationals. The provisions of the EC Treaty which prohibit discrimination on grounds of nationality, whether in general ('within the scope of application of [the EC] Treaty': Article 12 EC) or in the specific context of the freedom of movement of workers (Article 39(2) EC) or of freedom of establishment (Article 43 EC) have been interpreted to protect only the nationals of Member States. The scope of application of Article 12 EC is thus limited to nationals of EU Member States, and it covers neither differences of treatment between EU citizens and third-country nationals nor differences of treatment between the nationals of different third countries.

This report aims to identify whether there exists a gap in the degree of protection afforded to third-country nationals by examining whether they are protected from discrimination on grounds of nationality under international or European human rights law, under national constitutions, or under the ordinary domestic legislation of EU Member States.

In Part I, the concepts of 'nationality', 'race' and 'ethnic origin' are described, and they are related to the concept of 'national origin', which also appears in human rights instruments adopted at international and European levels and in EU law. The potential relationship between nationality-based discrimination, on the one hand, and discrimination on other grounds such as race, ethnic origin or religion, on the other hand, is explained.

Part II then discusses how discrimination on grounds of nationality is addressed in the framework of EU law. The provisions of the EC Treaty which prohibit discrimination on grounds of nationality cover only nationals of EU Member States. These provisions therefore prohibit neither differences of treatment between the citizens of the EU – who have the nationality of a Member State – and third-country nationals, nor differences of treatment between nationals of different third countries on grounds of nationality. Yet steps are being taken to overcome the exclusion of third-country nationals from free movement rights as granted in the EC Treaty to nationals of EU Member States. This is the purpose of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.¹ Association and partnership agreements concluded between the European Community and third countries also offer to the nationals of the States Parties to such agreements a certain degree of protection from nationality-based discrimination. Finally, Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted² aligns the

¹ OJ L 16 of 23.1.2004, p. 44. See also the *Proposal for a Council Directive amending Directive 2003/109/EC to extend its scope to beneficiaries of international protection*, COM(2007) 298 final of 6.6.2007.

² OJ L 304, 30.9.2004, p. 12.

situation of refugees and persons granted subsidiary protection either with the situation of nationals of the host State in which they reside or with the situation of other third-country nationals legally residing in that State, in a limited number of areas. Important though they are, these developments do not ensure full equality of treatment between third-country nationals and nationals of the EU Member States as regards protection from nationality-based discrimination. Nor will the Charter of Fundamental Rights change this situation since on this issue the Charter merely reaffirms the existing situation under EU primary law.

Part III examines the contribution of international and European human rights law to combating discrimination on grounds of nationality. The requirements of the International Covenant on Civil and Political Rights, of the Convention on the Rights of the Child and of the Council of Europe European Convention on Human Rights cannot be ignored since these instruments are a source of inspiration for the European Court of Justice in identifying the sources of the fundamental rights that it protects within the EU legal system as part of the general principles of EU law. This section also discusses the position of the Council of Europe European Social Charter on this issue, although the status of that treaty in the development of the case law of the European Court of Justice is less clear. In addition, Part III presents the contributions made to the issue of nationality-based discrimination by the 1951 Geneva Convention on the status of refugees and by the 1954 Convention on the status of stateless persons.

A comparison of these instruments leads us to the conclusion that differences of treatment on grounds of nationality are increasingly treated as suspect in international human rights law. The implication is that, in the future, the situation of third-country nationals who are legally residing in EU Member States may have to be more closely aligned with that of the nationals of other EU Member States; the mere fact that EU Member States have decided to establish among themselves a new legal system and to create a 'citizenship of the Union' should not be considered as sufficient justification for the maintenance of such differences beyond the narrow list of political rights currently attached to citizenship of the Union. Indeed, as regards at least the enjoyment of fundamental rights, even differences of treatment based on the administrative situation of individuals – particularly differences of treatment between legally residing migrants and migrants who are in an irregular situation – may be challenged.

Finally, Part IV asks whether third-country nationals are protected from differences of treatment on grounds of nationality in the domestic legal systems of EU Member States. Two questions are asked. First, are third-country nationals protected from differences of treatment on grounds of nationality which may be discriminatory in themselves? Second, are they protected from such differences in treatment to the extent that these measures may constitute indirect discrimination on grounds of race, ethnic origin, or religion, whether this is the intent of the author of the measures (who deliberately uses nationality as a proxy for race, ethnicity, or religion) or whether this is the result of such measures (differences of treatment on grounds of nationality leading to a particular disadvantage for members of certain racial or ethnic groups or for the members of a particular religious faith)? The answers are sought in the constitutions and the domestic legislation of EU Member States. Protection from discrimination under domestic laws is, of course, additional to, and not instead of, protection already granted through international and European rights law as described in Part III.

Lastly, this report concludes that the prohibition of discrimination on grounds of nationality is emerging as a general principle of international and European human rights law, and that it is recognised already by a significant number of EU Member States, to the extent that it can be considered as a general principle of EU law, for which the European Court of Justice may in the future seek to ensure respect. This does not mean that the European legislator should necessarily equalise the situation of third-country nationals legally residing on the territory of an EU Member State with that of nationals of other EU Member States, for example as regards access to social benefits such as health, education, or job placement services. But it may imply that when implementing EU law, Member States should take into account the need not to establish or maintain differences in treatment between different categories of foreign nationals (in particular between nationals of other EU Member States and nationals of third countries), nor to establish or maintain differences in treatment between nationals and foreigners, unless such differences can be justified as measures adopted in the pursuance of legitimate objectives and proportionate to such objectives.

Introduction

The role of immigration in European societies is already occupying a central place in public debate, and this role is bound to increase in the future.³ The number of immigrants in the European Union now lies at around six per cent. But this hides considerable differences between individual countries. In Luxembourg, about one-third of the population is foreign (32.03% from other EU Member States, and 4.88% from non-EU countries). In most of north-western Europe's traditional countries of immigration immigrants account for between seven and ten per cent of the population,⁴ but if the second generation is included this figure approaches twenty per cent in many countries. As noted by Entzinger: 'This implies that one in every five persons in countries such as France, Germany or the UK is an immigrant or has at least one immigrant parent. This situation is not very different from the United States, which is much more ready than any of its European counterparts to define itself as an immigration country.'⁵ In southern Europe immigration is a more recent phenomenon but the numbers are still high, in part because fewer immigrants have acquired the nationality of the host country through naturalisation; in both Greece and Spain 7% of the population is of foreign origin. In the new EU Member States of Central and Eastern Europe the figures are much lower still, but given that the birth rate is also below average and that these states are likely to undergo significant economic growth in the future, more immigration can be expected

It is in this context that the present report has been commissioned. Its aim is to examine whether third-country nationals are protected from discrimination in EU Member States or whether there are gaps in their protection which ought to be filled. The report addresses the question of whether differences of treatment on grounds of nationality may constitute a form of prohibited discrimination under EU law, under international and European human rights law, or under the domestic legislation of EU Member States. Differences of treatment on grounds of nationality fall under three categories: such differences may be created (a) between the nationals of one Member State and foreigners; (b) between nationals of one Member State and nationals of other EU Member States on the one hand and nationals of third countries on the other; and (c) between nationals of different third countries. Thus, in order to assess the current status of differences of treatment on grounds of nationality, we must not only examine in general whether the measures establishing such differences are acceptable and if so under what conditions, but also specifically whether the differences of treatment between citizens of the Union on the one hand and other foreigners on the other are allowable.

In addition, differences of treatment based on nationality may be discriminatory under two distinct lines of reasoning, which must be analysed separately. First, such differences in treatment may constitute direct discrimination on grounds of nationality. As we shall see, 'nationality' has become a suspect ground in international and European human rights in recent years, and this development cannot fail to influence the reading of general equality provisions in national constitutions or legislation. One of the aims of this report is to document this development, which is described in detail in Part III. Second however, differences of treatment on grounds of nationality may constitute a form of indirect discrimination on grounds of race, ethnic origin, or religion, either where 'nationality' is deliberately used as a proxy for these prohibited grounds of distinction (in order to achieve indirectly what

³ See for example Han Entzinger (2007), *The Social Integration of Immigrants in the European Union* in *JILPT International Symposium 'Migration Policy and Society in Europe'*, 17 January 2007, available at: www.jil.go.jp/event/symposium/sokuho/documents/20070117/Entzinger_e.pdf; and the statistics collected on immigration and asylum, last updated on 1 January 2003, available on: http://ec.europa.eu/justice_home/doc_centre/immigration/statistics/doc_immigration_statistics_en.htm.

⁴ But there are variations between countries. For instance in 2003, 8.22% of the population in Belgium was foreign, but this figure was only 4.32% in the Netherlands. For Denmark, Finland and Sweden, the number is about 5 to 6%. France is within the same range, but the figure is 8.32% for Germany.

⁵ Han Entzinger (2007), *The Social Integration of Immigrants in the European Union* in *JILPT International Symposium 'Migration Policy and Society in Europe'*, 17 January 2007, p. 3.

cannot be done directly) or where the impact of differences of treatment on grounds of nationality is such that it puts persons of a defined race, ethnic origin or religion at a disadvantage or affects them disproportionately. In its description of the evolving international and national legal framework, this report shall seek to keep these two issues separate.

The report is divided into five sections. Part I describes the scope of the report. The concepts of 'nationality', 'race' and 'ethnic origin' are described, and they are related to the concept of 'national origin' which also appears in human rights instruments adopted at international and European levels and in EU law. An attempt is made to relate these different concepts to one another and to explain how they can interact in anti-discrimination law. Part II discusses how discrimination on grounds of nationality is addressed in the framework of EU law. Although the provisions of the EC Treaty which prohibit discrimination on grounds of nationality cover only nationals of EU Member States, EU law has recently sought to improve the protection of third-country nationals legally residing on the territory of EU Member States. The initial exclusion of third-country nationals from free movement rights as recognised in the EC Treaty for the benefit of nationals of EU Member States has been overcome in part by the introduction of a particular status for third-country nationals who are long-term residents. The situation of refugees and other persons deserving international protection has been aligned, in certain fields, with that of the nationals of the EU Member State in which they reside. Association and partnership agreements concluded between the European Community and third countries also offer to the nationals of the States Parties to such agreements a certain degree of protection from nationality-based discrimination. Finally, minimum standards have been set for the status of third-country nationals or stateless persons who are recognised as refugees or as persons who are in need of international protection. These partly assimilate the situation of refugees and persons granted subsidiary protection either with the situation of the nationals of the host State in which they reside or with the situation of other third-country nationals legally residing in that State in a limited number of areas.

These developments were made possible thanks to the entry into force of the Treaty of Amsterdam on 1 May 1999 as this reform of the EC Treaty attributed to the European Community competences in an area – asylum and immigration and the status of third-country nationals – which was hitherto left to loose forms of intergovernmental cooperation. Such developments are encouraging, but they are still far from ensuring full equality of treatment between third-country nationals and nationals of EU Member States as regards protection from nationality-based discrimination. Nor will the Charter of Fundamental Rights change this situation since on this issue the Charter merely reaffirms the existing situation under EU primary law.

Against this background, the purpose of Part III is to examine whether this situation is compatible with the evolving requirements of international and European human rights. This Part reviews a number of instruments adopted at international and European levels, including not only human rights instruments but also conventions on the status of refugees and on stateless persons. The conclusion arising from this review is that differences of treatment on grounds of nationality are increasingly treated as suspect in international human rights law.

Part IV then examines how differences of treatment on grounds of nationality are addressed in the domestic legal systems of EU Member States. Part IV is divided into two sections. First, it examines whether the domestic legal systems of EU Member States include provisions which protect foreigners from being discriminated against directly on grounds of their nationality. Second, it examines whether the protection against discrimination on grounds of race or ethnic origin (or, perhaps more seldom, on grounds of religion or belief) may be relied upon in order to challenge differences of treatment on grounds of nationality, since nationality may be used as a proxy for race or ethnic origin or for religion or belief. The interpretation of general anti-discrimination clauses in national constitutions or in ordinary legislation may be influenced in the future by developments in international and European human rights law as described in Part III. In particular, open-ended non-discrimination clauses which do not list prohibited grounds exhaustively may in the future increasingly be interpreted as including a prohibition of

discrimination on grounds of nationality, and the justifications offered for differences in treatment on that ground may be subject to more searching scrutiny.

In conclusion, the prohibition of discrimination on grounds of nationality is emerging as a general principle of international and European human rights law. It does not follow that the European legislator should necessarily equalise the situation of third-country nationals legally residing on the territory of an EU Member State with that of nationals of other EU Member States for example as regards access to social advantages such as health, education, or job placement services. The prohibition of discrimination does not prohibit all differences in treatment, but only those which cannot be validly justified as reasonable and proportionate to the fulfilment of the aims which they pursue. But it may imply that differences in treatment between nationals and foreigners be subject to scrutiny, and that when implementing EU law, Member States should take into account the need not to establish or maintain differences in treatment between different categories of foreign nationals (in particular, between nationals of other EU Member States and nationals of third countries).



Ruben | 2000

Part I

Scope

1 Nationality

1.1 Definition of nationality

'Nationality' is understood here as the link between a State and an individual whom that State recognises as its citizen (or 'national'). In international law, nationality is attributed by each State according to its own national rules, although that attribution may only be opposable to other States if there exists a genuine link between the State concerned and the individual whom that State considers to be its national, for instance for the purposes of diplomatic protection.⁶ In the 1992 *Micheletti* case, the Court of Justice of the European Communities confirmed this rule in the context of EU law when asked to interpret the provisions of the European treaties which attribute certain rights to nationals of other Member States, who are therefore considered to be citizens of the Union. According to the Court, the rule implies that it is not permissible for the legislation of a Member State 'to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty'.⁷ In the *Micheletti* case, an individual with dual Argentinean and Italian nationality arrived in Spain wanting to exercise his right to freedom of establishment as guaranteed under Article 52 of the EC Treaty (which grants freedom of establishment to persons who are 'nationals of a Member State') and to practice as an orthodontist. He was refused a residence permit by the Spanish authorities because in such instances Spanish legislation refers to the applicant's latest or effective country of residence (in this case Argentina) in order to determine nationality. The ECJ ruled that nationality of one of the Member States was sufficient and that a citizen does not have to choose between the two nationalities.

In the *Micheletti* case, neither of the two nationalities held by the applicant was contested. Indeed, as noted by AG Tesouro in his Opinion to the Court, 'both are based on criteria which are universally applied and recognised, namely the *ius soli* and the *ius sanguinis* respectively'.⁸ Thus, a different solution could not be excluded if the nationality invoked was entirely fictitious, i.e. did not correspond to the existence of any link between the individual and the State whose nationality that individual claimed to possess. However, the opinion of AG Tesouro confirms that in principle, each Member State is free to decide whom should be considered its national, and that there is an obligation on all the other Member States to recognise this nationality, even in situations which might not correspond to the 'genuine link' criterion set forth by the International Court of Justice in the *Nottebohm* case: in other words, only in the most exceptional circumstances could it be imagined that the nationality attributed by one Member State may be set aside by another Member State in order to deny to an individual a right accorded to the citizens of the Union. On the other hand, the *Micheletti* case leaves open the reverse question, namely whether a Member State may be in violation of its obligations under EU law by refusing to attribute its nationality to an individual in conditions which are arbitrary or discriminatory, thus depriving that person from the rights benefiting the citizens of the Union. As we will see, this remains one of the most controversial questions in this area.

⁶ International Court of Justice, the *Nottebohm Case (Liechtenstein v. Guatemala)*, judgment of 6 April 1955, 1955 I.C.J. 4 (noting that 'nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national').

⁷ Case C-369/90, *Micheletti*, [1992] ECR I-4239, para. 10. See also Case 136/78, *Ministère Public v Auer* [1979] ECR 437, paragraph 28.

⁸ Para. 5 of the Opinion delivered on 30 January 1992.

1.2 'Nationality' and 'national origin'

In international human rights law, 'nationality' refers to the country of citizenship, whereas 'national origin' refers to the country of origin, whether the country of birth or the country of which the parents are nationals. 'National origin' is traditionally included among the prohibited grounds of discrimination. It is a concept close to, and at times indistinguishable from, racial or ethnic discrimination. Thus for instance Paragraph 1 of Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination⁹ defines 'racial discrimination' as 'any distinction, exclusion, restriction or preference based on *race, colour, descent, or national or ethnic origin* which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life' [author's italics]. Paragraph 2 of Article 1 excepts from this definition actions by a State party which differentiate between citizens and non-citizens.¹⁰ Paragraph 3 of Article 1 qualifies Paragraph 2 of Article 1 by declaring that, among non-citizens, States Parties may not discriminate against any particular nationality.

Paragraph 1 of Article 2 of the International Covenant on Civil and Political Rights obliges each State party to respect and ensure to all persons within its territory and subject to its jurisdiction the rights recognised in the Covenant 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, *national or social origin*, property, birth or other status' [author's italics]. Article 26 entitles all persons to equality before the law as well as to equal protection by the law. It also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination 'on any ground such as race, colour, sex, language, religion, political or other opinion, *national or social origin*, property, birth or other status' [author's italics].

As we shall see, however, under both the International Convention on the Elimination of Racial Discrimination and under the International Covenant on Civil and Political Rights, the prohibition of discrimination has been extended beyond discrimination on grounds of national origin to discrimination on grounds of nationality (or citizenship).¹¹

1.3 'Nationality' and 'national minorities'

In a number of Central and Eastern European States, 'nationality' is understood as distinct from 'citizenship', and it refers to the membership of a national minority: '*rahvus*' in Estonian (in practice synonymous to ethnicity, '*etniline päritolu*'), '*nemzetiség*' in Hungarian, '*narodowość*' in Polish, '*nacionalnost*' in Slovenian, '*Volksgruppe*' in Austria). A number of instruments clearly prescribe that every person should be protected from discrimination on the ground of his/her membership of a national minority. Article 14 of the European Convention on Human Rights mentions 'association with a national minority, language and religion' among the prohibited grounds of discrimination in the enjoyment of the rights and freedoms set forth in this instrument.¹² The Council of Europe Framework Convention for the Protection of National Minorities (FCNM), which was opened for signature on 1 February 1995 and entered into force on 1 February 1998, prohibits discrimination against members of national minorities. Although neither

⁹ Adopted and opened for signature and ratification by UN General Assembly Resolution 2106 (XX) of 21 December 1965; entered into force 4 January 1969.

¹⁰ This provision states that the Convention 'shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens'. However, this clause has been to a large extent rendered moot by the position adopted since 2004 by the Committee on the Elimination of Racial Discrimination. See below, text corresponding to footnotes 148-149.

¹¹ See below, Part I Section 1.4.

¹² These criteria are also listed by Article 1(1) of Protocol No.12 to European Convention on Human Rights, which contains a general anti-discrimination clause.

the FCNM¹³ nor other legally binding instruments define authoritatively the notion of ‘national minority’, such a definition is provided by the Parliamentary Assembly of the Council of Europe in its Recommendation 1201 (1993), which is generally considered to be authoritative on the European continent.¹⁴ According to this definition, a national minority is a group of persons who reside on the territory of a State and are citizens thereof, display distinctive ethnic, cultural, religious or linguistic characteristics, are smaller in number than the rest of the population of that state or of a region of that state, and are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language. In the domestic constitutions or legislation which prohibit discrimination on grounds of membership of a national minority, it is this definition which is normally relied upon. In the Czech Republic for instance, Paragraph 1 of Article 3 of the Charter of Fundamental Rights and Freedoms¹⁵ states that no discrimination in the enjoyment of fundamental rights may be based, *inter alia*, on affiliation with a national or ethnic minority, and Czech legislation further defines members of a national minority as persons who ‘differ from other citizens by common ethnic origin, language, culture and traditions, create a minority of inhabitants and at the same time show a will to be regarded as a national minority in order to preserve their own identity, language and culture and to express and protect interests of the historically created community.’¹⁶

Under existing EU Law, the members of ethnic and religious minorities are to a large extent already protected from discrimination. Directive 2000/43/CE of the Council of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the Racial Equality Directive)¹⁷ and Directive 2000/78/CE of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (the Employment Equality Directive)¹⁸ protect against certain forms of direct or indirect discrimination exercised in particular on the ground of racial or ethnic origin or religion. In addition, equality and the prohibition of discrimination are recognised in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union,¹⁹ and Article 21 (1) of the Charter explicitly prohibits discrimination based on membership of a national minority, ethnic origin, language and religion. We shall not dwell further in the remainder of this report on the protection of members of national minorities since this is a question distinct from that of protection from discrimination based on nationality understood as citizenship.

1.4 Outstanding problems in the attribution of nationality in EU Member States

While the principles recalled above are well established, certain situations remain problematic within the EU Member States. Two such situations deserve particular attention since they illustrate the difficulty of simply trusting the Member States in the attribution of their nationality – and thus of the rights granted to citizens of the EU.

¹³ See the Explanatory Report of the FCNM: ‘It was decided to adopt a pragmatic approach, based on the recognition that at this stage, it is impossible to arrive at a definition capable of mustering general support of all Council of Europe member States.’ (Paragraph 12).

¹⁴ Recommendation 1201 (1993) on an additional protocol on the rights of national minorities to the European Convention on Human Rights.

¹⁵ No. 2/1993 Coll., Charter of Fundamental Rights and Freedoms.

¹⁶ *Zákon č. 273/2001 Sb, o právech příslušníků národnostních menšin a o změně některých zákonů* [Law no. 273/2001 Coll., on Rights of National Minority Members (Collection of laws no. 2001, No. 104 p. 6461)]. In practice, a declaration by an individual that s/he is a member of a national minority would be regarded as satisfactory to meet the requirements of this definition.

¹⁷ OJ L 180 of 19.7.2000, p. 22.

¹⁸ OJ L 303 of 2.12.2000, p. 16.

¹⁹ OJ C 303 of 14.12.2007, p. 1.

A first problematic situation concerns the status of thousands of former Yugoslav citizens who were removed from the Slovenian population registry in 1992 (and are sometimes known as ‘the erased’). Non-governmental organisations²⁰ and specialist human rights bodies²¹ have expressed their concern about this issue. These individuals were citizens of other former Yugoslav republics who had been living in Slovenia but did not file an application for Slovenian citizenship after Slovenia became independent. The Slovenian Constitutional Court has recognised that the removal of these persons from the population registry constitutes a violation of the principle of equality and, in those cases where the individuals concerned had to leave Slovenian territory, that it gave rise to a violation of their rights to a family life and to freedom of movement. As noted in particular by Amnesty International, the removal from population registries may also give rise to violations of social and economic rights: in some cases the individuals concerned lost their employment and pension rights.

A second problematic situation is more widely discussed. In Estonia, ‘non-citizens’ are stateless former Soviet citizens (‘persons with undefined citizenship’). On 31 October 2003 there were 162 890 ‘non-citizens’ on the territory, representing 12% of the total population. Out of a total 1 356 045 people living in Estonia on that date, another 80.6% (1 092 633 persons) were Estonian citizens, 6.5% (88 202 persons) were Russian citizens, and 0.9% (12 320 persons) were foreigners with the nationality of another country. As of 1 January 2006 ‘non-citizens’ made up 10% of the total population (116 248 persons), and the percentage of foreigners (the overwhelming majority Russian citizens) now stands at 8%, and thus seemed to have increased slightly.²² As of 31 December 2007 there were 120 000 ‘persons with undefined citizenship’.²³

The situation of non-citizens in Estonia is unique and is without exact precedent in international law. ‘Non-citizens’ exercise some of the rights linked to nationality, but not all of them. They cannot take part in parliamentary elections, although they can vote and run in elections for local municipalities. They do not possess the nationality of another State, but they are not fully recognised as citizens in Estonia and their situation is best described as that of stateless persons with permanent residence in the host country. This category of residents is not even protected as a national minority. The current official definition of national minority, provided under the Law on Cultural Autonomy of National Minorities of 1993, excludes non-citizens, which category includes stateless persons with long-term residence in Estonia. The UN Committee on the Elimination of Racial Discrimination expressed its concern that such a situation ‘might lead to the alienation of that group from the Estonian State and society’, and it recommended that this situation be amended.²⁴ The same Committee also recommended that non-citizens be allowed to be members of political parties in Estonia, although at present Article 48 of the Constitution recognises the right of membership of political parties only for Estonian citizens.²⁵ In its Concluding Observations of 2003 relating to Estonia, the Human Rights Committee – the body of independent experts tasked with monitoring compliance with the International Covenant on Civil and Political Rights – went further, recommending that Estonia ‘seek to reduce the number of stateless persons, with priority for children, *inter alia* by encouraging their parents to apply for Estonian citizenship on their behalf and by promotion campaigns in schools.’ The Human Rights Committee invited Estonia ‘to reconsider its position as to the access to Estonian citizenship by persons who have taken the citizenship of another country during the period of transition and by stateless persons’, and also encouraged the State authorities ‘to conduct a study on the socio-economic consequences of statelessness in Estonia, including the issue of marginalisation

²⁰ Amnesty International, Europe and Central Asia, Concerns in Europe and Central Asia, July – December 2003, AI Index: EUR 01/001/2004.

²¹ Committee on the Rights of the Child, 35th session, Consideration of reports submitted by State parties under Article 44 of the Convention, Concluding observations of the Committee on the Rights of the Child: Slovenia, CRC/C/15/Add.230.

²² Citizenship and Migration Board, *Yearbook 2006*, pp. 13 and 24.

²³ Minister of Population Affairs; Information provided at: <http://www.rahvastikuminister.ee>.

²⁴ Concluding Observations of the Committee on the Elimination of Racial Discrimination: Estonia (UN doc. CERD/C/EST/CO/7, 19 October 2006), Paragraph 9.

²⁵ *Ibid.*, Paragraph 14. See also Human Rights Committee, Concluding Observations: Estonia (UN doc. CCPR/CO/77/EST, 15 April 2003, Paragraph 14).

and exclusion.²⁶ In his report on Estonia published on 12 February 2004, the Council of Europe Commissioner for Human Rights, Mr Gil-Robles, observed that although various measures have been taken in recent years to improve access to Estonian citizenship, of the total population of approximately 1 370 000 persons, some 80% have Estonian citizenship, some 7% have citizenship of another country (mainly Russia), and some 12% are still 'persons whose citizenship is undetermined' (they do not have citizenship of any state).²⁷

The lack of citizenship deprives these persons of a number of rights and carries an increased risk of social exclusion. The slow pace of naturalisation may be attributed to two factors: first, the continuing difficulties experienced by some in passing the examinations required for Estonian citizenship and second, the relatively limited motivation of some non-citizens to seek naturalisation.

A similar problem exists in Latvia, where 'permanently resident non-citizens' (*'nepilsoņi'*) constitute around 16% of the population (372 421 out of 2 276 282 inhabitants as of 1 January 2008). Under the 1995 Law on the status of citizens of the former USSR who are not citizens of Latvia or any other country, such non-citizens are neither citizens, nor foreigners, nor stateless persons. A great proportion of the large Russian-speaking population of the country falls within this category, unknown in public international law. Differences of treatment based on the status of non-citizens are increasingly considered with suspicion in Latvia, but certain such distinctions remain. For instance, Article 1 of the transition provisions of the Law on State Pensions provides for different pension calculations for Latvian citizens and non-citizens as well as for foreigners and stateless persons who have worked outside Latvia before 1991: years worked are taken into account in the calculation for citizens but not for the other categories. This provision was challenged in the Constitutional Court, but the Court declined to find this situation in violation of the Constitution: it took the view that since non-citizens are not mentioned in this provision (which only expressly deals with citizens, foreigners and stateless persons) the action challenged a legislative omission which it could not decide upon.²⁸

This situation is a source of concern for a number of international bodies. Thus, the Committee for the Elimination of Racial Discrimination recommended that non-citizens be allowed to take part in local elections.²⁹ In its Comments on the Concluding Observations of the Human Rights Committee, the Government of Latvia acknowledges that 'currently, a large proportion of the population are treated as a specific and distinct category of persons with long-standing and effective ties to Latvia. The Government regards them as potential citizens; ...'³⁰ Citizenship figures as one of the main issues in the Report by the Council of Europe Commissioner for Human Rights, who stated his belief that the Latvian authorities 'should do even more to bring those populations into its fold, as a forthright demonstration to them of their place in Latvian society. All who love the Latvia where they were born, where they have lived most of their lives, where their children have been born and where their family dead are buried, all who have a sense of belonging to the country they regard as their homeland, must be allowed full membership of the national community.'³¹ More recently, the European Court of Human Rights found Latvia to have committed discrimination against Ms Natālija Andrejeva, a 'permanently resident non-citizen' who was previously a national of the former USSR, and who, because she did not have Latvian citizenship, was denied pension rights since the fact of her having worked for an entity based outside Latvia despite her physical presence on Latvian territory did not constitute 'employment within the territory of Latvia' within the meaning of the State Pensions Act.³²

²⁶ Human Rights Committee, Concluding Observations: Estonia (UN document CCPR/CO/77/EST, 15 April 2003, Paragraph 14).

²⁷ CommDH(2004)5.

²⁸ Judgment of 26.06.2001 delivered in case no. 2001-02-0106, available online at [http://www.satv.tiesa.gov.lv/Eng/Spriedumi/02-0106\(01\).htm](http://www.satv.tiesa.gov.lv/Eng/Spriedumi/02-0106(01).htm) .

²⁹ UN document CERD/C/63/CO/8, 22 August 2003, paragraph 15.

³⁰ UN document CCPR/CO/79/LVA/Add.1, 16 November 2004.

³¹ CommDH(2004)3, 12 February 2004, paragraph 35.

³² Eur. Ct. HR (GC), *Andrejeva v. Latvia* (Appl. No. 55707/00), judgment of 18 February 2009.

While the difficulties described above may be extreme, they are not isolated. For instance, several decisions by the Ombudsman of Cyprus have criticised a number of practices of the Population Data Archives Department (part of the Interior Ministry) in the process of granting citizenship. In particular, criticism has been directed at the restrictive approach of the Director of the Population Data Archives as regards the acquisition of citizenship via registration and naturalisation; particularly critical are the Ombudsman's decisions regarding the rejections of applications for citizenship based on marriage with Cypriots.³³ Moreover, the decisions highlight the considerable delay in processing applications, prejudice due to the applicant's religion and the exercise of administrative discretion regarding the interpretation of the regulation that excludes those who have entered the country illegally from acquiring citizenship.³⁴ This further confirms that, in the process of attribution of citizenship, instances of discrimination on grounds of race, ethnic origin or religion may occur. Arguably, just as they may be examined under Article 26 of the International Covenant on Civil and Political Rights, under the International Convention for the Elimination of All Forms of Racial Discrimination, or under Article 1 of Protocol No. 12 to the ECHR, such instances could fall under the scope of application of the Racial Equality or the Employment Equality Directives, to the extent at least that citizenship is defined as a condition of access to certain forms of employment or to education, housing or social advantages to which the requirements of the Racial Equality Directive apply.

Indeed, it is in particular in order to avoid discrimination in matters relating to nationality that the European Convention on Nationality was concluded in 1997 under the auspices of the Council of Europe.³⁵ This instrument has been ratified by 12 EU Member States,³⁶ although unfortunately not by the countries where the problem seems most pressing, such as Cyprus, Latvia, Estonia, or Slovenia. While recognising that it is for each State to determine under its own law who are its nationals (Article 3(1)), the European Convention on Nationality nevertheless notes that such choices 'shall be accepted by other States in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognised with regard to nationality' (Article 3(2)). In particular, in determining its own rules on nationality, each State party should ensure that such rules do not 'contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin' (Article 5(1)). With a view to avoiding situations of statelessness, this convention also contains a number of rules relating to the acquisition of nationality, including a rule according to which 'Each State Party shall provide in its internal law for the possibility of naturalisation of persons lawfully and habitually resident on its territory' (Article 6(3)).

Although it is for EU Member States to define the criteria according to which they attribute their nationality, situations such as those described above result in certain permanent residents with strong links to one Member State in fact being deprived of the advantages of being a national of a Member State and thus a citizen of the Union.

2 Race and ethnic origin

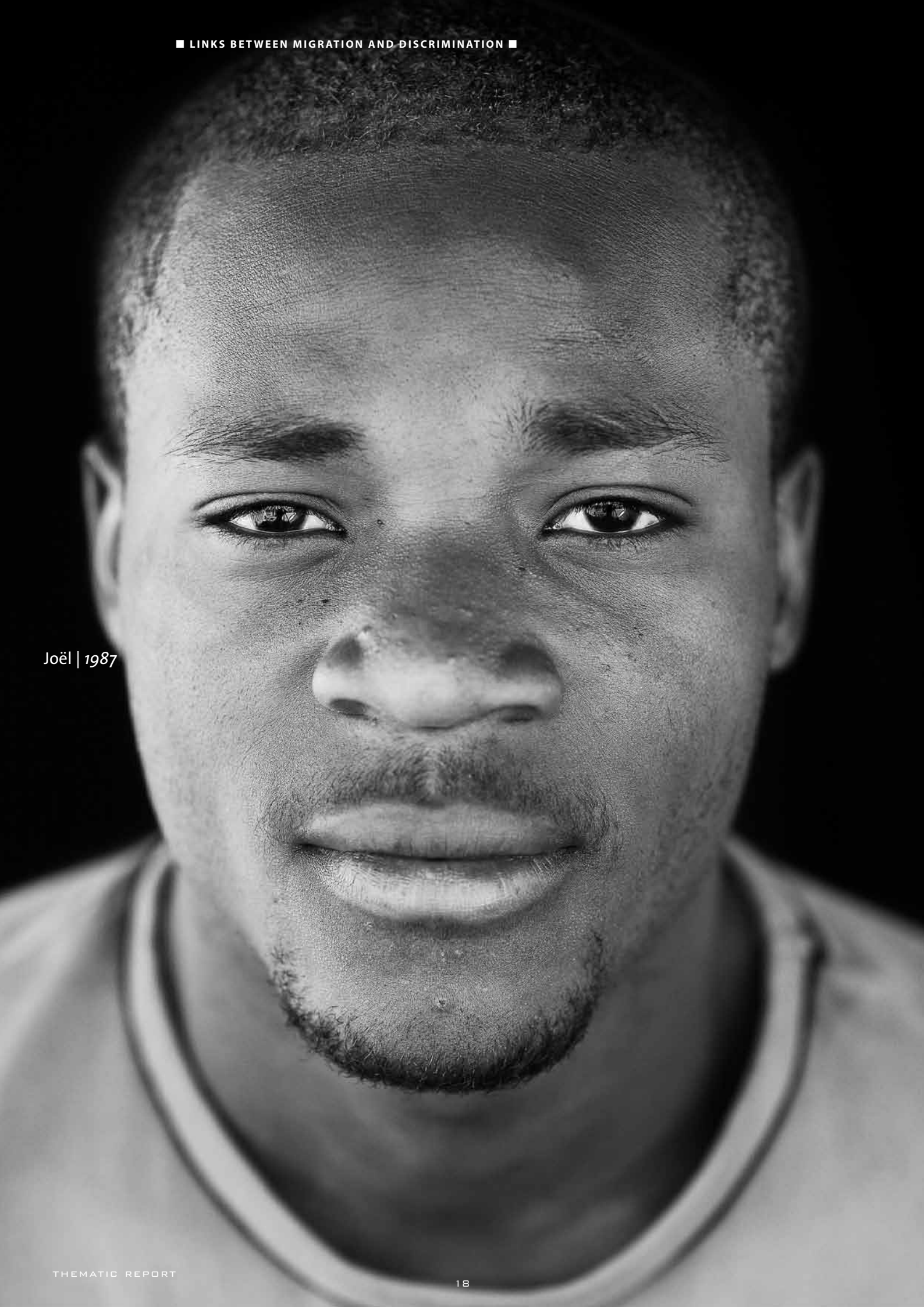
Neither Article 13 EC nor the Racial Equality Directive use the concept of 'national origin' despite the fact that this constitutes a traditionally prohibited ground of discrimination in international law. As to the concepts of 'race' and 'ethnicity', they tend to be blurred to a certain extent, due to the recognition that both race and ethnic origin are social or cultural constructs that do not correspond to an objective 'reality' independent from either self-identification by the individual concerned or labelling by external observers: 'Race and ethnic groups, like nations, are imagined communities. People are socially defined as belonging to particular ethnic or racial groups, either

³³ See relevant Ombudsman Reports, Files No. 2599/2005, 1958/2005, 2059/2005, 2368/2005, 2599/2005, 2780/2005.

³⁴ See Ombudsman Report, File No. 727/2006.

³⁵ ECTS., no. 166. Opened for signature in Strasbourg on 6 November 1997, entered into force on 1 March 2000.

³⁶ These are Austria, Bulgaria, the Czech Republic, Denmark, Finland, Germany, Hungary, the Netherlands, Portugal, Romania, the Slovak Republic, and Sweden.



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in terms of definitions employed by others, or definitions which members of particular ethnic groups develop for themselves.³⁷ Indeed, the Racial Equality Directive specifies in its preamble that the 'European Union rejects theories which attempt to determine the existence of separate human races. The use of the term 'racial origin' in this Directive does not imply an acceptance of such theories.'³⁸

Yet the fact that both 'race' and 'ethnic origin' are used alongside one another in Article 13 EC and in the Racial Equality Directive suggests that they should not be treated as synonymous. The clear intent of the drafters of the 1997 Amsterdam Treaty was to distinguish 'race' from 'ethnic origin' as separate grounds of prohibited discrimination. In the original text presented at the Dublin summit by the Irish Presidency of the Union in the framework of the intergovernmental conference preparing what would become the Treaty of Amsterdam, the wording proposed was: 'Within the scope of application of this Treaty and without prejudice to any special provisions contained therein, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to prohibit discrimination based on sex, racial, ethnic or social origin, religious belief, disability, age, or sexual orientation.'³⁹ This wording thus mentioned racial, ethnic and social origin as three different grounds in an apparent attempt to be as all-encompassing as possible in combating 'racial discrimination' in all its forms; the reference to 'social origin' was removed from the final version, not in order to narrow down the scope of the protection but because it was considered a term exceedingly vague and open-ended (despite the term being present in the Universal Declaration of Human Rights) and especially because it was considered redundant, its intended meaning of membership of a group defined by its common culture being covered by the expression 'racial and ethnic origin'.⁴⁰

Apart from the fact of being social constructs, 'race' and 'ethnic origin' are also both grounds of 'racial discrimination' as understood in international human rights law, and both refer to a broader notion of 'origin'. Nevertheless their coexistence in Article 13 EC and in the Racial Equality Directive indicates an intention to make clear that discrimination is prohibited not only when it is based on physical characteristics but also when it is based on cultural traits. The fact is that the prohibition of discrimination on grounds of membership of an 'ethnic group' coexists with the prohibition on grounds of 'race' and thus results in a dual form of protection, as has been recognised explicitly by certain jurisdictions, such as the New Zealand Court of Appeal in *King-Ansell v. Police*,⁴¹ or the United Kingdom House of Lords in the 1983 case of *Mandla v. Dowell Lee*.⁴² At the same time, we should be careful not to

³⁷ M. Bulmer and J. Solomos, 'Introduction: Re-thinking Ethnic and Racial Studies' (September 1998) 21(5) in *Ethnic and Racial Studies* pp. 819-837, at p. 822. D. I. Kertzer and D. Arel consider, on the other hand, that both 'race' and 'ethnicity' are based on a similar – mistaken – belief that identity can be somehow 'objectively' determined through ancestry' (D. I. Kertzer and D. Arel, 'Censuses, identity formation, and the struggle for political power' in D. I. Kertzer and D. Arel (ed.), *Census and Identity – The Politics of Race, Ethnicity, and Language in National Censuses* (Cambridge, Cambridge University Press, 2002) pp. 1-42, at p.11). On the relation between the concepts of 'race' and 'ethnicity'; see also A. Morning, 'Ethnic Classification in Global Perspective: A Cross-National Survey of the 2000 Census Round' (April 2008) 27(2) in *Population Research and Policy Review*, pp. 239-272.

³⁸ Preamble, Recital 6.

³⁹ European Union Today And Tomorrow - Adapting the European Union for the Benefit of its Peoples and Preparing it for the Future - A general outline for a draft revision of the treaties, CONF 2500/96, 5 December 1996, p.16.

⁴⁰ Some authors have argued that 'social origin' was intended to refer to the Roma (see L. Flynn, 'The Implications of Article 13 EC – After Amsterdam, Will Some Forms of Discrimination be More Equal than Others?' (1999) 36 *CMLRev* pp. 1127-1152, at p. 1132). This position seems untenable in the light of the unanimous understanding by European institutions that Article 13 EC when referring to 'ethnic origin' includes in particular protection against discrimination based on membership of the Roma community.

⁴¹ [1979] 2 N.Z.L.R. 531 (C.A.). This court held that the Jews of New Zealand were an 'ethnic group' so as to permit prosecution of the leader of the National Socialist Party of New Zealand for intentionally exciting ill-will against them; indeed, the statute protected groups identifiable on the basis of 'colour, race, or ethnic or national origins'.

⁴² [1983] IRLR 209 (defining the conditions which are to be satisfied in order for a community of individuals to be considered as an 'ethnic group' for the purposes of applying the Race Relations Act 1976).

attempt to draw clear-cut distinctions between ‘race’ and ‘ethnic origin’. Such attempts might paradoxically validate a biological understanding of ‘race’ in contrast with the ‘cultural’ understanding to be given to the concept of ‘ethnic origin’. In its judgment of 13 December 2005 in *Timishev v. Russia*, the European Court of Human Rights addressed the distinction between ‘race’ and ‘ethnic origin’ in the following terms:

‘Ethnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds.’⁴³

Although ‘race’ and ‘ethnicity’ are both social constructs referring to the ‘origin’ of the individual, they remain distinct concepts within the meaning of antidiscrimination law, in Europe at least. ‘Race’ is used primarily to refer to situations where persons are discriminated against based on physical characteristics which may be observed externally. ‘Ethnicity’ on the other hand refers rather to membership of a group that has certain shared common characteristics, such as language, a shared history or tradition, and a common descent or geographical origin. As some authors put it, the constitution of a ‘racial group’ results from a negative process since it is discrimination, past or present, that brings it into existence, whereas an ethnic group is based on features such as practices, lifestyles, and traditions which define a community positively, independently of discrimination; albeit inherited, these features are supported and continued by community members who find in them a source of identification.⁴⁴

3 The relationship between nationality and race, ethnic origin, and religion

The Racial Equality Directive (Directive 2000/43/EC) and the Employment Equality Directive (Directive 2000/78/EC) provide that the prohibition of discrimination based on race or ethnic origin, religion or belief, disability, age or sexual orientation in the areas covered by those instruments also applies to nationals of third countries. Both add, however, that this prohibition ‘does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and occupation’; nor does it cover ‘any treatment which arises from the legal status of the third-country nationals and stateless persons concerned’.⁴⁵

Therefore, even if it were to appear that differences in treatment on grounds of nationality or on grounds of the status of third-country national put persons of a particular racial or ethnic origin or holding a particular religion or belief at a particular disadvantage compared with other persons, this cannot be challenged under these instruments. According to the wording of these directives, this exemption not only concerns differences in treatment between third-country nationals and citizens of the EU. It also would seem to extend to differences in treatment between

⁴³ Eut. Ct. HR, (2nd section), *Timishev v Russia*, judgment of 13 December 2005 (Appl. Nos 55762/00 and 55974/00), at para. 55. The circumstances were that Timishev, a Chechen lawyer, had his car stopped at a checkpoint and was refused entry by officers of the Inspectorate for Road Safety. The refusal was based on an oral instruction from the Ministry of the Interior of Kabardino-Balkaria not to admit persons of Chechen ethnic origin.

⁴⁴ J. Dahan, J. Stavo-Debaugue and D. Thomas-Hislaire, *The Fight Against Discrimination and the Promotion of Equality: How to Measure Progress Done*, European Commission, DG for Employment, Social Affairs and Equal Opportunities (2008) at p.18.

⁴⁵ 13th Recital of the Preamble and Article 3(2) of the Racial Equality Directive; 12th Recital of the Preamble and Article 3(2) of the Employment Equality Directive.

different nationalities, and between those who possess a nationality on the one hand and stateless persons on the other.

This is regrettable, since nationality or status in certain cases may serve as a proxy for race or ethnic origin or for religion or belief. For instance, as highlighted most clearly in the context of counter-terrorism measures, the exclusion from certain positions or from access to the national territory of persons who hold a nationality included on a list of Middle Eastern countries might be a way of targeting Muslims.⁴⁶ Similarly, the exclusion of non-nationals from certain positions or advantages may in fact be a means of obfuscating racial discrimination: the Committee on the Elimination of Racial Discrimination for instance has recognised the close relationship between racial, ethnic or national origin discrimination and discrimination on the basis of nationality, noting that in some cases discrimination on the basis of nationality may actually be a proxy for discrimination on the basis of race.⁴⁷ A judgment delivered in the Netherlands by the District Court of Haarlem on 8 May 2007 may illustrate this.⁴⁸ This court found that the prohibition of discrimination on grounds of race stipulated in Article 1 of the Dutch Constitution had been violated, after the City Administration of Haarlem had ordered a specific investigation into the legal residency and right to receive welfare benefits of Somalian inhabitants who were receiving such benefits. These Somali inhabitants were thus clearly targeted by the investigation ordered. The Court found no sufficient objective justification for what it considered to constitute a clear infringement of the prohibition of discrimination on the ground of race. The City Administration advanced the justification that there were indications that a considerable number of Somalians had moved to the United Kingdom without de-registering from the City's administrative system and were still receiving benefits.

There are other examples of the interaction between nationality on the one hand and race or ethnic origin on the other hand as prohibited grounds of discrimination. Thus, it has been established that the exclusion of members of the Roma minority from a number of public services and essential social benefits is the result of their precarious administrative situation and often their statelessness, resulting in a lack of administrative documents attesting their legal status. This is also among the key findings of a 2003 Council of Europe report: 'Many Roma lack identity cards, birth certificates and other official documentation of their legal status. Such documents are often required to access public services. Statelessness, and the lack of status within the State of residence, as well as problems with documentation impede access to a range of rights including access to health care. These situations are created by a variety of factors, including information and financial barriers, eligibility criteria that have a disproportionate impact on Roma, and discrimination by local authorities. There is need for greater awareness among authorities of the situation of Roma, and greater flexibility in application of legal status requirements for Roma (as for other discriminated groups) in order that they may enjoy equal access to public services.'⁴⁹

⁴⁶ See, in particular, Center for Human Rights and Global Justice, *Irreversible Consequences: Racial Profiling and Lethal Force in the 'War Against Terror'* (New York: NYU School of Law, 2006).

⁴⁷ Committee on the Elimination of Racial Discrimination, *Ziad Ben Ahmed Habassi v. Denmark*, Communication No. 10/1997, U.N. Doc. CERD/C/54/D/10/1997 paras 9.3 – 9.4 (1997) (the author was refused a loan by a Danish bank on the sole ground of his non-Danish nationality and was told that the nationality requirement was motivated by the need to ensure that the loan was repaid; the Committee notes, however, that 'nationality is not the most appropriate requisite when investigating a person's will or capacity to reimburse a loan. The applicant's permanent residence or the place where his employment, property or family ties are to be found may be more relevant in this context. A citizen may move abroad or have all his property in another country and thus evade all attempts to enforce a claim of repayment. Accordingly, the Committee finds that [...] it is appropriate to initiate a proper investigation into the real reasons behind the bank's loan policy vis-à-vis foreign residents, in order to ascertain whether or not criteria involving racial discrimination, within the meaning of article 1 of the [International Convention on the Elimination of All Forms of Racial Discrimination], are being applied').

⁴⁸ *LJN: BA5410*.

⁴⁹ Council of Europe, *Breaking the Barriers – Romani Women and Access to Public Health Care*, 2003, p. 12.

The close interaction between nationality and race or ethnic origin also explains why nationality may be used as a proxy for race or ethnic origin in positive action schemes aimed at combating racial discrimination or at counteracting its effects. In Belgium, because of the strict restrictions imposed on the processing of personal data relating to an individual's race or ethnic origin,⁵⁰ the Flemish Region has chosen to implement 'diversity plans' not by using the criteria of racial or ethnic origin directly, but instead by relying on the far less sensitive criterion of nationality. The Executive Regulation adopted on 30 January 2004 by the Flemish Government to implement certain provisions of the Decree of 8 May 2002,⁵¹ which seeks both to prohibit direct and indirect discrimination on the grounds listed in Article 13 EC⁵² and to encourage the integration of target groups into the labour market by positive action measures (preparation of diversity plans and annual reports on progress made), details the procedures for implementing 'diversity plans' which aim to ensure progress towards proportionate representation in the employment market of identified 'target groups' with a view to combating discrimination on grounds of race and ethnic origin in particular. But this Regulation refers (in Article 2 paragraph 2, 1^o) not to workers' race or ethnic origin but instead – as a substitute for race or ethnic origin – to '*allochtones*'. These are defined as adult citizens legally residing in Belgium and whose socio-cultural background is of a country not part of the European Union, who may or may not have Belgian nationality and who either have arrived in Belgium as foreign workers or through family reunification, or have obtained the status of refugee, or are asylum-seekers whose claims to asylum have not been considered inadmissible, or have a right to residence in Belgium because their situation has been regularised, and who, because of their poor knowledge of the Dutch language and/or their weak socio-economic position, whether or not reinforced by their poor level of education, are disadvantaged. The absence of any reference to the 'racial' or 'ethnic' background of the individual in such a definition of the 'target group' is remarkable if we recall that these plans seek to implement the principle of equal treatment on the grounds of, *inter alia*, race and ethnic origin. However, processing of data on the race or ethnic origin of any individual would be in violation of the requirements of the Data Protection Act according to the Commission for the Protection of Private Life, which makes reliance on this kind of proxy inevitable.

The Flemish Region was heavily influenced by the developments which had taken place a decade earlier in the Netherlands. While 'ethnic minorities' remains the central notion used in Dutch public policy, the term '*allochtoon*' has appeared in administrative practice following the 1989 report on '*Allochtonen policy*' (*Allochtonenbeleid*) issued by the governmental academic advisory body,⁵³ and in 1995 the category *allochtonen* was introduced into official statistics to designate individuals with a foreign background living in the Netherlands. It was formally defined by the national statistics agency (the *Centraal Bureau voor de Statistiek* or CBS) in 1999 as including 'every

⁵⁰ See Opinion no. 7/93 adopted on 6 August 1993 by the Commission for the Protection of Privacy (*Commission de protection de la vie privée*), which offers a strict interpretation of the limits imposed by the Belgian Federal Act of 8 December 1992 on the protection of private life vis-à-vis the processing of personal data. See www.privacycommissie.be.

⁵¹ *Besluit van 30 Januari 2004 van de Vlaamse regering tot uitvoering van het decreet van 8 mei 2002 houdende evenredige participatie op de arbeidsmarkt wat betreft de beroepskeuzevoorlichting, beroepsopleiding, loopbaanbegeleiding en arbeidsbemiddeling* (Executive Regulation of 30 January 2004 of the Flemish Government concerning the execution of the Decree of 8 May 2002 on proportionate participation in the employment market concerning professional orientation, vocational training, career guidance and the action of intermediaries on the labour market), *Moniteur belge*, 4 March 2004, p. 12050. This implements the Decree of 8 May 2002 on proportionate participation in the employment market adopted by the Flemish Region/Community (*Decreet houdende evenredige participatie op de arbeidsmarkt*) (*Moniteur belge*, 26 July 2002, p. 33262), which seeks both to prohibit direct and indirect discrimination on the grounds listed in Article 13 EC, and to encourage the integration of target groups into the labour market by positive action measures (preparation of diversity plans and annual reports on progress made).

⁵² This limitation to the seven grounds listed in Article 13 EC is the result of an amendment to the Decree adopted on 9 March 2007 in order to take into account the decision of the Constitutional Court of 2004 regarding the list of criteria set out by the Federal Act adopted in 2003 (Decree of 9 March 2007 modifying the Decree on proportionate participation in the employment market (*Décret modifiant le décret du 8 mai 2002 relatif à la participation proportionnelle sur le marché de l'emploi*), *Moniteur belge*, 6 April 2007).

⁵³ *Wetenschappelijke Raade voor Regeringsbeleid* (WRR) 1989.

person living in the Netherlands of whom at least one parent was born abroad. This category therefore conflates foreigners and Dutch citizens with foreign origins. People are classified as *allochtonen* by the CBS on the basis of information available in municipality-level administrative systems (*Gementelijke Basisadministratie*). Since 1999 a further distinction has been made by the CBS between ‘Western *allochtonen*’ (who come from European countries [with the exception of Turkey], North America, and Oceania as well as Japan and Indonesia) and ‘non-Western *allochtonen*’ (those with Turkish, Asian [except for Japanese and Indonesian], African or Latin American origins). The third generation of immigrants is automatically classified as ‘autochtonous’ as opposed to *allochtoon*. However, although the CBS has avoided using the term *allochtonen* with respect to third-generation immigrants since 2000, it has started to collect figures on the third generation of ‘non-Western *allochtonen*’, i.e. persons with at least one grandparent who was born in Morocco, Turkey, Suriname or the Antilles.

A final remark can be made concerning the relationship between nationality-based differences of treatment and the prohibition of discrimination on grounds of race or ethnic origin, or religion or belief, under the Racial Equality and Employment Equality Directives. Although each Member State of the Union may determine who are its own nationals and thus has exclusive competence to define the rules according to which nationality may be attributed, Council Directives 2000/43/EC and 2000/78/EC apply to all persons without distinction as to their nationality. As already noted, according to Recital 13 of the Preamble of Directive 2000/43/EC, the prohibition of all direct or indirect discrimination on grounds of racial or ethnic origin does not concern differences in treatment on grounds of nationality, although it also applies to third-country nationals. Yet it cannot be ruled out that the very conditions for granting nationality may constitute this type of discrimination prohibited by the Directive. As a matter of fact, where they create differences in treatment between certain categories of persons, the conditions for granting nationality do not create a difference in treatment between nationals and non-nationals but between different categories of foreigners (some eligible for citizenship, others not), which places these differentiations under the scope of Directive 2000/43/EC. Consequently, where an individual’s access to nationality governs or facilitates access to employment, education or housing as well as to the other social benefits to which the Racial Equality Directive applies in accordance with its Article 3, it may need to be verified whether the rules governing access to nationality institute direct or indirect discrimination against certain persons defined according to their ethnic origin.



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Part II

The Framework of EU Law with Regard to Discrimination on the Ground of Nationality⁵⁴

⁵⁴ See also E. Bribosia, E. Dardenne, P. Magnette and A. Weyembergh (eds), *Union européenne et nationalité. Le principe de non-discrimination et ses limites*, Bruxelles, Bruylant, 1989.

The Racial Equality and Employment Equality Directives ‘do [...] not cover difference of treatment based on nationality’ according to Article 3(2) common to both Directives. The interpretation of this clause remains debatable, however. It does not necessarily imply that indirect discrimination on grounds of race, ethnic origin, or religion is not prohibited for the simple reason that it results from a difference of treatment based on nationality. In this Part however, we leave aside these Directives, and we describe the other instruments of EU law that relate to the prohibition of discrimination on grounds of nationality.

1 The prohibition of discrimination on grounds of nationality within the scope of application of the EC Treaty

The provisions of the EC Treaty which prohibit discrimination on grounds of nationality, whether in general (‘within the scope of application of [the EC] Treaty’: Article 12 EC) or in the specific context of the freedom of movement of workers (Article 39(2) EC) or of freedom of establishment (Article 43 EC) have been interpreted to protect only the nationals of the Member States. Although third-country nationals could benefit indirectly from these provisions when they fall under the remit of EC law – in particular as family members of a citizen of the Union – the scope of application of Article 12 EC is in principle limited to nationals of EU Member States, and it covers neither differences of treatment between EU citizens and third-country nationals nor differences of treatment between nationals from different third countries. In Case 238/83, the European Court of Justice confirmed that Article 39 EC (then Article 48 EEC) guarantees free movement only to workers from the Member States, and that the scope of application *ratione personae* of Regulation (EEC) No. 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families was similarly restricted.⁵⁵ In Case C-147/91, the Court confirmed that the rules of the EC Treaty on freedom of establishment and provisions of secondary legislation implementing this freedom may be relied on ‘only by a national of a Member State of the Community who seeks to establish himself in the territory of another Member State or by a national of the Member State in question who finds himself in a situation which is connected with any of the situations contemplated by Community law.’⁵⁶ Thus, the fundamental economic freedoms guaranteed in the EC Treaty benefit only nationals of EU Member States. The same restriction applied when freedom of movement within the EU was extended to the non-economically active in the EU, under Directives 90/364 (nationals of Member States who do not enjoy the right of residence under other provisions of Community law and their dependents),⁵⁷ 90/365 (persons having ceased their professional activity),⁵⁸ and 93/96 (students).⁵⁹ This has been more recently confirmed by the adoption of Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory

⁵⁵ It follows, according to the Court, that ‘Neither Regulation No. 1408/71 nor Article 48 of the Treaty prevents family allowances from being withdrawn pursuant to national legislation on the ground that a child is pursuing its studies in another Member State, where the parents of the child concerned are nationals of a non-member country or are not employed’ (Case 238/83, *Caisse d’allocations familiales v. Meade* [1984] ECR 2631, para. 10).

⁵⁶ Case C-147/91, *Criminal proceedings against Ferrer Laderer* [1992] ECR I-4097, para. 7.

⁵⁷ Council Directive 90/364/EEC of 28 June 1990 on the right of residence, OJ L 180, 13.7.1990, p. 26.

⁵⁸ Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity, OJ L 180, 13.7.1990, p. 28.

⁵⁹ Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students, OJ L 317, 18.12.1993, p. 59.

of the Member States,⁶⁰ which recasts these earlier directives and regulations into one single instrument. Directive 2004/38 confirms the link between the status of citizens of the Union and the enjoyment of the right to move freely within the EU. At the same time, it does attribute certain rights to family members of a Union citizen who exercises his/her freedom of movement in order to preserve the unity of the family.

Even the single legislative measure specifically aimed at facilitating the integration of migrant workers – Council Directive 77/486/EEC of 25 July 1977 on the education of the children of migrant workers⁶¹ – benefits only workers who are nationals of other EU Member States. In order to ensure the possibility of future reintegration in the State of origin, this directive obliges both the migrant worker's host State and State of origin to adopt 'appropriate measures to promote the teaching of the mother tongue and of the culture of the country of origin' to the children of migrant workers. In practice, the Directive, which has been very unsatisfactorily transposed by Member States, has not been effective; moreover, it is not considered to place binding obligations on the Member States.⁶² It is nevertheless significant that even this instrument was not aimed at facilitating the integration of migrant workers from third countries; although this may be explained by the fact that at the time when the Directive was adopted immigration was not part of the competences of the European Community, it provides a further illustration of the gap between the protection of nationals of EU Member States on the one hand and of third-country nationals on the other. That is not to say that no progress has been made to align, to a certain extent, the status of third-country nationals with that of nationals of EU Member States. Part two of this section reviews the progress that has been made in this regard.

All this being said, it is clear that certain prohibitions imposed on EU Member States in order to ensure that they will not discriminate against EU nationals may indirectly benefit third-country nationals by removing conditions which might otherwise affect them negatively. For instance, the Irish Employment Equality Act 1998-2004 provides at Section 36 that it is permissible to impose requirements in relation to residence, citizenship and proficiency in the Irish language for a number of public service jobs.⁶³ Under the rules pertaining to the free movement of workers in the Community, language requirements which cannot be defended as pursuing a legitimate objective and as proportionate to that objective may be denounced as indirectly discriminatory against the nationals of other Member States.⁶⁴ To the extent that such requirements have to be removed since they may constitute a violation of Articles 12 and 39 of the EC Treaty, the employment of third-country nationals in the sectors concerned may as a result be made possible, unless a formal condition related to nationality (reserving such positions to Irish nationals or nationals of EU Member States) is imposed. Similarly, the European Court of Justice considered, for instance, that the children of a Spanish national and a Belgian national residing in Belgium and holding dual Belgian and Spanish nationality, should not be treated in the same way as persons who have only Belgian nationality as regards the right to change surnames and in particular the right to opt for a surname consisting of the first surname of the father followed by that of the mother as according to Spanish law, rather than using the father's surname as in Belgian administrative practice applicable to Belgian nationals.⁶⁵ Although based on Article 12 EC, this case law will indirectly benefit third-country nationals residing in Belgium as the change in the rules relating to surnames will be extended to them.

⁶⁰ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, J L 229, 29.6.2004, p. 35. See also the corrigenda, OJ L 229, 29.6.2004, p. 35, and OJ L 204, 4.8.2007, p. 28.

⁶¹ OJ L 199 of 6.8.1977, p. 32.

⁶² Statement by Commissioner Reding, reply to written question E-1336/02, 8 May 2002, OJ C 277 E of 14.11.2002, p. 190.

⁶³ The positions where these requirements can be imposed are office holders in the service of the State, including the Garda Síochána and the defence forces; civil servants; and officers or servants of local authorities, harbour authorities, health boards or vocational education committees.

⁶⁴ Case C-379/87, *Groener* [1989] ECR 3967, paragraphs 19 and 23.

⁶⁵ Case C-148/02, *Carlos Garcia Avello* [1997] ECR I-11613, judgment of 2 October 2003.

2 The progressive alignment of the status of third-country nationals who are long-term residents in the EU with that of nationals of EU Member States

Steps are being taken to overcome the exclusion of third-country nationals from the free movement rights as granted in the EC Treaty to nationals of EU Member States. At its special meeting in Tampere on 15 and 16 October 1999, the European Council stated that the legal status of third-country nationals should be approximated to that of Member States' nationals and that a person who has resided legally in a Member State for a certain period of time and who holds a long-term residence permit should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by citizens of the European Union. Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents⁶⁶ is the outcome of this political commitment. The Directive, which EU Member States were to implement in domestic legislation by 23 January 2006 at the latest, provides that the Member States should grant long-term resident status to third-country nationals who have resided legally and continuously within their territory for five years, on the condition that third-country nationals seeking to acquire that status prove that they have, for themselves and for dependent family members, stable and regular resources which are sufficient to maintain themselves and the members of their family without recourse to the social benefit system of the Member State concerned as well as health insurance in respect of all risks normally covered for the nationals of the Member State concerned.

Long-term residents are to enjoy equal treatment with nationals as regards *inter alia* access to employment and self-employed activity and conditions of employment and working conditions; social security, social assistance and social protection as defined by national law; taxation; and access to housing. In addition, under certain conditions long-term residents have the right to reside in the territory of Member States other than the one which granted them long-term residence beyond the period of three months to which they are normally restricted; they then have access to the labour market in that Member State and they are to be treated equally with nationals in a number of areas, including those mentioned above. Finally, when the long-term resident exercises his/her right of residence in a second Member State, provided the family was already constituted in the first Member State, family members who fulfil the conditions referred to in Article 4(1) of Directive 2003/86/EC⁶⁷ are authorised to accompany or to join the long-term resident.

There is one potentially contentious limitation to the rights granted under this Directive, however. Article 5(2) of Directive 2003/109 provides that 'Member States may require third-country nationals to comply with integration conditions, in accordance with national law', before granting the status of long-term resident to a third-country national. Indeed, a number of EU Member States in recent years have developed 'tests' based for instance on language or on an understanding of the values and legal system of the host State which are then imposed on third-country nationals as a condition for the right to permanent residence on the host State's territory. This idea was dropped from the European Pact on Immigration and Asylum approved by EU Member States in July 2008, although it was initially included in the French Presidency's proposal for such a pact. However, the imposition of such 'integration conditions' forms part of the set of measures favouring the integration of migrants set out by the broader *The Hague Programme: strengthening freedom, security and justice in the European Union*, Paragraph 1.5 of which refers to the integration of migrants as implying 'respect for the basic values of the European Union and

⁶⁶ OJ L 16 of 23.1.2004, p. 44.

⁶⁷ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12).

fundamental human rights' and as requiring 'basic skills for participation in society'.⁶⁸ Such measures come under the understanding of the integration of legal immigrants as a 'two-way process' in the Common Basic Principles on Integration adopted in 2004,⁶⁹ which holds that integration must be improved through greater efforts by host Member States and contribution from immigrants themselves. It would be interesting to monitor in the future how such integration tests develop and to examine whether they end up nullifying the achievements of the Directive.

3 The impact of cooperation or association agreements concluded by the EC

The European Community has concluded a number of cooperation or association agreements with third countries. In principle, these agreements do not provide for the freedom of nationals of these countries to enter into the EU in order to seek employment. As regards in particular the 1963 EEC-Turkey Association,⁷⁰ the European Court of Justice has consistently held that its provisions relating to the progressive securing of freedom of movement for workers (Article 12), to the abolition of restrictions on freedom of establishment (Article 13) and to the freedom to provide services (Article 14), do not encroach upon the competence retained by Member States to regulate both the entry into their territories of Turkish nationals and the conditions under which they may take up their first employment: these provisions merely regulate the situation of Turkish workers once they are already lawfully integrated into the labour force of Member States.⁷¹ According to the Court it follows that 'a Turkish national's first admission to the territory of a Member State is governed exclusively by that State's own domestic law, and the person concerned may claim certain rights under Community law in relation to holding employment or exercising self-employed activity, and, correlatively, in relation to residence, only in so far as his position in the Member State concerned is regular.'⁷²

These agreements nevertheless are important in the context of the present study since they typically contain provisions which prohibit discrimination on grounds of nationality, for instance in access to employment, or in working conditions or social security, between the nationals of the EU Member States and the nationals of the third country with which the agreement is concluded. For instance, in Case C-430/00,⁷³ the Court was asked an interpretation of Article 38(1) of the Association Agreement between the EC and the Slovak Republic,⁷⁴ which provided that 'treatment accorded to workers of Slovak Republic nationality legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions,

⁶⁸ Council of the EU, doc. 16054/04, 13 December 2004.

⁶⁹ Council Document 14615/04 of 19 November 2004.

⁷⁰ Agreement establishing an Association between the European Economic Community and Turkey signed at Ankara on 12 September 1963, on the one hand, by the Republic of Turkey and, on the other, by the Member States of the EEC and the Community, and concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 (OJ 1973 C 133, p. 1); and Additional Protocol signed at Brussels on 23 November 1970 and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972 (OJ 1973 C 113, p. 17).

⁷¹ See, in particular, Case C-171/95, *Tetik v Land Berlin* [1997] ECR I-329, para. 21.

⁷² Case C-37/98, *Savas* [2000] ECR I-2927, para. 65.

⁷³ Case C-430/00, *Deutscher Handballbund* [2003] ECR I-4135.

⁷⁴ Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Slovak Republic, of the other part, approved on behalf of the Communities by Decision 94/909/ECSC, EEC, Euratom of the Council and the Commission of 19 December 1994 (OJ 1994 L 359, p. 1).

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remuneration or dismissal, as compared to its own nationals'. Referring to its 1995 judgment in the case of *Bosman*,⁷⁵ the Court considered that this provision 'must be construed as precluding the application to a professional sportsman of Slovak nationality, who is lawfully employed by a club established in a Member State, of a rule drawn up by a sports federation in that State under which clubs are authorised to field, during league or cup matches, only a limited number of players from non-member countries that are not parties to the EEA Agreement.'⁷⁶

By virtue of the association agreement, a third-country national who is legally employed in one EU Member State therefore must be treated, without discrimination on grounds of nationality, equally with the national of any EU Member State. Similarly, in the well-known case of *Yousfi*,⁷⁷ the Court was requested to interpret Article 41(1) of the EEC-Morocco Cooperation Agreement,⁷⁸ according to which workers of Moroccan nationality and any members of their families living with them are to enjoy in the field of social security treatment free from any discrimination based on nationality in relation to nationals of the Member States in which they are employed. The Court had already found this provision to have a direct effect.⁷⁹ In its *Yousfi* judgment of 20 April 1994, it confirmed that this provision precluded Belgium from refusing to grant a disability allowance, provided under its legislation to nationals residing in that State for at least five years, to a Moroccan national suffering permanent incapacity for work following an industrial accident occurring in Belgium and who had resided in Belgium for more than five years on the ground that the person concerned was of Moroccan nationality.

While the *Yousfi* case was a clear case of direct discrimination, the Court has extended its protection from discrimination on grounds of nationality to indirect discrimination on the basis of similarly worded clauses. For instance, in the *Pokrzepowicz-Meyer* case,⁸⁰ it held that a provision of the EC-Poland association agreement⁸¹ prohibiting discrimination on grounds of nationality between workers of Polish nationality legally employed in the territory of a Member State and the nationals of that Member State as regards working conditions, remuneration or dismissal precluded the application to Polish nationals of a provision stating that positions for foreign-language assistants could be filled using fixed-term employment contracts whereas for other teaching staff performing special duties recourse to such contracts had to be individually justified by an objective reason. Such a provision had already been considered to constitute indirect discrimination on grounds of nationality when applied to nationals of EU Member States legally employed in Germany;⁸² the Court simply extended this reasoning to Polish workers covered by the Association Agreement.

These guarantees are important since such agreements under certain conditions may be invoked directly by the beneficiaries before the national courts of EU Member States. Thus, the European Court of Justice has indicated⁸³

⁷⁵ Case C-415/93, *Bosman* [1995] ECR I-4921.

⁷⁶ Para. 58.

⁷⁷ Case C-58/93, *Yousfi v. Belgian State* [1994] ECR I-1353.

⁷⁸ Cooperation Agreement between the European Economic Community and the Kingdom of Morocco, signed at Rabat on 27 April 1976 and approved on behalf of the Community by Council Regulation (EEC) No 2211/78 of 26 September 1978 (OJ 1978 L 264, p. 19).

⁷⁹ See Case C-18/90, *Kziber* [1991] ECR I-199. In *Kziber*, the Court also found that the reference to social security made in this provision had to be construed as being analogous with the subject matter covered by Council Regulation (EEC) no. 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and to self-employed persons and to members of their families moving within the Community, as codified in Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6).

⁸⁰ Case C-162/00, *Land Nordrhein-Westfalen v. Pokrzepowicz-Meyer* [2002] ECR I-1049.

⁸¹ Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, concluded and approved on behalf of the Community by Decision 93/743/Euratom, ECSC, EC of the Council and the Commission of 13 December 1993 (OJ 1993 L 348, p. 1).

⁸² Case C-272/92, *Spotti* [1993] ECR I-5185.

⁸³ Case C-317/01 *Abatay and others* [2003] I-12301, para. 58-59.

that the Association Agreement between EC and Turkey has direct effect in the Member States, so that Turkish nationals to whom it applies are entitled to rely on it before national courts in order to prevent the application of inconsistent rules of national law;⁸⁴ furthermore, in a judgment of 11 November 2004, the Court ruled that the same Agreement precludes national courts, when reviewing the lawfulness of a Turkish national's expulsion, from not taking into consideration factual matters which occurred after the competent authorities' final decision and which no longer justified a limitation of the rights of the person concerned within the meaning of that provision.⁸⁵ One of the Court's most recent judgments relating to Russian nationals is that of 12 April 2005, in which the Court held that 'the Partnership Agreement between EC and Russia lays down, in clear, precise and unconditional terms, a prohibition precluding any Member State from discriminating, on the grounds of nationality, against Russian workers, vis-à-vis their own nationals, so far as their conditions of employment, remuneration and dismissal are concerned.'⁸⁶

4 The status of refugees and other persons in need of international protection

Partly to limit the secondary movements of asylum-seekers between EU Member States and partly to strengthen the implementation of the 1951 Geneva Convention on the Status of Refugees by Member States, the Council adopted Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.⁸⁷

This Directive includes provisions which either ensure that refugees or persons granted a subsidiary form of international protection are treated equally with nationals in certain areas, or – at a minimum – provide for treatment equal to that of other third-country nationals legally residing on the host State's territory. Thus, under Article 26 (1) and (2) Member States must authorise beneficiaries of refugee status to engage in employed or self-employed activities subject to rules generally applicable to the profession and to the public service, and they must ensure that activities such as employment-related education opportunities for adults, vocational training and practical workplace experience are offered to beneficiaries of refugee status on equivalent conditions to nationals. As regards access to education, Article 27(1) provides that Member States shall grant full access to the education system to all minors granted refugee or subsidiary protection status under the same conditions as nationals. Finally, the Member States are to ensure equal treatment between beneficiaries of refugee or subsidiary protection status and nationals in the context of the existing recognition procedures for foreign diplomas, certificates and other evidence of formal qualifications (Article 27(3)). As regards social welfare and health care, including for categories of beneficiaries who have special needs, those accorded refugee or subsidiary protection status must receive, in the Member State that has granted such status, the necessary social assistance or access to health care as provided to nationals of that Member State (Article 28(1) and Article 29(1)).

While the provisions cited above require that refugees benefit from equal treatment with the nationals of the Member States in which they reside, this is not the case for access to accommodation and freedom of movement within the host Member State (Article 31 and 32 respectively), where it is only required that refugees and persons

⁸⁴ See also Case C-373/02 *Sakir Ozturk* [2004] I-3605, para. 68, Case C-275/02 *Engin Ayaz* [2004] I-8765, para. 47-48, Case C-136/03 *Georg Dorr* [2005] xxx para. 66-69, Case C-374/03 *Gaye Gurol* [2005] para. 22-23, 26, 42-45, Case C-373/03 *Ceyhan Aydinli* [2005] para. 32, Case C-383/03 *Ergul Dogan* [2005] para. 25.

⁸⁵ Case C-467/02 *Inan Centikaya* [2004] ECJ I-10895, para. 48.

⁸⁶ Case C-265/03 *Igor Simutenkov* [2005], I-2579, para. 22, 29.

⁸⁷ OJ L 304, 30.9.2004, p. 12.

benefiting from subsidiary international protection be granted equal treatment with other third-country nationals legally residing in that Member State. The same is true for access of adults who are refugees or granted subsidiary protection status to the general education system, further training or retraining (Article 27(2)). In addition, while for most of these guarantees adults who are subsidiarily protected are assimilated to refugees, that is not the case as regards access to employment and access to activities such as employment-related education opportunities for adults, vocational training and practical workplace experience (Article 26 (3) and (4)), for which the Member States sought to preserve a certain margin of appreciation. As regards social welfare and health care, the Directive provides that Member States may limit the social assistance and health care granted to beneficiaries of subsidiary protection to 'core benefits which will then be provided at the same levels and under the same eligibility conditions as nationals', a restriction which does not apply to refugees (Article 28 (2) and Article 29 (2)).

5 Conclusion

Under EU law there remain significant differences of treatment between nationals of EU Member States and nationals of third countries, although these differences are attenuated either for third-country nationals who obtain the status of long-term resident in one Member State or for the nationals of countries with which the EU has concluded association or cooperation agreements. The Charter of Fundamental Rights of the European Union⁸⁸ does of course prohibit all forms of discrimination on whatever ground, including nationality (Article 21(1)). But as regards discrimination on grounds of nationality, this is only 'within the scope of application of the Treaties and without prejudice to any of their specific provisions' (Article 21(2)). The Charter in this respect does not seek to extend protection from discrimination beyond what is provided by Article 12 EC, by the provisions of the treaties, or by secondary legislation which guarantees economic freedoms without discrimination on grounds of nationality for the sole benefit of nationals of Member States.

⁸⁸ OJ C 303 of 14.12.2007, p. 1.

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Part III

The Framework of International and European Human Rights Law with Regard to Discrimination on Grounds of Nationality

The rise of the prohibition of differences of treatment on grounds of nationality in international and European human rights law is such that the position of EU law as described in the preceding section may have to be revised in the future. Indeed, as recalled by the UN Committee on the Elimination of Racial Discrimination in its General Recommendation 30 on Discrimination against Non-citizens, although some fundamental rights such as the right to participate in elections, to vote and to stand for election may be confined to citizens, 'human rights are, in principle, to be enjoyed by all persons. States Parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognised under international law.'⁸⁹ Indeed, the Committee on the Elimination of Racial Discrimination has frequently recommended to the States Parties to the International Convention on the Elimination of All Forms of Racial Discrimination that they should abstain from any discrimination on grounds of nationality: in the view of the Committee, differential treatment based on nationality and national or ethnic origin constitutes discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.⁹⁰ This prohibition extends to indirect discrimination on grounds of nationality, for instance when regulations are directed at newly established residents in a country without explicitly targeting foreigners. In its 2006 Concluding Observations relating to Denmark, the Committee thus expressed its concern that under Act No. 361 of June 2002, social benefits for persons newly arrived in Denmark are reduced in order to entice them to seek employment, a policy which 'has reportedly created social marginalisation, poverty and greater dependence on the social welfare system for those who have not become self-sufficient.' The Committee acknowledged that the new regulation applied to both citizens and non-citizens, yet it noted 'with concern that it is foreign nationals who are mainly affected by this policy.'⁹¹

It cannot be excluded that this may influence developments within EU law itself. Since the late 1970s, the European Court of Justice has considered that fundamental rights are part of the general principles of law for which it is the duty of the Court to ensure respect. Fundamental rights recognised as general principles of law are binding both on the institutions of the Union and on the Member States acting in the scope of application of Union law.⁹² The Court sees equality of treatment in particular as a general principle of law with which it should ensure compliance.⁹³ The principle of equal treatment requires that comparable situations are not treated differently and that different situations are not treated in the same way unless such treatment is objectively justified by the pursuit of a legitimate aim and provided that it is appropriate and necessary in order to achieve that aim.⁹⁴ In that sense, the directives

⁸⁹ General Recommendation 30 adopted at the 64th session of the Committee on the Elimination of Racial Discrimination (CERD/C/64/Misc.11/rev.3) (1 October 2004), para. 5.

⁹⁰ See for example Committee on the Elimination of Racial Discrimination, Concluding Observations: Denmark, UN doc. CERD/C/DEN/CO/17, 19 October 2006, para. 19 (the Committee therefore expresses its regret that in 2002, the municipalities' obligation to provide mother-tongue courses for bilingual students from other countries was repealed and that municipalities no longer receive financial support for that purpose).

⁹¹ Committee on the Elimination of Racial Discrimination, Concluding Observations: Denmark, UN doc. CERD/C/DEN/CO/17, 19 October 2006, para. 18.

⁹² See for example Case 36/75, *Rutili*, [1975] ECR 1219; Joined Cases 201/85 and 202/85, *Klensch* [1986] ECR 3477; Case 5/88, *Wachauf / Bundesamt für Ernährung und Forstwirtschaft*, [1989] ECR 2609; Case C-260/89, *ERT*, [1991] ECR I-2925.

⁹³ Case C-55/00, *Gottardo* [2002] ECR I-413, para. 34; Case C-442/00, *Caballero* [2002] ECR I-11915, paras. 30 to 32; Joined Cases 201/85 and 202/85, *Klensch* [1986] ECR 3477, paras. 9 to 10; Case C-351/92, *Graff* [1994] ECR I-3361, paragraphs 15 to 17; and Case C-15/95, *EARL de Kerlast* [1997] ECR I-1961, paras. 35 to 40.

⁹⁴ Case C-56/94, *SCAC* [1995] ECR I-1769, para. 27; Case C-15/95, *EARL de Kerlast* [1997] ECR I-1961, para. 35; Case C-354/95, *National Farmers' Union and Others* [1997] ECR I-4559, para. 61; and Case C-292/97, *Karlsson* [2000] ECR I-2737, para. 39.

adopted on the basis of Article 13 EC may be said to embody a general principle of equal treatment which predated their adoption and which the Court of Justice imposed in the field of application of European Union law.⁹⁵

When asked to identify if certain fundamental rights are worthy of protection as general principles of EU law, the European Court of Justice currently examines whether the right in question is included either in the European Convention on Human Rights, whose 'special significance' it has long recognised in its case law,⁹⁶ or in another international instrument for the protection of human rights to which the Member States have all agreed. The canonical formula used by the Court is that it 'draws inspiration [...] from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories.'⁹⁷ In practice, the only instruments other than the European Convention on Human Rights on which the Court relies are the 1966 International Covenant on Civil and Political Rights⁹⁸ and the 1989 Convention on the Rights of the Child.⁹⁹

This Part examines the status of non-discrimination on grounds of nationality in international and European human rights law.¹⁰⁰ The question of differences of treatment on grounds of nationality is first examined under the International Covenant on Civil and Political Rights and under the Convention on the Rights of the Child and under the two most important instruments of the Council of Europe, the European Convention on Human Rights and the European Social Charter. These instruments deserve particular attention¹⁰¹ because they are the main source of inspiration for the European Court of Justice when identifying the fundamental rights which are part of the general principles of law for which it ensures respect, although references to the European Social Charter of the Council of Europe are still timid and seem to be limited to the provisions of this instrument which inspired the drafting of the Charter of Fundamental

⁹⁵ See Case C-144/04, *Mangold v Helm*, [2005] ECR I-9981 (judgment of 22 November 2005 delivered upon a request for a preliminary ruling under Article 234 EC from the Arbeitsgericht München (Germany)), at paras. 74-75 (noting that 'Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation (...) the source of the actual principle underlying the prohibition of those forms of discrimination being found (...) in various international instruments and in the constitutional traditions common to the Member States'). This case concerned an instance of age-based discrimination; however, the very same reasoning could apply to forms of discrimination based on race, ethnicity, or religion or belief, all of which are prohibited under the Racial Equality Directive or the Employment Equality Directive but also under the general principle of equal treatment.

⁹⁶ Case C-260/89, *ERT* [1991] ECR I-2925, para. 41; Opinion 2/94, *Accession of the European Community to the European Convention for the Safeguard of Human Rights and Fundamental Freedoms*, [1996] ECR I-1759, para. 33; Case C-274/99 P, *Connolly v. Commission* [2001] ECR I-1611, para. 37; Case C-94/00, *Roquette Frères* [2002] ECR I-9011, para. 25; Case C-112/00, *Schmidberger* [2003] ECR I-5659, para. 71; Case C-36/02, *Omega* [2004] ECR I-9609, para. 33. Article 6(2) of the EU Treaty only refers to the European Convention on Human Rights, neglecting a reference to other human rights treaties to which the Member States have collaborated on or signed (an omission retained by the Reform Treaty in Article 6(3) of the EU Treaty, as amended).

⁹⁷ Case 4/73, *Nold KG v. Commission*, [1974] ECR 491. The wording has not evolved greatly. See e.g. Case C-94/00 *Roquette Freres* [2002] ECR I-9011.

⁹⁸ 999 UNTS 171. Case 249/96, *Grant v South West Trains Ltd* [1998] ECR I-621, para. 44 relating to ICCPR, Article 2(1); Case C-60/92, *Otto BV v Postbank NV* [1993] ECR I-5683, para. 11 relating to ICCPR, Article 14; Case 374/87, *Orkem v Commission* [1989] ECR 3283, para. 31 relating to ICCPR, Article 14.

⁹⁹ Case C-540/03, *Parliament v Council*, [2006] ECR I-5769, para. 37.

¹⁰⁰ See also, for a recent study of certain human rights instruments under this angle, S. Saroléa, *Droits de l'homme et migrations. De la protection du migrant aux droits de la personne migrante*, Bruxelles, Bruylant, 2006, chapter III.

¹⁰¹ That is not to say that in the future the International Convention on the Elimination of All Forms of Racial Discrimination will not be treated on a par with those instruments. See, for a discussion of whether this is a plausible scenario in the future case law, I. de Jesus Butler and O. De Schutter, 'Binding the EU to International Human Rights Law', *Yearbook of European Law*, vol. 27 (2008), pp. 277-320.

Rights of the European Union.¹⁰² In addition, this section presents the contributions made to the issue of nationality-based discrimination by the conventions relating to the status of refugees (1951) and stateless persons (1954).

1 United Nations Human Rights Treaties

1.1 The International Covenant on Civil and Political Rights (ICCPR)¹⁰³

As stated in its General Comment No. 15: The position of aliens under the Covenant, adopted in 1986, the view of the Human Rights Committee is that 'in general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness. Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. This guarantee applies to aliens and citizens alike.'

The above statement only refers to the right of foreigners not to be discriminated against in the enjoyment of the rights set out in the Covenant: as stipulated in Article 2 of this instrument, each State Party is bound 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status' [author's italics], including therefore nationality. But the Covenant also contains a general non-discrimination provision in Article 26 which states: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

Article 26 of the Covenant imposes the prohibition of discrimination in all fields, whether or not covered by other substantive provisions of this instrument. This too applies to discrimination on grounds of nationality. In the case of *Ibrahima Gueye and Others v. France*,¹⁰⁴ the Human Rights Committee was asked to find that France had violated its obligations under the Covenant after retired soldiers of Senegalese nationality who had served in the French Army prior to Senegal's independence in 1960 were denied pension rights from which French nationals in the same situation benefited in accordance with a law enacted in December 1974 which introduced a distinction between

¹⁰² Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti*, [2007] ECR I-10779, para. 43 (judgment of 11 December 2007); and Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet*, [2007] ECR I-11767, para. 90 (judgment of 18 December 2007). See in particular the seemingly decisive Opinion of AG Mengozzi, para. 78.

¹⁰³ See generally O. De Schutter, 'L'interdiction de la discrimination sur base de la nationalité dans le Pacte international relatif aux droits civils et politiques', in *L'étranger et le droit. Actes des journées juridiques Jean Dabin*, Bruylant, Bruxelles, 2009 (in press); Lord Lester of Herne QC & Sarah Joseph, 'Obligations of Non-Discrimination', in D. Harris & S. Joseph (eds.), *The International Covenant on Civil and Political Rights and United Kingdom Law*, Oxford, Clarendon Press, 1995, at 563; Torkel Opsahl, 'Equality in Human Rights Law. With Particular Reference to Article 26 of the International Covenant on Civil and Political Rights', in *Festschrift für Felix Ermacora: Fortschritt im Bewußtsein der Grund- und Menschenrechte*, Kehl am Rhein, Engel Verlag, 1988, pp. 51-65; Bertrand Ramcharan, 'Equality and Non-discrimination', in Louis Henkin (éd.), *The International Bill of Rights. The Covenant on Civil and Political Rights*, New York, Columbia Univ. Press, 1981, pp. 246-268; Frédéric Sudre, 'Le droit à la non-discrimination dans la jurisprudence du Comité des droits de l'homme des Nations Unies', in Frédéric Sudre (éd.), *La protection des droits de l'homme par le Comité des droits de l'homme des Nations Unies. Les constatations individuelles*, Montpellier, IDEDH, 1995, pp. 32-60; Wouter Vandenhole, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies*, Intersentia, Antwerpen-Oxford, 2005, 293 pp.

¹⁰⁴ *Ibrahima Gueye et al. v. France*, Communication No. 196/1985, U.N. Doc. CCPR/C/35/D/196/1985 (1989).

retired members of the French Army on grounds of nationality. The Committee considered that differences of treatment on grounds of nationality could, in principle, be prohibited by Article 26 of the Covenant, since this provision prohibits differences in treatment on any grounds 'such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status' [author's italics]. The Committee concluded that the difference in treatment of the authors of the communication was not based on reasonable and objective criteria and constituted discrimination prohibited by the Covenant, since 'it was not the question of nationality which determined the granting of pensions to the authors but the services rendered by them in the past. They had served in the French Armed Forces under the same conditions as French citizens; for 14 years subsequent to the independence of Senegal they were treated in the same way as their French counterparts for the purpose of pension rights, although their nationality was not French but Senegalese' (Paragraph 9.5). The French administrative courts have since this decision aligned themselves with the position of the Human Rights Committee.¹⁰⁵

The Human Rights Committee has adopted further decisions finding discrimination on grounds of nationality or on grounds of the status of permanent resident.¹⁰⁶ In the case of *Karakurt v. Austria*, the author of the communication complained that because of his Turkish nationality he could not stand for election to work councils in Austria since Section 53(1) of the Industrial Relations Act (*Arbeitsverfassungsgesetz*) limited eligibility for such work councils to Austrian nationals or members of the European Economic Area (EEA). The Committee concluded that this difference in treatment between, on the one hand, Austrians and nationals of EU Member States or of EEA Member States, and nationals of other countries on the other hand,¹⁰⁷ constituted discrimination prohibited under Article 26 of the International Covenant on Civil and Political Rights: '...the State party has granted the author, a non-Austrian/EEA national, the right to work in its territory for an open-ended period. The question therefore is whether there are reasonable and objective grounds justifying exclusion of the author from a close and natural incident of employment in the State party otherwise available to EEA nationals, namely the right to stand for election to the relevant work-council, on the basis of his citizenship alone. [...] With regard to the case at hand, the Committee has to take into account the function of a member of a work council, i.e., to promote staff interests and to supervise compliance with work conditions (...). In view of this, it is not reasonable to base a distinction between aliens concerning their capacity to stand for election for a work council solely on their different nationality' (Paragraph 8.4.).

Of course, the difference in treatment of which Mr Karakurt complained had its source in the obligation imposed on Austria by EC law and by the Agreement on the European Economic Area (EEA) not to establish any discrimination on grounds of nationality between Austrian nationals on the one hand, and nationals of other EU Member States

¹⁰⁵ See Conseil d'Etat, 30 November 2002, No. 212179, 212211 Diop.

¹⁰⁶ See Communication n°516/1992, *Simunek v. Czech Republic*, Decision of 19 July 1995, CCPR/C/54/D/516/1992; Communication n° 586/1994, *Adam v. Czech Republic*, Decision of 23 July 1996, CCPR/C/57/D/586/1994.

¹⁰⁷ Upon its ratification of the Covenant on 10 September 1978, Austria entered a reservation to the effect, *inter alia*, that: 'Article 26 is understood to mean that it does not exclude different treatment of Austrian nationals and aliens, as is also permissible under article 1, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination.' According to the majority of the Committee, this would have precluded the Committee from examining the communication should the alleged discrimination have been between Austrians on the one hand, and other nationalities on the other hand. This reading of the Austrian reservation was challenged in their partly dissenting individual opinion by two members of the Committee, Sir Nigel Rodley and Mr. Martin Scheinin, who considered that the Austrian reservation, since it explicitly referred to the International Convention on the Elimination of All Forms of Racial Discrimination, merely precluded the Committee from examining nationality-based differences of treatment as potentially discriminatory on grounds of 'race, colour, descent or national or ethnic origin', but that it was not an obstacle to examining whether such differences in treatment were discriminatory in their own right, i.e. as discriminatory on grounds of nationality.

or of EEA Member States, on the other hand.¹⁰⁸ But this, in the view of the Committee, did not preclude it from finding discrimination. Although its earlier case law seemed to suggest that the existence of an international agreement that conferred preferential treatment to nationals of a State party to that agreement might constitute an objective and reasonable ground for differentiation,¹⁰⁹ it stated in *Karakurt* that ‘there is no general rule to the effect that such an agreement in itself constitutes a sufficient ground with regard to the requirements of article 26 of the Covenant. Rather, it is necessary to judge every case on its own facts.’ It follows that differences in treatment between nationals of EU Member States, on the one hand, and third-country nationals, on the other hand, may be considered discriminatory, despite the fact that they result from the establishment of a new legal order by the EC/EU treaties and that they take the form of the creation of a citizenship of the Union.

The ICCPR allows for certain differences of treatment on grounds of nationality. In particular, Article 25 states that

‘Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.’

This provision thus suggests that differences in treatment on grounds of nationality in these areas (the right to vote, the right to be elected, and the right to have access to public service employment) are not in principle to be considered discriminatory. Therefore, although no discrimination is allowed in the exercise of these rights – for instance, distinctions between those who are entitled to citizenship by birth and those who acquire it by naturalisation may raise questions of compatibility with the Covenant – it is in principle allowable for States to reserve these rights to individuals having their nationality.¹¹⁰

1.2 The Convention on the Rights of the Child

All EU Member States have ratified the 1989 Convention on the Rights of the Child. Article 2(1) of this instrument provides that ‘States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status’. Although this provision only imposes a prohibition of discrimination in the enjoyment of the rights listed in the Convention, the list of these rights is such that this non-discrimination clause in fact has a very broad scope of application: the Convention on the Rights of the Child lists all basic civil and political rights as well as economic, social, and cultural rights, whose implications for children the Convention seeks to make explicit.

¹⁰⁸ The European Court of Justice concluded in a judgement of 16 September 2004 that, by excluding EU nationals employed in Austria from standing for election to the Chamber of Labour (*Arbeiterkammer*), Austria has violated its obligations under European Community law to grant equal conditions of employment without discrimination based on nationality to workers who are nationals of other Member States; the same obligation is violated with respect to non-EU nationals for whom special agreements between the Community and non-Member States are applicable (Case C-465/01, *Commission v. Austria*, [2004] ECR I-8291 (judgement of 16 September 2004)).

¹⁰⁹ Communication n° 658/1995, *Jacob and Jantina Hendrika van Oord v. The Netherlands*, Decision of 23 July 1997, UN doc. CCPR/C/60/D/658/1995.

¹¹⁰ See Human Rights Committee, General comment No. 25: Article 25 (Participation in public affairs and the right to vote), para. 3 (‘In contrast with other rights and freedoms recognised by the Covenant (which are ensured to all individuals within the territory and subject to the jurisdiction of the State), article 25 protects the rights of “every citizen”’).

In its recommendations to the States Parties to the Convention, the Committee on the Rights of the Child has recommended in particular that States systematically collect data about the situation of different groups of children in order to better target their policies in fields such as health, education and housing. For instance, in its most recent Concluding Observations relating to Latvia, the Committee recommends that the Latvian authorities ‘undertake measures to develop a systematic and comprehensive collection and disaggregation of data that is consistent with the Convention, and can be used for the development, implementation and monitoring of policies and programmes for children. Particular emphasis should be placed on gathering data relating to children who need special attention, including non-citizens, stateless and refugee children, and children of minorities.’¹¹¹ Similarly, in Concluding Observations on Hungary, the Committee recalls that ‘that the availability of statistical data is essential in order to identify and combat direct and indirect discrimination as well as devise and implement targeted positive action programmes and subsequent measures for monitoring progress achieved’; and it expresses its concern that ‘the Data Protection Act impedes the compilation of disaggregated statistics, especially with regard to most vulnerable groups of children, such as minority children; in particular Roma, disabled children, asylum-seeking children and children in conflict with the law.’¹¹²

But the importance of the Convention on the Rights of the Child may stem primarily from the tendency of courts applying this instrument to protect foreign children from discrimination, particularly in circumstances where a difference of treatment is made between children who are illegally residing on the territory of a Member State and other children who, although also foreigners, are in a regular situation. Indeed, differences of treatment between these two categories may be especially difficult to justify when they affect children, who bear no responsibility for the choices of the parents, for example as regards their choice to remain on the territory in an irregular situation.¹¹³

¹¹¹ Committee on the Rights of the Child, Concluding Observations/Comments: Latvia (UN doc. CRC/C/LVA/CO/2, 28 June 2006), para. 17, available at: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/681d67aa598c1c16c12572030047b9b7?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/681d67aa598c1c16c12572030047b9b7?OpenDocument). At the same time, the Committee ‘welcomes the declaration of the State party that all children in Latvia enjoy the same rights irrespective of their citizen-status as well as the decision to remove the mandatory requirement to record ethnic origin in passports’ (para. 20).

¹¹² Committee on the Rights of the Child, Concluding Observations/Comments: Hungary (UN doc. CRC/C/HUN/CO/2, 17 March 2006), para. 15.

¹¹³ For instance, the Belgian Constitutional Court, while allowing the legislator to deny social and medical assistance to adults irregularly staying in Belgium, expressed a reservation as regards the situation of their children, referring explicitly in this regard to the Convention on the Rights of the Child. In judgment No. 44/2006 of 15 March 2006, the Court noted thus: ‘...le fait qu’une personne adulte en séjour illégal n’ait pas droit, pour elle-même, à une aide sociale complète n’est pas contraire aux articles 10 et 11 de la Constitution [equality and non-discrimination]. Dès lors que l’enfant de cette personne a droit à une aide pour lui-même, les articles 2.2 et 3.2 de la Convention internationale relative aux droits de l’enfant ne sont pas violés’ [...the fact that an adult residing illegally does not for himself have the right to full social assistance is not contrary to Articles 10 and 11 of the Constitution [equality and non-discrimination]. Since the child of such a person has for himself the right to social assistance, Articles 2.2 and 3.2 on the International Convention on the Rights of the Child are not violated.] The Constitutional Court confirms in its most recent case law that adults irregularly staying on Belgian territory may be denied social benefits recognised to others: see for instance judgment No. 66/2006 of 3 May 2006, B.6.3.: ‘Lorsque le législateur entend mener une politique en matière d’étrangers et impose à cette fin des règles auxquelles il y a lieu de se conformer pour séjourner légalement sur le territoire, il utilise un critère de distinction objectif et pertinent s’il lie des effets aux manquements à ces règles, lors de l’octroi de l’aide sociale. La politique en matière d’accès au territoire et de séjour des étrangers serait en effet mise en échec s’il était admis que, pour les étrangers qui séjournent illégalement en Belgique, la même aide sociale soit accordée que pour ceux qui séjournent légalement dans le pays. La différence entre les deux catégories d’étrangers justifie que ce ne soient pas les mêmes obligations qui incombent à l’Etat à leur égard’. [When the legislator wishes to carry out a policy in relation to foreign nationals and for this reason imposes rules with which it is necessary to comply in order to legally reside on the territory, it uses an objective and relevant distinguishing criterion if it makes a connection with the effects of failure to comply with these rules when granting social assistance. Policy on access to the territory and the residence of foreign nationals would fail if it was accepted that the same social assistance would be given to foreigners residing illegally in Belgium as to those residing legally in the country. The difference between these two categories of foreign national justifies the fact that the State does not have the same obligations in their regard.]

2 The Council of Europe: the European Convention on Human Rights and the European Social Charter

2.1 The European Convention on Human Rights

a) *The general rule*

Article 14 of the European Convention on Human Rights provides that the rights and freedoms set forth in the Convention 'shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.' While this provision does not create independent protection from discrimination – it may only be invoked in combination with another substantive provision of the European Convention on Human Rights or of one of its additional Protocols¹¹⁴ – Protocol no. 12 to the Convention,¹¹⁵ adopted in 2000 and in force since 1 April 2005 for the States Parties to this instrument, does contain such a general prohibition of discrimination: 'The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status' (Article 1(1)).

Since the 1990s, differences in treatment on grounds of nationality have been increasingly treated as suspect in the case law of the European Court of Human Rights. In the case of *Gaygusuz v. Austria*,¹¹⁶ the applicant, a Turkish national who had worked in Austria with certain interruptions from 1973 until October 1984, was denied an advance on his pension in the form of emergency assistance (*Antrag auf Gewährung eines Pensionsvorschlusses in Form der Notstandshilfe*) after his entitlement to unemployment benefits expired in 1987. He complained before the European Court of Human Rights of the Austrian authorities' refusal to grant him emergency assistance on the ground that he did not have Austrian nationality, which was one of the conditions laid down in Section 33 (2) (a) of the 1977 Unemployment Insurance Act for entitlement to an allowance of that type. He claimed to be a victim of discrimination based on national origin, contrary to Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 to the Convention, which guarantees the right to property ('Every natural or legal person is entitled to the peaceful enjoyment of his possessions').

The Court agreed. It noted in the first place that 'Mr Gaygusuz was legally resident in Austria and worked there at certain times (...), paying contributions to the unemployment insurance fund in the same capacity and on the same basis as Austrian nationals.' It observed therefore that the Austrian authorities' refusal to grant him emergency assistance was based exclusively on the fact that he did not have Austrian nationality as required by Section 33

¹¹⁴ The European Court of Human Rights formulates this restriction by stating that 'Article 14 of the Convention complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to 'the enjoyment of the rights and freedoms' safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter'. See for example Eur. Ct. HR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, Series A no. 94, p. 35, § 71; Eur. Ct. HR, *Inze v. Austria* judgment of 28 October 1987, Series A no. 126, p. 17, § 36; *Karlheinz Schmidt v. Germany*, 18 July 1994, Series A no. 291-B, p. 32, § 22; Eur. Ct. HR, *Van Raalte v. the Netherlands*, judgment of 21 February 1997, Reports of Judgments and Decisions 1997-I, p. 184, § 33; Eur. Ct. HR, *Petrovic v. Austria*, 27 March 1998, Reports of Judgments and Decisions 1998-II, p. 585, § 22; Eur. Ct. HR, *Haas v. the Netherlands* (Appl. N° 36983/97), judgment of 13 January 2004, § 41.

¹¹⁵ E.T.S., n° 177. See footnote 158 below.

¹¹⁶ Eur. Ct. HR, *Gaygusuz v. Austria* (Appl. No. 17371/90), judgment of 16 September 1996, Reports 1996-IV.

(2) (a) of the 1977 Unemployment Insurance Act, since ‘it has not been argued that the applicant failed to satisfy the other statutory conditions for the award of the social benefit in question. He was accordingly in a like situation to Austrian nationals as regards his entitlement thereto.’ The Court concluded that ‘the difference in treatment between Austrians and non-Austrians as regards entitlement to emergency assistance, of which Mr Gaygusuz was a victim, is not based on any “objective and reasonable justification”, and that it was therefore discriminatory.’¹¹⁷

In *Gaygusuz*, the Court had formulated its doctrine thus: ‘...a difference of treatment is discriminatory, for the purposes of Article 14, if it “has no objective and reasonable justification”, that is if it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be realised”. Moreover the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. However, very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention.’¹¹⁸ In other words, similarly to birth out of wedlock,¹¹⁹ sex,¹²⁰ or sexual orientation,¹²¹ nationality is considered to constitute a ‘suspect’ ground, requiring that any difference of treatment grounded on nationality be justified by particularly strong reasons, which must be strictly necessary to achieve the objectives pursued.¹²²

This was confirmed in the case of *Koua Poirrez v. France*. The applicant, a national of Cote d’Ivoire who had failed to obtain French nationality because he had applied after his eighteenth birthday, had been physically disabled since the age of seven. He had been adopted by Mr Bernard Poirrez, a French national. In May 1990 he applied for a ‘disabled adults’ allowance’ (*allocation aux adultes handicapés* – AAH), stating in support of his application that he was a French resident of Ivory Coast nationality and the adopted son of a French national residing and working in France. His application was rejected on the ground that, as he was neither a French national nor a

¹¹⁷ Ibid., paras. 46-51.

¹¹⁸ Ibid., para. 42.

¹¹⁹ Eur. Ct. HR, *Inze v. Austria*, judgment of 28 October 1987, Series A n° 126, § 41; Eur. Ct. HR (3d sect.), *Mazurek v. France* (Appl. N° 34406/97), judgment of 1 February 2000, § 49; Eur. Ct HR (GC), *Sommerfeld v. Germany* (Appl. N° 31871/96), judgment of 8 July 2003, § 93 (‘very weighty reasons need to be put forward before a difference in treatment on the ground of birth out of or within wedlock can be regarded as compatible with the Convention (see *Mazurek v. France*, no. 34406/97, § 49, ECHR 2000-II, and *Camp and Bourimi v. the Netherlands*, no. 28369/95, §§ 37-38, ECHR 2000-X). The same is true for a difference in the treatment of the father of a child born of a relationship where the parties were living together out of wedlock as compared with the father of a child born of a marriage-based relationship’).

¹²⁰ See Eur. Ct. HR, *Burghartz v. Switzerland*, judgment of 22 February 1994, Series A no. 280-B, p. 29, § 27; *Karlheinz Schmidt v. Germany*, judgment of 18 July 1994, Series A no. 291-B, pp. 32-33, § 24; *Petrovic v. Austria*, judgment of 27 March 1998, Reports of Judgments and Decisions 1998-II, p. 587, § 37.

¹²¹ Indeed, in part for the same motives that interference with an individual’s sexual life will only be justified by very serious reasons as it is related to the most intimate aspects of one’s personality and such matters should in principle not concern the outside world (see for example Eur. Ct. HR, *Smith and Grady v. the United Kingdom* (Appl. No. 33985/96 and 33986/96), judgment of 27 September 1999; *Lustig-Prean and Beckett v. the United Kingdom* (Appl. N° 31417/96 and 32377/96), judgment of 27 September 1999; and Eur. Ct. HR (3d sect.), *A.D.T. v. the United Kingdom* (Appl. N° 35765/97), judgment of 31 July 2000, ECHR 2000-IX, § 37), the Court has considered that differences based on sexual orientation require particularly serious reasons by way of justification: see Eur. Ct. HR (1st section), *L. and V. v. Austria* (Appl. N° 39392/98 and 39829/98), judgment of 9 January 2003, § 45 (‘Just like differences based on sex (...), differences based on sexual orientation require particularly serious reasons by way of justification’); Eur. Ct. HR, *S.L. v. Austria* (Appl. N° 45330/99), judgment of 9 January 2003, § 36; Eur. Ct. HR (1st sect.), *Karner v. Austria* (Appl. N°40016/98), judgment of 24 July 2003, § 37.

¹²² It has been suggested that a new approach to dealing with protection against discrimination under the Convention should be adopted, based on more clearly delineated variations in the strictness of scrutiny: see Oddný Mjöll Arnadóttir, *Equality and non-discrimination under the European Convention on Human Rights*, Martinus Nijhoff Publ., International studies in human rights n° 74, The Hague, 2003, 265 pages ; and J. Gerards, ‘Intensity of Judicial Review in Equal Treatment Cases’ in *N.I.L.R.*, 2004, pp. 135-183.

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national of a country which had entered into a reciprocity agreement with France in respect of the AAH, he did not satisfy the relevant conditions laid down in Article L. 821-1 of the Social Security Code. The Court found this to constitute discrimination on grounds of nationality. It reiterated that ‘very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention.’¹²³ This has been restated in the case of *Andrejeva v. Latvia*, referred to above.¹²⁴ In this latter case, the Court dismissed the Latvian Government’s argument that the applicant could have applied to become a Latvian citizen through the process of naturalisation in order to avoid being treated differently as a ‘permanently resident non-citizen’ in Latvia and to receive the full amount of the pension claimed. The Court said: ‘The prohibition of discrimination enshrined in Article 14 of the Convention is meaningful only if, in each particular case, the applicant’s personal situation in relation to the criteria listed in that provision is taken into account exactly as it stands. To proceed otherwise in dismissing the victim’s claims on the ground that he or she could have avoided the discrimination by altering one of the factors in question – for example, by acquiring a nationality – would render Article 14 devoid of substance.’¹²⁵

Finally, the European Court of Human Rights also takes the view that differences of treatment between foreigners based on their right to be present on the territory – i.e. between irregular migrants on the one hand, and other people, whether nationals or legally residing migrants on the other hand – may be discriminatory, particularly in the exercise of certain rights such as the right of access to justice.¹²⁶

b) *The relevance of citizenship of the Union*

The rise of nationality to the status of a suspect ground of differentiation now leads to questioning of most distinctions based on nationality in the other areas concerned.¹²⁷ Differences of treatment between two different categories of foreigners – nationals of other EU Member States, on the one hand, and third-country nationals, on the other hand – may not be immune from this general movement towards equality without distinction as to nationality. Initially, the European Court of Human Rights seemed to accept that citizens of the Union may be treated better by Member States of the Union than third-state nationals where this is justified by the creation between Member States of a special legal order implicating certain citizenship rights. This was the position of the Court in the cases of *Moustaquim* and *Chorfi*, where the applicants complained that they were not as well protected from expulsion as would have been nationals from other Member States of the Union in similar circumstances.

In the case of *Moustaquim*, the Court considered that the applicant, a Moroccan national, had not faced discrimination in the enjoyment of his private and family life despite the fact that an EU citizen might have been better protected from the risk of expulsion for reasons of public order. It stated: ‘As for the preferential treatment given to nationals of the other member States of the Communities, there is an objective and reasonable justification for it as Belgium

¹²³ Eur. Ct. HR (3rd sect.), *Koua Poirrez v. France* (Appl. n° 40892/98), judgment of 30 September 2003 (final on 30 December 2003), para. 46.

¹²⁴ Eur. Ct. HR (GC), *Andrejeva v. Latvia* (Appl. No. 55707/00), judgment of 18 February 2009, para. 87.

¹²⁵ Para. 91.

¹²⁶ Eur. Ct. HR (2nd sect.), *Anakomba Yula v. Belgium* (Appl. No 45413/07), judgment of 10 March 2009.

¹²⁷ See, more recently, Eur. Ct. HR (4th sect.), *Niedzwiecki v. Germany* (Appl. no. 58453/00), judgment of 25 October 2005 (final on 15 February 2006), para. 33. The European Court of Human Rights takes the view that there are no sufficient reasons justifying a difference of treatment with regard to child benefits of aliens who were in possession of a stable residence permit on one hand and those who were not on the other. This follows the position of the German Federal Constitutional Court (*Bundesverfassungsgericht*) as expressed after the close of the litigation related to the applicant’s situation (see decision of 6 July 2004 (1 BvL 4/97, 1 BvL 5/97, 1 BvL 6/07)).

belongs, together with those States, to a special legal order.¹²⁸ This was repeated in the judgment of the Court in the case of *C. (Chorfi) v. Belgium*, where the Court added a reference to the notion of citizenship of the Union.¹²⁹

Yet the authorisation to establish differences in treatment between nationals of EU Member States and third-country nationals is not without limits. As the later cases of *Gaygusuz* (1996) and *Koua-Poirrez* (2003) show,¹³⁰ the notion of Union citizenship may not be invoked to justify differences in treatment between individuals who are citizens of the Union and nationals of third countries similarly placed, where the advantage denied to them presents no relationship to the notion of citizenship – a concept which, arguably, should only justify differences in treatment in areas such as the right to vote and to be elected, certain rights to political participation, or perhaps – as in *Moustaquim* and *Chorfi* – the right to remain in one country. The differences in treatment established by one EU Member State between nationals of other EU Member States on the one hand and third-country nationals on the other hand, are therefore only allowable under the European Convention on Human Rights in a limited set of situations.

Let us first consider the right not to be removed from the national territory. It may be tempting to argue that offering a higher level of protection from expulsion to Union citizens than to third-country nationals may be justified in reference to the right of nationals of a State Party to Protocol no. 4 to the ECHR, under Article 2 of that Protocol, not to be expelled from their country, applied per analogy. This indeed was the position adopted by Belgium in the *Moustaquim* and *Chorfi* cases, where the applicants complained that they were victims of discriminatory treatment since they could be expelled under conditions less strict than if they had been nationals of another EU Member State. However, this justification for the preferential treatment granted to Union citizens in comparison to third-country nationals is rather tautological, since it amounts to saying that nationals of other EU Member States are granted such preferential treatment because they are assimilated to nationals of the host Member States in accordance with the rules of the EC Treaty. In addition, this justification is not particularly convincing. Just like third-country nationals in situations such as those in which *Moustaquim* and *Chorfi* found themselves, nationals of EU Member States may be expelled for reasons of public order and public security.¹³¹ In other words, the real dividing line in this matter remains between nationals and non-nationals, rather than between nationals of EU Member States and third-country nationals.

As to the difference in treatment between nationals and foreigners in the field of political rights broadly conceived, which (beyond the right to vote and to seek to be elected) includes freedoms of expression and assembly, as well as to form political parties, it would at first appear to be compatible with the ECHR, Article 16 of which states that the provisions of the Convention relating to freedom of expression or association, or which prohibit discrimination in the enjoyment of such freedoms, shall not be regarded as ‘preventing the High Contracting Parties from imposing restrictions on the political activity of aliens’. In the 1995 case of *Piermont v. France*, the European Court of Human

¹²⁸ See Eur. Ct. HR, *Moustaquim v. Belgium*, judgment of 18 February 1991, Series A n°193, para. 49.

¹²⁹ *C. (Chorfi) v. Belgium*, 7 August 1996, Rep. 1996-III, para. 38.

¹³⁰ Eur. Ct. HR, *Gaygusuz v. Austria*, judgment of 16 September 1996, ECHR 1996-IV, p. 1142, para. 42; Eur. Ct. HR (3rd sect.), *Koua Poirrez v. France* (Appl. n° 40892/98), judgment of 30 September 2003 (final on 30 December 2003), para. 46. In *Koua Poirrez*, the Court is explicit about its overruling of the precedent established in *Moustaquim*. It states in para. 49: ‘The difference in treatment regarding entitlement to social benefits between French nationals or nationals of a country having signed a reciprocity agreement and other foreign nationals was not based on any “objective and reasonable justification” (see, conversely, *Moustaquim v. Belgium*, judgment of 18 February 1991, Series A no. 193, p. 20, § 49)’.

¹³¹ See for example Case C-100/01, *Oteiza Olazabal* [2002] ECR I-10981; and Chapter VI of Directive 2004/38/EC, cited above.

Rights seemed to adopt the view that this provision could justify certain restrictions being imposed on third-country nationals, even though it might not be applicable to nationals of EU Member States.¹³²

However, Article 16 of the Convention has been frequently criticised and is only seldom used even in situations where it would be obviously applicable.¹³³ A distinction should be made, however, between different sets of rights enumerated in Article 16 of the Convention. The exercise of civil liberties such as freedom of expression or freedom of assembly cannot be reserved to nationals only, or to the citizens of the Union: as stated by the UN Human Rights Committee, human rights are in principle to be enjoyed by all individuals under the jurisdiction of the State.

As regards political rights *stricto sensu* (the right to vote and the right to stand for elections and the right to form or join political parties), the situation may be different. The exercise of such rights is so closely bound to the concept of citizenship that it may be allowable to reserve these rights to nationals. Indeed, while Article 3 of Protocol No. 1 to the European Convention on Human Rights¹³⁴ provides that the States Parties ‘undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature’, there has never been a suggestion that the right to vote should be extended to non-nationals. But even this may be changing, at least as regards local elections. Article 3 of the 1992 Convention on the participation of foreigners in public life at local level¹³⁵ obliges each Party to that instrument to undertake ‘to guarantee to foreign residents, on the same terms as to its own nationals [the right to freedom of expression and] the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of their interests (...)’. The adoption of this instrument and the growing consensus about the need to improve integration of immigrants by allowing them to participate in the local political life of the State in which they reside may lead this rule to evolve in the future.

2.2 The European Social Charter

The European Social Charter was initially signed on 18 October 1961 to complement the European Convention on Human Rights in the field of economic and social rights. The initial list of 19 rights protected was expanded by the adoption of the Additional Protocol of 1988, which adds four rights closely inspired by developments in the social legislation of the European Community. On 3 May 1996, the Revised European Social Charter further expanded the list of rights to cover an increasingly large number of issues going beyond the protection of workers and their families, including the right to protection against poverty and social exclusion and the right to housing. In addition, Article E was included in Part V of the Revised Charter. This article contains ‘horizontal’ clauses applicable to the generality of the Charter’s substantive clauses. According to Article E:

¹³² Eur. Ct. HR, *Piermont v. France* (Appl. Nos. 15773/89 and 15774/89) judgment of 27 April 1995. This judgment is however difficult to interpret, since the applicant in that case was not only a national of Germany who could not exercise certain political activities in the French overseas territories of French Polynesia and New Caledonia, but also a Member of the European Parliament. The Court took the view that ‘Mrs Piermont’s possession of the nationality of a member State of the European Union and, in addition to that, her status as a member of the European Parliament do not allow Article 16 of the Convention to be raised against her, especially as the people of the OTs take part in the European Parliament elections’ (para. 64).

¹³³ It is notable for instance that neither in *Cissé v. France* ((Appl. n° 51346/99, judgment of 9 April 2002 (forced evacuation of the Saint-Bernard church in Paris, occupied for more than two months by undocumented aliens and their supporters)) for instance, nor in *Zaoui v. Switzerland* (Appl. n° 41615/98, non-admissibility decision of 18 January 2001 (Algerian national whose means of communication had been confiscated to deprive the applicant of the possibility of diffusing international propaganda in favour of the Algerian opposition party Front Islamique du Salut)) was Article 16 ECHR invoked by the defending State.

¹³⁴ Opened for signature in Paris on 2.3.1952.

¹³⁵ ETS no. 144, opened for signature in Strasbourg on 5.2.1992.

‘The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.’

Although this general, non-limitative list of prohibited grounds of discrimination might lead one to conclude that differences of treatment on grounds of nationality should be carefully scrutinised under the Charter, there is an important proviso. Paragraph 1 of the Appendix to the Revised European Social Charter (which is identical to the Appendix to the original European Social Charter) provides that a wide range of social rights protected under the Charter, including for instance the right to social and medical assistance (Paragraph 1 of Article 13) and the right to the protection of the child (Article 17), covers foreigners ‘only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned.’ Thus, the applicability of the Charter is in principle subject to a condition of reciprocity: it benefits only the nationals of the other States Parties to the Charter, and only if the individuals concerned are lawfully residing on the host State’s territory.

Although its scope of application is thus restricted *ratione personae*, the (Revised) European Social Charter contains provisions which seek to ensure full equality between the nationals of the host State and the nationals of other States Parties to the Charter who are residing on the former State’s territory. Article 19 of the Charter relates to the right of migrant workers and their families to protection and assistance. It lists a number of guarantees benefiting migrant workers. For instance, Paragraph 7 of Article 19 of the Revised European Social Charter provides, for the States Parties which have accepted this provision, that these States undertake to ‘secure for [migrant workers] lawfully residing within their territories treatment not less favourable than that of their own nationals in respect of legal proceedings relating to matters referred to in this article [concerning the right of migrant workers and their families to protection and assistance]’. The situation in Sweden was considered not be compatible with this clause, as according to the Swedish Legal Aid Act although all persons *domiciled* in Sweden have the right to legal aid whatever their nationality, non-Swedish citizens who are not domiciled in the country may receive legal aid only when international conventions and bilateral agreements have been concluded to that effect, even if they are *lawfully present* within the Swedish territory. The European Committee of Social Rights considered in its conclusions regarding the Swedish report in 2004 that Paragraph 17 of Article 19 (equality in legal proceedings) of the Revised European Social Charter ‘obliges states parties to secure the same treatment for nationals of other states parties as for their own nationals, independently of any international agreement.’

Article 12(4) of the Revised European Social Charter imposes on the States which have accepted that provision an obligation to ‘take steps, by the conclusion of appropriate bilateral and multilateral agreements or by other means, and subject to the conditions laid down in such agreements, to ensure: equal treatment with their own nationals of the nationals of other Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Parties; the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Parties.’ In Estonia, family benefits are granted to residents, whether permanent or temporary, on condition that family members are residing in Estonia. Benefits are not paid in respect of family members who already receive family benefit from other countries. The European Committee of Social Rights in its 2004 Conclusions on Estonia considered that the fact that child allowances were not paid in respect of children not residing with the claimant parent in Estonia (except where studying abroad was involved) constituted a case of indirect discrimination prohibited by Article 12(4) of the Revised European Social Charter.

We shall not detail these provisions, since although they do encourage the States Parties to the (Revised) European Social Charter to extend certain guarantees afforded to their nationals to the nationals of the other States Parties, they do not apply to all third-country nationals who are present or legally residing on the territory of the State concerned. This restriction to the scope of application *ratione personae* of the European Social Charter was challenged

in the case of *FIDH v. France*,¹³⁶ however. The complaining non-governmental organisation considered that the Revised European Social Charter had been violated by France, since French law excluded the provision of medical assistance to children of undocumented migrants on French territory, except as regards treatment for emergencies and life-threatening conditions. In its decision on the merits of 8 September 2004, the European Committee on Social Rights – the body of experts charged with interpreting the Charter – noted that ‘as a human rights instrument to complement the European Convention on Human Rights’, the Charter should be read, in accordance with the Vienna Convention on the Law of Treaties, as ‘a living instrument dedicated to certain values which inspired it: dignity, autonomy, equality and solidarity’. It also noted that the restriction to the scope of application *ratione personae* of the Charter ‘treads on a right of fundamental importance to the individual since it is connected to the right to life itself and goes to the very dignity of the human being’, and that it ‘impacts adversely on children who are exposed to the risk of no medical treatment’. Since ‘health care is a prerequisite for the preservation of human dignity’, it concluded that ‘legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter.’ The reference to ‘human dignity’ and to the Charter as a human rights instrument therefore allowed the Committee to circumvent the clear stipulations of the Appendix to the Charter. While it cannot be predicted how far this case law will develop – it is built on rather fragile ground – this audacity does provide an illustration of the extent to which, as regards at least the enjoyment of fundamental rights, differences of treatment on grounds of nationality have become suspect, even in the context of instruments such as the European Social Charter which are not designed to be universal in their scope of application.

The *FIDH v. France* decision also indicates that differences of treatment based on status (for instance, between third-country nationals legally residing on the territory of the host State and third-country nationals who are there illegally) are now also treated with suspicion as regards situations where fundamental values such as the ‘dignity’ of the individual and the right to life are at stake. This is quite a natural development as regards the enjoyment of fundamental rights, which in principle are to be granted to all without discrimination on grounds of nationality or administrative situation; and it is equally unsurprising that this decision of the European Committee of Social Rights was adopted in a case relating to the situation of children in which the Committee heavily relied on the 1989 Convention on the Rights of the Child referred to above. Indeed it may be noted that, although differences of treatment on grounds of status (legal resident or not) are extremely common throughout the Member States, it has recently been questioned by certain national courts. In Spain, the Law on the rights and duties of aliens (Organic Law 4/2000) requires foreigners to be in a regular situation in order to enjoy full protection of their rights in the labour market, education and training, social protection, social advantages, and access to and supply of goods and services. But several Constitutional Court (TC) judgments in late 2007 overturned the distinction made by OL 4/2000 between residents with legal status and illegal immigrants in access to fundamental rights. The Court made eight rulings¹³⁷ in which it declared the distinction to be unconstitutional for freedom of assembly, freedom of association, the right to non-obligatory education, the right to organise, the right to strike and the right to free legal assistance.

¹³⁶ European Committee of Social Rights, *International Federation for Human Rights (FIDH) v. France*, Complaint No. 14/2003, decision on the merits of 8 September 2004.

¹³⁷ TC Judgments 236/2007 of 7 November 2007, 259/2007 of 19 December 2007, and 260, 261, 262, 263, 264 and 265/2007, all of 20 December 2007.

3 The situation of refugees and stateless persons

3.1 The Geneva Convention on the Status of Refugees

Article 7 of the 1951 Geneva Convention on the Status of Refugees¹³⁸ provides that, at a minimum, the States Parties to this Convention ‘shall accord to refugees the same treatment as is accorded to aliens generally.’ This however is without prejudice to more favourable provisions contained in this same Convention. In Chapters II and IV of the Convention, which define the juridical status of refugees and contain provisions relating to welfare, a number of articles state that the refugee shall benefit in his/her State of habitual residence from equal treatment with nationals. This is the case for instance as regards the protection of industrial property and artistic rights (Article 14), access to courts (Article 16), rationing (Article 20), elementary education (Article 22), and public relief (Article 23). This also applies to labour legislation and social security, including remuneration, family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age of employment, apprenticeship and training, women’s work and the work of young persons, and the enjoyment of the benefits of collective bargaining on remuneration, in so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities (Article 24).

In two other domains, the right of association (Article 15) and the right to engage in wage-earning employment (Article 17), the refugee must be granted the ‘most favourable treatment accorded to nationals of a foreign country, in the same circumstances.’ The question whether this obliges EU Member States to ensure to refugees residing on their territory treatment as favourable as that afforded to nationals from other EU Member States remains controversial. Are citizens of the Union ‘nationals of a foreign country’, meaning that refugees must benefit from the same privileged position in conditions of equality? Or are they instead to be considered as nationals of the host State due to the specific nature of Union citizenship, meaning that the position of refugees does not have to be equated with that of nationals of the other EU Member States as regards freedom of association and the right to be employed? Legal opinion is divided.¹³⁹

In practice, the impact of this controversy is limited since EU Member States generally go beyond the minimum requirements of the Geneva Convention, and refugees under their jurisdiction are granted equal treatment with nationals in most areas of social life.¹⁴⁰ Indeed, as recalled above, Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted¹⁴¹ encourages this, since the provisions of this Directive which relate to access to employment for refugees (Article 26 (1) and (2)), access to education for minors granted refugee status (Article 27(1)), social assistance (Article 28(1)), access to

¹³⁸ Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly Resolution 429 (V) of 14 December 1950, entered into force on 22 April 1954.

¹³⁹ In favour of the former reading, see Jean-Yves Carlier, ‘Droit d’asile et des réfugiés. De la protection aux droits’ in *Recueil des cours de l’Académie de droit international de La Haye*, t. 332 (2007), pp. 274-280. In favour of the latter, see D. Alland and C. Teitgen-Colly, *Traité du droit de l’asile*, Paris, P.U.F., 2002, p. 555.

¹⁴⁰ D. Alland and C. Teitgen-Colly, *Traité du droit de l’asile*, cited above, p. 554.

¹⁴¹ OJ L 304, 30.9.2004, p. 12.

health care (Article 29(1)), particularly for persons with special needs (Article 29(3)) require that refugees benefit from equal treatment with the nationals of the Member States in which they reside.¹⁴²

There is one significant exception, however: refugees are considered to be third-country nationals under Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.¹⁴³ The implication is that they are not assimilated to Union citizens as regards the exercise of the right to seek employment in a Member State other than their State of residence: they are, like other third-country nationals, subject to the five year residency requirement. It may be asked whether this is compatible with Article 17 of the Geneva Convention on the Status of Refugees: if indeed refugees are to be granted the right to engage in wage-earning employment according to the ‘most favourable treatment accorded to nationals of a foreign country, in the same circumstances’, should their assimilation to citizens of the Union not be complete also as regards the right to circulate freely in order to seek employment in another Member State?

3.2 The Convention relating to the Status of Stateless Persons

The 1954 Convention relating to the Status of Stateless Persons¹⁴⁴ has been ratified by 17 EU Member States.¹⁴⁵ It provides that, at a minimum, the States Parties shall accord to stateless persons the same treatment as is accorded to aliens generally under their jurisdiction (Article 7(1)). In addition however, the States Parties must accord to stateless persons within their territories treatment ‘at least as favourable as that accorded to their nationals’ with respect to freedom to practise their religion and freedom as regards the religious education of their children (Article 4), the protection of artistic rights and industrial property (Article 14), access to the courts, including legal assistance and exemption from *cautio judicatum solvi* (Article 16(2)), rationing (Article 20), elementary education (Article 22(1)), public relief (Article 23), labour legislation and social security, including remuneration, family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, the minimum age of employment, apprenticeship and training, women’s work and the work of young persons, and the enjoyment of the benefits of collective bargaining on remuneration, in so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities (Article 24).

4 Conclusion

As regards the acceptability of differences of treatment on grounds of nationality, the evolution of the International Covenant on Civil and Political Rights and the European Convention on Human Rights – the international human rights instruments most influencing EU law – are strikingly similar. Under both treaties, such differences of

¹⁴² This is also generally the case for third-country nationals who are granted subsidiary international protection, although there are a number of exceptions as regards this category. As regards access to accommodation (Article 31) and freedom of movement on the territory of the host State (Article 32), the Directive provides that beneficiaries of refugee or subsidiary protection status have access to accommodation under equivalent conditions as other third-country nationals legally resident in their territories.

¹⁴³ OJ L 16, 23.1.2004, p. 44. The Commission has proposed an extension of this directive in order to allow the beneficiaries of subsidiary international protection to have access to the status of long-term residents. See Proposal for a Council Directive amending Directive 2003/109/EC to extend its scope to beneficiaries of international protection, COM(2007) 298 final of 6.6.2007.

¹⁴⁴ United Nations, Treaty Series, vol. 360, p.117. Adopted on 28 September 1954 by a Conference of Plenipotentiaries convened by Economic and Social Council Resolution 526 A(XVII) of 26 April 1954, entered into force on 6 June 1960.

¹⁴⁵ These are Belgium, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Slovakia, Spain, Sweden, and the United Kingdom.

treatment are increasingly being treated as suspect, and they now require particularly weighty justifications in order to be allowable. This fits within the broader development of international human rights law. Thus, the 1990 Migrant Workers Convention¹⁴⁶ contains a number of provisions which prohibit discrimination between migrant workers and host State nationals.¹⁴⁷ The UN Committee for the Elimination of Racial Discrimination, which considers that 'differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim',¹⁴⁸ has subjected differences of treatment on grounds of nationality to increasingly demanding scrutiny in its monitoring of compliance with the International Convention for the Elimination of All Forms of Racial Discrimination.¹⁴⁹ The European Social Charter, as we have seen, points in the same direction.

This evolution does not mean that differences in treatment between nationals of the EU Member States, on the one hand, and third-country nationals, on the other hand, are necessarily considered discriminatory. But the tautological reasoning behind early cases decided by the European Court of Human Rights such as *Moustaquim* and *Chorfi* seems more and more untenable. In these judgments, the European Court of Human Rights had seemed to allow preferential treatment of nationals of EU Member States (in comparison to third-country nationals) on the basis of the mere idea of a European citizenship, as if this were sufficient to provide the differentiation with an objective and reasonable justification. As more recent cases show – including *Karakurt*, decided by the Human Rights Committee – this circular reasoning should not be enough: only where a difference in treatment on grounds of nationality can be explained by a legitimate objective and does not go beyond what is necessary to fulfil that objective should it be allowed.

A number of rights are attributed by EU law exclusively to citizens of the Union. These rights include the right to vote and to stand as a candidate at elections to the European Parliament¹⁵⁰ and at municipal elections,¹⁵¹ freedom of movement and residence,¹⁵² and the right to diplomatic and consular protection.¹⁵³ Which differences of treatment between nationals of EU Member States and third-country nationals are legitimate according to the emerging consensus in international human rights law? A distinction should be made between political rights, on the one hand, and freedom of movement and residence, on the other. Nationality-based restrictions on the exercise of economic freedoms such as the freedom to move across EU Member States to seek employment seem increasingly challenged by developments in international human rights law. In contrast, at least at its present stage of its

¹⁴⁶ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990), entered into force 1 July 2003.

¹⁴⁷ See Arts. 25 and 43.

¹⁴⁸ General Recommendation No. 30: Discrimination Against Non Citizens, cited above, 1 October 2004.

¹⁴⁹ See for example the Concluding Observations on Bahrain, CERD/C/BHR/CO/7 (14 April 2005), para. 14; or the Concluding Observations on Azerbaijan, CERD/C/AZE/CO/4 (14 April 2005), para. 12; or the Concluding Observations on Denmark, CERD/C/DEN/CO/17 (19 October 2006), para. 19. In these conclusions, the Committee notes that there exists an 'obligation under the Convention not to discriminate against persons on the basis of their national or ethnic origin or against any particular nationality'. In its view, 'differential treatment based on nationality and national or ethnic origin constitutes discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim'.

¹⁵⁰ Article 39 of the Charter of Fundamental Rights. Article 19, paragraph 2, EC provides that every Union citizen residing in a Member State of which he or she does not have the nationality has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State where he or she is residing. This provision has been implemented by Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in elections to the European Parliament for citizens of the European Union residing in a Member State of which they are not nationals (OJ L 329 of 30/12/1993, p. 34).

¹⁵¹ Article 40 of the Charter of Fundamental Rights.

¹⁵² Article 45 of the Charter of Fundamental Rights.

¹⁵³ Article 46 of the Charter of Fundamental Rights.

evolution, international human rights law allows States to make the enjoyment of political rights conditional upon nationality, and this would seem to justify that certain rights of a political nature be granted to nationals of EU Member States in the name of the citizenship of the Union, without their extension to third-country nationals.

Even in this latter area, however, a nuanced appreciation is required since we may be witnessing an evolution towards a strengthened requirement of equality. The Convention on the Participation of Foreigners in Local Public Life, opened for signature in the Council of Europe on 5 February 1992,¹⁵⁴ stipulates that States Parties to that instrument undertake in principle ‘to grant all foreign residents the right to vote and to stand as candidates in local elections, provided that they fulfil the same conditions as those which apply to national citizens and, in addition, have resided legally and regularly in the State in question during the five years preceding the elections’ (Article 6(1)). And as the European Commission noted in its 2005 Communication on ‘A Common Agenda for Integration Framework for the Integration of Third-Country Nationals in the European Union’¹⁵⁵:

‘The participation of immigrants in the democratic process, particularly at the local level, enhances their role as residents and as participants in society. Providing for their participation and for the exercise of active citizenship is needed, most importantly at the political level and especially at the local level. Political rights provide both a means of expression and also bring with them responsibilities. [...] Information is [...] needed about the state of participation of immigrants both in the political process and in the development of integration policies in the different Member States. Such a mapping exercise will contribute to ongoing reflections at EU level on the value of developing a concept of civic citizenship as a means of promoting the integration of immigrants who do not have national citizenship. Problems of identity lie at the heart of the difficulties which many young immigrants in particular seem to face today. Further exploration of these issues at EU level may therefore be helpful.’

This is not an isolated view. In the Opinion of 14 May 2003 on Access to European Union Citizenship, the European Economic and Social Committee asked the European Convention in charge of preparing a Draft Treaty establishing a Constitution for Europe that the right to vote and to stand as candidate in elections, derived from European citizenship, in municipal as well as in European elections, be extended to third-country nationals who are stable or long-term residents in the European Union.¹⁵⁶ This opinion followed on from references to a form of ‘civic citizenship’ made at the time by the Commission in its proposals for progressively aligning the status of third-country nationals with that of the nationals of the Member States.¹⁵⁷ Statements such as these bear witness to the fact that, even as regards the core set of political rights – rights traditionally associated with citizenship such as the right to vote and to stand for elections – traditional differences of treatment on grounds of nationality are breaking down and are increasingly being challenged as obstacles to the integration of immigrants into the community of the host State.

¹⁵⁴ ETS n° 144. The Convention came into force on 1 May 1997.

¹⁵⁵ COM(2005) 389 final, of 1.9.2005.

¹⁵⁶ Opinion CES SOC/41 of 14 May 2003 on Access to European Union citizenship.

¹⁵⁷ Communication of the Commission on a Community Immigration Policy, COM(2000) 757 final; see also COM(2001)127 final. The more recent Communication of 17 June 2008 on A Common Immigration Policy for Europe is vaguer on this point, but it does recommend that the EU Member States ‘explore increased participation at local, national and European levels to reflect the multiple and evolving identities of European societies.’

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Part IV

Protection from Discrimination on Grounds of Nationality in EU Member States

This Part is divided into two parts. First, it examines whether the domestic legal systems of EU Member States include provisions which protect foreigners from being discriminated against on the grounds of their nationality. Second, this Part examines whether protection against discrimination on grounds of race or ethnic origin (or, perhaps more seldom, on grounds of religion or belief) may be relied upon in order to challenge differences in treatment on grounds of nationality, since nationality may be used as a proxy for race or ethnic origin, or for religion or belief.

1 Discrimination on grounds of nationality

1.1 Prohibition of nationality-based discrimination through international treaties or in constitutional provisions

a) *International treaties*

All EU Member States are parties to the International Covenant on Civil and Political Rights, to the Convention on the Rights of the Child, and to the European Convention on Human Rights, and six of them are parties to Protocol no. 12 of the European Convention on Human Rights which extends the scope of non-discrimination requirement under this instrument beyond the enjoyment of the rights and freedoms listed therein.¹⁵⁸ In most States, these instruments, especially the European Convention on Human Rights, are directly applicable by national courts.¹⁵⁹ While the United Kingdom and Ireland were until recently exceptions in this regard, this has changed with the adoption in 1998 of the Human Rights Act (HRA) in the UK¹⁶⁰ and with the adoption in Ireland of the European Convention on Human Rights Act 2003. The Human Rights Act came into force in the UK on 2 October 2000. It gives the UK courts jurisdiction to enforce the rights guaranteed under the ECHR, including Article 14. In Ireland, the European Convention on Human Rights Act 2003 now provides in Section 2 (1) that: 'In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.' Courts in Ireland and in the United Kingdom are therefore now empowered, as in other EU Member States, to enforce the provisions of the European Convention on Human Rights in the cases before them.

b) *Domestic constitutions*

Most Member States have general equality clauses in their national constitutions drafted in terms broad enough to extend to the prohibition of any discrimination on grounds of nationality. Indeed, no single EU Member State lacks an equality clause in its constitution.¹⁶¹ But in one group of States, non-nationals are not protected from discrimination on grounds of nationality. In three of these States, this stems from the fact that the constitution contains an equality clause with a closed list of prohibited grounds of discrimination not including nationality: in Bulgaria, Article 6 (2) of the Constitution bans discrimination on grounds of, exhaustively, race, national origin, ethnicity, sex, origin, religion, education, conviction, political affiliation, personal or public status, and property status – indeed, the Constitution explicitly allows differences on treatment on grounds of nationality (Article 26(2)), although it would appear that the Executive is not allowed to use the criterion of nationality in the absence of a law adopted in Parliament specifically allowing this; in Lithuania, Article 29 of the 1992 Constitution is similarly

¹⁵⁸ The EU Member States which are parties to Protocol n°12 to the ECHR are Cyprus, Finland, Luxembourg, the Netherlands, Romania, and Spain.

¹⁵⁹ See Robert Blackburn and Jörg Polakiewicz, *Fundamental Rights in Europe. The ECHR and Its Member States, 1950-2000*, Oxford University Press, 2001.

¹⁶⁰ See <http://www.hms0.gov.uk/acts/acts1998.htm>.

¹⁶¹ The United Kingdom is the only EU Member State that has no written constitution. The situation of the UK is discussed hereafter in more detail.

restrictive;¹⁶² and in Malta, Article 45 of the Constitution refers to race, place of origin, political opinions, colour, creed or sex.¹⁶³

Two other EU Member States are part of this group of States. In Denmark, Section 71(1) of the Constitution (*Grundloven*)¹⁶⁴ provides that ‘No Danish subject shall in any manner whatever be deprived of his liberty because of his political or religious convictions or because of his descent.’ This section therefore only covers Danish citizens, although foreigners are to some extent protected by Section 70 of the Constitution, which provides that ‘no person shall be denied the right to full enjoyment of civil and political rights by reason of his creed or descent; nor shall he for such reasons evade any common civil duty.’ Yet it would appear from a judgment delivered in 2002 by the Supreme Court¹⁶⁵ that only Parliament may create differences of treatment on grounds of nationality; such distinctions remain allowable, provided they are prescribed by law and are not disproportionate, such as in the case submitted to the Court where third-country nationals were prohibited from acquiring a licence to drive a taxicab.¹⁶⁶ In Romania finally, the principle of equal treatment is guaranteed at constitutional level through Articles 1(3), 4(2), 6 and 16 of the 1991 Constitution. In particular, Article 4(2) of the 1991 Constitution states that ‘Romania is the common and indivisible homeland of all its citizens, without any discrimination on account of race, nationality, ethnic origin, language, religion, sex, opinion, political adherence, property or social origin.’ In this provision, the reference to ‘nationality’ is to members of national minorities, rather than to nationality as defined by citizenship. Article 16(1) states that ‘Citizens are equal before the law and public authorities, without any privilege or discrimination.’ It is unclear whether this provision also ensures protection of foreigners from discrimination: the reference to ‘citizens’ suggests that the anti-discrimination may be invoked only by Romanian nationals. The provisions of the Constitution, in any event, are not directly applicable by courts: they can only be invoked if implemented by legislation or regulation.

All other EU Member States – 21 in total, leaving aside the United Kingdom – have equality clauses within their constitutions which either list no grounds of prohibited discrimination or provide only a non-exhaustive list of such grounds. Most equality clauses contained in constitutions do not include nationality among the prohibited grounds of discrimination: this reflects the fact that nationality has only emerged in recent years as a suspect ground of differentiation. But the open-ended list of grounds contained by these constitutions allows courts to include discrimination on grounds of nationality. They are encouraged to do so by the international human rights instruments referred to above,¹⁶⁷ which clearly are moving towards the recognition of nationality as a suspect ground. In addition, while the fact that certain grounds of discrimination benefit from better protection than others does not constitute *per se* a violation of the international law of human rights, differences in treatment between different categories as to the degree of protection they are afforded will only be acceptable if these differences

¹⁶² Article 29 of the Constitution (adopted by referendum on 25 October 1992 and entering into force on 2 November 1992) declares that all people are equal before the law, the courts and other state institutions and officers. A person’s rights may not be restricted in any way and s/he may not be granted any privileges on the basis of his or her sex, race, nationality, language, origin, social status, religion, convictions or opinions. The reference to ‘nationality’ here, however, should be understood as referring to membership of a national minority, rather than to the notion of citizenship.

¹⁶³ The Maltese courts have confirmed that the list of prohibited grounds of discrimination could not be extended beyond the exhaustive list of Article 45: see *Dr Walter Cuschieri et vs. The Hon. Prime Minister et noe* – Constitutional Court – 30 November 1977. However, the European Convention Act 1987 compensates for this, since any person who alleges discrimination in the enjoyment of the rights and freedoms provided for in the Convention may apply to the Maltese Courts for redress.

¹⁶⁴ Lov 1953-06-05 No. 169 Danmarks Riges Grundlov.

¹⁶⁵ Danish Law weekly 2002 page 1789 Supreme Court (UfR. 2002. 1789.H).

¹⁶⁶ Bill no. 329 of 14 May 1997 provided that in future only persons of Danish nationality and persons from EU member countries could obtain a licence as a taxicab owner. The bill was changed in 1999 so that Danish nationality is now no longer a condition for obtaining this licence.

¹⁶⁷ For example, the Latvian Constitutional Court has adopted the doctrine that the norms of the Constitution have to be interpreted in the light of international human rights standards binding upon Latvia: Constitutional Court 30 August 2000 judgment in case No.2000-03-01, available in English at [http://www.satv.tiesa.gov.lv/Eng/Spriedumi/03-01\(00\).htm](http://www.satv.tiesa.gov.lv/Eng/Spriedumi/03-01(00).htm).

are reasonably and objectively justified, which requires that they pursue a legitimate aim and that there exists a reasonable relationship of proportionality between the means employed and the aim sought to be realised.¹⁶⁸

The situation in the States forming this second group may be summarised as follows:

- In Austria, the general principle of equality is enshrined in Article 2 of the Basic Law of the State 1867 (*Staatsgrundgesetz, StGG*) and in Article 7 of the Federal Constitutional Act 1929 (*Bundes-Verfassungsgesetz, B-VG*).
- In Belgium, Articles 10 and 11 of the Constitution guarantee in general terms equality and non-discrimination. The Constitutional Court (formerly called Court of Arbitration) has considered (since a judgment of 14 July 1994) that non-nationals are protected by Articles 10 and 11 of the Constitution prohibiting discrimination.
- In Cyprus, Article 28(1) of the Constitution states: 'All persons are equal before the law, the administration and justice, and are entitled to equal protection thereof and treatment thereby.' Article 28(2) guarantees the enjoyment of economic, social and cultural rights by all persons without any discrimination and provides that every person shall enjoy all the rights and liberties provided for in the Constitution without any direct or indirect discrimination against any person on the grounds of: community; race; religion; language; sex; political or other conviction; national or social descent; birth; colour; wealth; social class; or any ground whatsoever, unless the Constitution itself provides otherwise. The Fundamental Rights and Liberties of Part II of the Constitution are expressly guaranteed to 'everyone' or to 'all persons' or to 'every person', with no distinction or differentiation between citizens and non-citizens of the Republic. However, Article 32 states that nothing in Part II of the Constitution 'shall preclude the Republic from regulating by law any matter relating to aliens in accordance with International Law.'
- The Constitution of the Czech Republic¹⁶⁹ lacks a specific provision prohibiting discrimination, but a general anti-discrimination clause can be found in the Charter of Fundamental Rights and Freedoms,¹⁷⁰ which prohibits discrimination in regard to basic rights and freedoms in respect of sex, race, colour, language, religion or belief, political or other orientation, national or social origin, adherence to national or ethnic minority, property, birth or any other status. The Charter forms part of the constitutional order, which has precedence over ordinary laws.¹⁷¹
- In Estonia, Article 12, al. 1, of the Constitution reads: 'Everyone is equal before the law. No one shall be discriminated against on the basis of ethnic origin, race, colour, sex, language, origin, religion, political or other opinion, property or social status, or on other grounds.'¹⁷²
- In Finland, Article 6(1) of the Constitution contains a general principle of equality broad enough to prohibit discrimination on grounds of nationality.¹⁷³
- In France, Article 1 of the Constitution of 1958 states that: 'France guarantees equality before the law to all citizens without distinction based on origin, race or religion.' The Declaration of the Rights of Man and Citizen of 1789, which is also part of the 'constitutional block' of texts whose principles are considered binding, states in Article 1: 'Men are born and remain free and equal in rights. Social distinctions can have no other basis than common utility.' The list of discriminatory criteria listed in the Constitution has not been deemed to be exhaustive by the Constitutional Council who decided that the list of grounds was open and subject to evolution.¹⁷⁴

¹⁶⁸ Eur. Ct. HR (GC), *Burden v. the United Kingdom*, Appl. No. 13378/05, judgment of 29 April 2008, para. 60.

¹⁶⁹ *1/1993Sb., Ústava České republiky* [No. 1/1993 Coll., Constitution of the Czech Republic (Collection of Laws 1993, no.1 p.001)].

¹⁷⁰ *2/1993 Sb., Listina základních práv a svobod* [No.2/1993 Coll., the Charter of Fundamental Rights and Freedoms (Collection of Laws 1993, no. 1 p. 017)].

¹⁷¹ Newly approved constitutional laws must be in accordance with the Constitution and the Charter. Although the Charter is regarded as a part of the constitutional order, it is not possible to challenge the Constitution or any constitutional law for being inconsistent with the Charter. There are no provisions giving guidance on interpretation in the event of conflicts between the Charter and Constitution or constitutional laws. Public authorities, including the courts, are not permitted to apply any laws that contradict any of the basic rights guaranteed by the Charter.

¹⁷² *Eesti Vabariigi põhiseadus, Riigi Teataja* 1992, 26, 349 *Riigi Teataja* (hereinafter RT) – Official State Gazette.

¹⁷³ Section 6(1) of the Constitution [*perustuslaki* (731/1999)] states that 'Everyone is equal before the law'.

¹⁷⁴ Mélin-Soucranian, *Le principe d'égalité dans la jurisprudence du Conseil constitutionnel*, RFDA, Economica, 1997, 92. Conseil d'Etat, *Sur le principe d'égalité*, La documentation Française, 1998.

- In Germany, the guarantee of equality in Article 3 of the Federal Basic Law (*Grundgesetz*)¹⁷⁵ provides for equality before the law without this being limited to a series of enumerated grounds.¹⁷⁶ This guarantee has been interpreted by the Federal German Constitutional Court as going beyond the equal application of law and as giving the right to create law that respects the principle of equality in treating essentially equal things equally and essentially unequal things unequally.¹⁷⁷
- In Greece, in addition to a reference to the general principle of equality in Article 4.1, the Constitution provides in Article 25 that ‘the rights of man as an individual and as a member of society and the principle of the constitutional welfare state’, which the State must guarantee, must be complied with not only by the agents of the State but also in relationships between private parties. The Court of First Instance of Thessaloniki in its Decision no. 5251/2004 declared that Article 25 of the Greek Constitution entitles foreigners to equal treatment as that right is granted to nationals in the field of human rights, explaining that the phrase ‘human rights’ includes foreigners who reside in Greece as well as nationals. These rights include not only the respect of human dignity and the free development of personality but also the right to work and equal pay as well as to welfare benefits, namely all the rights that nationals enjoy. The same decision recognized that in matters related to principle of equality and human rights, reciprocal recognition of these rights by the foreign national’s state of origin could not be required.
- In Hungary, Article 70/A of Act XX of 1949 of the Constitution contains a general equality clause which may be applied to discrimination on grounds of nationality.
- In Ireland, the Constitution (*Bunreacht na hEireann*) of 1937 contains an equality clause in Article 40.1 which states: ‘All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.’ In addition, the Constitutional Courts have held that some of the protections of the Constitution can be extended to non-citizens.¹⁷⁸ To date however, the Irish Supreme Court has been disinclined to rigorously enforce the equality provision.¹⁷⁹ The Constitution Review Group has stated that the provision ‘has too frequently been used by the courts as a means of upholding legislation by reference to questionable stereotypes, thereby justifying discrimination.’¹⁸⁰
- In Italy, Article 3 of the 1948 Constitution recognises equal dignity and equality under the law without distinction on grounds of sex, race, language, religion, political opinions, and personal or social conditions. The latter expression may be broad enough to encompass differences of treatment on grounds of nationality.
- In Latvia, Article 91 of the *Satversme* contains a general equality clause which may be applied to discrimination on grounds of nationality.
- In Luxembourg, the principle of equal treatment is incorporated in Article 10 *bis* of the Constitution, according to which all Luxembourgers are equal before the Law. Although this non-discrimination principle applies *stricto sensu* only to Luxembourg nationals and not foreign citizens, it is generally understood to be a general principle of law implying equality for all inhabitants.
- In the Netherlands, Article 1 of the 1983 Constitution provides that: ‘All who are in the Netherlands shall be treated equal in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race, sex or on any other ground shall be prohibited’.
- In Poland, the 1997 Constitution contains a general anti-discrimination clause that reads: ‘(1) All persons shall be equal before the law. All persons shall have the right to equal treatment by the public authorities. (2) No one

¹⁷⁵ No attempt is made here to go through the constitutions of the Länder. It should be noted however that in a number of these, the list of protected grounds in equality provisions includes a reference to nationality.

¹⁷⁶ Article 3.1 All humans are equal before the law.

¹⁷⁷ Settled case law, BVerfGE (Decisions of the Federal Constitutional Court) 49, 148 (165); 98, 365 (385).

¹⁷⁸ *The State (Nicolaou) v. An Bord Uchtála*, [1966] IR 567.

¹⁷⁹ Casey, *Constitutional Law in Ireland*, 3rd Ed Dublin 2000.

¹⁸⁰ Government of Ireland, (1996) *Report of the Constitution Review Group*, at 228

shall be discriminated against in political, social or economic life for any reason whatsoever.¹⁸¹ This principle is not restricted to specific grounds of discrimination.¹⁸²

- In Portugal, Articles 13 and 26(1) of the Constitution of 2 April 1976¹⁸³ contain a principle of equal treatment and a general prohibition of discrimination. Although ancestry, sex, race, language, country of origin, religion, political or ideological convictions, education, economic situation, social condition and sexual orientation, are explicitly referred to, the list is non exhaustive. Article 15 also provides for the equal treatment of aliens and stateless persons, establishing that aliens and stateless persons temporarily or habitually resident in Portugal shall enjoy the same rights and are subject to the same duties as Portuguese citizens. Exceptions to this general rule are political rights, the exercise of public functions which are not predominantly technical, and the rights and duties which according to the Constitution or the law are restricted to Portuguese citizens. Articles 58 and 59 provides for the equal treatment of all workers without discrimination.
- In the Slovak Republic, Article 12(2) of the Constitution states that ‘fundamental rights and freedoms are guaranteed in the territory of the Slovak Republic to every person regardless of sex, race, skin colour, language, belief, religion, political affiliation or conviction, national or social origin, nationality or ethnic origin, property, lineage or any other status. No person shall be denied their legal rights, discriminated against or favoured on any of these grounds.’ Although the reference to ‘nationality’ is to membership of a national minority rather than to citizenship, the list of prohibited grounds is open-ended, which would make it possible to include discrimination on grounds of nationality in this general prohibition.
- In Slovenia, Article 14 § 1 of the Constitution¹⁸⁴ provides that everyone shall be guaranteed equal human rights and fundamental freedoms irrespective of national origin, race, gender, language, religion, political or other conviction, financial status, birth, education, social status, disability or any other personal circumstance (Article 14). The Slovenian Constitutional Court confirmed in a judgment of 23 September 1998 that this provision extended to differences of treatment on grounds of nationality.
- In Spain, Article 14 of the Spanish Constitution provides for equality before the law and prohibits discrimination ‘on the grounds of birth, race, sex, religion, opinion or any other personal or social condition or circumstance.’ By protecting a worker from discrimination on grounds of sexual orientation, the Constitutional Court has made it clear that this constituted an open-ended list, which therefore extends to nationality.¹⁸⁵
- In Sweden, Paragraph 4 of Article 2 of the 1975 Instrument of Government¹⁸⁶ guarantees equality in general terms, thus also offering a protection against discrimination on grounds of nationality.

Since the United Kingdom does not have a written constitution – although there are a number of ‘constitutional conventions’ – it deserves specific comment. There is a general principle according to which legislation may not create ‘partial and unequal treatment as between different classes.’¹⁸⁷ This general principle has a scope of application that goes beyond non-discrimination in the enjoyment of fundamental rights. As stated by Lord Steyn in a lecture that he gave on 18 September 2002 in honour of Lord Cooke of Thorndon: ‘The anti-discrimination provision contained in Article 14 of the European Convention is parasitic in as much as it serves only to protect other Convention rights. There is no general or free-standing prohibition of discrimination. This is a relatively weak provision. On the other hand, the constitutional principle of equality developed domestically by English courts is

¹⁸¹ Article 32 Constitution of the Republic of Poland [further: Constitution].

¹⁸² ‘This means that the creators of the Constitution gave the principle of equality a universal dimension, referring to all forms of differentiation which may arise in political, social or economic life, regardless of the characteristic (criterion) according to which differentiation may occur’ – from the judgment of the Constitutional Tribunal of 16 December 1997 K. 8/97.

¹⁸³ *Constituição da República Portuguesa de 2 de Abril de 1976*. The text of the 1976 Constitution can be read at <http://www.cidadevirtual.pt/cpr/legis2.html>.

¹⁸⁴ *Ustava Republike Slovenije* [The Constitution of the Republic of Slovenia], Official Journal of the Republic of Slovenia, No. 33/1991, 42/1997, 66/2000, 24/2003, 69/2004.

¹⁸⁵ Judgment of the Constitutional Court 41/2006, of 13 February 2006: *P.C. vs. Alitalia Italian Airlines*.

¹⁸⁶ *Lag 2002:903*.

¹⁸⁷ *Kruse v Johnson* [1898] 2 QB 91.

wider. The law and the government must accord every individual equal concern and respect for their welfare and dignity. Everyone is entitled to equal protection of the law, which must be applied without fear or favour. Except where compellingly justified distinctions must never be made on the grounds of race, colour, belief, gender or other irrational ground. Individuals are therefore comprehensively protected from discrimination by the principle of equality. This constitutional right has a continuing role to play. The organic development of constitutional rights is therefore a complementary and parallel process to the application of human rights legislation.¹⁸⁸

In the case of *ABCIFER v Secretary of State for Defence*,¹⁸⁹ a claim had been filed by British civilian subjects who were neither born in the United Kingdom nor had a parent or grandparent who had been so born, after it was announced that a scheme providing compensation to 'British civilians' who were interned as prisoners of war by the Japanese during the Second World War would benefit only those born in the UK or whose parents or grandparents had been born there. Although this constituted a clear case of a difference of treatment on grounds of national origin, the claim failed because the judge was unable to conclude that the imposition of a requirement of a link to the United Kingdom on the part of the civilian claimants was irrational and that the distinction should therefore be considered discriminatory. He pointed to the wide category of persons who were 'British subjects' in the 1940s but who were now nationals of independent states. He held that it was reasonable for the Government to take the view that the scheme should be limited to persons with some close connection with the United Kingdom and, following that, to determine the criteria for qualification. The *ABCIFER* case was distinguished in *Pahalam Gurung and Others v. Ministry of Defence*, however, where the Court (McCombe J.) decided that the exclusion of Gurkha soldiers from a scheme of compensation payments awarded to former prisoners of war held in Japanese prison camps in the Second World War was based on *de facto* racial distinctions, which were contrary to this common law principle of non-discrimination.¹⁹⁰ While no case could be identified where a difference of treatment on grounds of nationality was considered to be 'irrational' and thus to constitute discrimination, it cannot be excluded that such distinctions will be successfully challenged in the future under this common law principle.

In sum, including the United Kingdom, 22 out of 27 EU Member States protect non-nationals from discrimination on grounds of nationality by rules which are adopted at a constitutional level. This protection remains fragile in certain States however: in Ireland, the reliance by courts on the equality clause contained in the constitution is weak; in Cyprus, the legislator is explicitly authorised to adopt specific legislation on foreigners, which may lead the courts to presume differences of treatment on grounds of nationality to be compatible with the Constitution. More generally, protection from discrimination on grounds of nationality is the result of judicial interpretation of generally worded equality provisions: there is no example in which a national constitution makes an explicit reference to nationality in such provisions. Although there are no clear examples in the case law of some Member States in this second group of the general equality clauses of the relevant constitutions being interpreted in order to protect foreigners from nationality-based discrimination, such interpretation is nevertheless increasingly plausible when we take into consideration developments in international human rights law and the tendency of domestic courts for obvious reasons to seek to interpret provisions of national law in accordance with the international obligations of the States of which they are an organ.

There is no doubt, for all these reasons, that the requirement of non-discrimination on the grounds of nationality has developed into a general principle of law which the European Court of Justice may rely upon in the future in order to identify the fundamental rights for which it ensures respect in the scope of application of EU law. Indeed, the general principle of equal treatment has already been accorded this status, as this comparison shows; protection from discrimination on grounds of nationality is part both of the international human rights instruments to which EU Member States are parties and of their common constitutional traditions. The implication is that in implementing EU law, EU Member States may not establish differences of treatment on grounds of nationality,

¹⁸⁸ Quoted in *Pahalam Gurung and Others v. Ministry of Defence*, [2002] EWHC 2463 (Admin.) (leading opinion by Mr Justice McCombe), para. 36.

¹⁸⁹ [2002] EWHC 2119 (Admin.).

¹⁹⁰ [2002] EWHC 2463 (Admin.).

unless they can provide proper justification for this, i.e. unless such distinctions are in pursuance of a legitimate aim and are necessary for the achievement of that aim. This may lead in the future to the extension of rights presently reserved to nationals of other EU Member States (citizens of the Union) to all non-nationals who are legally present on the territory of the EU Member State concerned.

1.2 Prohibition of nationality-based discrimination in ordinary legislation

In at least 11 Member States, domestic legislation implementing the Racial Equality Directive (alone or with the Employment Equality Directive) explicitly extends the prohibition of discrimination to discrimination on grounds of nationality:

- In Belgium, the 2007 Racial Equality Federal Act (Federal Act amending the Act of 30 July 1981 criminalising certain acts inspired by racism or xenophobia)¹⁹¹ defines nationality as a prohibited ground; a judgment of 26 March 2007 of the President of the First Instance Labour Court (*Tribunal du travail*) of Ghent in the case of *Caliskan Murat and Centre for Equal Opportunities and Opposition to Racism v. Delgouffe Yves and Euro-Lock* provides a good illustration of the use of this prohibition.¹⁹² However, the nature of this prohibition is slightly more flexible than for the other grounds covered by the Act (alleged race, colour, descent, ethnic or national origin). Whereas for the latter grounds differences in treatment may only be justified in certain exhaustively enumerated situations, differences of treatment based on nationality may be justified if they seek to fulfil legitimate objectives by means which are both appropriate and necessary; discrimination based on nationality may be justified as means both appropriate and necessary for the fulfillment of legitimate objectives (Article 7 § 2, al. 1) unless this would be in violation of the prohibition of discrimination on grounds of nationality under EU law (Article 7 § 2, al. 2); by contrast, differences in treatment based on alleged race, colour, descent, national or ethnic origin, are in principle absolutely prohibited (i.e. such differences cannot be justified) (Article 7 § 1).
- In Bulgaria, the Protection Against Discrimination Act treats nationality in principle as a protected ground, banning all forms of discrimination based on it in all fields of life.¹⁹³ It makes a significant exception, however, for differential treatment based on nationality that is provided for under primary legislation.¹⁹⁴ As we have seen therefore, executive and local government bodies, as well as private parties, are not allowed to treat non-nationals differently based on their nationality, unless Parliament has authorised such treatment by law. Under the Protection Against Discrimination Act, both nationality and statelessness are included in the concept of nationality as a protected ground.¹⁹⁵
- In the Czech Republic, the draft Anti-discrimination Law may also apply to discrimination on grounds of nationality. At present, Paragraph 2 of Section 4 of Law No. 435/2004 Coll. on Employment¹⁹⁶ prohibits discrimination in employment on a number of grounds including racial or ethnic origin, national origin, and nationality; but the reference to nationality in this context would seem to be to membership of a national minority, rather than to the country of citizenship.
- In Finland, Section 6(1) of the Non-Discrimination Act [*yhdenvertaisuuslaki 21/2004*] provides that ‘no-one shall be discriminated against on the basis of age, ethnic or national origin, nationality, language, religion, belief, opinion, health, disability, sexual orientation or any other reason related to a person.’ In the fields of employment and education, the Non-Discrimination Act thus prohibits discrimination also on the grounds of

¹⁹¹ *Moniteur belge*, 30.5.2007.

¹⁹² In this case, the defendant firm Euro-Lock was found to be in violation of the Federal Anti-discrimination Act of 25 February 2003 applicable at the time, after it had refused to hire someone because of his national origin. This was held directly discriminatory by the President of the Labour Court of Ghent in an injunction procedure (*action en cessation*).

¹⁹³ Article 4 (1).

¹⁹⁴ Article 7 (1.1).

¹⁹⁵ Article 7 (1.1) expressly exempts legal differences of treatment based on lack of nationality, as well as nationality.

¹⁹⁶ *Zákon č. 435/2004 Sb., o zaměstnanosti* [Law no. 435/2004 Coll., on Employment (Collection of Laws 2004, no.143 p. 8270)].

national origin and nationality.¹⁹⁷ At the same time, it explicitly allows for differences of treatment on grounds of legal status: Section 3 of the Act provides that the Act does not apply to the ‘application of provisions governing entry into and residence in the country by foreigners, or the placing of foreigners in a different position for a reason deriving from their legal status under the law.’

- In Greece, the anti-discrimination law (Law n. 3304/2005) lists nationality, along with race, ethnic origin, language, religion, political or other beliefs, sex, disability, age and sexual orientation among the prohibited grounds of discrimination. In practice, nationality (or national origin) is not clearly distinguished from race and ethnic origin, as illustrated by decisions of the Supreme Administrative Court, namely n. 957/2003, 3057/1999, 3832/1992, and 3603/1991.
- In Hungary, the Equal Treatment Act does not mention explicitly nationality as a prohibited ground of discrimination, but this Act does refer to ‘other grounds’. The list of prohibited grounds is thus open-ended, and may therefore include nationality (i.e., citizenship); in case 56/2007 for example, the Equal Treatment Authority took the view that a financial services company had committed direct discrimination because it refused a loan to a Romanian citizen, arguing that the risks of non-repayment were too high.
- In Ireland, the Employment Equality Act 1998-2004 and Equal Status Act 2000-2004 both prohibit discrimination on nine grounds: marital status, family status, sexual orientation, religious belief, age, disability, gender, race (including nationality and ethnic origin) and membership of the traveller community.¹⁹⁸ Nationality is therefore included among the prohibited grounds of discrimination. There are important exceptions, however, in both these acts. Section 12(7) of the Employment Equality Act 1998-2004 provides for different treatment on the basis of nationality in relation to fees for admission or attendance at any vocational or training course, where different treatment is permitted for citizens of Ireland or nationals of other Member States of the European Union. It also provides that it is not discriminatory to offer assistance to particular categories of persons by way of sponsorships, scholarships, bursaries or other awards, which assistance is reasonably justifiable, having regard to traditional or historical considerations. The Equal Status Act 2000-2004 at Section 6(7) provides that nothing in the Act shall be construed as prohibiting, in relation to housing accommodation provided by or on behalf of the Minister, different treatment to persons on the basis of their nationality, gender, family size, family status, marital status, disability, age or membership of the traveller community. In addition, educational establishments are exempted in Section 7 of the Equal Status Act 2000-2004 and a new subsection has been added by virtue of the Equality Act 2004, permitting the Minister for Education and Science to differentiate between nationals, members of the European Union and others in relation to the provision of educational grants.¹⁹⁹ Section 5(2)(f) continues to permit a difference in treatment of persons on the basis of nationality in relation to the provision or organisation of a sporting facility or event to the extent that the differences are reasonably necessary having regard to the nature of the facility or event and are relevant to the purpose of the facility or event. A final distinction made in this area relates to Section 9 of the Equal Status Act which provides that a club will not be a discriminating club if it excludes membership by reason only that its principal purpose is to cater for the needs of a particular nationality.
- In the Netherlands, Article 1 of the General Equal Treatment Act (GETA) (*Algemene Wet Gelijke Behandeling*)²⁰⁰ defines ‘direct distinction’ as ‘distinction between persons on the grounds of religion, belief, political opinion, race, sex, nationality, hetero- or homosexual orientation or marital status.’ The GETA thus prohibits discrimination on grounds of nationality. However, Article 2(5) GETA²⁰¹ adds that this prohibition shall not apply, if the distinction is based upon *generally binding rules* (i.e. statutory legislation and subordinate legislation passed

¹⁹⁷ For the Åland Islands however, the Provincial Act on the Prevention of Discrimination does not prohibit discrimination on the basis of nationality.

¹⁹⁸ Section 3(2)(a-j) Equal Status Act 2000-2004 and section 6(2)(a-i) Employment Equality Act 1998-2004.

¹⁹⁹ Section 7(5)(b) Equal Status Act 2000-2004.

²⁰⁰ Staatsblad 1994, 230.

²⁰¹ Article 2(5) GETA reads: ‘The prohibition on discrimination on the grounds of nationality contained in this Act shall not apply: (a) if the discrimination is based on generally binding regulations or on written or unwritten rules of international law and (b) in cases where nationality is a determining factor.’ This clause is generally understood in such a way that especially immigration law and nationality law is exempted from equal treatment legislation.

by the administration such as governmental decrees) or on *written or unwritten rules of international law*²⁰²; nor does this prohibition apply where ‘nationality’ is a determining factor (e.g. nationality requirements imposed upon players for the national football team).²⁰³

- In Portugal, Law 7/2009 of 12 February 2009 adopting the new Labour Code implements Directives 2000/43 and 2000/78 in Article 2 (i) and (j).²⁰⁴ However, Article 24 of the new Labour Code extends the prohibition of discrimination in employment beyond the grounds listed in Article 13 EC by prohibiting direct or indirect discrimination *inter alia* on grounds of nationality. Article 3 (2) of Law 18/2004 of 11 May 2004 which transposes Council Directive 2000/43 of 29 June 2000 into Portuguese law²⁰⁵ also goes beyond the Racial Equality Directive as it prohibits discrimination based on nationality and skin colour.
- In Romania, Article 2 of Governmental Ordinance 137/2000 (implementing the 2000 directives) defines discrimination as: ‘any difference, exclusion, restriction or preference based on race, nationality,^[206] ethnic origin, language, religion, social status, beliefs, sex, sexual orientation, age, disability, chronic disease, HIV positive status, or *belonging to a disadvantaged group or any other criterion*, aiming to or resulting in a restriction or prevention of the equal recognition, use or exercise of human rights and fundamental freedoms in the political, economic, social and cultural field or in any other fields of public life.’²⁰⁷ This open-ended formulation suggests that differences of treatment on grounds of citizenship (nationality in the meaning in which the expression is used in this report) may be challenged under this legislation. Indeed, on the basis of Article 2 (3) of GO 137/2000²⁰⁸ a Syrian citizen, B.A., filed a complaint with the national equality body – the *Consiliul Național pentru Combaterea Discriminării* [National Council for Combating Discrimination (NCCD)] – on the basis that the requirements established by Law 306/2005 on exercising the profession of medical doctor were discriminatory. This legislation restricted the right to obtain authorisation to freely practice medicine to Romanian citizens, citizens of the EU Member States, spouses or descendants of EU citizens and long term residents (but not to spouses of Romanian citizens as in the case of the plaintiff). The NCCD concluded that such conditions amount to indirect discrimination on grounds of nationality.²⁰⁹
- In Slovenia, both the Act Implementing the Principle of Equal Treatment and the Employment Relations Act prohibit discrimination on the basis of an open-ended list of grounds, therefore including, albeit implicitly, nationality. The Act Implementing the Principle of Equal Treatment, which entered into force on 7 May 2004 and was amended in 2007,²¹⁰ ensures that equal treatment is guaranteed irrespective of personal circumstances such as gender, ethnicity, race or ethnic origin, religion or belief, disability, age, sexual orientation, or other personal circumstance.²¹¹ Article 6 § 1 of the 2002 Employment Relations Act, which entered into force on 1 January 2003 and was further amended on 29 October 2007,²¹² prohibits discrimination in employment on grounds

²⁰² See e.g. ETC Opinion 2002-61, 1998-81 and 1997-13.

²⁰³ See e.g. ETC Opinion 1996-77.

²⁰⁴ *Lei n.º 7/2009 de 12 de Fevereiro de 2009, aprova a revisão do Código do Trabalho*. Its text can be read at: <http://www.dre.pt/pdf1s/2009/02/03000/0092601029.pdf>.

²⁰⁵ *Lei n.º 18/2004 de 11 de Maio de 2004, transpõe para a ordem jurídica nacional a Directiva n.º 2000/43/CE do Conselho, de 29 de Junho, que aplica o princípio da igualdade de tratamento entre as pessoas, sem distinção de origem racial ou étnica, e tem por objectivo estabelecer um quadro jurídico para o combate à discriminação baseada em motivos de origem racial ou étnica*.

²⁰⁶ The expression should be understood in this context as referring to national minorities or to ethnicity of a national minority.

²⁰⁷ Emphasis added.

²⁰⁸ Article 2 (3) of GO 137/2000 prohibits ‘any provisions, criteria or practices apparently neutral which disadvantage certain persons on grounds of one of the protected grounds from para.(1) [race, nationality, ethnic origin, language, religion, social status, beliefs, sex, sexual orientation, age, disability, chronic disease, HIV positive status, belonging to a disadvantaged group or any other criterion], unless these practices, criteria and provisions are objectively justified by a legitimate aim and the methods used to reach that purpose are appropriate and necessary.’

²⁰⁹ NCCD, *B.A. v. Ministry of Health and the College of Doctors*, 31.08.2005.

²¹⁰ This act was amended on 22 June 2007; the amendments entered into force on 25 July 2007.

²¹¹ *Zakon o uresničevanju načela enakega obravnavanja – Uradno prečiščeno besedilo* [Act Implementing the Principle of Equal Treatment – Official Consolidated Version], Official Journal of the Republic of Slovenia, No. 93/2007.

²¹² These amendments came into force on 28 November 2007.

of ethnicity, race or ethnic origin, national and social origin, gender, skin colour, state of health, disability, religion or belief, age, sexual orientation, family status, membership in a trade union, financial situation or other personal circumstance.

In at least 11 other EU Member States, discrimination on grounds of nationality is prohibited in specific fields under ordinary legislation distinct from that implementing the Racial Equality Directive and the Employment Equality Directive:

- In Austria, administrative penal law protects social groups characterised by their 'race', ethnicity, national origin (*nationale Herkunft*), religion and (since 1997) disability against disadvantage.²¹³ Although most authors still consider that the reference to national origin should be distinguished from a reference to nationality (citizenship), a reading of this provision in accordance with the International Convention on the Elimination of All Forms of Racial Discrimination could lead to a different conclusion in the future.
- In France, where the legislation implementing the Racial Equality and the Employment Equality Directives does not extend the prohibition of discrimination to discrimination on grounds of nationality,²¹⁴ the criterion of nationality has been held in criminal cases to be a form of direct discrimination based on origin as the Criminal Code refers to discrimination based on the link with a nation,²¹⁵ while the Labour Code also contains a prohibition of discrimination on grounds of nationality.²¹⁶ There are also interesting developments in case law which show increased protection from differences of treatment on grounds of nationality. A decision adopted on 18 December 2007 by the *Conseil d'Etat* (the highest administrative court) is worth mentioning

²¹³ Article IX par. 1 lit. 3 Introductory Law to the Administrative Procedures Code 1925 [*Einführungsgesetz zu den Verwaltungsverfahrensgesetzen 1925, EGVG*]. Until 1997 the offence covered only public disadvantage. Since 1997 also non-public disadvantage is an offence (Federal law Gazette I 63/1997).

²¹⁴ See *Loi n° 2008-496 du 27 mai 2008 portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la lutte contre les discriminations*.

²¹⁵ See Article 225-1 of the Criminal Code as amended by Law n°2006-340 of 23 March 2006 (Article 13), JORF 24 March 2006: '*Constitue une discrimination toute distinction opérée entre les personnes physiques à raison de leur origine, de leur sexe, de leur situation de famille, de leur grossesse, de leur apparence physique, de leur patronyme, de leur état de santé, de leur handicap, de leurs caractéristiques génétiques, de leurs moeurs, de leur orientation sexuelle, de leur âge, de leurs opinions politiques, de leurs activités syndicales, de leur appartenance ou de leur non-appartenance, vraie ou supposée, à une ethnie, une nation, une race ou une religion déterminée*'. [Any discrimination made between natural persons for reason of their origin, sex, family situation, pregnancy, physical appearance, family name, state of health, disability, genetic characteristics, lifestyle, sexual orientation, age, political opinions, trade union activities or their membership or non membership, real or supposed, of an ethnic group, nation, race or certain religion, amounts to discrimination.]

²¹⁶ See Article 1132-1 of the Labour Code (Code du travail), as amended by Article 6 of *Loi n° 2008-496 du 27 mai 2008 portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la lutte contre les discriminations*: '*Aucune personne ne peut être écartée d'une procédure de recrutement ou de l'accès à un stage ou à une période de formation en entreprise, aucun salarié ne peut être sanctionné, licencié ou faire l'objet d'une mesure discriminatoire, directe ou indirecte, notamment en matière de rémunération, (...), de mesures d'intéressement ou de distribution d'actions, de formation, de reclassement, d'affectation, de qualification, de classification, de promotion professionnelle, de mutation ou de renouvellement de contrat en raison de son origine, de son sexe, de ses moeurs, de son orientation sexuelle, de son âge, de sa situation de famille ou de sa grossesse, de ses caractéristiques génétiques, de son appartenance ou de sa non-appartenance, vraie ou supposée, à une ethnie, une nation ou une race, de ses opinions politiques, de ses activités syndicales ou mutualistes, de ses convictions religieuses, de son apparence physique, de son nom de famille ou en raison de son état de santé ou de son handicap*'. [No person may be excluded from a recruitment procedure or from access to a placement or a period of training in a company, no employee may be disciplined, dismissed or subjected to a discriminatory measure, direct or indirect, in particular regarding remuneration, (...) from measures of profit-sharing or share distribution, training, redeployment, appointment, qualification, classification, career promotion, or change or renewal of his contract for reason of his origin, sex, lifestyle, sexual orientation, age, family situation or pregnancy, genetic characteristics, membership or non membership, real or supposed, of an ethnic group, nation or race, political opinions, trade union or mutualist activities, religious convictions, physical appearance, family name or for reason of his state of health or disability.]

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in this regard. By ministerial instruction of 28 September 2007, the Minister of Foreign Affairs gave to consular and diplomatic authorities abroad the faculty to refuse to register civil partnerships (PACS) between French nationals and foreigners, thereby preventing these couples from prevailing themselves of the corresponding spousal residential rights in France. This instruction was adopted on the ground that same sex couples were prohibited by law in certain countries and in consideration of the fact that registration of the PACS might put the persons concerned at risk in their country of residence. The *Conseil d'Etat* quashed this ministerial instruction on the ground that the alleged risks were more related to the spouses' cohabitation than to the registration of the partnership and that the institution of a differential practice according to whether the two spouse were of French nationality or one was of foreign nationality would be contrary to the principle of equality. That is not to say, of course, that differences of treatment on grounds of nationality will necessarily be judged to constitute discrimination: they may be allowed, as long as they may be objectively and reasonably justified and that they respect the principle of proportionality.²¹⁷ But this decision by the *Conseil d'Etat* is by no means isolated.

For example, a French court decided in a judgment of 16 March 2005 that, since Article L312-1 of the Monetary and Financial Code, which defines the conditions governing the right to a bank account, does not foresee the obligation to prove legal residence in France before opening a bank account, the *Banque de France* could not be authorised to refuse the right to open a bank account to illegal and non resident non nationals.²¹⁸ More recently, the *Conseil d'Etat* annulled Articles 4 and 5 of the Decree of 27 August 2004 modifying the decree of 27 May 1999 and Article 2 of the Decree of 27 August 2004 since these provisions imposed a condition of nationality on the right to be elected and to vote in the Chamber of Trade, restricting it to the holders of citizenship of France or an EU Member State.²¹⁹

- In Germany, ordinary legislation sometimes prohibits discrimination including nationality as forbidden ground. According to Section 75.1 of the Work Constitution Act (*Betriebsverfassungsgesetz*), employers and work councils are under an obligation to ensure that all employees are treated in conformity with the principles of law and fairness, and in particular that nobody is discriminated against because of race or ethnic origin, parentage or other origin, nationality, religion or belief, disability, age, political or union activities or attitudes, sex or sexual identity.²²⁰ Section 27.1 of the Law on Bodies of Executives (*Sprecherausschussgesetz*) contains an equivalent provision for executives. Section 67 of the Federal Employee Representation Law (*Bundespersonalvertretungsgesetz*) obliges employers and employees in the public sector to ensure that all employees are treated in conformity with the principles of law and fairness, and in particular that nobody is discriminated against because of race or ethnic origin, parentage or other origin, nationality, religion or belief, disability, age, political or union activities, or attitude or sex or sexual identity.²²¹ There are laws which either allow public authorities to act against certain forms of discrimination in the private sector or require equal treatment of clients in specific market segments where specific market conditions apply. For example, insurance

²¹⁷ See, e.g., CE, 30 October 2001, no 204909, Association française des sociétés financières (www.legifrance.gouv.fr/WAspad/UnDocument?base=JADE&nod=JGXAX2001X10X000004909). The *Conseil d'Etat* quashed a deliberation of the National Commission on Data Collection and the Protection of Personal Data (CNIL) of 22 December 1998, which had forbidden, on grounds of discrimination, the use of a person's nationality as a criterion in credit assessments. The *Conseil d'Etat* took the view that, as long as nationality was merely one element in an automatic calculation that did not itself determine a credit decision made by a financial institution, the criterion of nationality was not discriminatory under the terms of Article 13 EC and the Criminal Code. Nationality may be relevant as to the likelihood of a debtor leaving the country and, as a result, failing to repay a loan. It is therefore an admissible criterion and applicants for a loan may lawfully be required to provide it.

²¹⁸ *Tribunal d'arrondissement de Paris*, 16 March 2005, No. 0502805/9 (www.gisti.org/doc/actions/2005/bnf/arret.html).

²¹⁹ *Conseil d'Etat*, no 274664, 18/07/2006, GISTI, AJDA n° 33, 09/10/2006, p. 1833-1838 (http://www.conseil-etat.fr/ce/jurispd/index_ac_ld0636.shtml).

²²⁰ *Rasse, ethnische Herkunft, Abstammung oder sonstigen Herkunft, Religion, Nationalität, Religion, Weltanschauung, Behinderung, Alter, politische oder gewerkschaftliche Betätigung oder Einstellung, Geschlecht, sexuelle Identität.*

²²¹ *Rasse, ethnische Herkunft, Abstammung oder sonstige Herkunft, Nationalität, Religion oder Weltanschauung, Behinderung, Alter, politische oder gewerkschaftliche Betätigung oder Einstellung, Geschlecht, sexuelle Identität.*

premiums must not be calculated on the basis of nationality or ethnic origin.²²² In addition, unequal treatment on the basis of nationality can be considered a breach of the general provisions of private law.

- In Greece, Presidential Decrees nos. 358/1997 and 359/1997 confer equal employment rights on Greek citizens and all foreign nationals legally working in Greece without discrimination, racial or otherwise; in addition, it has been inferred from Article 4 of the Civil Code, which stipulates that aliens enjoy the same civil law rights as Greek nationals, that aliens legally employed or working in Greece are subject to Greek labour law on the same conditions as Greek nationals.
- In Ireland, the Unfair Dismissals Act 1977-1993 – although not specifically outlawing discrimination on grounds of nationality²²³ – was occasionally used by courts in order to protect non-nationals from unfair practices by employers. In *17 Complainants v. Eamonn Murray t/a Kilnaleck Mushrooms*,²²⁴ the complainants were employed as mushroom pickers. In January 2006 they left their employment due to a dispute and contacted their local SIPTU office.²²⁵ The Employment Appeals Tribunal determined that the employees were unfairly dismissed because they had joined a trade union. The dismissals were held to be blatantly unfair due to the employees being non-nationals with limited English who had been brought to Ireland specifically to pick mushrooms. The Tribunal awarded the maximum award of two years' salary, EUR 26 000, in addition to varying amounts of compensation for lack of notice and annual leave/holiday pay to the 13 employees that proceeded with their claims.
- In Italy, while Decree 2003/215 transposing Directive 2000/43/EC does not extend to differences of treatment on grounds of nationality, the 1998 Immigration Act²²⁶ prohibits in its Article 43 direct and indirect discrimination on grounds of race and colour, ethnic origin, 'religious beliefs and practices' (*le convinzioni e le pratiche religiose*), and nationality (national origin). The antidiscrimination provisions of the 1998 Immigration Act were relied upon by a court of first instance in Milan to declare void a regulation on public housing adopted by the town council, which gave priority to Italian citizens.²²⁷ On 19 May 2005, the court of first instance of Padua (*Tribunale di Padova*) issued an order (*ordinanza*) against a company which owned a bar as it was proved that higher prices were applied to persons of non-Italian origin as a way of decreasing the number of clients perceived as *extracomunitari* ('non community citizens', a term usually used to refer to immigrants of non-Western or 'remote' origin). The order was issued on the basis of the summary procedure foreseen in the 1998 Immigration Act.²²⁸
- In Lithuania, Article 2 of the Employment Code lists among the principles that regulate employment relations the 'equality of subjects of employment law irrespective of their sex, sexual orientation, race, ethnic origin, language, social origin, citizenship and social status, religion, marital and family status, age, opinions or views, membership of a political party or public organisation and factors unrelated to the employee's professional qualities'. Foreigners are guaranteed a right to equal treatment under Article 3 of the Law on the Legal Status of Aliens in the Republic of Lithuania,²²⁹ which states that foreigners are equal before the law regardless of their race, sex, colour, language, religion, political or other convictions, national or social origin, the fact that they belong to a national minority, their property, place of birth or any other status.
- In Luxembourg, Article 454 of the Penal Code states: 'any difference of treatment applied to natural persons on grounds of their racial or ethnic origin, skin colour, sex, sexual orientation, family situation, age, state of health, disability, customs, political or philosophical opinions, trade union activities, their membership, actual

²²² Section 81e Insurance Supervision Law (*Versicherungsaufsichtsgesetz*).

²²³ Section 6(2) prohibits discrimination in respect of union membership, religious or political opinions, for taking an action against the employer, race, colour sexual orientation, age or membership of the Traveller community.

²²⁴ UD155/200.

²²⁵ SIPTU; The Services, Industrial, Professional and Technical Union is one of the largest trade unions in Ireland.

²²⁶ The 1998 Act is studied in detail by G. Scarselli, 'Appunti sulla discriminazione razziale e la sua tutela giurisdizionale', in *Rivista di diritto civile*, 2001, I, pp. 804 ff., and from the point of view of religion by P. Cavana, 'Pluralismo religioso e modelli di cittadinanza: l'azione civile contro la discriminazione', in *Il diritto ecclesiastico*, 2000, I, pp. 165 ff.

²²⁷ *Tribunale di Milano, sez. I, sentenza 20/21 3.2002 n. 3624*, published in *Diritto, Immigrazione e Cittadinanza*, 4. 2002, with a commentary by Alessandro Simoni.

²²⁸ See <http://www.pariopportunita.gov.it/IL-DIPARTI/---Ufficio/-/Le-pronunc/sentenza-padova.pdf>.

²²⁹ *Lietuvos Respublikos įstatymas 'Dėl užsieniečių teisinės padėties'*, Official Publication *Valstybės žinios*, 1998, No. 115-3236.

or supposed, of an ethnic group, nationality, race or specific religion shall constitute discrimination.’ However, differences of treatment in relation to recruitment for employment on grounds of nationality are permissible where being of a specific nationality constitutes a determining condition for employment or the exercise of a professional occupation, in accordance with statutory provisions regarding the public service, regulations applicable to the exercise of certain professions and provisions on the right to work.

- In Portugal, discrimination based on nationality is specifically prohibited in labour law by the Labour Code²³⁰ and in general by Article 3 (2) of Law 18/2004 of 11 May 2004.
- In Spain, Article 23.2 of Organic Law 4/2000 defines ‘indirect discrimination’ in the sphere of immigration and treats ‘nationality’ and ‘race or ethnic origin’ as equivalent when prohibiting discriminatory acts ‘against a foreign citizen merely because of his condition as such or because he belongs to a particular race, religion, ethnic group or nationality.’ Moreover, the Criminal Code (Organic Law 10/1995) contains a number of offences of violation of fundamental rights, including Article 314 which defines as a punishable offence ‘serious discrimination in a public or private workplace against any person by reason of his ideology, religion or beliefs, ethnic group, race or nationality, gender, sexual orientation, family background, illness or disability, legal or trade-union representation of workers, family relationship with other employees, or use of any of the official languages within the State of Spain...’.
- In the United Kingdom, the 1976 Race Relations Act (Section 3) and the 1997 Race Relations (NI) Order (Article 5) define ‘racial grounds’ as on grounds of race, colour, nationality²³¹ and ethnic or national origins. Thus, under UK legislation, discrimination on grounds of nationality – across the full scope of the RRA or RRO - is prohibited in the same manner as was race discrimination before the 2000 Race Directive was implemented.²³² The original (pre-2000 Directives) definition of indirect discrimination included in RRA section 1(1)(b) therefore continues to apply where discrimination on grounds of nationality is alleged. According to this definition:

‘1(1)(b) A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same racial group as that other but –

- a. Which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it; and
- b. Which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied; and
- c. Which is to the detriment of that other because he cannot comply with it.’

The legislative prohibition of nationality-based discrimination which pre-existed the implementation of the 2000 directives has been left untouched, but it lacks the enhanced protection given against racial discrimination by the 2000 Racial Equality Directive and the 2003 RRO (which includes a more expansive definition of indirect discrimination, a more onerous objective justification test and a tighter set of exceptions). Protection against discrimination on the basis of nationality is therefore currently less developed than protection against discrimination on the basis

²³⁰ The new Labour Code explicitly states that discrimination on the grounds of nationality is forbidden (Article 24(1)). In addition, the same provision refers to equal treatment in access to employment and work. Article 4 of the same code in principle grants foreign workers equal rights to Portuguese citizens, provided they are legally permitted to work in the country.

²³¹ S.78/Article 2 defines ‘nationality’ as including citizenship.

²³² However, the legislative prohibition on nationality-based discrimination lacks the enhanced protection given against racial discrimination by the 2000 Racial Equality Directive and the 2003 Race Relations Order, which include a more expansive definition of indirect discrimination, a more onerous objective justification test and a tighter set of exceptions. Protection against nationality-based discrimination is therefore currently less developed than protection against discrimination on the basis of race, ethnicity or national origin.

of race, ethnicity or national origin. In addition, as regards differences of treatment on grounds of nationality, the RRA (Section 41(1)) and the RRO (Article 40(1)) allow such differences to be established where this was done under statutory authority (to comply with primary or secondary legislation or as a requirement imposed by a Minister by virtue of an enactment). In addition, the UK has strengthened the exceptions in RRA Section 41(2)/RRO Article 40(2) that permit discrimination not only on grounds of nationality but also on place of ordinary residence or length of time a person has been present in the UK, if this is done under statutory authority or in pursuance of any arrangements made or approved by a Minister of the Crown or in order to comply with any condition imposed by a Minister of the Crown. This exception applies in relation to legislation passed at any time.

c) *Existing differences of treatment on grounds of nationality*

Whether stipulated under domestic constitutions or ordinary legislation, the prohibition of discrimination on grounds of nationality does not imply that any difference of treatment on that basis will necessarily be found invalid; only those differences in treatment which cannot be objectively or reasonably justified as pursuing a legitimate objective and as proportionate are treated as discriminatory. As we have seen, this too is the position of human rights bodies in general and in particular of the European Court of Human Rights, the UN Human Rights Committee, and the UN Committee on the Elimination of Racial Discrimination. Indeed, in a number of Member States, certain differences of treatment on grounds of nationality are stipulated in the Constitution itself. In Belgium, where the Constitution prohibits discrimination on any ground (including therefore nationality), exceptions as regards differences of treatment on grounds of nationality concern the exercise of political rights (Article 8 al. 2 of the Constitution) and access to public service employment (Article 10 of the Constitution). In Cyprus, although Part II of the Constitution states explicitly that fundamental rights are guaranteed to all individuals, with no distinction or differentiation between citizens and non-citizens of the Republic, Article 32 of the Constitution adds that nothing in that Part 'shall preclude the Republic from regulating by law any matter relating to aliens in accordance with International Law'. The Estonian Constitution also explicitly permits differential treatment of non-citizens in certain social fields (Articles 28, 29, 31).

Outside constitutional provisions, differences of treatment on grounds of nationality are quite common even in fields other than access to public service jobs or the exercise of political rights. For instance, in Estonia a non-citizen cannot be a sole proprietor who provides security services, a security officer or head of an in-house security unit (Article 22 (2) of the Law on Security Services²³³). In France, the law reserves access to specific professions and jobs (about 7,000 named jobs) subjecting them to conditions of citizenship, whether national or European Union; this concerns in particular access to jobs in the public service (Article 5 of Law no. 83-634 of 13 July 1983).²³⁴ In Germany, differences in treatment between nationals and non-nationals exist in various spheres such as residence rights, work permits or some social security rights.²³⁵ Some

²³³ *Turvaseadus*, RT I 2003, 68, 461. An in-house security unit is a unit of an undertaking, state authority or local government authority which guards property owned or possessed by the undertaking, state authority or local government authority (Article 18 (1)).

²³⁴ See Groupe d'études et de lutte contre les discriminations (GELD), publication no 1. on legal discrimination and jobs inaccessible to foreigners (2000) and, for the text of the law of 1983, see <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006068812&dateTexte=20090823>. However, the list of professions which are not accessible to third-country nationals has been shortened since the date of the publication by the GELD.

²³⁵ Some examples: the federal scheme to support educational costs through grants is not only open to Germans, but to non-Germans of various legal status as well as persons entitled to asylum, refugees, long term legal residents, and persons enjoying exceptional leave to remain, see Section 8.1 No. 2 – No. 7; 8.2 Federal Law on Promotion of Education (*Bundesausbildungsförderungsgesetz*). See also Section 63.1 and 63.2 of the Social Code III (*Sozialgesetzbuch III*).

professions are open only to Germans and specified groups of non-Germans such as EU citizens and stateless people.²³⁶ In Greece, labour legislation contains provisions that discriminate against alien immigrant workers, such as those regarding compensation in case of a work accident. According to the (amended) Decree of 24 July/25 August 1920, compensation owed to alien workers is dependent on various conditions such as their residence in Greece.²³⁷ According to the same Law, alien workers are entitled to the same treatment as nationals on the condition that there is reciprocity between Greece and the alien's country of origin by virtue of an inter-state agreement. In Ireland, Section 7 of the Equal Status Act 2000-2004 – which has been added to by virtue of the Equality Act 2004 – permits the Minister for Education and Science to differentiate between EU nationals and others in relation to the provision of educational grants,²³⁸ and the same Act allows differential treatment of persons on the ground of nationality in relation to housing or accommodation provided by or on behalf of the Minister.²³⁹ The Employment Equality Act 1998-2004 provides at Section 36 that it is permissible to impose requirements in relation to residence, citizenship and proficiency in the Irish language for public service jobs.²⁴⁰ In addition, Section 12(7) of the Employment Equality Act 1998-2004 provides for different treatment on the basis of nationality in relation to fees for admission or attendance at any vocational or training course; citizens of Ireland or nationals of other EU Member States may therefore be favoured in these areas. In Latvia, all employment in the civil and intelligence services as well as military service is restricted to Latvian citizens; the Law on the Bar restricts access to the legal profession to Latvian citizens and – recently – also to EU nationals admitted to the bar in other EU Member States; Article 1 of the transition provisions of the Law on State Pensions provides for different calculations of pensions for Latvian citizens and non-citizens as well as for foreigners and stateless persons who have worked outside Latvia before 1991. In Lithuania, citizenship of the country is required to join the civil service, intelligence services, police and armed forces. In Luxembourg, Article 457 § 3 of the Penal Code as amended by the Law of 28 November 2006 explicitly allows differentiation of treatment in relation to recruitment for employment on grounds of nationality where being of a specific nationality constitutes a determining condition for employment or the exercise of a professional occupation in accordance with statutory provisions regarding the public service, with regulations applicable to the exercise of certain professions and with provisions on the right to work. In Poland, a number of professional occupations are reserved to Polish citizens or nationals of other EU Member States: they include public notaries, medical doctors, and two categories of teachers - nominated and certified (*mianowany* and *dplomowany* respectively). Similarly, a range of professions are reserved to nationals in the Slovak Republic.²⁴¹ In the United Kingdom, the RRA (s.75) and RRO (Article 71) permit rules which restrict employment in the civil service or by prescribed public bodies to persons of particular birth, nationality, descent or residence; in addition, while the government had indicated its intention to review this restriction, there remains a long list of 'reserved posts' in the civil service that are open to UK citizens only.

²³⁶ See Section 3.1 No. 1 of the Federal Medical Regulation (*Bundesärzteordnung*): admission to medical practice only for German citizens according to Article 116 of the Basic Law (*Grundgesetz*), citizens of EU Member States, contractual parties to the Treaty on the European Economic Area, and other contractual partners in this respect or stateless people; there are similar regulations in other areas, for example pharmacists, see Section 2.1 Nr. 1 of the Law on Pharmacies (*Apothekengesetz*); Section 4.2 No. 2 of the Law on the Trade of Chimney Sweeps (*Gesetz über das Schornsteinfegerwesen*): permission to work as a chimney sweep is only granted to German citizens according to Article 116 of the Basic Law (*Grundgesetz*), citizens of EU Member States, and contractual parties to the Treaty on the European Economic Area.

²³⁷ See also Council of State judgments 2599/1982, 2637/1982, 1318/1990, affirming the above, reported in *Greek Yearbook of Refugee and Aliens Law 1999 (GYRAL)*, pp.160-166 (in Greek). See also Auditors' Court judgment 1617/1998 affirming the right of an alien widow of a Greek citizen, a former public servant, to receive the pension of her deceased husband, *GYRAL*, 182.

²³⁸ Section 7(5)(b) Equal Status Act 2000-2004.

²³⁹ Section 5(2)(f) also allows a difference in treatment of persons on the basis of nationality in relation to the provision or organisation of a sporting facility or event to the extent that the differences are reasonably necessary having regard to the nature of the facility or event and are relevant to the purpose of the facility or event. A final distinction made in this area relates to Section 9 of the Equal Status Act which provides that a club will not be a discriminating club if it excludes membership by reason only that its principal purpose is to cater for the needs of a particular nationality.

²⁴⁰ The positions where these requirements can be imposed are office holders in the service of the State, including the Garda Síochána and the defence forces; civil servants; and officers or servants of local authorities, harbour authorities, health boards or vocational education committees.

²⁴¹ Highly placed state officials, prosecutors, constitutional judges, judges, police officers, customs officers, fire and rescue service members, mountain rescue service members, and professional soldiers.

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2 Differences of treatment on grounds of nationality as indirect discrimination on grounds of race or ethnic origin, or religion or belief

A distinct question is whether domestic legislation prohibiting discrimination on grounds other than nationality – particularly on grounds of race or ethnic origin, or on grounds of religion or belief – extends, or can be interpreted to extend, to differences of treatment on grounds of nationality where this may amount to indirect discrimination on these other grounds. In their implementation of the Racial Equality Directive and of the Employment Equality Directive, only a minority of EU Member States have extended protection from discrimination on grounds of race or ethnic origin or on the other grounds listed in Article 13 EC to nationality-based discrimination – although the States that have done so form a significant group of at least eleven States. In this respect, most EU Member States have implemented the directives *a minima*, not going beyond their minimal requirements as regards the list of the grounds protected. However, it cannot be excluded that in certain cases the prohibition of indirect discrimination on grounds of race or ethnic origin or on grounds of religion or belief will extend to situations where nationality is used as a proxy for race, ethnicity or religion or belief, and where therefore differences of treatment on grounds of nationality will be found in violation of legislation prohibiting discrimination on those grounds. For instance, in a deliberation of 18 September 2006,²⁴² the HALDE (the French equality authority),²⁴³ took the view that the condition of French nationality should not be set for access to a discount card for families of three children or more since this would constitute indirect discrimination on grounds of race or ethnic origin contrary to the requirements of the Racial Equality Directive; the HALDE therefore recommended that this condition be removed from the existing regulations. Indeed, as remarked by an Irish court, positive duties to accommodate the specific needs of non-nationals may be required in order to ensure that they are not placed at a disadvantage, for instance in disciplinary proceedings. In *Campbell Catering Ltd., v. Rasag*²⁴⁴ the Labour Court highlighted the difficulties faced by migrant workers, and stated:

‘It is clear that many non-national workers encounter special difficulties in employment arising from a lack of knowledge concerning statutory and contractual employment rights together with difficulties of language and culture. In the case of disciplinary proceedings, employers have a positive duty to ensure that all workers fully understand what is alleged against them, the gravity of the alleged misconduct and their right to mount a full defence including the right to representation ... Special measures may be necessary in the case of non-national workers to ensure that this obligation is fulfilled and that the accused worker fully appreciates the gravity of the situation and is given appropriate facilities and guidance in making a defence.’

Similarly, also in Ireland, the Equality Officer expressed concern in a claim under the Employment Equality Acts 1998 and 2004 that the employer engaged a large number of foreign workers without having translated contracts available and then proceeded to make unlawful deductions from their wages and to permit some of them to work hours in breach of the Organisation of Working Time Act. The Equality Officer found that the employer made no adequate provision for the employment of foreign workers and had failed in its duty of care to them as employees.²⁴⁵

A reading of domestic legislation implementing the Racial Equality or the Employment Equality Directives as also prohibiting differences of treatment on grounds of nationality where this would result in indirect discrimination

²⁴² Deliberation no. 2006-192.

²⁴³ Haute Autorité de la Lutte contre les Discriminations et pour l’Egalité.

²⁴⁴ EED 048.

²⁴⁵ Equality Tribunal DEC – E2006 – 050 *Five Complainants v Hannon’s Poultry Export Ltd, Roscommon*.

on grounds of race or ethnic origin could result from such legislation being interpreted in accordance with the requirements of the International Convention on the Elimination of All Forms of Racial Discrimination. As explained above, this instrument contains a prohibition of discrimination on the grounds of 'race, colour, descent, or national or ethnic origin' (Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination), a prohibition which has been interpreted to extend to a prohibition of indirect discrimination on those grounds, *inter alia* by nationality-based differences of treatment.²⁴⁶ It cannot be excluded, therefore, that domestic legislation adopted in order to implement the Article 13 EC directives could be read broadly, in line with the other obligations imposed under international law on the EU Member States. In Austria for instance, the Vienna Court of Appeal ruled in the case of *Hayet B. v. Ferdinand S.* that a woman of Tunisian origin who had been physically removed from a fashion store with the words 'we do not sell to foreigners' in Vienna had been victim of discrimination and harassment on the ground of ethnic affiliation.²⁴⁷ It stated that it was irrelevant whether the plaintiff was in fact a foreigner or an Austrian citizen of Tunisian origin. While the difference of treatment was openly based on the nationality of the victim, this did not stop the Court from finding discrimination on the grounds of ethnic origin.

This broad interpretation of the prohibition of discrimination on grounds of race and ethnic origin – as extending to indirect discrimination by the use of nationality-based differences in treatment – would be even more clearly justified where domestic legislation adopted in order to implement the International Convention on the Elimination of All Forms of Racial Discrimination is concerned, since such interpretation should naturally follow the reading of the Committee on the Elimination of Racial Discrimination. In Austria, this would justify extending Figure 3 of Paragraph 1 of Article IX of the Introductory Provisions to the Code of Administrative Procedure,²⁴⁸ which (as seen above) provides for an administrative criminal sanction for discrimination against a person due to his/her race, skin colour, national or ethnic origin, religious faith or disability; this prohibition extends to indirect discrimination on any of these grounds, for instance through the use of differential treatment on grounds of nationality. In France, the Court of Cassation has treated discrimination based on nationality as a source of apparent indirect discrimination in civil cases, thus obliging the employer relying on that criterion to justify its use.²⁴⁹

The possibility that domestic legislation implementing the Racial Equality or the Employment Equality Directives will be interpreted to prohibit differences of treatment on grounds of nationality as a form of indirect discrimination on grounds of race or ethnic origin is left open by the wordings chosen in certain Member States.

In Austria, the explanatory notes to the Equal Treatment Act state that §§ 17 (2) and 31 (2) of this Act, which provide that the principle of equal treatment 'do not cover difference of treatment based on citizenship nor the treatment which arises from the legal status of the third-country nationals or stateless persons', adding that 'different treatment based on citizenship is not prohibited when it is based on objective reasons, but not where racist behaviour is the aim. This exception cannot be used to legitimate discrimination on the grounds covered in this act.' This suggests that, where reliance on the criterion of nationality appears to be used a disguised means to effectuate discrimination on grounds of race or ethnic origin, the courts may find that the prohibition of discrimination on those grounds has been violated. In Cyprus, the Equality Body appears to consider discrimination based on nationality as prohibited by international laws; on some occasions nationality and ethnic origin have been used interchangeably, in the sense that when cases at issue clearly related to discrimination based on nationality, decisions also invoked the provisions of the laws transposing the anti-discrimination directives. Thus, the Equality Body found that the exclusion of non-Cypriot EU citizens from a scheme

²⁴⁶ See the case of *Ziad Ben Ahmed Habassi v. Denmark*, presented to the Committee on the Elimination of Racial Discrimination, referred to above, Footnote 47.

²⁴⁷ Ref. Nr. 35R68/07w (35R104/07i, date: 30.03.2007, available on the searchable database www.ris.bka.gv.at; commentary (German) on: <http://www.klagsverband.at/fall/gericht2.pdf>.

²⁴⁸ Federal law Gazette 50/1991 as last amended by Federal law Gazette I Nr. 63/1997 (Article IX Abs. 1 Z, 3 EGVG, *Einführungsgesetz zu den Verwaltungsverfahrensgesetzen*, BGBl 50/1991 idF. BGBl I Nr. 63/1997).

²⁴⁹ Cass. Soc., n° 03-47720, 09/11/2005, Soc ESRF c/ M. X., confirmed in another matter against ESRF on April 17, 2008 (Soc; 819 FS-P+B).

granting heating allowances amounted to discrimination on the basis of race or ethnic background and of national background under Protocol 12 to the ECHR.²⁵⁰ It also considered that the denial of access to EU citizens to the electoral register for the purpose of voting at local elections was discriminatory on the basis of race or ethnic origin.²⁵¹ The Equality Body also found that the refusal of public assistance to an asylum-seeker because of his nationality amounted to indirect discrimination on the ground of race or ethnic origin in the area of social protection and social welfare.²⁵²

Similarly in Finland, the national Discrimination Tribunal has opined that discrimination on the grounds of (foreign) nationality may constitute indirect ethnic discrimination since the majority of foreign nationals have an ethnic origin other than Finnish.²⁵³ This is also the practice of the Ombudsman in Greece. In Germany, under the General Law on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz (AGG)*) in force since 18 August 2006, discrimination on the basis of nationality is generally regarded as possible indirect discrimination on the basis of race or ethnic origin and as such forbidden.

In contrast, such a development seems excluded in other Member States. In Estonia for instance, the draft Law on Equal Treatment does not provide protection against discrimination on the basis of citizenship (Article 1 (1)), and the explanatory note attached to the draft law clarifies that ethnicity or ethnic origin ('*rahvus*') as a protected ground should not to be confused with nationality/citizenship ('*kodakondsus*').

For the moment, it seems premature to draw general conclusions about the question of whether the prohibition of discrimination on grounds of race, ethnic origin, or religion, may lead to the questioning of certain differences of treatment on grounds of nationality where such distinctions may put persons of a particular race, ethnic origin, or religion, at a particular disadvantage. Such an interpretation of the requirements of the Racial Equality and Employment Equality Directives cannot be excluded on the basis of the shared Article 3(2) of these directives, although the exact implications of this clause – according to which the directives 'do [...] not cover difference of treatment based on nationality' remain a matter of dispute. A reading of the requirements of the directives adopted on the basis of Article 13 EC in accordance with developments in international human rights law would certainly favour an interpretation according to which this clause does not exclude challenging nationality-based differences of treatment in situations where such distinctions lead to indirect discrimination on grounds of race, ethnicity or religion. This controversy is of limited practical significance as regards situations which fall under the scope of application of EU law; in such cases, the national authorities are in any case bound to comply with the general principle of equality which is part of the general principles of law for which the European Court of Justice ensures respect, and which, as we have seen, should be interpreted as including a prohibition of discrimination on grounds of nationality. But this question of interpretation of the directives does matter where the situation concerned presents no links to EU law save for the fact that it is covered by one of these directives.

²⁵⁰ Files AKP 22/2004, AKP 42/2004, AKP 43/2004, AKP 44/2004, AKP 49/2004, AKP 58/2004.

²⁵¹ Files AKP 75/2005 and AKP 78/2005.

²⁵² Files AKI 131/2005 and AKI 8/2005.

²⁵³ See e.g. the decision of the Tribunal of 22 September 2006, available in English at: <http://www.intermin.fi/intermin/hankkeet/sltk/home.nsf/pages/indexeng>.



Wouter | 1981

Conclusion

This study demonstrates that the prohibition of discrimination on grounds of nationality is emerging as a general principle of international and European human rights law, and that it is already recognised by a significant number of EU Member States. It may therefore be considered as a general principle of EU law for which the European Court of Justice may in the future seek to ensure respect. This does not mean that the European legislator should necessarily equalise the situation of third-country nationals legally residing on the territory of an EU Member State with that of nationals of other EU Member States, for example as regards access to social advantages such as health, education, or job placement services. Indeed, the European Court of Justice generally takes the view that, although the EU Member States must implement EU law in conformity with the requirements of fundamental rights included among the general principles of EU law, it is not for the European legislator to ensure such compatibility: all that is expected of EU secondary legislation is that it does not impose on the EU Member States an obligation to violate such fundamental rights. In the case of *Parliament v Council*²⁵⁴ for example, the Court noted that ‘while the [2003 Family Reunification] Directive leaves the Member States a margin of appreciation, it is sufficiently wide to enable them to apply the Directive’s rules in a manner consistent with the requirements flowing from the protection of fundamental rights.’²⁵⁵ Thus, secondary legislation is compatible with the requirements of fundamental rights provided that it does not compel Member States to violate such rights, even where it does not establish clear safeguards against such risk.²⁵⁶ This suggests that Community legislation will be valid as long as it can be interpreted in conformity with general principles. The implication is that there is no requirement that Community law denies scope to a Member State to exercise its discretion under EU legislation in such a way as to violate human rights standards. This is consistent with the approach in the *Lindqvist* case where the ECJ stated that it was for the national authorities to ensure that they did not adopt an interpretation of Community law that conflicted with the general principles of law, but that the directive in question was not invalid merely for allowing a Member State discretion which could be exercised in this manner.²⁵⁷

Yet the emergence of the prohibition of discrimination on grounds of nationality as a general principle of law does imply that when implementing EU law, Member States should take into account the need not to establish or maintain differences in treatment between different categories of foreign nationals (in particular, between nationals of other EU Member States and nationals of third countries) nor to establish or maintain differences in treatment between nationals and foreigners, unless such differences can be justified as measures adopted in the pursuance of legitimate objectives and proportionate to such objectives.

The conditions under which such justifications may be provided are increasingly restrictive. The enjoyment of fundamental rights cannot be restricted to nationals only, or to nationals of the State concerned and nationals of other EU Member States: they must be extended to all without discrimination, as required by Article 14 of the European Convention on Human Rights – indeed this extends even beyond nationals who are legally present on the territory of the State concerned to all non-nationals, whichever their administrative status. Even beyond the area of fundamental rights, the principle of equality leads courts to treat with suspicion any differences of treatment on grounds of nationality in social and economic life. This includes freedom of movement, which is clearly bound to access to employment without discrimination in EU Member States. The only area in which differences of treatment

²⁵⁴ Case C-540/03, *Parliament v Council*, [2006] ECR I-5769.

²⁵⁵ Para. 104.

²⁵⁶ This corresponds also to the position adopted by AG Kokott in her opinion in this case. Her view as expressed in paras. 89-92 of her opinion was that the contested provisions of the Family Reunification Directive must be examined ‘in order to determine whether there is sufficient scope for them to be applied in conformity with human rights. [author’s italics]’ Otherwise put ‘Community provisions are compatible with fundamental rights if they are *capable of being interpreted in a way which produces the outcome which those rights require*. [...] [What] matters is not what rules Member States might be minded to adopt in order to take full advantage of the latitude which the contested provisions afford, but rather what rules Member States may lawfully adopt if the Community provisions in question are interpreted in conformity with fundamental rights [author’s italics]’.

²⁵⁷ Case C-101/01, *Lindqvist* [2003] ECR I-12971, paras. 84-88.

imposing disadvantages on non-nationals are still common and, seemingly, widely accepted, is that of political rights – the right to vote and to stand for elections and the right to access public service employment. The fact that even this privilege is now being challenged, particularly at local level, bears testimony to the vitality of the principle of equality and to the strength of the movement towards increased inclusion of third-country nationals in our societies.



Sifra | 2003

Excerpts of the Main Provisions of International Law Pertaining to Non-Discrimination

I. United Nations

International Convention on the Elimination of All Forms of Racial Discrimination, adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 (entry into force 4 January 1969)

Article 1

1. In this Convention, the term «racial discrimination» shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.
2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.
3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.
4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 (entry into force 23 March 1976)

Article 2(1)

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

II. Council of Europe

Convention for the Protection of Human Rights and Fundamental Freedoms, originally signed in Rome on 4 November 1950, as amended by Protocol No. 11

Article 14 – Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No.: 177), opened for signature in Rome on 4 November 2000, entered into force on 1 April 2005

Article 1 – General prohibition of discrimination

- 1 The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
- 2 No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

European Social Charter (revised), signed in Strasbourg, 3 May 1996

Article E – Non-discrimination

The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.

Appendix to the European Social Charter (Revised): Scope of the Revised European Social Charter in terms of persons protected

1. Without prejudice to Article 12, paragraph 4, and Article 13, paragraph 4, the persons covered by Articles 1 to 17 and 20 to 31 [of the European Social Charter (revised)] include foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned, subject to the understanding that these articles are to be interpreted in the light of the provisions of Articles 18 and 19. This interpretation would not prejudice the extension of similar facilities to other persons by any of the Parties.
2. Each Party will grant to refugees as defined in the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 and in the Protocol of 31 January 1967, and lawfully staying in its territory, treatment

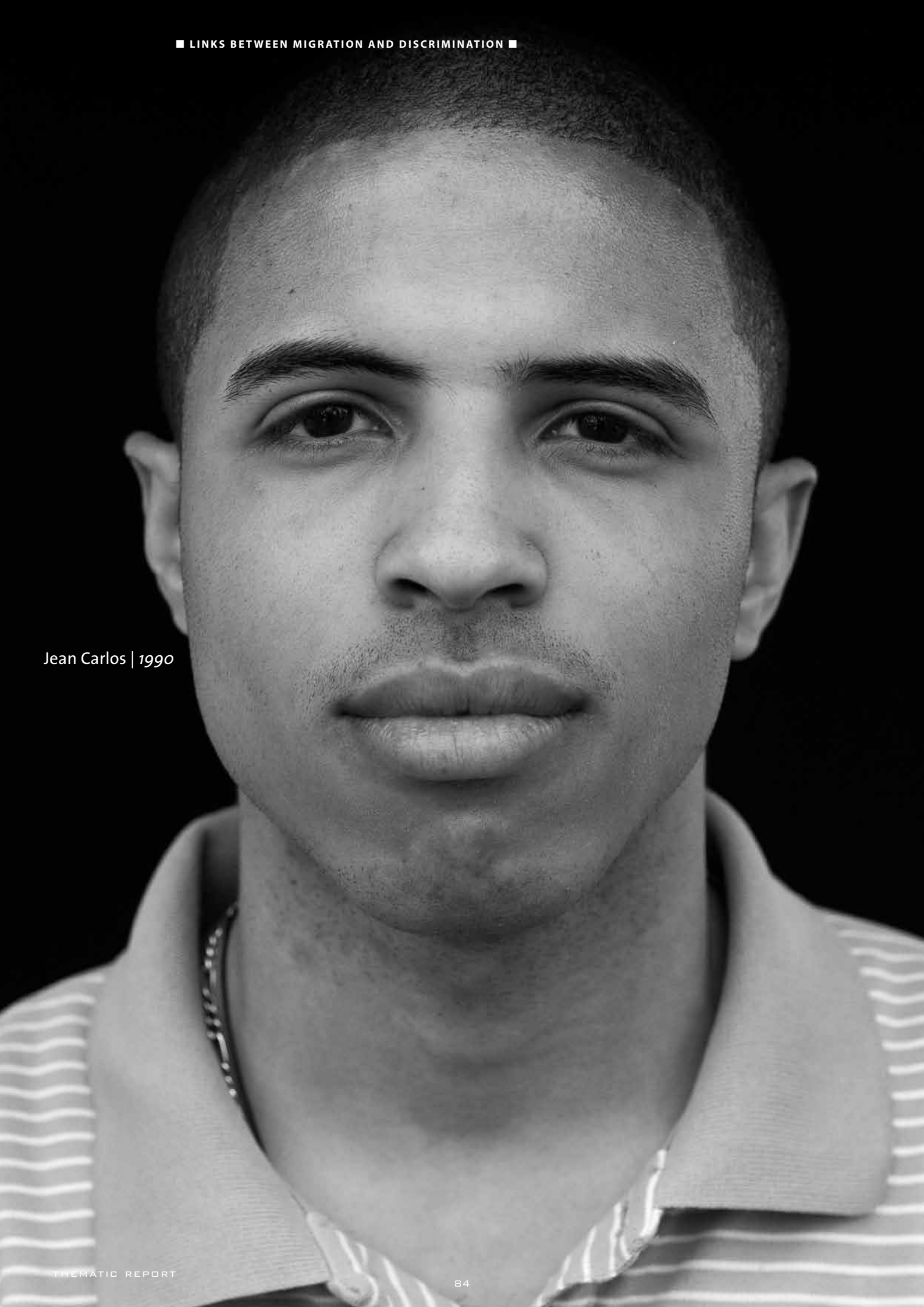
as favourable as possible, and in any case not less favourable than under the obligations accepted by the Party under the said convention and under any other existing international instruments applicable to those refugees.

3. Each Party will grant to stateless persons as defined in the Convention on the Status of Stateless Persons done in New York on 28 September 1954 and lawfully staying in its territory, treatment as favourable as possible and in any case not less favourable than under the obligations accepted by the Party under the said instrument and under any other existing international instruments applicable to those stateless persons.

Framework Convention for the Protection of National Minorities (CETS No. 157), signed on 1 February 1995 (entry into force: 1 February 1998)

Article 4

1. The Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited.
2. The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities.
3. The measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination.



Jean Carlos | 1990

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