



Trinity College Dublin
Coláiste na Tríonóide, Baile Átha Cliath
The University of Dublin

Academy of European Law
Current Reflections on EU Anti-Discrimination Law

Racial discrimination and nationality/migration exceptions: the case of the Race Equality Directive

David Fennelly
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Race/Nationality/Migration/Residence – Navigating the Boundaries

I. CERD

- I. Article 1(1): any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of.....
- II. Article 1(2): non-applicability to distinctions between citizens and non-citizens
- III. Article 1(3): saver for laws concerning nationality, citizenship or naturalization – subject to no discrimination against any particular nationality

II. ECHR

- I. Article 14 – Race and colour; national origin; immigration status; place of residence?
- II. Immigration and "Residence": *X and Others v. Ireland* (Apps no. 23851/20 and 24360/20), 22 June 2023

III. EU Law?

- I. Nationality Discrimination: EU v TCNs
- II. Race Discrimination?

Race Equality Directive: Directive 2000/43/EC

Article 2(1) RED

For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.

(Farkas, *The meaning of racial and ethnic origin in EU law*, 2016)

Article 3(1) RED

Broad Scope of Application: Employment, Social Protection, Education, Goods & Service, Etc.

L 180/22 EN Official Journal of the European Communities 19.7.2000

COUNCIL DIRECTIVE 2000/43/EC of 29 June 2000

implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

THE COUNCIL OF THE EUROPEAN UNION,

tion of private and family life and transactions carried out in this context.

Having regard to the Treaty establishing the European Community and in particular Article 13 thereof,

(5) The European Parliament has adopted a number of Resolutions on the fight against racism in the European Union.

Having regard to the proposal from the Commission⁽¹⁾,

Having regard to the opinion of the European Parliament⁽²⁾,

(4) The European Union exists to ensure which attempt to

RED's Nationality/Migration Exemption

Article 3(2) RED

This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

Recital (13) RED

.....This prohibition of discrimination should also apply to nationals of third countries, but 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 to occupation.

“one of the most sensitive issues within the Council” (Bell, Anti-Discrimination Law and the EU, 2002, 76)

Guidance from Luxembourg?

Firma Feryn, C-54/07, EU:C:2008:397

- Private sector employer's public statements about not employing migrants
- Nationality/migration status treated as racial/ethnic origin?
- “The fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin, something which is clearly likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market, constitutes direct discrimination in respect of recruitment within the meaning of Directive 2000/43. The existence of such direct discrimination is not dependant on the identification of a complainant who claims to have been the victim.” (para. 25)



Guidance from Luxembourg?

Kamberaj, C-571/10, EU:C:2012:233

- access to housing benefit by non-national long-term resident
- based on nationality, not race/ethnic origin – Article 3(2) applied
- “the discrimination of which the applicant in the main proceedings claims to be victim compared to Italian nationals is based on his status as a third-country national.” (para. 48)

Jyske Finans, C-668/15, EU:C:2017:278

- Finance company requiring additional proof of identity for non-EEA national
- Country of birth and ethnicity (*CHEZ*) – discussion of concept of ethnic origin (paras. 17-21)
- no general presumption - requirement here was not based on ethnic origin - Article 3(2) applied



Guidance from Luxembourg?

Land Oberösterreich v KV, C-94/20, [EU:C:2021:477](#)

- Access of long-term resident TCNs to housing assistance
- Requirement of proof of basic command of MS language
- Article 11 of LTR Directive precluded such a requirement if housing assistance constituted ‘core benefit’
- But did the RED also apply?
 - Difference of treatment was on grounds of nationality – Article 3(2)/*Kamberaj*
 - Indirect discrimination? “*applicable only if the allegedly discriminatory measure has the effect of placing a person of a particular ethnic origin at a disadvantage*” (para. 55)
 - AT legislation was applicable to all TCNs without distinction and did not place persons of a particular ethnic origin at a disadvantage



The Effect of Article 3(2) RED in National Law: the case of Ireland

Equal Status Act 2000 (Ireland)

Broad-based legislation prohibiting discrimination in goods and services, accommodation, education etc.

Section 3(1)

For the purposes of this Act discrimination shall be taken to occur—

(a) where a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the grounds specified in *subsection (2)* or, if appropriate, *subsection (3B)* (...the ‘discriminatory grounds’)

Section 3(2)

(h) that they are of different race, colour, nationality or ethnic or national origins (the “ground of race”),



Number 8 of 2000

EQUAL STATUS ACT 2000

REVISED

Updated to 1 January 2016

Taking Advantage of the Exemption in National Law

Section 14(1), Equal Status Act 2000 (as amended by Equality Act 2004)

Nothing in this Act shall be construed as prohibiting—

(a) the taking of any action that is required by or under— (i) any enactment or order of a court,

(aa) on the basis of nationality —

(i) any action taken by a public authority in relation to a non-national —

(I) who, when the action was taken, was either outside the State or, for the purposes of the Immigration Act 2004 , unlawfully present in it, or

(II) in accordance with any provision or condition made by or under any enactment and arising from his or her entry to or residence in the State,

Or (ii) any action taken by the Minister in relation to a non-national where the action arises from an action referred to in subparagraph (i)

Fennelly and Murphy, “Racial Discrimination and Nationality and Migration Exceptions: Reconciling CERD and the Race Equality Directive” (2021) NQHR 39(4) 308

To what extent does the RED protect vulnerable migrants?

- **Access to Bank Accounts?**
- **A Syrian Refugee v. A Bank (WRC, April 2019)**
- Refugee from Syria as part of Ireland's Refugee Protection Programme sought to set up the bank account after he entered employment
- Bank refused to accept refugee travel document as proof of identity - *"we don't open bank accounts for Syrians at the moment"*.
- WRC: express policy of direct discrimination on the ground of nationality; ordered compensation of €4,000 and directed to engage with IHREC to prevent re-occurrence



To what extent does the RED protect vulnerable migrants?

- **Access to Driving Licences**
- Refusal by RSA, a public authority, to accept TRCs as a proof of “normal residence”
- In two cases, WRC concluded that there was indirect discrimination on the ground of race
- **On appeal in *AB v. Road Safety Authority***
 - Circuit Court: because asylum seeker with limited permission to reside in the State, not entitled to the protection of the Equal Status Act [2020] IECC 3
 - High Court: proof of residence was required under an enactment and the conduct was therefore exempt under section 14 [2021] IEHC 217



Epilogue: *Landsberg v. NDLS* [2021] IEHC 748

To what extent does the RED protect vulnerable migrants?

III. Access to Accommodation?

Local Authorities' 'Cold Weather' Accommodation

- Exclusion of homeless international protection applicants

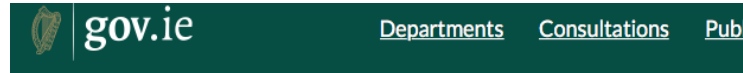
Conditions in Accommodation Centres?

- Direct Provision Centres?
- Ukrainian Refugees?
- Role of the Reception Conditions Directive and the CFR

Broader Questions: Distinctions between Different Categories of Migrant and the Special Regime for Ukrainian Refugees under the Temporary Protection Directive



Review of Equality Law



Consultation

Consultation on the Review of the Equality Acts

From [Department of Children, Equality, Disability, Integration and Youth](#)
5 July 2021



EU Level

A Union of equality: EU anti-racism action plan 2020-2025

2021 report on the application of the Racial Equality and Employment Equality Directives.

Consultation on Addressing possible gaps in the Racial Equality Directive

Broader work:

- Strengthening equality bodies
- Equality data



Towards more effective race discrimination law for vulnerable groups?

I. Existing Framework?

- I. The Uncertain Scope of Race Equality Directive
- II. The Importance of Strict Interpretation of Exceptions

II. Reform?

- I. Removing over-broad nationality/migration exemptions
- II. Addressing the specific challenges facing vulnerable groups: interaction of non-discrimination law and human rights law & other specific measures

