



Migration and Nationality- based Discrimination

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The prohibition of nationality-based discrimination as a tool to favor integration of migrants

Differences of treatment on grounds of nationality :

- (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.

The prohibition of discrimination on grounds of nationality under EU law (I)

- The prohibition of discrimination on grounds of nationality within the scope of application of the EU Treaty: article 18 TFEU (ex art. 12 EC) ('Within the scope of application of the treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited') benefits only nationals of the EU Member States (also as regards free movement of workers (art. 45 TFEU (ex art. 39 EC)) and freedom of establishment (art. 49 TFEU (ex art. 43 EC))*
- However, third-country nationals may indirectly benefit from the removals of conditions that are discriminatory against EU citizens (eg, Irish proficiency requirements in the Irish Employment Equality Act 1998-2004 (Case C-379/87, *Groener* [1989] ECR 3967), or regulations regarding the right to choose a surname in Belgium (Case C-148/02, *Carlos Garcia Avello* [2003] ECR I-11613))
- And partnership or association agreements may provide that the national of the partner states legally employed in one EU Member State must be treated, without discrimination on grounds of nationality, equally with the nationals of any EU Member State : see eg Case C-162/00, *Land Nordrhein-Westfalen v. Pokrzeptowicz-Meyer* [2002] ECR I-1049

The prohibition of discrimination on grounds of nationality under EU law (II)

- The prohibition of discrimination based on race or ethnic origin, religion or belief, disability, age or sexual orientation in the areas covered by Racial Equality Directive (2000/43) and Employment Equality Directive (2000/78) also applies to nationals of third countries, but this ‘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’ (art. 3(2)); nor does it cover ‘any treatment which arises from the legal status of the third-country nationals and stateless persons concerned’.
- However nationality as a proxy for discrimination on grounds of race/ethnic origin or religion or indirectly discriminatory on those grounds may be prohibited : see CERD, *Ziad Ben Ahmed Habassi v. Denmark*, Communication No. 10/1997

The prohibition of discrimination on grounds of nationality under EU law (III)

- CERD, *Ziad Ben Ahmed Habassi v. Denmark*, Communication No. 10/1997 (author refused a loan by a Danish bank on the sole ground of his non-Danish nationality, the nationality requirement being allegedly 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. [Therefore] 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’)

Article 45 TFEU (ex art. 39 EC)

1. Freedom of movement for workers shall be secured within the Union.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

‘Neither [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] 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)

Article 49 TFEU (ex art. 43 EC)

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, ... under the conditions laid down for its own nationals by the law of the country where such establishment is effected.

These provisions 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.’ (Case C-147/91, *Criminal proceedings against Ferrer Laderer* [1992] ECR I-4097, para. 7)

The prohibition of discrimination on grounds of nationality under EU law (IV): the gradual alignment of the status of third-country nationals who are long-term residents in the EU with that of nationals of EU Member States

- Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents: 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.

The prohibition of discrimination on grounds of nationality under international and European human rights law -- as general principles of EU law

International Covenant on Civil and Political Rights - arts. 2 and 26

Ibrahima Gueye et al. v. France, Communication No. 196/1985 (1989):

- 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*’
- in this case, 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...’

International Covenant on Civil and Political Rights - arts. 2 and 26

Karakurt v Austria, Communication No. 965/2000 (2002):

- because of his Turkish nationality, the author 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 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. [Since the function of a member of a work council is to promote staff interests and to supervise compliance with work conditions], 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’

European Convention on Human Rights - art. 14 (and Protocol No. 12 (2000, in force 1.4.2005)) - differences of treatment between nationals (or assimilated) and non-nationals

- Eur. Ct. HR, *Gaygusuz v. Austria* (Appl. No. 17371/90), judgment of 16 September 1996 : Turkish national who had worked in Austria from 1973 to 1984, denied an advance on his pension in the form of emergency assistance after his entitlement to unemployment benefits expired in 1987
- ‘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 is therefore discriminatory’.
- ‘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. ... 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.’

European Convention on Human Rights - art. 14 (and Protocol No. 12 (2000, in force 1.4.2005)) - differences of treatment between nationals (or assimilated) and non-nationals

- Eur. Ct. HR (3rd sect.), *Koua Poirrez v. France* (Appl. No. 40892/98), judgment of 30 September 2003 : national of Cote d'Ivoire having failed to obtain French nationality because he had applied after his eighteenth birthday, physically disabled and adopted by Mr Poirrez, a French national, but denied a 'disabled adults' allowance' on the ground that he was neither a French national nor a national of a country which had entered into a reciprocity agreement with France in respect of the allowance - amounts to discrimination
- Eur. Ct. HR (GC), *Andrejeva v. Latvia* (Appl. No. 55707/00), judgment of 18 February 2009: the Court the Court dismisses 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.

European Convention on Human Rights - art. 14 (and Protocol No. 12 (2000, in force 1.4.2005)) - differences of treatment between different categories of foreigners

- Eur. Ct. HR (2nd sect.), *Anakomba Yula v. Belgium* (Appl. No 45413/07), judgment of 10 March 2009: 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.
- Eur. Ct. HR (4th sect.), *Niedzwiecki v. Germany* (Appl. no. 58453/00), judgment of 25 October 2005 : 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.

(Revised) European Social Charter (3 May 1996) - art. E

- 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.
- Paragraph 1 of the Appendix to the Revised European Social Charter : 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.’
- However, see 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

(Revised) European Social Charter (3 May 1996) - art. E

- 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 : exclusion under French law of the provision of medical assistance to children of undocumented migrants on French territory, except as regards treatment for emergencies and life-threatening conditions
- However, 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 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’, ‘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 prohibition of discrimination on grounds of nationality under the domestic constitutions or legislation of the EU Member States

- All EU Member States have a non-discrimination clause in their constitution
- 5 States do not protect foreigners from non-discrimination on grounds of nationality : Bulgaria, Lithuania and Malta do not include nationality among the prohibited grounds of discrimination; and in Denmark and Romania only nationals can claim the benefit from the Equality Clause.
- 21 States include in principle nationality among the prohibited grounds of discrimination or use open-ended clauses
- The situation in the UK (which has no written constitution) may be assimilated to this latter group, although there is no case where differential treatment on grounds of nationality was considered ‘irrational’ and thus discriminatory
- Conclusion : 22 Member States may allow for protection of foreigner against discrimination on grounds of nationality, which thus may be a general principle of EU Law

Conclusions

- Emergence of non-discrimination on grounds of nationality as a general principle of EU law (both because of converging national constitutional traditions and because of the influence of international human rights law)
- When implementing EU law, Member States should avoid creating unjustifiable differences of treatment on grounds of nationality
- Such differences of treatment may be justified in a limited range of cases that relate to political rights (to vote and to be elected, participation in public affairs by access to public employment), but not for the enjoyment of access to employment not linked to sovereignty, to health, to education, to social protection, etc.