

# Racial Discrimination and Nationality and Migration Exceptions: Reconciling CERD and the Race Equality Directive

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## Abstract

The principles of equality and non-discrimination offer potentially valuable tools to challenge discriminatory practices employed by States against non-citizens. However, nationality and immigration-related exceptions are an established feature of non-discrimination laws. Such exceptions raise fundamental questions about the scope of the protection offered by anti-discrimination laws and have the potential to perpetuate, rather than eliminate, race discrimination. This article addresses this critical but often neglected issue, through a doctrinal analysis of two specific exceptions - Articles 1(2) and 1(3) of the UN Convention on the Elimination of All Forms of Racial Discrimination and Article 3(2) of the EU's Race Equality Directive - and an examination of their impact in practice at the domestic level. We argue that nationality and migration status exceptions must be interpreted as narrowly as possible, in line with the core purpose of these instruments to eliminate race discrimination. Furthermore, we suggest that the interplay between these legal frameworks at the domestic level of implementation takes on particular importance in defining the scope and limits of nationality and migration-based exceptions.

## Keywords

Equality, discrimination, race, migration, migrants, non-citizens

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## I. INTRODUCTION

The principles of equality and non-discrimination offer potentially valuable tools to challenge discriminatory practices employed by States against non-citizens.<sup>1</sup> However, nationality and immigration-related exceptions are an established feature of international, European Union (EU) and domestic non-discrimination laws. Such exceptions raise fundamental questions about the scope of the protection offered by anti-discrimination laws and have the potential to entrench, rather than eliminate, existing forms of discrimination, in particular race discrimination. While such exceptions are arguably inherently problematic, where they apply, the scope of these provisions can have a very significant effect on the extent to which non-citizens are able to rely on the protections of anti-discrimination laws. This article will address this critical but often neglected issue, through an examination of how the nationality and migration status-related exceptions in two key instruments combatting race discrimination – the UN Convention on the Elimination of All Forms of Racial Discrimination (CERD or Convention)<sup>2</sup> and the EU’s Race Equality Directive 2000/43/EC (RED or Directive)<sup>3</sup> – interact and take effect at the domestic level. In this article, we do so by taking as a case study the experience in one EU Member State, Ireland.

In the case of EU Member States, two key exceptions, which differ in their form and scope, arise for consideration. First, Articles 1(2) and 1(3) of CERD – to which all EU Member States are parties – provide a saver for discrimination based on citizenship and nationality in the following terms:

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.

Second, Article 3(2) of the RED excludes from its scope nationality-based discrimination in the following way:

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.

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1. See generally the wide-ranging contributions to the *Special Issue on Discrimination in Migration and Citizenship* (2019) *Journal of Ethnic and Migration Studies*; Marie-Bénédicté Dembour, ‘*Gaygusuz* Revisited: The Limits of the European Court of Human Rights’ Equality Agenda’ (2012) 12(4) *Human Rights Law Review* 689; Sara Benedí Lahuerta, ‘Race Equality and TCNs, or How to Fight Discrimination with A Discriminatory Law’ (2009) 15(6) *European Law Journal* 738; Karin de Vries, ‘Rewriting *Abdulaziz*: The ECtHR Grand Chamber’s Ruling in *Biao v. Denmark*’ (2016) 18 *European Journal of Migration and Law* 467; Mathias Moschel, ‘The Strasbourg Court and Indirect Race Discrimination: Going Beyond the Education Domain’ (2017) 80 *Modern Law Review* 121; Maarten den Heijer, ‘Visas and Non-discrimination’ (2018) 20 *European Journal of Migration and Law* 470; Jean-Baptiste Farcy, ‘Equality in Immigration Law: An Impossible Quest?’ (2020) 20(4) *Human Rights Law Review* 725; Mathias Moschel, ‘Eighteen Years of Race Equality Directive: A Mitigated Balance’, in Uladzislau Belavusau and Kristin Henrard (eds), *EU Anti-discrimination Law Beyond Gender* (Hart 2018).
  2. *International Convention on the Elimination of All Forms of Racial Discrimination* (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (CERD).
  3. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/19.

In order to understand how these exceptions operate in practice, and accordingly the extent to which they deprive non-nationals of protection against race discrimination, it is necessary to examine not only the scope of the exceptions but also their application at the domestic level. The multi-level analysis undertaken in this article builds on the existing literature,<sup>4</sup> which does not generally consider the question of national implementation in detail.

In exploring these issues, the article is structured as follows. Section 2 of the article briefly explores the connections between migration, discrimination, race and nationality in order to place the issue within its broader context. Section 3 sets out the approach under CERD to the exceptions in Articles 1(2) and 1(3) of that instrument. Section 4 examines the impact of the exception contained in Article 3(2) of the RED. Drawing on this analysis, Section 5 uses the Irish case study to demonstrate how the tensions between the different legal obligations can play out in practice at the national level. In particular, by taking the example of the Irish experience, we examine how transposing Article 3(2) RED into domestic law creates a real risk that Member States may undermine their compliance with their obligations under CERD. In circumstances where all EU Member States are parties to CERD, this underlines the importance of interpreting Article 3(2) RED in line with States' obligations under CERD.<sup>5</sup> In light of this analysis, we argue that, despite the inherent limitations of anti-discrimination law in addressing deep-rooted structural or institutionalised forms of exclusion, its potential to tackle migration-related discrimination has not yet been fully realised.

## 2. UNPACKING THE CONNECTIONS BETWEEN MIGRATION, DISCRIMINATION, RACE AND NATIONALITY

The complex connections between migration, discrimination, race, and nationality are highlighted in both the academic literature and legal doctrine. 'Race' is a classic prohibited ground of discrimination in anti-discrimination law. 'National origin' (which refers to the country of origin, whether the country of birth or the country of which the parents are nationals) is also traditionally included among the prohibited grounds of discrimination, including within Article 1(1) of CERD.<sup>6</sup> De Schutter describes it as 'a concept close to, and at times indistinguishable from, racial or ethnic discrimination'.<sup>7</sup> Nationality, in contrast, refers to the legal bond of citizenship, and is less well developed as a legally problematic ground of discrimination. International anti-discrimination provisions do not generally contain express prohibitions of nationality-based discrimination, and EU Law,<sup>8</sup> as currently interpreted, does not address nationality-based discrimination except for EU citizens. In some countries (including Ireland), the definition of 'race discrimination' expressly covers discrimination on the basis of nationality.

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4 As referred to in (n 1).

5 While this article focuses on the interaction between EU Law and CERD, EU law is also out of step with the ECHR in this field, as analysed in, for example, Evelien Brouwer and Karin de Vries, 'Third-Country Nationals and Discrimination on the Ground of Nationality: Article 18 TFEU in the Context of Article 14 ECHR and EU Migration Law: Time for a New Approach', in Marjolein Van den Brink, Susanne Burri and Jenny Goldschmidt (eds), *Equality and Human Rights: Nothing but Trouble?* (SIM 2015) 123-146.

6 See, for example, Article 2 of the Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

7 Olivier De Schutter, *Links between Migration and Discrimination: A Legal Analysis of the Situation in EU Member States* (European Commission 2016) 29.

8 See the detailed examination contained at Section 4 of this article.

The traditional relative weakness of nationality compared to race in anti-discrimination law<sup>9</sup> is highlighted by the express exceptions for non-citizens and immigration-related measures under consideration in this article. Commenting on the RED in 2004, Hepple pointed out:

the effects of this exclusion are disproportionately felt by ethnic minorities, who make up the majority of TCNs [Third-Country Nationals]. Their inferior legal status has serious repercussions on the perceptions of ethnic minorities generally and on their integration.<sup>10</sup>

Over time, the practice of the Human Rights Committee,<sup>11</sup> the Committee for the Elimination of Racial Discrimination (CERD Committee)<sup>12</sup> and the European Court of Human Rights (ECtHR),<sup>13</sup> has established nationality as a suspect ground of discrimination. Yet significant limitations persist, particularly in relation to the issues of immigration admissions and removal. In the ECtHR jurisprudence, the principle of equal treatment has primarily been applied in cases involving equal treatment of migrants legally residing within the State and their access to social benefits, rather than in cases involving the prior question of immigration control or in deportation scenarios.<sup>14</sup> Moreover, the ECtHR's strict approach to nationality-based discrimination does not apply to differential treatment solely on the basis of migration status, which it explicitly separates from the nationality ground.<sup>15</sup> These limitations highlight the delicate balancing act inherent in the work of international and regional bodies charged with respecting and protecting both the principle of State sovereignty and the principle of non-discrimination.

De Schutter emphasises that 'nationality or status in certain cases may serve as a proxy for race or ethnic origin or for religion or belief'.<sup>16</sup> In its 1997 decision in *Habassi*,<sup>17</sup> the CERD Committee found that a Danish bank's refusal to provide a loan on the basis of the applicant's non-Danish nationality, and the justification that this was intended to make sure the loan was repaid, was unconvincing. The Committee opined that Denmark should have investigated

9 Karin De Vries, 'The Non-national As 'The Other': What Role for Anti-Discrimination Law?', in Moritz Jesse (ed), *European Societies, Migration and the Law: The 'Others' Amongst 'Us'* (Cambridge University Press 2020) 192-210.

10 Bob Hepple, 'Race and Law in Fortress Europe' (2004) 67(1) *Modern Law Review* 1, 7. See also, Sara Benedi-Lahuerta, 'Race Equality and TCNs, or How to Fight Discrimination with A Discriminatory Law' (2011) 15(6) *European Law Journal* 738.

11 *Ibrahima Gueye and others v France* Communication No 196/198, CCPR/C/35/D/1985 (UNHRC, 3 April 1989) and subsequent decisions including *Simunek v Czech Republic* Communication No 586/1994, CCPR/C/D/516/1992 (UNHRC, 31 July 1995); and *Karakurt v Austria* Communication No. 965/2000, CCPR/C/74/D/965/2000 (UNHRC, 4 April 2002).

12 See the detailed examination contained at Section 3 of this article.

13 *Gaygusuz v Austria* App no 17371/90 (ECtHR, 16 September 1996) and subsequent case-law, including *Koua Poirrez v France* App no 40892/98 (ECtHR, 30 September 2003); *Andrejeva v Latvia* [GC] App no 55707/00 (ECtHR, 18 February 2009); and *Ponomaryovi v Bulgaria* App no 5335/05 (ECtHR, 21 June 2011).

14 On some of the limitations of the *Gaygusuz* line of case law, see for example, Marie-Bénédicte Dembour, 'Still Silencing the Racism Suffered by Migrants—The Limits of Current Developments under Article 14 ECHR' (2009) 11 *European Journal of Migration and Law* 22; Marie-Bénédicte Dembour, 'Gaygusuz Revisited: The Limits of the European Court of Human Rights' Equality Agenda' (2012) 12 *Human Rights Law Review* 689; Jean-Baptiste Farcy, 'Equality in Immigration Law: An Impossible Quest?' (2020) 20(4) *Human Rights Law Review* 725.

15 See in particular, *Bah v United Kingdom* App no 56328/07 (ECtHR, 27 September 2011).

16 De Schutter (n 7) 37. See, for example, UNCERD, *Ziad Ben Ahmed Habassi v Denmark*, Communication No 10/1997, UN Doc CERD/C/54/D/10/1997, 6 April 1999.

17 UNCERD, *Ziad Ben Ahmed Habassi v Denmark*, Communication No. 10/1997, UN Doc CERD/C/54/D/10/1997, 6 April 1999.

'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 Convention, are being applied'.<sup>18</sup> This 'proxy' factor is addressed by anti-discrimination provisions which explicitly define racial discrimination to include nationality. In Ireland, for example, a Syrian refugee who was refused a bank account on the basis of his Syrian nationality won his equality case on the basis of race discrimination, pursuant to the definitions contained in the relevant legislation.<sup>19</sup>

Moreover, it is well known that race and nationality can combine with other factors, such as gender and class, to channel people into a variety of precarious migration statuses.<sup>20</sup> Migration status (or lack thereof) is a particular source of vulnerability, marginalisation and differential treatment within States, as has been explored in depth in the case of migrant domestic workers,<sup>21</sup> asylum seekers,<sup>22</sup> and undocumented migrants.<sup>23</sup> Despite this, courts have rarely considered the way in which migration status can serve as a proxy for race.<sup>24</sup> Against this backdrop, it has been argued that the principle of equality and non-discrimination 'remains an unfulfilled promise in the context of immigration'.<sup>25</sup>

Finally, a growing body of literature suggests that the basis of the international order – state sovereignty linked to control of national borders – needs to be fundamentally reimagined in order to address the problem of inherently discriminatory 'racial borders'.<sup>26</sup> The presence of nationality and migration-related exceptions in key anti-discrimination instruments, such as the CERD and RED, may be regarded as forming an important part of this problem. For its part, this article explores how to maximise the space offered within *existing* international, regional and national structures to challenge discrimination against non-citizens and migrants.

18 *ibid* para 9.3.

19 *A Syrian Refugee v A Bank*, ADJ-00013897 (Workplace Relations Commission, 18 November 2018) <<https://www.workplacerelations.ie/en/cases/2019/march/adj-00013897.html>> accessed 7 October 2021.

20 See generally Bridget Anderson, *Us and Them? The Dangerous Politics of Immigration Control* (Oxford University Press 2013); Mourao Permoser, 'Redefining Membership: Restrictive Rights and Categorization in European Union Migration Policy' (2017) 43 *Journal of Ethnic and Migration Studies* 2536.

21 See, for example, Virginia Mantouvalou, 'Am I Free Now?' *Overseas Domestic Workers in Slavery* (2015) 42(3) *Journal of Law and Society* 329, 357; Clíodhna Murphy, 'The Enduring Vulnerability of Migrant Domestic Workers in Europe' (2013) 62(3) *International and Comparative Law Quarterly* 599.

22 See, for example, Liam Thornton, 'Social Welfare Law and Asylum Seekers in Ireland: An Anatomy of Exclusion' (2013) 20(2) *Journal of Social Security Law* 66.

23 See, for example, Jaya Ramji-Nogales, 'The Right to Have Rights': Undocumented Migrants and State Protection' (2015) 63 *Kansas Law Review* 1045.

24 See *Taiwo v Olaigbe*; and *Onu v Akwivu* [2016] UKSC 31 (where the UK Supreme Court found that immigration status was dissociable from both race and nationality); *Bah* (n 15); UNCERD, *AMM v Switzerland*, Communication No. 50/2012, UN Doc CERD/C/84/D/50/2012, 11 March 2014.

25 Jean-Baptiste Farcy, 'Equality in Immigration Law: An Impossible Quest?' (2020) 20(4) *Human Rights Law Review* 725.

26 On racial borders, see Nicholas De Genova, 'Europe's racial borders' (*Monitoracism*, January 2018), <<http://monitoracism.eu/europes-racial-borders/>> accessed 7 October 2021; Nicholas De Genova, 'The "Crisis" of the European Border Regime: Towards a Marxist Theory of Borders' (2016) 150 *International Socialism* 31; E. Tendayi Achiume, 'Migration as Decolonization' (2019) 71(6) *Stanford Law Review* 1509; John Reynolds, 'Emergency and Migration, Race and the Nation' (2021) 67(6) *UCLA Law Review* 1768; John Reynolds 'Fortress Europe, Global Migration & the Global Pandemic' (2020) *AJIL Unbound* 114; E. Tendayi Achiume, Thomas Gammeltoft-Hansen and Thomas Spijkerboer 'Introduction to the Symposium on COVID-19, Global Mobility and International Law' (2020) 114 *AJIL Unbound* 312.

### 3. RACIAL DISCRIMINATION, CITIZENSHIP AND MIGRATION UNDER CERD

Despite the strong protections against racial discrimination outlined in Article 5 CERD, Articles 1(2) and (3) – which are set out in full above – appear to specifically exclude nationality and migration status-based discrimination from the ambit of the Treaty. Lerner’s study of CERD’s drafting history reveals the context to the adoption of the two paragraphs.<sup>27</sup> In negotiations, a “serious problem” arose in relation to the inclusion of ‘national origin’ in Article 1(1).<sup>28</sup> Discussions showed the prevailing confusion between the concepts of ‘nationality’ and ‘national origin’ and fears (from both post-colonial States and powerful, developed States) that the two concepts would be equated.<sup>29</sup> An agreement was finally reached by inserting Article 1(2) and (3). These paragraphs were thus specifically designed to ensure that the Convention would ‘not interfere in the internal legislation of the state as far as differences between citizens and non-citizens are concerned’,<sup>30</sup> neither would it ‘pretend to affect substantive norms on citizenship or naturalisation’.<sup>31</sup> Lerner’s assessment of the exceptions is instructive in understanding the viewpoint of the time:

They do not offer particular difficulties, as they merely confirm that distinctions etc between citizens and non-citizens should not be considered discriminatory acts prohibited by the Convention.<sup>32</sup>

The interpretive difficulties which have persisted around these provisions are underlined by the recent diverging approaches of the CERD Committee and the International Court of Justice (ICJ) to the question of whether discrimination on the basis of current nationality constitutes racial discrimination falling within the scope of the Convention. In *Qatar v United Arab Emirates* (UAE), the inter-State complaint made under CERD to both the CERD Committee<sup>33</sup> and the ICJ<sup>34</sup> concerned measures related to the current nationality of Qatar’s citizens. The CERD Committee drew on its own ‘constant practice’<sup>35</sup> to stress that, while not every difference in treatment on the basis of nationality would constitute racial discrimination (as this would be contrary to Article 1(2) CERD), differentiated treatment must pursue a legitimate aim, be proportional to the aim pursued and not result in a denial of the fundamental human

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27 Natan Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination: Reprint Revised by Natan Lerner* (Brill 2015) (originally published in 1970). See also Theodor Meron, ‘The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination’ (1985) 79 *American Journal of International Law* 283. For an in-depth study of the history of the drafting of Article 1(3), see Michelle Foster and Timnah Rachel Baker, ‘Racial Discrimination in Nationality Laws: A Doctrinal Blind Spot of International Law?’ (2021) 11(1) *Columbia Journal of Race and Law* 83.

28 Lerner (n 27) 33.

29 *ibid.*

30 *ibid.* 34.

31 *ibid.* 35.

32 *ibid.*

33 Pursuant to Article 11 CERD. UNCERD, *Decision on the admissibility of the inter-state communication Qatar v United Arab Emirates* UN Doc CERD/C/99/4, 27 August 2019.

34 Pursuant to Article 22 CERD. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates)*, 4 February 2021, ICJ General List No. 172.

35 *Decision on the admissibility of the inter-state communication Qatar v United Arab Emirates*, UN Doc CERD/C/99/4 (UNCERD, 27 August 2019), para 63.

rights of non-citizens.<sup>36</sup> On this basis, the Committee rejected the UAE's preliminary objection that the complaint was inadmissible because it fell outside the material scope of the Convention.

In contrast, applying standard rules of treaty interpretation and a textual approach which included a thorough analysis of the drafting history of Article 1(2) CERD, the ICJ found that CERD 'was clearly not intended to cover every instance of differentiation between persons based on their nationality. Differentiation on the basis of nationality is common and is reflected in the legislation of most States parties'.<sup>37</sup> The ICJ reasoned that the term 'national origin' in Article 1(1) CERD, 'in accordance with its ordinary meaning, read in its context and in the light of the object and purpose of the Convention, does not encompass current nationality'.<sup>38</sup> On this basis, the ICJ concluded that it did not have jurisdiction to entertain Qatar's application.<sup>39</sup> This disagreement between the CERD Committee and the ICJ on the basic question of the scope of application of CERD highlights both the ongoing impact of the express nationality exception and the fact that judicial actors continue to 'struggle with the meaning of racial discrimination under ICERD and how to interpret it'.<sup>40</sup>

### 3.1. GENERAL RECOMMENDATION NO. 30 AND THE PRACTICE OF THE CERD COMMITTEE: CERD AS A 'LIVING INSTRUMENT'

As Foster and Baker note, Articles 1(2) and (3) CERD 'severely limit' the 'universalist ambition' of the Convention.<sup>41</sup> They argue that Article 1(2) should be construed narrowly in light of the broad protections contained in Article 5 relating to the prohibition of racial discrimination and equality before the law.<sup>42</sup> The impact of the paragraphs has been curtailed through the practice of the CERD Committee, most notably through the adoption of General Recommendation No. 30 (GR30) and its clarification of how the paragraphs are to be interpreted.<sup>43</sup> GR30 builds on General Recommendations No. 11 (on non-citizens) and No. 22 (on Article 5 and refugees) but is significantly more ambitious.<sup>44</sup> The Preamble to GR30 states that it has become evident from the examination of the reports of States Parties that such groups, including migrants, refugees, asylum-seekers and undocumented non-citizens, constitute 'one of the main sources of contemporary racism and that human rights violations against members of

36 *ibid.*

37 Pursuant to Article 22 CERD. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v UAE)*, 4 February 2021, ICJ General List No. 172, para 87.

38 *Ibid.*, para 88.

39 In a number of declarations and dissenting opinions, members of the Court expressed disagreement with the Court's conclusion in this regard or its underlying reasoning, emphasising the importance of looking beyond labels to the substance in claims of racial discrimination. See Dissenting Opinions of Judge Bhandari and Judge Robinson; and Declaration of President Yusuf and the Dissenting Opinions of Judge Sebutinde and Judge Iwasawa.

40 Anna Spain Bradley, 'Human Rights Racism' (2019) 32(1) *Harvard Human Rights Journal* 1, 4.

41 Foster and Baker (n 27) 69.

42 For further analysis, see Foster and Baker (n 27) 82; Report of the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance (2018) UN Doc A/HRC/38/52 para 19.

43 UNCERD, 'General recommendation 30 on discrimination against non-citizens' (2004) UN Doc CERD/C/64/Misc.11/rev.3.

44 Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (Oxford University Press 2016) 146.

such groups occur widely.<sup>45</sup> Therefore, GR30 clarifies, Article 1(2) must be construed in a way that avoids undermining the basic prohibition of discrimination; it should not be interpreted to detract in any way from the rights and freedoms recognised and enunciated in particular in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.<sup>46</sup> In the view of the Committee, 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.<sup>47</sup>

In this way, the Committee brings nationality and migration status-based discrimination within the scope of the CERD. This reflects the reality of the work of the Committee, which consistently witnesses – and is called upon to evaluate – discrimination against migrants.<sup>48</sup> GR30 and the concluding observations of the CERD Committee<sup>49</sup> embrace the universalist underpinnings of the Convention and describe transformative State obligations to eliminate racial discrimination against non-citizens and migrants. The importance of these developments, which effectively neutralise the effects of Articles 1(2) and (3) in most circumstances, cannot be underestimated. The recent findings of the Committee in *Qatar v United Arab Emirates*,<sup>50</sup> while not directly related to questions of immigration – reaffirm the Committee’s commitment to its ‘constant practice’ that its competence *ratione materiae* extends to differences of treatment on the basis of nationality.<sup>51</sup>

### 3.2. DOCTRINAL UNCERTAINTY AND UNRESOLVED TENSIONS IN THE CERD COMMITTEE’S APPROACH

Despite the clear progress achieved through the purposive interpretation of CERD, it must be acknowledged that there are limitations in the CERD Committee’s approach. In particular, migration status as a ground of discrimination is conceptually underdeveloped. In GR30, the Committee does not systematically explain the relationship between racial discrimination and non-citizenship or migration status. The Committee’s justification for extending the scope of the Convention is primarily practical – it has witnessed racial discrimination against non-citizens so therefore it must respond – rather than conceptual. This lack of conceptual clarity carries through to its jurisprudence and its concluding observations. In its concluding observations, the Committee frequently expresses concern and makes recommendations about the treatment of non-citizens or categories of migrants,<sup>52</sup> but often without clarifying whether the policy or practice at issue constitutes

45 GR30 (n 43), Preamble.

46 *ibid.*, para. 2.

47 *ibid.*, para. 4.

48 UNCERD, *Diop v France*, Communication No. 2/1989, UN Doc CERD/C/39/D/2/1989, 18 March 1991. See also, in relation to a quota and examination system for doctors trained overseas, UNCERD, *BMS v Australia*, Communication No. 8/1996, UN Doc CERD/C/54/D/8/1996, 12 March 1999.

49 For an overview, see Thornberry (n 44) 153-154; he describes the archive of concluding observations relating to the treatment of non-citizens as ‘formidable’. For further analysis of the concluding observations of UNCERD as related to the situation of migrants, see Cliodhna Murphy, Mary Gilmartin and Leanne Caulfield, ‘Building and Applying a Human Rights-Based Model for Migrant Integration Policy’ (2019) 11(3) *Journal of Human Rights Practice* 445-466; and, in relation to Article 1(3) CERD, Foster and Baker (n 27) 94-101.

50 UNCERD, *Decision on the admissibility of the inter-state communication Qatar v United Arab Emirates* (n 33), para 63.

51 *ibid.*

52 See (n 50).



discrimination on the basis of nationality, national origin, migration status, or a combination of these, and why it constitutes *racial* discrimination.

In his analysis, Thornberry draws attention to the doctrinal problem relating to the ‘migration status’ ground. Noting that GR30 appears to adopt ‘nationality and immigration status’ as a ground of discrimination in itself, he points out that this would be an addition to the grounds expressly laid out in the Convention.<sup>53</sup> In Thornberry’s reading, nationality and immigration status are subsidiary to race and do not form a separate ground of discrimination. He concludes that ‘while distinctions according to citizenship/nationality may be drawn by States Parties, they will be tested for inferences that they are racially biased, or used as a “pretext for racial discrimination”, in purpose or effect’.<sup>54</sup> The case *AMM v Switzerland*<sup>55</sup> illustrates some of the difficulties that may arise in practice. Here, the Somali applicant had been granted ‘temporary admission status’ as a humanitarian alternative to expulsion. He complained that, for a variety of reasons stemming from this temporary residence status (which did not constitute a residence permission), he had encountered significant barriers in accessing the labour market, education, and healthcare, and had his letterbox tampered with by the immigration authorities. In its assessment of the merits, the Committee noted: ‘temporary admission is a legal status and no particular link with the individual and his or her personal situation, such as that required to demonstrate discrimination, is inherent in this legal status’.<sup>56</sup> It recalled both Articles 1(1) and 1(2) CERD and recognised the complexity of the issues raised by the case.<sup>57</sup> As the discriminatory acts were based solely on legal status under immigration law – it had not been ‘unequivocally established’<sup>58</sup> that the discrimination was based on his ethnic origin or Somali nationality – the situation did not constitute discrimination within the meaning of CERD.

More broadly, the debate on Articles 1(2) and (3) CERD brings to the surface the tension between the desire for universality in the protection of human rights and the reality of a State-centred international system in which distinctions based on nationality and citizenship continue to play a critical role. The evolution in CERD does not fundamentally challenge the sovereign right to exclude non-citizens which manifests itself in nationality-based visa requirements and travel authorisation systems and the resulting unequal access to the ‘global mobility infrastructure’.<sup>59</sup> While the CERD Committee’s practice – particularly in its concluding observations – clearly requires States to eliminate racial discrimination against non-citizens and immigrants, it fails to broach the question of whether immigration policies are inherently discriminatory when considered in their wider historical and geopolitical context. Of course, it would be difficult for the Committee to tackle this question whilst maintaining the support of States and staying within the confines of the wording of the Convention itself.

However, a recent decision of the Committee illustrates its ongoing deference to State sovereignty in the field of citizenship and immigration despite the innovations in GR30 and its wider

53 Thornberry (n 44) 147.

54 *ibid.*

55 UNCERD, *AMM v Switzerland*, Communication No. 50/2012, UN Doc CERD/C/84/D/50/2012, 18 February 2014. On a similar point, see also UNCERD, *DF v Australia*, Communication No. 39/2006, UN Doc. CERD/C/75/D/42/2008, 22 February 2008.

56 UNCERD, *AMM v Switzerland* (n 55), para. 4.5.

57 *ibid.*, para. 8.6.

58 *ibid.*

59 Thomas Spijkerboer, ‘The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control’ (2018) 20 *European Journal of Migration and Law* 452; also Achiume, ‘Migration as Decolonization’ (n 27) 1516.

practice. In *Benon Pjetri v Switzerland*, the applicant was an Albanian citizen who had lived in Switzerland since the age of two.<sup>60</sup> After ten years of residence in Switzerland, his application for naturalisation was refused on the basis that he had not demonstrated his ‘local integration’ in the municipality. He alleged, among other things, that the integration requirements for naturalisation were not adapted to the fact that he has a disability (he was confined to a wheelchair and had difficulty speaking) or to the ‘massive and racist’ hostility he faced from the local population. This hostility, the applicant argued, was due to his disability and his national origin and it caused him to withdraw from communal life. The CERD Committee found no violation of the Convention on the facts, accepting without much scrutiny that ‘integration’ was a neutral, non-discriminatory criterion for exclusion from naturalisation.<sup>61</sup> It did not take the opportunity to explore the effects of social context on a person’s ability to integrate, preferring to reiterate that ‘it is not the Committee’s role to review the interpretation of facts and national law made by national authorities, unless the decisions were manifestly arbitrary or otherwise amounted to a denial of justice’.<sup>62</sup>

### 3.3. THE VERDICT ON CERD: TRANSFORMATIVE POTENTIAL, INTERNAL CONSTRAINTS AND ROOM FOR FURTHER INCREMENTAL DEVELOPMENT

In the previous section, we saw that the practice of the Committee has not yet fully got to grips with the racial discrimination which is usually deeply embedded (and hidden) within systems of immigration control, and that the spirit of Articles 1(2) and 1(3) CERD hovers over the jurisprudence of the Committee.<sup>63</sup> Drawing on O’Cinneide’s work, these can be seen as ‘internal constraints’ on the effectiveness of CERD.<sup>64</sup> However, as O’Cinneide points out in the context of his assessment of the potential of international human rights law to enhance rights protection for undocumented migrants, ‘such constraints act as drag factors on the development of rights protection, but some space is left for incremental development of existing standards’.<sup>65</sup> If the CERD Committee were to clarify the conceptual relationship between racial discrimination, migration status, and the exceptions contained in Article 1(2) and 1(3), this would go a long way to reducing the ‘wriggle room’ still left to States in applying the Convention. Moreover, the expansive ‘living instrument’ approach employed in GR30 can be ‘used as a lever to open up new legal and political avenues of rights protection’.<sup>66</sup> The approach taken in GR30 illustrates the potentially transformative effect of a purposive interpretation of racial discrimination instruments and provides a benchmark for the critical assessment of EU and domestic law and policy. If a similar approach were implemented at the regional and national levels, discrimination on the basis of nationality and/or migration status could in some circumstances constitute ‘racial discrimination’ (at least in principle), and discrimination against non-citizens could be tackled head-on through anti-racial discrimination instruments

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60 *Benon Pjetri v Switzerland* Communication No. 53/2013, UN Doc CERD/C/91/D/53/2013 (UNCERD, 5 December 2016).

61 *ibid.*, para 7.6.

62 *ibid.*, para. 7.5.

63 E. Tendayi Achiume, ‘Governing Xenophobia’ (2018) 51 *Vanderbilt Journal of Transnational Law* 333, 357.

64 Colm O’Cinneide, ‘The Human Rights of Migrants with Irregular Status: Giving Substance to Aspirations of Universalism’, in Sarah Spencer and Anna Triandafyllidou (eds) *Migrants with Irregular Status in Europe: Evolving Conceptual and Policy Challenges* (Springer 2020) 56-59.

65 *ibid.* 63.

66 *ibid.*

such as the RED. The emphasis on the national level is particularly important because while CERD provides an international mechanism for redress and reporting, complaints are few and far between and the State reporting cycle is periodic in nature: it is at the national level that CERD's provisions must be implemented and applied in practice for the benefit of individuals.

#### 4. RACIAL DISCRIMINATION, NATIONALITY AND MIGRATION UNDER EU LAW

Turning to the position in EU law, while the prohibition of discrimination on the grounds of nationality is one of the overarching principles of EU law enshrined in Article 18 of the Treaty on the Functioning of the European Union (TFEU) and Article 21(2) of the EU's Charter of Fundamental Rights (CFR), this principle is erected on a fundamental distinction between nationals of EU Member States, on the one hand, and nationals of non-member countries, on the other hand.<sup>67</sup> Thus, the fundamental principle prohibiting nationality discrimination stops at the EU's own borders.

The implications of this approach are evident in the development of EU anti-discrimination law. One of the first outputs of the EU's more expansive competence in the field of non-discrimination<sup>68</sup> was the Race Directive adopted in 2000, prohibiting discrimination 'based on racial or ethnic origin'.<sup>69</sup> Article 3(1), defining the material scope, confirms that the Directive applies 'to all persons, as regards both the public and private sectors, including public bodies' in relation to the fields of employment, social protection (including social security and healthcare), social advantages, education, and access to and supply of goods and services which are available to the public, including housing. However, in Article 3(2), as set out in Section 1, the scope of the Directive is subject to a broad exception in respect of treatment based on nationality.

The tension between the broad prohibition on race discrimination and the exclusion of nationality-based differences of treatment is captured in Recital 13 of the Directive: on the one hand, the prohibition of discrimination applies to 'nationals of third countries' and, on the other hand, as reflected in Article 3(2), it 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'.

As Bell has discussed, the impact of the Directive on third-country nationals was 'one of the most sensitive issues within the Council', with certain Member States particularly concerned about restrictions on access for third-country nationals to the labour market being challenged under the Directive.<sup>70</sup> Against this backdrop, Article 3(2) was 'the final compromise on this issue, and it seeks to protect rules and practices that treat less favourably third country nationals (in comparison with EU nationals) from complaints of unlawful discrimination'.<sup>71</sup>

Of particular concern in this regard is the breadth of the second clause of Article 3(2). In providing that the Directive does not affect Member State rules relating to (i) entry into and residence of

67 Joined Cases C-22/08 and C-23/08 *Athanasios Vatsouras and Josif Koupatantze v Arbeitsgemeinschaft (ARGE) Nürnberg 900* [2009] ECR I-04585, para 52; See more recently Case Avis 1/17 *Accord ECG UE-Canada* [2019] ECLI:EU:C:2019:341, para 169.

68 See Article 19 TFEU.

69 For an excellent and detailed analysis of the EU's intervention in this field, see Mark Bell, *Racism and Equality in the European Union* (Oxford University Press 2008).

70 Mark Bell, *Anti-Discrimination Law and the European Union* (Oxford University Press 2002) 76.

71 Bell (n 70) 77.

third-country nationals and stateless persons on the territory of Member States, and (ii) *any treatment which arises from the legal status* of the third-country nationals and stateless persons concerned, Article 3(2) has a potentially broad application. This could exclude the protection of the Directive from those most vulnerable to racial discrimination not only in respect of the conditions of entry, residence and legal status in EU Member States in the strict sense (which is already far-reaching) but even in other areas of life where the difference in treatment could be said in some way to arise from their legal status in the State, including the specific areas identified in Article 3(1) RED. If interpreted and applied in such a broad way, this would fundamentally call into question the application of the Directive to third-country nationals, expressly referenced in Recital 13.

Despite its very wide-ranging scope, over twenty years on from its adoption, the Directive has given rise to very little litigation before the Court of Justice of the European Union (CJEU or Court). Indeed, the limited amount of litigation may itself be a signal of certain limitations within the Directive itself. As de Búrca has observed, ‘while the tiny trickle of cases concern race discrimination being referred is a factor largely outside the control of the CJEU, nevertheless the Court did not exactly embrace all the opportunities which were provided to address some possibly important questions of racial and ethnic discrimination’.<sup>72</sup> If this is true of the Directive generally, it applies with particular force to Article 3(2) RED.

In its judgment in *Firma Feryn*, the Court of Justice was called on to consider whether a private sector’s employer’s public statements – that he would not employ immigrants – fell foul of the prohibition on discrimination under the Directive. The reference itself, and the Advocate General’s Opinion, recited the statements of a director of the company to the effect that he was not ‘looking for Moroccans’<sup>73</sup> and that people often say ‘no immigrants’.<sup>74</sup> However, in its judgment, the Court did not make any reference to nationality or migration status, instead concluding that:

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.<sup>75</sup>

Thus, in this particular context, the Court appeared to consider that nationality and migration status were so closely linked to ethnic or racial origin as to bring the conduct in question within the scope of the Directive.<sup>76</sup> Indeed, the exception in Article 3(2) RED is discussed neither in the Advocate General’s Opinion nor in the Court’s judgment. This judgment suggests that the Directive may provide an effective mechanism for combating race discrimination in the field of employment targeted at particular groups of third-country nationals.

72 Gráinne de Búrca, ‘The Decline of the EU Anti-Discrimination Law?’, Note for the Colloquium on Comparative and Global Public Law (New York University 2016) <[http://www.law.nyu.edu/sites/default/files/upload\\_documents/The%20Decline%20of%20the%20EU%20Anti-Discrimination%20Law.pdf](http://www.law.nyu.edu/sites/default/files/upload_documents/The%20Decline%20of%20the%20EU%20Anti-Discrimination%20Law.pdf)> accessed 22 March 2021.

73 Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008] ECR I-05187, Opinion of AG Poiares Maduro, para 3.

74 *ibid*, para 4.

75 *Firma Feryn* (n 73), para 25.

76 See Lilla Farkas, *The Meaning of Racial or Ethnic Origin in EU Law: between Stereotypes and Identities* (European Commission 2017) 112.

However, in subsequent cases, where Article 3(2) has been expressly invoked, a more cautious approach is apparent. In *Kamberaj*, the applicant was an Albanian national of Muslim faith who had been a resident of and in stable employment in the province of Bolzano in Italy since 1994. The applicant held a residence permit for an indefinite period and challenged the refusal of the local authorities to grant him access to housing benefit on the basis that he was a third-country national. The reference raised a series of questions in relation to both the RED and Directive 2003/109/EC on the status of third-country nationals who are long-term residents. According to the Advocate General, it was clear from the reference that the applicant had ‘not suffered any direct or indirect discrimination based on his racial or ethnic origin’.<sup>77</sup> This being so, the Advocate General considered that the difference in treatment suffered was based ‘on his status as a third-country national, and therefore on his nationality’.<sup>78</sup> By reason of Article 3(2), the Court concluded that the discrimination did not fall within the scope of Directive 2000/43 and that the questions relating thereto were inadmissible.<sup>79</sup> According to Farkas, in *Kamberaj*:

more evidence would have been necessary to bring the RED into play, other than an assertion of its applicability to the individual claim, primarily seeking to establish direct nationality based discrimination, and secondarily, indirect discrimination on the grounds of racial or ethnic origin as prohibited under the RED.<sup>80</sup>

While the approach taken in *Kamberaj* may be understood by reference to the evidence before the Court, and also the applicability of Directive 2003/109/EC, the Court’s mechanistic approach to Article 3(2) RED is nonetheless difficult to reconcile fully with the approach in *Firma Feryn*.<sup>81</sup>

More recently, in *Jyske Finans*, a Danish finance company required additional proof of identity from persons applying for a car loan who produced a driving licence indicating a country of birth other than an EU/EEA Member State. Mr. Huskic sought a car loan with his partner but was asked to provide additional proof of identity as his driving licence indicated that he had been born in Bosnia and Herzegovina in 1975 even though he had lived in Denmark since 1993, and had acquired Danish nationality in 2000. In its judgment, the Court first considered whether ‘a person’s country of birth is to be regarded as directly or inextricably linked to his specific ethnic origin’.<sup>82</sup> Referring to its earlier judgment in *CHEZ*, the Court noted that the concept of ‘ethnicity’ has its origin in the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds.<sup>83</sup> While country of birth could not be excluded from the criteria for determining ethnicity, the Court considered that ethnic origin could not be identified on the basis of one criterion alone and a person’s country of birth could not in itself ‘justify a general presumption that that person is a member of a given ethnic group such as to establish the existence of a direct or inextricable link

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77 Case C-571/10 *Servet Kamberaj v Istituto per l’Edilizia Sociale della Provincia autonoma di Bolzano (IPES) and Others* [2012] ECLI:EU:C:2012:233, Opinion of AG Bot, para 42.

78 *ibid.*

79 *Kamberaj* (n 77), para 50.

80 See Farkas (n 76) 112.

81 The approach of the Court has guided national courts: see for example, Case C-94/20 *Land Oberösterreich v KV* [2021] ECLI:EU:C:2021:477, Opinion of Advocate General Hogan, para 35.

82 Case C-668/15 *Jyske Finans A/S v Ligebehandlingsnævnet* [2017] ECLI:EU:C:2017:278.

83 *ibid.*, para 7.

between those two concepts'.<sup>84</sup> Furthermore, it could not be presumed that 'each sovereign State has one, and only one, ethnic origin'.<sup>85</sup> Noting that the country of birth was the only criterion on the basis of which the practice of *Jyske Finans* was found to constitute discrimination, the Court said that it could not be concluded that the requirement to provide additional identification was directly based on ethnic origin.<sup>86</sup> In reaching this conclusion, the Court held that the Directive did not apply to discrimination on the ground of nationality. Once again, as in *Kamberaj*, the Court applies the nationality exception in a mechanistic way which does not take into account the complex links between nationality and race discrimination. Moreover, on the question of indirect discrimination, the Court rejected the argument that the use of the neutral criterion at issue (that is a person's country of birth) was generally more likely to affect persons of a 'given ethnicity' than 'other persons'.<sup>87</sup> As *Atrey* has argued, the Court's approach 'sacrifices the form and substance of direct and indirect discrimination under Article 2(2) of the Race Directive'.<sup>88</sup>

It follows that, twenty years since the adoption of the Directive, we still have little guidance on the proper scope and limits of Article 3(2) RED and the extent to which the Race Directive can offer protection to non-nationals living in the EU. At best, there are mixed signals in the case law. On the one hand, in *Firma Feryn*, the Court has recognised that nationality and migration may indeed be a relevant factor in assessing claims of racial and ethnic discrimination and that the protection of the Directive extends to discrimination against non-nationals in the field of employment. On the other hand, in *Kamberaj* and *Jyske Finans*, the Court has not only affirmed that the Directive does not extend to discrimination on the ground of nationality but has applied Article 3(2) RED in a mechanistic way, without critically interrogating its scope and application. In addition, it is notable that the well-established general principle that exceptions to the principle of equal treatment must be interpreted narrowly,<sup>89</sup> has never been expressly articulated in the context of Article 3(2) RED. More generally, the dearth of case law may in itself point to the potential ineffectiveness of the Directive in tackling race discrimination, particularly against the most vulnerable groups such as migrants.<sup>90</sup> While caution must be exercised in drawing conclusions from such a small number of judgments, the approach to Article 3(2) RED to date does not necessarily inspire confidence that the Court is always willing to engage with the complex role of nationality and migration status in race discrimination, as explored in the opening sections of this article. Given the influence of the Court's case law on the approach of national courts and decision-makers in this field, this is a matter of some concern. While the Directive sets minimum safeguards such that Member States may opt to provide more extensive protection,<sup>91</sup> as will be explored in the next section, it opens the possibility to Member States to carve out wide-ranging exceptions to race discrimination provisions.

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84 *ibid.*, para. 10.

85 *ibid.*, paras 20-21.

86 *ibid.*, para 23.

87 *ibid.*, para 33.

88 Shreya Atrey, 'Race Discrimination in EU Law after *Jyske Finans*' (2018) 55(2) *Common Market Law Review* 625-642.

89 Bell (n 70) 77; See for example, Case C-222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabular* [1986] ECR -01651.

90 See for example, Commission, 'Report on the application of the Racial Equality Directive and the Employment Equality Directive', COM (2021) 139 final, noting the continued high levels of discrimination against people from ethnic and immigrant minority groups, the low levels of awareness of anti-discrimination law and the importance of enforcement at the national level.

91 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/19, Article 6.

## 5. BROAD AND UNCERTAIN EXCLUSIONS AT THE NATIONAL LEVEL: THE IRISH CASE STUDY

To understand how the exceptions in CERD and RED operate in practice, it is necessary to examine their implementation at the national level. We do not suggest that the Irish case study is representative of the approach of all EU Member States, but rather that it illustrates the gaps which may arise when national lawmakers expressly seek to implement the legal obligations imposed by both CERD and RED. The treatment of discrimination based on race, ethnic origin, national origin and/or nationality varies from Member State to Member State. According to de Schutter, seven Member States explicitly prohibit discrimination based on nationality, while it may be a protected ground under other headings in four additional States.<sup>92</sup> In Ireland, the national legislative framework in the field of equality – the Employment Equality Acts 1998–2015 and the Equal Status Acts 2000–2015 – broadly defines the concept of race discrimination. Thus, for example, under the Equal Status Act, the ground of race refers to ‘difference of treatment between persons who are of different race, colour, nationality or ethnic or national origins’.<sup>93</sup> This reflects the fact that the enactment of the Equal Status Act was necessary to enable Ireland to ratify CERD and was intended to give effect to the State’s obligations under CERD at the domestic level.<sup>94</sup>

However, in giving effect to the provisions of the Race Directive at the domestic level in 2004, the Irish legislature introduced a significant qualification to the scope of protection against race discrimination. According to Section 14(1) of the Equal Status Act, nothing in the legislation should be construed as prohibiting:

(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) [...].

Thus, taking advantage of the exception in Article 3(2) RED, this provision undercuts the scope of protection against race discrimination under the original legislation, at least insofar as actions taken by public authorities vis-à-vis non-nationals were concerned.<sup>95</sup> Like Article 3(2), the provision extends both to actions taken to address the unlawful presence of non-nationals in the State as well as, more problematically, actions taken in accordance with any provision or condition under any enactment and arising from his/her entry to or residence in the State.

92 De Schutter (n 7) Chapter IV.

93 Equal Status Acts 2000–2015, Section 3.

94 See Dáil Debates Vol 505 (No. 2) 20 May 1999.

95 Judy Walsh, *Equal Status Acts 2000–2011: Discrimination in the Provision of Goods and Services* (Blackhall Publishing 2012) 62.

While the intention behind the provision appears to have been to ensure that asylum and immigration applications, and the non-statutory direct provision system for international protection applicants, would not be open to challenge under the Equal Status Act,<sup>96</sup> like Article 3(2) RED, Section 14(1)(aa) of the Equal Status Act is cast in very broad terms. At its most benign, this provision creates very significant uncertainty about the extent to which third-country nationals may rely on the protection of the legislation against public authorities. At its worst, this provision serves to shield public authorities from complaints of race discrimination by third-country nationals, including applicants for international protection.

Having regard to the approach of the CERD Committee to the interpretation of Articles 1(2) and 1(3) CERD, as discussed above, it is open to question whether Section 14 of the Equal Status Act is consistent with Ireland's obligations under CERD. In its most recent Concluding Observations in respect of Ireland from December 2019, the Committee expressed its concern about shortcomings in the legislative framework under the Equal Status Acts (and, in the field of employment, the Employment Equality Acts) including:

1. the absence of all prohibited grounds of racial discrimination in conformity with Article 1 of the Convention;
2. the absence of explicit prohibition of multiple or intersectional discrimination;
3. the unclear definition of 'services' in Section 5 of the Equal Status Acts, which may exclude the provision of services provided by public authorities such as the police, the prison service and the immigration service; and
4. preclusion of complaints against legislative provisions in Section 14 of the Equal Status Acts (Articles 1 and 2).<sup>97</sup>

In short, the amendment to Irish law – taking advantage of the exception in Article 3(2) RED – significantly impedes the ability of non-nationals to challenge discriminatory conduct on the part of public authorities and, in this way, creates a material risk that domestic law is inconsistent with the State's obligations under CERD. Having regard to the breadth of this exception, the lack of practice in this regard since 2004 – in particular, the dearth of cases of race discrimination against public authorities – is itself a concern that migrants are unwilling to challenge discriminatory practices.

The scope of this exception has recently come under the spotlight. The backdrop to this development lies in a judgment of the Irish Supreme Court, in the case of *NHV v Minister for Justice*, which struck down a provision of Irish legislation that imposed an absolute prohibition on applicants for international protection engaging in employment.<sup>98</sup> Following this judgment, the Irish Government provided applicants for international protection with access to the labour market. However, for many such persons, other obstacles – such as the lack of access to a driving licence – have hindered their ability to obtain employment.

In a series of recent cases, applicants for international protection – who have been present in the State for a considerable period of time without having their applications finally determined – have challenged the refusal by the Road Safety Authority, the statutory body responsible for the issuing

<sup>96</sup> *ibid.*, 64.

<sup>97</sup> UNCERD, 'Concluding observations on the combined fifth to ninth reports of Ireland', CERD/C/IRL/CO/5-9, 2.

<sup>98</sup> *NHV v Minister for Justice* [2018] 1 IR 246.



of driving licences, to process their applications for either a learner permit or a driving licence on the basis that they are not 'resident' within the State. The Driving Licence Regulations require that all applicants are 'normally resident' in the State or, in the case of students, have been in the State for six months or more. In practice, the RSA has interpreted the requirement of 'normal residence' in the State as meaning 'residency entitlement' in the form of particular types of lawful residence which an applicant for international protection, no matter how long they had in fact been in the State, could never satisfy.

In two complaints made to the statutory tribunal with responsibility for equality complaints, the Workplace Relations Commission, applicants alleged that the refusal to provide them with access to a driving licence on this basis – notwithstanding that they have held 'temporary' residence certificates confirming their entitlement to be in the State for a significant period of time – constituted discrimination on the ground of race. In defending these claims, the public authority relied *inter alia* on Section 14 of the Equal Status Acts, arguing first that the residency requirement derived from legislation and applied to all nationalities and second that in any event it constituted a requirement 'arising from' a person's entry to or residence in the State such that it was exempt from the application of equality legislation.

At first instance, the Workplace Relations Commission upheld these complaints. In the first decision delivered in November 2019,<sup>99</sup> the Adjudicator concluded that Section 14 of the Equal Status Act provided no defence in circumstances where the discriminatory requirement for additional proof went beyond what was expressly required under the relevant Driving Licence Regulations. The Adjudicator rejected the complaint that the conduct concerned was direct discrimination on the basis that asylum seeker status was not one of the protected grounds under the equality legislation. However, the Adjudicator upheld the complaint of indirect discrimination.<sup>100</sup> On appeal, the man, whose circumstances had changed, only sought to have the award of compensation upheld. The appeal was resolved on the basis that the appeal would be allowed but a payment of €4,000 would be made to the man.<sup>101</sup>

In a second case,<sup>102</sup> the applicant was an asylum seeker living in a rural direct provision centre who had to commute for over three hours each way on public transport in order to access employment. In this case too, the Adjudicator rejected the defence based on Section 14 and concluded that the requirement for additional proof for certain categories of non-national such as the applicant constituted indirect discrimination on the ground of race. Having found 'that the impact of the indirect discrimination was pronounced and obstructive to the complainant's wish for self-actualisation in accessing work', the Adjudicator awarded compensation in the sum of €5,000 for the distress suffered and directed the respondent to amend its practices. However, on appeal, the Circuit Court concluded, albeit without detailed reasoning, that the practice of the public authority was not discriminatory on the ground of race.<sup>103</sup> While the reasoning of the Court is unclear, the thrust of the judgment appears to be that, because of the applicant's status as an asylum seeker and immigrant

99 *An asylum seeker v A Government Agency*, ADJ-00017832 (Workplace Relations Commission, 20 November 2019) <<https://www.workplacerelations.ie/en/cases/2019/november/adj-00017832%20.html>> accessed 7 October 2021.

100 *ibid.*

101 See Irish Human Rights and Equality Commission Press Release, available at <<https://www.ihrec.ie/court-rules-that-rsa-regulations-block-all-asylum-seekers-from-getting-driving-licence/>> accessed 7 October 2021.

102 *An asylum seeker v A Government Agency*, ADJ-00020743 (Workplace Relations Commission, 4 September 2019) <<https://www.workplacerelations.ie/en/cases/2020/january/adj-00020743.html>> accessed 7 October 2021.

103 *Road Safety Authority v AB* [2020] IECC 3.

with limited permission to enter and reside in the State, she did not enjoy the right to make a claim of discrimination. According to the Court, while there are ‘legitimate political concerns for asylum applicants’ rights’, these are matters for the legislature, not for the courts.<sup>104</sup> On further appeal on a point of law to the High Court, the High Court concluded that, because the actions of the public authority were required under an enactment, they could not be the subject of a discrimination claim under the Equal Status Acts.<sup>105</sup>

While these cases merely present an example of a much broader issue, they illustrate how a broad application of nationality-based exceptions – in particular measures giving effect to Article 3(2) RED – may be used to deprive non-nationals of the protection of anti-discrimination law even in the context of access to basic services. However, interpreting such exceptions strictly and in light of CERD, we argue that third-country nationals must *prima facie* be entitled to protection against race discrimination in the fields specifically referred to in Article 3(1) RED, including access to basic public services such as driving licences. If a student who is resident in the State for six months can access such a service, it is very difficult to justify a blanket exclusion on access for third-country nationals, such as applicants for international protection, who have been lawfully present in the State often for extended periods of time before their applications are finally determined.

Unfortunately, the manner in which Article 3(2) RED is given effect in Irish law through Section 14(1)(aa) of the Equal Status Act creates very significant uncertainty about the extent to which migrants – who are often the persons most vulnerable to various forms of race discrimination – are entitled to rely on the protection of anti-discrimination law against public authorities. First, the mere existence of these exceptions may deter migrants, particularly those with precarious migration status, from challenging discriminatory practices which exclude them from access to basic services. Second, even if an individual is willing to challenge such practices, these exceptions may serve as shields for public authorities in defending such challenges. Indeed, the complex issues of interpretation to which these provisions give rise may in themselves entail costly and time-consuming litigation about the scope of applications of laws before the substantive issue of discrimination can even be considered.

In circumstances where the Directive makes specific reference to CERD,<sup>106</sup> and all Member States are parties to that Convention, it is important that the provisions of the Directive are interpreted in a manner consistent with CERD.<sup>107</sup> Drawing on the approach of the CERD Committee in GR30, it is argued that in applying the Race Directive, it must be recognised that discrimination against groups such as migrants, refugees, asylum-seekers and undocumented non-citizens ‘constitutes one of the main sources of contemporary racism’.<sup>108</sup> In line with GR30, the ‘legislative guarantees against racial discrimination’ contained in the Directive ought to ‘apply to non-citizens

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104 *Road Safety Authority v AB* [2020] IECC 3, para 51.

105 *AB v Road Safety Authority* [2021] IEHC 217.

106 Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* [2015] ECLI:EU:C:2015:480, para 73.

107 The Court of Justice has long recognised that, in interpreting EU law, it is important to have regard to Member States’ international obligations: Case C-308/06, *Intertanko and Others v Secretary of State for Transport* [2008] ECR I-04057, para 52; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v. Council and Commission*, EU:C:2008:461, paras 285, 308. On CERD, see also for example, Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* [2017] ECLI:EU:C:2018:257, Opinion of AG Kokott.

108 GR30, Preamble.

regardless of their immigration status'. The exception in Article 3(2) RED should not be interpreted in such a way as to undermine the protection against racial discrimination for third-country nationals in the fields covered by Article 3(1) RED. While the Directive may not affect the application of Member States' immigration laws in a direct sense, there is no reason in principle why the protection of the Directive should not apply to non-nationals in the fields specifically covered in Article 3(1) from employment and social protection and education to access to goods and services. While not every difference in treatment on the basis of nationality would constitute racial discrimination (as this would be contrary to Article 3(2) RED), differentiated treatment must be subject to careful scrutiny to ensure its proportionality.<sup>109</sup> In circumstances where national measures or practices will rarely be openly or expressly race or ethnicity based, very careful scrutiny is required to ensure that apparently neutral measures – which are based on nationality, residence or similar criteria – do not in fact put persons of a racial or ethnic origin at a particular disadvantage compared with other persons.<sup>110</sup> While such measures may be capable of objective justification, this concept 'must be interpreted strictly'<sup>111</sup> and the onus lies on the respondent to provide evidence in support of any such plea.<sup>112</sup>

If anti-discrimination laws fail to provide protection against race discrimination for the most vulnerable groups, they may serve to entrench, rather than eliminate, some of the most serious forms of race discrimination present in our societies. The manner in which Article 3(2) RED has been used to limit the application of the Equal Status Act in Ireland provides a concrete illustration of this problem. In our view, such an approach is not only inconsistent with the very purpose of the Race Directive; it also creates a very real risk that domestic law is inconsistent with the State's obligations under international law and, specifically, CERD. In these circumstances, a strict interpretation of Article 3(2) RED – and of any implementing domestic law – is essential to avoid a conflict between EU law and international law.

## 6. Conclusion

Broad-based nationality, citizenship and immigration exceptions present a real risk of undermining the promise of discrimination law in the context of racial discrimination connected with nationality and migration status. The CERD Committee has minimised the impact of the exceptions in Articles 1(2) and 1(3) CERD, using a purposive interpretation of the relevant provisions to ensure that nationality and migration status-based discrimination fall within the scope of the Convention. While we have identified conceptual issues in the practice of the Committee, we suggest that this approach, as articulated most clearly in General Recommendation No. 30, unlocks the potential of this key anti-discrimination instrument to protect migrants. Turning to EU Law, Article 3(2)

109 This draws on the approach of the UNCERD in *Decision on the admissibility of the inter-state communication Qatar v. United Arab Emirates* (n 33), para 63.

110 In its judgment in *Taiwo v Olaigbe and Onu v Okwiwu*, [2016] UKSC 31, para 32, the UK Supreme Court was satisfied that there was no indirect discrimination on the facts of the particular case but accepted the argument that the Court should not 'rule out the possibility that, in other cases involving the exploitation of migrant workers, it may be possible to discern a [provision, criterion or practice] which has an indirectly discriminatory effect'.

111 *CHEZ Razpredelenie Bulgaria* (n 106), para 112.

112 Case C-167/97 *Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez* [1999] ECR I-00623, paras 75 and 76. See also Case C-388/07 *Age Concern England v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] ECR I-01569, para 51.

RED affords EU Member States significant leeway in discriminating against non-nationals simply because of their immigration status. In contrast to the CERD Committee, the CJEU has not embarked on a clear path of minimising the impact of this provision in practice. While the Directive provides minimum protections and States may opt for more extensive protection in their national laws, the transposition of Article 3(2) into the domestic laws of Member States may thus give rise to a real risk of conflict with the Member States' obligations under CERD. This is certainly the case in respect of Ireland, the Member State examined as a case study in this article.

In order to avoid the risk of conflict between EU law and international law, particularly in the context of their practical implementation at the domestic levels, we argue that Article 3(2) RED must be strictly interpreted. In our view, the requirement for a strict interpretation flows not only from the general principle that exceptions to the principle of equal treatment must be narrowly interpreted or the importance of adopting an interpretation of secondary legislation that is consistent with fundamental rights, including Article 21 of the CFR. It also flows from – and is significantly reinforced by – the need to interpret the Directive in a manner compatible with Member States' obligations under international law and specifically CERD. While this article has drawn attention to the gaps in protection for non-citizens within the CERD framework, the approach of the CERD Committee in GR30 and its concluding observations illustrates that exceptions from the scope of race discrimination *can* and *should* be interpreted so as to preserve the core purpose of the legal instrument. In a similar way to Article 1(2)-(3) CERD, Article 3(2) RED must not be interpreted and applied so as to exclude from the protection of the Directive non-nationals, including different categories of migrants. Rather than helping to combat discrimination, such an interpretation of the Race Directive – which is difficult to reconcile with Recital 13 – would serve to reinforce and legitimise forms of race discrimination.

In making this modest suggestion, we do not suggest that a narrow interpretation and application of nationality-based exceptions alone would provide adequate protection for non-nationals and migrants against race discrimination within the EU. Even leaving aside such exceptions, discrimination law – which has traditionally been focused on the model of individual enforcement – has significant limitations in tackling deep-rooted structural or institutionalised forms of discrimination. While litigation may play a part in tackling such discrimination in individual cases, it is ill suited to effecting the deeper cultural change. More broadly, the tensions in anti-discrimination law's treatment of questions of race, nationality, and migration underline the need for further reflection on how our legal systems – premised on the promise of equality before the law and equality in public life – accommodate the rights of those who cross borders. However, if there were clarity about the extent to which the existing framework was available to non-nationals and migrants, this could allow for meaningful challenges to some of the most egregious barriers facing these groups within the EU today.

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