



This third General Policy Paper by the European Network against Racism (ENAR) deals with the equal treatment of ‘third country nationals’ (TCN), that is “any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty”.¹ This definition includes a number of categories of persons: refugees, asylum seekers, migrant workers, those who enter through family reunion, and legally resident and undocumented immigrants. It also includes stateless persons, in accordance with the definition in the Constitutional Treaty.²

Equal treatment is an integral part of the fundamental right to non-discrimination, and therefore of the mission of ENAR. Although, in principle, every person is entitled to this right regardless of his/her legal status, the effective exercise of rights can be, and is, undermined by differential treatment based on citizenship or immigration status. According to the UN Committee on the Elimination of Racial Discrimination this “constitutes [racial] discrimination if the criteria for such differentiation... are not applied pursuant to a legitimate aim, and are not proportional”.³ Xenophobia against non-nationals was recognised as one of the main sources of contemporary racism by the UN World Conference against Racism.⁴

In the European Union (EU), equal treatment of TCNs is both an obligation, under the general principle of respect for fundamental rights, and a political commitment. The Tampere Presidency conclusions in 1999 stated that: “The European Union *must* ensure fair treatment of third country nationals who reside legally on the territory of its Member States.”⁵ The same commitment was reaffirmed in the Common Basic Principles on Integration adopted by the European Council in 2004, which provide a clear, though implicit, indication of the link between equal treatment of TCNs and protection against racial and ethnic discrimination:

If immigrants are to be allowed to participate fully within the host society, they must be treated equally and fairly and be protected from discrimination. EU law prohibits discrimination on the grounds of racial or ethnic origin in employment, education, social security, healthcare, access to goods and services, and housing.⁶

EU Agencies, such as the European Monitoring Centre on Racism and Xenophobia (EUMC), and anti-racist civil society recognise immigration and asylum policies as one of the key priorities in the ambition to make the EU an area free from racism.⁷

¹ Directive 2003/109/CE, Art. 2 (a).

² EUCT, Article III-257(2). While the definition adopted by this paper includes stateless persons, stateless persons are not generally the primary focus of this policy statement.

³ CERD (2004) General recommendation XXX on discrimination against non-citizens.

⁴ UN (2001) World Conference against Racism, Declaration and Programme of Action.

⁵ Presidency Conclusions, 15-16 December 1999 (emphasis added).

⁶ Presidency Conclusions, 19 November 2004.

⁷ See for example ENAR (2006) Shadow Report 2005; EUMC (2004) Comparative Report: Migrants, Minorities and Legislation.

TCNs tend to suffer multiple discrimination, which can blur the distinction between 'lawful' differential treatment based on citizenship status and unlawful discrimination on the grounds prohibited by the European treaties. Member States often find justification for differential treatment on the basis of citizenship status; yet it is undeniable that real or presumed belonging to certain ethnic, 'racial' or religious groups plays a crucial role in the identification of groups that can be 'legally' discriminated against. The experience of ENAR members demonstrates that asylum and immigration legislation has become a manifestation of institutional discrimination,⁸ often failing to meet the basic principle of equality before the law. In Europe today 'immigrants' are popularly identified as a homogenous group, different and incompatible with European societies, which represent a threat, justifying the violation of their fundamental rights and the values of the EU.

Advocating for the equal treatment of TCNs in the EU is a duty in the context of the protection of fundamental human rights, and a strategic priority in the eradication of all forms of racism. Consequently this paper elaborates five key principles:

1. European immigration and asylum policy must respect all international human rights instruments.
2. Anti-discrimination legislation must protect everyone living in the EU.
3. All security measures must be fully compatible with fundamental rights.
4. Positive steps must be taken to ensure equal access to, and the effective enjoyment of, fundamental rights by third country nationals.
5. Member States must protect fundamental rights in implementing the 'external dimension' of migration and asylum policies.

1. European immigration and asylum policy must respect all international human rights instruments.

The EU is founded on the respect for human rights, and should comply with the highest international standards, including respect for the fundamental rights of migrants and non-nationals.

ENAR urges:

- European institutions to fully implement and where needed revise relevant Community legislation to comply with the 1951 United Nations Convention Relating to the Status of Refugees, the 1954 United Nations Convention relating to the Status of Stateless Persons and CERD General Recommendation 30 on discrimination against non-citizens, as well as the relevant recommendations of the Council of Europe, the Conventions of the International Labour Organisation, and the Palermo Protocols to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and against the Smuggling of Migrants by Land, Air and Sea;
- The Community and its Member States to sign, ratify and implement the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. The European institutions must ensure that Community legislation complies with the provisions of the Convention.

⁸ ENAR (2006) Shadow Report 2005, p. 9.

2. Anti-discrimination legislation must protect everyone living in the EU.

The EU has, in its own words, ‘one of the most advanced anti-discrimination legislations in the world’. This protection must be applied to all persons living in its territory. All rights protected under international and European law must be enjoyed in a non-discriminatory manner. Derogations and exemptions allowed under existing anti-discrimination legislation have been mis-used by Member States to evade their obligation to ensure that asylum and immigration laws are neither discriminatory nor have discriminatory effects. Furthermore, since the entry into force of the Treaty of Amsterdam and the transfer of immigration and asylum policies to the first pillar, it can be argued that the prohibition of discrimination on the grounds of nationality provided by Article 12 TEC is also applicable to TCNs.

ENAR calls for:

- Abrogation of Article 3.2 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, which provides an unacceptable derogation to the principle of non-discrimination, allowing ‘any difference of treatment’ arising from nationality and the legal status of third country nationals;
- Extension of the protection against discrimination on the ground of nationality provided by the Treaties to every person living in the territory of the EU;
- Extension of the entitlement to European citizenship to everyone who has been legally residing in the territory of the EU for a reasonable number of years.

3. All security measures must be fully compatible with fundamental rights.

In the past five years the EU and its Member States have adopted security provisions and anti-terrorism legislation leading to a ‘special criminal law’ for foreigners. In addition there is evidence of racial profiling in the implementation of security and policing measures.⁹ Under such security provisions, the right of every person to equality before the law and equal access to effective legal remedies has been deeply undermined, including the denial, either by law or *de facto*, of the right to a fair hearing. Furthermore even less favourable treatment compared to other non-nationals, is reserved to certain groups of TCNs defined on the grounds of their real or presumed racial, ethnic, cultural or religious origin or belonging.

ENAR calls for:

- An independent review, coordinated by the European Commission, of both existing and proposed community legislation in the area of freedom, security, and justice in order to ensure compliance with the principle of non-discrimination and the effective enjoyment by TCNs of the fundamental rights they are entitled to. This review should complement current provisions on fundamental rights impact assessment;
- A European Commission review of the implementation of Community legislation by Member States in the area of freedom, security and justice in order to guarantee compliance with the values of the EU, including fundamental rights.

⁹ ENAR (2006) Shadow Report 2005, pp. 29-30.

4. Positive steps must be taken to ensure equal access to, and the effective enjoyment of, fundamental rights by third country nationals.

Although an incremental and time-bound access to particular rights can be reasonable, no limitation of fundamental rights is acceptable. Equal access to the effective enjoyment of such fundamental rights, including equal access to employment, housing, education and health, is currently undermined by illegal regulations and practices. 'Fair treatment' is not enough if the EU is to live up to its basic principles and values. In order to overcome these limitations, positive steps need to be taken, with the support and participation of TCNs themselves, their organisations and the antiracist NGO community. Integration policies can be instrumental in guaranteeing effective equal treatment, provided that it is acknowledged that experiences of discrimination and inequality will undermine any integration strategy.

ENAR urges the EU to:

- Include equal treatment of TCNs in the common European policies on immigration and integration, modifying existing and proposed legislation;
- Ensure that transposition and implementation of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents as well as the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, are fully compliant with the principle of non-discrimination.
- Launch a specific programme to support positive action for the promotion of equal treatment, building on past experience, but going beyond the consideration of migrants as workforce;
- Acknowledge the role of TCN's representatives and anti-racist organisations in guaranteeing that legislation and policy does not lead to unlawful discrimination against non-nationals, and provide for structured and permanent participation of NGOs in the EU institutional debate and decision making process on immigration and asylum.

5. Member States must protect fundamental rights in implementing the 'external dimension' of migration and asylum policies.

A range of instruments have been either created or proposed in the 'externalisation' of immigration and asylum. These instruments range from cooperation tools such as 'immigration liaison officers' or the joint patrols for interception at sea, to direct 'transfer of responsibility' such as regional protection programmes and readmission agreements. There is evidence that this process endangers the respect for the fundamental rights of those who try to reach the EU.

ENAR calls for:

- European institutions not to adopt any bi or multilateral agreements which undermine, or fail to protect, the fundamental rights of immigrants, with particular reference to: readmission agreements; Regional Protection Programmes; and agreements in the framework of the European Neighbourhood Policy and the World Trade Organisation
- European NGO community to build relations and establish cooperation agreements with civil society organizations in the concerned third countries.