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Focus
Vulnerabilità legate al genere: nuove sfide per la tutela di migranti e richiedenti asilo

Il focus *raccoglie i contributi selezionati a seguito di* call for papers *promossa dal Gruppo di interesse "Diritto internazionale ed europeo delle migrazioni e dell'asilo (DIEMA)" della Società italiana di Diritto internazionale e di Diritto dell'Unione europea (SIDI).*

DIALOGUE ACROSS COURTS: THE CJEU, THE ECTHR, AND THE RIGHTS OF MIGRANT WOMEN

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SUMMARY: 1. Introduction. – 2. Research Context. – 3. Residence in a host Member State. – 4. Residence in a home Member State. – 4.1. Parents of minor EU citizens. – 4.2. Spouses. – 5. Return to the Member State of origin. – 6. Conclusion.

1. Introduction

This article focuses on the jurisprudence of the Court of Justice of the European Union (CJEU) and its regional counterpart, the European Court of Human Rights (ECtHR) in the area of family migration.[1] Using an intersectional feminist lens,[2] this article offers a critical analysis of the regional courts' approach to family migration case law. The case law analysis exposes gendered vulnerabilities interacting with nationality, ethnicity or race, and precarious immigration status. The precarious immigration status of racialised migrant women often results from the fact that they do not have an independent right of residence in the European Union (EU), even when they are married to an EU citizen. Consequently, this article provides a fresh insight into existing jurisprudence and deepens our understanding of the regional courts' approach towards gendered vulnerabilities in migration law.[3]

The aim of this article is to assess the question of how the regional courts take gender into account in their jurisprudence concerning migrant women, who are either married to

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[1] The term "family migration" is used to categorise the international movement of people who migrate due to new or established family ties. See E. KOFMAN, F. BUHR, M. L. FONSECA, *Family Migration*, in P. SCHOLTEN (ed.), *Introduction to Migration Studies: An Interactive Guide to the Literatures on Migration and Diversity*, Cham, 2022, pp. 137-149.

[2] Intersectional discrimination recognises that instead of focusing on one ground of discrimination, differential treatment operates in circumstances where gender discrimination interacts with specific combinations of several grounds, including age, race or ethnicity, religious beliefs or sexual orientation. See eg P. HILL COLLINS, *Intersectionality as Critical Social Theory*, Durham, NC, 2019.

[3] The vulnerability theory seeks to encourage critical reflection of the role of economic, social, legal, and political systems in rendering some individuals and groups more vulnerable than others. See M.A. FINEMAN, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, in *Yale Journal of Law and Feminism*, 2008, n. 1 pp. 1-23; A. KÜÇÜKSU, *Fineman in Luxembourg: Empirical lessons in asylum seeker vulnerability from the CJEU*, in *Netherlands Quarterly of Human Rights*, 2022, n. 3, pp. 290-310.

an EU citizen or care for a minor EU citizen, as well as women, who are EU citizens, who have exercised their free movement rights by relocating to another Member State. The case law chosen for the analysis spans from 1985 to 2025, and it concerns unsuccessful applications for family residence permit in the territory of the EU Member States by an EU citizen's migrant spouse, who him- or herself is not an EU citizen. As a third country national (TCN) spouse needs a family residence permit to reside in a Member State, their nationality evidently impacts on the national authorities' decision as to whether the spouse is admitted to the State territory.[4] Spijkerboer argues that as most citizens from Global South fail to obtain visas to travel to the EU, visa requirements mean that they cannot enter the EU territory in the first place.[5] In many of the judgments, the TCN spouse has initially entered an EU Member State either irregularly or using a short term visa.

A critical analysis concerning the residence rights of the TCN spouses under of the respective jurisprudence of the CJEU and the ECtHR is possible because there is considerable overlap between the two courts in this area.[6] Despite this the jurisprudence of these two courts is not strictly like-for-like comparable for several reasons, including, *inter alia*, the fact that the two courts exercise different types of jurisdictions, relate to national courts and constitutions in different ways and operate in two different legal systems. Whereas the ECtHR as the judicial body of the Council of Europe applies the European Convention on Human Rights[7] (ECHR) in the disputes concerning residence rights of a TNC spouse before it, the CJEU applies the provisions of the Treaty on the Functioning of the European Union[8] (TFEU). Even though the CJEU is not bound by the rulings of the ECtHR, it frequently draws upon the latter court's jurisprudence for the protection of human rights in the EU.[9] Consequently, the CJEU increasingly recognises the relevance of human rights in disputes concerning the right of TCN spouses to reside in the territory of the EU Member States. Similarly, the ECtHR has been argued to use EU law, particularly the Charter of Fundamental Rights of the European Union,[10] to support its own reasoning in favour of raising the level of protection under the ECHR.[11]

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[4] T. SPIJKERBOER, *The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control*, in *European Journal of Migration and Law*, 2018, n. 4, pp. 452-469.
[5] T. SPIJKERBOER *The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control*, cit.
[6] The relationship between the two regional courts is based on dialogue, rather than one-sided influence from the ECtHR to the CJEU or the other way around.
[7] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended).
[8] Treaty on the Functioning of the European Union, 26 October 2012, in OJ C326, pp. 47-390.
[9] F. IPPOLITO, S. VELLUTI, *The Relationship between the CJEU and the ECtHR: The Case of Asylum*, in K. DZEHTSIAROU, T. KONSTADINIDES, T. LOCK, N. O'MEARA (eds.) *Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and the ECHR*, London, 2014, pp. 156-187.
[10] Charter of Fundamental Rights of the European Union, 26 October 2012, in OJ C326, pp. 391-407.
[11] J. CALLEWAERT, *Convention Control Over the Application of Union Law by National Judges: The Case for a Wholistic Approach to Fundamental Rights*, in *European Papers*, 2023, n. 1, pp. 331-347. See also L.S. ROSSI, *The Interaction between Directive 2003/86 and the Charter of Fundamental Rights of the European Union in the Family Reunification of a Third Country National*, in this *Journal*, 2024, n. 1, pp. 25-40.

It is important to emphasise that whether the case is heard by the CJEU or the ECtHR means that different bodies of law are applied to the circumstances of the TCN spouse. While the ECtHR applies the provisions of the ECHR in the disputes before it, it cannot decide an individual complaint applying the provisions of EU free movement law. Despite this, the ECtHR occasionally comments on the relevance of the CJEU's judgments in the area of EU free movement law in its own jurisprudence.

In contrast, when the CJEU hears a case, it focuses on the interpretation of the right of EU citizens and their family members to move freely within the territory of the EU under Articles 20-21 and 45 TFEU and the right of residence in a host Member State under Article 7 of Directive 2004/38[12] on the freedom of movement of EU citizens and their family members. All of these provisions, alongside the Charter of Fundamental Rights, limit the Member State discretion regarding the TNC spouse's right of residence in the EU territory.[13] In its jurisprudence the CJEU increasingly notes the relevance of Article 8 ECHR and the corresponding right under Article 7 of the Charter on the grounds that all EU Member States are under the supervision of the ECtHR.[14] While the rights in the Charter are comparable to those in the ECHR,[15] they are also more contemporary and detailed.

The article is structured in the following way. Section 2 sets the research context while sections 3-5 focus on three types of family migration cases which have gendered impacts on women. The first type of cases concern instances where a racialised migrant woman as a spouse of an EU migrant worker has faced restrictions in her ability to reside in the territory of a host EU Member State after an EU citizen has migrated there for the purposes of work (section 3). These cases demonstrate gendered vulnerabilities as the restrictions on the women's right of residence most frequently occur after a breakdown of a marriage. The CJEU has established that the mere fact that a married couple no longer lives together does not necessarily mean that the TCN spouse cannot retain a right of residence in the host Member State. This is because the right of a spouse to join or accompany an EU citizen to another Member State under Directive 2004/38[16] is

[12] Directive 2004/38/EC of the European Parliament and of the Council, *on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States* amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, of 29 April 2004, in OJ L158, 30 April 2004, pp. 77-123.

[13] H. ASKOLA, *(No) Migrating for Family Care in Later Life: Senchishak v Finland, Older Parents and Family Reunification*, in *European Journal of Migration and Law*, 2016, n. 3, pp. 351-372.

[14] J. VILJANEN, H.E. HEISKANEN, *The European Court of Human Rights: A Guardian of Minimum Standards in the Context of Immigration*, in *Netherlands Quarterly of Human Rights*, 2016, n. 2, pp. 174-193.

[15] Charter of Fundamental Rights of the European Union, cit., art. 52(3) stipulates that rights in the Charter that correspond to those in the ECHR must be given the same meaning and scope as those laid down by the Convention.

[16] Directive 2004/38/EC of the European Parliament and of the Council, *on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, cit.

automatic in cases of an immediate family member.[17] Without the oversight of regional courts, the migrant women in these cases would have lost their right of residence in the host State.

With the establishment of the concept EU citizenship in 1992, the second type of cases concern the ability of a TCN spouse to settle in the EU citizen's country of origin (section 4). These cases have been controversial. As the right to free movement and residence in the territory of the EU Member States was extended from a group of highly mobile EU migrant workers to all EU citizens under Articles 20 and 21 TFEU with the Treaty amendment in 2009, judgments in this area have been of great relevance for the development of EU citizenship case law. However, the CJEU has been careful to recognise that adult EU citizens may rely on Articles 20 and 21 TFEU in order for married couples to benefit from the derived right of residence in the home Member State of the EU citizen (section 4). Although the CJEU has established that the principle of free movement applies to EU's family members under EU law,[18] there are certain conditions to the exercise of the related rights of residence, including the requirement for the EU migrant to be in employment or have sufficient resources not to become a burden on the social assistance system of the host State.[19]

The regional courts have also addressed a situation where a TCN spouse accompanies an EU citizen to the Member State of origin of the latter after a period of legal residence in another Member State (section 5). The CJEU has ruled that Article 7 of Directive 2004/38[20] applies to this type of situation by analogy.

Many of the cases before the ECtHR have touched upon similar issues. However, as the ECtHR has interpreted the cases before it using the provisions of the ECHR, the court has found instances of both racial and gender discrimination within the national immigration legislation. In 1985 the ECtHR established in that the UK immigration legislation had a discriminatory impact on racialised migrant women, who sought to be reunited with their TNC husbands, on the grounds of gender.[21] In 2016 the ECtHR found that the Danish rules on family reunification afforded less favourable treatment to naturalised Danish citizens and therefore, discriminated on grounds of race.[22] These cases demonstrate that the national immigration legislation is still enacted with the assumption that there is an ideal immigrant.

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[17] A. ALBORS-LLORENS, *Family Members and the Citizens Directive: Broadening the Scope of the Principle of Effective Judicial Protection*, in M.L. ÖBERG, A. TRYFONIDOU (eds.) *The Family in EU Law*, Cambridge, 2024, pp. 130-150.

[18] For commentary, see eg A. TRYFONIDOU, *The ECJ Recognises the Right of Same-Sex Spouses to Move Freely Between EU Member States: The Coman Ruling*, in *European Law review*, 2019, n. 5, pp. 663-679.

[19] Directive 2004/38/EC of the European Parliament and of the Council, *on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, cit., art 7.

[20] Directive 2004/38/EC of the European Parliament and of the Council, *on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, cit., art. 7.

[21] European Court of Human Rights, Court (Plenary), judgment of 28 May 1985, application no. 9214/80; 9473/81; 9474/81, *Abdulaziz and others v. the United Kingdom*.

[22] European Court of Human Rights, Grand Chamber, judgment of 24 May 2016, application no. 38590/10, *Biao v. Denmark*.

2. Research Context

Considerable academic commentary exists on the relationship between the ECHR and EU law,[23] and the relationship between the ECtHR and the CJEU.[24] While it is often assumed that the CJEU frequently draws inspiration from jurisprudence of the ECtHR, cross references in the reasoning of both the ECtHR and the CJEU to one another's jurisprudence demonstrates that the regional court's relationship is based on dialogue, rather than one-sided influences from the ECtHR to the CJEU.[25] The impact of EU law on the jurisprudence of the ECtHR and *vice versa* is particularly evident in the area of family migration.[26] Some of the ECtHR's judgments concerning family migration have been influenced by the CJEU's growing jurisprudence concerning EU free movement rights and the accompanying residence rights for an EU citizen's family members under the EU Treaties and the Directive 2004/38.[27]

Consequently, positive influence can be drawn from the CJEU's case law regarding free movement which has seen an increase in the number of cases concerning applications for residence permits by TCN family members in the past few years.[28] While the CJEU is evidently a generalist court, Pinto de Albuquerque and Lim note that the CJEU's judgments have been influential when the ECtHR has adjudicated the right of residence for TCN parents of minor EU citizens in the territory of the EU Member States.[29] By establishing a systematic judicial dialogue between themselves, the regional judiciary can adapt to the changing interpretations of what constitutes gendered vulnerability in a migration context and thereby exercise important influence over the Member States by developing minimum European human rights standards in this area.

Scholars have also commented on the regional courts' increasing reliance on international and regional human rights instruments. Both courts increasingly address gender-based discrimination while recognising that women are uniquely at risk of gender-based violence in their jurisprudence. The EU's accession to the Istanbul Convention[30] prohibiting violence and discrimination against women in 2023 marks a defined shift in

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[23] See eg K. S. ZIEGLER, E. WICKS, L. HODSON, *The UK and European Human Rights: A Strained Relationship?*, Oxford, 2015.

[24] See eg L.R. GLAS, J. KROMMENDIJK, *From Opinion 2/13 to Avotiņš: Recent Developments in the Relationship between the Luxembourg and Strasbourg Courts*, in *Human Rights Law Review*, 2017, n. 3, pp. 567-587.

[25] H. LAMBERT, *Family Unity in Migration Law: The Evolution of a More Unified Approach in Europe*, in V. CHETAIL, C. BAULOZ (eds.), *Research Handbook on International Law and Migration*, Cheltenham, 2014, pp. 194-215.

[26] S. ELFVING, *Gender and the European Court of Human Rights*, London, 2025.

[27] P. PINTO DE ALBUQUERQUE, H. S. LIM, *The Cross-Fertilisation between the Court of Justice of the European Union and the European Court of Human Rights: Reframing the Discussion on Brexit*, in *European Human Rights Law Review*, 2018, n. 6, pp. 567-577.

[28] K. KRUMA, *Family Reunification: A Tool to Shape the Concept of EU citizenship*, in M. GONZÁLES PASCUAL, A. TORRES PÉREZ (eds.), *The Right to Family Life in the European Union*, London, 2017.

[29] P. PINTO DE ALBUQUERQUE, H.S. LIM, *The Cross-Fertilisation between the Court of Justice of the European Union and the European Court of Human Rights*, cit., p. 573.

[30] Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, 11 May 2011, CETS No. 210.

the CJEU's approach towards a more inclusive judicial decision making.[31] In contrast, the ECtHR has rarely cited the Istanbul Convention in its judgments up until recently. Scholars note that the case law of the CJEU increasingly considers the Charter of Fundamental rights in the context of migration law.[32] They, however, criticise the CJEU for not incorporating explicit citations to the right to family life in Article 7 of the Charter in its family migration jurisprudence, and developing family migration jurisprudence using the general principles of EU law, specifically Article 8 ECHR and referring to the rights of the child.[33] In the context of the refusal of the national authorities to grant a residence permit to a TCN parent, the CJEU has emphasised the potential deprivation of a minor EU citizen of genuine enjoyment of the substance of rights conferred by EU citizenship under Article 20 TFEU in situations where the minor may be forced to leave the territory of the Member States, if the parent's residence permit is refused.[34] Instead of finding a violation of Article 7 of the Charter in these types of cases, the CJEU has largely focused on building its arguments around Article 20 TFEU.[35]

While increased references to gender equality and the need to eradicate discrimination and violence against women in the regional courts' jurisprudence demonstrate the judiciary's growing awareness of the centrality of gender in domestic violence cases[36] and in the context of asylum,[37] the judiciary has been less vocal about the discriminatory impact that seemingly neutral migration legislation, policies and practices have on migrant women.[38] This is a significant oversight since spouses entering

[31] C. WARIN, *Gender in EU Asylum Law: The Istanbul Convention as a Game Changer?*, in *International Journal of Refugee Law*, 2024, n. 1-2, pp. 93-105.
[32] X. GROUSSOT, G. THOR PETURSSON, A. LOXAIN, *The Fundament of the Fundaments? Family Rights and the EU Charter of Fundamental Rights*, in M. L. ÖBERG, A. TRYFONIDOU (eds.), *The Family in EU Law*, Cambridge, 2024, pp. 99-117.
[33] Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3.
[34] N. NIC SHUIBHNE, *EU Citizenship Law*, Oxford, 2023.
[35] X. GROUSSOT, G. THOR PETURSSON, A. LOXAIN, *The Fundament of the Fundaments? Family Rights and the EU Charter of Fundamental Rights*, cit.
[36] For cases concerning acknowledgement that women and girls are particularly affected by domestic and intimate partner violence, see eg European Court of Human Rights, Third Section, judgment of 14 September 2021, application no. 40419/19, *Volodina v. Russia (no. 2)*; European Court of Human Rights, Fifth Section, judgment of 8 July 2021, application no. 33056/17, *Tkhelidze v. Georgia*. See also R. A. COSTELLO, *Volodina v Russia (no. 2): Intimate Images, Domestic Violence and the Positive Obligations of Member States under Article 8 ECHR*, in *European Data Protection Law*, 2021, n. 4, p. 614.
[37] For successful challenges in the context of expulsion in the context of *non-refoulement* claims under art 3 ECHR, see European Court of Human Rights, Third Section, judgment of 20 July 2010, application no. 23505/09, *N v. Sweden*; European Court of Human Rights, Fifth Section, judgment of 16 June 2016, application no. 34648/14, *RD v. France*; Court of Justice, Grand Chamber, judgment of 16 January 2024, *WS*, case C-621/21; Court of Justice, Grand Chamber, Judgment of 11 June 2024, *K and L*, case C-646/21. For recent cases concerning gender and asylum reception conditions, see European Court of Human Rights, Third Section, judgment of 4 April 2023, application no. 55363/19, *AD v. Greece*; European Court of Human Rights, First Section, judgment of 31 August 2023, application no. 70583/17 *MA v. Italy*.
[38] In this article, the term "migrant woman" is understood to encompass women from Global South as well as nationals of one of the EU Member States who exercise their free movement rights by migrating to another Member State for the purposes of work.

as marriage migrants, constitute the largest group of migrants entering the countries of the Organisation for Economic Co-operation and Development.[39]

Existing research shows that although national admission and migration policies are often expressed in seemingly gender-neutral, meritocratic terms,[40] States continue to create hierarchies among migrants based on intersecting identities, including gender, ethnicity and nationality.[41] Kofman and her colleagues argue that national family migration policies define the acceptable familial and intimate relationships, including marriage and parenting of children.[42] EU migration legislation plays a major role in how individuals perform family, especially at the time when Member States increasingly make the conditions of entry more restrictive for the TCN spouse of their own citizens, particularly by prioritising citizens who have the resources to meet minimum income thresholds.[43] The ECtHR has increasingly come under State criticism for its interpretation of the ECHR over issues relating to migration in proportion to the will of European citizens.[44] This is not the first time, however, when the Strasbourg court has been criticised for allowing an irregularly staying TCN to remain in the State territory by regularising their stay, while the signatory States to the ECHR had arguably never intended to extend the rights contained in the ECHR to migrants.[45]

Bottero has argued that national integration requirements imposed on TCNs operate as a tool of exclusion and discrimination against specific categories of immigrants, including, women, older persons, and individuals belonging to poorer social classes and nationals of Muslim majority, African, and Middle Eastern countries.[46] Salomon argues that the States' restrictive national migration policies routinely create intersecting inequalities on the grounds of the individuals' class and gender and they also often impact on racialised women and men.[47] He further argues that the threat of expulsion of a TCN spouse exacerbates structurally disadvantaged legal positions of racialised EU citizens as

[39] In 2023, family migrants consisted of 43% of total permanent migration flows in 2023, which is far higher than any other migrant category. See Organisation for Economic Co-operation and Development, *International Migration Outlook 2024*, Organisation for Economic Co-operation and Development, 2024, https://doi.org/10.1787/50b0353e-en, last accessed 9 January 2026.

[40] J. L. HENNEBRY, A. J. PETROZZIELLO, *Closing the Gap? Gender and the Global Compacts for Migration and Refugees*, in *International Migration*, 2019, n. 6, pp. 115-138.

[41] J. B. FARCY, *Equality in Immigration Law: An Impossible Quest?*, in *Human Rights Law Review*, 2020, n. 4, pp. 725-744.

[42] E. KOFMAN, F. BUHR, M. L. FONSECA, *Family Migration*, cit., pp. 142-143.

[43] E. KOFMAN, P. RAGHURAM, *Gender and Migration*, in P. SCHOLTEN (ed.), *Introduction to Migration Studies: An Interactive Guide to the Literatures on Migration and Diversity*, Cham, 2022, pp. 281-294.

[44] V. P. TZEVELEKOS, *Has the ECHR Failed Us?*, in *European Convention on Human Rights Law Review*, 2025, n. 3, pp. 275-280.

[45] See eg D. THYM, *Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?*, in *International and Comparative Law Quarterly*, 2008, n. 1, pp. 87-112; M. B. DÉMBOUR, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint*, Oxford, 2015.

[46] M. BOTTERO, *Integration (of Immigrants) in the European Courts' Jurisprudence: Supporting a Pluralist and Rights-Based Paradigm?*, in *Journal of International Migration and Integration*, 2023, n. 24, pp. 1719-1750.

[47] S. SALOMON, *Citizenship and Unauthorised Migration: A Dialectical Relationship*, in *Modern Law Review*, 2020, n. 3, pp. 583-613.

they are more likely to encounter restrictions on family life by the expulsion.[48] The reduction of social benefits for nationals that aim to deter irregular migration may also adversely impact racialised EU citizens.[49] Further, an EU citizen may be forced to follow their TCN spouse to the country of origin of the latter due to the family's changed economic situation. Therefore, the regional courts' ability to hold governments accountable for a variety of arbitrary measures taken against TCN spouses in the State territory, including administrative or penal sanctions as well as immigration detention for irregular stay, is critical.[50]

The next three sections focus on the case law of the regional courts.

3. Residence in a host Member State

The principle established in the case law of the CJEU is that when an EU citizen exercises their free movement rights, their spouse, regardless of their nationality, may accompany or join the former in the State of migration to under the provisions of Directive 2004/38.[51] The CJEU has nevertheless delivered several judgments where racialised migrant women have faced restrictions on their ability to reside in the host State with their husbands. The CJEU's 1985 judgment in *Diatta* is one of the first cases where the national authorities refused to extent the residence permit of a Senegalese spouse of a French national, who worked and resided in Berlin.[52] The extension was refused on the grounds that Ms Diatta was no longer a family member of an EU migrant worker as she and her husband no longer lived together.[53] The CJEU started its analysis by noting that even if Ms Diatta did not enjoy an independent residence in Germany under EU law, there was no requirement for a married couple to cohabit in order to qualify for the right of residence as a family member of an EU migrant worker under Article 10 of Regulation No 1612/18.[54] The CJEU concluded that as the couple had not officially divorced, Ms Diatta was still a family member within the meaning of EU.[55]

In a series of cases concerning similar circumstances where the married couple no longer cohabited, the national authorities considered that the migrant women had no right of residence in the host State.[56] However, this time, the CJEU based the women's right

[48] S. SALOMON, *Citizenship and Unauthorised Migration: A Dialectical Relationship*, cit., p. 611.
[49] *Ibidem*.
[50] *Ibidem*.
[51] Directive 2004/38/EC of the European Parliament and of the Council, *on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, cit.
[52] Court of Justice, Judgment of 13 February 1985, *Diatta*, case 267/83, parr. 2-3.
[53] Court of Justice, *Diatta*, cit., par. 5.
[54] Court of Justice, *Diatta* cit., parr. 21-22. Regulation (EEC) No 1612/68 of the Council, *on freedom of movement for workers within the Community*, of 15 October 1968, in OJ L257, 19 October 1968, pp. 2-12.
[55] Court of Justice, *Diatta*, cit., par. 20.
[56] Court of Justice, Judgment of 17 September 2002, *Baumbast and other*, case C-413/99; Court of Justice, Grand Chamber, Judgment of 23 February 2010, *Teixeira*, case C-480/08; Court of Justice, Grand Chamber, Judgment of 23 February 2010, *Ibrahim and other*, case C-310/08.

of residence on Article 12 of Regulation No 1612/68,[57] namely the right of their children to continue their education in the host Member State. What is problematic about these judgments is that the mothers, who were nationals of Colombia, Portugal and Somalia respectively, did not enjoy independent residence rights in the UK under EU law. Instead, their derived right of residence was dependent on their children's continued residence there, which in turn was dependent on their father's previous economic activities as a migrant worker.

The CJEU has confirmed that under Article 2(2)(c) of Directive 2004/38,[58] also the stepchildren of the EU migrant worker have a right to reside in the host Member State while they attend schools there.[59] Additionally, children and stepchildren benefit from such rights even in cases where their parents have divorced. In its 2013 judgment in *Alarape,*[60] the national authorities were seeking to terminate the right of residence of a Nigerian mother and her son, who had a history of irregular stay in the UK before the mother married a French migrant worker. The CJEU decided that after the couple's divorce, the former wife's residence rights in the UK were subject to a condition that her 22 year old son remained "in need of the presence and care of [his mother] in order to be able to continue and to complete his education".[61] The CJEU took an expansive reading of the term "dependant", concluding that the children of the spouse or partner of a migrant worker do not need to related to the rights holder or to be below 21 years of age.

While these judgments can be seen as a positive step towards greater gender equality as they uphold the rights of racialised migrant women to continue to reside in the host State, a careful reading of these cases reveals an economic undertone. The CJEU recognises the right of the children to remain the territory of the host Member State because their fathers or stepfathers have a history working there. Even though the residence rights of migrant women are dependent on the right of their husbands to work in the host State as well as the couple's children to continue their education there, the series of cases are positive. The CJEU clearly recognises the necessity of racialised migrant women, who have care responsibilities, to remain in the host State in circumstances where the children's biological parent or stepparent no longer lives with the family. The judgments certainly help the racialised migrant women to secure a right of residence in the host Member State during the years when their children's formative years. However, there are questions as to whether the right of residence ends once the

[57] Regulation (EEC) No 1612/68 of the Council, *on freedom of movement for workers within the Community*, cit.

[58] Directive 2004/38/EC of the European Parliament and of the Council, *on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, cit., art 2(2)(c): the relevant individuals are "the direct descendants … under the age of 21" or "dependants" of an EU migrant worker or their spouse or partner.

[59] Regulation (EU) No 492/2011 of the European Parliament and of the Council, *on freedom of movement for workers within the Union Text with EEA relevance*, of 5 April 2011, in OJ L41, 27 May 2011, pp. 1-12, art. 10.

[60] Court of Justice, Second Chamber, Judgment of 8 May 2013, *Alarape and other*, case C-529/11, para. 49.

[61] Court of Justice, Second Chamber, *Alarape and other*, para. 49. The son was at the time completing a PhD at the University of Edinburgh.

children finish their education,[62] making the women's residence temporary and emphasising the intersectional vulnerability of the women.

The TCN spouse's lack of independent residence rights has continued to expose migrant women to gendered vulnerabilities in circumstances where an EU citizen spouse leaves the host Member State territory before the marital relationship ends. While Directive 2004/38[63] is aimed at preventing TCN spouses from losing their right of residence in a host State due to marriage breakdown, death, or departure of the EU citizen from the host State,[64] a handful of judgments have exposed gendered vulnerabilities of racialised migrant women. Consequently, women may lose their right of residence upon their spouse's departure from the host Member State. In the CJEU's 2016 judgment in *NA*,[65] the Pakistani wife of a German national lost her residence rights in the UK due to her husband's return to Germany. Despite the alleged domestic violence during the couple's marriage, the CJEU held that the wife could only retain her derived right of residence in the UK if her husband was still present in the host Member State. The judgment seems illogical, exposing multiple vulnerabilities faced by racialised migrant women who are dependent on their abusive and coercive husband for their continued right of residence in the host State.

The issue concerning the departure of an EU citizen from the host Member State arose in the CJEU's 2019 judgment in *Chencooliah*.[66] The case concerned an expulsion order and automatic entry ban adopted against the Mauritian wife of a Portuguese man, who was absent from the Irish territory while serving a prison sentence in Portugal. Much more aware of the consequences of the precarious immigration status of the wife, the CJEU decided that as EU law provided certain safeguards for EU citizens and their family members residing in the territory of another Member State, the wife could not be subjected to an automatic entry ban despite not enjoying an independent right of residence in Ireland. An automatic entry ban adopted against her was disproportionate as it would have prevented her from returning to Ireland together with her husband after his release from prison.

It is worth noting that the CJEU has decided a handful of judgments where migrant women, who are EU citizens, have relied on EU law in order for their TCN husbands to reside in a host Member State. Many of these judgments reveal the suspicion of the authorities that the couples use EU law to circumvent national rules on spousal migration. This makes the EU citizen's position vulnerable as their marital relationship is considered fraudulent and thus, their conduct and character questionable. The case law also reveals

[62] J. GUTH, S. ELFVING, S. MAYAT, *European Union Citizenship: Free Movement for All?*, in J. GUTH, S. ELFVING, *Gender and the Court of Justice of the European Union*, London, 2018, pp. 144-179.
[63] Directive 2004/38/EC of the European Parliament and of the Council, *on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, cit.
[64] Articles 12 and 13(1) of Directive 2004/38 are aimed at protecting non-national spouses and partners, who are at risk of losing their derived rights of residence in a host Member State because of a marriage breakdown.
[65] Court of Justice, First Chamber, Judgment of 30 June 2016, *NA*, case C-115/15.
[66] Court of Justice, Grand Chamber, Judgment of 10 September 2019, Chenchooliah, case C-94/18.

the national authorities' stereotypical view of the ideal male bread winner migrant who migrates for work purposes, whereas women migrate to join their husbands, not the other way around.[67]

In its 2008 judgment in *Metock*,[68] the CJEU refuted the Member States' suggestion that the marital relationship between an EU migrant worker and a TCN husband should have existed before the couple entered Ireland. In this case four EU migrant workers, two British nationals, one German national and one Polish national had resided lawfully in Ireland. Their TCN husbands applied for a residence permit as a family member of an EU citizen. The Irish authorities rejected the applications on the grounds that the husbands did not satisfy the condition of prior lawful residence in another Member State required by Irish law. The CJEU held that there was no requirement for the couples to have lived in another Member State prior to their migration to Ireland. The judgment was seen controversial at the time, with several national governments submitting their observations to the CJEU. The outcome of the case has nevertheless been interpreted as an indication that a TCN spouse has an automatic right to benefit from derived residence in a host State under EU law, regardless of when and where the couple married and of how the TCN spouse entered the host Member State.[69] This way the CJEU strengthened the ability of the TCN spouses to accompany or join their EU citizen spouse in the host Member State, regardless of their immigration history.

Similarly, in the 2017 judgment in *Lounes*,[70] the British authorities contested the right of an Algerian national husband of a Spanish migrant worker to reside in the UK on the grounds that she had become naturalised as British after moving to the UK. The authorities argued that although she had also retained her Spanish citizenship, she could no longer benefit from EU free movement. The CJEU disagreed and held that such an interpretation was inconsistent with Article 20 TFEU as to conclude otherwise would discourage an EU citizen from exercising their free movement rights.

4. Residence in the home State

Before the development of EU citizenship case law and concept of EU citizenship in 1992, both the ECtHR and the CJEU took a restrictive approach towards the ability of a TCN spouse to reside in the Member State of the EU citizen's nationality. Although there is a significant difference in the approaches of the regional courts in terms of the provisions of law that they use to decide a case before them, it is possible to argue that their approaches increasingly result in the same outcome, especially in cases concerning a TCN parent of a minor EU citizen. In many of these cases the TCN parent may be

[67] European Court of Human Rights, Grand Chamber, *Abdulaziz*, cit.
[68] Court of Justice, Grand Chamber, Judgment of 25 July 2008, *Metock and others*, Case C-127/08.
[69] Court of Justice, Grand Chamber, *Metock*, cit., par. 101.
[70] Court of Justice, Grand Chamber, Judgment of 14 November 2017, *Lounes*, Case C-165/16.

married to an EU citizen, or they may have cohabited with an unmarried partner who is an EU citizen. However, in some cases the couple's relationship may have ended, making the racialised migrant women vulnerable to expulsion. In cases where the national authorities conclude that the TCN spouse or unmarried partner has no right to reside in the territory of the EU Member State, they seek to reject the application for residence permit. The ECtHR has considered such cases by examining whether the refusal and subsequent expulsion from the State's territory results in a violation of the rights of the TCN spouse or unmarried partner under Article 8 ECHR. In contrast, the CJEU examines whether there is a potential breach of Articles 20 or 21 TFEU of the minor EU citizen's rights.

The starting point for the ECtHR in cases concerning refusal of the authorities to grant a residence permit to a TCN spouse of an EU citizen in the home State of the latter is that the spouses must have known that the immigration status of the TCN spouse was precarious and that they may be subsequently requested to leave the territory of the State. This is because in its case law concerning admission, residence and expulsion of a TCN spouse the ECtHR tends to reiterate the customary international law principle, according to which each State is entitled, subject to its treaty obligations, to control the entry and residence of non-nationals on its territory. In this context, the ECtHR emphasises the fact that States are not obliged to allow the migrant spouse to reside in their territory on the grounds that the ECHR does not guarantee married couples an automatic right to settle in a particular country.[71] According to the ECtHR, in a situation where the immigration status of a TCN spouse is precarious, the refusal of a residence permit and subsequent expulsion constitute a violation of Article 8 ECHR only in exceptional circumstances.[72] When establishing whether the expulsion violates this provision, the ECtHR focuses on questions such as whether the EU citizen would face any difficulties in their spouse's country of origin, if they have to accompany the latter there.[73]

Both the CJEU and the ECtHR have decided several cases concerning the ability of a TCN parent of a minor EU citizen to remain in territory of the Member State of the latter's nationality. In this context, the regional courts have made explicit cross references to one another's judgments. Their judgments in this area important as the case law enables us to recognise the vulnerabilities racialised migrant women are exposed to when their migration status is precarious even though their children hold the nationality of an EU Member State. Section 4.1 analyses cases where the TCN is a parent of a minor EU citizen, while cases where the EU citizen is an adult, who has never exercised their free movement rights, are analysed in section 4.2.

[71] European Court of Human Rights, Grand Chamber, *Abdulaziz*, cit.
[72] European Court of Human Rights, Grand Chamber, judgment of 9 July 2021, application no. 6697/18, *MA v. Denmark*, par. 134.
[73] S. SALOMON, *Citizenship and Unauthorised Migration: A Dialectical Relationship*, cit., p. 603.

4.1. Parents of minor EU citizens

The ECtHR delivered a judgment in 1988 in *Berrehab*[74] where it held that the expulsion of a Moroccan citizen after his divorce from a Dutch woman with whom he had a minor Dutch national daughter, on the sole reason that the couple no longer lived together violated Article 8 ECHR. It concluded that Mr Berrehab's expulsion and subsequent separation from his daughter would threaten to break the close ties between the father and the daughter.[75] The striking feature of the judgment is that the TCN parent of a Dutch minor was able to benefit from the right of residence in the EU Member State under Article 8 ECHR.

Although it took the CJEU several decades to develop similar jurisprudence, commentators have argued that the CJEU's subsequent case law concerning situations that are similar to *Berrehab* have played an influential role in the judicial reasoning of the ECtHR.[76] In 2004, the CJEU handed down a judgment in *Zhu*[77] which concerned the ability of a minor daughter of a Chinese mother to reside in the UK together with her mother. As the daughter had obtained both British and Irish nationality at birth during a time when her mother was not habitually resident in Northern Ireland, the CJEU recognised that she was an EU citizen. While the authorities rejected Ms Chen's application for a residence permit in the UK, the CJEU held that the refusal to allow the mother and the daughter to reside in the UK would deprive the minor child of her right of residence under EU law of any useful effect.[78]

Following *Zhu*,[79] the ECtHR took a seemingly accommodating approach towards racialised migrant women whose children had acquired EU citizenship at birth. The judgments concerning the expulsion of a primary carer of a minor EU citizen frequently revolve around the question whether the expulsion of the TCN parent - often a mother - would amount to a violation of their rights under Article 8 ECHR. The ECtHR's 2006 judgment in *Rodrigues da Silva and Hoogkamer*[80] concerned the issue whether a Brazilian woman, who had overstayed her visa in the Netherlands, could be expelled.[81] During her irregular stay in the country Ms da Silva and her unmarried partner had a daughter who obtained Dutch nationality at birth.[82] After the couple's relationship ended, her former partner was granted parental responsibility over their daughter and the

[74] European Court of Human Rights, judgment of 21 June 1988, application no. 10730/84, *Berrehab v. Netherlands*.
[75] European Court of Human Rights, *Berrehab*, cit., par. 29.
[76] P. PINTO DE ALBUQUERQUE, H.S. LIM, *The Cross-Fertilisation between the Court of Justice of the European Union and the European Court of Human Rights*, cit., p. 573.
[77] Court of Justice, Full Court, Judgment of 19 October 2004, *Zhu and other*, case C-200/02.
[78] Court of Justice, Full Court, *Zhu and other*, cit., par. 45.
[79] Court of Justice, Full Court, *Zhu and other*, cit.
[80] European Court of Human Rights, Former Second Section, judgment of 31 January 2006, application no. 50435/99, *Rodrigues da Silva and Hoogkamer v. The Netherlands*.
[81] M. KLAASSEN, *Between Facts and Norms: Testing Compliance with Article 8 ECHR in Immigration Cases*, in *Netherlands Quarterly of Human Rights*, 2019, n. 2, pp. 157-177.
[82] European Court of Human Rights, *Rodrigues da Silva*, cit., parr. 9-11.

authorities rejected Ms da Silva's application for a residence permit.[83] The ECtHR found a violation of Article 8 ECHR, concluding that the mother's expulsion would have far reaching consequences on her family life and her parental responsibilities. Furthermore, it was in the best interest of the minor daughter that her mother stayed in the Netherlands.[84] Lambert argues that in effect, the ECtHR did not leave any room for the authorities to reject her residence permit.[85] She further notes that the ECtHR considered that Ms da Silva's irregular residence at the time of her daughter's birth was irrelevant,[86] taking a clear stance on need for her to be present in her daughter's life. This judgment not only reinforces the CJEU's emerging judgments concerning minors born in the Member State territory who hold the nationality of the State but also strengthen the rights of migrant women to reside in the State territory despite their irregular immigration status before the judgment.

Lambert further argues that *Rodrigues da Silva* influenced the CJEU's 2011 judgment in *Ruiz Zambrano*,[87] which essentially confirmed the approach adopted in *Zhu*.[88] In both of these judgments decided by the CJEU, the judges of the Luxembourg court emphasised that if the refusal to issue a residence permit to a TCN parent of a minor EU citizen would result in a situation where the minor would be forced to leave the EU territory as a whole, they would be deprived of the substance of their EU law rights.

The ECtHR further delivered a similar judgment concerning an irregularly staying migrant mother of three Dutch citizen children in 2014 in *Jeunesse*.[89] While the facts are very similar to those in *Rodrigues da Silva*, the case concerned a residence permit of a Surinamese migrant mother who had stayed irregularly in the Netherlands for almost two decades. The ECtHR found that the circumstances of the case where exceptional for several reasons, including the fact that the Dutch authorities had never tried to expel Ms Jeunesse before and the fact that she was born as a Dutch citizen but lost her nationality after Suriname's independence from the Netherlands in 1975.

While both courts have accepted that migrant mothers and fathers of minor EU citizens may be able to reside in the territory of an EU Member State because the expulsion of the parent may lead into a situation where the minor EU citizen has to leave the Member State territory, the issue whether a TCN spouse of an EU citizen can settle in the Member State of origin of the latter has been much more complex.

[83] European Court of Human Rights, *Rodrigues da Silva*, cit., parr. 11-13.
[84] European Court of Human Rights, *Rodrigues da Silva*, cit., par. 44.
[85] H. LAMBERT, *Family Unity in Migration Law: The Evolution of a More Unified Approach in Europe*, cit.
[86] European Court of Human Rights, *Rodrigues da Silva*, cit., par. 44.
[87] Court of Justice, Grand Chamber, Judgment of 8 March 2011, *Ruiz Zambrano*, case C-34/09.
[88] H. LAMBERT, *Family Unity in Migration Law: The Evolution of a More Unified Approach in Europe*, cit.; Court of Justice, Full Court, *Zhu and other*, cit.
[89] European Court of Human Rights, Grand Chamber, judgment of 3 October 2014, application no. 12738/10, *Jeunesse v. The Netherlands*, parr. 71-72.

4.2. Spouses

The CJEU's restrictive approach towards adult EU citizens, who have not exercised their free movement rights, appears to align with the jurisprudence of the ECtHR which emphasises the right of the States to decide who enters their territory under customary international law. Scholars note that the CJEU's judgments in this area have been influenced by those of the ECtHR.[90] According to the long-established approach of the CJEU, Articles 20 and 21 TFEU do not enable a TCN family member to join an EU citizen, who has never lived in a Member State other than that of their nationality, in order to benefit from a derived right of residence in the home Member State. Two judgments from 2011 reject the suggestion that EU law requires Member States to grant a residence permit to a TCN spouse of an EU citizen, who has always resided in the same Member State. *McCarthy*[91] concerned a dual British Irish citizen who relied on Article 21 TFEU to apply for a residence permit for her Jamaican national husband in the UK. The CJEU held that Article 21 TFEU did not apply to her circumstances as she had never lived in any other Member State. The court noted that the authorities' rejection of her husband's residence permit was consistent with Article 21 TFEU, as long as she was not deprived of the genuine enjoyment of the substance of the rights conferred by EU citizenship.[92] The CJEU did not think this was so in her case, without examining the family's individual circumstances.

The CJEU arrived at the same conclusion in its 2011 judgment in *Dereci*.[93] This judgment involved several married couples consisting of an Austrian citizen and their TCN spouse against whom the authorities had adopted an expulsion order. The referring court noted that the Austrian citizens in question had never lived in another Member State and questioned whether they could still benefit from EU law provisions allowing a TCN spouse to reside in the territory of the State. The CJEU answered this in the negative. It ruled that the authorities could reject the application for a family residence permit, provided that the refusal did not result in the deprivation of the EU citizen from the substance of their rights conferred by virtue of their status as an EU citizen.

The CJEU's approach in these cases confirms the approach of the ECtHR established in its 1985 landmark judgment in *Abdulaziz, Cabales and Balkandali*,[94] where the ECtHR accepted the argument of the UK government that a non-UK citizen spouse of a legally resident non-UK citizen, could not settle in the UK just because his wife had chosen to settle in the country. De Vries and Spijkerboer argue that the case exposed unfavourable treatment in the national immigration legislation of racialised migrant women from former British colonies and territories, who sought family reunification with their non-

[90] P. PINTO DE ALBUQUERQUE, H.S. LIM, *The Cross-Fertilisation between the Court of Justice of the European Union and the European Court of Human Rights*, cit.
[91] Court of Justice, Third Chamber, judgment of 5 May 2011, *McCarthy*, case C-434/09.
[92] Court of Justice, Grand Chamber, *McCarthy*, cit., par. 56.
[93] Court of Justice, Grand Chamber, Judgment of 15 November 2011, *Dereci*, case C-256/11, par. 102.
[94] European Court of Human Rights, Grand Chamber, *Abdulaziz*, cit.

British husbands.[95] The ECtHR accepted the migrant women's argument concerning discrimination on the grounds of gender, but denied that the UK legislation was racially discriminatory.

The ECtHR decided an important case concerning the right of a TCN national spouse of an EU citizen to settle in Denmark in 2016 in *Biao*.[96] Although the ECtHR could not apply EU law to the dispute, it nevertheless noted that the family migration rules imposed on naturalised Danish citizens were disproportionate as the couple, who lodged the complaint before the ECtHR, would have had to wait until 2030 in order to lived together in Denmark. The reason why the Danish authorities refused Mr Biao's Ghanian wife's residence permit was that Mr Biao had only recently acquired Danish citizenship. In its judgment, the ECtHR held that the Danish family reunification rules were not only disproportionate but also distinguished between the ethnic origin of Danish citizens. It concluded that the refusal to grant family residence permit to Mr Biao's wife violated Article 8 ECHR in combination with Article 14 ECHR (prohibition of non-discrimination). Two aspects are significant about this case. First, the national rules exposed intersectional vulnerabilities of Mr Biao's wife as a racialised migrant woman. Second, the fact that the couple resided in Sweden would have brought the case to the remit of EU free movement law, had the national court seen the relevance of making a preliminary reference to the CJEU.

In its more recent judgments, starting from 2018, the CJEU has elaborated its stance corning the circumstances where a TCN spouse may be able to benefit from the legal right of residence in the home Member State under Articles 20 and 21 TFEU when the EU citizen has not exercised their free movement rights. It has been argued that the significance of Article 21(1) TFEU is that it grants every EU citizen and their TNC family members the right to move and reside freely in the territory of the Member States, regardless of whether the EU citizen has exercised their free movement rights within the EU or not.[97] In the past few years, the CJEU has produced most groundbreaking case law in this area because the protection provided by Articles 20 and 21 TFEU applies not only to racialised migrant women, who are married to so called mobile EU citizens, but also to women who are citizens of one of the EU Member States in cases where the latter have never left the territory of the Member State of their nationality.

In its 2018 judgment in *KA*,[98] the CJEU reiterated the principle according to which national courts must ensure that the refusal to grant a residence permit to a TCN spouse or parent cannot result in a situation where the EU citizen is forced to leave the Member State of their origin or the territory of the EU as a whole. The reasoning is that if the TCN spouse of an EU citizen is unable to settle in the home State territory, the latter may be

[95] K. DE VRIES, T. SPIJKERBOER, *Race and the Regulation of International Migration: The Ongoing Impact of Colonialism in the Case Law of the European Court of Human Rights*, in *Netherlands Quarterly of Human Rights*, 2021, n. 4, pp. 291-307.
[96] European Court of Human Rights, Grand Chamber, *Biao v. Denmark*, cit.
[97] M. BOGDAN, *The Status of Family Member as a Pre-condition of the Free Movement in the EU*, in M. L. ÖBERG, A. TRYFONIDOU (eds.), *Family in EU Law*, Cambridge, 2024, pp. 118-129.
[98] Court of Justice, Grand Chamber, Judgment of 8 May 2018, *KA and others*, case C-82/16.

forced to leave the EU in cases where they are financially dependent on their TCN spouse.[99] In *RH*,[100] the CJEU noted that for adult EU citizens, reunification with their TCN spouse in the home Member State of the EU citizen is typically available only in exceptional circumstances where there is a relationship of dependency, such as need of financial support from their TCN spouse.[101] The CJEU suggested that although it might appear desirable for the married couple to reside in Spain, the refusal to grant the Moroccan husband of a Spanish woman the right of residence may not in itself violate Article 20 TFEU, unless this resulted in a situation where the wife was forced to leave Spain and relocate to Morocco with her husband. While this new development in the CJEU's citizenship case law is welcome, the relationship of dependency between spouses still highlights the male bread winner ideal where the EU citizen wife must be either financially or otherwise dependent on her husband in order to benefit from the rights conferred by EU citizenship.

The last substantive section analysing the case law of the regional courts focuses on a handful of cases concerning the issuance of a family residence permit to a TCN spouse upon the couple's return to the country of origin of the EU citizen.

5. Return to the Member State of origin

Many of the cases concerning the return to the Member State of origin have exposed gendered vulnerabilities, especially when a migrant woman is financially dependent on their EU citizen husband, or when the couple is not married. A small number of cases in this area indicate that the national governments contest the ability of their citizens to benefit from free movement rights upon return to the Member State of origin.

The ECtHR has decided very few cases that fit into this category. In 1999 the ECtHR considered a complaint by a Nigerian migrant woman, who was subject to an expulsion order after having breached her visa conditions by working in the UK contrary to immigration rules.[102] Even though she was married to a British citizen with whom she had two biological children and one child from a previous relationship to another British citizen, all of whom were British citizens, the UK authorities were not prepared to revoke the deportation order against her and resolutely pursued her expulsion. The British authorities finally withdrew the expulsion order against her and granted her a residence permit in the UK as a family member of an EU citizen after the entire family returned to the UK after residing a little over a year in Ireland while the husband worked there. The ECtHR was satisfied that the matter was resolved as the TCN spouse was able to reside in the UK and subsequently declared the complaint inadmissible.

[99] Court of Justice, Fifth Chamber, Judgment of 27 February 2020, *RH*, case C-836/18.
[100] Court of Justice, Fifth Chamber, *RH*, cit.
[101] H. ASKOLA, *(No) Migrating for Family Care in Later Life: Senchishak v Finland, Older Parents and Family Reunification*, cit., p. 356.
[102] European Court of Human Rights, Third Section, Decision on admissibility of 22 June 1999, application no. 27663/95, *Theodora Ajayi and others v. UK*.

Strikingly, many cases concerning return before the CJEU have involved married couples where the migrant woman is an EU citizen, whereas the husband is a TCN. The CJEU has explicitly noted that Member States should recognise that derived residence rights apply by analogy in situations where the EU citizen returns to their Member State of origin in order to reside there with their spouse.[103] In its 1992 judgment in *Singh*,[104] the CJEU recognised that an Indian husband of a British woman could benefit from the right to reside in the UK upon the couple's return from Germany under EU law.[105] This was because the couple had worked in Germany for two years before deciding to return.

While the CJEU's approach in *Singh* is seemingly progressive and accommodating, the UK government was unsatisfied with the outcome of the judgment, claiming that the EU free movement rules circumvented the national rules that governed family reunification with foreign spouses.[106] In the 2003 judgment in *Akrich*,[107] the British government convinced the CJEU that the married couple had briefly migrated to Ireland with the sole aim of circumventing the national rules on spousal visas and suspected that the couple's marriage was not genuine. The national immigration authorities rejected the application for residence permit by a Moroccan husband of a British migrant woman upon the couple's return to the UK on the grounds that he was previously removed from the UK after staying there irregularly for several years. The CJEU sided with the authorities, holding that a residence permit could be refused in case where the authorities suspected a marriage of convenience. In the ECtHR's 2009 decision in *Schembri*,[108] the ECtHR similarly sided with the Maltese authorities, who suspected a marriage of convenience between a Maltese woman, who relocated to Italy with her Pakistani national husband, on the grounds that the husband was considerably younger than the wife and had previously unsuccessfully applied for asylum in Malta. The ECtHR held that the couple had not provided sufficient evidence to demonstrate that their marriage was genuine and concluded that the couple's rights were not violated by the Maltese authorities' refusal of the husband's residence permit. This was so, despite the earlier decision of the CJEU in *Metock*[109] where the CJEU held that the migration history of the spouse was irrelevant.

The CJEU's 2014 judgment in *O and B*[110] similarly concerned the return to the Member State of origin of two Dutch women whose partners had lived in Belgium and

[103] Court of Justice, Grand Chamber, *Banger*, cit., par. 29. See also Court of Justice, Grand Chamber, Judgment of 12 March 2014, *O and other*, Case C-456/12, parr. 51, 60.
[104] Court of Justice, Judgment of 7 July 1992, *Singh*, Case C-370/90.
[105] Council Directive 73/148/EEC, *on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services*, of 21 May 1973, in OJ L172, 28 June 1973, pp. 14-16.
[106] After this judgment, UK immigration practitioners informally advised their British clients to migrate to another EU Member State for a period in order to benefit from EU law rights of residence in the home State after their return. H. WRAY, *An Ideal Husband? Marriages of Convenience, Moral Gate-keeping and Immigration to the UK*, in *European Journal of Migration and Law*, 2006, n. 3, pp. 303-320.
[107] Court of Justice, Judgment of 23 September 2003, *Akrich*, case C-109/01.
[108] European Court of Human Rights, Fourth Section, judgment of 10 November 2009, application no. 42583/06, *Schembri and others v. Malta*.
[109] Court of Justice, Grand Chamber, *Metock* cit.
[110] Court of Justice, Grand Chamber, *O and other*, cit.

Spain respectively for a period of some months. The CJEU upheld the refusal of the Dutch authorities on the grounds that both women still resided and worked in the Netherlands despite visiting their husbands in Spain and Belgium during holidays and weekends. Consequently, the CJEU held that their husbands could not accompany them to the Netherlands upon return because the wives had not worked or resided in another Member State for a continuous period of over three months under Article 7 of Directive 2004/38.[111] The absence of marital relationship was an issue in *O and B* as one of the couples was unmarried at the time of their application for a family residence permit. As unmarried cohabitees cannot enjoy automatic rights of residence under EU law, Member States are required to facilitate their entry to and residence in the State territory, subject to the condition under Article 3(2) of Directive 2004/38[112] that the couple's relationship is durable and duly attested.[113] However, the Member States may refuse admission or residence for an unmarried cohabitee, provided that they justify their decision.

The same issue was raised in the CJEU's 2019 judgment in *Banger* where the court deliberated whether the UK could refuse the residency of a South African cohabitee of a British migrant worker who returned to the UK after a period of residence in the Netherlands.[114] The authorities refused Ms Banger's residence permit in the UK on the grounds that the couple was not married at the time of application although they married later in the UK.[115] The CJEU noted that when refusing a residence permit, the immigration authorities must undertake an extensive examination of unmarried partner's personal circumstances and justify the denial of entry or residence under Article 3(2)(b) of Directive 2004/38.[116] Whereas the national law did not allow a challenge against the authorities' refusal to issue a residence card, the CJEU held that the guarantees under Article 47 of the Charter meant that Ms Banger was able to challenge the refusal. Although it could be argued that Ms Banger's right of residence would have been more straightforward under Article 2(2) of Directive 2004/38[117] had the couple married before migrating to the UK, expecting couples to marry for the purposes of immigration law places an unnecessary pressure on the couples to conform to the heteronormative societal expectations. Additionally, it may also prompt the national authorities to suspect that the couple has married merely for the purposes of migration law, further exacerbating intersectional vulnerabilities faced by racialised migrant women.

[111] Directive 2004/38/EC of the European Parliament and of the Council, *on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, cit.
[112] Directive 2004/38/EC of the European Parliament and of the Council, *on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, cit.
[113] Directive 2004/38/EC of the European Parliament and of the Council, *on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, cit.
[114] Court of Justice, Fourth Chamber, 12 July 2018, *Banger*, Case C-89/17.
[115] The Secretary of State did not consider the fact that the couple had married after they moved to the UK. See Opinion of Advocate General M. BOBEK, delivered on 10 April 2018, in the case C-89/17, *Banger*, par. 17.
[116] Court of Justice, Fourth Chamber, *Banger*, cit., par. 52.
[117] Directive 2004/38/EC of the European Parliament and of the Council, *on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, cit.

6. Same-sex couples

In recent years the CJEU has decided a handful of cases which concern the refusal of the Member State of origin to recognise same-sex unions concluded in another Member State. These cases expose gendered vulnerabilities particularly on lesbian couples and children, as the refusal to recognise the same-sex union means that the couple cannot legally reside in the Member State of the EU citizen's origin nor can their children acquire identification papers required to travel within the EU. The first case to address the issue was the CJEU's 2018 landmark judgment in *Coman*,[118] which started as a preliminary reference from the Romanian courts. In this case the CJEU noted that the refusal by the Romanian authorities to recognise the derived right of residence to an American same-sex spouse of a Romanian man may interfere with the couple's right to move and reside freely in the territory of the Member States under Article 21(1) TFEU. The couple wanted to settle in Romania after a period of legal residence in the Netherlands. The CJEU's reasoning was that the refusal would amount to a denial of the EU citizen to return to Member State of his origin together with his spouse.[119] According to it, the denial to recognise a same-sex marriage in order to grant the TCN spouse a derived right was liable to obstruct the exercise of freedom of movement for persons and could only be justified where the national measure was consistent with the fundamental rights guaranteed by the Charter.[120]

In *Coman*, the CJEU made a reference to jurisprudence of the ECtHR,[121] noting that the relationship of a same-sex couple may fall within Article 7 of the Charter (right to respect for private and family life) in the same way as the relationship of an opposite-sex couple in the same situation.[122] While it worded the requirement to recognise the same-sex marriage only for the purpose of granting the American husband of the Romanian citizen a right of residence, the ECtHR has held that signatory States to the ECHR have an obligation to provide legal recognition of same-sex unions. In *Koilova*,[123] the ECtHR held that Bulgarian authorities' failure to provide any form of legal recognition and protection of a lesbian couple, who had married while residing for several years in the United Kingdom, after they relocated to Bulgaria, violated Article 8 ECHR. The CJEU followed suit in 2025, when it ruled in *Cupriak-Trojan*[124] that the administrative

[118] Court of Justice, Grand Chamber, Judgment of 5 June 2018, *Coman and others*, case C-673/16. For a commentary, see A. TRYFONIDOU, *The ECJ Recognises the Right of Same-Sex Spouses to Move Freely Between EU Member States: The Coman Ruling*, in *European Law Review*, 2019, n. 5, pp. 663-679.
[119] Court of Justice, Grand Chamber, *Coman*, cit., par. 40.
[120] Court of Justice, Grand Chamber, *Coman*, cit., parr. 46-47.
[121] European Court of Human Rights, Grand Chamber, judgment of 7 November 2013, application nos. 29381/09 and 32684/09, *Vallianatos and others v. Greece*, par. 73; European Court of Human Rights, Grand Chamber, judgment of 14 December 2017, application nos. 26431/12; 26742/12; 44057/12 and 60088/12, *Orlandi and others v. Italy*, par. 143.
[122] Court of Justice, Grand Chamber, *Coman*, cit., par. 50.
[123] European Court of Human Rights, Third Section, judgment of 5 September 2023, application no. 40209/20, *Koilova and other v. Bulgaria*.
[124] Court of Justice, Grand Chamber, Judgment of 25 November 2025, *Cupriak-Trojan and other*, Case C-713/23.

authorities' refusal to transcribe the marriage certificate of a same-sex couple in the Polish civil register was contrary to EU law. The refusal infringed the couple's right to freedom of movement under Articles 20 and 21(1) TFEU and the right to respect for private and family life under Article 7 of the Charter.

The courts' approach towards recognition of the right of the children of same-sex couples to obtain the nationality of Member State of their EU citizen parent has differed slightly. As the child's ability to obtain EU citizenship affects their ability to reside and travel within the territory of the EU with their parents, the case law can expose gendered vulnerabilities that have an impact on both the parents and the children. In its 2021 decision in *S-H v. Poland*,[125] the ECtHR found that Polish authorities' refusal to grant Polish citizenship to two minor children of a dual citizen of Poland and Israel did not violate the rights of the children or the parents under Article 8 ECHR. The ECtHR noted that although one of the parents, who was the children's biological father, was a dual citizen of Israel and Poland, the children were dual nationals of United States and Israel.[126] Additionally, the refusal had little impact on the family because they had never lived in Poland nor there was any evidence that they had made concrete plans to relocate to Poland despite being worried about Israel's difficult geopolitical situation and their heritage as Polish Jews was extremely important to them.[127] Furthermore, the ECtHR noted that the refusal did not result in the children's statelessness or the lack of recognition of the child-parent relationship.

The CJEU's 2021 judgment in *VMA*[128] concerned a similar issue. However, the CJEU arrived at a very different outcome. The case concerned the refusal of Bulgarian authorities to issue a minor daughter of a married lesbian couple an identity card or a passport on the grounds that Bulgarian law did not permit same-sex marriage. Although the family did not seek to reside in Bulgaria, the CJEU ruled that the refusal to issue the couple's Bulgarian daughter an identity card or passport constituted an impediment of her free movement rights under Article 21(1) TFEU.[129] This was because she would not be able to travel with her Bulgarian and British parents without a valid document that recorded them as being entitled to travel with her.[130] While all the cases discussed in this section expose the adverse impact of the national authorities' refusal to formally recognise same-sex marriages on the spouses, *VMA*[131] demonstrates very clearly how the refusal to issue travel documents to the minor daughter of a lesbian couple evidently disadvantages the couple and their child not only on the grounds of the parents' sexual orientation but also their gender.

[125] European Court of Human Rights, First Section, judgment of 16 November 2021, application nos. 56846/15 and 56849/15, *S-H v. Poland*.
[126] European Court of Human Rights, First Section, *S-H v. Poland*, cit., par. 69.
[127] European Court of Human Rights, First Section, *S-H v. Poland*, cit, par. 68.
[128] Court of Justice, Grand Chamber, Judgment of 14 December 2021, *VMA v. Stolichna obshtina, rayon „Pancharevo"*, case C-490/20.
[129] Court of Justice, Grand Chamber, *VMA*, cit., par. 50.
[130] *Ibidem*.
[131] *Ibidem*.

7. Conclusion

This article assesses the question of how the regional courts take gender into account in their jurisprudence concerning women in the context of free movement rights. Therefore, the research focuses on the impact of family migration policies on racialised migrant women, who are seeking to join their EU citizen husbands, in one of the EU Member States, as well as EU citizen women whose TCN spouse is denied the right to reside in the territory of the EU. Several judgments of the European regional courts concerning the rights of residence of racialised migrant women discussed in section 3 demonstrate that national immigration authorities continue to adopt restrictive approaches in this area. As migrant women's derived right of residence in the host Member State is dependent on their EU citizen family member, this has a potential to create a power imbalance between the spouses and, in some cases, also expose women to gender-based violence. While in many cases of the CJEU demonstrate that the court's judiciary understands how intersectional identity characteristics such as race or ethnicity, migration status, or class intensify gendered vulnerabilities when a marital relationship breaks down, it has been reluctant to extend EU law protection to TCN spouses whose EU citizen spouse has left the host Member State.[132]

In many cases involving a minor EU citizen, the CJEU has employed Articles 20 and 21 TFEU to extend the protection for racialised TCN parents whose children have obtained EU citizenship at birth. Judgments of both the CJEU and ECtHR discussed in section 4.1 demonstrate that national authorities frequently seek to expel a racialised TCN parent on the grounds that their stay in the State is irregular. Both courts can be applauded for taking a progressive approach that challenges the national authorities' refusal to grant a family a residence permit to a primary carer of a minor EU citizen without considering structural inequalities, such as unpaid care work performed by women. Whereas the CJEU's reasoning is based on the argument that the minor would be deprived from their EU citizenship rights if they had to accompany their TCN parent to a country outside the EU, the ECtHR bases its decisions on the argument that the expulsion of the parent would violate the family life of the parent and the child.

Cases discussed in sections 4.2 and 5 in contrast demonstrate that women, who are EU citizens, may face situations where their TCN spouses is refused the right of residence in the EU on the grounds that the authorities do not consider their relationship genuine. Although women in these cases may not themselves be racialised, their TCN spouse often is. The national authorities in these cases frequently reinforce the male breadwinner ideal, whereas an application for family residence by for an EU citizen's TCN husband is subject to heightened scrutiny. Such reasoning exposes the structural vulnerability of women whose lived realities do not conform to the States' gendered expectations of the EU migrant being a male.

[132] Court of Justice, First Chamber, *NA*, cit.

Even though Member States' refusal to recognise same-sex marriage for the purposes of free movement and residence exposes the multiple vulnerabilities an EU citizen's same-sex spouse experiences on grounds of their nationality, sexual orientation, and/or gender, the regional courts can be commended for taking a proactive approach by obliging Member States to legally recognise same-sex unions. All in all, both courts can also be applauded for recognising variant degrees of precarity facing women based on their own, or their spouse's immigration status, gender, race or ethnicity, lack of resources to exercise one's rights or knowledge of the content of rights in an environment where the law changes constantly. Much like the ECtHR, the CJEU increasingly acknowledges the importance of right to respect of private and family life in the context of migration.[133]

ABSTRACT: This article argues that the similarities between the case law of the European regional courts in respect of family migration are significant. Many of the judgments concerning the right of a migrant spouse of an EU citizen to reside in the EU demonstrate that national migration laws are still influenced by the male bread winner ideal. Building upon the work of intersectional feminist scholars, this article argues that the judgments reveal gendered vulnerabilities on the account of intersecting identities, including class, race and ethnic origin. While both courts are aware of intersectional discrimination, they rarely apply this concept in their judgments. This article concludes that the ongoing dialogue between the two regional courts is ever important as it is likely to have a lasting impact on how gender-related vulnerabilities are viewed in Europe in the future.

KEYWORDS: CJEU – ECtHR – family migration – European Union law – Charter of Fundamental Rights.

[133] X. GROUSSOT, G. THOR PETURSSON, A. LOXAIN, *The Fundament of the Fundaments? Family Rights and the EU Charter of Fundamental Rights*, cit.