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MIGRATION STATUS AND VIOLENCE AGAINST WOMEN:

FOUR LEGAL RESPONSES EVALUATED

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ABSTRACT

MIGRATION STATUS AND VIOLENCE AGAINST WOMEN:

FOUR LEGAL RESPONSES EVALUATED

Violence against women (VAW) is constitutive of patriarchal dominance and a distinctive human rights violation. This thesis explores VAW in the context of migration, focussing on the main laws governing migration to the UK and within the EU. To do so, it develops a conceptual account of VAW, one that is grounded in international law and which establishes what is at the core of this wrong: interpersonal, discriminatory violence.

Part 1 of this thesis demonstrates that British immigration law disadvantages women, granting them migration statuses which make them dependent on others and which bestow few rights. Some of the rules that create this disadvantage are properly characterised as involving unlawful discrimination. This State-created disadvantage interacts with the extant risks and consequences of VAW in particular ways, including by granting its perpetrators access to the coercive power of the State. Not only does the State increase migrant women's vulnerability to VAW, it compounds their experience of it.

States and others, including the EU, have recognised that some migrant women's experience of VAW warrants an immigration law response. This has, however, been achieved in a piecemeal fashion, by establishing what this thesis characterises as 'regimes of exception'. Part 2 evaluates four of these regimes. Chapter 4 examines two sets of rules which determine the migration status of some domestic violence victims. Chapter 5 analyses the European trafficking regime, whilst Chapter 6 focuses on the Istanbul Convention. Contrary to the obligations identified in Part 1, Part 2 demonstrates that the domestic violence and trafficking regimes provide a migration status which is reparative of the compounded disadvantage migrant women experience in only a minority of cases. Accordingly, this thesis argues for States' and the EU's *full* ratification of the Istanbul Convention, and for comprehensive migration status reform, including the abolition of dependent migration statuses.

The personal is theoretical.

- Sara Ahmed

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Sara Ahmed, whose description of the 'personal as theoretical' precedes these acknowledgements,[1] describes citations as 'feminist bricks', 'the materials through which, from which, we create our dwellings'.[2] I cite, acknowledge the contributions of and thank Sandra Fredman, Carolyn Hoyle, Tarun Khaitan, Michelle Madden Dempsey and Denise Réaume for reading and commenting on various drafts of what have now become Chapters 1, 2, 3 and 4 of this thesis. I would also like to thank two anonymous reviewers for their comments on the article that I adapted from Chapter 1 which has now been published in *Social & Legal Studies*. Particular thanks are due to Cathryn Costello. It is difficult to do justice here to the contribution that Cathryn's scholarship and supervision has made to both this research and my broader academic life. Her constructive criticisms, insights, support and encouragement have spurred me to produce a better work than I would otherwise have been capable of. Any errors or shortcomings remain my own. I would also like to thank Janet, Colin and Jonathan Briddick, Henry Radice and Raphy and Bella Briddick Radice for being the reasons to both start and stop working. Finally, in undertaking this research, I have sought to 'do justice', in some small way, to the accounts of violence and migration status that women shared with me when I was in practice. Their stories both motivated and sustained this research, which I offer in return, in gratitude and with solidarity. Thank you.

1 Sara Ahmed, *Living a Feminist Life* (Duke University Press 2017) 1.

2 ibid, 16.

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ACHR	American Convention on Human Rights
AG	Advocate General
CA	Competent Authority
CAT	Convention Against Torture and other Cruel, Inhuman or Degrading Treatment
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CGD	Conclusive Grounds Decision
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CSR	Convention Relating to the Status of Refugees
EC	European Community
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEA	European Economic Area
ET	Employment Tribunal
EU	European Union
EUCFR	European Union Charter of Fundamental Rights
FOI	Freedom of Information

GBV	Gender-Based Violence
GRETA	Group of Experts on Action against Trafficking in Human Beings
GREVIO	Group of Experts on Violence against Women
HRA	Human Rights Act
IACommHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
IHRL	International human rights law
ILR	Indefinite leave to remain
MSHTU	Modern Slavery and Human Trafficking Unit
MS	Member State
NHS	National Health Service
NRM	National Referral Mechanism
NGO	Non-Governmental Organisation
ODW	Overseas Domestic Worker
PBS	Points-based system
PSED	Public Sector Equality Duty
RGD	Reasonable Grounds Decision
SCA	Single Competent Authority

TCN	Third-Country National
TFEU	Treaty on the Functioning of the European Union
UKVI	UK Visas and Immigration
VAW	Violence Against Women
VCLT	Vienna Convention on the Law of Treaties

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PART ONE

INTRODUCTION

For nearly ten years I worked for a not-for-profit organisation that provided women in England and Wales with legal advice. During this period I directly advised hundreds of women on issues arising from domestic and sexual violence, relationship breakdown and child abuse. When managing the legal advice service, I reviewed the advice given by our staff and volunteers to many more women. Almost all the women we advised had directly experienced some form of violence. Whilst the majority of those who contacted us were British or resident here, a significant proportion had a migration status in the UK that was not so secure, having come to work or study, or as the partner of a British or European Union (EU) Citizen. A significant proportion of the women we advised who were in this position were dependent for their migration status, their permission or right under British or European law to be in the UK, on the person who was violent towards them.

One of the last women I advised was in this very situation, dependent for her migration status on the permission to remain held by her husband, a skilled labour migrant. She also worked in the UK and the couple had two children in school. The woman's husband regularly raped her and demanded that she pay him a sizable portion of the money she earned. For a variety of legal and practical reasons, she could better protect her children from his violence in the UK than she could in her country of origin. She wanted legal advice on how she could end her marriage and remain in the UK, having been advised by a local domestic violence support service that there was an immigration rule, the 'domestic violence rule', which would enable her to do this. I advised this woman that whilst there was a domestic violence rule that enabled some women to separate from their partner and

remain in the UK, she could not benefit from it because of the particular migration status that she held (just why this is the case is one of the issues dealt with in Part 2 of this thesis). Although there were other applications she could make, including those based on her and her children's human rights, their outcome was far from certain. If she made one of these applications and it was refused, she might have her permission to remain curtailed and face removal from the UK. Having considered the limited options available to her, the woman decided to remain with her husband. He would be entitled to permanent residence in a couple of years and, as his dependent, she would get the same. Once she had that secure migration status, she would divorce him. Until then she would "live with it". She would continue to protect her children and their education would not be disrupted. Her children, if not her, would be safe here.

When advising women in situations like the one I have just described two things (at least) struck me. The first was the impact that migration status had on almost every aspect of its holder's life. It was *the* factor that determined not only the legal options a woman had, but also the financial and other support (whether provided by the local authority, police or a specialist support service) that she would receive. It frequently influenced the behaviour of the perpetrator of violence, as women I advised reported that they were threatened with "prison" (immigration detention) and being "sent back" (deportation). It was often the first and last thing that a professional 'working with' a victim of violence said about her case. Indeed the phrase "she's 'no recourse'", a reference to the restriction attached to almost all migration statuses which prohibits its holder from having access to certain sources of State support (including welfare benefits) appeared to some

social workers and domestic violence advocates to operate as some kind of magical formula that divested them of any legal or other obligation to a victim of violence.[1]

The second striking feature of such cases was that, in contrast to advising victims of violence on remedies based in family or criminal law, on domestic violence injunctions for example, rules or regimes based in immigration law did not usually provide the remedy they promised.[2] Rules which appeared to enable a victim of domestic violence to receive permanent residence, for example, or to provide a victim of trafficking with a residence permit, did not usually yield these outcomes when women affected by these forms of violence actually sought to rely on them. Indeed, applying under these rules might leave a victim 'worse off' as, if she were unsuccessful, she was likely to be subject to immigration detention and deportation.

A number of distinct, inter-connected and reinforcing forms of disadvantage, discrimination and violence can be identified as being at work in situations like the one I have described. First, the woman concerned was disadvantaged by her husband, whose violent conduct harmed her in many ways, including physically, sexually, psychologically and financially. She was also, however, disadvantaged by her position as a subject of UK immigration law. Whilst her husband had a (relatively) independent migration status that would, after a certain period, enable him to live permanently in the UK, as his wife *she* was dependent on *him* for *her* migration status. If their marriage broke down, she, not he, would lose her ability to live in the UK. This was the case *even though he had perpetrated*

1 The extent to which this is the case is discussed in detail in Chapter 3.

2 This is not to minimise the barriers that women face when they seek to access such remedies, nor the shortcomings of either the family or criminal justice systems in relation to violence against women.

domestic violence against her.[3] A person's migration status does more though than say how long they can remain in the UK and under what circumstances (as a labour migrant's dependent, or as a student for example). It also determines whether its holder is eligible to access certain services, including those provided directly and indirectly by the State (the 'no recourse' rules, introduced above). Unlike the first type of disadvantage discussed, that which flows from being subject to domestic violence, this disadvantage (which involves forced dependency and rights restriction, as will be discussed in the sections and chapters that follow) *is State-created*. It is produced by the immigration rules that create and distribute the status of 'dependent-of-a-skilled-labour-migrant', rules which not only determine whether their holder can separate from a violent partner and remain in the UK, but also prohibit them from accessing a raft of support services.

In addition to considering who is responsible for disadvantage like that experienced by the woman whose case I have briefly described (a private individual/the State), such disadvantage can also be explored by reference to its gendered nature and consequences. Firstly, it remains the case that women are significantly more likely than men to experience domestic violence and, if they do experience it, are more likely to experience particular forms of it and suffer particular harms as a consequence.[4] Secondly, whilst both the woman who sought advice and her husband both held migration statuses that accorded them fewer rights than those enjoyed by British residents and citizens/subjects, it was the woman

3 This could/would change if he were prosecuted for a criminal offence.

4 Office for National Statistics, *Domestic abuse in England and Wales: year ending March 2018* (Statistical bulletin, 22 November 2018), 8 and as discussed in detail in Chapter 2.

whose status as a wife made her dependent on her 'skilled labour migrant' husband.[5] That so many of the women I spoke to reported being threatened with detention and deportation by the person who was violent towards them indicates that many perpetrators of violence are, irrespective of their own nationality or migration status, aware of, and indeed exploit, this difference in rights/position.[6] Whilst women are, as a group, more likely to be disadvantaged by an experience of domestic violence than men, this disadvantage is compounded for *migrant women* by immigration rules which effectively grant their perpetrators access to the coercive power of the State ("I can have you deported") whilst simultaneously preventing them, in many cases, from securing an independent migration status and accessing those services that would enable them to escape the violence.

Differential treatment on the grounds of sex, migration status, or both, may, under certain circumstances, be correctly characterised as the legal wrong of discrimination. Discrimination is a complex and multi-faceted concept, encompassing (depending on the philosophical or legal account selected) direct and indirect discrimination, organisational, institutional and structural discrimination.[7] Different types of conduct, including non-

5 Immigration Rules part 6A: the points-based system, which establishes who may enter and remain in the UK as a labour migrant and under what circumstances their dependent family members may accompany, join and remain with them.

6 Empirical research demonstrates this to be the case, for an introduction to this issue and the relevant research see Sundari Anitha, 'Immigration status and domestic violence' (*Open Democracy*, 14 Sept 2015) <https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/immigration-status-and-domestic-violence/> accessed 8 April 2019 and Sundari Anitha and others, *Forgotten Women: Domestic violence, poverty and South Asian women with No Recourse to Public Funds* (Saheli, March 2008).

7 See Andrew Altman, 'Discrimination' in Edward N Zalta (ed) (ed), *The Stanford Encyclopaedia of Philosophy* (Winter 2016 edn, 2016) <https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=discrimination> for an introduction to and a discussion of these.

justifiable differential treatment in the distribution of migration opportunities,[8] certain forms of harassment[9] and violence[10] have all, again, depending on the account adopted, been described as sex discrimination. Such conduct may also, depending on the circumstances and jurisdiction, be unlawful, as a multiplicity of domestic, regional and international instruments have been developed and adopted to identify, prohibit and remedy different forms, or manifestations of, discriminatory treatment. The disadvantageous treatment experienced by the woman whose case I have described above can properly be characterised as arising from unlawful discrimination by reference to some of these instruments.

Domestic violence is understood to be both discrimination against women and a breach of women's human rights by, amongst others, the European Court of Human Rights,[11] the Council of Europe[12] and the Committee on the Elimination of All Forms of Discrimination against Women (the CEDAW Committee).[13] It is well-established under both European and international human rights law that States are required to respond to such violence, in line with their positive obligations and/or with 'due diligence'.[14] Such responses include, as will be discussed in detail in Chapter 2, properly investigating

8 *Abdulaziz, Cabales and Balkandali v UK* App nos 9214/80; 9473/81; 9474/81 (ECtHR, 28 May 1985).

9 Catharine A MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (Yale University Press 1979).

10 General Recommendation No 35 on Gender-Based Violence Against Women, Updating General Recommendation No 19 CEDAW/C/GC/35 (26 July 2017).

11 *Opuz v Turkey* App no 33401/02 (ECtHR, 9 June 2009).

12 Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul, 11th Oct 2011) CETS 210 (Istanbul Convention).

13 *Ms A T v Hungary* Communication No 2/2003 (26 January 2005) CEDAW/C/36/D/2/2003.

14 Rashida Manjoo, 'State Responsibility to act with Due Diligence in the Elimination of Violence against Women' (2013) 2(2) *International Human Rights Law Review* 240.

violence and providing victims with practical and effective remedies for it. States' failure to discharge these obligations may itself also constitute unlawful discrimination.[15] The differential treatment of men and women by immigration law may disadvantage women in a number of ways, including by making them dependent on another and by restricting their rights, as we have seen, but also by increasing their vulnerability to violence.[16] If violence does occur, the inability of many victims to secure an independent migration status, and the exclusion of most from the general and specialist support services that States provide victims, may intensify and prolong its experience.[17] This was precisely the situation of the woman whose case I described above. She 'chose' to remain with her husband, notwithstanding the sexual violence and financial abuse he perpetrated against her, because separation from him would entail the loss of her (and potentially her children's) right to live in the UK. Whilst the *violence* that she experienced breached her human rights and was discriminatory, the States' role in first, *increasing her vulnerability to such violence* and second, *compounding her experience of it* may have done the same. Such treatment may violate the State's positive or 'due diligence' obligations and constitute unlawful discrimination under both the European Convention on Human Rights (ECHR)[18] and the

15 For a discussion of violence against women and the State's failure to respond to such violence as different forms of unlawful discrimination on the grounds of sex, see *Gonzalez et al ('Cotton Field') v Mexico* Preliminary Objection, Merits, Reparations, and Costs (IACtHR, 16 November 2009) as discussed in Chapter 2.

16 Anita Raj and Jay Silverman, 'Violence Against Immigrant Women: The Roles of Culture, Context, and Legal Immigrant Status on Intimate Partner Violence' (2002) 8(3) *Violence Against Women* 367.

17 Sundari Anitha, 'Legislating Gender Inequalities' (2011) 17(10) *Violence Against Women* 1260; Rebecca Gail Dudley, 'Domestic Abuse and Women with 'No Recourse to Public Funds': the State's Role in Shaping and Reinforcing Coercive Control' (2017) 6 *Families, Relationships And Societies* 201.

18 European Convention on Human Rights and Fundamental Freedoms (4 November 1950) ETS 5 (ECHR), as discussed in *Opuz v Turkey* (n 11) and in Chapter 2.

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[19] If this can be proved to be the case, the State is not only obliged to remedy its disadvantageous and discriminatory treatment of migrant women, it should also provide reparation to all those who, like the woman whose situation I have described, it has so disadvantaged and discriminated against.[20]

Empirical research demonstrates that cases like the one I have described are not anomalous, but representative of many migrant women's experiences of both violence and migration status.[21] Partners are also not alone in immigration law in being granted migration statuses that place them in relationships of dependency, or which significantly restrict their rights. Domestic workers, for example, are also rendered dependent-in-practice for their permission to remain in the UK on their employer, in whose household they are also required to work.[22] This status, like that of dependent wife, also increases its holder's vulnerability to violence and other rights-violations, including labour exploitation and (re)trafficking.[23]

19 Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979) UNTS 1249 13 (CEDAW).

20 Per the relevant provisions of the Equality Act 2010, ECHR and CEDAW as explained in Part 1 of this thesis.

21 See the references above at n 6 and n 17 and as discussed in Chapter 3.

22 Immigration Rules part 5: working in the UK.

23 Virginia Mantouvalou, ‘`Am I Free Now?' Overseas Domestic Workers in Slavery' (2015) 42(3) *Journal of Law and Society* 329; Natalie Sedacca and Avril Sharp, 'Dignity, not destitution: the impact of differential rights to work for migrant domestic workers' (*UK Labour Law*, 12 April 2019) <https://wordpress.com/view/uklabourlawblog.com> accessed 17 June 2019.

1. This Thesis

In Part 1 of this thesis, I subject the State's treatment of migrant women, including partners and domestic workers, to scrutiny.[24] In doing so, I establish that the State disadvantages and discriminates against women, treatment it is obliged to remedy (by, for example, changing the relevant rules) and provide reparation for (to all those who have been, and continue to be, affected by it). To discharge these obligations, I argue for migration status reform, including the abolition of all dependent migration statuses. In the absence of such reform, I argue that migrant women victims of a particular form of violence, violence against women, should receive an independent, rights-bestowing migration status. This argument is advanced in three steps.

Legal scholars, whether concerned with British immigration law, EU free movement law or discrimination law more broadly, have tended to neglect the question of how migration status affects *women*.[25] In Chapter 1 I address this issue, combining original research on the number and proportion of women and men who hold particular migration statuses with doctrinal legal analysis, to establish that women are disadvantaged by immigration law. Drawing on Bridget Anderson's influential analysis of migration law's 'fashioning' of precarious workers, the disadvantage that particular rules produce is explored by reference to the reduction or restriction of migrants' rights, forced dependency

24 Drawing on the language used by Baroness Hale in *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, [2012] 3 All ER 1287, para 17.

25 Exceptions include Natasha Carver, ''For Her Protection and Benefit': The Regulation of Marriage-Related Migration to the UK' (2016) 39(15) *Ethnic and Racial Studies* 2758 and Isabel Shutes and Sarah Walker, 'Gender and Free movement: EU migrant women's Access to Residence and Social Rights in the UK' (2018) 44(1) *Journal of Ethnic and Migration Studies* 137.

and precarity.[26] Empirical evidence of women's lived experience of the relevant migration statuses is relied on to reveal a fourth disadvantage: an increased risk of experiencing violence. Having established that women are disadvantaged by immigration law in particular ways, I argue that their differential treatment cannot be justified and that it is, at least in some cases, the result of rules which unlawfully discriminate on the grounds of sex contrary to Article 14 ECHR.

This thesis is concerned with the predicament confronted by migrant women who have, or are, experiencing a particular form of violence: violence against women. What constitutes such violence is, however, the subject of debate and contestation. As Chapter 2 explains, there is a lack of conceptual and legal clarity as to 'violence against women's' definition and place within both general human rights law and the specialist legal frameworks concerned with discrimination against women.[27] Rather than selecting one of the five relevant legal instruments' definition of such violence,[28] Chapter 2 advances a *conceptual account* of violence against women, establishing the points at which these instruments converge to ascertain what is at the core or heart of this legal wrong. According to this account 'violence against women' is interpersonal violence which discriminates against women, such violence arising from, creating and/or perpetuating the subordination of women (VAW = interpersonal violence + discrimination ↔ domination/subordination).

26 Bridget Anderson, 'Migration, Immigration Controls and the Fashioning of Precarious Workers' (2010) 24(2) *Work, Employment & Society* 300.

27 See that chapter's discussion of *Opuz v Turkey* (n 11).

28 General Recommendation 19 Violence Against Women (11th session, 1992) (as developed in CEDAW's GR 35); the Declaration on the Elimination of Violence against Women 1993, GA Res. A/RES/48/104, 20 December 1993; Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Belém do Pará, 9 June 1994), Article 1; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo, 21 July 2003), Article 1 and Istanbul Convention, Article 3(a).

A focus on interpersonal (rather than, for example, structural) violence here, enables the relationships and contexts that migration status particularly affects, intimate partnerships, the home and workplace, to be placed at the centre of analysis. In the second part of Chapter 2 I apply this account to domestic violence and trafficking, to establish them to be, for the purposes of this thesis at least, forms of violence against women. Finally, I explore the duties States have under the ECHR to prevent and provide practical and effective protection from such violence to *all* those within their jurisdiction.

Whilst legal responses to 'violence against women' have been the subject of sustained scholarly analysis,[29] this research has not been fully engaged with by academics concerned with migration, who have tended instead to focus on particular forms or subsets of such violence.[30] My arguments for the abolition of dependent migration statuses and the granting of an independent migration status to victims of violence are justified ethically and legally in Chapter 3 by reference to the State's role in compounding, through immigration laws that disadvantage and discriminate against women (per Chapter 1), the disadvantage experienced by victims of violence against women (as defined in Chapter 2). Drawing inspiration once again from Anderson's work, the distinguishing features of such

29 Alice Edwards, *Violence Against Women under International Human Rights Law* (CUP 2011); Christine Chinkin, 'Violence against Women' in Marsha A. Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (OUP 2012) and Christine Chinkin, 'Addressing violence against women in the Commonwealth within states' obligations under international law' (2014) 40(3) *Commonwealth Law Bulletin* 471.

30 For example, on trafficking, sexual harassment in the workplace or domestic violence rather than violence against women per se. For examples see the wealth of literature engaged with in Part 2.

compounded disadvantage are identified as control, exclusion, a perilous migration status and an intensified experience of that violence.[31]

The ethical foundations to the obligations I identify (for migration status reform and the provision of an independent migration status to victims of violence) are provided by Martha Fineman's theorising on vulnerability and the duties on States that she contends arise from it.[32] Anchoring my account of compounded disadvantage in Fineman's vulnerability thesis enables me to highlight and encompass a range of different inequalities, whether or not those inequalities are themselves the result of unlawful discrimination.[33] It also complements more recent intersectional approaches to disadvantage which 'excavate and expose multi-layered structures of power and domination'.[34] What is additionally revealing about a vulnerability analysis is, however, the role that the State (and, as we shall see, the EU) *plays in first producing and then compounding* migrant women's disadvantage. The legal foundations to the obligations I identify are provided by reference to the prohibition of discrimination found in both domestic and European human rights and equality law (set out in Chapter 1) and the obligations on States to provide practical and effective protection from and remedies for, violence (as established in Chapter 2).

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31 Anderson (n 26) as, as will be discussed in that chapter, dependency → control, rights-restriction → exclusion, a perilous migration status → one that is imperilled.

32 Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) *Yale Journal of Law and Feminism* 1 and Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2013) *Emory University School of Law, Public Law & Legal Theory Research Paper Series, Research Paper No 10-130*.

33 As we shall see in Chapters 1 and 3, whilst discrimination on the grounds of sex is prohibited by a range of different domestic, European and international instruments, the same is not necessarily true for migration status.

34 Sumi Cho, Kimberlé Crenshaw and Leslie McCall, 'Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis' (2013) 38(4) *Signs* 785, 804.

States have recognised that in certain, limited circumstances, the violence that migrant women experience requires an immigration law response. The 'domestic violence rule' that the woman whose case I started this introduction with had heard about, but was ineligible for, is one such response. Rules which enable victims of trafficking, or violence against women more broadly, to receive an independent migration status in certain circumstances are two others. Having established, in Part 1, that States should grant migrant victims of violence an independent migration status, in Part 2 I turn to the specific rules, termed 'regimes of exception',[35] that States, the EU and the Council of Europe have developed, evaluating those rules by reference to the extent to which this duty is discharged.

The regimes of exception enable some migrant women who have experienced some forms of violence to receive a migration status in their country of residence when they might otherwise be compelled to return to their country of origin. They are so described because they are exceptions to the conventional migration law position that a person who does not have valid permission to be in the UK, or who no longer meets the conditions attached to that permission, should return to her country of origin.[36] People in this position may be detained (subject to certain conditions and safeguards) and deported if they do not, or cannot, return home voluntarily. These regimes also differ from refugee and other protections from *refoulement*. Refugee protection (broadly defined) is future oriented – it aims to protect a woman from the risk of experiencing harm in the future, and usually in

35 With thanks to Cathryn Costello who developed this term.

36 For example, women who have permission to remain as a partner but whose relationship has broken down will have that permission curtailed and will be expected to leave the UK, see Chapter 1's detailed discussion of the partner and domestic worker routes.

her *country of origin*.[37] In contrast, these regimes grant status to women based on *past* violence experienced in her *country of residence*.

Part 2 evaluates four different regimes of exception. In Chapter 4 I examine two rules which require an independent migration status to be granted to some women who experience domestic violence, who are dependent for their migration status on their partner and whose relationship breaks down. The source of the first of these 'domestic violence rules' is EU law,[38] the source of the second is British immigration law.[39] In Chapter 5 I evaluate the European trafficking 'regime', a multi-layered regime with diverse legal sources.[40] Here I focus on rules that require States to grant residence permits to some victims of trafficking. The final regime I consider, in Chapter 6, is that created by the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (the 'Istanbul Convention'),[41] Article 59 of which requires States

37 Under the Convention Relating to the Status of Refugees (Geneva, 22 April 1954) UNTS 189 137 (CSR), Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted OJ L 304/12 and/or the ECHR, Arts 2 and 3.

38 European Parliament and Council Directive 2004/38/EC of 29 April 2004 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 OJ L 158/77.

39 Specifically, the Immigration Rules.

40 Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities OJ 261/19 (EU Residence Permit Directive); Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA OJ L 101/1 (EU Trafficking Directive); and, Council of Europe Convention on Action against Trafficking in Human Beings (Warsaw, 16.V.2005) CETS 197 (Council of Europe Trafficking Convention).

41 Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul, 11th Oct 2011) CETS 210 (Istanbul Convention).

to grant either autonomous or renewable residence permits to some women who have experienced violence.

As the preceding sketch indicates, the regimes differ from each other in several important respects. They are concerned with different forms of violence (domestic violence, trafficking or any form of violence against women); have different rationales (protection from violence or to facilitate the prosecution of certain perpetrators of it); and, bestow different packages of rights (permanent residence or a renewable residence permit). They also differ in their legal source (domestic immigration law, EU law and human rights law emanating from the Council of Europe). Although one of the regimes I consider, the trafficking regime, has been the subject of lively scholarly debate which has generated literature that is illuminating, both doctrinally and normatively,[42] the other regimes I evaluate have received comparatively little attention.[43] Where those regimes have been the subject of academic inquiry, the focus has tended to be on a particular rule, or even a particular paragraph of a particular rule, and the consequences of making comparatively limited, technical, changes to it.[44] Consequently, whilst feminist activism and empirical

42 See, for example, Bridget Anderson, 'Trafficking' in Elena Fiddian-Qasmiyeh and others (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford University Press 2014) (for an introduction and overview) and Michelle Madden Dempsey, Carolyn Hoyle and Mary Bosworth, 'Defining Sex Trafficking in International and Domestic Law: Mind the Gaps' (2012) 26(1) *Emory International Law Review* 137; Janie A. Chuang, 'Exploitation Creep and the Unmaking of Human Trafficking Law' (2014) 108(4) *The American Journal of International Law* 609 and Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European law* (CUP 2017).

43 I have identified just two articles that take as their focus the EU's 'domestic violence rule': Adam Weiss, 'Transnational Families in Crisis: An Analysis of the Domestic Violence Rule in E.U. Free Movement Law' (2009) 30(3) *Michigan Journal of International Law* 841 and Helen Oosterom-Staples, 'Residence Rights for Caring Parents who are also Victims of Domestic Violence' (2017) 19(4) *European Journal of Migration and Law* 396.

44 This is not a criticism of this research which is, or maybe, central to attempts to challenge such provisions, see, for example Helena Wray and Eleonore Kofman, 'The Financial Requirements to Sponsor an Overseas Spouse' (*Middlesex Minds*, 18 February 2016) <http://mdxminds.com/2016/02/18/the-financial-requirements-to-sponsor-an-overseas-spouse/> .

research have consistently highlighted the deleterious impacts of migration status on women who have experienced violence,[45] the legal rules that both create these statuses and which practitioners 'go to' when they seek to assist victims, have been both under-examined and under-theorised. Differences between the regimes notwithstanding, their comparison and evaluation in this thesis is analytically and normatively revealing as, in seeking to remedy these gaps in the literature, I identify deficiencies common to all four regimes. These deficiencies include their (sometimes absurdly) narrow scope and their normalisation of coercive migration control. This analysis can, drawing on the writings of Martha Minnow, be characterised as a 'feminist'[46] 'recasting project', as I 'gather' rules from different areas of law and offer a new framework for their comparison and evaluation.[47]

To evaluate each of the regimes, I adopt a similar approach to that employed by Martha Nussbaum, who drew on the experiences of women she encountered in India to explore the obstacles which impede women's flourishing and to advance her capabilities approach.[48] Consonant with Nussbaum's methodology, I draw on the legal cases that NA[49]

45 See the references above at n 6 and n 17 and as discussed in Chapter 3.

46 Martha Minnow, 'Adjudicating Differences: Conflicts Among Feminist Lawyers' in Marianne Hirsch and Evelyn Fox Keller (eds), *Conflicts in Feminism* (New York: Routledge 1990), 161-2.

47 Martha Minnow, 'Archetypal Legal Scholarship: A Field Guide' (2013) 63(1) *Journal of Legal Education* 65, 66.

48 Martha Craven Nussbaum, *Women and Human Development: The Capabilities Approach* (CUP 2000). Nussbaum states that this narrative method places an 'implicit emphasis on the political importance of the imagination and the emotions…' page 15. See also Matthew E. Price, *Rethinking Asylum: History, Purpose and Limits* (CUP 2009) for the adoption of a similar approach in the asylum context.

49 Case C-115/15 *Secretary of State for the Home Department v NA* ECLI:EU:C:2016:487 [2016].

and EK,[50] referred to in this thesis as 'Naomi' and 'Eleanor' (for ease of reading) fought to remain in the UK.

Naomi is from Pakistan, her husband 'Kafeel' is a dual-national, having both Pakistani and German citizenship. Naomi came to the UK with Kafeel under EU law; she was dependent on him for her migration status. Kafeel was violent to Naomi and when their relationship ended, she sought permission to remain in the UK (rather than returning to Pakistan) under the EU's domestic violence rule. Eleanor is from Tanzania, she held a domestic worker visa when she arrived in the UK, so her migration status was determined by British immigration law. Eleanor was trafficked into and then within the UK, being compelled to undertake domestic work for her traffickers. Having escaped those who exploited her, she sought permission to remain under the trafficking regime. Part 2 follows first Naomi's case (in Chapter 4) and then Eleanor's (in Chapter 5) before bringing the two women's experiences together (in Chapter 6) to explore whether their situations would have been different had they been decided under the Istanbul Convention.

Of course, all cases are constructed by significant 'others' in the legal process and can only ever present or represent a very partial, or constructed, 'reality'. This important caveat notwithstanding, drawing on cases like those brought by Naomi and Eleanor, is fruitful for three reasons. Firstly, whilst no experience of violence is the same, these cases are, to an extent, archetypal or representative of many women's experiences. They can be drawn on, therefore, to facilitate the exploration of experiences which, as this thesis will demonstrate, are shared by many women. These include having a perpetrator of violence

50 *EK (Article 4 ECHR: Anti-Trafficking Convention) Tanzania* [2013] UKUT 313 (IAC) (19 June 2013).

manipulate a dependent migration status and being deterred from seeking help by the fear of immigration enforcement action (issues which are discussed in detail in Chapter 3). Secondly, these cases are legally significant. In Naomi's case, for example, the Court of Justice of the EU (the CJEU) issued its first and, so far, only ruling on the correct interpretation of the EU's domestic violence rule. In Eleanor's case, the British Court of Appeal drew on the ECHR to bolster, and give effect to, the rights afforded to victims under the trafficking regime. Each case has, therefore, set precedent for its regime's interpretation. Thirdly, the use of these cases as a narrative device, whilst offering a necessarily selective and partial account of each regime, seeks to do justice to the women who shaped them and to those who, like the woman whose case I started this introduction with, continue to be affected by them. Migrant women are frequently portrayed as passive victims, disadvantaged by violence that is ascribed to 'other', 'non-native' 'cultures' and 'practices'.[51] By focussing on the cases that women have fought in order to challenge the rules that determine their situation, I am able to refute these stereotypes (and the sexist and racist views which inform them) foregrounding migrant women's agency and resilience to focus on the *British and European laws* which disadvantage them. Such an approach can be understood as 'feminist' in its emphasis on women whose lives and concerns have been

51 As described in Celeste Montoya and Lise Rolandsen Agustin, 'The Othering of Domestic Violence: The EU and Cultural Framings of Violence against Women' (2013) 20(4) *Social Politics* 534.

excluded from legal scholarship,[52] and a response to calls from theorists like Nussbaum for research which helps us 'see and understand' women's lives better.[53]

2. The Elephant in the Thesis

The UK is, at the time that this thesis is submitted, a member of the EU. It may not be at the time that it is either read or examined. It is unclear when, how or even if this departure will occur. Predicting the impact that Brexit, in one form or another, has or may have on the issues and topics covered in this thesis is, therefore, extremely challenging. Some very general comments can, however, be made. Britain's departure from the EU will not affect Part 1's *analysis* of migration status, violence and compounded disadvantage. What will be affected are the rights of all those people in the UK whose migration statuses are currently determined by EU law. These people will (either immediately on the UK's exit or after a 'transition' period) be subject to British immigration law; the disadvantageous and discriminatory rules described in Chapter 1 and the disadvantageous and discriminatory rules that are likely to be forthcoming.[54]

Chapter 4's *analysis* of EU free movement law and its domestic violence rule will also remain unchanged by Brexit. Whilst the relevant rules will no longer (or again, no

52 Denise G. Réaume, 'What's Distinctive about Feminist Analysis of Law?: A Conceptual Analysis of Women's Exclusion from Law' (1996) 2(4) *Legal Theory* 265 and Minnow, 'Adjudicating Differences: Conflicts Among Feminist Lawyers' (n 46), 161-2.

53 Nussbaum (n 48), 11.

54 HM Government, *The UK's Future Skills-Based Immigration System (Cm 9722)* (December 2018) for a brief discussion of which see Catherine Briddick, 'Sex discrimination in British immigration law is likely to get worse after Brexit' (*The Conversation*, 29 April 2019) <https://theconversation.com/sex-discrimination-in-british-immigration-law-is-likely-to-get-worse-after-brexit-115607> accessed 14 May 2019.

longer after a 'transition' period) bind the UK, they will continue to operate, as Chapter 4 critiques, in the remaining Member States of the EU.

The rights available to victims of trafficking *in the UK* under the European trafficking regime are likely to be affected, and negatively affected, by Brexit. As Chapter 5 describes, the UK has opted-in to the EU Trafficking Directive and the decision to do so has benefitted victims including, for example, those who have sought compensation for their experiences. Such improvements may be lost when/if the UK is no longer bound by the provisions of the Directive that provide them.

Finally, the obligations that the UK has assumed, and is assuming, under the various Council of Europe Conventions this thesis considers, including those set out in the ECHR itself and in the Trafficking and Istanbul Conventions (discussed in Chapters 5 and 6 respectively) will, thankfully, remain unchanged by the UK's potential exit from the EU. Whether or not this will remain the case is a separate issue.

CHAPTER 1: PRECARIOUS WORKERS AND PROBATIONARY WIVES - HOW IMMIGRATION LAW DISCRIMINATES AGAINST WOMEN[1]

Introduction

Migration status is the personal status that attaches to migrants by virtue of their position as subjects of immigration law.[2] A person's migration status determines how long she or he is permitted by law to remain in the UK (a few months, years or permanently), on what basis (as a visitor, student, family member, worker or permanent resident) and what rights she or he has whilst here (to work, to study, to access welfare benefits or health care, to bring family members and/or to settle here permanently). Migration status is 'at once transient and indelible', determining rights for a fixed period of time, but often also having an enduring impact, even after the 'migrant' has become a 'citizen'.[3]

In the UK, some forms of migration status, such as 'indefinite leave to remain', bestow rights that are almost analogous to those enjoyed by British citizens/subjects. Others, such as 'immigration bail' (or temporary admission as it was previously known) provide only a very limited ability to enter and confer very few rights.[4] Immigration law

1 A shorter, more socio-legal, adaption of this chapter has been published in Social & Legal Studies, Catherine Briddick, 'Precarious Workers and Probationary Wives: How Immigration Law Discriminates Against Women' (2020) 29(2) *Social & Legal Studies* 221.

2 Immigration law (broadly defined) comprises of particular application forms and processes, immigration rules and accompanying policies, primary legislation, European Directives, international conventions and the decisions of the Tribunals, appellate courts and the supra-national courts of Strasbourg and Luxembourg.

3 Mark Freedland and Cathryn Costello, 'Migrants at Work and the Division of Labour' in Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (OUP 2014) 4.

4 See the restrictions on accessing services in the Immigration Act 2016, Part 2 (which built on those introduced in Immigration Act 2014) and Nira Yuval-Davis, Georgie Wemyss and Kathryn Cassidy,

consequently engages in a distribution of statuses that is more complex than either a 'yes, you are entitled to a migration status' or 'no, you are not' distribution. *If* a migration status is bestowed upon a particular applicant, it will place her or him within a status-based hierarchy, with the most advantageous forms of permission to enter or remain in the UK,[5] at the top and the most disadvantageous, those to which few rights accrue, or which either cannot be renewed or require regular renewal, at the bottom. Against the backdrop of this hierarchy, this chapter makes two claims about contemporary British immigration law and the migration statuses it creates. First, that women are disadvantaged by immigration law's distribution of migration statuses. Second, that this disadvantage is, in some cases, produced by rules and policies which unlawfully discriminate on the grounds of sex, contrary to domestic and European human rights and equality law.[6]

Direct discrimination involves treating one person less favourably than another 'because of a protected characteristic that the former has' such as their race or sexual orientation.[7] Indirect discrimination involves treating a person less favourably than another

'Everyday Bordering, Belonging and the Reorientation of British Immigration Legislation' (2018) 52(2) *Sociology* 228.

5 Described as 'leave to remain' in the immigration rules but referred to in this thesis as simply 'permission', unless a particular migration status, such as 'indefinite leave to remain', is being referred to.

6 Both Art 14 European Convention on Human Rights and Fundamental Freedoms (4 November 1950) ETS 5 (ECHR) and the Equality Act 2010 prohibit discrimination on the grounds of sex. Discrimination on the grounds of sex is also prohibited under EU law, Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L 39/40 (now repealed, see Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 2004/23)). EU anti-discrimination law has been drawn on by the European Court of Human Rights (ECtHR) in the development of its own discrimination jurisprudence, see for example, *DH and others v Czech Republic* App no 57325/00 (ECtHR GC, 13 November 2007), paras 82-92.

7 *Essop and others v Home Office* [2017] UKSC 27, [2017] 3 All ER 551, para 1.

through rules or practices which, whilst not being 'directed at or against people with a particular protected characteristic' nevertheless 'have the effect of putting them at a disadvantage.'[8] The 'key factor' that distinguishes direct from indirect discrimination is, as Sandra Fredman argues, the 'possibility of justification'.[9] Whilst direct discrimination cannot usually be legally justified (unless such justification is permitted by a specific legal rule), indirect discrimination can be, if it is a proportionate means of achieving a legitimate aim.[10]

Both direct and indirect discrimination on suspect grounds have and continue to be, features of immigration law. Consider, for example, the rule challenged in the European Court of Human Rights (ECtHR) in *Abdulaziz, Cabales and Balkandali v UK* [1985][11] that allowed resident husbands to bring their wives to the UK, but denied wives the equivalent right (direct discrimination on the grounds of sex, contrary to Article 14 of the European Convention on Human Rights (ECHR)).[12] Consider also the provisions of the Commonwealth Immigrants Act 1962 challenged in *East African Asians v UK* [1973][13] which extended immigration control to the citizens of independent Commonwealth

8 ibid.

9 In the UK/EU context, Sandra Fredman, 'Direct and Indirect Discrimination: Is There Still a Divide?' in Hugh Collins and Tarunabh Khaitan (eds), *Foundations of Indirect Discrimination Law* (Hart Publishing 2018), 36. As Fredman explains, the line between direct/indirect discrimination is not so brightly drawn in the ECtHR's jurisprudence which also does not preclude the possibility that certain types of direct discrimination (e.g. positive discrimination/special measures) may be legally justified.

10 ibid, 36. In support of her argument Fredman quotes Baroness Hale in *R (on the application of E) v Governing Body of JFS & Anor* [2009] UKSC 15, [2010] 2 AC 728, para 57.

11 *Abdulaziz, Cabales and Balkandali v UK* App nos 9214/80; 9473/81; 9474/81 (ECtHR, 28 May 1985).

12 European Convention on Human Rights and Fundamental Freedoms (4 November 1950) ETS (ECHR).

13 *East African Asians v UK* [1973] 3 EHRR 76.

countries and those of British dependencies who had passports issued by the colonial, rather than UK government (indirect discrimination on the grounds of race, also contrary to Article 14 ECHR). As Anderson and others have observed, immigration law distributes migration opportunities to certain groups of people, to the exclusion and disadvantage of others.[14] An appreciation of the role and prevalence of both direct and indirect discrimination in immigration law historically enables us to see through what Bridget Anderson describes as the

> taken-for-grantedness of immigration controls which views them as neutral sorting mechanisms, and to consider them as a factor in shaping actions and processes productive of certain types of relations.[15]

Whilst the gendered and racialised underpinnings of particular rules and decisions have been highlighted,[16] and individual sections of the immigration rules continue to be impugned on the grounds that they unlawfully discriminate,[17] this chapter goes further and demonstrates that discrimination on the grounds of sex is a pervasive, rather than isolated, feature of British immigration law. In advancing this argument, this chapter contributes to migration law scholarship an improved understanding of migration status and the role of

14 Bridget Anderson, *Us and Them?: The Dangerous Politics of Immigration Control* (OUP 2013) and, in relation to marriage migration, Helena Wray, 'An Ideal Husband? Marriages of Convenience, Moral Gate-keeping and Immigration to the UK' (2006) 8(3) *European Journal of Migration and Law* 303.

15 Anderson, ibid.

16 Betty de Hart, 'The Right to Domicile of Women with a Migrant Partner in European Immigration Law' in Sarah van Walsum and Thomas Spijkerboer (eds), *Women and Immigration Law: New Variations on Classical Feminist Themes* (Routledge Cavendish 2007) and Sarah van Walsum, 'Transnational Mothering, National Immigration Policy and the European Court of Human Rights' in Prakash Shah and Werner Menski (eds), *Migration, Diasporas and Legal Systems in Europe* (Routledge Cavendish 2006).

17 Helena Wray and Eleonore Kofman, 'The Financial Requirements to Sponsor an Overseas Spouse' (*Middlesex Minds*, 18 February 2016) <http://mdxminds.com/2016/02/18/the-financial-requirements-to-sponsor-an-overseas-spouse/> .

sex/gender and sexed/gendered stereotypes, not only in underpinning various (other) forms of disadvantage and exclusion (such as those premised on race or class), but as a source of disadvantage and exclusion in its own right.[18]

The chapter proceeds as follows: section 1 introduces the relevant discrimination law framework (the ECHR) and anticipates and rebuts two potential objections to my claim that women are disadvantaged and discriminated against by particular immigration rules. Section 2 sets out the rules that apply to certain family and labour migrants, discussing the migration statuses they produce and their position within the status-based hierarchy that immigration law creates. Section 3 draws on statistical information to establish 'who' is 'where' in the main family and labour migration routes to reveal, in section 4, the sexed/gendered disadvantage that pertains to immigration law's distribution of migration statuses. To foreshadow the more detailed discussion engaged in in sections 2, 3 and 4: three quarters of those who are accorded the relatively advantageous migration status of 'skilled' labour migrant are men; whilst three quarters of those accorded the highly disadvantageous status of 'domestic worker' are women. Nearly three quarters of those accorded the relatively disadvantageous status of 'partner' are 'women-as-wives'. Section 5 evaluates the rules that determine who may enter and remain in the UK as a partner or domestic worker, arguing that these rules indirectly discriminate against women. In doing so I also contend that the migration status of 'partner', 'skilled labour migrant' and 'domestic worker' are premised on and reinforce stereotypical understandings of men's

18 Contra Wray, 'Gender, while always present, comes in and out of focus as a critical feature of the legal regime and has been harnessed in different ways to underpin particular forms of exclusion.' Helena Wray, 'Spousal Migration, Gender and UK Immigration Law' (*Border Criminologies*, 24 April 2015) <http://bordercriminologies.law.ox.ac.uk/spousal-migration-gender/> .

and women's roles and attributes. Section 6 considers migration for work, family and protection more broadly, arguing that immigration law, as a whole, may disadvantage women. The final section explores how the discriminatory treatment of women might be remedied and draws on the State's positive equality duties to argue for comprehensive migration status reform.

Before proceeding to my substantive arguments, it is necessary to introduce the methodology and terminology I employ. I reviewed publicly available Home Office statistical reports from 2004/5-2017 to ascertain the number and proportion of women and men who were granted various migration statuses, including those of husband, wife, skilled labour migrant and domestic worker. Where relevant statistical information was not disaggregated by sex (such as that pertaining to the number of labour migrants who hold particular migration statuses) I made a series of freedom of information (FOI) requests to obtain it for particular years and particular migration statuses during the reviewed period. Appendix 1 contains the template(s) that I used for each FOI request. Having established that different migration statuses are distributed differently to women and men to women's disadvantage, I rely on Article 14 ECHR to demonstrate that the rules that determine this distribution discriminate against women. Throughout the chapter, I draw on language used in either the Home Office's statistical reports or particular immigration rules.[19] In referring

19 The statistical categories distinguish between husbands, wives, civil partners, common-law spouses (there is no such thing in law) and same-sex partners, for example, Home Office, 'Immigration Statistics, Settlement tables - se_01 to se_06, Table Grants of settlement to spouses on the basis of marriage' (*Home Office*, 29 Nov 2018) <https://www.gov.uk/government/publications/immigration-statistics-year-ending-september-2018/why-do-people-come-to-the-uk-4-for-family-reasons> accessed 6 Feb 2019. The immigration rules themselves refer to 'partners', a term which applies to those who are married, in a civil partnership or a relationship of significant duration.

to ‘wives’ or partners as ‘she’ or skilled labour migrants as ‘he’, I seek to highlight, not reproduce, the State’s and immigration law’s categorisation(s) of migrant women and examine (just) one of the types of discrimination that produces these categorisation(s). As will become apparent, stereotypes based on sex/gender, sexual orientation and family relationships are ‘written’ into immigration law in a way that would be considered unacceptable in other legal domains. Finally, the focus of this chapter is British immigration law, specifically the immigration rules.[20] That migration law, broadly defined, disadvantages women is, however, one of this thesis’ central claims. Consequently, in Chapter 4, I demonstrate that this chapter’s analysis may also be applied to the migration statuses generated by EU law.

1. Indirect Discrimination on the Grounds of Sex

Migrants in the UK are protected from unlawful discrimination by the ECHR (incorporated into domestic law by the Human Rights Act 1998, the HRA) and the Equality Act 2010. In line with both the relevant jurisprudence and literature, the discrimination law analysis engaged in here will centre on the ECHR’s prohibition of discrimination, with the specific obligations placed on public authorities by the Equality Act 2010 referred to where necessary.[21]

20 The immigration rules are subordinate legislation made under the Immigration Act 1971, for an interesting discussion of the role/place of the rules in British immigration law see Carol Harlow, ‘How not to do things with rules’ (*UK Constitutional Law Blog*, 15 September 2012) <https://ukconstitutionallaw.org/2012/09/15/carol-harlow-how-not-to-do-things-with-rules/> accessed 12 June 2018.

21 Where both the ECHR/ HRA and Equality Act 2010 apply, the non-discrimination analysis engaged in by the domestic courts subsumes the latter into the former as they are substantively similar. Measures taken by the legislature and Courts pursuant to either or both the HRA and Equality Act 2010 remain subject to scrutiny under the ECHR by the ECtHR.

Article 14 ECHR, the right not to be discriminated against, is not a free-standing right to equal treatment. Consequently, any difference in treatment complained of must relate to the exercise of a protected right, such as the right to private and family life under Article 8. To rely on Article 14, an applicant or group does not have to show that one of the substantive rights within the ECHR or its protocols has been violated, only that the 'facts at issue fall within the ambit' of the protected 'rights and freedoms'.[22] Article 8 is engaged in immigration cases involving marriage and other significant family relationships,[23] and where a person's employment and social connections are affected by a particular policy or practice.[24]

Discrimination law claims are, in general, comparative and grounds-based.[25] To successfully bring a claim an applicant or a group has to show that they have been treated differently in comparison with members of a comparator group.[26] Different systems identify different 'grounds', or protected characteristics, as requiring of protection. Whilst the Equality Act 2010 only offers protection from discrimination on a certain limited number of grounds, Article 14's reference to 'other status' enables it to be relied upon to challenge differences in treatment between individuals who are similarly situated for a range of different reasons, although different types of discrimination attract different levels

22 *Weller v Hungary* App no 44399/05 (ECtHR, 31 March 2009), para 26 and *Ponomaryov v Bulgaria* App no 5335/05 (ECtHR, 21 June 2011), para 53.

23 *Biao v Denmark* App no 38590/10 (ECtHR GC, 24 May 2016).

24 *Emel Boyraz v Turkey* Application no 61960/08 (ECtHR, 2 Dec 2014).

25 Harassment is an example of a discrimination claim that is not comparative, see Sophia R. Moreau, 'Equality Rights and the Relevance of Comparator Groups' (2006) 5 *Journal of Law and Equality* 81 for a discussion of this point.

26 In *Weller v Hungary* (n 22) which concerned exclusion from a maternity benefit on the grounds of nationality, the ECtHR held at para 27 that applicants had to establish that other persons in 'an analogous or relatively similar situation enjoy preferential treatment'.

of scrutiny.[27] As stated above, the prohibition of both direct and indirect discrimination on the grounds of sex is found in domestic and European human rights and equality law.[28] It does not matter whether the difference in treatment complained of arises because the relevant duty-bearer (in this case, the State) has the express intention of disadvantaging a particular group, what matters is if this is the result.[29]

Finally, under Article 14, indirect discrimination can be legally justified. The differential treatment of a protected group is not unlawful if the relevant distributive purpose is a legitimate one (pertains to a public or social 'good' for example) and there is a 'reasonable relationship of proportionality' between that purpose and the criteria adopted.[30] Once differential treatment has been established, it is for the State to provide the requisite justification.[31] As Baroness Hale explained in *Homer v Chief Constable of West Yorkshire Police* [2012]:

> The law of indirect discrimination is an attempt to level the playing field by subjecting to scrutiny requirements which look neutral on their face but in

27 In *Taiwo & Anor v Olaigbe & Ors* [2016] UKSC 31, [2016] 1 WLR 2653 the Supreme Court considered discrimination on the grounds of migration status and found that it was different to discrimination on the grounds of race or nationality and was not, therefore, covered by the Equality Act 2010. In contrast, the more open-ended protection against discrimination on the grounds of 'other status' in Art 14 ECHR has been used by the ECtHR to protect individuals from discrimination on the grounds of migration status, see *Hode & Abdi v UK* App no 22341/09 (ECtHR, 6 November 2012), para 46.

28 See the references at n 6.

29 In *DH and others v Czech Republic* (n 6) 'unconscious racial bias' (para 169) was identified and indirect discrimination found.

30 See *Gaygusuz v Austria* App no 17371/90 (ECtHR, 16 Sept 1996), which discusses direct discrimination on the grounds of nationality and the requirement for 'very weighty reasons' to justify such discrimination and *Di Trizio v Switzerland* App no 7186/09 (ECtHR, 2 Feb 2016) which rejected justifications for a measure found to be indirectly discriminatory on the grounds of sex.

31 *DH and others v Czech Republic* (n 6), para 180.

> reality work to the comparative disadvantage of people with a particular protected characteristic.[32]

In this chapter I subject to scrutiny the requirements of the immigration rules which distribute different migration statuses. This distribution will, accordingly, unlawfully indirectly discriminate against women if, without justification, it affects men and women differently to women's disadvantage.[33]

As it is 'commonplace' for indirect discrimination to be established on the basis of statistical information,[34] this chapter draws on such data taken from over a thirteen-year period to show that British immigration law distributes certain migration statuses, those of partner, skilled labour migrant and domestic worker, differently to men and women. Sophia Moreau has expressed concern about the use and selection of comparator groups in discrimination law, arguing that they should not involve the types of stereotyping and essentialising that prohibitions on discrimination seek to prevent, but should instead be relied on to reveal, in certain circumstances, the differential distribution of particular benefits or burdens.[35] Mindful of Moreau's concerns, the migration statuses of partner, skilled labour migrant and domestic worker are compared with each other here, because in addition to being legally and statistically significant (as we shall see), they are distributed differently to men and women, bestowing very different benefits and burdens upon their

32 *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, [2012] 3 All ER 1287, para 17.

33 ECHR, Art 14 (and Equality Act 2010, s19) as applied in, for example, *DH and others v Czech Republic* (n 6). This case is presented as paradigmatic of the type of indirect discrimination law claim that the argument advanced here relies on because the Grand Chamber adopts a structural approach which focussed on relative group disadvantage, drawing support from definitions of indirect discrimination in EU law, as well as from other international instruments.

34 *Essop and others v Home Office* (n 7), para 28.

35 Moreau (n 25), 95 and 86.

holders. To demonstrate that this differential and disadvantageous treatment may be discriminatory, I examine the relationship between the distributive purposes of the relevant rules and the criteria adopted to meet them. I consider and reject official justifications for disadvantageous facets of rules to demonstrate that they are not just productive of certain types of subjects and relationships, as Helena Wray and Elenore Kofman have persuasively argued, but may also entail unlawful discrimination on the grounds of sex.[36]

Two potential objections to these arguments can be anticipated and refuted. The first is that my comparison of partners and domestic workers with skilled labour migrants is inappropriate; that the rules that apply to domestic workers should, for example, be compared with the rules that apply to other 'low-skilled' labour migrants. Significantly, as will be seen, there is simply no 'low-skilled' employment category the majority of whose subjects are men.[37] The refutation of this objection to my argument lies not in a search through all the possible migration statuses created by immigration law, however, but in a consideration of the premise on which the objection rests.

Every distribution of a social good, such as migration status, has a purpose and criteria that govern that distribution.[38] The purpose of distributing labour migration statuses, for example, may be to benefit the national economy of the host state; the criteria

36 Eleonore Kofman, 'Gendered Labour Migrations in Europe and Emblematic Migratory Figures' (2012) 39(4) *Journal of Ethnic and Migration Studies* 579 and Helen Wray, *Regulating Marriage Migration into the UK* (Ashgate 2011).

37 The Seasonal Agricultural Workers' Scheme which ended in 2013 and concerned short-term employment in the food industries might have been a potential comparator. It is similarly not clear who the comparator for a spouse might be.

38 Denise G. Réaume, 'Dignity, Equality, and Comparison' in Deborah Hellman and Sophia Reibetanz Moreau (eds), *Philosophical Foundations of Discrimination Law* (Oxford: OUP 2013), 7.

that govern this distribution are the immigration rules which determine who may enter to work, under what conditions and for how long. An argument that seeks to reject potential comparators is one that is grounded in a prior claim as to the purpose and criteria adopted for the relevant distribution; it 'is by reference to this purpose that X is comparable to Y or not, as the case may be'.[39] Comparison may be required in discrimination law to show relative group disadvantage, but who a group may compare itself with can only be ascertained by reference to the purpose/criteria of the rule being impugned. It is only by bringing the *purpose* of the relevant distribution into view that we ascertain who a potential comparator may be. An argument that states that the rules that apply to domestic workers should be compared with those that apply to another unskilled labour migration category takes as its premise that the purpose of these rules is to distribute statuses according to 'skill' and that domestic workers are 'low-skilled'. If domestic work is thought to be simply incomparable with 'skilled' work, then the State's distributive purpose and criteria, the reasons it gives for distributing migration statuses to labour migrants and its assessment of the skill and value of different types of labour, are accepted without scrutiny.

Determining the purposes of an immigration rule is not straightforward. Determining what a 'skill' is and who might have it is also not a question of fact, it is one of judgement. Later I demonstrate that if the State's distributive criteria are subjected to scrutiny, it becomes apparent that the rules that apply to domestic workers and partners are grounded in stereotypical understandings of women's roles and attributes. Establishing that the immigration rules that apply to partners or domestic workers are based on stereotypes

39 ibid, 7.

not only resolves any potential objections to the comparison of migration statuses engaged in in the sections that follow, but also goes to demonstrating that their disadvantageous treatment of women cannot be legally justified. As we shall see, 'justifications' based on such stereotypes do not pursue a legitimate aim and are unable, therefore, to operate as justifications as a matter of law.

The second potential objection to my arguments is that the discrimination law analysis undertaken should compare the number of applications *from* men and women for a particular migration status with the number of grants *to* men and women of it. An objector raising such an argument might contend that as more women than men apply to be spouses, there can be no discrimination if more women than men hold that migration status. Such objections miss the point of the analysis I engage in here. I am concerned with the creation and distribution of *different migration statuses* and the disadvantageous and potentially discriminatory consequences for migrant women (and men) of that creation and distribution. In conducting such an analysis, it is not relevant (in the first instance) that more women than men apply as partners, or that more men than women apply as skilled labour migrants (issues I do consider in section 5, where I evaluate potential justifications for the differential treatment of women and men and argue that the migration statuses considered are based on stereotypes). What is relevant is whether the migration statuses the majority of whose subjects are women (partners/domestic workers) are, comparatively,

more disadvantageous than the migration statuses the majority of whose holders are men (skilled labour migrants). These are the issues to which I now turn.

2. Creation of a Status Hierarchy

In this section I set out the rules that apply to certain family and labour migrants, discussing the migration statuses they produce and their position within the status-based hierarchy established by British immigration law. The ever-shifting and highly complex nature of immigration law makes analysing migration routes or categories something akin to shooting at a moving target. The rules discussed here have, of necessity, been simplified considerably and may have changed since the completion of this research.[40]

(a) Entering and remaining in the UK as a partner

Partners (whether married/civilly-partnered or not), fiancé(e)s and proposed civil partners, children, parents, grandparents and other dependent relatives *may* all be given permission to join someone who is British or settled here via one of a variety of family migration routes, each of which requires particular criteria to be met before the relevant status is granted. The most statistically significant of these routes is that which enables someone to enter and then remain in the UK with his or her British or resident spouse, civil-partner or unmarried partner.[41]

40 In February 2019.

41 Home Office, 'Immigration Statistics, Admissions tables ad_01 to ad_04_q, Table ad_03_f: Passengers given leave to enter the United Kingdom in family categories by country of nationality' (*Home Office*, 29 Nov 2018) <https://www.gov.uk/government/publications/immigration-statistics-year-ending-september-2018/why-do-people-come-to-the-uk-4-for-family-reasons> accessed 9 July 2019; Home Office, 'Immigration Statistics, Settlement tables - se_01 to se_06, Table Grants of settlement to spouses on the basis of marriage' (n 19).

To enter and remain as a partner, a number of conditions have to be met which relate to the applicant him or herself (aged 18 or over, able to speak English to a specified level), the couple's relationship (they have met, they are not related in certain ways, previous relationships have permanently broken down, the current relationship is genuine and subsisting) and how they will live in the UK (together, permanently).[42] Applicants must also meet onerous financial requirements in the form of a minimum income threshold (currently £18,600 with an additional £3,800 for a first child and £2,400 for each child after that) but are limited in both the sources of income and forms of evidence they are able to rely on to do this.[43] Once in the UK, the rules establish a five-year 'route to settlement' whereby an applicant is granted an initial period of permission for thirty months (during which she may work but not access public funds) which *may* be renewed on application for another thirty months, after which she may apply for indefinite leave to remain.[44]

(b) Entering and remaining in the UK as a labour migrant

Labour migration to the UK is, for the most part, organised through a five-tier points-based system (the PBS), in which permission to enter/remain is granted according to whether a labour migrant has certain skills or attributes.[45] Entrepreneurs, investors and those considered to have 'exceptional talent' may receive a Tier 1 visa. Long-term 'skilled' employment is covered by Tier 2. Short-term employment by Tier 5 (Tier 3 of the PBS is

42 Immigration Rules Appendix FM: family members, paras E-ECP.2.1-10, ELTRP 4.1.

43 ibid, paras, E-LTRP.3.1.

44 ibid, paras, D-LTRP, E-ILRP.

45 The UK's Highly Skilled Migrant Programme (HSMP) ran from 2002-8 when it was replaced by Tier 1 of the points-based system (PBS). The term 'highly-skilled migrant' and 'skilled migrant' are being used to connote the position of migrants in Tiers 1 and 2 of the PBS respectively.

currently suspended, Tier 4 covers students). The PBS operates hierarchically, creating a 'labour-migration-status-based-hierarchy' within the general 'migration-status-based-hierarchy'. Those statuses which confer significant rights or benefits, such as the right to bring family members or settle within a short(er) period, are at the 'top' of the PBS (Tier 1 and then 2) whilst those which confer the least, which require regular renewal for example, are at the 'bottom' (Tier 5). Permission to enter the UK as an overseas domestic worker (ODW), the labour migration route to which the fewest rights accrue, is given outside of the PBS.

More people enter the UK under Tier 2 of the PBS, which covers 'skilled', employer-sponsored workers, than they do under any other labour migration category.[46] Tier 2 (General) Migrants must score 70 points (depending on the circumstances). Points are allocated on the basis of attributes which include speaking English to a particular level, having certain funds available, having a sponsor employer and a particular level of earnings. Permission is granted for periods up to five years (depending on the employment's duration) and may be renewed. After five years the applicant may apply for indefinite leave to remain.[47] The family members of Tier 1 and 2 points-based system migrants may join them and can also work (but not access public funds).

In contrast, to be granted permission as an overseas domestic worker in a private household, an applicant must have worked and lived in their employer's home for at least a year and plan to travel to the UK with them. Applicants must leave the UK at the end of

46 Appendix 3.

47 Immigration Rules Part 6A: Points-Based System, paras 245H-245HF.

six months (or at the same time as their employer, whichever is sooner). The employer and domestic worker must have agreed in writing the terms and conditions of the employment, conditions which include paying a wage that complies with the National Minimum Wage Act 1998.[48] Domestic workers cannot apply for settlement, their family members cannot apply to join them and they cannot seek to remain in the UK on a different basis. Domestic workers cannot change jobs for the same employer. They cannot access public funds. Domestic workers have in theory, been able to change employers (if not employment type) since 2016.[49] However, ODWs inability to extend or renew their leave, if they wish to do this, renders this change to the regime 'meaningless',[50] domestic workers remaining 'tied [to their employer] in practice'.[51]

3. The Distribution of Migration Statuses

(a) Family migrants: partners

As others have also observed, it is disproportionately 'women-as-wives' who enter and then remain in the UK under the 'partner' route.[52] In 2013, to take just one representative year in the period I review, 70% of those granted admission as a partner were 'wives',

48 As required by paragraphs 159A(v), 159D(iv), 159EA(iii) of the Immigration Rules part 5: working in the UK, per the format in Immigration Rules Appendix 7: overseas workers in private households.

49 Immigration Rules part 5: working in the UK, para 159A-C.

50 KALAYAAN, *Kalayaan briefing on the Government Response to the Independent Review of the Overseas Domestic Worker (ODW) Visa* (2016), 2.

51 Natalie Sedacca, 'International Domestic Workers' Day 2019: the rights of domestic workers in the UK need far-reaching and urgent reform' (*Focus on Labour Exploitation*, 13 June 2019) <https://www.labourexploitation.org/news/international-domestic-workers%E2%80%99-day-2019-rights-domestic-workers-uk-need-far-reaching-and> accessed 17 Jun 2019.

52 Katharine Charsley and others, 'Marriage-Related Migration to the UK ' 46(4) *International Migration Review* 861.

compared with 23% of men who were admitted as 'husbands.'[53] As Appendix 2 demonstrates, in each and every year over the thirteen-year period considered, significantly more women than men, generally two thirds or more, entered the UK as wives.[54] I use the word 'wife' because, as noted above, this is the term that the Home Office uses in its statistical reports. That it does so (rather than referring to 'spouses' or 'women') is highlighted here to foreshadow the discussion of migration status and stereotypes engaged in later in this chapter.

(b) Labour migrants

In contrast to family migration, it is not just that labour migration is predominantly male, but that, as Appendix 3 demonstrates, men are consistently more likely to be at the 'top' of the labour migration hierarchy as 'skilled migrants', whilst those present at the 'bottom end' of the labour migration spectrum, outside of the PBS as ODWs, are overwhelmingly women.

In 2005 69% of those given permission to enter under Tier 2 and its pre-PBS equivalent were men; by 2014 this had risen to 75%,[55] the disproportion of men/women

53 The total number of people admitted as spouses or fiancé(e)s in 2013 was 15,800 of which 3,650 (23%) were husbands, 11,100 (70%) were wives, 360 (2%) were men granted entry for marriage and 685 (4%) were women granted entry for marriage. See further Appendix 2 which is drawn from Home Office, 'Immigration Statistics, Admissions tables ad_01 to ad_04_q, Table ad_03_f: Passengers given leave to enter the United Kingdom in family categories by country of nationality' (n 41).

54 ibid.

55 In 2005 66,214 migrants were given permission to enter the UK as Tier-2 migrants and its pre-PBS equivalent of whom 45,475 (69%) were men and 20,724 (31%) were women. In 2014 52, 501 migrants were given permission to enter the UK as Tier-2 migrants and its pre-PBS equivalent of whom 39,119 (75%) were men and 13,355 (25%) were women. See Appendix 3 which is drawn from Home Office, 'Entry Clearence Visas granted outside the UK, Volumn 2, Table vi_06_q_w: Entry clearance visas granted by category and country of nationality: Work' (*Home Office*, 29 Nov 2018) <https://www.gov.uk/government/statistics/immigration-statistics-july-to-september-2014-data-tables> accessed 6 Feb 2019 and supplemented by data obtained by FOI request.

being given permission to enter on this basis appearing to remain broadly consistent throughout the period considered.[56] Tier 2 is, therefore, particularly significant not just because it covers the majority of labour migrants, but because of the considerable disparity in the number of women and men granted permission to enter under it.

As we move 'down' the PBS (from a consideration of those the State considers highly-skilled, through those who are skilled to those whose skills it values less, or indeed in the case of domestic workers, not at all) we see that 53% of those given permission to remain in the UK as temporary workers (Tier 5 migrants and its pre-PBS equivalent) were women in both 2005 and 2014.[57] The proportion of women in a labour migration category is at its highest once we move out of the points-based system: 76% of those given permission to enter the UK as domestic workers were women in both 2005 and 2014.[58] Tellingly then, the proportion of women and men in a particular employment category only equalises when we move down the PBS to consider temporary workers, and the proportion

56 Appendix 3, see also Permits Foundation, *The Impact of Removing the Unrestricted Right of Dependants to Work in the UK* (September 2015) and Anderson (n 14), Chapter 3.

57 In 2005 64,651 migrants were given permission to enter the UK as Tier-5 migrants and its pre-PBS equivalent of whom 30,395 (47%) were men and 34,248 (53%) were women. In 2014 42,197 migrants were given permission to enter the UK as Tier-5 migrants and its pre-PBS equivalent of whom 19,741 (47%) were men and 22,441 (53%) were women. The proportion of men/women remained consistent throughout the intervening years, Appendix 3.

58 In 2005 16,939 migrants were given permission to enter the UK as domestic workers of whom 4,005 (24%) were men and 12,929 (76%) were women. In 2014 16,753 migrants were given permission to enter the UK as domestic workers of whom 4,046 (24%) were men and 12,707 (76%) were women. Again, the proportion of men/women remained consistent throughout the intervening years, Appendix 3.

of women only exceeds that of men when we move out of the PBS entirely to consider the non-PBS employment category which applies to overseas domestic workers.

4. The Disadvantage Produced by Different Migration Statuses

Drawing on Bridget Anderson's influential analysis of migration law's 'fashioning' of precarious workers, the disadvantage that the rules summarised briefly above produces is explored here by reference to the reduction or restriction of migrants' rights, forced dependency and precarity.[59] Empirical evidence of women's lived experience of the relevant statuses highlights a fourth disadvantage: an increased risk of experiencing violence and other rights-violations. Of course, these are not the only forms of disadvantage immigration law creates, nor are these forms of disadvantage distinct. The argument being made here is not that the migration routes, the majority of whose subjects are men, are unproblematic or do not also produce (sometimes significant) disadvantage. Labour migration routes into the UK have been restricted and subject to considerable change: there is an annual limit on the number of sponsorship certificates available under the Tier 2, and prospective employers may also have to satisfy a resident labour market test (a test to see if the position could be filled by someone who is British/resident here). Rather, Anderson's insights into the way that immigration law creates classes of precarious and dependent employees have been developed and enhanced by a focus on sex/gender and a consideration of family migration, to reveal how immigration law produces both the precarious workers and the probationary wives of this chapter's title. Finally, many

59 Bridget Anderson, 'Migration, Immigration Controls and the Fashioning of Precarious Workers' (2010) 24(2) *Work, Employment & Society* 300.

migrants who are partners or who undertake paid domestic work do not actually hold the relevant migration status of 'partner' or 'overseas domestic worker'. Such people may have permission to remain on another basis (as students or visitors for example) or have no permission to remain at all. A discussion of the disadvantage faced by these migrants is beyond the scope of this chapter.

(a) 'Wives'

Turning first to the partner route and its financial requirements, the rules which set out a 'minimum income threshold' which couples must meet for the migrant partner to be given permission to enter and remain. These rules are significant because not only must a couple demonstrate that they have substantial financial resources, but also where the applicant is to travel to the UK with or to join her partner, it is only income from *his* employment/self-employment that is considered.[60] Dependency for those seeking permission to enter as a partner is created by disregarding a woman's financial contributions, making her reliant on her husband's resources for the purposes of the immigration application. Preventing women from relying on earnings received outside of the UK, or anticipated UK earnings, (from secured employment for example) operates as a disincentive to those seeking permission in this category to seek employment before they enter, or to maintain it in their country of origin during the application process. Indeed, during this pre-entry period it makes more 'sense' under the rules for an applicant to support her husband to maximise

60 Immigration Rules Appendix FM: family members and Immigration Rules Appendix FM-SE: family members specified evidence. See also *R (on the application of MM (Lebanon) and others) v Secretary of State for the Home Department* [2017] UKSC 10, [2017] Imm AR 729 and Chai Patel and Minnie Rahman, *Guide to Spouse/Partner Visa Rules post MM The Minimum Income Requirement, Exceptional Circumstances & the Best Interests of Children* (JCWI, May 2018).

his income, rather than to seek to secure her own. Once in the UK, the five-year 'probationary period' undermines women's autonomy, potentially affecting decisions about their family and professional lives.[61]

Different disadvantageous facets of the route may also interact with and reinforce each other. Precarity and dependency are created not just by the imposition of an immigration application mid-way through the five years, an application which is costly and in which the applicant must demonstrate that all the requirements of the rules continue to be met (if they are not, permission to remain is likely to be refused) but also by the application process itself. A wife must ask for her husband's signature on *her* immigration application. A husband's refusal to sign the form will result in the applicant becoming an 'overstayer', even if her marriage or relationship is continuing and all the requirements of the rules are satisfied.[62] As the *Balakoohi* [2017][63] case demonstrates, a letter from a husband to the Home Office stating that the relationship has ended may result in his wife's permission to remain being curtailed, *even if he does not tell her that he believes the relationship has ended.* The dependency and accompanying precarity created by the 'probationary period' may also increase a woman's risk of experiencing domestic violence, in addition to changing the nature and character of any violence that is experienced (as Chapter 3 explains). Empirical research has identified a strong correlation between rules and practices which disadvantage women and grant men control over them and an

61 Katharine Charsley and others, *Marriage Migration and Integration Report* (University of Bristol, 2016).

62 See section 15, Home Office, *Application for an extension of stay in the UK as the partner of a person present and settled in the UK or as a partner of a person with refugee leave or humanitarian protection and for a biometric immigration document (Version 04/2016)* (Home Office 2016).

63 *Balakoohi, R (on the application of) v Secretary of State for the Home Department* [2012] EWHC 1439 (Admin).

increased risk of experiencing domestic violence,[64] with the power imbalances created by migration status (particularly those which impose dependency) being specifically identified as increasing women's vulnerability to such violence.[65]

Finally, whilst the migration status given to partners does give them rights, including the right to work, the frequency with which permission must be renewed acts as a substantial barrier to actually securing employment.[66] Settlement, or the promise of it, obscures the precarity of a route which tests the same requirements three times in five years and which enforces a woman's dependency on her British/resident partner throughout this period. Whilst the partner route confers benefits, the dependency and precarity created by the rules and processes discussed (briefly) here have significant consequences, in effect creating the migration status of 'probationary wife'.

(b) Domestic Workers

There is a great disparity between the rules that apply to overseas domestic workers and those which apply to, for example, skilled labour migrants. A skilled or highly-skilled labour migrant may have the freedom to work or be self-employed, to change employers or employment type, to bring family members with them, extend their stay, stay in a different category or settle in the UK. Whilst dependency on an employer or 'designated

64 Lori L Heise and Andreas Kotsadam, 'Cross-national and Multilevel Correlates of Partner Violence: An Analysis of Data From Population-Based Surveys' (2015) 3(6) *Elsevier* 332.

65 Anita Raj and Jay Silverman, 'Violence Against Immigrant Women: The Roles of Culture, Context, and Legal Immigrant Status on Intimate Partner Violence' (2002) 8(3) *Violence Against Women* 367, 375. See also Sundari Anitha, 'Legislating Gender Inequalities' (2011) 17(10) *Violence Against Women* 1260 for a discussion of the literature on this point.

66 Nisan Z Kesete, Danielle Thom and Heather Harvey, *Settling In* (Eaves, 2015) 45.

competent body', and recent changes to limit skilled labour migration are certainly problematic, the disadvantage that accrues to the statuses given to skilled labour migrants is of a different order to that which accrues to domestic workers.

As highlighted in relation to the partner route, different facets of a domestic worker's migration status interact to both produce and amplify the disadvantage they are subject to. The migration status given to ODWs is highly precarious because they have permission to remain in the UK only for a short, non-renewable period. The acute precarity generated by such a status, when combined with the isolation that comes from being required to work in an employer's home (without an ODW's own family members) makes domestic workers dependent on their employer. Domestic workers who leave their employer (even following the 2016 rule changes) may lose their permission to remain, even if their employer has acted unlawfully or has been abusive.[67] In some limited circumstances, where a domestic worker is recognised as a victim of trafficking or slavery, she may apply to extend her stay and may, therefore, be able to secure alternative employment.[68] However, where trafficking/slavery is not the abuse complained of, or if a claim is either not accepted by the authorities, or not accepted at a particular time, and the ODW nevertheless 'chooses' to leave her employer, she may lose her migration status as a result and be at risk of destitution and/or further violence.[69] A domestic worker's visa may

67 As Lord Hylton has argued, Melanie Gower and Doug Pyper, *Immigration Bill 2015-16: Lords amendments and ping-pong stages* (BRIEFING PAPER Number 7558, 4 May 2016), 24.

68 Immigration Rules part 5: working in the UK, 159J-159K.

69 Natalie Sedacca and Avril Sharp, 'Dignity, not destitution: the impact of differential rights to work for migrant domestic workers' (*UK Labour Law*, 12 April 2019) <https://wordpress.com/view/uklabourlawblog.com> accessed 17 June 2019 and Virginia Mantouvalou, ''Am I Free Now?' Overseas Domestic Workers in Slavery' (2015) 42(3) *Journal of Law and Society* 329.

no longer itself refer to her employer by name, as was the case until 2016,[70] but ODWs remain 'tied in practice' to them.[71]

Empirical research has demonstrated that short-term, precarious migration routes generally, and these rules in particular, increase vulnerability to violence and exploitation;[72] such increased vulnerability also being highlighted by the Supreme Court,[73] and the CEDAW Committee.[74] The migration status of ODW, like that of partner, not only makes its holder dependent on another and restricts their rights, it also increases its holder's vulnerability to violence and other rights-violations. These issues are the subject of detailed discussion in Chapter 3.

5. From Disadvantage To (Unlawful?) Discrimination

The preceding discussion has demonstrated that immigration law produces a status-based hierarchy in which women are disproportionately the holders of those migration statuses which are precarious, which produce dependency and to which few rights accrue. Women who hold such disadvantageous statuses also face an increased risk of experiencing violence, including domestic violence, and other violations of their human rights. Additional steps need to be taken, however, before it can be argued that these rules

70 Email from KALAYAAN on file with the author (16 November 2016).

71 Sedacca (n 51).

72 KALAYAAN, *Still Enslaved: The Migrant Domestic Workers who are Trapped by the Immigration Rules* (April 2014); FLEX, *The Risks of Exploitation in Temporary Migration Programmes: A FLEX response to the 2018 Immigration White Paper* (Focus on Labour Exploitation (FLEX) 2019).

73 *Taiwo & Anor v Olaigbe & Ors* (n 27).

74 General Recommendation No. 26 on Women Migrant Workers CEDAW/C/2009/WP.1/R (5 Dec 2008) (CEDAW's GR 26), paras 19-21.

unlawfully discriminate against women. In this section, I rely on Article 14 ECHR to evaluate the rules that determine who is accorded the migration status of partner or domestic worker, and some of their potential justifications, to argue that these rules indirectly discriminate against women. Of course, the process of identifying, examining and rejecting potential justifications engaged in here is of a different order to that which would be carried out by a court. As will be discussed in section 7 below, however, it is sufficient to require the State to consider and remedy its treatment of migrant women.[75] As violence against women and the obligations States have to prevent and respond to it are discussed in detail in Chapter 2, the following analysis focusses on the dependency, precarity and rights-restriction created by the partner and domestic worker routes and how such disadvantage might be justified.

To recap: a distributive criterion will indirectly discriminate if, without justification, it affects men and women differently to women's disadvantage. Rules which impact on a woman's ability to work or change employers, which interfere with her ability to live in the UK and conduct an (equal) relationship with her partner all engage Article 8 ECHR, the right to a private and family life. It is not necessary to show that the rules relating to partners or domestic workers themselves violate Article 8 (although they may), only that the 'facts at issue', the dependency, precarity, and rights-restriction the rules produce, 'fall within' its ambit.

Under Article 14 ECHR, the State can legally justify aspects of the relevant immigration rules that disadvantage women. Whether or not a 'justification' can

75 Equality Act 2010, s149 and Sandra Fredman, 'Addressing Disparate Impact: Indirect Discrimination and the Public Sector Equality Duty' (2014) 43(3) *Industrial Law Journal* 349.

successfully 'justify' differential treatment depends firstly on whether or not it reflects a legitimate aim.[76] In the following paragraphs I start to evaluate as justifications the original legislative purposes of the particular immigration rules that have been shown to disadvantage women. Ascertaining the 'purposes' of immigration law is far from straightforward, however. Whilst recognising, therefore, that the rules I consider may have many 'purposes' (including those which are not explicitly stated)[77] and that the State is not bound to present or present only these purposes as justifications, I will accept at face value and analyse the State's main stated explanations for the relevant rules.[78] Explanations which are grounded in stereotypes are identified and rejected.

When stereotypes are considered in discrimination law, it is usually in the context of a distributive criterion which is based on a stereotype that relates to a protected ground. For example, an employer seeking to employ an engineer who only wishes to hire men because he believes women are not good at maths will be directly discriminating against women by relying on stereotypical understandings of women's (and men's) attributes. I am not suggesting that the rules considered here are discriminatory because they specify that the applicant for a particular migration status be either male or female. Rather, I contend

76 *Stec and others v UK* App nos 65731/01 and 65900/01 (ECtHR, 12 April 2006) paras 61-62, in which the ECtHR held that the different retirement ages of men and women were reasonably and objectively justified by reference to women's shorter working lives.

77 Czaika and de Haas note that policies selecting migrants by 'skill' can be an 'indirect and covert measure' designed to influence the national and/or racial origins of prospective migrants, Mathias Czaika and Hein De Haas, 'The Effectiveness of Immigration Policies' (2013) 39(3) *Population and Development Review* 487 490. The absence of sex/gender from this argument is noticeable.

78 Consistent with the approach taken in, for example, *R (on the application of Quila and another) v Secretary of State for the Home Department* [2011] UKSC 45, [2012] 1 All ER 1011 and *A v Secretary of State for the Home Department* [2016] CSIH 38. The Government is, however, not confined to justifications presented in policy documents at the time that the relevant rules were adopted, *British Airways v Starmer* [2005] IRLR 863, [2005] UKEAT 0306_05_0607.

that the migration statuses of 'wife' and 'domestic worker' are premised on stereotypical understandings of men's and women's roles and attributes. Of course, 'traditional' employment practices such as the division between 'women's' and 'men's' jobs, or the expectation that a wife will bear the greater responsibility for caring for a home and family *may* explain why a greater proportion of women than men *enter* as domestic workers or partners (or it may not, the reasons for migration are many and various).[79] The disadvantageous treatment of domestic workers on the grounds of sex cannot, however, be justified by reference to arguments which assert that women are more likely than men to be domestic workers, or that such work is 'women's work' and therefore unskilled.[80] 'Justifications' based solely on such stereotypes do not pursue a legitimate aim and cannot, therefore, operate as justifications as a matter of law. As the Grand Chamber ruled in *Konstantin Markin v Russia* [2012] [81] (which concerned men's access to parental leave):

> The Court concludes from the above that the reference to the traditional distribution of gender roles in society cannot justify the exclusion of men, including servicemen, from the entitlement to parental leave. The Court agrees with the Chamber that gender stereotypes, such as the perception of women as primary child-carers and men as primary breadwinners, cannot,

79 A number of studies have found that skilled women migrate more than men but that 'gendered' immigration laws/policies devalue women's skills, Kofman (n 36) and Frédéric Docquier, B. Lindsay Lowell and Abdeslam Marfouk, 'A Gendered Assessment of Highly Skilled Emigration' (Oxford, UK) 35(2) *Population and Development Review* 297.

80 Baroness Hale's describes these as 'contextual factors', *Essop and others v Home Office* (n 7) para 26.

81 *Konstantin Markin v Russia* App no 30078/06 (ECtHR, GC, 22 March 2012).

> by themselves, be considered to amount to sufficient justification for a difference in treatment...[82]

In addition to having a legitimate aim, whether or not a particular 'justification' 'justifies' differential treatment also depends on whether there is a reasonable relationship of proportionality between the means employed and the aim to be realised. When assessing justification, the ECtHR employs a proportionality test which varies in intensity depending on the ground at issue, in conjunction with granting a 'margin of appreciation' to States.[83] The UK's domestic courts engage in an analogous proportionality exercise in conjunction with showing deference to areas within the Government's 'discretionary area of judgement'.[84] In assessing proportionality, the relevant Court must ascertain whether or not the measures designed to meet the legitimate aim are rationally connected to it, and that the means employed are no more than is necessary to accomplish them.[85] Whilst 'very weighty reasons' are required to justify differential treatment on the grounds of sex, following *Stec and others v UK* [2006],[86] this litigation has been concerned with (amongst other things), whether a justification offered in the immigration law context, and its

82 ibid, para 143 and *Emel Boyraz v Turkey* (n 24). See also Case 170/84 *Bilka-Kaufhaus GmbH v Karin Weber von Hartz* ECLI:EU:C:1986:204 [2005] ECR -01607 for an EU law example that supports this conclusion.

83 Oddný Mjöll Arnardóttir, 'The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights' (2014) 14(4) *Human Rights Law Review* 647.

84 Nicholas Bamforth and others, *Discrimination Law: Theory and Context, Text and Materials* (Sweet & Maxwell 2008), 87.

85 ibid, 81.

86 *Stec and others v UK* (n 76).

relationship to the relevant legitimate aim, is 'not so manifestly unreasonable' as to exceed the wide margin of appreciation granted to Governments.[87]

(a) 'Wives'

Historically, women were prevented from retaining their property, nationality and bodily integrity following marriage, married women being considered in law as 'feme covert'. As Blackstone memorably explained:

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything.[88]

The laws that created couverture have now, of course, either been repealed or superseded. The Married Women's Property Act 1882 enabled some married women to own and control property independently of their husband. In 1948 women were able to retain their British nationality following marriage (rather than being automatically denaturalised).[89] Marital rape finally became a criminal offence following *R v R* [1991].[90] Notwithstanding these changes (and changes in social attitudes) the stereotype of the dependent wife persists, at least in part because of the legal rules and structures that continue to give it meaning. Such rules include the immigration rules discussed here which are both premised

87 ibid, paras 52 and 66. For the application of this approach in an immigration case which concerned the rights that attach to different migration statuses see *Hode & Abdi v UK* (n 27) paras 52-56.

88 William Blackstone, *Commentaries on the Laws of England (1765)*, vol 1 (University of Chicargo Press 1979), 430.

89 Helen Irving, *Citizenship, Alienage, and the Modern Constitutional State: A Gendered History* (CUP 2016).

90 *R v R* [1991] UKHL 12, [1991] 4 All ER 481.

on, and reinforce, the stereotype.[91] Analogous arguments have also been made about US law.[92]

The Home Office states that the purpose of the rules that apply to partners is to ensure that those establishing their family life in the UK are 'genuine' families, able to 'integrate', who are not a burden on the 'taxpayer'.[93] The financial rules (which disregard a migrant partner's financial contributions to the household during the pre-entry period) are justified by reference to the fact that applicants 'may' be financially dependent on their partner and that, therefore, they may seek support from 'the taxpayer' if their partner is unable/unwilling to continue to support them.[94] This justification is directly premised on the stereotype that wives are the financial dependents of their husbands, treating all migrant partners as if this were the case, even when the Home Office's own research demonstrates that it is not.[95] The strength and salience of the 'dependent wife' stereotype is also evident in the fact that the Home Office consistently presents the 'migrant spouse or partner' as an altogether different person from 'the taxpayer', as if it were not possible for migrant wives to contribute to the economy, work and pay tax. Justifications premised on such stereotypes are unable, as a matter of law, to operate as such. It is also difficult to see any correlation between the purpose of the rules and these criteria. If financial dependency in some

91 Anderson, *Us and Them?: The Dangerous Politics of Immigration Control* (n 14) Chapter 3 and Natasha Carver, ''For Her Protection and Benefit': The Regulation of Marriage-Related Migration to the UK' (2016) 39(15) *Ethnic and Racial Studies* 2758.

92 Janet M Calvo, 'Spouse-Based Immigration Laws: The Legacies Of Coverture' (1991) 28 *San Diego Law Review* 593 and Sabrina Balgamwalla, 'Bride and Prejudice: How US Immigration Law Discriminates Against Spousal Visa Holders' (2014) 29(1) *Berkeley Journal of Gender, Law & Justice* 25.

93 Home Office, *Family Migration: A Consultation* (July 2011), para 2.3.

94 ibid, 21-23.

95 ibid, 21. According to the Home Office 28% of applicants were in paid employment at the time that their application was made.

instances of marriage migration is a problem, then it is not one that can be resolved by treating all migrant partners as if they were so dependent. Furthermore, the financial requirements, combined with the condition that migrant partners have 'no recourse to public funds' means that they are not a 'burden' to 'the taxpayer', and in any case, access to healthcare, for example, is permitted throughout the period the partner has permission to remain, as well as after settlement. The financial requirements are not, therefore, rationally connected to the legitimate aim they purport to pursue.

The Home Office argues that the five-year probationary period is necessary to test the genuineness of a relationship, to encourage 'integration' of the partner before settlement and to reduce the burden on the 'taxpayer' of the partner. The 'probationary period' is also directly traceable to the 'wife' stereotype. It treats and indeed makes migrant wives appendages of their 'sponsor' husbands for five years, not just in relation to their migration status (and all the rights that it bestows) but also during immigration processes, as demonstrated by the requirement that a husband sign his wife's application. In addition, the reasons given for these criteria do not have a sufficiently proportionate relationship to the stated purposes of the rules. It is unclear, for example, how a relationship that lasts between two and five years (the difference between 'probationary periods' in the previous and current set of rules) can be said to be any less 'genuine' than one that lasts over five years. Whilst a probationary period of either one or two years might be considered to be a proportionate means of ensuring a relationship is genuine (genuine rather than say, enduring), one of five years (with an additional immigration application mid-way through)

is arbitrary[96] and wholly disproportionate because it is so much longer, for example, than the approach adopted in certain UK family law proceedings which may consider genuine a relationship that has lasted a few months.[97] Similarly, stressing the need for wives to 'integrate' presupposes their separation (in the private sphere?) from wider society, a separation that is in fact facilitated and maintained by the dependency and precarity the rules create.[98]

(b) Domestic workers

Women (and usually particular kinds of women) were and are believed to be naturally nurturing and therefore particularly suited to caring for dependents and looking after the/a family home. Such work is, almost by definition, 'unskilled'. Feminist analyses of employment and the labour market have highlighted both the sexed/gendered stereotypes that underlie the categorisations of certain types of work and worker as either low/high skilled,[99] and the idea that 'skill' itself can be determined objectively.[100] As Anne Phillips

96 This and the discussion that follows draws on Timothy Endicott, 'Arbitrariness' (2014) 27(1) *The Canadian Journal of Law and Jurisprudence* 49.

97 Section 62(3) of the Family Law Act 1996 states that associated persons (those who have genuine, family relationships) include those who 'have or have had an intimate personal relationship with each other which is or was of significant duration.' This section has been interpreted to offer protection to those in relationships lasting a few months. Whilst EU migration law requires a relationship to have lasted five years before spouses can obtain permanent residence, spouses do not have to live together or have a subsisting relationship, Case C-218/14 *Kuldip Singh, Denzel Njume, Khaled Aly v Minister for Justice and Equality* ECLI:EU:C:2015:306 [2015].

98 Kesete, Thom and Harvey (n 66).

99 Ronnie J. Steinberg, 'Social Construction of Skill: Gender, Power, and Comparable Worth' (1990) 17(4) *Work and Occupations* 449.

100 Linda McDowell, 'Skills' in Bridget Anderson and Michael Keith (eds), *Migration: A COMPAS Anthology* (COMPAS 2014).

and Barbara Taylor argue '[s]kill definitions are saturated with sexual bias. The work of women is often deemed inferior simply because it is women who do it'.[101]

A number of scholars have sought to explore and unpick this 'saturation' further. Jane Jenson, for example, discusses skill differentiation (low/high) and attribution (women/men) by contrasting what are socially understood to be 'the talents of women' (including empathy, dealing with bodily fluids etc.) with the 'skills of men' (as demonstrable through the holding of certain qualifications).[102] Eleonore Kofman's discussion of the unequal valorisation of certain types of knowledge/person similarly contrasts the classification of some kinds of knowledge as 'embrained' (that which is scientific, technical or 'objective' in some way) with that which is 'embodied' (uses the body to acquire learning and perform tasks, 'subjective').[103] Notwithstanding these critiques (and perhaps more importantly for this chapter's discrimination law argument) legislation and a raft of associated legal challenges, the woman-carer stereotype continues to impact upon almost every aspect of women's participation in the labour market, including the gender pay gap, the continued existence of sex segregated or gendered roles,

101 Anne Phillips and Barbara Taylor, 'Sex and Skill: Notes towards a Feminist Economics' (1980) 6(1) *Feminist Review* 79, 79.

102 Jane Jenson, 'The Talents of Women, the Skills of Men' in S Wood (ed), *The Transformation of Work,* (Unwin and Hyman 1989).

103 Kofman (n 36) 583-4.

the devaluation of caring work and the devaluation of all work (whether caring or not) that women do.[104]

According to the Home Office, the purposes of the labour migration rules are to encourage 'the brightest and the best, those who contribute to our economy and who are really needed by the UK', whilst ensuring that the majority of labour migrants return to their country of origin.[105] In comparison with those migrants who are 'really needed', domestic workers do not 'fill skills gaps' and 'those who enter in this capacity are not assessed against the economic needs of the country'.[106]

It will be recalled that labour migration is primarily dealt with under the PBS, but that the ODW (in a private household) route has been maintained outside of this system. Putting to one side the considerable material disadvantage that pertains to this route, and imagining instead one that offered domestic workers the same rights and opportunities as those enjoyed by (other?) skilled migrants and it is evident that what is discriminatory about it is not 'just' the material disadvantage that accrues to its holders, but its treatment of domestic workers as if they and their skills are *fundamentally different* from all other types of worker and all other types of work. This is the case even though the PBS covers

104 Francine D Blau and Lawrence M Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations* (IZA Discussion Paper No 9656, Institute for the Study of Labor, January 2016), D Bovill, *Patterns of Pay: Results from the Annual Survey of Hours and Earnings, 1997 to 2012* (Office for National Statistics, 2013), A J Bowlus and L Grogan, 'Gender Wage Differentials, Job Search, and Part-Time Employment in the UK' 61(2) *Oxford Economic Papers* 27 Asaf Levanon, Paula England and Paul Allison, 'Occupational Feminization and Pay: Assessing Causal Dynamics Using 1950–2000 US Census Data' (2009) 88(2) *Social Forces* 865 and Daniel Muzio and Sharon Bolton, 'Feminisation and Paradox: Stratification and Segmentation in Professional Contexts' (2006) 27(1) *Irish Journal of Management* 79.

105 Home Office, *Employment-related settlement, Tier 5 and Overseas Domestic Workers: A Consultation* (June 2011), Ministerial Forward 3.

106 Indeed restrictions to the route are put forward as an alternative to its closure, ibid, 29-30.

work as diverse as that done by investors, intra-company transferees, sports-persons, artists, healthcare professionals, charity and religious workers. As Siobhán Mullally and Cliodhna Murphy observe, such differentiation 'reflects' the 'continuing characterization of domestic work as work like no other.'[107]

That a domestic worker can only, in practice, work temporarily for one employer is justified by reference to both the unskilled nature of the work and the employer's ability to recruit workers from the UK 'labour pool'.[108] The 'tying' of domestic workers to their employers (by preventing them from renewing their permission to remain or, as in the pre-2016 rules, naming an employer in the worker's visa, as discussed above) has been justified in Parliament as follows:

> Looking at our national interest, if wealthy investors, skilled workers and others with the potential to benefit our economy were unable to be accompanied by *their* domestic staff they might not come here at all but take *their* money and skills to other countries only too keen to welcome them.[109]

If the ODW regime is a 'benefit' that accrues to someone other than the person whose rights are determined by it, its considerable disadvantages make 'sense'. The route changes demand structures in this part of the economy, depresses wages and prevents domestic workers from securing other, better employment, even if they have been exploited. Whilst there is an extent to which this argument can also be applied to (again other?) 'skilled'

107 Siobhán Mullally and Cliodhna Murphy, 'Migrant Domestic Workers in the UK: Enacting Exclusions, Exemptions, and Rights' 36(2) *Human Rights Quarterly* 397, 417.

108 Home Office, *Employment-related settlement, Tier 5 and Overseas Domestic Workers: A Consultation*, 30-31.

109 Lord Reay, *523 HL Debs., column 1052* (Hansard 28 November 1990), emphasis added.

labour migrants, the difference is that the relationship between them and their employers is one that is positioned as being mutually (although not necessarily symmetrically) beneficial. In contrast, the ability to bring 'their' domestic workers is a benefit that is bestowed upon, for example, the 'right' type of migrant, those with money for example.[110]

Putting to one side the stereotypical characterisation of domestic workers as unskilled workers, justifications for disadvantage that treat those who experience it instrumentally (almost as chattels, per the above quote) either cannot be relied on as justifications for discriminatory treatment or, if they are, are wholly disproportionate. There is simply no reasonable relationship of proportionality between the aim (benefiting the employer) and the means used (disadvantaging 'their' domestic workers to such a considerable extent) given the myriad of alternatives the State has at its disposal (tax breaks or less restrictive immigration rules for employers themselves for example).

Of course, the Home Office's justification for first, differentiating between domestic workers and all other workers and second, disadvantaging the former for the benefit of a particularly valued subset of the latter, is comprehensible only by reference to the sexed/gendered stereotypes discussed above. Such work and those who do it are deemed unskilled and un-valuable because it is impossible to separate the classification and valorisation of particular skills, talents or knowledge from the bodies of those who

110 Interestingly, domestic workers who work in diplomatic households (as opposed to the private households of British citizens, EEA nationals or certain skilled labour migrants) are dealt with under different, slightly more advantageous rules in Tier 5 of the PBS. This difference of treatment, which is determined by reference to the status of the employer not the employee, supports this analysis.

have them, whether 'naturally' or not.[111] Justifications that rest on such stereotypes do not have a legitimate aim and cannot, therefore, operate as justifications for the differential and disadvantageous treatment of domestic workers as a matter of law.

(c) Wives and domestic workers: differential or discriminatory treatment?

Whilst the rules that apply to partners and domestic workers do not specify that the holders of such statuses must be women, they are predicated on stereotypical understandings of marriage, the role of men and women within it, women's work and women's skills. They are 'saturated with sexual bias'.[112] Women who hold the status of partner or domestic worker are disadvantaged, therefore, not just by the material disadvantage that these statuses produce, but also by being treated as if the stereotype were true, as if they were dependent on their husbands or as if their work had no value. Such treatment is a wrong in and of itself.[113] Men may also be disadvantaged by such stereotyping, their claims to family life interpreted as attempts to secure an immigration advantage, the value they accord to their familial relationships minimised and their contributions as carers dismissed.[114] Whilst these stereotypes may be subject to challenge and have decreasing popular salience, their incorporation into the immigration rules accords them new significance. All women are

111 Paula England and Nancy Folbre, 'The Cost of Caring' (1999) 561(1) *The ANNALS of the American Academy of Political and Social Science* 39; Nancy Folbre, *Greed, Lust & Gender: A History of Economic Ideas* (OUP 2009); Jenson (n 102) and Kofman (n 36).

112 Phillips and Taylor (n 101), 79.

113 Sophia R. Moreau, 'The Wrongs of Unequal Treatment' University of Toronto, Public Law Research Paper No 04-04 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=535622> accessed 6 May 2015, 8.

114 Helena Wray, '"A Thing Apart": Controlling Male Family Migration to the United Kingdom' (2015) 18(4) *Men and Masculinities* 424 and Melanie Griffiths, 'Invisible fathers of immigration detention in the UK ' (*Open Democracy*, 31 October 2016) <https://www.opendemocracy.net/5050/melanie-griffiths/invisible-fathers-of-immigration-detention> accessed 15 February 2019.

harmed by this as the migration statuses strengthen the stereotypes, (re)making them anew. Whilst States may differentiate between and offer incentives to certain groups of migrants to attract them to their jurisdiction,[115] justifications for disadvantaging migrant women that rest solely on such sexed/gendered stereotypes do not have a legitimate aim and cannot, therefore, operate as justifications as a matter of law.[116] Other explanations for particular facets of these two routes that create disadvantage have also been considered and rejected as disproportionate. Based on the statistical information presented and legal analysis conducted, it can be concluded, therefore, that the rules that apply to wives and domestic workers indirectly discriminate against women.

6. Immigration Law and Discrimination Against Women

Thus far I have focused on two migration statuses and their place within immigration law's highly complex and differentiated status-based hierarchy. If we take a step back, however, and consider migration for work, study, family and protection more broadly, we see that the family and labour migration routes analysed here are far from anomalous in their differential treatment of women and men. The majority of non-EU migrants come to the UK to study; this is followed by migration for work, family and protection (or 'other') reasons.[117] Men make up the majority of non-EU labour migrants whilst the majority of migrants whose basis for entry is a family relationship are women.[118] Women also make

115 *Hode & Abdi v UK* (n 27).

116 *Konstantin Markin v Russia* (n 81), 143.

117 Scott Blinder, *Immigration by Category: Workers, Students, Family Members, Asylum Applicants* (Migration Observatory briefing, COMPAS, University of Oxford, 28 June 2018).

118 Scott Blinder, *BRIEFING: Non-European Labour Migration to the UK* (Migration Observatory briefing, COMPAS, University of Oxford, 14 June 2018) and Scott Blinder, *BRIEFING: Non-European Migration to the UK: Family Unification and Dependents* (Migration Observatory briefing, COMPAS, University of Oxford, 3 Jul 2018).

up the majority of students[119] whilst considerably more men than women apply for asylum.[120] That women are more likely to enter the UK as students (who cannot settle here and face considerable restrictions in their ability to work or take parental leave) or family migrants (whose migration statuses produce disadvantage which is either equivalent to or worse than that discussed in relation to the partner route) is significant. That most people who settle permanently in the UK do so on the basis of labour migration, a route the majority of whose subjects are men, is similarly noteworthy.[121]

An analysis of all the different immigration rules and the migration statuses that they produce is beyond the scope of this chapter and thesis. It is, however, possible to combine what we know about migration to the UK, the structure of immigration law and the particular rules examined in the preceding sections, to found a broader, normative claim about immigration law as a whole. Immigration law creates a status-based hierarchy. The disadvantageous position given to wives and domestic workers within this hierarchy is the product of indirect discrimination. It is not just wives and domestic workers that are disadvantaged by immigration law, however. (Female) students and other family migrants also appear to be situated disadvantageously whilst, at least according to one indicator (the ability to settle in the UK), (male) labour migrants appear to be more advantageously placed. Immigration law as a whole, therefore, disadvantages a significant proportion of the women whose migration status it determines, and this disadvantage is the product of

119 This represents a substantial change from the period 1999-2011, Scott Blinder, *Non-European Student Migration to the UK* (Migration Observatory briefing, COMPAS, University of Oxford, 20 July 2017).

120 Scott Blinder, *BRIEFING Migration to the UK: Asylum* (Migration Observatory, COMPASS, University of Oxford, 26 Oct 2017).

121 Scott Blinder, *Settlement in the UK* (Migration Observatory briefing, COMPAS, University of Oxford, 20 July 2018).

discrimination which may be, at least in some cases, unlawful. Of course, not all migrant women are disadvantaged or discriminated against; some women do come to the UK as skilled labour migrants and obtain settlement within a (relatively) short period of time. However, many women are disadvantaged by immigration law and whether or not this disadvantage is (always/sometimes) the product of unlawful discrimination, its consequences may be significant and enduring.

7. Remedies and Duties

Different parts of the immigration rules have been challenged, both domestically and before the ECtHR, on the grounds that they are discriminatory and/or that they breach migrants' fundamental human rights. Such challenges, where successful, have compelled or resulted in the State granting particular individuals or groups permission to enter or remain, caused it to change certain rules and policies or even to abandon them altogether.[122] The State is not, however, only required to end discriminatory practices when those practices are challenged in Court. As Sandra Fredman argues, the prohibition on indirect discrimination includes a duty to take 'pre-emptive action to address a pattern of disparate impact, even in the absence of litigation.'[123] Fredman justifies this argument firstly, by

122 In *R (on the application of MM (Lebanon) and others) v Secretary of State for the Home Department* (n 60) (which concerned the minimum income requirement) for example, the Supreme Court stated it was for Secretary of State to decide whether or not the immigration rules or relevant policies should be changed to enable alternative sources of funding to be taken into account, paras 98-101. In *R (Joint Council for the Welfare of Immigrants) v SSHD* [2019] EWHC 452 (Admin), [2019] WLR(D) 149 HHJ Martin Spencer made a declaration of incompatibility (pursuant to s 4 of the HRA 1998) about the so-called 'right to rent scheme' (Immigration Act 2014, s20-37) as a well as an order that any decision to commence the scheme without further evaluation would be irrational and a breach of s149 Equality Act 2010.

123 Fredman, 'Addressing Disparate Impact: Indirect Discrimination and the Public Sector Equality Duty' (n 75), 349.

reference to the ability of duty-bearers to justify disadvantageous treatment; and, secondly, by reference to the Equality Act 2010's public sector equality duty (PSED).[124]

It will be recalled that the State can justify disadvantageous treatment by demonstrating that there is no other, or no less discriminatory, means of achieving the relevant legitimate aim. The corollary of this, Fredman contends, is that in order to successfully defend itself from discrimination claims, the relevant duty-bearer must carefully consider and review how it achieves its aims and, if necessary, change the means it adopts to do so.[125] This argument is reinforced, in the case of public authorities like the Home Office (and authorities which exercise public functions), by the PSED, the duty to have 'due regard' to the need to eliminate discrimination and advance equality of opportunity.[126] Whilst the phrasing of this duty may give rise to ambiguity (why not just require the elimination of discrimination?) the PSED has nevertheless been interpreted robustly to make substantial improvements to, for example, the policy process and means by which the State develops and implements its immigration control objectives.[127] Although the partner and domestic worker routes have not (yet) been challenged in court on the grounds that they indirectly discriminate against women, the State should, following Fredman's analysis, take pre-emptive action to address the patterns of disadvantage this

124 ibid, 349-350.

125 ibid, 354.

126 Equality Act 2010, s149, this is subject to exemptions. See, for example, Home Office, *Family Migration* (Home Office Policy Equality Statement, 13 June 2012).

127 In *R (Joint Council for the Welfare of Immigrants) v SSHD* (n 122) the proposed roll-out of a racially discriminatory housing scheme without further evaluation was found to breach this obligation (in addition to being irrational).

chapter has identified.[128] Finally, whilst this chapter's discrimination law analysis has centred on domestic and European human rights law, the argument for pre-emptive migration status reform advanced also finds support from the CEDAW Committee, which has recommended that States lift discriminatory immigration restrictions and 'ensure that their visa schemes do not indirectly discriminate against women'.[129]

A detailed discussion of the reformed migration statuses that would emerge from a non-discriminatory system of immigration rules and policies is beyond the scope of this chapter (and thesis). This chapter's analysis of the partner and domestic worker routes can be relied on, however, to advocate for some key reforms to the current immigration rules. In advancing these arguments, I start from the premise that pre-emptive migration status reform should level-up, not level-down.[130] Some scholars argue that levelling-down is a permissible response to discrimination, that it is the 'unavoidable price we must pay to optimize the range of opportunities to which members of protected groups have access to'.[131] Levelling-down would, however, be an inapposite (and indeed, potentially unlawful) response to the disadvantage this chapter has identified, which is produced by rules which affect or engage a range of fundamental human rights. Giving *all* labour migrants (including those considered skilled or highly-skilled) a very short period of permission to remain in the UK, or one which provides few rights, may eliminate sex discrimination but

128 Fredman, 'Addressing Disparate Impact: Indirect Discrimination and the Public Sector Equality Duty' (n 75).

129 CEDAW GR 26 (n 74), para 26(A).

130 E.g. that rules that produce disadvantage in the migration statuses disproportionately held by women should be changed to ensure that no-one is so-disadvantaged (levelling-up), rather than to extend those rules to the migration statuses the majority of whose holders are men (levelling-down).

131 Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015), 133.

it may also offer migrants insufficient protection from violence and exploitation, contrary to Articles 3 and 4 of the ECHR.[132] As will be discussed in Chapters 2 and 3, the rules that generate particular migration statuses must not only not discriminate, they must also offer their holders genuine and effective protection from violence and other human rights abuses.

As dependency on another is a key source of migrant women's disadvantage, dependent migration statuses should be abolished and replaced by those which are wholly independent of any family or other relationship the migrant has in the UK. In the context of family migration, this would involve granting the *migrant partner of someone who is British or resident here* permanent residence when either they enter the UK, or when the relevant immigration application is granted, thereby abolishing the 'probationary period'.[133] One of the central justifications for the dependency imposed on partners is (as discussed in section 5(a) above) the need to test the 'genuineness' of a relationship.[134] Those concerned with ensuring that this route is not 'abused' might argue that instead of granting migrant wives a wholly independent migration status, the disadvantage the current probationary period causes could be ameliorated by its reduction. This approach has been advocated by the Council of Europe's Parliamentary Assembly, which has consistently called for migrant spouses/partners to be given an independent migration status in their country of residence after one year.[135] However, as Immigration, Refugees and Citizens

132 Drawing on case *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 Jan 2010), para 292.

133 Whilst this section focuses on the migrant partners of British/resident spouses, the arguments made here can be applied by analogy to the spouses of labour migrants although the independent migration status they should be granted would not necessarily be permanent residence (e.g. they could be granted 5 years leave to remain with the right to work etc. mirroring the rights given to their partner/spouse).

134 Home Office, *Family Migration: A Consultation* (n 93), 8.

135 Council of Europe Parliamentary Assembly, *Resolution 1811 (2011) Protecting Migrant Women in the Labour Market* (2011).

Canada (IRCC, the Canadian equivalent of the UK's Home Office) has recognised, even a (comparatively) short probationary period can produce significant sexed/gendered disadvantage:

> The [IRCC] analysis recognized that a sponsored spouse or partner can be vulnerable for many reasons, including gender, age, official language proficiency, isolation and financial dependence, and that these factors can create an imbalance between the sponsor and their spouse or partner. It was further assessed that the conditional permanent residence two-year co-habitation requirement could compound these vulnerabilities in situations of domestic abuse. Noting that women made up a majority (70%) of affected individuals who submitted requests to IRCC for an exception to the condition on the basis of abuse or neglect, IRCC assessed that this regulatory requirement may potentially result in vulnerable spouses and partners remaining in abusive relationships out of fear of losing their permanent resident status in Canada.[136]

It was for these reasons that the IRCC abolished the Canadian equivalent of the probationary period in April 2017.[137]

If the 'genuineness' of a relationship is to be tested, then it must be done so proportionately and without reference to the 'dependent wife' stereotype. A proportionate and non-stereotypical means of testing 'genuineness' (because it would not assume or enforce dependency) might be to require partners who are returning to/entering the UK together to provide evidence of cohabitation in the former country of residence for example (one of the requirements for 'common-law partners' seeking entrance to Canada).[138] Alternatively, where the migrant wife/partner is to travel to the UK to join her British or

136 Immigration, Refugees and Citizenship Canada (IRCC), *2017 Annual Report to Parliament on Immigration* (1 Nov 2017), section 4.

137 ibid.

138 Immigration, Refugees and Citizenship Canada (IRCC), 'Who is eligible to sponsor their spouse, partner or child' (2019) <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/family-sponsorship/spouse-partner-children/eligibility.html> accessed 9 April 2019.

resident husband/partner, evidence of sustained communication, visits or mutual material or other support could be relied on. Such means may produce disadvantage for some couples, but it would be far less than that which is generated by the imposition of a probationary period, even one which was significantly shortened.

Precarity is another key source of migrant women's disadvantage. It will be recalled that domestic workers are unique amongst labour migrants in having a temporary and non-renewable (unless the worker has been enslaved/trafficked) migration status that makes them, in practice, dependent on their employer. Precarity also arises when migration statuses have onerous or repeatedly tested conditions attached to them. Pre-emptive migration status reform should, therefore, ensure that domestic workers receive an independent migration status that is for a non-temporary period and is renewable. This status should also bestow rights comparable to those enjoyed by other labour migrants, including the right to be accompanied by family members. Unlike the migration status that must be accorded to partners, however, such a status would not have to bestow permanent residence on its holder to meet these requirements.

Whilst the differential treatment of labour migrants is permissible (per *Hode & Abdi v UK* [2012],[139] to attract particular migrants to the jurisdiction for example), such treatment should not discriminate against women (or others) by basing its valorisation of certain skills or attributes on sexist or other discriminatory stereotypes.[140] Advocating that domestic workers receive a migration status that is more akin to that currently given to labour migrants the Government considers 'skilled' than those it considers 'unskilled'

139 *Hode & Abdi v UK* (n 27).

140 *Konstantin Markin v Russia* (n 81).

raises two related questions. First, can the current system's differentiation between domestic work and other types of labour migration (in the PBS) be maintained? Second, is a labour migration system that distinguishes on the basis of 'skill' on a non-discriminatory basis possible?

Following section 5(b)'s discussion of sex and skill, I would answer the first question in the negative. The distinction the current system draws between domestic workers and other labour migrants is comprehensible only by reference to the sexed/gendered stereotypes set out and discussed above. If labour migrants are to be differentiated between, and some given greater rights than others (even within the framework sketched above, in which no migrant can be given a migration status that is precarious for example) domestic work should be regulated alongside all other types of employment. This brings us to the second question, the answer to which is not so straightforward and which, thankfully, I do not need to resolve here for this section's core argument, on the need for pre-emptive migration status reform, to succeed. I remain to be convinced that the non-discriminatory differentiation between different labour migrants on the basis of skill is possible. However, as Anna Boucher's multi-jurisdictional and gendered analysis of skilled labour migration rules indicates, some countries, like Denmark and Canada, perform better in terms of 'gender awareness' than others, such as Australia or the UK.[141] One reason they do so is because they undertake regular gender audits of their immigration rules.[142] It may not be necessary, therefore, to wholly abandon a skills-based labour migration system in order to remedy the disadvantage and discrimination that

141 Anna Boucher, *Gender, Migration and the Global Race for Talent* (Manchester University Press 2016), 5 and Chapter 2.

142 ibid.

women are subject to. It may be enough if all labour migrants considered low or low(er) skilled are granted, per this section's argument, an independent migration status to which significant rights accrue and that any differentiation between those considered low/high skilled is justified by reference to rules which are regularly subjected to a gendered scrutiny.

Conclusion

The State does not have to establish a range of different migration routes, nor give those migrants it does choose to admit the same or analogous rights to those enjoyed by British citizens/subjects. The migration statuses it does create should not, however, as a matter of law if nothing else, disadvantage and discriminate against women. Contrary to these obligations, the immigration routes examined in this chapter indirectly discriminate on the grounds of sex. Apparently neutral rules that apply to particular family and labour migrants in fact disadvantage women. Bridget Anderson's insights into immigration law's constitutive role illuminates the material disadvantage that results from this differential treatment, whilst doctrinal legal analysis and empirical evidence of women's lived experiences of the rules reveals the 'fashioning' of migrant women as precarious workers and probationary wives. The disadvantage that results from the domestic worker and partner routes is not limited to material disadvantage. An expressive harm also accrues to all women, by virtue of the existence of migration statuses that are premised on sexed/gendered stereotypes. Justifications for the differential treatment of men and women, including those that are based on these stereotypes, are untenable. Recognising that women and men are disproportionately present in different migration categories, the role that immigration law plays in institutionalising precarity and dependency, and the disadvantage

that results from the creation and distribution of different migration statuses, enables us to identify ways in which immigration law discriminates against women. This insight, when combined with a broader consideration of gendered patterns of migration to the UK and the statuses that such patterns produce, founds the normative claim that women are disadvantaged by immigration law.

The State should change its disadvantageous and discriminatory treatment of migrant women, whether or not that treatment is subject to legal challenge. The abolition of dependent migration statuses and the refashioning of migration status more broadly, to ensure that no migrant's position is dependent on another, or precarious, would discharge this obligation. The need for such pre-emptive migration status reform is all the more pressing when we consider not just those women whose rights are currently determined by the routes this chapter impugns, but also all those who face being made subject to them when (and if) the UK leaves the EU.

CHAPTER 2: VIOLENCE AGAINST WOMEN

Introduction

This thesis is concerned with the predicament confronted by migrant women who have, or are, experiencing a particular form of violence: violence against women. Establishing the types of violence I am concerned with is, therefore, necessary to set the foundations for the arguments I advance later in this thesis on the obligations States owe migrant women who have experienced it (Chapter 3) and the extent to which these obligations are discharged (Part 2's evaluation of the 'regimes of exception').

As the first part of this chapter discusses, violence against women is recognised in European and international human rights law as both discrimination against women and a violation of women's human rights. It is not always straightforward to ascertain, however, what constitutes 'violence against women' and whether or not such violence sometimes/always involves discrimination (generally, or under a particular, specialist legal regime), as a consideration of the ECtHR's judgement in *Opuz v Turkey* [2009][1] demonstrates. 'Violence against women' is a term of art, used to denote a particular type of un-justifiable violence and therefore, a particular type of wrong. Like 'crime' in domestic law, or 'persecution' in refugee law, the phrase 'violence against women' has a meaning (or meanings) within international human rights law that is, or may be, different from both the phrase's ordinary meaning and use by other disciplines. Like 'crime' or 'persecution', the content of the term is subject to debate and contestation, such debates being made more complex by the fact that, as will become apparent, significant differences between particular legal instruments, academic or disciplinary approaches are obscured by phrases like 'violence against women', 'gender-based violence'

1 *Opuz v Turkey* App no 33401/02 (ECtHR, 9 June 2009).

and ‘gender-based violence against women’ being used interchangeably and without definition.[2]

Rather than endorsing one legal approach to violence against women or another, the second part of this chapter draws on international and regional human rights law, as well as philosophical accounts of violence, to develop a *conceptual* account of violence against women. To do so I establish the points at which different legal definitions of such violence converge, to ascertain what is at the core or heart of this legal wrong. According to this account ‘violence against women’ is interpersonal violence which discriminates against women on the grounds of sex/gender, such violence arising from, creating and/or perpetuating the subordination of women (VAW = interpersonal violence + discrimination ↔ domination/subordination, as will be explained below). In the third part of this chapter, I apply this account to domestic violence and trafficking, to establish them to be, for the purposes of this thesis at least, forms of violence against women. Finally, I explore the duties States have under the ECHR to prevent and respond to such violence, highlighting cases where their failure to discharge these obligations itself also constitutes discrimination. Space precludes me from evaluating in this analysis (and thesis) the obligations imposed by a range of other relevant international instruments including, for example, the International Labour Organisation’s Conventions on decent work for domestic workers[3] and violence and harassment in the workplace.[4]

2 Human rights instruments/bodies tend to use the term ‘violence against women’ whilst ‘gender-based violence’ is more frequently referred to in the jurisprudence, guidelines and statements of the broader UN, Alice Edwards, *Violence Against Women under International Human Rights Law* (CUP 2011), 20.

3 Convention concerning Decent Work for Domestic Workers, ILO Convention No 189 (Geneva, 16 Jun 2011) for a discussion of which see Sandra Fredman, ‘Home from Home: Migrant Domestic Workers and the ILO Convention on Domestic Workers’ in C Costello and M Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (OUP 2014).

4 Convention concerning the Elimination of Violence and Harassment in the World of Work, ILO Convention No 190 (Geneva, 21 June 2019), for a discussion of which see Nousiainen Kevät, ‘The ILO adopts Convention concerning violence and harassment at work’ (*Oxford Human Rights Hub*, 22 July

1. Towards a Conceptual Account of 'Violence against Women': European, Regional and International Approaches Discussed

Before I proceed to establish 'violence against women's' focal meaning, it is fruitful to consider first how such violence is defined, understood and responded to in the European Convention system. In *Opuz v Turkey* [2009] the ECtHR considered the implications of its Article 14 jurisprudence (as discussed in the previous chapter) for States' obligations to provide sufficient protection from domestic violence.[5] The applicant, Nahide Opuz, had been subjected to years of physical and psychological abuse by her husband. He had also been violent and abusive towards her mother, whom he eventually murdered. Opuz and her mother had repeatedly sought assistance and protection from State authorities, including the police, but insufficient action was taken by them, even after Opuz's mother's death. Opuz sought to hold the State responsible for failing to protect her and her mother from domestic violence. The positive, or 'due diligence', obligations owed by States generally, to those within their jurisdiction, and specifically, to victims, are discussed in section 3 below. In this section I am concerned with the more limited questions of first, how the ECtHR approached violence and discrimination

2019) <http://ohrh.law.ox.ac.uk/the-ilo-adopts-convention-concerning-violence-and-harassment-at-work/> accessed 23 July 2019.

5 *Opuz v Turkey* (n 1).

against women; and, second, how this approach fits or accords with those adopted by other relevant regional and international instruments.

Having first established the nature of the ECHR's prohibition of discrimination,[6] the Court in *Opuz* [2009] conceded the need to consult other 'specialised legal instruments and the decisions of international legal bodies on the question of *violence against women'*[7] to:

> clarify the scope of a Convention provision [Article 14] that more conventional means of interpretation have not enabled it to establish with a sufficient degree of certainty…[8]

The Court then drew on the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)[9] (Article 2 of which defines discrimination against women); the CEDAW Committee's General Recommendation No 19 on Violence Against Women (GR 19);[10] the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (the Convention of Belém do Pará);[11] and, a case decided with reference to it, *Maria da Penha Maia Fernandes v Brazil* [2001][12] to observe firstly, that violence against women, including domestic violence, is a form of discrimination against women,[13] and that secondly:

6 ibid, para 183. In doing so the Court quotes at length from *DH and others v Czech Republic* App no 57325/00 (ECtHR GC, 13 November 2007).

7 *Opuz v Turkey* (n 1), para 185 (emphasis added).

8 ibid, para 184.

9 Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979) UNTS 1249 13 (CEDAW).

10 General Recommendation 19 Violence Against Women (11th session, 1992) .

11 Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Belém do Pará, 9 June 1994), Article 1.

12 *Maria da Penha Maia Fernandes v Brazil* Report No 54/01 (Inter-American Commission on Human Rights, 16 April 2001).

13 *Opuz v Turkey* (n 1), para 187.

> the State's failure to protect women against domestic violence breaches their right to equal protection of the law and that this failure does not need to be intentional.[14]

The Court then proceeded to find breaches of Article 14 in conjunction with Articles 2 and 3 (the right to life and to be free from torture, inhuman and degrading treatment) on the following grounds:

> Bearing in mind its finding above that the general and discriminatory judicial passivity in Turkey, albeit unintentional, mainly affected women, the Court considers that the violence suffered by the applicant and her mother may be regarded as gender-based violence which is a form of discrimination against women.[15]

In addition to contradicting the analysis of violence and discrimination it had already engaged in, the reasoning in this paragraph is, to say the least, tortuous. The domestic violence the applicants experienced is, this time, gender-based violence (in addition to/instead of being violence against women?) because the judiciary's unintentional but nonetheless (indirectly?) discriminatory attitudes mainly affected women. Part of the Court's confusion about the relationship(s) between violence and discrimination against women seems to arise from the lengths it goes to avoid deciding the specific question of whether the Turkish authorities *intentionally* discriminated against women in denying them protection. Instead this issue is elided as, in addition to drawing on its indirect discrimination jurisprudence,[16] the discriminatory *violence* (rather than, or in addition to) the State's *response* to it, is relied on to bring Article 14 into the frame.[17] The Court's reluctance on this point is surprising given the evidence it cites[18] and its reliance on *Maria da Penha Maia Fernandes* [2001], a case in which

14 ibid, para 191.

15 ibid, para 200.

16 ibid, para 183.

17 ibid, para 200.

18 ibid, paras 91-105, 192-202 on domestic violence in Turkey and the authorities' response to it.

the Inter-American Commission on Human Rights found that the State's failure to protect the applicant was both deliberate and discriminatory.[19]

The central problem that the Court faces in its Article 14 analysis is, however, the fact that it is not dealing with one, *but two distinct forms of discrimination, each of which is prohibited by its own legal framework.* The first of these is violence against women itself (of which domestic violence is but one particular subset) which, following CEDAW (Article 1 in conjunction with GR 19), is understood by the ECtHR to be discrimination against women.[20] The Court does not, however, explain how this form of discrimination fits within its Article 14 jurisprudence when, for example, the actors responsible for it may be private individuals and/or agents of the State and such violence occurs in a greater variety of contexts than those discrimination law is usually concerned with (in the home and community, in addition to the workplace or police station).[21]

The second form of discrimination identified is the State's failure to protect women from this violence. Here the Court is concerned with the non-violent inaction of the 'usual' discrimination law duty-bearers (the police and courts) and their (unintentional?) failure to protect people from violence (whether indiscriminate/discriminate), a failure that had particular consequences for women, particularly Kurdish women living in certain parts of the country. [22] This discrimination is straightforwardly prohibited by Article 14 because, following the legal framework set out in Chapter 1, it involves non-justifiable differential treatment on the basis

19 *Maria da Penha Maia Fernandes v Brazil* (n 12), paras 55-58.

20 *Opuz v Turkey* (n 1), paras 185-187.

21 Such conduct of such actors *is* covered by CEDAW's GR 19, para 9. See, for example, *Ms A T v Hungary* Communication No 2/2003 (26 January 2005) CEDAW/C/36/D/2/2003, para 9.2 which notes that 'discrimination under the Convention is not restricted to action by or on behalf of Governments…'. The discrimination this case involved was domestic violence.

22 *Opuz v Turkey* (n 1), paras 191, 199-202.

of sex.[23] The Court did not have to determine whether or not domestic violence *is* violence against women, or whether or not violence against women *is also* discrimination (under Article 14 or other international instruments) to find that Turkey had discriminated in its failure to *respond to it* under Article 14[24] (drawing on its indirect discrimination jurisprudence, and with it the ability to provide statistical evidence to establish a difference of treatment, to do so).[25] Having done so (or having attempted to do so) it should, however, have explained with greater clarity its reasoning, and whether and how violence against women itself, as distinct from the State's response to it, violates Article 14.

The Court's failure in *Opuz* [2009] to define and then explain the relationship(s) between the two forms of discrimination it discusses (one violent, the other not) is indicative of a broader lack of conceptual and legal clarity as to the nature of violence against women and its place within the general and specialist human rights frameworks concerned with discrimination. There are five main legal definitions of violence against women,[26] these can be found in CEDAW's GR 19 and GR 35,[27] the UN Declaration on the Elimination of Violence

23 ibid, para 183, again, following *DH and others v Czech Republic* (n 6).

24 Discrimination could be established, for example, if the State's failure to respond to indiscriminate violence disproportionately affected women. In contrast, GR 19's 'violence against women is discrimination' position was necessary to ensure that CEDAW (and the broader UN) were not constrained in their ability to respond to such violence, as CEDAW (unlike the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (21 December 1965, New York) UNTS 660 195, Art 5(b)) contains no direct prohibition of such violence. See Edwards (n 2), 183-4 for a discussion of this point.

25 *Opuz v Turkey* (n 1), para 183.

26 There is a fourth regional response to violence against women, The Declaration on the Elimination of Violence Against Women and Elimination of Violence Against Children in ASEAN Region (2014), it does not contain a definition of violence against women and so is not considered here.

27 General Recommendation No 35 on Gender-Based Violence Against Women, Updating General Recommendation No 19 CEDAW/C/GC/35 (26 July 2017), para 9, which develops and draws on CEDAW's GR 19, para 6.

against Women (DEVAW);[28] the Convention of Belém do Pará;[29] the Protocol on the Rights of Women in Africa (the Maputo Protocol);[30] and the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (the Istanbul Convention, discussed in Chapter 6).[31] As will become apparent in the section that follows, these instruments take different and sometimes divergent approaches to the question of what constitutes violence against women and whether or not such violence is also (sometimes/always) discrimination. Rather than selecting and adopting one instrument's definition, in Section 2 I advance a *conceptual account* of violence against women which draws on these instruments, establishing the points at which the definitions converge to ascertain what is at the core or heart of this legal wrong. In doing so I am not attempting, or purporting to have developed, a 'theory of violence against women', true for all forms of violence and all women. Instead, I seek to establish violence against women's focal meaning in order to determine the types of violence I am concerned with and differentiate these from other forms of violence and injustice. In doing so I acknowledge, and do not seek to resolve, issues that arise at the outer edges of my argument.

I draw on relevant legal definitions (and use the standard means of treaty interpretation to do so)[32] to advance my conceptual account of violence against women for two main reasons. Firstly, the definitions are contained in instruments ratified by significant numbers of States

28 UN Declaration on the Elimination of Violence against Women 1993, GA Res. A/RES/48/104, 20 December 1993 , Art 1. This definition is repeated in the Beijing Declaration and Platform for Action, Adopted at the Fourth World Conference on Women, 15 Sept 1995 (which expanded it to cover violence experienced in conflict) and GA RES.A/RES/61/143, 19 December 2006, on Intensification of Efforts to Eliminate All Forms of Violence against Women.

29 Convention of Belém do Pará, Article 1.

30 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo, 21 July 2003), Article 1(j).

31 Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul, 11th Oct 2011) CETS 210 (Istanbul Convention) Article 3(a).

32 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) UNTS 1155 331 (VCLT), Art 31.

and which (as the discussion above on *Opuz* [2009] demonstrates) have influenced the jurisprudence of regional courts and human rights bodies. Despite their differences they do represent, therefore, a weak international consensus as to the nature of this form of violence. Secondly, these definitions may (depending on the instrument and jurisdiction) have a direct bearing on relevant national and EU law and practice. By grounding my account of violence against women in these definitions and this consensus, I provide an account that is or should be, uncontested by and garner the support of, the academic and practitioner audiences with whom I seek to engage. At the same time, narrow, doctrinal arguments as to applicability (or not) of a definition or instrument in a particular context or jurisdiction, as well as on which definition takes precedence where several are potentially applicable, are also avoided.[33] As will be seen in the paragraphs that follow, however, there are several points at which the different definitions diverge, or which they fail to address. Philosophical accounts of violence and discrimination are, therefore, drawn on to resolve these conflicts and to give substance to those areas on which the legal instruments are silent. In addition to providing a persuasive, coherent and uncontentious foundation to this thesis' claims that certain conduct is violence against women, it is hoped that the conceptual account advanced here contributes to the literature on such violence an improved understanding of what is at the core of this legal wrong.

2. VAW = Interpersonal Violence + Discrimination ↔ Domination/Subordination

The first table presented below sets out the five main definitions of violence against women in full, whilst the second deconstructs and then reconstructs excerpts from the definitions (and complementary parts of the instruments from which they are drawn) around three elements:

33 This particularly relevant to the Istanbul Convention which can and is being ratified by EU member states as well as, to a limited extent, as we shall see in Chapter 6, the EU itself.

interpersonal violence, discrimination on the grounds of sex/gender and domination/subordination.

Five Definitions of Violence Against Women	
Instrument	**Definition**
CEDAW's General Recommendation No 19 (paragraph 6)	'The Convention [CEDAW] in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.'
CEDAW's General Recommendation No 35 (paragraph 9)	'The concept of 'violence against women' in general recommendation No. 19 and other international instruments and documents has emphasised that this violence is gender-based. Accordingly, this document uses the expression 'gender-based violence against women', as a more precise term that makes explicit the gendered causes and impacts of the violence.'
DEVAW (Article 1)	'"violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.'
Convention of Belém do Pará (Article 1)	'violence against women shall be understood as any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere.'
Maputo Protocol (Article 1(j))	'"Violence against women" means all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war.'
Istanbul Convention (Article 3(a) and (e))	"violence against women" is understood as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life; "gender-based violence against women" shall mean violence that is directed against a woman because she is a woman or that affects women disproportionately;'

Instruments and Elements: The 'Core' of Violence against Women in International Law			
	Instrument		
	CEDAW's General Recommendation No 19	**DEVAW**	**Convention of Belém do Pará**
Interpersonal Violence	Acts which inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.	Acts that result in, or are likely to result in, physical, sexual or psychological harm or suffering, including threats of such acts, coercion or arbitrary deprivations of liberty.	Acts or conduct which cause death or physical, sexual or psychological harm or suffering.
Discrimination on the grounds of sex/gender	The definition of discrimination includes 'gender-based violence', 'violence that is directed against a woman because she is a woman or that affects women disproportionately.' See also GR 35 para 9 which uses the term 'gender-based violence against women' to make 'explicit the gendered causes and impacts' of violence.	VAW is an act of 'gender-based violence'.	VAW is conduct that is 'based on gender'.
Domination / Subordination	Paras 11-12 link women's subordination, gender stereotyping and gender-based violence.	Preamble: 'Recognizing that violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination	Preamble states that VAW is a manifestation of historically unequal power relations between women and men. Art 6 explicitly links violence, discrimination,

		over and discrimination against women by men and… that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men'	gender stereotyping and subordination.

Instruments and Elements: The 'Core' of Violence against Women in International Law		
	Instrument	
	Maputo Protocol	**Istanbul Convention**
Interpersonal Violence	Acts that cause physical, sexual, psychological and economic harm, including threats of such acts, as well as the imposition of restrictions and deprivation of fundamental freedoms.	Acts that result in or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivations of liberty.
Discrimination on the grounds of sex/gender		VAW is discrimination against women and a violation of women's human rights. VAW is an act of gender-based violence, 'gender-based violence against women' is violence that is directed against a woman because she is a woman or that affects women disproportionately.'
Domination / Subordination		See the preamble which, echoing DEVAW, states that VAW is 'a manifestation of historically unequal power relations between women and men' and one of the 'crucial social mechanisms' through which women are subordinated.

Whilst the legal definitions of violence against women are all, in different ways and to different extents, broader than the account I advance (something I discuss further below), the three elements identified: interpersonal violence, discrimination on the grounds of sex/gender and women's subordination, are points at which they converge or overlap. Accordingly, 'violence against women' is (1) interpersonal violence which (2) discriminates against women on the grounds of sex/gender where (3) such discriminatory violence arises from, creates and/or perpetuates the subordination of women.

VAW = interpersonal violence + discrimination ↔ domination/subordination

For any particular conduct to be considered violence against women in my account, elements (1) and (2) need to be established. Where they are (3) is made out as, as four out of the five legal instruments recognise (as discussed further below), such discriminatory violence cannot, and should not, be conceived of without its role in creating and maintaining women's inequality being explicitly acknowledged. In the paragraphs that follow, each element, and the relationships between them, are explored in turn. Whilst each element is discussed separately, they are fundamentally interrelated.

(a) Interpersonal Violence

The first element in my account of violence against women is violence itself, specifically that violence which is *interpersonal*, rather than structural in nature. In discussing, briefly, what conduct constitutes violence it must be recalled that violence against women, like 'persecution' in refugee law, is a term of art. Thus an experience that may not be recognised by the public in general, or human rights law in particular, as inflicting serious harm, such as having to hide one's sexual orientation in order to avoid homophobic violence, has been recognised as

'persecution' in refugee law.[34] Analogously, acts that are not considered violent per se (or criminalised as such)[35] may be appropriately described as violent for the purposes of developing and applying a definition of violence against women that is meaningful for this thesis and in international human rights law terms.

Interpersonal violence is violence that one individual (or individuals) perpetrates against another. Perpetrators of such violence may be a woman's partner, family member, employer or a stranger. Interpersonal violence can occur in the family home, the workplace, a police cell or a refugee camp. It can occur in 'peacetime', as well as situations of armed conflict. Structural violence is, in contrast, the conduct or practice of institutions and social structures (rather than individual(s)) which produces harm or is discriminatory and/or unjust.[36] All the legal instruments considered define violence against women in terms of acts or conduct that produce (or have the potential to produce) harm, such harms including those which are physical, sexual, psychological or economic in nature. Whilst none of the instruments considered here specifically define violence against women in terms of either interpersonal or structural violence (or indeed define 'violence'), my account of violence against women is potentially *narrower* than (some) of the definitions set out above, in its focus on that violence which is interpersonal, not structural, in nature.

The inclusion of economic harm in both the Maputo Protocol and Istanbul Convention has been interpreted as being consistent with a broader approach (for my purposes) to violence

34 Compare *F v UK* App no 17341/03 (ECtHR, 22 June 2004) (which found that having to be 'discrete' in order to avoid homophobic violence did not amount to a 'flagrant breach' of the applicant's right to a private and family life) with *HJ (Iran) v Secretary of State for the Home Department* [2010] UKSC 31, [2011] 1 AC 596 (which found that having to be discrete was persecution under refugee law).

35 I am not arguing that such forms of violence should not be criminalised. One of the significant successes of the feminist movement in UK in recent years has been the creation of the criminal offence of coercive control per s76 Serious Crime Act 2015. Following the conceptual account advanced in this chapter, I would describe coercive control as a form of violence against women.

36 Definition drawn from Johan Galtung, 'Violence, Peace, and Peace Research' (1969) 6(3) *Journal of Peace Research* 167.

against women that encompasses structural violence. Such developments have been welcomed by a number of feminist practitioners and scholars who have sought to argue that issues relating to women's inequality should be understood in terms of violence against women. Alice Edwards, for example, specifically includes structural violence within the definition of violence against women that she adopts in her study of international human rights law, an approach that was also advocated by the (now former) UN Special Rapporteur on Violence against Women, Rashida Manjoo.[37]

In limiting my account of violence against women to interpersonal violence, I am not seeking to undermine the value and efficacy of characterising some other structural forms of harm, inequality or injustice as violence. Such an approach is rejected here, however, for three main reasons. Firstly, describing all inequality or injustice as violence risks conflating what are related, but fundamentally different concepts and losing sight of what is different and even 'special' about both of these wrongs.[38] Whilst I agree with Edwards that there is something 'counter-intuitive about calling violent conduct discrimination rather than violence itself', I hold that the reverse is also true.[39] Discrimination against women (and others) is a significant wrong in and of itself. Demonstrating that a particular practice, such as the differential distribution of migration statuses to women and men (per Chapter 1, something that may be included in accounts of violence against women which include structural violence, but which is excluded from my own) discriminates against women, should be sufficient to ground a 'normative attack'[40] on that practice. Indeed, seeking to characterise unjust conduct as violence

37 Edwards (n 2) 25 and Rashida Manjoo, 'The Continuum of Violence against Women and the Challenges of Effective Redress' (2012) 1(1) *International Human Rights Law Review* 1.

38 Interestingly, Hannah Arendt distinguishes between 'violence' and 'force' (so social forces, or the forces of circumstance) in order to capture what is different about the former from the 'energy' released by social (or physical) movements, Hannah Arendt, *On Violence* (Harcourt 1970) 45.

39 Edwards (n 2), 194.

40 Michelle Madden Dempsey, *Prosecuting Domestic Violence: A Philosophical Analysis* (OUP 2009), 107.

may have the opposite effect to the one intended and serve instead to devalue claims based on disadvantage/discrimination by implying that they are somehow less 'wrong' or less 'requiring of a response' than wrongs that are violent in nature.

Secondly, whilst it may be useful to describe immigration law's treatment of women as 'violent' in some contexts,[41] to do so in this thesis would risk obscuring, rather than foregrounding, the connections between 'violence' and migration status that I seek to unpack and explore. A focus on interpersonal violence enables the relationships and contexts that migration status particularly affects, intimate partnerships, the home and workplace, to be placed at the centre of analysis. In Chapter 1, I highlighted empirical evidence that suggested that migrant women may be more vulnerable to experiencing certain types of violence than other women, and implicated rules which made them dependent on another (such as a partner or employer) in this increased risk. An understanding of the difference that migration status makes to a woman's risk of experiencing a particular form of violence, or to the experience of violence itself, may be lost by the adoption of a definitional approach to 'violence' that encompassed the distribution of migration statuses itself, in addition to a diverse range of other injustices. In contrast, this thesis' approach enables the increased risk of experiencing violence that partners and domestic workers face to be revealed, and the duties States have to prevent and protect women from such violence, to be explored.

The third and more pragmatic reason for excluding structural violence is that such an approach is in line with the 'ordinary' meaning of the term 'violence' and is, therefore, more likely to be satisfying to the legal and policy audiences this work seeks to engage with.[42]

41 See, for example, Victoria Canning, *Gendered Harm and Structural Violence in the British Asylum System* (Routledge 2017).

42 The World Health Organisation, for example, defines 'violence' as 'the intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community, that either results in or has a high likelihood of resulting in injury, death, psychological harm,

Unlike Michelle Madden Dempsey, however, I do not believe that to reject structural accounts of violence requires, or logically results in, a focus on violence which is limited to 'physical' violence.[43] Instead and to return to the legal definitions of violence against women discussed above, acts which are violent are those which wrongfully cause certain types of harm;[44] including that which is physical, psychological, sexual and/or economic in nature. The consequences of such violence can include death (including suicide), physical and mental injuries, becoming pregnant (as a result of unwanted sex or unwanted 'unprotected' sex), miscarrying and experiencing 'maldevelopment' or deprivation.[45] Violence that may produce economic harm includes the unjustifiable non-payment of wages (in the context of an interpersonal relationship between a domestic worker and her employer, for example) or withholding financial support/denying a woman access to her own means of support (in an intimate personal relationship). It does not matter whether the conduct in question actually produces a particular harm (whether harm is threatened but not carried out, for example, or whether the conduct fails to achieve its harmful aim); what matters is that it has the potential to do so. Consistent with four of the five definitions (the exception being the Convention of Belém do Pará), I include within my account of violence against women threats of harmful acts, as well as acts that have the potential to cause harm. A resilient woman may be unharmed by a threat of violence made on the street; a woman who is threatened with violence on social

maldevelopment, or deprivation.' World Health Organisation, 'Definition and Typology of Violence' (2016) <http://www.who.int/violenceprevention/approach/definition/en/> accessed 16 Dec 2016.

43 Dempsey (n 40), 109. Dempsey is, however, concerned with domestic violence, not violence against women per se, see also Michelle Madden Dempsey, 'Response to Commentators (2014) Criminal Law & Philosophy (Symposium on Michelle M. Dempsey's 'Prosecuting Domestic Violence')' (2014) 8 *Villanova Law/Public Policy Research Paper No 2014-1016*, 9.

44 Not all harms are wrongful and not all wrongful harms are violent, see further R A Duff, 'Harms and Wrongs' (2001) 5(1) *Buffalo Criminal Law Review* 13.

45 World Health Organisation (n 42); World Health Organisation, *Global and Regional Estimates of Violence Against Women: Prevalence and Health Effects of Intimate Partner Violence and Non-Partner Sexual Violence* (2013).

media may be unharmed by it while she is unaware of it.[46] In both cases it is the threat or potential to cause harm that renders the conduct violent.

Finally, whilst as a matter of domestic law, failures to act, omissions, may have different legal consequences from acts themselves, I contend that violent conduct is not limited to acts, and that omissions which produce the requisite type of harm (physical, psychological, sexual or economic), also constitute violence. The legal instruments themselves are silent on this point. However, failing to enable women to obtain medical attention, a common feature in cases involving the abuse of women with disabilities for example, is an omission which can cause as much harm as an act of physical violence.[47] As Martha Nussbaum observes, many forms of behaviour which appear at 'first glance' to be non-violent, such as the under-nutrition of girls (an omission) or the non-consensual publishing of private images (an act), should be considered to be so because 'they have the same crippling effects on women's capabilities as actual bodily violence.'[48]

The preceding discussion has explored the types of conduct that are violent for the purposes of my account of violence against women. Some of these interpersonal acts are violent per se (such as an act of physical or sexual violence) whilst others, such as those acts which cause economic harm, or omissions, do not appear at 'first glance' to be so. Such conduct is considered violent, however, because drawing on the legal definitions and Nussbaum's theorising on violence, it involves the conduct of one person (or persons) towards another and

46 See Ruth Lewis, 'Online Abuse of Feminists as an Emerging Form of Violence Against Women And Girls' (2017) 54(6) *The British Journal of Criminology* 1462 for a discussion of online abuse and its impact.

47 Hence the World Health Organisation includes deprivation and neglect within their typology of violence, World Health Organisation, *World Report on Violence and Health* (Geneva, 2002) 6.

48 Martha Craven Nussbaum, 'Women's Bodies: Violence, Security, Capabilities' (2005) 6(2) *Journal of Human Development* 167, 168. The first example given is Nussbaum's own, the second is mine.

wrongfully produces a particular type of harm(s). Interestingly, whilst such conduct may not (always) be criminalised in domestic law, it is often regulated by the civil law where it may be prohibited by protective orders (e.g. an order from the family court which prohibits a perpetrator from using or threatening violence or requires him to pay the rent) the breaching of which may itself constitute a criminal offence.[49] That the conduct is violent, however, is not enough for it to be characterised as violence against women. Rather, interpersonal violence of the kind discussed here is violence against women where it also discriminates against women on the grounds of sex/gender, whether alone or in conjunction with other 'grounds'.

(b) Discrimination on the Grounds of Sex/Gender

In Chapter 1, I relied on Article 14 of the ECHR to argue that the State's distribution of migration statuses discriminated on the grounds of sex. In the preceding section of this chapter, I discussed how the ECtHR had approached violence against women, and highlighted the Court's lack of clarity as to the discriminatory nature of such *violence*, as distinct from the State's discriminatory *response* to it.[50] The approach to discrimination adopted here (again, in relation to *violence*) is not the same as that relied on in Chapter 1, as I pivot from the ECHR to the intersectional approach CEDAW adopts to violence and discrimination against women.[51] I draw on it, as the *lex specialis* for violence against women,[52] (as the ECtHR itself recognised

49 In the UK through, for example, non-molestation or occupation orders under Part IV of the Family Law Act 1996 or a restraining order under the Protection from Harassment Act 1997.

50 For a detailed discussion of violence against women as discrimination and the States' discriminatory non-response to it, see *Gonzalez et al ('Cotton Field') v Mexico* Preliminary Objection, Merits, Reparations, and Costs (IACtHR, 16 November 2009), paras 390-402.

51 CEDAW's GR 35, para 12 and General Recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women CEDAW/C/2010/47/GC.2 (19 October 2010).

52 Consistent with the Report of the Study Group of the International Law Commission: Finalized by Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (UN Doc A/CN4/L682, 13 April 2006) which establishes the role and nature of the *lex specialis* rule as a 'pragmatic mechanism' (page 30) for dealing with situations where two rules of international law, one specialist, one general, are both potentially valid (see generally Part C of the Report). See also United Nations General Assembly Resolution 56/83: Responsibility of States

in *Opuz* [2009]),[53] in conjunction with Shreya Atrey's theorising on intersectionality,[54] to argue that violence against women is that violence which discriminates on the grounds of sex/gender alone *and in conjunction with other grounds* (whether themselves legally protected or not). The benefits of adopting such an approach to the domestic violence Nahide Opuz experienced are immediately identifiable, as her particular vulnerability to it as a Kurdish woman living in rural Turkey is acknowledged and, therefore, may be responded to.[55]

Violence against women was not defined or prohibited in CEDAW itself; instead it was brought within its purview through the CEDAW Committee's GR 19, which authoritatively defined violence against women as a form of sex discrimination.[56] This approach was subsequently adopted by other treaty bodies and UN organs, as well as by the Inter-American and European systems in both their jurisprudence and violence against women-specific conventions.[57] References to discrimination (and, in the following section, domination/subordination) rather than simply 'the patriarchy' are, therefore, intended to denote recognition of the mutually reinforcing nature of inequalities such as racism, homophobia and patriarchy, not to deny or minimise the role of the latter in women's subordination. As Dempsey argues:

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for Internationally Wrongful Acts (UNGA) UN Doc A/RES/56/83, GAOR 56th Session Supp 49 Vol 1, 499 (2001), Art 55 and the VCLT, Arts 31-33.

53 *Opuz v Turkey* (n 1) para 185.

54 Shreya Atrey, 'Lifting as We Climb: Recognising Intersectional Gender Violence in Law' (2015) 5(6) *Oñati Socio-Legal Series* 1512; Shreya Atrey, 'From Progress to Transformation, An Intersectional Response to Martha Nussbaum' (2018) 40(4) *Human Rights Quarterly* 859. Indeed, there is a growing body of literature on this approach to VAW, Lorena Sosa, *Intersectionality in the Human Rights Legal Framework on Violence against Women: At the Centre or the Margins?* (CUP 2017).

55 *Opuz v Turkey* (n 1) paras 191, 199-202.

56 Christine Chinkin, 'Violence against Women' in Marsha A. Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (OUP 2012). This 'soft law' approach to violence against women has been criticised by the former UN Special Rapporteur on Violence Against Women who argued for the development and adoption of a UN treaty on violence against women, Rashida Manjoo, *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo* (A/HRC/29/27, 2015).

57 *Opuz v Turkey* (n 1) and *Gonzalez et al ('Cotton Field') v Mexico* (n 50) pars 390-402.

> at least some of the salient features of women's condition are best understood by reference to patriarchy. This point of view does not deny that a variety of other considerations, including other intersecting structural inequalities, are also relevant to a fully illuminated account of women's conditions. Rather, it merely shines one particular light on this issue, so as to illuminate an admittedly partial yet nonetheless salient aspect of women's subordination.[58]

I refer to 'discrimination on the grounds of sex/gender' to encompass a range of different and sometimes divergent views as to the nature and degree of women's inequality and the role of sex/gender and violence in maintaining it.[59] My account stands whether or not sex/gender is understood as a binary (m/f) with gender inequality occurring along a single axis (m>f), or whether instead sex/gender is viewed as implicated in, but nevertheless distinct from, gendered subordination. It is also relevant to those who challenge and problematise the distinction made between 'sex' and 'gender' (which posits the former as a natural given and the latter as a cultural construct, hence the reference to sex/gender here) and who instead assert the existence of a range of different sexed/gendered identities.[60]

In contrast to the account set out above, a broader approach to violence against women is adopted by the Maputo Protocol which defines it in terms of any violence that women experience, including indiscriminate violence. Edwards endorses this definition (the only one that does not consider violence against women to be violence that women experience on the grounds of sex/gender and, therefore, an 'outlier'), arguing that such an expansive approach is

58 Dempsey, *Prosecuting Domestic Violence: A Philosophical Analysis* (n 40), 135.

59 Joanne Conaghan, *Law and Gender* (OUP 2013), Chapter 1 similarly adopts this approach.

60 Per Judith Butler's seminal argument that neither 'sex' nor 'gender' are natural categories. Butler's theory of performative gender conceptualises gender as an ongoing action rather than a natural or fixed category, Judith Butler, *Undoing Gender* (Routledge 2004). Butler's influential work on sex/gender enables an appreciation of the role that gender plays in constituting the violence experienced by those who do not fit within the traditional male/female heteronormative binaries and stresses that gendered violence affects and constructs a/the full range of gendered identities. Violence towards and between those in same-sex relationships may be brought to the fore under such an analysis. Such an appreciation does not necessarily lead to a rejection of feminist understandings of the role of gender to subordination and violence, Kathryn McNeilly, 'Gendered Violence and International Human Rights: Thinking Non-discrimination Beyond the Sex Binary' (2013) 22(3) *Feminist Legal Studies* 263, 268. See also Dianne Otto, 'Queering Gender Identity in International Law' (2015) 33(4) *Nordic Journal of Human Rights* 299 for an evaluation of the CEDAW Committee's response to such arguments.

necessary to include violence which is perceived to be indiscriminate in nature, but from which women disproportionately suffer.[61] Similarly, whilst some forms of violence against women, such as FGM, are and can be explicitly linked to discrimination on the grounds of sex/gender,[62] others, such as domestic violence, are less readily comprehensible (to some) in these terms and are frequently (and increasingly) presented as non-discriminatory, gender-neutral harms.[63]

Discrimination involves treating differently, without an objective and reasonable justification, people who are similarly situated. Whether or not a particular form of disadvantageous/discriminatory treatment can, in law, be justified and on what grounds, depends on the type of treatment involved and the particular legal rules in the jurisdiction considered.[64] In the context of violence against women, this differential treatment occurs when women experience particular forms of violence because they are women (or particular kinds of women) or when women disproportionately experience a particular form of violence and/or are disproportionally affected by it.[65] Contrary to Edwards' argument, violence which appears to be indiscriminate but which disproportionately affects women is, therefore, violence which discriminates. Similarly, my account of violence against women as being concerned with that violence which is discriminatory does not require it to be shown that an individual perpetrator

61 Edwards (n 2) 25.

62 In *Fornah v Secretary of State for the Home Department* [2006] UKHL 46, [2007] 1 All ER 671, for example, FGM in Sierra Leone was described as an act deliberately designed to institutionalise women's inferiority to men, para 31.

63 Renee G Romkens, 'Reflections on Domestic Violence as Gender-Based Violence in European Legal Developments' in Maznah Mohamad and Saskia Wieringa (eds), *Family Ambiguity and Domestic Violence in Asia* (Sussex Academic Press 2013) and Rashida Manjoo, *Report of the Special Rapporteur on violence against women, its causes and consequences (2011)* (A/HRC/17/26, 2011).

64 Whilst the ECtHR enables both direct and indirect discrimination to be justified, in contrast under EU law direct discrimination can only be justified where it is in pursuit of particular aims set out in the relevant directives, European Union Agency for Fundamental Rights, *Handbook on European Non-Discrimination Law* (Publications Office of the European Union 2010), 43.

65 See CEDAW's GR 19 which states that violence against women is 'violence that is directed against a woman because she is a woman or that affects women disproportionately'. This definition is used in the Istanbul Convention's definition of 'gender-based violence against women', its definition of violence against women including any act that is 'gender-based' (language that is also used in both DEVAW and the Convention of Belém do Pará).

of such violence had discriminatory intent. A discriminatory practice does not need to have been formulated or engaged in with the express desire of discriminating against a particular individual or group, although it may be. What is relevant is that women and men are treated differently (in terms of the form of violence, its prevalence and/or impact) and that this difference of treatment cannot be justified. The link between violence and discrimination can, therefore, be made at the 'social or external' level as well as, or in addition to, the individual level.[66]

Finally, whilst incorporating a discrimination element directly into my account of violence against women (rather than, for example, referring to 'less favourable treatment'), may theoretically 'open-up' that violence to justification, the potential existence of a justification defence is not necessarily problematic. As Sandra Fredman argues, the 'challenge' in any particular case is not that justification is possible or attempted, but that the *evaluation* of any such attempt 'be calibrated in a manner which can discern individual discrimination and distinguish it from appropriate differentiation.'[67] Any justification for interpersonal violence which disproportionately affects women (again, whether in form, prevalence or impact) could not, for example, be premised on stereotypical understandings of sex/gender, women's roles or attributes. This is an issue that will be considered further below when two forms of violence, domestic violence and trafficking, are discussed.

(c) Domination / Subordination

Whilst Chapter 1 identified and discussed the ways in which migrant women are disadvantaged by their migration statuses, here I am concerned with women's inequality more broadly and

66 Julie Goldscheid, 'Domestic and Sexual Violence as Sex Discrimination: Comparing American and International Approaches' (2005) 28 *Thomas Jefferson Law Review* 355, 360

67 Sandra Fredman, 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights' (2016) 16(2) *Human Rights Law Review* 273, 281.

the role that violence against women plays in creating and perpetuating women's subordination. An account of violence against women that explained it solely in terms of unlawful sex discrimination could operate to normalise the patriarchal context in which such violence occurs and obscure its role in maintaining gender inequality. As Fredman observes '[d]iscrimination is not symmetrical; it operates to create or entrench domination by some over others'.[68] Consequently, in my account, where it is established that particular conduct involves impersonal violence which discriminates against women, the role of such violence in creating and maintaining women's inequality is explicitly recognised, an approach to sex discrimination that is sometimes lacking in international law.[69] This approach is consistent with four of the five legal instruments (as will be recalled from the previous section, the Maputo Protocol is the 'outlier' on this point), which recognise that the discriminatory violence that women experience on the grounds of their sex/gender arises from, creates and perpetuates women's subordination. Such violence needs to be understood in terms of its role in asserting male power and control, enforcing assigned gender roles and punishing deviant female behaviour.[70] To employ a phrase often used by feminist activists, violence against women is both a cause and consequence of women's inequality. Such violence is a 'manifestation of historically unequal power relations between men and women' and one of the 'crucial social mechanisms by which women are forced into a subordinate position compared with men'.[71] As with discrimination, violence against women arises from and is a cause and consequence of women's subordination not because (some/all) individual perpetrators engage in violence with the conscious intent to dominate/subordinate (although they may, as discussed below) but because in society the

68 Sandra Fredman, *Intersectional Discrimination in EU Gender Equality and Non-Discrimination law* (Luxembourg: Publications Office of the European Union, May 2016), 8.

69 Compare, for example, the preamble to the CERD with the preamble to CEDAW. The former condemns racism as a 'lie' that enables domination on the grounds of race, the latter appears more concerned with the impact that sex discrimination has on a country's development.

70 Chinkin (n 56), 452.

71 Istanbul Convention preamble (itself quoting the DEVAW preamble).

power to subordinate is one that is determined by group membership.[72] As Hannah Arendt argued:

> Power is never the property of an individual; it belongs to a group and remains in existence only so long as the group keeps together. When we say of somebody the he is 'in power' we actually refer to his being empowered by a certain number of people…[73]

3. Identifying Violence Against Women

Having developed an account of violence against women, it is fruitful to apply it to two specific forms of violence: domestic violence and trafficking. Migrant women who experience either or both forms of violence may have recourse to one or more of the 'regimes of exception' evaluated in Part 2. Whilst different definitional approaches to both forms of violence have and can be taken, they are (very briefly) discussed here to demonstrate how the account developed in the preceding section can be applied in practice, drawing on empirical evidence of women's lived experiences of such violence to do so. Before I do so, however, several caveats to my argument require stating. In stating that domestic violence or trafficking can and should be understood as forms of violence against women under certain circumstances, I am not arguing that they can or should *only* be understood in these terms. Domestic violence that occurs between siblings or within same sex relationships, for example, may or may not fall within my account of violence against women. Conduct which falls within European or international definitions of trafficking (the legal construction of which is highly problematic, as Chapter 5 discusses) will not fall within my account if it does not involve interpersonal violence or is not discriminatory. Violence (as a general phenomenon) can take many forms and so will have the

72 See *Prosecutor v Kunarac, Kovac and Vokovic* ICTY, Case No IT-96-23-T and IT-96-23/1-T (22 Feb 2001) para 816 where the Trial Chamber ruled that the issue was not whether the defendant's sole or predominant motivation for raping women in his control was personal discrimination against those women but that, for the purposes of the international criminal law on torture, what was required was that the defendant discriminated 'between the group of which he is a member' (a male Serb) and 'the group of his victim' (Bosnian Muslim women).

73 Arendt (n 38), 44.

elements identified as being central to violence against women within it to a greater or lesser extent, if at all. Empirical evidence may also speak to some, but not all the different elements of violence against women that I identify.

Whilst violence that occurs within intimate and familial relationships can take many forms and can, therefore, be defined and discussed in many different ways,[74] domestic violence has been defined in the Istanbul Convention as 'all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim'.[75] Domestic violence involves interpersonal conduct that entails the infliction (or the attempted infliction), whether by act or omission, of physical, sexual, psychological and/or economic harm.[76] Women are significantly more likely than men to experience domestic violence[77] and when they do, are more negatively impacted by it and/or by particular forms of it.[78] Empirical research on domestic violence has consistently emphasised the attempt/desire of (male) perpetrators of such violence to control the lives of and to dominate their (female)

74 See for example, Dempsey, *Prosecuting Domestic Violence: A Philosophical Analysis* (n 40) Chapter 1 'What Counts as Domestic Violence?' for a conceptual account and Michael P. Johnson, 'Conflict and Control: Gender Symmetry and Asymmetry in Domestic Violence' (2006) 12(11) *Violence Against Women* 1003 which draws on the literature and empirical evidence to identify four distinct types of domestic violence (situational couple violence, intimate terrorism, violent resistance, and mutual violent control).

75 Istanbul Convention, Art 3. For a discussion about different international legal definitions of and approaches to domestic violence see Bonita Meyersfeld, *Domestic Violence and International Law* (Hart 2010).

76 World Health Organisation (n 45) 21-26; European Union Agency for Fundamental Rights, *Violence Against Women: An EU-wide Survey: Main Results Report* (Publications Office of the European Union, 2014) (chapters 2, 3 and 4).

77 World Health Organisation (n 45); European Union Agency for Fundamental Rights, *Violence Against Women: An EU-wide Survey: Main Results Report* (ibid); and, in the UK specifically Sylvia Walby and Jonathan Allen, *Domestic Violence, Sexual Assault and Stalking: Findings from the British Crime Survey* (2004) and Office for National Statistics, *Domestic abuse in England and Wales: year ending March 2018* (Statistical bulletin, 22 November 2018).

78 That particular forms of domestic violence, such as coercive control, are disproportionately perpetrated by men against women, Marieh Tanha and others, 'Sex Differences in Intimate Partner Violence and the Use of Coercive Control as a Motivational Factor for Intimate Partner Violence' (2010) 25(10) *Journal of Interpersonal Violence* 1836. See also Office for National Statistics (ibid).

victims.[79] Domestic violence has also been linked to women's inequality, with women's inequality within individual relationships and society more broadly being correlated with both a greater individual risk of experiencing domestic violence and higher societal levels of it.[80] Women's and men's differential experiences of domestic violence (in form, prevalence and impact) cannot, therefore, be 'justified' for reasons that are unrelated to sex/gender, as domestic violence contributes to and perpetuates women's subordination by determining and reinforcing, at both the individual and group level, the sexed/gendered roles and relationships in which such violence occurs.[81]

Domestic violence is just one form of violence against women that can be understood as such using the account developed here; the same exercise can be undertaken in relation to other forms of violence, which either are or are not (depending on the legal and conceptual approach adopted) currently considered violence against women, such as trafficking.

'Trafficking' and other conduct that occurs in the context of slavery, forced or coerced 'labour' can be conceptualised and approached in a number of different ways (as discussed in

79 Carolyn Hoyle and Nicola Palmer, 'Family Justice Centres: A Model for Empowerment?' (2014) 20(2) *International Review of Victimology* 191, 196; Emma Fulu and others, *Why Do Some Men Use Violence Against Women and How Can We Prevent It? Quantitative Findings from the United Nations Multi-Country Study on Men and Violence in Asia and the Pacific* (Bangkok: UNDP, UNFPA, UN Women and UNV, 2013). See also R Emerson Dobash and Russell Dobash, *Violence Against Wives: A Case Against Patriarchy* (New York: Free Press 1979); Evan Stark, *Coercive Control: The Entrapment Of Women in Personal Life* (OUP 2007). The Domestic Abuse Intervention Programs (DAIP), 'Power and Control Wheel' <http://www.theduluthmodel.org/pdf/PowerandControl.pdf> accessed 18 May 2015 explores different forms of domestic violence and their use to control/dominate the victims of such violence.

80 Lori L Heise and Andreas Kotsadam, 'Cross-national and Multilevel Correlates of Partner Violence: An Analysis of Data From Population-Based Surveys' (2015) 3(6) *Elsevier* 332. See also Sidney Ruth Schuler and others, 'Credit Programs, Patriarchy and Men's Violence Against Women in Rural Bangladesh' (1996) 43(12) *Social Science & Medicine* 1729; Bina Agarwal and Pradeep Panda, 'Home and the World: Revisiting Violence' *Indian Express* (7 August 2003) 9; and Anna Aizer, 'The Gender Wage Gap and Domestic Violence' (2010) 100(4) *American Economic Review* 1847.

81 Justifications for differential treatment that are premised on such sexed/gendered roles and/or stereotypes cannot operate as justifications as a matter of law, per Chapter 1, section 5.

Chapter 5).[82] Whilst conducting empirical and other research on trafficking is challenging, and the findings of such research are frequently the subject of debate and contestation, there is an evidence base which can be drawn on to argue that conduct that falls within the current trafficking definition may also be understood to be violence against women.[83] Trafficking has been defined in European law as:

> the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.[84]

Trafficking, whether for labour or sexual exploitation, involves interpersonal conduct that causes harm.[85] This conduct may produce harm that is physical, sexual, psychological or economic in nature and include, for example, physical or sexual assault, the use of 'witchcraft' or debt bondage.[86] Empirically, notwithstanding difficulties assessing the scale of trafficking, women and girls are more likely than men and boys to be trafficked and are also more likely to be trafficked for particular forms of exploitation.[87] Trafficking involves conduct that may

82 See for example, Klara Skrivankova, *Between Decent Work and Forced Labour: Examining the Continuum of Exploitation* (JRF programme paper, Joseph Rowtree Foundation, 2010).

83 On the challenges of engaging in such research see Mary Bosworth, Carolyn Hoyle and Michelle Madden Dempsey, 'Researching Trafficked Women: On Institutional Resistance and the Limits to Feminist Reflexivity' 17(9) *Qualitative Inquiry* 769.

84 Council of Europe Convention on Action against Trafficking in Human Beings (Warsaw, 16.V.2005) CETS 197 (Council of Europe Trafficking Convention), Art 4(a) chosen because the Convention forms part of one of the 'regimes of exception' analysed in Part 2 of this thesis. For a discussion of this definition and its adoption by States see Michelle Madden Dempsey, Carolyn Hoyle and Mary Bosworth, 'Defining Sex Trafficking in International and Domestic Law: Mind the Gaps' (2012) 26(1) *Emory International Law Review* 137 and Jean Allain, 'No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol ' (2014) 7(1) *Albany Government Law Review* 111.

85 Such 'harm', or threat thereof, being one of 'means' by which a person is trafficked, whether or not further harm results from their exploitation.

86 Cathy Zimmerman and others, *Stolen smiles: The Physical and Psychological Health Consequences of Women and Adolescents Trafficked in Europe* (The London School of Hygiene & Tropical Medicine, 2006).

87 Eurostat, *Trafficking in Human Beings* (2015), over the three-year period considered, 80% of identified and registered victims of trafficking were women, 95% of those trafficked for sexual exploitation were women whilst 71% of those trafficked for labour exploitation were men. See also Sylvia Walby and others, *Study on the Gender Dimension of Trafficking in Human Beings* (Migration and Home Affairs,

discriminate against women because women are trafficked for sexual and particular gender-specific types of labour exploitation (such as domestic servitude) and because societal and individual views concerning the 'fitness' of (certain) women for such 'work' (and the disadvantageous conditions applied to it) continue to be based on, and reinforce, stereotypical understandings of (certain) women's (inferior) roles and attributes.[88] Individuals involved in trafficking may also themselves hold, or be motivated by, the discriminatory beliefs of third parties, such as 'clients'.[89] The value of formulating the second element in my account of violence against women as discrimination (rather than 'patriarchal control') is evident here, as inequalities based on sex/gender and race (and potentially also age and sexual orientation), interact with and reinforce each other. Like domestic violence, trafficking contributes to and

European Commission, 2016) and, on the UK, Group of Experts on Action Against Trafficking in Human Beings (GRETA), *Report Concerning The Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom* (GRETA(2012)6, 2012)).

88 For a discussion on trafficking as a form of violence against women and the link between trafficking and discrimination/subordination at the societal level see Sigma Huda, *Report of the Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children* (E/CN4/2006/62 (20 February 2006), 2006). See also Laura Maria Agustin, 'A Migrant World of Services ' in Sarah van Walsum and Thomas Spijkerboer (eds), *Women and Immigration Law: New Variations on Classical Feminist Themes* (Routledge Cavendish 2007) and Bridget Anderson and Julia O'Connell Davidson, *Is Trafficking in Human Beings Demand Driven? A Multi-Country Pilot Study* (International Organization for Migration, December 2003).

89 Maddy Coy, Miranda Horvath and Liz Kelly, *'It's Just Like Going To The Supermarket': Men Buying Sex in East London* (Report for Safe Exit at Toynbee Hall, Child and Women's Abuse Study Unit, London Metropolitan University, 2007) and Anderson and O'Connell Davidson (n 88).

perpetuates women's subordination by determining and reinforcing, at both the individual and group level, the sexed/gendered roles and relationships in which such violence occurs.[90]

4. Obligations and Remedies

(a) Establishing the State's obligations in relation to violence against women

Violence against women may be perpetrated by both State and non-State actors. In the former case, such violence will be attributed to the State, who will be directly responsible for it under both European and international human rights law. Thus in *Aydin v Turkey* [1998][91], the rape and ill-treatment of Şükran Aydin by Turkish security forces was found to breach the ECHR's Article 3 prohibition of torture, inhuman and degrading treatment.[92] Human rights law does not just prohibit States from directly violating a protected right, as occurred in Aydin's case, it also imposes positive or 'due diligence' obligations on them to *respond* appropriately to such violence, whether or not it is attributable to the State.[93] Accordingly, in Nahide Opuz's case, Turkey's failure to respond to the violence that she and her mother had been subject to by a private actor (her husband/ex-husband) was found to violate the positive obligations inherent

90 For a discussion/overview of relevant European literature on this in relation to prostitution/sexual exploitation see Erika Schulze and others, *Sexual exploitation and prostitution and its impact on gender equality* (Policy Department C: Citizens' Rights and Constitutional Affairs, 2014).

91 *Aydin v Turkey* (1998) 25 EHRR 251.

92 ibid, paras 82-87.

93 Such obligations have been found to be inherent in protected rights and have also been justified by reference to States' obligations to secure rights within their jurisdictions and provide effective remedies to victims (Articles 1 and 13 ECHR), see for example *MC v Bulgaria* App no 39272/98 (ECtHR, 4 Dec 2003) para 149. The ECtHR has referred to, but not adopted, the terminology of 'due diligence' (used by the CEDAW Committee, the IACtHR/IACommHR and now the Istanbul Convention) when considering States' positive obligations (see, for example, *Opuz v Turkey* (n 1) para 77). As space precludes me from examining how these institutions/instruments differ in their definitions of and approaches to positive obligations/due diligence, these terms are used interchangeably here.

in the right to a family life, to be free from torture and in Opuz's mother's case, her right to life (per Arts 8, 3 2 ECHR).[94]

Broadly speaking, there are two categories or levels at which positive or due diligence obligations operate: the 'structural' or 'systemic' level (general obligations owed to all within the jurisdiction) and the individual level (specific obligations owed to identifiable individuals or groups).[95] In relation to the former category, States are required to put in place laws, processes and policies to address the 'root causes' of rights-violations, to prevent/deter them and, if/when they do occur, to identify perpetrators, hold them to account and make appropriate reparation to their victims.[96] Whilst a full consideration of States' positive or due diligence obligations in relation to violence against women is beyond the scope of this chapter,[97] certain key obligations under the ECHR are discussed here to establish the core obligations States owe women who are at risk of, or who have experienced, violence against women.

Firstly, States must criminalise, under appropriate labels, conduct (such as non-consensual sexual activity or forced labour) that falls within the ambit of a protected right (such as, in the case of rape, the right to be free from torture).[98] Secondly, criminal offences must be effectively investigated and, where appropriate, prosecuted.[99] States must also ensure that their

94 *Opuz v Turkey* (n 1), see also Ronagh J. A. McQuigg, 'Domestic Violence as a Human Rights Issue: Rumor v. Italy' (2015) 26(4) *European Journal of International Law* 1009.

95 Adapted from Rashida Manjoo, 'State Responsibility to act with Due Diligence in the Elimination of Violence against Women' (2013) 2(2) *International Human Rights Law Review* 240, 262. A similar distinction is drawn in Clare McGlynn, 'Rape, Torture and the European Convention on Human Rights' (2009) 58(3) *International & Comparative Law Quarterly* 565, 592-3.

96 Manjoo, 'State Responsibility to act with Due Diligence in the Elimination of Violence against Women' (n 95) 262-4.

97 See ibid, Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European law* (CUP 2017), Chapter 8 and the references at n 4 on ILO standards instead.

98 *MC v Bulgaria* (n 93), para 166. In relation to forced labour see *Siliadin v France* App no 73316/01 (ECtHR, 26 July 2005) and *CN v UK* App no 4239/08 (ECtHR, 13 November 2012).

99 *MC v Bulgaria* (n 93), paras 166-185.

judicial systems are functioning, 'responsive' and independent.[100] Such systems should be able to impose and enforce proportionate sanctions on perpetrators which are capable of deterring them (and others) from engaging in further acts of violence.[101] Positive obligations do not just arise in relation to a State's criminal justice system. States are also required to develop a range of legal frameworks to secure Convention rights. Such frameworks include effective child protection procedures[102] and robust employment laws.[103] Importantly for this chapter and thesis (and as will be discussed in the following section and Chapter 3) States' immigration rules should offer migrants 'practical and effective' protection against violence, trafficking and exploitation.[104]

In addition to these structural or systemic obligations, States are also required to offer individual victims (or potential victims) of violence 'effective measures of prevention, protection, punishment and reparation'.[105] Following *Osman v UK* [1988][106] a State is required to take 'preventative operational measures' where it knows (or ought to know) that a particular individual faces a 'real and immediate risk' of harm.[107] 'Preventative operation measures' can take many forms. Whilst, for example, criminal investigations should be conducted promptly in all cases, where 'the possibility of removing the individual from the harmful situation is available' such investigations must be undertaken 'as a matter of urgency' to enable this.[108] As with other positive obligations, such measures are not limited to those available to criminal

100 *Opuz v Turkey* (n 1), paras 150, 200.

101 ibid, paras 150, 169.

102 *Z and others v UK* App no 29392/95 (ECtHR GC, 10 May 2001), para 73-74.

103 And regulatory agencies to oversee and enforce them, see Stoyanova (n 97), Chapter 8.7.

104 *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 Jan 2010), paras 292-3.

105 Manjoo, 'State Responsibility to act with Due Diligence in the Elimination of Violence against Women' (n 95), 254.

106 *Osman v UK* App no 87/1997/871/1083 (ECtHR, 28 Oct 1988).

107 ibid, para 116.

108 *Rantsev v Cyprus and Russia* (n 104), para 288.

justice agencies and may include, for example, public law procedures to remove a child from the 'care' of an abusive parent.[109] Whilst it is not discussed in these terms by the ECtHR, protection from removal or *refoulement* can be characterised as a 'preventative operational measure'. Whether or not the harm feared is anticipated to materialise in the State's own jurisdiction or another (the country of return), its obligation to the relevant individual is triggered in comparable circumstances: where she/he faces a 'real and immediate risk'[110] or a 'real risk'[111] of serious harm (contrary to Arts 2 or 3 ECHR), or the 'flagrant breach'[112] of another protected right.[113] It should be noted at this juncture that an individual may be protected from removal, but not, under the ECHR *alone,* be granted a migration status in their country of residence.[114] The potential consequences of this for those individuals concerned are discussed further in Chapter 3.

The positive/due diligence obligations outlined briefly above should protect women from violence and ensure that when it does occur, that those responsible for it are identified and held to account. Where States fail to discharge these obligations, the victims of violence are entitled to an effective remedy for this failure under Article 13 of the ECHR. This right is broader than the right to, for example, have the criminal conduct of a perpetrator of domestic violence investigated by the police (a right inherent in certain protected rights, including Article 3 ECHR). It requires an investigation of the States' failure to conduct such an investigation (a

109 *Z and others v UK* (n 102), para 73.

110 *Osman v UK* (n 106), para 116.

111 *MSS v Belgium and Greece* App no 30696/09 (ECtHR, 21 Jan 2011).

112 *EM (Lebanon) v Secretary of State For The Home Department* [2008] UKHL 64, [2009] 1 All ER 559.

113 It seems likely that States would have to take 'positive operational measures' to prevent the breach of Convention rights before the 'flagrant breach' test (which arises in relation to removal cases) is reached. The jurisprudence on this point is, however, unclear.

114 *Hayaati Ahmed Ali v the Netherlands* App no 26494/09 (ECtHR, 24 Jan 2012), para 19, and as did not occur in *Siliadin v France* (n 98). How positive obligations in conjunction with the requirements imposed on States by the 'regimes of exception' may yield a migration status is explored in Part 2.

harm that is linked to, but separate from, the original violation) and to hold those responsible for that failure to account.[115] Şükran Aydin, for example, argued that Turkey had also breached her Article 3 rights by failing to properly investigate her detention and torture, and by subjecting her to repeated virginity tests as part of that failed investigation.[116] Rather than considering this complaint separately under Article 3, the Court found that the whole investigation was ineffective, thereby breaching Aydin's Article 13 rights.[117] To be effective, a remedy must be capable of enforcing the substance of a protected right by granting the person who seeks to access it appropriate relief.[118] The right to a remedy may also require a State to pay compensation to the victim (for pecuniary and non-pecuniary damage).[119] Article 13 does not require States to provide victims with any *specific* remedy, however. In relation to immigration matters, the ECtHR has declined to find that to be effective, a remedy should prevent a migrant from being removed from a particular jurisdiction (where that removal does not expose the individual to a risk of harm and where no other relevant human rights instruments are involved/engaged).[120] Instead, it is sufficient if the person concerned is able to challenge the relevant immigration decision through an independent and impartial procedure which has the ability to examine the situation.[121] Article 13 may, however, protect from removal in situations where removing the victim of violence would prevent her from taking

115 Stoyanova (n 97), 412.

116 *Aydin v Turkey* (n 91), paras 76, 88 and 107.

117 ibid paras 103-109. Whilst the Court's evaluation of the investigation was thorough, it failed to recognise that the virginity tests were themselves violence and discrimination against women that breached the applicants Art 3 rights *in addition* to those protected by Art 13.

118 ibid, 107.

119 Art 41 ECHR allows the Court to order a State to afford 'just satisfaction' 'if necessary' to the injured party where a Convention right(s) has been violated for which only partial reparation can be made, see Luzius Wildhaber, 'Article 41 of the European Convention on Human Rights: Just Satisfaction Under the European Convention on Human Rights' (2003) 3(1) *Baltic Yearbook of International Law* 1.

120 *De Souza Ribeiro v France* App no 22689/07 (ECtHR CG, 13 Dec 2012), para 83. In this case the applicant's private and family life in the country of residence was at issue.

121 ibid, para 83.

part in criminal proceedings, as any such proceedings will only be effective if the victim is 'involved in the procedure to the extent necessary to safeguard their legitimate interests.'[122]

Finally, positive obligations must be discharged on a non-discriminatory basis. States' *response* to violence against women must not itself discriminate, directly or indirectly, intentionally or otherwise. Significantly, the ECtHR has now overcome the unwillingness it demonstrated in *Opuz* [2009] to find intentional sex discrimination in States' (lack of) response to certain forms of violence against women. In *Eremia v Republic of Moldova* [2013][123] for example, it concluded that the failure to protect the applicant and her son in effect condoned the violence she experienced and reflected a discriminatory attitude towards women.[124] As occurred in *Opuz* [2009], the ECtHR's non-discrimination jurisprudence was drawn on to find that the failure to respond to the (discriminatory, per the above) violence was itself discrimination (contrary to Article 14, per the framework set out in Chapter 1) thereby breaching Eremia's and her son's right to the equal protection of the law.[125]

(b) Establishing the State's Obligations to Migrant Women

Chapter 1 argued that the State should engage in migration status reform to remedy its disadvantageous and discriminatory treatment of women, whether or not that treatment was subject to legal challenge. As dependency on another is a key source of migrant women's

122 *CN v UK* (n 98), para 62, see also *Chowdury and Others v Greece* App no 21884/15 (ECtHR, 30 March 2017), paras 116-128. Again (n 114), the impact that a 'regime of exception' can have on such positive obligations is explored in Part 2 with *Chowdury and Others* [2017] being specifically considered in Chapter 6.

123 *Eremia v Republic of Moldova* Application no 3564/11 (ECtHR, 28 May 2013).

124 ibid, para 89.

125 ibid, para 82-91. However, in *Talpis v Italy* App no 41237/14 (ECtHR, 2 March 2017) two judges voted against finding that the State's failure to provide sufficient protection to victim of domestic violence breached Article 14, see further Lourdes Peroni, 'Talpis v. Italy: Elements to Show An Article 14 Violation in Domestic Violence Cases' (*Strasbourg Observers*, 19 April 2017) <https://strasbourgobservers.com/2017/04/19/talpis-v-italy-elements-to-show-an-article-14-violation-in-domestic-violence-cases/#more-3628> accessed 24 June 2019.

disadvantage, Chapter 1 argued for the abolition of all dependent migration statuses and that to achieve this, the partners of those who are British or settled here should be granted permanent residence (and not be subject to a 'probationary period'). The immigration rules impugned however, did not just discriminate against women, they also placed them at an increased risk of experiencing violence. As Raj and Silverman observe 'there is a hierarchy of immigrant status, and women's place in this hierarchy relates to their vulnerability to abuse'.[126] Following the preceding discussion, immigration rules that increase women's vulnerability to violence *may* be unlawful not just because they discriminate, but also because they breach States' 'structural' positive or due diligence obligations under the ECHR. In *Rantsev v Cyprus and Russia* [2010][127] the ECtHR was called on to consider these issues in the context of trafficking.

As was the case with domestic violence (and violence against women more broadly), trafficking was not explicitly prohibited by the ECHR. As it did in *Opuz* [2009] with domestic violence, the ECtHR in *Rantsev* [2010] ruled that trafficking nonetheless fell within the ECHR's scope.[128] Oxana Rantseva was a 21-year-old woman who travelled from Russia to Cyprus in 2001 and who died shortly after. Ms Rantseva's migration status was governed by Cyprus' 'artiste' visa scheme, a scheme which made her dependent on her employer and subjected her to several significant rights-restrictions.[129] In Ms Rantseva's case, these restrictions resulted in her being returned by the police, just hours before she died, to an employer she had sought to leave. The ECtHR held that the artiste visa regime violated the positive obligations of Article 4 ECHR (not, it is interesting to note, in conjunction with Article

126 Anita Raj and Jay Silverman, 'Violence Against Immigrant Women: The Roles of Culture, Context, and Legal Immigrant Status on Intimate Partner Violence' (2002) 8(3) *Violence Against Women* 367, 375.

127 *Rantsev v Cyprus and Russia* (n 104).

128 ibid, para 272-282. See further Jean Allain, 'Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery' (2010) 10(3) *Human Rights Law Review* 546. In contrast, trafficking is specifically prohibited by Art 5(3) CFREU.

129 *Rantsev v Cyprus and Russia* (n 104), 291-3.

14 ECHR) by not affording their holders sufficient protection against trafficking and exploitation.[130] In reaching this judgement, the ECtHR found that an obligation on an employer to notify the authorities if their employee leaves was 'a legitimate measure to allow the authorities to monitor the compliance of immigrants…'.[131] However, requiring employers to provide financial guarantees for their employees, and requiring employees to sign separate bonds were described by the Court as 'of equal concern'.[132]

The Court's analysis in *Rantsev* [2010] can be relied on to provide further support to my migration status reform arguments. The dependency imposed by the domestic worker route, for example, appears comparable to that which the ECtHR impugned in *Rantsev* [2010]. Whilst the Court accepted that rules which imposed *some* dependency on an employer do not, in and of themselves, violate the positive obligations inherent in Article 4 (as demonstrated by its finding in relation to employers 'informing' on their employees) a package of restrictions which both directly and practically enforced dependency was found to.[133] That an employer has to notify the State of their employee's departure may not, therefore, be problematic if that employee has a non-temporary and/or renewable migration status and is able to change both employer and employment type. It may be problematic, and may violate Article 4, if the employee does not have these rights and, therefore, is exposed to a greater risk of experiencing violence.

It will be recalled from Chapter 1 that changes to the immigration rules in 2016 gave domestic workers the theoretical ability to change employers, one that was not accessible in practice because it was not accompanied by the ability to renew or extend leave (other than in

130 ibid, 292-3.

131 ibid, 292.

132 ibid, 292.

133 ibid, 292-3.

cases of trafficking/slavery). The 2016 change followed a Government-commissioned, independent review of the post-2012 ODW scheme (in which domestic workers were legally tied to their employers). This review recommended that, *as a minimum* to prevent 'abuse', domestic workers should both be given the right to change employers *and* renew their visas annually, for a period of up to two-and-a-half years; the right to change employer only being meaningful if *all* ODWs can extend their leave to do so *without* having to demonstrate having experienced abuse or some other form of harm.[134] In failing, and continuing to fail, to fully implement this recommendation, the UK is providing domestic workers with *less* protection from violence than it has repeatedly been advised to provide.[135] The post-2016 rules may, therefore, not just perpetuate domestic worker's dependency on their employer through the precarity and rights-restrictions they impose, they may also breach the positive obligations inherent in Articles 3 and 4 (in relation to violence against women, trafficking and slavery). Such a conclusion provides further support to my argument for migration status reform that gives domestic workers a non-temporary, renewable, rights-bestowing migration status.

Conclusion

This chapter has examined two forms of discrimination against women and the different, but complementary and connected, legal regimes that have developed a response to them. The first form of discrimination is violence against women itself. I drew on legal regimes specifically concerned with sex discrimination and violence, including CEDAW and the Istanbul Convention, to argue that 'violence against women' is interpersonal and discriminatory

134 James Ewins QC, *Independent Review of the Overseas Domestic Workers Visa* (17 December 2015), paras 65-87, 90, 99-106.

135 The full implementation of the Ewins review has also been recommended by the monitoring body of the Council of Europe's Trafficking Convention, Group of Experts on Action Against Trafficking in Human Beings (GRETA), *Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom, Second Evaluation Round* (GRETA(2016)21 7 October 2016).

violence, such violence arising from and/or perpetuating women's subordination (VAW = interpersonal violence + discrimination ↔ domination/subordination). Two particular types of violence, domestic violence and trafficking, were examined using this account and found to be forms of violence against women, for the purposes of this thesis at least.

In addition to establishing which forms of violence this thesis is concerned with, this chapter has also delineated some of the positive, or due diligence obligations, States have to respond to it. These obligations include ensuring that relevant laws and policies secure rights within their jurisdiction, in addition to offering meaningful protection and support to women who have experienced, or are at risk of experiencing, violence. In charting these obligations, I highlighted and discussed another form of discrimination, States' failure to respond to violence against women in accordance with these obligations.

Having outlined States' structural positive obligations to ensure that their immigration laws do not expose women to violence and exploitation, and to offer meaningful protection from it, I can now proceed, in Chapter 3, to explore the impact of rules which do not (as I will show) offer such protection. The obligations owed by the State to individuals affected by this failure are then established.

CHAPTER 3: UNDERSTANDING AND RESPONDING TO COMPOUNDED DISADVANTAGE

Introduction

In Chapter 1, I argued that migrant women are disadvantaged by immigration law's distribution of migration statuses and that these disadvantageous practices are, sometimes at least, unlawful discrimination. In Chapter 2, I argued that women are at risk of, and experience, particular forms of interpersonal and discriminatory violence: violence against women, such violence arising from and contributing to, women's subordination. In this chapter, I argue that migration law's treatment of women actively compounds the disadvantage that arises from such violence.[1] 'Compounded disadvantage' is the term I use, therefore, to capture a range of distinctive scenarios in which a woman's migration status interacts with an experience of violence in particular, injurious ways, to produce a qualitatively different experience of both.[2]

In the first part of this chapter I justify my approach to compounded disadvantage, one that is grounded in Martha Fineman's theorising on vulnerability. Whilst much of the scholarship on migrant women's experiences of violence remains rooted in intersectional approaches to discrimination, Fineman's vulnerability thesis is relied on in this chapter to reveal the role that the State plays in first producing, and then compounding, migrant women's disadvantage. I then explain the circumstances which give rise to compounded disadvantage

1 A compound is a combination or mixture of elements; to compound something is to increase or augment it, per 'compound' in John Simpson and Edmund Weiner (eds), *Oxford English Dictionary* (2nd edn, OUP 1989).

2 In advancing this argument I am not asserting the primacy of these experiences over others, as women's experiences of both migration status and violence are influenced by a range of factors. A focus on compounded disadvantage, however, reveals how these two phenomena interact, within a range of intersecting and mutually reinforcing inequalities, to facilitate the exploration of one (admittedly partial but nevertheless significant) aspect of many women's lives.

and proceed to trace its features, drawing on empirical research that reveals and explores women's lived experiences of violence and state power to do so. Whilst migration status and violence may interact to produce a constellation of different experiences, what is shared and what are, therefore, the defining features of compounded disadvantage are control, exclusion, a perilous migration status and an intensified experience of violence.

Having demonstrated that the State (and, as we shall see in Chapter 4, the EU) is responsible for creating and perpetuating the wrong of compounded disadvantage, I contend that it has a duty to remedy it. Drawing on the arguments made in the two preceding chapters, that the State is obliged to first, remedy its disadvantageous/discriminatory treatment of migrant women and second, to respond to violence against women with due diligence, I explore what would be required to respond to, or remedy, compounded disadvantage. Establishing both the nature of compounded disadvantage, and what is or may be reparative of it, provides a legal and ethical foundation for Part 2's evaluation of the 'regimes of exception', the legal rules which currently determine victims' migration statuses.

1. The Wrong: Compounding Disadvantage

(a) Anchoring Compounded Disadvantage: Intersectionality or Vulnerability?

The scholarship on migrant women's experiences of violence (including much of the empirical research this chapter draws on) has been dominated by approaches that directly draw on, or are significantly influenced by, Kimberlé Crenshaw's intersectionality thesis.[3] Crenshaw developed the term 'intersectionality' to critique 'but for' conceptions of equality that 'condition us to think about subordination as disadvantage occurring along a single categorical

3 Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Therory and Antiracist Politics [1989]' in Katharine T Bartlett and Rosanne Kennedy (eds), *Feminist Legal Theory, Readings in Law and Gender* (Westview Press 1991).

axis'.[4] Such thinking, she contended 'erases Black women' by 'limiting inquiry to the experiences of otherwise-privileged members of the group'.[5] Thus, for example, Erica Burman and Khatidja Chantler's research on domestic violence explores the barriers that women seeking to leave abusive relationships face as a result of their presence at the intersection of a myriad of different structures of oppression, including immigration control, gender, race and class.[6]

Intersectional approaches to discrimination focus attention on one or more different identity grounds, such as sex and race. Identity grounds generally exist in two orders, the universal and the particular.[7] Sex is the universal order ground from which it is possible to classify people into particular cognate groups: men and women. Race is another universal order ground. Whilst migration status may be a universal order ground (with migrants and citizens being cognates) being 'subject to violence against women' is not.[8] Consequently, when Crenshaw critiques a provision in US immigration law that enables women who have experienced domestic violence in the US to receive a migration status (a 'regime of exception', like those considered in Part 2 of this thesis) she does so on the basis that, amongst other things,

4 ibid, 57.

5 ibid, 57.

6 Erica Burman and Khatidja Chantler, 'Domestic Violence and Minoritisation: Legal and Policy Barriers Facing Minoritized Women Leaving Violent Relationships' (2005) 28(1) *International Journal of Law and Psychiatry* 59. Similarly, Sundari Anitha's study of domestic violence and patriarchy highlights the intersection between immigration control and inequalities based on culture, gender, class and race whilst Aisha Gill and Kaveri Sharma argue that migrant women subject to violence face a 'quadruple whammy' of marginalisation as a result of their immigration status, gender, ethnicity and experience of abuse. Sundari Anitha, 'Legislating Gender Inequalities' (2011) 17(10) *Violence Against Women* 1260 and Aisha Gill and Kaveri Sharma, 'Response and Responsibility: Domestic Violence and Marriage Migration in The UK' in Sarah van Walsum and Thomas Spijkerboer (eds), *Women and Immigration Law: New Variations on Classical Feminist Themes* (Routledge Cavendish 2007).

7 Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015), 29-30.

8 As discussed in Chapter 1, not all identity grounds are protected by law. See also Meghan Campbell, 'CEDAW and Women's Intersecting Identities: A Pioneering New Apporach to Intersectional Discrimination' (2015) 11(2) *Revista Direito Gv, São Paulo* 479, 481-484 for a discussion of the challenges of bringing discrimination law claims based on more than one ground and/or on an unrecognised/unprotected ground.

'women of color' may find the requirements of the rule harder to meet.[9] Whilst intersectional approaches to discrimination improve upon those which focus only on a single identity ground, one of their weaknesses is that they, like Crenshaw's analysis of the US' domestic violence rule, remain grounds-based.[10] Such accounts risk under-examining, or omitting from analysis, a range of sources of disadvantage, including being unable to communicate in the language of your country of residence, suffering from ill-health and/or having caring responsibilities.[11] Similarly, while migration status and nationality *may* both be universal order grounds, a grounds-based approach may not be able to reveal and explore the different types of disadvantage that accrues to the holders of different migration statuses.

An alternative approach to intersectionality has attempted to resolve such 'gaps' by drawing on a broader range of different personal characteristics to try to reflect particular intersectional experiences.[12] In addition to being unsatisfactory because of their complexity and specificity (with different explanations for disadvantage referring to different and ever-expanding lists of personal characteristics), such accounts also assume homogeneity within the subgroup. Such approaches, Fredman argues, 'fall into the very trap that intersectionality has aimed to avoid, namely the assumption that all members of the sub-group are the same and that identity is fixed and static.'[13] Anchoring my account of compounded disadvantage in Fineman's theorising on vulnerability enables me to highlight and encompass a range of

9 Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43(6) *Stanford Law Review* 1241, 1248.

10 Crenshaw focuses on the universal order grounds of sex and race, ibid, 1249.

11 Joanne Conaghan's detailed critique of intersectionality makes this argument re socio-disadvantage and a range of and other inequalities which are excluded from grounds-based approaches to discrimination, Joanne Conaghan, 'Intersectionality and the Feminist Project in Law' in Davina Cooper (ed), *Law, Power and the Politics of Subjectivity: Intersectionality and Beyond* (Routledge Cavendish 2008).

12 Sandra Fredman, *Intersectional Discrimination in EU Gender Equality and Non-Discrimination law* (Luxembourg: Publications Office of the European Union, May 2016), 31-38. See also the references cited in n 6 which support Fredman's analysis in the context of migration status and violence against women.

13 ibid, 31

different inequalities without reifying the characteristics that may be linked to them, or resorting to the creation of complex sub-groups. It also complements more recent intersectional approaches to disadvantage which 'excavate and expose multi-layered structures of power and domination'.[14] What is additionally revealing about a vulnerability analysis is, however, the role that the State (and, as we shall see, the EU) *plays in first producing and then compounding* migrant women's disadvantage.

Martha Fineman's theorising on inequality is based on a 'descriptive account of the human condition as one of universal and continuous vulnerability.[15] Embodiment, as Fineman has observed, 'carries with it the ever-present possibility of harm, injury, and misfortune from mildly adverse to catastrophically devastating events, whether accidental, intentional, or otherwise.'[16] There are two 'relevant forms of individual difference' in Fineman's vulnerability approach, 'those that arise because we are *embodied* beings and those that arise because we are social beings *embedded* in social institutions and relationships.'[17] An individual woman's vulnerability to, and experience of violence, for example, may be shaped by a range of factors, including those that are personal to her (her age and health for example) and those that are linked to her place in society (whether or not she is employed, has access to health care or safe accommodation etc.). In contrast to this universal approach to vulnerability, the jurisprudence

14 Sumi Cho, Kimberlé Crenshaw and Leslie McCall, 'Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis' (2013) 38(4) *Signs* 785, 804. The authors give two examples of such approaches 'structural intersectionality' (which emphasises political and structural inequalities, rather than 'categories, identities and subjectivities') and 'political intersectionality' (which involves 'a dual concern for resisting the systematic forces that significantly shape the differential life changes of intersectionality's subjects and for reshaping modes of resistance beyond allegedly universal, single axis approaches'), 797, 800. For an account that adopts both of these approaches see Jennifer Jihye Chun, George Lipsitz and Young Shin, 'Intersectionality as a Social Movement Strategy: Asian Immigrant Women Advocates' (2013) 38(4) *Signs* 917.

15 Martha Albertson Fineman, 'Vulnerability and Inevitable Inequality' (2017) 4(3) *Oslo Law Review* 133, 134.

16 Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) *Yale Journal of Law and Feminism* 1, 9.

17 Fineman, 'Vulnerability and Inevitable Inequality' (n 15), 343.

of, amongst others, the ECtHR, has located vulnerability in certain groups or individuals, including the members of particular racial or ethnic groups,[18] and those who have certain medical conditions.[19] Whilst Fineman's approach disproves the idea that most people are 'un-vulnerable', autonomous and self-sufficient (and, therefore, not requiring of the assistance of the State)[20] the latter, as Lourdes Peroni observes, 'carries inherent stigmatising risks'.[21] Members of the 'vulnerable' group are 'perpetual, deprived victims' their vulnerability arising from something specific and intrinsic to them, rather than from structural or other inequalities.[22]

The approach to vulnerability adopted by the Explanatory Report to the Istanbul Convention (one of the regional responses to violence against women introduced in the preceding chapter) straddles these competing accounts, alluding to but never quite identifying

18 *Oršuš and Others v Croatia,* App no 15766/03 (ECtHR, GC, 16 March 2010).

19 *Kiyutin v Russia* App no 2700/10 (ECtHR, 10 March 2011). For a detailed discussion of the Court's jurisprudence on this point see Oddný Mjöll Arnardóttir, 'Vulnerability under Article 14 of the European Convention on Human Rights' 4(3) *Oslo Law Review* 150. Arnardóttir concludes his study by stating at 169: 'the Court's application of the concept of vulnerability is diverse and multifaceted. It seems sometimes relational in character but sometimes essentialist; it sometimes focuses on group identities, but sometimes on otherwise precarious situations; and it sometimes enables a reaction to intersectional situations, while sometimes being used outside that context.'

20 Martha Albertson Fineman, ''Elderly'' as vulnerable: Rethinking the nature of individual and societal responsibility' (2012) 20(2) *The Elder Law Journal* 101, 117.

21 Lourdes Peroni, 'Violence Against Migrant Women: The Istanbul Convention Through a Postcolonial Feminist Lens' (2016) 24(1) *Feminist Legal Studies* 49, 54-55,

22 ibid 44-45 and Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11(4) *International Journal of Constitutional Law* 1056 1064, 1073-1074. Whilst Peroni and Timmer refer to vulnerability as 'relational', influenced by 'broader social and historical contexts' I prefer the term 'structural' as it roots theorising on vulnerability within broader debates on equality.

what I contend is a key source of migrant women's vulnerability: their migration status. The Explanatory Report states that perpetrators of violence 'often choose to target' migrant women:

> because they know that they are less likely to be able to defend themselves, or seek prosecution of the perpetrator and other forms of reparation, because of their situation.[23]

Peroni argues that this statement defines migrant women 'exclusively by their intrinsic diminished capacity to protect themselves', situating this characterisation within a broader, post-colonial critique that highlights the Istanbul Convention's rejection/reinvention of particularised gendered and racial stereotypes.[24] Whilst compelling, this critique doesn't fully engage with the Report's location of migrant women's vulnerability in 'their situation.' It is migration status and the control it accords perpetrators that militates against women 'defending themselves'. Migration status is also the reason why migrant women are 'particularly vulnerable to gender-based violence' and face 'difficulties and structural barriers in overcoming violence'.[25] That a woman's migration status may be determinative of her 'situation' is acknowledged later in the Report which states:

> fear of deportation or loss of residence status is a very powerful tool used by perpetrators to prevent victims of violence against women and domestic violence from seeking help from authorities … As a result many victims whose residence status is dependent on that of the perpetrator stay in relationships where they are forced to endure situations of abuse and violence for long periods of time.[26]

What is not acknowledged, however, is that it is the Convention's *Parties,* States (and potentially soon, as well shall see, the EU), that have created and shaped this 'very powerful tool'. Migration status produces vulnerability, but this vulnerability differs from other forms

23 Council of Europe, *Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence against women and Domestic Violence (CETS No. 210)* (2011), para 87.

24 Peroni (n 21), 63.

25 Council of Europe (n 23), paras 301 and 298.

26 ibid, para 301.

of embodied or embedded vulnerability that Fineman discusses because, as the ECtHR itself has noted, *it is one that is legally constructed and imposed*.[27] A migrant is vulnerable because her legal status disadvantages her, forcing her to be dependent (on a partner or employer), restricting her rights (to work or access welfare benefits) and rendering her position in her country of residence precarious (she may lose her status for a variety of reasons outside of her control). One of the consequences of this vulnerability is, as was highlighted in Chapter 1, an increased risk of experiencing violence (or other rights-violations) where a woman's migration status makes her dependent on another, such as a partner or employer. Given that certain forms of violence against women are commonly perpetrated by intimate partners and in the workplace, the role of the State in amplifying vulnerability to violence, is consequently, revealed by my account.

The 'critical, yet incomplete, solution to our vulnerability' is, according to Fineman, resilience.[28] Individuals may have recourse to a number of different types of 'assets' that provide them with resilience to various forms of harm or misfortune.[29] A family may be an asset, as may be a functioning criminal justice system, a good job, a social network or religious faith. Fineman argues that many of the assets that provide us with resilience can only exist through State action.[30] Such assets can be mapped onto States' positive/due diligence obligations to people within their jurisdiction generally, and victims of violence specifically. [31]

27 *MSS v Belgium and Greece* App no 30696/09 (ECtHR, 21 Jan 2011), para 233 and *Chowdury and Others v Greece* App no 21884/15 (ECtHR, 30 March 2017) paras 95-6. See also Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/60.

28 Fineman, 'Vulnerability and Inevitable Inequality' (n 15), 146.

29 Fineman argues that there are at least five different types of assets that societal organisations/institutions can provide: physical, human, social, ecological or environmental and existential, Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2013) *Emory University School of Law, Public Law & Legal Theory Research Paper Series, Research Paper No 10-130,* 31-39.

30 ibid, 31.

31 In relation to domestic violence see *Talpis v Italy* App no 41237/14 (ECtHR, 2 March 2017), para 115 in which the ECtHR found that Italy should have taken the 'psychological, physical and material situation in which the applicant found herself and to assess the situation accordingly, providing her with

Whilst States may create or amplify vulnerability to different forms of harm, the responsive State should (ethically and legally) take positive action to counter and ameliorate it.[32] A recognition of our shared vulnerability gives rise, therefore, to 'a duty for the state to actively assume broad societal responsibility in regard to ensuring equality for citizens and others to whom it owes some obligation'.[33] States may discharge this responsibility by acting directly, by providing a funded health system, for example, or indirectly, by granting status to certain religious institutions and ensuing that they act in accordance with particular values, such as non-discrimination.[34] What is important for the purposes of this chapter and Part 2's evaluation of the regimes of exception, is that in arguing that migrant women who experience violence are subject to a compounded disadvantage that arises from their vulnerability (that which is universal and that which is constructed and imposed), I am highlighting the role of the State in producing disadvantage and contending that it has a duty (the content of which I discuss later) to remedy and ameliorate it.

(b) The Interaction between Violence and Migration Status

As discussed in Chapter 2, women are at risk of and experience a particular type of violence, violence against women. This violence is interpersonal and discriminatory, it arises from and enables women's gendered subordination. Compounded disadvantage arises when migration status and an experience of this violence interact. This section considers *how* this interaction

appropriate support.' The State's failure to provide that support was found to breach its positive obligations under Arts 2, 3 and 14 ECHR.

32 Fineman, 'The Vulnerable Subject and the Responsive State' (n 29).

33 ibid, 10. Fineman states that certain non-citizens may be counted amongst those to whom the State has a duty.

34 ibid, 36.

occurs. The section that follows explains *why* this interaction produces compounded disadvantage and what an experience of this disadvantage entails.

Compounded disadvantage *always* arises where a woman who experiences violence is *dependent for her migration status on the person who is violent towards her*. Compounded disadvantage is, therefore, experienced by a woman on a partner visa whose husband perpetrates domestic violence against her and a domestic worker or skilled labour migrant whose employer sexually harasses her. The nature and extent of the disadvantage experienced will, of course, vary depending on a range of factors including the severity of that violence and the type of migration status held (as discussed in the sections that follow). The kind of disadvantage experienced by a domestic worker may be of a different order to that experienced by a skilled labour migrant. In the latter case, the worker may have access to a range of assets that provide resilience, including assistance from her union or the ability to transfer or change employer, which a domestic worker does not. The disadvantage experienced by a domestic worker, may therefore, be more severe than that experienced by a labour migrant who has more advantageous conditions of employment and a less restrictive migration status.

Compounded disadvantage *may or may not* arise when a migrant woman who experiences violence against women is *not dependent* on the person who is violent towards her for her migration status. A woman who is in the UK as a student and who experiences domestic violence from her partner may experience compounded disadvantage if, for example, her studies are affected by it, as her migration status depends on her (verified) attendance and course progression.[35] The impact of the violence experienced may also be more severe if the restrictions that pertain to her migration status exclude her from those sources of support that

35 See, for example, *SSHD and OB* [2016] UKAITUR IA277252014.

would assist and promote her recovery. Compounded disadvantage may not arise, however, where there is sufficient distance between the experience of violence and the migration status held, for example, where sexual harassment from a neighbour does not interfere with a labour migrant's employment because she is able to change her accommodation without difficulty.

Compounded disadvantage will not arise if there is *no interaction* between a woman's migration status and her experience of violence (although women in this situation will still be disadvantaged by their position in the status-based hierarchy immigration law creates). This may be the case where, for example, the woman concerned has either citizenship of, or permanent residence in the UK. Whilst citizenship and permanent or settled status are not synonymous, they do carry with them similar rights, so that little or indeed no disadvantage may be experienced by holders of this migration status. Indeed, a woman who is entitled to permanent residence in more than one country (because, for example, she is a dual national) may have access to a greater range of assets that provide resilience to violence than a woman who does not, as the former may have recourse to assets, both those provided by each State and those that come from other sources, in more than one jurisdiction.

Having set out the different ways in which migration status and an experience of violence may or may not interact, the following section examines *why* this interaction produces disadvantage and identifies its distinguishing features.

(c) Exploring the Facets of Compounded Disadvantage

An experience of interpersonal, discriminatory violence which either makes or reinforces its victim's gendered subordination both transforms and is itself transformed by, the disadvantage produced by migration status. In the paragraphs that follow, I draw once again on Bridget

Anderson's work on the State's role in 'fashioning' precarious workers,[36] Chapter 1's analysis of migration status and empirical evidence to argue that compounded disadvantage involves the *dependency* created by particular migration statuses being transformed into a source of *control*, *rights-restriction* developing into *exclusion* and a *precarious migration status* becoming one that is *imperilled*. Holding (or not holding) a particular migration status may not only increase a woman's vulnerability to violence, it may also interact with any violence that is experienced to increase its severity. In making and substantiating these claims, I am not making assumptions about 'migrant women' and their 'experiences'. Rather, I draw on the legal analysis engaged in in Chapter 1 to highlight and organise the findings of a range of empirical studies that focus on and explore migrant women's experiences of violence. This is not, of course, the only way such research might be drawn on, or presented. It does, however, highlight the value of bringing insights gained from legal analysis to bear on empirical research, and to root Part 2's analysis of the 'regimes of exception' in women's lived experiences of both violence and migration status.

In the four sections that follow, I unpack the different facets of compounded disadvantage: control, rights-restriction, exclusion and an intensified experience of violence. Whilst these facets are explored separately, they are inter-related and mutually reinforcing. The analysis engaged in is based on the first scenario set out in the preceding section, where compounded disadvantage *arises because the person on whom a woman is dependent for her migration status is the person who is violent towards her*. As explained, however, compounded disadvantage can and does arise in circumstances where the person responsible for the violence is not the person on whom the woman is dependent for her migration status, but where the two

36 Bridget Anderson, 'Migration, Immigration Controls and the Fashioning of Precarious Workers' (2010) 24(2) *Work, Employment & Society* 300.

nevertheless interact (because the violence interferes with a woman's work or studies, for example, thus imperilling the migration status predicated on that activity).

From Dependency to Control

In Chapter 1, I argued that placing a migrant spouse or domestic worker in a position of dependency on another for her migration status was particularly disadvantageous because migration status determines not only the right to enter and remain, but an array of other rights. As the Home Office's own guidance on coercive control recognises, 'dependency on' becomes 'control of' when the person on whom a woman depends for her migration status is the person who is violent towards her.[37] This control may be exercised in several different ways. A violent husband may, for example, refuse to support his wife's immigration application even though their relationship is 'subsisting'.[38] He may seek to have her migration status curtailed, by informing the Home Office that their relationship has ended (even if he does not inform her of this or take any action to separate from her or end their relationship).[39] Similarly, the employer of a domestic worker who threatens her with destitution or loss of status should she demand to be paid can potentially, make good these threats.

Migration status is not the only 'thing' over which perpetrators of violence may exercise control. Perpetrators may also use the rights-restrictions/exclusions that migrant women are subject to as a source of control. Sundari Anitha, for example, notes that perpetrators are often

37 Home Office, *Controlling or Coercive Behaviour in an Intimate or Family Relationship: Statutory Guidance Framework* (December 2015), 7. See also Rebecca Gail Dudley, 'Domestic Abuse and Women with 'No Recourse to Public Funds': the State's Role in Shaping and Reinforcing Coercive Control' (2017) 6 *Families, Relationships And Societies* 201.

38 *SSHD and OB* (n 35).

39 See the account given by a woman in Nisan Z Kesete, Danielle Thom and Heather Harvey, *Settling In* (Eaves, 2015), 81. See also *Balakoohi, R (on the application of) v Secretary of State for the Home Department* [2012] EWHC 1439 (Admin) and *R (on the application of AT) v Secretary of State for the Home Department* [2017] EWHC 2589 (Admin), [2018] Imm AR 483 discussed further below.

aware of the exclusionary practices of local authorities, who deny women access to their services because of their migration status (discussed below), using these to dominate women and prevent them from leaving the relationship.[40] Where a woman is dependent on her partner or employer to communicate with others (because she does not speak English) as well as for knowledge of her 'rights', including to protection from violence (as discussed in Chapter 2), 'dependency on' may become 'control of' that communication and knowledge, as perpetrators 'impose isolation, thereby cutting women off from any sources of support…'.[41]

One of *the* defining features of compounded disadvantage is, therefore, the control that perpetrators of violence have over the women they victimise. The most significant element of this is control over migration status, which effectively allows perpetrators of violence to harness the State's coercive migration controls. By manipulating migration status, perpetrators of violence may render their victims vulnerable to destitution (as will be discussed in the next section). In extremis, deprivation of migration status renders victims vulnerable to detention and even deportation. The legal barriers to, or in the case of domestic workers, the impossibility of, obtaining a different and crucially, independent and renewable migration status makes it

40 Sundari Anitha, 'No Recourse, No Support: State Policy and Practice towards South Asian Women Facing Domestic Violence in the UK' (2010) 40(2) *British Journal of Social Work* 462, 471. See also Nughmana Mirza, 'The UK government's conflicting agendas and 'harmful' immigration policies: Shaping South Asian women's experiences of abuse and 'exit'' (2016) 36(4) *Critical Social Policy* 592.

41 Anitha, 'Legislating Gender Inequalities' (n 6), 172.

difficult (or again impossible) for victims to extricate themselves from this control.[42] The impact that such control has on a woman's experience of violence is considered further below.

From Rights-Restriction to Exclusion

As discussed in Chapter 1, many women hold migration statuses that significantly restrict their rights. When women with these restrictive statuses experience violence they are, because of them, excluded from receiving those assets which, following Fineman's terminology and vulnerability thesis, provide resilience to violence, including the means to escape and recover from it.

In the UK, assets that provide resilience to violence may be delivered directly by the State, through the National Health Service (NHS) or justice system, or indirectly, through specialist organisations, such as women's refuges. A British or resident woman made homeless by domestic violence may, for example, be placed in emergency accommodation directly by her local authority. Alternatively, she may secure her own accommodation or go into a women's refuge. In the latter case, the refuge may be an independent charity, but accessing its services (as well as potentially accessing accommodation provided in the private or not-for-profit sectors) will usually depend on being eligible for either welfare benefits or support from the local authority. Therefore, assets, such as welfare benefits (housing benefit, income support, job-seeker's allowance and working tax credits or universal credit) provide women subject to violence with the means to separate from and live independently of a perpetrator of violence. If a migrant woman is in the UK with some form of valid permission to remain, then that status

42 Unless the victim concerned is one of the few who has access to a 'regime of exception', discussed in Part 2. The restrictions on domestic workers can be found in Immigration Rules part 5: working in the UK.

will usually be subject to the condition that she has 'no recourse to public funds'.[43] A current migration status, and the ability to secure further permission to remain, will be adversely affected by a claim for a public fund made by someone subject to the 'no recourse' prohibition.[44] Whilst all migrants subject to these restrictions may be disadvantaged by them, women subject to violence have that disadvantage compounded by restrictions which exclude them from those assets, such as welfare benefits, which provide resilience to it. These 'no recourse' rules also apply to child benefit and child tax credit (where the parent with care is subject to the condition) and benefits such as disability living allowance/personal independence payments, so women with children and those with disabilities may be particularly affected by them.

Welfare benefits are not the only 'assets' from which migrant women are excluded. If a woman is made homeless as a consequence of domestic violence, then the 'no recourse' rules exclude her from receiving local authority housing or homelessness assistance.[45] Such exclusions, in conjunction with those already described, operate to bar migrant women from receiving support from specialist organisations, such as women's refuges, as well as from other

43 Assuming that the woman in question does not have ILR. Section 115 of the Immigration and Asylum Act 1999 states that a person will have 'no recourse to public funds' if they are 'subject to immigration control'. A person is 'subject to immigration control' if they have leave to enter or remain in the UK subject to the condition that they have no recourse; if they have leave to enter or remain that is subject to a maintenance undertaking; or, if they have no leave to remain when they are required to (for example, they have overstayed their leave or entered the UK illegally). A full list of 'public funds' is available under section 155 of the Immigration and Asylum Act 1999 or under paragraph 6 of the Immigration Rules. There are some very limited exceptions to the 'no recourse' rules, such as where the prospective applicant is the national of a country which has a reciprocal agreement with the UK or where the prospective applicant is living with someone who does have recourse, in which case they can jointly claim working tax and child tax credits (where appropriate). Of course, in the latter case, the ability to claim such benefits ends if the relationship on which the joint claim is based breaks down, even if domestic violence was the cause of the relationship break down.

44 Under the Immigration Rules part 9: grounds for refusal, an application for leave to remain or an application for a variation of leave will usually be refused if the applicant has failed to maintain or accommodate themselves without recourse to public funds.

45 In *Bah v UK* App no 56328/07 (ECtHR, 27 September 2011) a challenge to the legality of these rules on the grounds that they were discriminatory was rejected. This case concerned a woman with ILR who sought accommodation for herself and her child when they were made homeless. Because her child was subject to immigration control this assistance was refused.

sources of accommodation.[46] Migrant women are also excluded from receiving a range of other local authority services. Whilst the eligibility rules for these services are extremely complicated, in 'no recourse' cases, it can be said that migrant women who do not have children or 'additional' care needs (such as a need that arises from disability, rather than destitution) are excluded from receiving the financial and other support that British or resident women in their situation would be eligible for.[47] Local authorities may also simply refuse to provide support where the woman concerned is not excluded from receiving it or, worse still, threaten to provide 'support' to women with children by taking their children into care. Whilst this practice is unlawful, it deters women from seeking the few services they may be entitled to.[48]

Women who do not have a current, valid migration status, because either they overstayed their permission to remain, or because they never had it (irregular entrants) are subject to still greater exclusions. These apply even when a woman has 'overstayed' because of her partner's behaviour, where, for example, an abusive husband has withheld his wife's passport from her (or where an abusive employer takes the passport of 'their' domestic worker). Women in such cases are subject to all the no recourse rules already described, but they may

46 OpCit Research London and others, *Access to Shelters of Undocumented Migrant Women Fleeing Domestic Violence: The Legal and Practical Situation in the Member States* (Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, 2013) and Monica McWilliams, Priyamvada Nellum Rose Yarnell and Molly Churchill, 'Forced Dependency and Legal Barriers: Implications of the UK's Immigration and Social Security Policies for Minoritized Women Living in Abusive Intimate Relationships in Northern Ireland' (2015) 5(6) *Oñati Socio-Legal Series* 1536, 1544-7.

47 Families with a child 'in need' may be eligible for assistance under section 17 Children Act 1989; a young person who was 'looked after' by the local authority may be eligible for assistance under sections 23C, 24A and 24B of the Children Act 1989; adults in England with a need for care and support may be eligible for assistance under Part 1 of the Care Act 2014 (different but analogous provisions apply in Wales, Scotland and Northern Ireland). See Amy Murtagh, *Project 17's 'Hotel Fund': Provision of emergency accommodation to families left street home-less following a local authority refusal of support under Section 17 of the Children Act 1989* (June 2018) on the impact of such refusals.

48 From practice, I am aware of a number of cases where local authorities responded to parents with children in 'no recourse' cases by threatening to discharge their obligations under the Children Act 1989 by taking the child into care (under section 21). In cases where there is no safeguarding issue such an approach would be unlawful as it is in a child's best interests to be cared for by their (non-abusive) parent. Such threats are also reported in Anitha, 'No Recourse, No Support: State Policy and Practice towards South Asian Women Facing Domestic Violence in the UK' (n 40) as were cases in which children were supported whilst their mothers were not.

also be excluded from accessing certain forms of medical treatment provided by the NHS[49] and the already very limited support available to migrants from local authorities.[50]

Of course, there are a number of sources of resilience to violence that are not provided by the State. These include a woman's savings and social capital, as well as her ability to access familial support or alternative employment. Whether or not an individual woman is affected by the exclusions listed here and to what extent, will, therefore, vary. Notwithstanding this caveat, however, migrant women subject to violence are excluded from a range of assets which provide resilience to violence. The extent to which a woman is excluded is dependent on the type of migration status she has, with women who are irregularly present in the UK being excluded from a greater array of services than are women who have permission to remain, and different permissions to remain themselves having different exclusions attached to them.[51] Without the ability to access such assets, migrant women subject to violence who do not have, or do not

49 The definition of 'ordinary residence' was changed in the Immigration Act 2014 to further exclude migrants from accessing medical treatment under the NHS. Migrants and their family members who are not EU citizens are now only considered 'ordinarily resident' if they have indefinite leave to remain (see Chapter 2 of the Act). Those with migration statuses which give them leave for six months or more must now pay a surcharge on top of their immigration application fee, after which they are entitled to access NHS treatment. Those who have overstayed, who are illegal entrants or refused asylum-seekers (who are not supported by the Home Office) will be charged if they access NHS treatment (unless an exemption applies, such as where the treatment is provided in an A&E Department or is required as the result of having experienced domestic or sexual violence), National Health Service (Charges to Overseas Visitors) Regulations 2015, S1 2015/238 and The National Health Service (Charges to Overseas Visitors) (Amendment) Regulations 2017, SI 2017/756.

50 Under Schedule 3 of the Nationality Immigration and Asylum Act 2002. Not only are these migrants excluded, but local authorities may also be required to report to the Home Office those present as requiring assistance.

51 Women who have permission specifically as the spouse or partner of someone who is British or settled here may be able to apply under the Destitute Domestic Violence Concession (DDVC) for a limited form of permission that *does* enables access to public funds. This concession, which is linked to the UK's domestic violence rule, will be considered in Chapter 4 as a 'regime of exception'.

have access to, their own means of financial or other support, may find themselves forced to choose between remaining in a violent relationship and being destitute.[52]

From Precarious to Perilous

The precariousness or precarity of a migration status lies, typically, in its duration and whether, and how often, it can be extended. Women, I have argued, are disproportionately the holders of those migration statuses which are precarious. These statuses may be imperilled, however, when their holder experiences violence. The migration status given to partners, in which the same requirements are tested three times in five years, give a perpetrator of violence who has control over that status three opportunities to exercise it. As *Balakoohi* [2012][53] (discussed in Chapter 1) and *R (on the application of AT)* [2017][54] demonstrate, a migrant partner may be, at any time, one letter away from having her leave curtailed.[55] One letter, from the perpetrator of violence to the Home Office, claiming for example, that the relationship has ended *may* result in the victim of violence losing her permission to remain in the UK. If the victim of violence does not know about the curtailment decision, or does not challenge it in time, she may become an overstayer. Such challenges are far from straightforward. In *R (on the application of AT)* [2017] for example, HHJ Kerr found that the Home Office had applied a 'double standard' when considering the evidence provided by an abusive partner that his relationship had ended, to the extent that '[o]ne is left with the uncomfortable feeling that the man's evidence counted for more than the woman's'.[56]

52 Anitha, 'No Recourse, No Support: State Policy and Practice towards South Asian Women Facing Domestic Violence in the UK' (n 40), 469.

53 *Balakoohi, R (on the application of) v Secretary of State for the Home Department* (n 39).

54 *R (on the application of AT) v Secretary of State for the Home Department* (n 39).

55 ibid.

56 ibid, para 101.

Precarity may also be experienced by the holder of a migration status which is particularly restrictive. The extreme precarity of the domestic worker route not only increases a worker's risk of experiencing violence, it makes it difficult, if not impossible for her to escape it. It will be recalled that the *only* circumstances in which a domestic worker can renew or extend her permission to remain is if she has been recognised as a victim of slavery or trafficking. However, the initial findings of empirical research on the processes that surround this exception reveal workers being denied this extension and right to work, with those being so denied experiencing (further, additional) hardship as a result.[57] A partner or domestic worker who loses her migration status, even if that loss occurs as a result of her experience of violence, may become destitute in addition to being both detainable and deportable.

An Intensified Experience of Violence

When discussing the elements of violence against women in Chapter 2 and the behaviour which is considered 'violent' for the purposes of this work, I gave the example of a resilient woman who may be unharmed by conduct that should nevertheless be considered 'violent' because of its *potential* to cause harm. Resilience was discussed again when I highlighted the role of the State in delivering and regulating some of those assets which provide it, and the exclusion of migrant women from many of them. By stripping women of key sources of resilience, the State may not only increase migrant women's risk of experiencing violence (as was discussed in relation to partners and domestic workers in Chapter 1), it may also expose them to more serious forms of violence. An experience of violence, may therefore, be transmuted by (as well

57 Natalie Sedacca and Avril Sharp, 'Dignity, not destitution: the impact of differential rights to work for migrant domestic workers' (*UK Labour Law*, 12 April 2019) <https://wordpress.com/view/uklabourlawblog.com> accessed 17 June 2019.

as itself transmuting) the disadvantage produced by particular migration statuses, changing the nature, experience and severity of that violence.

Migrant women subject to violence experience 'particularly intense and chronic forms of abuse, reinforced by threats of deportation and destitution'.[58] Such abuse has been found to involve severe physical, psychological and sexual violence from a range of perpetrators, including a woman's partner, extended family and employer.[59] Migrant women with permission as partners who have been subjected to domestic violence, for example, have reported being beaten, imprisoned, forced to engage in non-consensual sexual activity as well as being denied reproductive autonomy, access to their earned income and basic goods (such as food, appropriate clothes, privacy or a place to sleep).[60] Whilst such conduct may be identifiable in many cases involving domestic violence, migration status has been specifically identified as shaping 'particular techniques of control and forms of violence'.[61] In one case, for instance, a woman described being beaten by her husband while holding her baby and being threatened by another family member with them both being deported.[62] Whilst women are less likely to report incidents of violence against women to the police than they are to report other types of crime, and whilst Black and Minority Ethnic women are less likely again to report such violence,[63] migrant women are further deterred from seeking help because they fear (and

58 Sundari Anitha and others, *Forgotten Women: Domestic violence, poverty and South Asian women with No Recourse to Public Funds* (Saheli, March 2008), Anitha, 'No Recourse, No Support: State Policy and Practice towards South Asian Women Facing Domestic Violence in the UK' 473 (n 40).

59 On such violence in the employment context see Virginia Mantouvalou, ``Am I Free Now?' Overseas Domestic Workers in Slavery' (2015) 42(3) *Journal of Law and Society* 329 and KALAYAAN, *Still Enslaved: The Migrant Domestic Workers who are Trapped by the Immigration Rules* (April 2014).

60 Anitha, 'Legislating Gender Inequalities' (n 6).

61 ibid 1278. See also Sundari Anitha, Anupama Roy and Harshita Yalamarty, 'Gender, Migration, and Exclusionary Citizenship Regimes: Conceptualizing Transnational Abandonment of Wives as a Form of Violence Against Women' (2018) 24(7) *Violence Against Women* 747.

62 Anitha, 'Legislating Gender Inequalities' (n 6), 1274.

63 Aisha K. Gill and Karen Harrison, 'Police Responses to Intimate Partner Sexual Violence in South Asian Communities' (2016) 10(4) *Policing* 446.

crucially, their fear is justified) that if they did so, they would either be denied help or be arrested themselves and 'sent back'.[64] Research that has focused on women's experiences of both violence and migration status has, therefore, found that the violence migrant women are subject to is made possible 'precisely because of their immigration status'[65] and that migrant women subject to violence are less likely than settled women to leave, and to be able to leave, a violent relationship.[66]

2. The Remedies: Migration Status Reform and an Independent Migration Status for Victims of Violence

I have demonstrated that migrant women who experience violence are subject to a State-created disadvantage, the distinguishing features of which are control, exclusion, a perilous migration status and an intensified experience of that violence. In anchoring my account of compounded disadvantage in Martha Fineman's theorising on vulnerability, I have not only drawn attention to the State's role in disadvantaging women, I have, therefore, contended that it has an ethical duty to remedy it. This ethical duty is mirrored by a legal one. As demonstrated in Chapter 2, States have positive obligations to ensure that their laws and policies offer practical and

64 Radha Vishnuvajjala, 'Insecure Communities: How an Immigration Enforcement Program Encourages Battered Women to Stay Silent' (2012) 32(1) *Boston College Journal of Law & Social Justice* 185. See also Natalie Bloomer, 'Woman reports rape to police - and is arrested on immigration charges' (*politics.co.uk*, 2017) <www.politics.co.uk/news/2017/11/28/woman-reports-rape-to-police-and-is-arrested-on-immigration> accessed 16th May 2018 and Mayor of London, 'Mayor Calls To Protect Victims of Serious Crime with Insecure Status' (*Mayor of London*, 15 August 2018) <https://www.london.gov.uk/press-releases/mayoral/protect-victims-of-crime-with-insecure-status> accessed 15 August 2018.

65 Khatidja Chantler and others, *Attempted Suicide and Self Harm (South Asian women): Project Report* (Manchester Metropolitan University, March 2001).

66 McWilliams, Yarnell and Churchill (n 46); Khatidja Chantler, 'Independence, Dependency and Interdependence: Struggles and Resistances of Minoritized Women Within and on Leaving Violent Relationships' (2006) 82(1) *Feminist Review* 27 (who also highlights the forms of resistance employed by women who remain in violent relationships) and Yvonne Amanour-Boadu and others, 'Immigrant and Nonimmigrant Women: Factors That Predict Leaving an Abusive Relationship' (2012) 18(5) *Violence Against Women* 611.

effective protection from violence and exploitation. The ECtHR has, in its post-*Opuz* [2009][67] jurisprudence on domestic violence, discussed these obligations in terms of applicants' vulnerability to (further) violence and the failure of the State to offer them sufficient protection from it.[68] In *Talpis v Italy* [2017][69] for example, the ECtHR ruled:

> that children and other vulnerable individuals – into which category fall victims of domestic violence – in particular are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity.[70]

In the same way that those assets Fineman argues the responsive State should provide can be mapped onto the positive obligations States owe those within its jurisdiction, so too can the different facets of compounded disadvantage traced above be used to chart States' failure to discharge these obligations to migrant victims of violence. Perpetrators' ability to manipulate their victims' migration status, when combined with victims' exclusion from State and other sources of support, combine to expose migrant women to an intensified experience of violence, at the same time as impeding their escape from it. There are several ways in which an experience of such compounded disadvantage may breach States' positive obligations, at both the structural and individual level. The 'effectiveness' of any criminal investigation is likely to be compromised if the victim is deterred from reporting violence, or cooperating with it, because either they (correctly) fear loss of status, or if their status has already been imperilled, because they are destitute or subject to immigration enforcement action. A State's ability to take 'preventative operational measures' to protect a victim of violence may be seriously hampered by the 'no recourse' rules and exclusions which prevent victims from, for example, being placed in a women's refuge or another place of safety. In both situations, compounded

67 *Opuz v Turkey* App no 33401/02 (ECtHR, 9 June 2009).

68 For a general discussion of these cases see Arnardóttir (n 19), 159-60.

69 *Talpis v Italy* (n 31).

70 ibid, para 99.

disadvantage could, depending on the circumstances and the nature and severity of the violence experienced, give rise to breaches of Articles 3, 4, 8 and even Article 2 of the ECHR (in conjunction with Article 14).[71] Having established, therefore, States' ethical and legal obligations to remedy its treatment of migrant women, in this, the final section of Part 1, I set out how this obligation might be discharged.

(a) Migration Status Reform

The preceding analysis of compounded disadvantage and States' obligations to those subject to it, lends further support to my arguments for comprehensive migration status reform. Such reform would include the abolition of *all* dependent migration statuses; the granting of immediate permanent residence to the migrant partners *of British citizens/residents*; and, the granting of an independent, renewable, rights-bestowing migration status to domestic workers.

Permanent residence would both decrease migrant partners' vulnerability to violence and, it is hoped, positively affect the 'specific patterns of abuse—such as …more intensified forms of domestic violence… underlined with threats of arrest and deportation' they have been found to be subject to.[72] As Anitha argues:

71 *Paul and Audrey Edwards v UK* App no 46477/9 (ECtHR, 14 June 2002), para 73 (on the proper involvement of victims/next of kin in investigations); *Osman v UK* App no 87/1997/871/1083 (ECtHR, 28 Oct 1988), paras 115-116 and *CN v UK* App no 4239/08 (ECtHR, 13 November 2012), para 67 (on State's obligations to take appropriate measures within the scope of their powers to remove and individual from a situation/ risk of violence).

72 Sundari Anitha, 'Immigration status and domestic violence' (*Open Democracy*, 14 Sept 2015) <https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/immigration-status-and-domestic-violence/> accessed 8 April 2019.

> removing women's dependency on 'sponsors'—aka spouses—is surely the most effective way to take away the power that enables perpetrators to carry out their abuse.[73]

Significantly, a similar argument to those this thesis advances was made by the Department of Citizenship and Immigration to justify its decision (discussed in the preceding chapter) to abolish Canada's equivalent of the probationary period, 'conditional permanent residence':

> On balance, the… benefits of conditional permanent residence have not been shown to outweigh the risks to vulnerable sponsored spouses and partners subject to the two-year cohabitation requirement . . . The proposed repeal of conditional permanent residence recognizes that the majority of relationships are genuine, and the majority of applications are made in good faith. Eliminating conditional permanent residence would facilitate family reunification, remove the potential increased vulnerability faced by abused and neglected spouses and partners, and support the Government's commitment to combating gender-based violence.[74]

Granting permanent residence to the migrant partners of British citizens/residents would not only prevent perpetrators from manipulating their victims' migration status, it would also ensure that, should violence occur, the migrant-now-resident partner would have full access to all those assets that provide resilience to it, offering both effective protection from violence and the means to recover from it (as, it will be recalled, those with ILR/permanent residence can access public funds). The State's ability to take preventative operational measures to protect a victim would no longer be hampered, or even precluded, by the no recourse exclusions that migrant partners are currently subject to. Should a partner avail herself of these sources of support and end her violent relationship, her right to live in the UK would not be imperilled by that decision, it would remain secure.

Granting an independent migration status to those who request permission to enter or remain in the UK as partners would not, however, prevent all those migrants who *are*

73 ibid.

74 Department of Citizenship and Immigration, *Regulatory Impact Analysis Statement* (Canada Gazette, Part 1: Vol 150 (2016), 29 October 2016).

partners/spouses from experiencing compounded disadvantage. In section 1(b) above, I gave the example of a woman who experienced domestic violence and whose permission to remain *as a student* was jeopardised as a result (the fact that she never received permission as a spouse/partner was, at least in part, because of her husband's successful attempts to control her migration status).[75] Whilst students may benefit from an independent migration status, compounded disadvantage may arise if, for example, being victimised affects a woman's ability to meet the conditions attached to her permission to remain. Ensuring that *no* migration status is precarious (because it is temporary or has onerous or repeatedly tested conditions attached to it) will ensure that compounded disadvantage does not arise in such cases. Such arguments also apply to domestic workers. Research conducted by Kalayaan (an NGO that supports and advocates for domestic workers) on the pre-2016 ODW scheme found that ODWs who were 'tied' to their employers were twice as likely to report being physically abused and more likely to be confined to the 'family' home than those admitted under the pre-2012 rules in which they were not so 'tied'.[76] The abolition of dependent and precarious migration statuses (in practice, as well as in law) would not only decrease students' and domestic workers' vulnerability to violence, it may also affect its nature and reduce its severity. It would also ensure that statuses like those given to students and domestic workers, offer effective protection from any violence that was experienced because, for example, the holder could seek protection from it and extend and renew their leave if necessary, to suspend/resume their studies or secure alternative, safe, employment.

Whilst States are permitted to impose some restrictions on a migrant's ability to access the full range of services provided either directly or indirectly by the State,[77] such restrictions

75 This was based on *SSHD and OB* (n 35).

76 KALAYAAN (n 59).

77 *Bah v UK* (n 45).

should not, per Fineman's theorising and my brief account of States' positive obligations under the ECHR, operate to deny women practical and effective protection from violence. Migration status (and fear of its loss) should not operate to deter women from seeking protection. Key rights, such as access to health care or to safe accommodation, should not be restricted. As the CEDAW Committee has recommended, restrictive immigration laws that discourage women from reporting violence should be repealed and States should ensure that legal proceedings, protective support measures and services should be accessible to all women, irrespective of migration status.[78] Whilst spouses, domestic workers, students and others could, therefore, still be required to demonstrate that they can maintain and accommodate themselves without recourse to public funds *pre-entry*, once within the jurisdiction, this requirement should not be enforced to the detriment of migrants' human rights. A 'firewall', to quote Joseph Carens, should exist between 'the enforcement of immigration law, on the one hand, and the protection of general human rights, on the other'.[79] Without such a separation, as Siobhán Mullally and Cliodhna Murphy, observe, 'the disciplinary and punitive reach of immigration controls functions as a limit to the claiming of rights.'[80] This has particular consequences for migrant women, as the Special Rapporteur on the human rights of migrants has recognised:

> firewalls, or the strict and real separation between the immigration authorities and public services, are crucial for migrants to exercise and enjoy their human rights without fear of being reported to the immigration authorities. It is thus firewalls that will allow migrant women and girls who may become victims of any form of violence or abuse, including gender-based violence and sexual

78 General Recommendation No 35 on Gender-Based Violence Against Women, Updating General Recommendation No 19 CEDAW/C/GC/35 (26 July 2017), paras 29(c)(iii) and 31(b) and General Recommendation No. 26 on Women Migrant Workers CEDAW/C/2009/WP.1/R (5 Dec 2008) (CEDAW's GR 26), para 26.

79 Joseph Carens, *The Ethics of Immigration* (OUP 2013), 133-4.

80 Siobhán Mullally and Cliodhna Murphy, 'Migrant Domestic Workers in the UK: Enacting Exclusions, Exemptions, and Rights' 36(2) *Human Rights Quarterly* 397, 414.

abuse, to report the crimes, obtain legal assistance and gain access to the courts to defend their rights.[81]

(b) Effective Protection and the Right to a Remedy

The brief and extremely partial reimagining of immigration law that I started in Chapter 1 (where it was discussed in terms of States' equality duties) and have continued here (where it has been justified by reference to both the State's positive obligations and Fineman's theorising) does not seem likely to be realised anytime soon. Indeed, in the UK and elsewhere, the trend seems to be towards both family and labour migration routes which are more conditional and less likely to result in the migrant becoming a permanent resident or citizen of the State to which she seeks entry. In relation to family migration in Europe, a 'family resemblance' in the control of marriage migration is discernible, with an increasing number of States imposing requirements that relate to a couple's income, accommodation and 'integration' which differ 'in degree rather than kind.'[82] Similarly, States seem increasingly reliant on guest-worker and temporary labour migration programmes and routes, rather than those that result in, or at least enable, naturalisation.[83] The UK's proposals for labour migration post-Brexit (if and when that occurs) conform to this trend.[84] Not only is the State currently subjecting migrant women to compounded disadvantage, but it seems likely that it will continue to do so, with potentially even greater numbers of women being affected by it. What

81 Special Rapporteur on the human rights of migrants, *The Impact of Migration on Migrant Women and Girls: a Gender Perspective* (A/HRC/41/38, 15 April 2019), para 66.

82 Helena Wray, Agnes Agoston and Jocelyn Hutton, 'A Family Resemblance? The Regulation of Marriage Migration in Europe' (2014) 16(2) *European Journal of Migration and Law* 209, 246.

83 Anna Boucher and Justin Gest, *Crossroads: Comparative Immigration Regimes in a World of Demographic Change* (Cambridge University Press 2018) and in relation to patterns of migration more broadly, see Catherine Dauvergne, *The New Politics of Immigration and the End of Settler Societies* (Cambridge University Press 2016).

84 HM Government, *The UK's Future Skills-Based Immigration System (Cm 9722)* (December 2018) for a brief discussion of which see Catherine Briddick, 'Sex discrimination in British immigration law is likely to get worse after Brexit' (*The Conversation*, 29 April 2019) <https://theconversation.com/sex-discrimination-in-british-immigration-law-is-likely-to-get-worse-after-brexit-115607> accessed 14 May 2019.

obligations might the State have to the women it has disadvantaged and will thus disadvantage? First, States' legal systems, including their immigration laws, must still offer practical and effective protection from violence. Second, as compounded disadvantage involves a breach of these obligations, women affected by it are entitled to an effective remedy for it. As will be recalled from Chapter 2, to be effective under the ECHR, a remedy must be capable of enforcing the substance of the relevant protected right by granting those who seek access to it appropriate relief.[85]

It will be recalled from the previous chapter that the ECtHR has consistently ruled that whilst States' positive obligations may prevent removal in certain circumstances, they do not require a migration status to be granted to someone who cannot be removed.[86] Whilst the ECtHR has argued that positive obligations require the victims of trafficking to be identified as such (support and other rights flowing from this recognition, as will be discussed in Chapter 5)[87] ECHR obligations, *in and of themselves*, do not require any particular migration status to be granted to such a victim.[88] Of greater concern is the fact that where the violence a migrant woman has experienced occurred in *her country of residence*, her right to an effective remedy for that violence does not *necessarily* even preclude her removal.[89] Whilst Article 13 may protect her from removal in certain situations (for example, where removing a victim of criminal violence would prevent her from taking part in its investigation or prosecution), such protection will be of a short duration and will not necessarily grant her other rights, such as the

85 *Aydin v Turkey* (1998) 25 EHRR 251, 107.

86 *Hayaati Ahmed Ali v the Netherlands* App no 26494/09 (ECtHR, 24 Jan 2012).

87 Vladislava Stoyanova, 'L.E. v. Greece: Human Trafficking and the Scope of States' Positive Obligations under the ECHR' (2016) 3 *European Human Rights Law Review* 290 and Vladislava Stoyanova, 'Sweet Taste With Bitter Roots - Forced Labour and Chowdury v Greece' (2018) 1 *European Human Rights Law Review* 67.

88 Again, the relationship between migration status, positive obligations and the regimes of exception will be discussed further in Part 2.

89 *De Souza Ribeiro v France* App no 22689/07 (ECtHR CG, 13 Dec 2012), para 83.

right to work. Under the ECHR, therefore, victims of compounded disadvantage may only be entitled to short term non-removal for particular purposes, potentially without status (or without a rights-bestowing status). Once the relevant criminal or other proceedings have ended, the woman concerned would, potentially, face removal to her country of origin (unless she is able to secure a migration status on another basis, which, as discussed above, may be difficult, if not impossible to achieve).

Under public international law and international human rights law, an action is considered reparative of a wrong when it involves three components: restitution (to restore the pre-violation status quo), compensation (e.g. the payment of damages) and satisfaction (e.g. the acknowledgement of wrong-doing, guarantees of non-repetition).[90] Ruth Rubio-Marín and Clara Sandoval contend that because violence against women occurs in the context of structural discrimination, to be reparative, a remedy for it must transform, not perpetuate, that context:

> [T]he law would be wrong if, discarding alternative options, it simply sought to return women to the *status quo ante*, when doing so entails perpetuating conditions of discrimination, violence, and power-which were often at the root

90 United Nations General Assembly Resolution 56/83: Responsibility of States for Internationally Wrongful Acts (UNGA) UN Doc A/RES/56/83, GAOR 56th Session Supp 49 Vol 1, 499 (2001), Art 34-37 and Resolution adopted by the General Assembly on 16 December 2005 [on the report of the Third Committee (A/60/509/Add.1)] 60/147. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

> of the violence and which accounted for the specific and compounded form of harm that women experienced.[91]

As the IACtHR stated in *González et al. ('Cotton Field') v Mexico* [2009]:[92]

> [R]eparations must be designed to change this situation, so that their effect is not only of restitution, but also rectification. In this regard, re-establishment of the same structural context of violence and discrimination is not acceptable.[93]

It is illuminating to briefly consider the remedies available to migrant victims of violence under the ECHR against these standards. Non-removal (without status, or with one that is temporary, precarious and rights-restrictive) does not provide a victim with satisfaction, because whilst it *may* enable someone to take part in relevant legal proceedings, it will also expose them to the risk of further violence and exploitation (per Chapter 1's arguments on dependency/precarity and violence). Removal itself may also appear to involve the relatively benign re-establishment of the status quo, but it involves (often prolonged) detention, (sometimes extreme) violence and family separation.[94] Indeed, non-deportation followed by forced migration, in the form of forced removal,[95] is more likely to enforce than rectify compounded disadvantage, because it proves correct the threats that perpetrators of violence use against those whose migration status they manipulate: 'if you seek to leave (this relationship or employment) you risk destitution and deportation'. To draw on and paraphrase Rubio-Marín and Sandoval, the 'remedy' of non-

91 Ruth Rubio-Marín and Clara Sandoval, 'Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the Cotton Field Judgment' (2011) 33(4) *Human Rights Quarterly* 1062, 1070. See also Carla Ferstman, 'Reparations for Sexual and Other Gender-Based Violence' in *Gender Perspectives on Torture: Law and Practice* (Washington College of Law, American University and Anti-Torture Initiative, Center for Human Rights & Humanitarian Law 9 Feb 2018).

92 *Gonzalez et al ('Cotton Field') v Mexico* Preliminary Objection, Merits, Reparations, and Costs (IACtHR, 16 November 2009).

93 ibid, para 450.

94 See for example Matthew Gibney's discussion of the case of Jimmy Mubenga, Matthew J. Gibney, 'Is Deportation a Form of Forced Migration?' 32(2) *Refugee Survey Quarterly* 116, 116-18, more generally see Nicholas De Genova and Nathalie Peutz (eds), *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement* (Duke University Press 2010).

95 Drawing on Gibney (ibid).

deportation/forced migration may perpetuate the 'conditions of discrimination, violence, and power' which account 'for the specific and compounded form of harm'[96] migrant women subject to violence experience. It is not, therefore, reparative of compounded disadvantage, even if the person concerned also receives damages or, for example, legal aid to enable them to secure a particular right whilst they were in the jurisdiction.

When arguing for comprehensive migration status reform, I asserted that an independent, non-temporary, rights-bestowing migration statuses would prevent compounded disadvantage from arising and meet States' structural positive or due diligence obligations to protect all women from violence. Where such reform is not engaged in, such a status would, analogously, offer victims of violence effective protection from further harm and centrally, *genuine* reparation for compounded disadvantage. This argument is consistent with the gender-sensitive approach to remedies introduced above, which has been advocated and adopted by a variety of institutions and actors, including the UN Special Rapporteur on Violence against Women, its causes and consequences.[97] The CEDAW Committee has, for example, recommended that States pass 'non-discriminatory residency regulations' including to 'allow for the legal stay of a woman who flees her abusive employer or spouse…'.[98] Migrant victims of violence should also be granted 'all necessary benefits', including, where necessary, a migration status, reintegration and support services.[99] The UN Special Rapporteur on Trafficking in Persons, Especially Women and Children has also recommended granting victims of trafficking a temporary or permanent migration status in certain circumstances, as a

96 Rubio-Marín and Sandoval (n 91), 1070.

97 Rashida Manjoo, *First thematic report of the UN Special Rapporteur on violence against women, its causes and consequences (reparations)* (A/HRC/14/22, 19 April 2010).

98 CEDAW's GR 26, para 26(f).

99 *Zheng v the Netherlands* Communication No 15/2007 (14 November 2008) CEDAW/C/42/D/15/2007 dissenting opinion of Committee members Mary Shanthi Dairiam, Violeta Neubauer and Silvia Pimentel (the majority finding the trafficking complaint inadmissible), para 8.7.

transformative remedy.[100] This gender-sensitive approach to the question of what is reparative of violence against women and compounded disadvantage is also consonant with approaches to equality that advocate for 'multi-dimensional' responses to discrimination which recognise and address the 'distributional, recognition, structural and exclusive wrongs' experienced by disadvantaged groups.[101]

In the UK refugees and those in receipt of humanitarian protection receive five years permission to remain in the UK which carries with it the right to family reunion, the right to work and full access to public funds.[102] Granting a victim of violence a similar status would transform her predicament. It would enable a partner or domestic worker to leave their violent situation and access the support they need to recover from it, putting her back into the position she was in before she was made dependent on another and her rights were restricted. Crucially, while it could not prevent her from being subject to further violence, it would reduce her vulnerability to it. Should violence reoccur, such a rights-bestowing status would also guarantee the non-repetition of compounded disadvantage. An independent, rights-bestowing migration status would also enable a victim of violence to support, and meaningfully engage with, criminal or other legal proceedings against their perpetrator (for lost wages, compensation or in relation to children). Such a status would also compensate a victim of compounded disadvantage by empowering her and enabling her to re-establish herself independently from her abuser. An independent, non-temporary, rights-bestowing migration status, similar to (but not necessarily identical to) that given to refugees, has all the hallmarks, therefore, of a truly

100 Joy Ngozi Ezeilo, *Report submitted by the Special Rapporteur on trafficking in persons, especially women and children,* (A/HRC/10/16, 20 February 2009), paras 16 and 41, see also draft principle 9(b)(i).

101 Sandra Fredman, 'Substantive Equality Revisited' [2014] *Oxford Legal Studies Research Paper No 70/2014*, 2 and Sandra Fredman, 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights' (2016) 16(2) *Human Rights Law Review* 273.

102 Immigration Rules part 11: asylum, para 339Q (residence permits) and 339R (requirements for indefinite leave to remain for persons granted refugee status of humanitarian protection).

reparative remedy for compounded disadvantage. Of course, the provision of such a status would not preclude a State from encouraging, or even assisting, a migrant to return 'home' voluntarily (through a resettlement grant for example). Its provision would, however, ensure that any such return was indeed truly voluntary.[103]

Conclusion

This chapter has argued for migration status reform (including the abolition of dependent statuses) and for migrant victims of violence to be granted an independent, rights-bestowing migration status. These arguments have been justified ethically and legally by reference to the State's role in compounding, through immigration laws that disadvantage and discriminate against women (as established in Chapter 1), the disadvantage experienced by victims of violence (as defined in Chapter 2). The distinguishing features of such compounded disadvantage have been identified as control, exclusion, a perilous migration status and an intensified experience of that violence. The ethical foundations to the obligations I have identified have been provided by Martha Fineman's theorising on vulnerability and resilience. The prohibition of discrimination found in both domestic and European human rights and equality law, and the ECHR's requirement that States offer victims of violence effective protection from it, have been relied on to provide their legal foundation. Having, however, ascertained that the ECHR's right to a remedy offers victims of compounded disadvantage only very limited relief, I drew on gender-sensitive approaches to reparations, including CEDAW

103 Such a return could only be truly voluntary if the person considering it had other options available to them. The Home Office's proposal (HM Government, *Transforming the Response to Domestic Abuse Consultation Response and Draft Bill (CP 15)* (January 2019), 24-5) which presented return as preferable to destitution, could not, therefore, be described as 'voluntary' even though the individual concerned may not be forcibly removed for the UK.

Committee recommendations, to argue that whilst removal is not reparative of compounded disadvantage, an independent, rights-bestowing migration status would be.

Having established, in Part 1 of this thesis, that there are strong ethical and legal grounds for contending that States should grant migrant victims of violence an independent, rights-bestowing migration status, the specific rules that they (and as we shall see, the EU) have assumed in such cases may be evaluated by reference to the extent to which this duty is discharged. It is to these rules, the 'regimes of exception' that I now turn.

PART 2

CHAPTER 4: THE DOMESTIC VIOLENCE RULES

Introduction

Part 1 of this thesis established that States should grant migrant victims of violence an independent, rights-bestowing migration status on the grounds that such a status is reparative of compounded disadvantage. This chapter is the first of three which evaluates the specific rules, the 'regimes of exception', that States and the EU have assumed towards migrant victims of violence by reference to the extent to which this obligation is discharged. In this Chapter I evaluate two regimes which require either the relevant EU Member State (MS), or the UK, to grant permanent residence to some victims of domestic violence whose relationship with their spouse or partner has broken down.[1] The legal source of the first of these domestic violence rules, Article 13(2)(c) of the EU Citizens' Directive,[2] is EU law, whilst the source of the second, DVILR of Appendix FM of the Immigration Rules, is British immigration law.[3]

Domestic violence is a form of violence against women[4] estimated to affect one in five women in the European Union (the EU).[5] Despite its devastating, even lethal consequences, it

1 The European Union's (EU) member states are Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Greece, Germany, Hungary, the Irish Republic, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and (currently) the UK. Four other countries that are not members of the EU but are of the European Economic Area (the EEA) and who are, therefore, usually treated analogously are Iceland, Norway, Liechtenstein and Switzerland. A third-country national (TCN) is a national of any State that is not a Member State of the EU/EEA.

2 European Parliament and Council Directive 2004/38/EC of 29 April 2004 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 OJ L 158/77.

3 The relevant rules are paragraphs 289 A-D of the Immigration Rules; section DVILR, Immigration Rules, Appendix FM and Part 6 of Appendix Armed Forces (which covers the partners of those who are serving in the Armed Forces).

4 As explained in Chapter 2 and subject to the caveats discussed there.

5 European Union Agency for Fundamental Rights, *Violence Against Women: An EU-wide Survey: Main Results Report* (Publications Office of the European Union, 2014), 21.

remains underreported (to the police or to other potential sources of support), victims' needs (for protection and other assistance) continuing to go unmet.[6] States have positive or due diligence obligations to respond to such discriminatory violence, their failure to do so potentially violating a women's human rights.[7] Migrant women who experience such violence are, as Part 1 of this thesis demonstrated, particularly disadvantaged by it.

To evaluate the two domestic violence regimes of exception, I draw on the legal case that NA, or 'Naomi' (as she is called in this thesis) fought for permanent residence in UK, a case in which the Court of Justice of the European Union (the CJEU) was called on to clarify the correct interpretation of the EU's domestic violence rule.[8] Naomi is from Pakistan (and so was a third-country national under EU law, TCN) whilst KA, or 'Kafeel', her husband is a dual-national, having both Pakistani and German citizenship. Naomi came to the UK with Kafeel; she was dependent on him for her migration status. Kafeel was violent to Naomi and when he abandoned her and their child, she sought permission to remain in the UK under the EU's domestic violence rule. Before I consider Naomi's case and evaluate the two-domestic violence 'regimes of exception' this chapter takes as its focus, I must, however, take a step back and establish that the normative framework developed in Part 1 applies to women whose migration statuses are determined *by EU law* (rather than British immigration law). Consequently, this chapter commences with a discussion of EU Citizenship and the rights (to move, to work etc.) that it bestows, such rights determining Kafeel's and, centrally, therefore, Naomi's ability to enter and then remain in the UK. Having then introduced and compared the two domestic violence rules, I proceed to evaluate the extent to which each is reparative of the compounded disadvantage experienced by women who are dependent for their migration status

6 ibid, Chapter 3.

7 *Opuz v Turkey* App no 33401/02 (ECtHR, 9 June 2009) and as discussed in Chapters 2 and 3.

8 Case C-115/15 *Secretary of State for the Home Department v NA* ECLI:EU:C:2016:487 [2016]. I refer to the applicant as Naomi (rather than simply 'NA') for ease of reading.

on the person who is violent towards them. The EU's domestic violence rule will be considered first, as I provide the legal context to, and chart the progression of, Naomi's case to the CJEU. The ability of Article 13(2)(c) to respond to disadvantage like that experienced by women in Naomi's position will be ascertained through a critical evaluation of the CJEU's judgement in her case. In doing so, I draw on Lizzie's Barmes' observation that case law is valuable qualitatively (as well as doctrinally) as a source of material on the nature of certain types of adjudication.[9] Naomi's situation and its 'resolution' by the CJEU will then be contrasted with the position of similarly situated women subject to British immigration law.

1. Women Whose Migration Statuses are Determined by EU Law

The first part of this chapter focuses on the position of women who, like Naomi, are TCNs, dependent for their right to live in the UK (or another EU MS) on their EU Citizen family member. As this and the following section will demonstrate, women whose migration statuses are determined by EU law (rather than British immigration law) may also be subject to compounded disadvantage. Before I can proceed with this analysis, I must, however, acknowledge the limits of the research that founds this chapter's evaluation of the European domestic violence rule. In Chapter 1 the doctrinal arguments made were supported by reference to statistical information on the number and proportion of women and men who entered and remained in the UK in particular migration categories over a significant period of time. Comparable research on EU Citizens and their family members is not possible because the Home Office does not collect or publish analogous information about them.[10] Whilst qualitative

9 Lizzie Barmes, 'Learning from Case Law Accounts of Marginalised Working' in Judy Fudge, Shae McCrystal and Kamala Sankaran (eds), *Challenging The Legal Boundaries of Work Regulation* (Hart 2012).

10 This is because, as will be seen, EU Citizens and their family members do not need permission to enter and remain in the UK (or another MS) under the UK's (or another MS') immigration law. Estimates are available from other sources, including the Long-Term International Migration (LTIM) estimates of the UK Office for National Statistics (ONS). However, these estimates do not distinguish between EU citizens joining British family members and those who are, like Naomi, the family member of another migrant. For an overview of EU migration to the UK which includes a discussion of the limitations of

evidence of women's experiences of both migration status and violence were relied on in Chapters 1 and 2, there is very little empirical research that focusses specifically on the experiences of EU Citizens and their family members. Indeed, family migration has been neglected in European migration scholarship.[11] Where it has been the object of study, the focus has tended to be on admission-seekers rather than, as is the case here, what happens to those family members who are admitted. Similarly, although the rights of some TCNs in the EU have been the subject of sustained academic attention,[12] the position of those who derive their status from their family relationship has received considerably less and the position of *former* family members almost none.[13] In addition to demonstrating that the legal and normative framework developed in Part 1 applies to women who have their migration status determined by European law, this section, and indeed this chapter, is also intended to highlight and respond to this gap in the literature.

The migration status of TCN women like Naomi may be determined by EU law when they are the family member of a particular type of EU Citizen, their rights as TCN's depending on, and deriving from, those enjoyed by that EU Citizen family member.[14] EU Citizens, even

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the available data see Carlos Vargas-Silva and Mariña Fernández-Reino, *BRIEFING: EU Migration to and from the UK* (The Migration Observatory, University of Oxford, 1 Dec 2018).

11 In comparison with research and theorising on either labour or forced migration, Eleonore Kofman, 'Family-Related Migration: A Critical Review of European Studies' (2004) 30(2) *Journal of Ethnic and Migration Studies* 243.

12 See, for example, Theodora Kostakopoulou, 'Long-term Resident Third-Country Nationals in the European Union: Normative Expectations and Institutional Openings' (2002) 28(2) *Journal of Ethnic and Migration Studies* 443 and Anja Wiesbrock and Sergio Carrera, 'Whose European Citizenship in the Stockholm Programme? The Enactment of Citizenship by Third Country Nationals in the EU' (2010) 12(3) *European Journal of Migration and Law* 337.

13 I have only identified two articles that focus on the issues addressed in this chapter: Adam Weiss, 'Transnational Families in Crisis: An Analysis of the Domestic Violence Rule in E.U. Free Movement Law' (2009) 30(3) *Michigan Journal of International Law* 841 and Helen Oosterom-Staples, 'Residence Rights for Caring Parents who are also Victims of Domestic Violence' (2017) 19(4) *European Journal of Migration and Law* 396.

14 Arts 20 and 21 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (TFEU). On the importance of citizenship of a MS as a pre-requisite for EU Citizenship see Case C-135/08 *Janko Rottmann v Freistaat Bayern* EU:C:2010:104 [2010] ECR I-01449.

those who are young children, have the right to have their family members accompany or join them if they move from one EU MS to another.[15] Under the EU Citizens' Directive, EU Citizens and their family members who enter another MS have an initial right of residence that lasts three months.[16] Subject to conditions, after three months EU Citizens who are 'qualified persons' and their family members have an extended right of residence.[17] Qualified persons are those who are workers, self-employed, self-sufficient, job-seekers or students.[18] After 5 years' residence as a qualified person, EU Citizens and their family members may become permanent residents.[19] EU Citizens and their family members residing in another MS on the basis of the EU Citizens' Directive have a general right (albeit one that has and is being eroded) to be treated equally in comparison with the relevant MS' own nationals.[20] Unlike the permission-seeking partners considered in Chapter 1, whose ability to enter and remain in the UK is contingent and dependent on meeting a range of different requirements (including, for example, financial requirements), TCN family members are subject to no such rules or restrictions. The definition of a 'family member' under European law is also more expansive than it is under British immigration law, and TCNs can join family members in a greater variety of different circumstances.[21] Under British immigration law, the rights of families to migrate or reunite are rights which are qualified and can be limited permissibly in a range of different

15 EU Citizens' Directive and Case C-200/02 *Zhu and Chen* ECLI:EU:C:2004:639 [2004] ECR I-9925.

16 EU Citizens' Directive, Art 6.

17 EU Citizens' Directive, Article 7(1). These limitations include not becoming a burden on the social assistance programmes of a particular MS and having comprehensive sickness insurance.

18 EU Citizens' Directive, Art 7. Some statuses may be 'retained' even though the person concerned no longer fulfils the requisite criteria, see Case C-480/08 *Teixeira v London Borough of Lambeth and Secretary of State for the Home Department* ECLI:EU:C:2010:83 [2010] I-011107.

19 EU Citizens' Directive, Art 16.

20 ibid, Art 24. On its erosion see Charlotte O'Brien, 'The ECJ Sacrifices EU Citizenship in Vain: Commission v. United Kingdom' (2017) 54(1) *Common Market Law Review* 209.

21 EU Citizens' Directive, Arts 2 and 3. This definition covers relatives in the ascending line (parents, parents-in-law); relatives in the descending line who are under the age of 21 or still dependent on their parents; and, extended family relationships which involve the provision of care. In contrast it is extremely difficult for someone who is British to bring an elderly or dependent relative to the UK.

circumstances.[22] These rights are also subject to restriction under EU law in certain circumstances, but to a considerably lesser extent.[23]

The CJEU (formerly the European Court of Justice, ECJ) has, historically at least, defended and developed the rights that EU Citizens and, consequently, their family members, have to move freely within the EU.[24] The ECJ/CJEU has required MS to enable TCN family members to enter their territories; to give permission to remain to TCN spouses; and, to grant residence rights (and the right to work) to the TCN parents of EU Citizen children.[25] MS have also been prohibited from adopting measures which have the effect of depriving, in practice, an EU Citizen of their rights.[26]

The nature and extent of the derivative rights accorded to TCN family members, like Naomi, has, therefore, developed in concert with the rights accorded to EU Citizens, like Kafeel. Ascertaining the rights that a particular EU Citizen, and therefore, a particular family member enjoys, may not be straightforward, however. Rights that appear to pertain to EU Citizenship in fact continue to attach only to those EU Citizens who meet certain conditions by, for example, crossing a border and/or undertaking a certain kind of economic activity. By granting rights only to those who meet certain conditions or have particular statuses, rather than

22 Pursuant to the UK's obligations under the European Convention on Human Rights and Fundamental Freedoms (4 November 1950) ETS 5 (ECHR).

23 Restrictions on the right of free movement and residence are permitted on the grounds of public policy, public security or public health, Arts 27-33, EU Citizens' Directive. These restrictions are significantly less than, for example, those described in Chapter 1 which apply to the partners of British Citizens/residents.

24 See, for example, Case C-85/96 *Martinez Sala v Freistaat Bayern* ECLI:EU:C:1998:217 [1998] ECR I-02691 in which the non-economically active applicant was able to receive a benefit on a non-discriminatory basis with the citizens of the MS in which she lived.

25 Case C-459/99 *MRAX* ECLI:EU:C:2002:461 [2002] ECR I-06591; Case C-60/00 *Carpenter v Secretary of State for the Home Department* ECLI:EU:C:2002:434 [2002] ECR I-06279; Case C-503/03 *Commission v Spain* ECLI:EU:C:2006:74 [2006] ECR I-01097; and, Case C-34/09 *Ruiz Zambrano v Office national de l'emloi (ONEM)* ECLI:EU:C:2011:124 [2011] ECR I-01177.

26 *Ruiz Zambrano v Office national de l'emloi (ONEM)*, ibid.

simply to all those who *are actually citizens*, EU Citizenship is best understood not as a 'fundamental status' (as the EU Citizens' Directive says it should be)[27] but as a 'patchwork of personhoods'.[28] Gender, race and class all inform the type of EU Citizen who is, in fact, able to benefit from the rights that citizenship purportedly bestows. The rights of residence given to those who are not *considered* to be economically active or self-sufficient, and who wish to reside in another MS, are much more limited. This affects women who, for example, care for dependent relatives but whose care 'work' is not considered to be so, whilst the unpaid work done by men in religious communities is.[29] Like the status of 'wife' and 'domestic worker' discussed in Chapter 1, the 'worker' with EU Citizenship rights appears drawn from a sexed/gendered stereotype, this time one that takes as its inspiration a male model of work which excludes, or has excluded, women who care for family members within the home or who are pregnant, while including men who benefit from women's care or who can no longer work because of illness or industrial accident.[30]

EU law has, however, resisted adopting some of the disadvantageous features of the migration statuses given to partners/wives under domestic (British and other) immigration

27 EU Citizens' Directive, preamble.

28 Charlotte O'Brien, 'I trade, therefore I am: legal personhood in the European Union' (2013) 50(6) *Common Market Law Review* 1643, 1643. See also Dimitry Kochenov, 'Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights' (2009) 15(2) *Columbia Journal of European Law* 169 in which he questions the value and status of a citizenship which cannot guarantee all of its holders certain minimum rights.

29 Compare Case C-77/95 *Züchner and Handelskrankenkasse (Ersatzkasse) Bremen* ECLI:EU:C:1996:425 [1996] ECR I-5689 with *Carpenter v Secretary of State for the Home Department* (n 25) and Case 196/87 *Steymann v Staatssecretaris van Justitie* ECLI:EU:C:1988:475 [1988] ECR 6159. Women's caring 'work' is also not considered to be a permitted break from work.

30 O'Brien, 'I trade, therefore I am: legal personhood in the European Union' (n 28) and C-507/12 *Jessy Saint Prix v Secretary of State for the Work and Pensions* ECLI:EU:C:2014:2007 [2014]. Sex discrimination is not the only form of discrimination at work here, those who are unemployed or who have not acquired the necessary skills to gain employment, because of entrenched racial discrimination for example, may be similarly precluded from enjoying the benefits of their 'Citizenship', Theodora Kostakopoulou, *Co-Creating European Citizenship: Policy Review* (European Commission, 2013), 27-28.

law.[31] The rights given to *spouses* (and in some cases partners) under EU law are less precarious than those given under British law, as the EU Citizens' Directive establishes a straightforward, five-year route to settlement. During this period TCNs do not have to demonstrate that they continue to meet the requisite conditions, or have to apply to have their rights or status confirmed or renewed. The migration status enjoyed by TCN family members is also considerably less restrictive than that enjoyed by the partners of British Citizens/residents under British immigration law. TCN family members are entitled to access state support and welfare benefits alongside British nationals/residents and are not subject to the 'no recourse' rules described in Chapter 3.

Fundamentally, however, a TCN's rights in another MS are justified by reference to the needs of her EU Citizen 'sponsor'; *her* presence is necessary to enable *him* to exercise the rights that attach to *his* citizenship. As stated in *Metock* [2008],[32] TCNs derive rights from their relationships with EU Citizens because:

> if Union citizens were not allowed to lead a normal family life in the host Member State, the exercise of the freedoms they are guaranteed by the Treaty would be seriously obstructed. [33]

As TCN family members' rights are derivative they, like the partners subject to British immigration law discussed in Chapter 1, *are made dependent on their EU Citizen spouse*. This dependency does not just extend to a TCN's migration status and any application she might

31 That the family members of some EU Citizens are treated more favourably than those of MS' own nationals has given rise to claims of 'reverse discrimination', see, for example, Peter Van Elsuwege and Dimitry Kochenov, 'On The Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights' (2011) 13(4) *European Journal of Migration and Law* 443.

32 Case C-127/08 *Metock* ECLI:EU:C:2008:449 [2008] ECR I-06241.

33 ibid, para 62.

make in relation to it (again a TCN wife requires her EU Citizen husband's signature on her application) but also to her ability to access the labour market and/or receive welfare benefits.[34]

EU Citizen women (in comparison with EU Citizen men) are, therefore, disadvantaged by a citizenship-status which has not shaken off its market origins and which remains imbued with gendered (and racialised and classed) conceptions of work and economic activity. TCN women family members are similarly disadvantaged by being considered adjuncts of these Citizens and their economic activity. The disadvantageous consequences for TCN victims of domestic violence of having only derivative rights, and rights premised on particular types of economic activity, are discussed later in this chapter.

2. The Domestic Violence Rules Compared

This chapter compares and evaluates two regimes of exception that determine the status of migrant victims of domestic violence.

Article 13(2)(c) of the EU Citizens' Directive enables some TCNs to retain their rights of residence on divorce in particular circumstances, including where domestic violence has occurred, if certain conditions are met. Article 13 states:

> 1. Without prejudice to the second subparagraph, divorce, annulment of the Union Citizen's marriage or termination of his/her registered partnership, as referred to in point 2(b) of Article 2 shall not affect the right of residence of his/her family members who are nationals of a Member State.
>
> Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).
>
> 2. Without prejudice to the second subparagraph, divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of

34 Home Office, *EEA(PR) Application for a Document Certifying Permanent Residence or Permanent Residence Card under the EEA Regulations* (UK Visas & Immigration, 18 March 2016).

> Article 2 shall not entail loss of the right of residence of a Union Citizen's family members who are not nationals of a Member State where:…
>
> (c) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; …
>
> Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4).[35]

Section DVILR of Appendix FM of the Immigration Rules (and its accompanying provisions) allows those who have permission to remain in the UK as the partner of someone who is British or settled here and whose relationship has broken down because of domestic violence to be granted permanent residence:

> E-DVILR.1.3. The applicant must provide evidence that during the last period of limited leave as a partner of a British Citizen or a person settled in the UK under paragraph D-ECP.1.1., D-LTRP.1.1 or D-LTRP.1.2 of this Appendix the applicant's relationship with their partner broke down permanently as a result of domestic violence.[36]

35 EU Citizens' Directive, Art 13 (edited for clarity).

36 Section DVILR of Appendix FM of the Immigration Rules. See also pars 289 A-D of the Immigration Rules; and, Part 6 of Appendix Armed Forces. Note: this chapter does not consider the impact of a criminal conviction on an application for indefinite leave to remain.

The two regimes differ in several key respects. Firstly, the EU domestic violence rule applies on divorce, which means that, as will be seen, it does not apply in situations where a couple are separated but not divorced. In contrast, the UK's domestic violence rule can be relied on at the point at which the relationship permanently broke down in fact, not the point at which it was ended as a matter of law. Secondly, under EU law, domestic violence does not have to be the reason for the relationship breakdown, the retention of rights is simply justified on the basis that the applicant has experienced 'difficult circumstances'. Under British law, domestic violence must have caused the relationship to permanently break down. Thirdly, under EU law, to benefit from the rule, the TCN has to meet certain conditions, these conditions do not relate to domestic violence but are economic, as the TCN has to show that she is economically active in certain ways and has comprehensive sickness insurance (or be the family member of someone who themselves meets these conditions). Under British law, if the relationship has broken down permanently because of domestic violence, the economic position of the applicant is irrelevant. Finally, EU law only protects spouses; it does not extend to those in durable relationships who also have derivative rights as the family members of EU Citizens. The UK's domestic violence rule applies to partners; this includes married couples (whether same-sex or opposite-sex), civil partners and those in durable relationships (again, whether same or opposite sex).

Neither rule specifies how an application under it should be made, nor what evidence should be adduced to support it, such issues being dealt with in policies adopted at a national level.[37] A woman whose application is successful will receive an independent migration status which enables them to work, receive State support and remain in the UK (or another EU MS) permanently, either immediately (in the UK case); or, immediately or following a period where

37 Subject to review by the Courts where such policies operate to undermine the effectiveness of the relevant rule in practice. See, for an example of such a review, *JL (Domestic violence: evidence and procedure) India* [2006] UKAIT 58, [2006] UKAIT 00058.

rights are retained (in the EU case, Citizens' Directive Article 13(2) in conjunction with Article 18).

3. Encountering the EU Regime

(a) Naomi's Fight For Residence

The facts of Naomi's case are set out in paragraphs 11-23 of the Advocate General's opinion and in a summary of the case drafted by Naomi's legal representatives.[38] Naomi was a TCN who came to the UK as the family member of an EU Citizen worker. Naomi was Pakistani, her husband, Kafeel was both German and Pakistani. Naomi and Kafeel married in September 2003 and moved to the UK in March 2004, Kafeel being a 'qualified person' under the EU Citizens' Directive as he was, at various times, either employed or self-employed. The couple had two daughters, MA (born in 2005) and IA (born 2007). Both daughters were German. Kafeel was violent to Naomi throughout their relationship. In October 2006, following an assault on Naomi, who was at that time pregnant and which involved the police, Kafeel left the 'family home' and two months later, the UK for Pakistan. Almost immediately after his return to Pakistan, Kafeel wrote to the Home Office asking them to cancel Naomi's residence permit and to be informed when they had done so. On 13 March 2007 Kafeel purported to divorce Naomi by a *talaq* (an Islamic divorce) issued in Karachi, Pakistan. In September 2008, Naomi began divorce proceedings in the UK, the decree absolute was issued on 4 August 2009 and Naomi was granted sole custody of their two children. From January 2009 and September 2010 respectively, MA and IA attended school in the UK. Both Naomi's divorce and the entry of her

38 Case C-115/15 *Secretary of State for the Home Department v NA* ECLI:EU:C:2016:259 and Bojana Asanovic, *Note on SSHD v NA Pakistan, C-115/15, AIRE Centre Intervening* (Document number 160732348, Resources for Members, Immigration Law Practitioners' Assocation, 28 July 2016).

children into school in the UK occurred *after* her EU Citizen husband had departed from the UK.

Naomi derived her right to be in the UK from Kafeel's right as an EU Citizen to work here. After he left, she applied for permanent residence under Article 13(2)(c) of the EU Citizens' Directive, as incorporated into British law through regulation 10(5)(d)(iv) of the EEA Regulations 2006.[39] Her application was rejected. It will be recalled that under Article 13(2)(c) 'divorce, annulment of marriage or termination of the registered partnership' 'shall not *entail loss of the right of residence'* where 'this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting.' The applicant also has to show that at the relevant point in time 'they are workers or self-employed persons' etc. The issue in Naomi's case was, essentially, one of timing. On one interpretation, (the interpretation adopted by Home Office), the EU's rule *appears* only to protect a potential applicant from losing her *current right of residence* (a) at the point at which she divorces where (b) that current right of residence would be lost when the relationship was legally ended; and (c) she is economically active/self-sufficient etc. in the required manner. It will be recalled that for an applicant to have (a) she must be deriving it from her (soon to be former) EU Citizen partner, who himself would have to be in the relevant MS in accordance with EU law (e.g. being a worker, etc.). Naomi was denied the benefit of the rule because it appeared that she had no right of residence at point (a) to retain, that right having potentially already been lost when Kafeel left the UK.

Naomi's case progressed through the appellate courts in the UK until the Court of Appeal, in two judgements given on 17 July 2014[40] and 25 February 2015[41] respectively,

39 The Immigration (European Economic Area) Regulations 2006.

40 *NA v Secretary of State for the Home Department* [2014] EWCA Civ 995.

41 *Secretary of State for the Home Department v NA (Pakistan)* [2015] EWCA Civ 140.

referred four questions to the CJEU for a preliminary ruling. One of these questions concerned how the domestic violence rule should be interpreted when the EU Citizen, on whom a TCN depended for the residence right she sought to retain, left the country *before* that right could be protected. Following terminology used in the UK in relation to EU law, the question was phrased as follows:

> Must a third country national ex-spouse of a Union citizen be able to show that their former spouse was exercising Treaty rights in the host Member State at the time of their divorce in order to retain a right of residence as a victim of domestic violence under Article 13(2) of the Citizens' Directive (regulation 10 of the EEA Regulations 2006)? [42]

(b) Compounded Disadvantage

Naomi's position as a subject of EU law compounded the disadvantage she experienced as a victim of violence. In this section I unpack this disadvantage, the defining features of which, are, following the analysis engaged in in Chapter 3, control, exclusion a perilous migration status and an intensified experience of violence. In doing so I focus on Naomi's predicament *at the time she sought to rely on the domestic violence rule,* the uncertainty surrounding her migration status at this point giving rise to the preliminary references made to the CJEU.

Imperilled Migration Status

Naomi's migration status was imperilled by the departure from the UK of the person on whom she depended for her right to live here, her EU Citizen husband. As discussed above, Naomi derived her migration status from the rights that Kafeel had as an EU Citizen who was working (or otherwise 'qualified', per the EU Citizens' Directive) in the UK. That Naomi was so dependent can be illustrated by reference to *Diatta* [1985],[43] a case which pre-dates the EU

42 *NA v Secretary of State for the Home Department* (n 40), para 22.

43 Case C-267/83 *Diatta v Land Berlin* ECLI:EU:C:1985:67 [1985] ECR 0056.

Citizens' Directive (but which remains relevant to Naomi's case, as we shall see) and concerned the residence rights of a TCN who was separated, but not yet divorced, from her EU Citizen husband. The ECJ held that in such cases TCNs *only* have residence rights *while* their EU Citizen spouse is economically active in the country of residence and until the marriage is ended by (legal) divorce proceedings. Following *Diatta* [1985], when a marriage ends or, as in Naomi's case, the EU Citizen departs, such derivative rights might be lost, or even deliberately extinguished, by the actions of the EU Citizen. Article 13 of the EU Citizens' Directive was adopted to respond to the TCN-rights-lacuna *Diatta* [1985] revealed, putting 'safeguards' in place which should enable a TCN to retain her derived rights in certain circumstances, including where domestic violence has occurred.[44] As the preamble of the EU Citizens' Directive states:

> Family members should be legally safeguarded in the event of the death of the Union Citizen, divorce, annulment of marriage or termination of a registered partnership. With due regard for family life and human dignity, and in certain conditions to guard against abuse, measures should therefore be taken to ensure that in such circumstances family members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis.[45]

The problem that Naomi had was that her EU Citizen husband left the UK *before* she had the opportunity to start divorce proceedings and/or apply to retain her right of residence under Article 13. Would Naomi, in such circumstances be able to retain the rights she had prior to Kafeel's departure? In *Singh and Others* [2015][46] the CJEU confirmed the *Diatta* [1985] position that where divorce proceedings are commenced *after* the departure of the EU Citizen,

44 European Commission, *Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member State* (Brussels, 2352001 COM(2001) 257 final, 2001), commentary to Art 13, 14-15.

45 EU Citizens' Directive, recital 15.

46 Case C-218/14 *Kuldip Singh, Denzel Njume, Khaled Aly v Minister for Justice and Equality* ECLI:EU:C:2015:306 [2015].

the TCN family member has no derivative rights to either retain or revive. Domestic violence was not raised as an issue in either *Diatta* [1985] or *Singh and Others* [2015]. However, if the reasoning employed in these cases were applied directly to Naomi's situation, she would have no right to retain under the domestic violence rule, her residence rights not just being imperilled by Kafeel's departure, but extinguished.

Control

Kafeel's control over, and desire to control, Naomi's migration status is evident in the fact that his departure from the UK appears to have been undertaken, at least in part, to end her rights of residence here (it may also have been motivated by a desire to evade criminal sanction, his violent behaviour having also come to the attention of the police). It is telling that he not only wrote to the Home Office to request that they cancel her residence permit (a document issued to EU Citizens and their family members to confirm their right to live in the UK) but that he also wanted to be informed when they had done so. That Kafeel sought both Naomi's return to Pakistan and knowledge of when this might occur indicates that, had she been compelled to leave the UK, she may have been at risk of further violence there.[47]

The requirement that an EU Citizen not only remains in the relevant EU MS (as discussed above) but also continues to be economically active in particular ways (as a qualified person) provides perpetrators of violence with an additional source of control over their TCN spouses. Perpetrators may seek to affect the migration status of their spouse not only by departing (or threatening to depart) from a MS, but also by ceasing to be economically active or refusing to provide evidence of their being so. In the former case the TCN spouse, per *Singh*

47 Women who are unable to benefit from the domestic violence provisions of either EU or domestic immigration law may, in such cases, make a sur place claim for protection under refugee law or from protection from refoulement under human rights law.

and Others [2015], may lose her right to remain in the UK. In the latter, the inability of a TCN spouse to evidence the rights she does have (for reasons beyond her control) may have the same effect.[48] Whilst the EU and its MS are concerned, therefore, with the abuse of free movement law by TCNs who enter into 'sham' marriages, TCN family members are at risk of its abuse by EU Citizens who sham a lack-of-economic-activity.

Exclusion

While many migrants may be adversely affected by the restrictions that flow from the migration statuses they hold, women subject to violence experience a compounded disadvantage where these restrictions exclude them from those 'assets' which provide 'resilience' to violence.[49] TCNs who have a right of residence in the UK under EU law are able to work, to access welfare benefits and housing services as well as services provided by local authorities and the NHS. TCN family members, or former TCN family members, who *do not* have an EU right of residence require permission to remain under immigration law and are, therefore, affected by all the 'no recourse' rules and exclusions described in Chapter 3, the consequences of which are discussed below.

If the CJEU found that Naomi did retain a right of residence following Kafeel's departure she would continue to have, in law, all the rights enjoyed by the family members of

48 Women who have separated, but not divorced, from an abusive partner may seek to remain in the UK where they meet the criteria necessary to either retain a right of residence, or obtain permanent residence. TCNs in these cases have, amongst other things, to provide evidence of their family relationship and that the Union Citizen in question has been exercising Treaty rights for the requisite period of time. Whilst 'a pragmatic approach' to the evidential requirements may be taken in cases involving domestic violence, this does not appear to always be the case as the relevant guidance is far from clear, compare Home Office, *Family members of European Economic Area (EEA) nationals who have retained the right of residence* (7 April 2015), page 31 with Home Office, *Direct family members of European Economic Area (EEA) nationals* (29 September 2015), 34.

49 To draw once again on the terminology employed in Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) *Yale Journal of Law and Feminism* 1.

EU Citizens. In practice, Naomi's migration status and personal situation may have combined to generate barriers which could have resulted in her exclusion from those sources of support she was legally entitled to. Whilst being able to provide a current residence permit may be sufficient evidence of eligibility for some types of service or support, others, such as welfare benefits, usually require a TCN to provide evidence that their EU Citizen family member was/is a qualified person. We do not know whether Naomi would have had access to such information and evidence.

If, however, the CJEU applied *Singh and Others* [2015] directly to Naomi's case, she would lose her right to live in the UK and all the rights that flow from it. In considering the impact that the resulting exclusion might have had on Naomi, it is worth recalling her personal circumstances at this point: financially dependent on the husband who had left her; a victim of recent (potentially criminal) violence; the sole carer of an 11-month old child; and, five months pregnant.

A person's migration status should not affect the response they receive as a victim of crime from agencies, such as the police, who are part of the criminal justice system.[50] Naomi should, therefore, have been able to benefit from the support and protection the police are able to provide victims of domestic violence. Similarly, if she had been injured by Kafeel's conduct she would have been able to receive urgent medical care, such care being available free of charge regardless of a person's migration status. Determining a woman's ability to access antenatal and maternity services when her migration status is insecure is significantly more complicated. A woman seeking antenatal care under the NHS will, in general, be charged for it if she has neither indefinite leave to remain nor a right of residence in the UK under EU

50 See, however, the discussion and references in Chapter 3 on migrant women's intensified experience of violence.

law.[51] Whilst maternity care should be provided whether or not the woman concerned can pay for it, in practice women are deterred from accessing care by the charging regime and may experience adverse health consequences as a result, particularly if there are complications (such as those that may arise from being subject to violence).[52] We do not know whether or not Naomi's migration status impacted on the maternity care she sought or received. Given that pregnancy increases a woman's risk of being subject to domestic violence we can surmise, however, that there will be many women in Naomi's position whose migration status negatively effects the care they receive and who suffer as a result.[53]

Naomi's potential loss of rights on Kafeel's departure would also have excluded her from a range of other assets that provide resilience to violence and enable women to recover from it. Without repeating Chapter 3's exploration of exclusion as a facet of compounded disadvantage, such assets include welfare benefits; local authority housing or homelessness assistance; and, (potentially) assistance from social services.[54] These assets enable someone in Naomi's position to support themselves financially, and to either maintain, or secure, alternative accommodation (including, if necessary, in a woman's refuge). Exclusion from these assets may result in women in Naomi's position facing destitution and even homelessness.[55] These exclusions may also intensify the violence migrant women are subject

51 National Health Service (Charges to Overseas Visitors) Regulations 2015, S1 2015/238; The National Health Service (Charges to Overseas Visitors) (Amendment) Regulations 2017, SI 2017/756.

52 Rayah Feldman, 'Maternity Care for Undocumented Migrant Women: The Impact of Charging for Maternity Care' (2016) 24(1) *British Journal of Midwifery* 52; Maternity Action, *What Price Safe Motherhood? Charging for NHS Maternity Care in England and its Impact on Migrant Women* (September 2018).

53 In 30% of cases domestic violence starts in pregnancy. Existing violence may get worse during pregnancy or after the birth of the child, NHS Choices, 'Domestic Abuse' (*NHS*, 17 March 2015) <http://www.nhs.uk/conditions/pregnancy-and-baby/pages/domestic-abuse-pregnant.aspx> accessed 11 August 2016 and Editorial, 'Domestic Violence and Pregnancy ' (1997) 314 *British Medical Journal* 1295.

54 The one source of support Naomi does not appear to have been excluded from was legal aid.

55 Charlotte O'Brien, 'The Pillory, the Precipice and the Slippery Slope: the Profound Effects of the UK's Legal Reform Programme Targeting EU Migrants' (2015) 37(1) *Journal of Social Welfare and Family Law* 111, 115 and Charlotte O'Brien, 'Civis Capitalist Sum: Class as the new Guiding Principle of EU

to, with devastating, even lethal consequences. The exclusion of one EU Citizen, Adult D, from the 'refuge, support and safety which would be provided to a UK national in similar circumstances' was specifically identified by those examining her death as contributing to the circumstances in which she was murdered by her former partner.[56]

Intensified Experience of Violence

Chapter 3 drew on empirical evidence to demonstrate that women who are dependent for their migration status on the person who is violent towards them have an intensified experience of that violence. This was precisely Naomi's situation, irrespective of the fact that her status was derived from EU (rather than UK) law. There is, however, one aspect of the migration status held by a TCN family member of an EU Citizen that is significant here: the potential for a EU Citizen to deter his TCN spouse from seeking protection from the police on the grounds that to do so may interfere with *his* economic activity and/or result in his imprisonment with, in both cases, the consequential loss of *her* right to live in the UK.[57] Women with permission to remain in the UK may, of course, be deterred from reporting offences to the police, particularly if to do so may jeopardise a potential future immigration application. Following *Diatta* [1985] and *Singh and Others* [2015], however, the possibility that a right of residence may be lost *as soon as* the EU Citizen ceases to reside lawfully in the UK is, for the perpetrator, an additional source

Free Movement Rights' (2016) 53(4) *Common Market Law Review* 937, 962. Depending on her circumstances, Naomi and her children may be eligible for support under section 17 Children Act 1989. Applications for such support are not straightforward, however, as discussed in Chapter 3. Naomi may also however, have been excluded from the provisions on support for pregnant women. Of course, Naomi may have had access to sources of resilience that are not provided by the State, she may have had savings or friends or family in the UK able to assist her.

56 Sheffield Safer and Sustainable Communities Partnership, *Learning from Domestic Homicide Review (DHR): Adult D* (January 2014).

57 On economic activity, see the preceding discussion on 'Control'. The CJEU has ruled that time spent in prison is not legal residence under EU law, Case C-378/12 *Nnamdi Onuekwere v Secretary of State for the Home Department* ECLI:EU:C:2014:13 [2014].

of control and, for the spouse, an additional source of vulnerability to further and/or intensified violence.

(c) Secretary of State for the Home Department v NA [2016]

Having unpacked the compounded disadvantage that Naomi was subject to at the time she made her application under the domestic violence rule, it remains to analyse the CJEU's response to it.

The CJEU's Judgement

In this, the first and thus far only case in which it has been called upon to interpret the specific provision in the EU Citizens' Directive that relates to domestic violence, the CJEU failed to do so in a manner that ensures that this 'safeguard' (to return to the language of the Preamble) operates as such. The Court ruled that:

> In the light of the foregoing, the answer to the first question is that Article 13(2)(c) of Directive 2004/38 must be interpreted as meaning that a third-country national, who is divorced from a Union Citizen at whose hands she has been the victim of domestic violence during the marriage, cannot rely on the retention of her right of residence in the host Member State, on the basis of that provision, where the commencement of divorce proceedings post-dates the departure of the Union Citizen spouse from that Member State.[58]

According to the CJEU, Kafeel's departure from the UK extinguished Naomi's right of residence. She could not rely on the domestic violence rule because at the time of her divorce she had no derivative right of residence to retain. Thankfully Naomi did not face removal from the UK as a result of this decision, the Upper Tribunal having already ruled that she had a derivative right of residence as the parent of EU Citizens who were completing their education;

58 *Secretary of State for the Home Department v NA* (n 8), para 51.

and, that removing her would be a disproportionate interference with her and her children's right to a private and family life.[59]

Three other questions were asked of the CJEU in Naomi's case; these questions concerned rights that Naomi might have as the carer of EU Citizen children and those children's rights in the UK. In relation to Naomi herself, and confirming the judgement of the Upper Tribunal, the CJEU found that Naomi had a right of residence under Article 12 of Regulation (EEC) No 1612/68[60] on the basis that her children had the right to continue their education here.[61] Following its case-law on the rights of EU Citizens to have their family members accompany or join them (discussed above), the Court drew on the '(admittedly latently patriarchal) notion of the 'primary caregiver''[62] to grant Naomi a right of residence. Such a right is purely instrumental. Naomi's presence is permitted whilst it is necessary to realise the rights of her EU Citizen children. As I discuss the judgement in detail elsewhere, the analysis, undertaken in the paragraphs that follow focuses on the domestic violence element of Naomi's case.[63]

Evaluating the CJEU's Judgement

The Court justifies its narrow interpretation of the domestic violence rule on two grounds: its reasoning in *Singh and Others* [2015] (the case discussed above which concerned TCN residence rights post-departure but pre-divorce); and, a comparison of Article 12 of the

59 *Ahmed (Amos; Zambrano; reg 15A(3)(c) 2006 EEA Regs)* [2013] UKUT 00089 (IAC); the Upper Tribunal's finding on private and family life, Art 8 ECHR, was not appealed by the Home Office.

60 Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L 257 2.

61 ibid, Art 12 of which concerns the rights of the children of workers to access education in the country the Union Citizen worked in.

62 Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (OUP 2016), 168.

63 Catherine Briddick, 'Case Comment: Secretary of State for the Home Department v NA' (2016) 30(4) *Journal of Immigration Asylum and Nationality Law* 367.

Citizens' Directive, which concerns the departure of EU Citizens, with Article 13(2)(c). The Court, therefore, interprets a rule on domestic violence by reference not to the context and objectives of that provision, but by reference to the context and objectives of *other* provisions which are themselves entirely unrelated to violence.[64] The impact of this on the Court's language and interpretative approach, in comparison with that adopted by AG Wathelet in his opinion, is significant.

The Court starts from the premise that it can directly 'transpose' its reasoning in *Singh and Others* [2015] to Naomi's case.[65] TCNs should, following the logic of this judgement, either 'divorce immediately or leave'.[66] The Court then proceeds to describe Article 13(2)(c) as a 'derogation' from the usual EU law position that EU Citizens have rights of entry to and residence in other MS, which TCNs (who are not family members etc.) do not.[67] Whilst this reasoning supports my characterisation of Article 13(2)(c) as a 'regime of exception', the Court's approach to Article 13(2)(c), as relevant only in 'exceptional cases', means that it understands this provision as one that requires a narrow, rather than purposive, interpretation.[68] In contrast, AG Wathelet adopts as the premise of his opinion that it is important to provide Naomi with legal certainty about her migration status and the rights that pertain to it. It is telling that in so doing the Advocate General acknowledges the rights-restriction and exclusion that may flow from holding, or not holding, a particular migration status:

> After all… the Court's answers to the various questions put to it will determine whether NA is eligible for certain social security benefits and special non-

64 Contrary to interpretative approach advocated by the Court in Case C-306/12 *Spedition Welter GmbH v Avanssur SA* ECLI:EU:C:2013:650 [2013], para 17.

65 *Secretary of State for the Home Department v NA* (n 8), para 37.

66 Francesca Strumia, 'Divorce Immediately, or Leave. Rights of Third Country Nationals and Family Protection in the Context of EU Citizens' Free Movement: Kuldip Singh and Others' (2016) 53(5) *Common Market Law Review* 1373.

67 *Secretary of State for the Home Department v NA* (n 8), para 41.

68 ibid, para 42.

> contributory benefits which she is currently denied because of the restriction of the rights conferred by a right of residence based on Article 8 ECHR. A right of residence based directly on EU law would at the very least be such as to afford NA an increased level of legal certainty.[69]

AG Wathelet refers to *Singh and Others* [2015], but distinguishes it from cases involving domestic violence where victims may, he opines, be deterred or prevented from taking action to preserve their position (by initiating divorce proceedings) because they fear the perpetrator of violence, because that perpetrator manipulates their migration status, or, because they are simply 'worn down' by their experiences.[70] The Advocate General is also alive to the fact that perpetrators of violence may seek to evade criminal penalties by departing from the country they committed offences in, thereby 'effectively depriving' their spouse of their residence rights.[71] Having focussed his attention on domestic violence and its impacts, AG Wathelet opines that a restrictive interpretation of Article 13(2)(c) would be 'manifestly contrary' to the provision's protective objective.[72] He concludes:

> If the fact of being a victim of an act of domestic violence was regarded by the EU legislature as a ground for converting a derived right into an individual right, the recognition of such a right cannot depend exclusively on whether the

69 *Secretary of State for the Home Department v NA* (n 38), para 30.

70 ibid, para 70.

71 ibid, para 70-76.

72 ibid, paras 73 and 80.

> perpetrator of those acts chooses to remain in the territory of the host Member State.[73]

It is telling that, in its rejection of AG Wathelet's interpretation of Article 13(2)(c), the Court failed to engage with, or even acknowledge, any of the domestic violence-specific arguments he made.

In addition to relying on *Singh and Others* [2015], the Court also interprets Article 13(2)(c) by reference to Article 12, which concerns cases that do not involve domestic violence but do involve the departure of an EU Citizen from the TCN's country of residence. The fact that Article 12 does not provide for retained rights of residence is held by the Court to be significant and to provide further justification for denying rights to Naomi following the departure (before divorce proceedings had been initiated) of Kafeel. The fact that the EU Citizens' Directive has a general provision for cases which involve departure does not 'tell' us anything, however, about the specific provision it has on domestic violence. These provisions are not presented hierarchically. The EU legislature has not indicated which provision should take precedence if more than one may apply. Indeed, in the absence of such an indication, one might assume that the correct interpretative approach would be to treat the specialist rule as having precedence over the rule of more general application. This approach is endorsed by AG Wathelet, who also refers to Articles 12 and 13 but differentiates the former from the latter on the grounds that Article 13(2)(c) concerns departure that occurs after domestic violence,

73 ibid, para 76.

domestic violence being the event which triggers the retention of rights, making it the relevant provision in such cases.[74]

The Court does, at the end of its reasoning on the domestic violence element of Naomi's case, refer to the Commission's proposals which resulted in adoption of Article 13(2)(c), recalling that its purpose was:

> …to offer certain legal safeguards to third-country nationals whose right of residence was dependent on a family relationship by marriage and who could therefore be open to blackmail accompanied by threats of divorce, and that safeguards were necessary only in the event of final divorce, since, in the event of *de facto* separation, the right of residence of a spouse who is a third-country national is not at all affected.[75]

The Court takes from this, however, that rights only require protection on divorce *and not departure,* because before a couple legally end their marriage, the TCN's rights do not require safeguarding.[76] This reasoning is simply incomprehensible. It is precisely because Naomi's rights are not protected post her violent partner's departure and pre-divorce, that the point at which rights may be lost or retained is so significant.

At no point in this reasoning does the Court acknowledge, let alone vindicate, Naomi's *human* rights, such rights existing regardless of whether she has particular derived rights under free movement law. As will be recalled from this chapter's introduction and Chapter 2, domestic violence has been found by the ECtHR to be discrimination against women which violates a women's human rights, including her rights to a private and family life and to be free from torture, inhuman and degrading treatment. The Charter of Fundamental Rights of the

74 ibid, para 62.

75 *Secretary of State for the Home Department v NA* (n 8), para 47.

76 ibid, para 48-9.

European Union (CFREU)[77] also contains several rights that apply directly to Naomi's situation. These rights can be relied upon within the scope of EU law and should, therefore, have been considered by the Court in its interpretation of Article 13(2)(c). Such rights include the right to human dignity (Article 1, CFREU); the right to integrity of the person (Article 3); the right to be free from inhuman and degrading treatment (Article 4); and, the right to a private and family life (Article 7). It is of concern, therefore, that when faced with the apparent ambiguity of Article 13(2)(c), the CJEU did not construe it in such a way as to ensure that the provision did not conflict with, and indeed protected, the human rights of victims of domestic violence.[78]

When contrasting the approaches taken by the Court and Advocate General it is fruitful to draw on Lizzie Barmes' claim that case law is valuable qualitatively, as a source of material on the nature of adjudication. Barmes examined one case as it progressed through the Tribunal system to the Court of Appeal, identifying a series of 'effects': the distancing, truth and muting effects.[79] These effects can be identified in Naomi's case and in so doing, several conclusions can be (tentatively) drawn about how the Court and Advocate General understand both domestic violence and Naomi's situation.

The 'distancing' effect relates to the way that the facts of cases are presented in judgements; how only the barest details are recounted and how these 'facts' become the 'truth' of the case. Barmes focuses our attention on the way that Courts 'selectively narrate'

77 Charter of Fundamental Rights of the European Union [2007] OJ C 303/01 (CFREU).

78 In Case C-400/10 *PPU J McB v LE* ECLI:EU:C:2010:582 [2010] ECR I-08965, for example, the CJEU held that a Regulation had to be interpreted to ensure the protection of the fundamental rights of parents and children. In the same case, at para 53, the Court reiterated that the meaning and scope of rights protected by the Charter are the same as those protected by the ECHR. These arguments were made on Naomi's behalf, they are referred to in the domestic litigation, *Ahmed (Amos; Zambrano; reg 15A(3)(c) 2006 EEA Regs)* (n 59), para 17.

79 Barmes (n 9).

applicants' experiences and how this narration delimits the legal reasoning that follows.[80] The 'distancing' and 'truth' effects are evident in Naomi's case, as a comparison of the 'facts' of her case as described by the Court and the Advocate General reveals. The Court devotes fifteen paragraphs to describing Naomi's situation of which just one concerned the domestic violence she experienced:

> The marital relationship deteriorated subsequently. NA was the victim of domestic violence on a number of occasions.[81]

The phrasing here is significant. Naomi is rendered a passive 'victim', domestic violence is something that 'just happens' for which no one is responsible. Not only is there no reference to Kafeel as the EU Citizen-perpetrator of potentially criminal violence, but there is also no mention of the fact that he assaulted Naomi when she was pregnant, left the country and then sought to manipulate her migration status having done so. Similarly absent is a discussion of domestic violence as a phenomenon and its impacts. The reason for this absence cannot be a need for brevity; the Court devotes eight detailed paragraphs to Naomi's legal proceedings in the UK. The Advocate General also describes Naomi's circumstances briefly, however, his Opinion includes 'facts' the Court omits and devotes significant space to domestic violence and its consequences.[82] The partial account of Naomi's circumstances given by the Court, and its only very limited engagement with the domestic violence element of her case, enables it to

80 ibid, 315-8.

81 *Secretary of State for the Home Department v NA* (n 8), para 16.

82 *Secretary of State for the Home Department v NA* (n 38), paras 70-76.

side-step a consideration of the disadvantage that Naomi is subject to and sets the stage for a restrictive interpretation of the rule.[83]

Barmes' muting effect, the loss of the applicant's individual voice, is also apparent in both the Advocate General's opinion and Court's judgement. One thing that is 'lost', for example, is Naomi's agency and resilience. Naomi legally divorces Kafeel; she obtains sole custody of her children (presumably as a protection from potential abduction); she sets herself up as self-employed and maintains that employment. She resists first her husband's, and then the Home Office's, attempts to remove her from the UK. In contrast, in the Court's judgement in particular, she exists only as the primary carer of her EU Citizen children. Applying Barmes' insights on adjudication to Naomi's case serves to highlight how judicial decision-making obscures the 'politically contested and morally troubling choices'[84] raised by EU law's distribution of Citizenship/derivative residence rights, and the gendered disadvantage that TCN women in particular (as spouses or primary carers, not independent rights-holding individuals), experience as a result.

Is Article 13(2)(c) Reparative of the Compounded Disadvantage Experienced by TCN Women?

Naomi sought permanent residence in the UK. Following the CJEU's judgement, she only has the right, under EU law, to remain here while her children are in education.[85] This right produces a precarious migration status, valid only whilst her children are in school and until

83 It is significant that the most detailed recounting of the facts in Naomi's case is given by the Upper Tribunal and that it is at this point that she is granted status in the UK, albeit not on the basis she sought, *Ahmed (Amos; Zambrano; reg 15A(3)(c) 2006 EEA Regs)* (n 59).

84 Barmes (n 9), 320.

85 The possibility that Naomi may have obtained permanent residence on other grounds was raised by the Commission and confirmed by Advocate General but not discussed by the Court. See Briddick (n 63) for a discussion of this point.

they are 18 years old. It does not lead to permanent residence.[86] This 'positive outcome' to Naomi's case came 10 years after Kafeel left the UK; 10 years during which her and her children's ability to live here was in doubt, and during which she may have been excluded from a number of sources of financial and other support. The CJEU's reasoning in Naomi's case raises questions about what might happen to a similarly situated TCN who did not have children (or EU Citizen children, or children in education…), or indeed, to a TCN whose children were abducted by the EU Citizen spouse. Whilst the children of *workers* have a right of residence to enable them to continue their education, the children of those who are self-employed do not.[87] Following the CJEU's judgement, in all these cases the woman concerned may be left without a clear migration status in her country of residence.

Article 13(2)(c), as interpreted by the CJEU, fails, therefore, to provide a reparative response to the compounded disadvantage experienced by TCNs who are unable, for a variety of practical and/or legal reasons, to initiate divorce proceedings at the 'right' time.[88] In drawing this conclusion it should be recalled that the factual matrix of Naomi's case was not unusual, as the Court's jurisprudence on the rights of TCNs following relationship breakdown (in cases which did not involve domestic violence but did involve either departure or divorce) demonstrates.[89] Indeed, Naomi's circumstances appear to be almost exactly those that this

86 The Article 8 ECHR decision of the Upper Tribunal, which stated that Naomi could not be removed from the UK as to do so would be a disproportionate interference with her and her children's right to a private and family life, could have given Naomi security in the form of a migration status which offered the possibility of receiving indefinite leave to remain in the future. However, the migration statuses given to those protected from removal under Article 8 are precarious and have several rights-restrictions pertaining to them. We do not know what form of permission to remain Naomi eventually received.

87 Regulation (EEC) No 1612/68, Art 12 of which concerns the rights of the children of *workers* to access education in the country the Union Citizen worked in.

88 See *Baigazieva v Secretary of State for the Home Department* [2018] EWCA Civ 1088, [2018] INLR 516 for a discussion of when the relevant conditions of Art 13(2)(c) need to be met, as distinct from when rights are retained.

89 Per *Kuldip Singh, Denzel Njume, Khaled Aly v Minister for Justice and Equality* (n 46) and the cases that preceded it.

domestic violence rule was designed to address.[90] The CJEU could not have been unaware of the consequences of this judgement for TCN victims of domestic violence affected by it. As Advocate General Wathelet's opinion, and the Court of Appeal's reference show, the CJEU had received arguments on domestic violence and its impacts. These arguments specifically highlighted the potential for perpetrators of violence to 'abuse' (to quote the Court of Appeal) their Citizenship rights in order to manipulate the migration status of their partner and continue their abusive behaviour.[91] These issues were discussed both by Naomi's counsel and the AIRE Centre,[92] which intervened in this case at both the national and European level.

That the rule fails to provide a reparative response to compounded disadvantage more generally can be demonstrated by considering the position of women who, following the CJEU's judgement, may still be able to benefit from it. In such cases, the EU Citizen spouse will be present in the UK (or other MS) and economically active (as a worker or self-employed person, for example). The TCN spouse will be able to start divorce proceedings (legally, because she has been married for over one year and practically, because she has sought legal advice and is able to act on it).[93] It is not just the EU Citizen who has to be economically active in the MS, however. Under Article 13, to receive permanent residence the TCN *also* has to be economically active, or already the family member of someone else who is.[94] This part of the

90 European Commission (n 44), 14-15.

91 *NA v Secretary of State for the Home Department* (n 40), para 21 at which the Court of Appeal noted that there was considerable force in the arguments made on Naomi's behalf that Article 13(2) should be construed in a purposive manner so as to avoid potential abuse by EU Citizens in domestic violence cases or those where EU Citizens are, for example, contesting custody or rights of access to their children in divorce proceedings.

92 The AIRE Centre is a charity which promotes European rights see AIRE Centre, *Written Evidence of The AIRE Centre to the Joint Committee on the Draft Domestic Abuse Bill* (24 April 2019) for further information about the organisation and its work in relation to domestic violence.

93 Divorce (and divorce at a particular time) is essentially a 'gateway' requirement to the rule, this is particularly problematic in jurisdictions where the ability to divorce is (more) restricted than it is in the UK.

94 Per the references to Art 7 in Art 13. Art 7 sets out who is a 'qualified person' under the Directive. This requirement, as well as the requirement that an applicant has comprehensive sickness insurance, is also reiterated in the penultimate paragraph of Article 13.

rule *initially* appears justifiable as the Directive is requiring no more of TCNs that it does of EU Citizens, that in order to benefit from their Citizenship they be economically active in particular ways (or the family member of someone who is). What the TCN is being promised or accorded here are the rights that go with EU *market citizenship*, the right to enter the workforce and to be an economic actor. However, as discussed above, market citizenship is problematic for women whose caring responsibilities are not themselves considered to be 'work', but which impact on their ability to engage in 'work' that is so considered. Single parents may be particularly disadvantaged by the EU law definition of 'worker', as may be women who are recovering from an experience of violence.[95] The EU's domestic violence rule is, therefore, extremely limited in its scope and, as Adam Weiss notes, of use to 'an absurdly discrete group':

> Among migrant couples in abusive relationships, there would appear to be an indirect relationship between the severity of abuse on the one hand and the ability of the abused spouse to support herself in the new country on the other. If this inverse relationship holds true, then the rule becomes less effective as the vulnerability of the individual it is designed to protect increases.[96]

This group shrinks even further if we consider the position of those in durable relationships who are subject to the same compounded disadvantage as their married/civilly-partnered counterparts, but who are excluded from the ambit of the rule.[97]

There will, of course, be some TCN victims of domestic violence who are able to obtain permanent residence under this regime of exception. For them, receiving permanent residence (and with it the right to work, to claim benefits or access other forms of State support) would be reparative of the compounded disadvantage they had experienced. The restrictive drafting

95 As appeared to have been in the case for the victim in *Sanneh & Ors v Secretary of State for Work and Pensions* [2015] EWCA Civ 49, [2016] QB 455. Part-time work is 'work' for the purposes of EU law.

96 Weiss (n 13), 853.

97 EU Citizens' Directive, Art 13(1) which states that the rule is for the benefit of those whose marriage or registered partnership is terminated.

of the rule itself, and the CJEU's restrictive interpretation of it, however, means that those who do benefit from it are likely to be only a very small proportion of those women who may have need of it.

4. Encountering the UK Regime

This section evaluates the UK's domestic violence rule and the extent to which it responds to the compounded disadvantage that women whose migration statuses are *determined by British immigration law* are subject to.

The UK's domestic violence rule is available to women who *have or had* leave as the partner of someone who is British, a permanent resident or a refugee, and whose 'relationship with their partner broke down permanently as a result of domestic violence.'[98] Women whose cases meet these criteria are granted indefinite leave to remain (ILR). As explained in Chapter 1, ILR (sometimes also referred to as 'settlement') is the right to live permanently in the UK: its holder can work and has full access to the labour market, welfare benefits and local authority support.

If Naomi had been the partner of someone who was British/settled here (rather than of an EU Citizen) then she would, it appears, have been able to benefit from this domestic violence rule. Naomi was subject to domestic violence and that violence caused her relationship to permanently breakdown (as potentially evidenced by the police's involvement and Kafeel's subsequent departure from the family home).[99] Kafeel's location and economic activity (or lack thereof) would not impact upon Naomi's ability to apply for, or benefit from the rule, nor would

98 DVILR, Immigration Rules, Appendix FM. See also Appendix Armed Forces, Part 6 (which covers the partners of those who are serving in the Armed Forces).

99 Other potential sources of evidence could be Naomi's GP/midwife or a specialist domestic violence support organisation. For information about the forms of evidence that can be used to support an application under the rule see Home Office, *Victims of domestic violence* (5 February 2018).

it matter whether or not Naomi was herself economically active or able to financially support their children. Indeed, if Naomi were destitute, she would not have to pay to make her immigration application and she may be able to rely on the Destitute Domestic Violence Concession (DDVC) to receive public funds, including welfare benefits and housing support, whilst that application was decided.[100] Although the 'quality' of Home Office decision-making has been subject to sustained criticism,[101] and victims may have problems evidencing the violence they have experienced to the required standard, the Tribunals/Courts have, in general, ensured that the rule is interpreted purposively to afford meaningful protection to its beneficiaries.[102]

What if Naomi had a migration status that was dependent on someone who themselves needed permission to remain, such as a student or labour migrant? If Naomi were in the UK as the dependent of a skilled labour migrant, for example, and that relationship broke down because of domestic violence she would be ineligible for either the domestic violence rule or DDVC. As was the case under EU law, in this scenario Kafeel's departure from the UK would result in Naomi losing her permission to remain. Naomi (and potentially her children) would then be subject to the full panoply of exclusions and restrictions discussed earlier and in Chapter 3, as well as being at risk of both detention and deportation. Although the domestic violence rule *may* assist those who have (or had) permission as the spouse/partner of someone

100 The DDVC is available to those eligible for the domestic violence rule who are destitute, see further Home Office, *Destitute domestic violence (DDV) concession* (5 February 2018) and Home Office, *Victims of domestic violence (DDVC) concession* (31 August 2018).

101 Niamh McIntyre and Alexandra Topping, 'Abuse Victims Increasingly Denied Right To Stay in UK' *The Guardian* (London) <https://www.theguardian.com/uk-news/2018/aug/16/abuse-victims-increasingly-denied-right-to-stay-in-uk> accessed 17 August 2018.

102 See *Balakoohi, R (on the application of) v Secretary of State for the Home Department* [2012] EWHC 1439 (Admin) and, in contrast, *Barbara Masengu v SSHD* [2015] UKAITUR IA234092014. The removal, or attempted removal, of appeal rights from victims of domestic violence may have been in response to this, see further *R (on the application of AT) v Secretary of State for the Home Department* [2017] EWHC 2589 (Admin), [2018] Imm AR 483 and Robert Matthews, 'Domestic Violence Settlement Applications and Appeal Rights' (*Garden Court North Chambers*, 23 November 2017) <https://gcnchambers.co.uk/domestic-violence-settlement-applications-appeal-rights/> accessed 18 August 2018.

who is British or settled here, those who do have such permission may be forced to choose between remaining in a violent relationship (and having an intensified experience of that violence) or forfeiting the right to live and potentially settle in the UK. This is the case even where the woman concerned *was in fact* the partner of a British citizen, that partner was violent towards her causing their relationship to breakdown and *his* manipulation of *her* migration status was the/a reason why she did not have the requisite permission to remain as a partner.[103]

The (comparative) simplicity of the UK's domestic violence rule, the existence of the DDVC, and the fact that the rule bestows ILR *on those eligible for it* combine to enable this regime to provide a response to victims of domestic violence that is reparative of the compounded disadvantage they have been subject to.[104] As the preceding discussion demonstrates, however, those eligible for the rule and accompanying concession are only a small proportion of those who the State subjects to compounded disadvantage.

Conclusion

Domestic violence is both a cause and consequence of women's inequality (per Chapter 2) and the EU, which aims to eliminate such inequality,[105] has consequently committed 'to combat all forms of domestic violence'.[106] However, until the adoption of a Directive and Regulation (in 1999 and 2013 respectively) on protective orders, none of the measures adopted by the EU in relation to violence against women could be used by victims of such violence themselves.[107]

103 As occurred in *SSHD and OB* [2016] UKAITUR IA277252014, discussed in Chapter 3.

104 In theory, if not necessarily in practice. In addition to concerns about the quality of Home Office decision making, victims of violence may face other barriers which impede their ability to benefit from the rule, including in accessing legal advice and representation.

105 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 'TFEU', Art 8.

106 Declaration 19 on Article 8, ibid.

107 Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order OJ L 338/2 and Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters OJ L181/4. Similarly, the rights of victims of crime did not receive substantive protection until 2012,

Initiatives the EU has undertaken have been criticised for failing to recognise the discriminatory nature of violence against women/domestic violence (again, per Chapter 2) and focusing instead on particular 'culturised' forms of violence as experienced/perpetrated by non-European 'outsiders'.[108] It is, therefore, a profound disappointment that when given the opportunity to vindicate the rights of an 'outsider' victimised by an EU Citizen, the CJEU failed to do so, its judgement in *NA* [2016] – Naomi's case - being described by some as 'shameful'.[109]

Twenty-six years ago Joseph Weiler criticised the then ECJ for defining what it means to be an EU Citizen by reference to what it means to be an outsider; the former a rights-holder the 'other' someone who can be stripped of his or her rights.[110] This chapter demonstrates the continued relevance of this critique, notwithstanding the adoption of the EU Citizens' Directive and the raft of cases that followed it, by highlighting the disadvantage that EU free movement law and EU Citizenship, in its current semi-market, semi-rights-based incarnation, generates for TCN women. In *NA* [2016] the CJEU does not simply affirm the rights of certain EU Citizens vis-à-vis outsiders, it disadvantages TCN women knowing (because the Advocate General has told them) that doing so enables migration statuses granted under EU law to be manipulated by perpetrators of violence. To return to *Metock* [2008] and the rationale the CJEU

Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA OJ L 315/57.

108 Celeste Montoya and Lise Rolandsen Agustin, 'The Othering of Domestic Violence: The EU and Cultural Framings of Violence against Women' (2013) 20(4) *Social Politics* 534. Contrast this with Shazia Choudhry, 'Towards a Transformative Conceptualisation of Violence Against Women - A Critical Frame Analysis of Council of Europe Discourse on Violence Against Women' (2016) 79(3) *Modern Law Review* 406.

109 Steve Peers, 'Domestic Violence and Free Movement of EU Citizens: A Shameful CJEU Ruling ' (*EU Law Analysis* 25 July 2016) <http://eulawanalysis.blogspot.co.uk/2016/07/domestic-violence-and-free-movement-of.html> accessed 2 August 2016.

110 Joseph HH Weiler, 'Thous Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals - A Critique ' (1992) 3(1) *European Journal of International Law* 65, 90.

gave in that case for vindicating the rights of TCNs, 'normal family life'[111] in the EU appears to include the right to take your family with you when you move and to abandon them, whichever is the most convenient. It also appears to include the right of perpetrators of violence to exercise control over their victims transnationally. Having decried TCNs' instrumentalisation by the Court, Weiler argued that the ECJ/CJEU should scrutinise the individual circumstances of TCNs whose residence rights are imperilled when their family circumstances change and to vindicate their fundamental rights, where required, in order to affirm the 'humaneness of the individual'.[112] By refusing to scrutinise Naomi's circumstances, engage with the domestic-violence specific elements of her case or consider her Charter-and ECHR-protected rights, the CJEU did not merely instrumentalise Naomi, it dehumanised her. This did not have to be the outcome of Naomi's case. Consistent with Weiler's critique, the Court could have adopted an approach to Naomi's situation which recognised and affirmed her human rights, as the Advocate General's opinion demonstrates.[113] The EU's domestic rule and the independent, secure migration status that it bestows will be of assistance to some women whose EU Citizen spouse perpetrates violence against them. The restrictive interpretation of a rule the scope of which is, as we have seen, already very limited, serves to render that assistance unavailable to all but a small minority of those women whose migration statuses are determined by EU law.

In contrast to the lack of attention paid to violence against women in the EU, decades of feminist activism in the UK has ensured that the domestic violence rule has been the subject of both political campaigns and strategic litigation. Whilst these strategies have yielded successes, of which the DDVC is itself one, they have failed to transform the domestic violence

111 *Metock* (n 32), para 62.

112 Weiler (n 110), 91.

113 See also Oosterom-Staples (n 13) who sets out another approach which could have been adopted by the CJEU.

rule and accompanying DDVC into a regime which is reparative of the compounded disadvantage experienced by victims of domestic violence whose migration statuses are determined by UK law. Indeed, where legal challenges to the rule have broadened its scope, these 'successes' have simultaneously confirmed the exclusion from it of other migrant women, such as the dependents of workers.[114] Consequently, a rule that is reparative (or potentially reparative) of the compounded disadvantage experienced by some women subject to domestic violence, excludes from its purview many women who are similarly disadvantaged, with potentially devastating consequences.

The limited scope of each regime and the failure of the CJEU in particular to engage with the substantive legal issues that arose from Naomi's experience of domestic violence adds impetus to calls for both the EU and UK to sign and ratify, *in full*, the Istanbul Convention. The Istanbul Convention (which it will be recalled from Chapter 2, is a Council of Europe treaty on violence against women and domestic violence), provides in Article 59 for autonomous or renewable rights of residence to be granted to some migrant victims of violence. As we shall see, this provision draws on, but is significantly more expansive than, the EU's domestic violence rule. In Chapter 6, I will draw on Naomi's case again to evaluate Article 59 of the Istanbul Convention as a regime of exception. It will then be possible to conclude

114 *A v Secretary of State for the Home Department* [2016] CSIH 38, discussed in this thesis' conclusion.

whether the EU's accession to, or the UK's ratification of, the Istanbul Convention will improve the position of migrant women who are subject to violence.

CHAPTER 5 REGIME OF EXCEPTION OR REGIME OF READMISSION? THE EUROPEAN TRAFFICKING REGIME

Introduction

This chapter is the second of three which evaluates a 'regime of exception'. Here I focus on the rules which require States to grant residence permits (a form of permission to remain) to some victims of trafficking under the 'European trafficking regime,' a regime comprised of the EU Residence Permit Directive,[1] the Council of Europe Convention on Action against Trafficking in Human Beings (the Trafficking Convention)[2] and the EU Trafficking Directive.[3] To evaluate the regime, I draw on the legal proceedings that EK, referred to here as Eleanor, fought for permission to remain in the UK.[4] Eleanor is from Tanzania, she had been trafficked into, and then within, the UK. She held a domestic worker visa when she arrived in the UK, she was not an EU Citizen (or the family member of one) so her migration status was determined by British immigration law. This chapter starts by discussing, and critically examining, the European trafficking regime and its operationalisation in the UK. In doing so, I draw attention to the lower standards on victims' safety and privacy set by certain instruments within the regime, in comparison with those obligations imposed by human rights law. I also demonstrate that the regime establishes victims' return, involuntarily if necessary, to be the

1 Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities OJ 261/19 (EU Residence Permit Directive).

2 Council of Europe Convention on Action against Trafficking in Human Beings (Warsaw, 16.V.2005) CETS 197 (Council of Europe Trafficking Convention).

3 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA OJ L 101/1 (EU Trafficking Directive).

4 'Eleanor' is 'EK' in *EK (Article 4 ECHR: Anti-Trafficking Convention) Tanzania* [2013] UKUT 313 (IAC) (19 June 2013).

usual or default means by which a trafficking case is resolved. The ability of the regime to offer a reparative response to the compounded disadvantage experienced by trafficked women is then ascertained through a detailed analysis of Eleanor's case. Unlike Naomi (from the previous chapter) Eleanor's reliance on the trafficking regime, *in conjunction with European human rights law*, did yield a positive result – she was granted permission to remain in the UK.

The European trafficking regime, like both the EU's and UK's domestic violence rules, operates alongside States' obligations under human rights law, including those imposed by the ECHR and the CFREU. Consonant with the arguments made in Chapter 2, and subject to the caveats detailed there, I understand certain conduct that may be defined in the relevant legal framework as being or involving 'trafficking'[5] (that which involves interpersonal violence, which discriminates, and which creates and/or perpetuates women's subordination) to be violence against women. Such violence breaches women's human rights, including, as we have seen in Chapter 2, the right to be free from slavery, servitude and forced labour (Article 4 ECHR, Article 5 CFREU).[6] To adopt such an approach does not denote uncritical endorsement of current definitional approaches to trafficking, the legal regimes(s) that have emerged to 'fight' it or the arguments deployed to justify them (issues that will be considered below, in section 2). It simply posits the existence of conduct that falls within both the trafficking definition and the conceptual account of violence against women I advance, grounding its evaluation of the European trafficking regime, per the normative framework set out in Part 1, in the latter.

5 Council of Europe Trafficking Convention, Art 4(a) trafficking is 'the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.'

6 It will be recalled that trafficking was brought within the ambit of Article 4 ECHR by the ECtHR in *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 Jan 2010), see further Jean Allain, 'Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery' (2010) 10(3) *Human Rights Law Review* 546. In contrast, trafficking is specifically prohibited by Art 5(3) CFREU.

1. The European Trafficking Regime

(a) Rights, Residence Permits and Return: An Overview

In this section, I provide an overview of the European trafficking regime, tracing its origins and development in so doing. Whilst the circumstances in which residence permits may be granted are considered in the section that follows, here I situate the applicable rules within the context of both the regime's history and other provisions in the relevant instruments which seek to ensure victims' return to their countries of origin.

The *contemporary* origins of the European trafficking regime can be traced to the Palermo Protocol to the UN Convention Against Transnational Crime.[7] It was from Palermo, for example, that the European regime's definition of trafficking (set out in Chapter 2 and footnote 5 above) was drawn.[8] The Palermo Protocol is 'in substance very much an instrument of criminal law as opposed to human rights law.'[9] Whilst the Palermo Protocol *requires* States to criminalise trafficking,[10] States are only encouraged to consider protecting victims' 'privacy and identity' where 'appropriate', rather than protecting victims' privacy per se.[11] States are also only required to 'endeavour to provide for the physical safety of victims of trafficking' within their territory.[12] This and other, allied, measures appear to impose on States duties in relation to victims' safety that are of a lower standard than is required by human rights law.[13]

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7 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organised Crime (New York, 15 Nov 2000) UNTS 2237 319.

8 Compare Council of Europe Trafficking Convention, Art 4(a) with Article 3(a) of the Palermo Protocol.

9 Jean Allain, 'No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol ' (2014) 7(1) *Albany Government Law Review* 111 (n 6), 7.

10 Palermo Protocol, Art 5 'Each State Party shall adopt…'.

11 ibid, Art 6(1) 'In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking…'

12 ibid, Art 6(5).

13 See also Art 6(3), which invites States to 'consider' implementing support services for victims.

As will be recalled from Chapter 2, under human rights law, States are obliged to offer practical and effective protection from violence and/or to respond, not to endeavour to respond, to such violence with due diligence.[14] It is telling that, in relation to victims, the only clear obligations on States arise in relation to victims' role as witnesses in criminal proceedings. States 'shall ensure', for example, that victims are provided with information on court proceedings and assistance to enable their views to be presented and considered in relevant legal proceedings.[15] The immigration position of victims of trafficking is dealt with in Articles 7 and 8 of the Palermo Protocol. Whilst Article 7 briefly encourages States to consider taking measures to permit victims of trafficking to remain in their territory, taking into account 'humanitarian and compassionate factors', Article 8 provides detailed guidance to States on the 'repatriation' of victims. States in which the trafficked person last had a right of permanent residence are to 'facilitate and accept' their return, they are also to assist in verifying the identity of a trafficked person and to facilitate re-documentation.[16] Whilst such a return is 'preferably voluntary'[17] it does not have to be so, the Protocol's drafters having rejected a US proposal that required any repatriation to be both 'safe and voluntary'.[18]

The Palermo Protocol's criminal law approach to trafficking was replicated, to differing extents, by both the EU and the Council of Europe (CoE) in their legislative engagement with

14 Per Chapter 2, for a summary of the relevant standards see Rashida Manjoo, 'State Responsibility to act with Due Diligence in the Elimination of Violence against Women' (2013) 2(2) *International Human Rights Law Review* 240.

15 Palermo Protocol, Art 6(2).

16 ibid, Art 8(1), (3) and (4). An interesting requirement as States are not usually obliged to admit permanent residents.

17 ibid, Art 8(2)

18 James Hathaway, 'The Human Rights Quagmire of "Human Trafficking"' (2008-9) 49(1) *Virgina Journal of International Law* 1, 3 citing the Draft Protocol to Combat International Trafficking in Women and Children Supplementary to the United Nations Convention against Transnational Organized Crime; Proposal Submitted by the United States of America, art. 4(l)(a), UN Doc. A/AC.254/4/Add.3 (Nov 25, 1998).

the issue.[19] Whilst, for example, the 2002 EU Framework Decision required MS to criminalise certain trafficking-related activities, victims were offered 'protection and assistance' only insofar as these arose through, or resulted from, criminal proceedings.[20] The immigration position of those who had been trafficked went unaddressed by the Framework Decision and remained so by the EU legal order until the adoption, two years later, of the Residence Permit Directive. As was the case with the Palermo Protocol, the EU Residence Permit Directive also appears to require less of MS, in terms of their treatment of trafficking victims, than is required by human rights law.[21] Making the provision of assistance conditional on a victim cooperating with criminal proceedings, for example, not only appears to be contrary to the relevant positive obligations imposed by the ECHR (discussed in Chapter 2) , it also renders any such assistance of 'dubious worth' to those it purports to benefit.[22]

In contrast, the benefits granted to a (identified, discussed further below) victim under the CoE's Trafficking Convention are not dependent on her co-operating with criminal proceedings and include protection from discrimination, protection of privacy and the provision of material support to assist victims' physical, psychological and social recovery.[23] States are also required to establish mechanisms which enable victims to secure compensation

19 Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European law* (CUP 2017), 180-185.

20 Council Framework Decision of 19 July 2002 on combating trafficking in human beings (2002/629/JHA) [2007] OJ L 203/1 (EU Framework Decision), Arts 1-3 and 7. Indeed, the assistance offered by Art 7 (to adult victims) is that criminal offences be investigated whether or not the trafficked person has reported those offences to the relevant authorities.

21 Under the Residence Permit Directive for example, MS are only required to 'take due account of the safety and protection needs' of victims of trafficking. The special needs of victims, including 'the most vulnerable' victims, are to be attended to 'where appropriate' and 'if provided by national law', EU Residence Permit Directive, Art 7.

22 Susan Egan, 'Protecting the Victims of Trafficking: Problems and Prospects' (2008) 1 *European Human Rights Law Review* 106, 111.

23 Council of Europe Trafficking Convention, Arts 3, 11 and 12.

(from the State and/or the perpetrators) and, importantly, to ensure that victims are protected from punishment for any involvement in trafficking-related criminal activities.[24]

Within the EU legal order, the EU Residence Permit Directive was followed by the EU Trafficking Directive (which itself replaced the EU Framework Decision).[25] Whilst the Directive does not add to the measures which concern residence permits (considered in detail below), a shift of emphasis can, nonetheless, be discerned. The preamble of the Directive positions trafficking as both a crime and a serious violation of human rights, referring to the CFREU in doing so.[26] As the CFREU also prohibits trafficking, it and the Directive can be seen as mutually reinforcing, the Directive giving effect to fundamental rights protected by the CFREU, whilst the CFREU tilts the Directive towards a rights-based (vs migration control/criminal law) approach to both trafficking and its victims. Trafficking is also understood to be a gendered phenomenon that requires 'where appropriate, a gender specific response'.[27] In language that echoes that of the CoE Trafficking Convention, assistance and support 'shall' be provided to (again identified) victims, such support including the provision of safe accommodation and psychological assistance.[28] MS also 'shall ensure' that victims have access to legal assistance and representation, as well as to existing compensation schemes.[29]

The rights that follow recognition as a victim of trafficking under EU law (the Residence Permit Directive and Trafficking Directive) differ, therefore, from those that follow from recognition as a victim under the CoE Trafficking Convention. Whilst a consideration of these (in some instances substantial) differences is beyond the purview of this Chapter, it can

24 ibid, Arts 15 and 26.

25 EU Trafficking Directive, Art 21.

26 ibid, preamble paras 1, 4 and 7

27 ibid, preamble para 3, see also para 25 and Art 1.

28 ibid, Art 11.

29 ibid, Arts 12 and 17.

be noted that, broadly speaking, the benefits conferred on victims under EU law are more limited than those available under the Trafficking Convention.[30]

The trafficking regime does then grant victims certain important rights and protections. In order to actually benefit from these, however, the trafficked person has to be physically present in and remain in the host State and, under the regime, 'the mere recognition' of an individual as a 'victim of trafficking' does *not* usually yield this result.[31] Although the provisions of the regime that deal with residence permits are the focus of this chapter's analysis, it is important to note here, as we consider the regime in overview, that the granting of such permits is not what is envisaged by either the EU or CoE to be the 'usual' outcome of a trafficking case. As Vladislava Stoyanova explains in her comprehensive evaluation of the regime, the 'standard resolution' for an identified victim of trafficking is return.[32] Whilst return 'shall preferably be voluntary', it does not have to be so.[33] Again, following Palermo, the CoE Trafficking Convention requires, for example, 'receiving States' to assist in verifying the identity and migration status of victims, to assist in re-documenting them and to facilitate their return 'without delay'.[34] 'Due regard' is, however, to be given to the 'rights, safety and dignity' of the trafficked person by both the State into which she was trafficked and the State to which she is returned (requirements pertinent to Eleanor's case, as we shall see).[35] States are also

30 For example, the non-punishment provision of the Trafficking Convention (Article 26) is broader than that of the EU Trafficking Directive, the latter requiring that any crime committed has to be a 'direct consequence' of their trafficking situation (Art 8). For a detailed consideration of the obligations placed on States by the trafficking regime and how EU law diverges from the more protective standards established by the Council of Europe Convention see Stoyanova (n 19), chapters 4 and 9.

31 ibid, 443.

32 ibid, 183.

33 Council of Europe Trafficking Convention, Art 16(2).

34 ibid, Art 16(3) and (4).

35 ibid, Art 16(1) and (2).

required to establish repatriation programmes which 'avoid re-victimisation' and which assist those who are returned to reintegrate and access services.[36]

When a resident permit is granted, if it is granted, it provides only a temporary, not permanent, stay on removal. As the Explanatory Report to the Convention explains, the 'immediate return', rather than simply 'return', of victims is 'unsatisfactory' because victims who are immediately returned are unlikely to provide the authorities with information.[37] Whilst a shift from Palermo's 'migration control/criminal law approach' to trafficking to one which is (comparatively) more rights-based can, therefore, be identified, in tracing the development of the European trafficking regime, it is apparent that the former continues to dominate, so much so that any theoretical advances made in relation to victims' 'rights' are in danger of being denuded in practice by the removal of those victims from the very States which have undertaken to uphold them. This tension will be explored further in the sections that follow.

Finally, the provisions of the EU Residence Permit Directive (and the EU Trafficking Directive) must be transposed into MS' domestic law and may also have direct effect, thereby enabling individuals to enforce their rights directly in national courts and, if necessary, at the CJEU (as Naomi attempted with the EU's domestic violence rule).[38] In contrast, how a State Party to the CoE's Trafficking Convention meets its legal obligations varies according to how that State's domestic legal order interacts with international law and what steps that State has taken on, or before, ratification. The UK is a dualist jurisdiction: it differentiates between national and international law and requires the latter to be incorporated into the former to be

36 ibid, Art 16(5)-(6).

37 ibid, Explanatory Report paras 180-181.

38 If they are sufficiently clear and unambiguous etc. following Case 26-62 *Van Gend en Loos v Netherlands Inland Revenue Administration* [1963] ECR 1.

domestically enforceable.[39] The UK was, consequently, required to adopt certain measures to comply with its obligations under the Trafficking Convention (measures which are discussed further below). An individual who seeks to enforce her rights under the Convention can only do so where a State Party provides for this, there is no supra-national 'trafficking court' that can be applied to. Instead, Article 36 of the Trafficking Convention establishes a committee to oversee it, the Group of Experts on Action against Trafficking in Human Beings (GRETA). GRETA visits and publishes reports on States Parties, in addition to publishing general reports on its activities.

(b) The Granting of Residence Permits under the Regime

In essence, the trafficking regime creates a process whereby victims of trafficking, having been identified as such by a 'competent authority', may be granted, in certain circumstances, first a period of reflection and/or recovery and second, a residence permit. How someone is identified as a victim and the rights that accrue to them on this basis differs depending on whether their status is determined by EU law, the Trafficking Convention, or both.[40] This chapter examines the granting of residence permits under Article 8 of the EU Residence Permit Directive and Article 14 of the CoE's Trafficking Convention.[41] As the preceding and following sections explain, the granting of permits under the trafficking regime operates as a narrow exception, and one that is usually only temporary, to both the EU's and CoE's default position of 'return or be removed.'[42]

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39 See Jan Klabbers, *International law* (CUP 2013), chapter 16 for a discussion of monism, dualism and the relationship between domestic courts and international law.

40 Whilst most members of the EU are States Parties to the CoE Trafficking Convention, the Convention has been signed by a number of members of the Council of Europe who are not members of the EU (such as the Russian Federation) as well States who are members of neither (Belarus).

41 As the EU Trafficking Directive does not deal with the immigration position of victims of trafficking, the protections it offers will be considered later in this chapter.

42 Of course, some trafficked women may (also) be able to rely on Article 3 ECHR (the right to be free from torture, inhuman or degrading treatment), or on refugee law to prevent their removal where to do so would expose them to real risk of persecution or some other form of serious harm. The scope of these

Article 8(1) of the EU Residence Permit Directive states:

> After the expiry of the reflection period, or earlier if the competent authorities are of the view that the third-country national concerned has already fulfilled the criterion set out in subparagraph (b), Member States shall consider:
>
> (a) the opportunity presented by prolonging his/her stay on its territory for the investigations or the judicial proceedings, and
>
> (b) whether he/she has shown a clear intention to cooperate and
>
> (c) whether he/she has severed all relations with those suspected of acts that might be included among the offences referred to in Article 2(b) and (c).

In contrast, under Article 14(1) of the CoE Trafficking Convention:

> Each Party shall issue a renewable residence permit to victims, in one or other of the two following situations or in both:
>
> (a) the competent authority considers that their stay is necessary owing to their personal situation;
>
> (b) the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings.

There are some key differences between these rules (and the provisions that relate to them), and between the trafficking regime and the domestic violence rules considered in the previous chapter, that require elaboration and discussion.

Firstly, the EU Residence Permit Directive, like the domestic violence rules considered in the previous chapter, applies *only* to TCNs (third-country nationals); the Trafficking Convention to any victim of trafficking (so, potentially, both European citizens and TCNs).[43]

rules, however, and the thresholds that applicants must reach in order to benefit from them, renders the protection they offer unobtainable in all but a minority of cases. See *HD (Trafficked women) (CG)* [2016] UKUT 454 (IAC), for example, and Satvinder S. Juss, 'Recognizing Refugee Status for Victims of Trafficking and the Myth of Progress' (2015) 34(2) *Refugee Survey Quarterly* 107.

43 EU Residence Permit Directive, Art 1 and Council of Europe Trafficking Convention, Chapter 1.

Secondly, under the EU Residence Permit Directive there is no *explicit* provision which requires MS to *identify* victims of trafficking. The wording of Article 3(1) of the Directive, which states that it applies to TCNs who are, or have been, *victims of offences*, implies that the identification of *victims of trafficking* is inherently linked with a criminal investigation. Identified victims are then provided with 'information' and a period of 'reflection' in order to decide whether or not they wish to co-operate with that investigation.[44] In contrast, the Trafficking Convention requires States to identify victims of trafficking using collaborative procedures which are independent from any criminal justice processes.[45] Where there are reasonable grounds for believing that a person has been trafficked, they are accorded a 'recovery and reflection period', of at least thirty days, after which they can apply for a residence permit.[46]

Thirdly, in deciding whether or not to grant a residence permit, the EU requires MS to consider 'the opportunity presented' by prolonging a victim's stay for any criminal or other legal proceedings and whether or not the victim has shown 'a clear intention to co-operate' with such proceedings.[47] Being granted a permit under EU law is, therefore, contingent on first, there being criminal proceedings against any suspected trafficker(s) and second, the victim cooperating with those proceedings.[48] In comparison, under the Trafficking Convention, residence permits should be granted where the stay of the trafficked person is 'necessary owing to their personal situation' under Article 14(1)(a) and/or where it 'is necessary for the purpose of their co-operation' with criminal proceedings under Article 14(1)(b). Centrally, States are

44 EU Residence Permit Directive, Arts 5 and 6. The duration and start of such a period being determined by national law.

45 Council of Europe Trafficking Convention, Art 10 for a different interpretation see Stoyanova (n 19), 90.

46 Council of Europe Trafficking Convention, Arts 13 and 14.

47 EU Residence Permit Directive, Art 8(1)(a) and (b).

48 Whilst the EU Trafficking Directive requires States to provide support unconditionally to victims, this requirement is 'without prejudice' to relevant provisions in either the Residence Permits Directive or 'similar national rules', EU Trafficking Directive, Art 11(3).

not *required* to provide residence permits in *both* sets of circumstances. States will be complying with the Convention where, for example, they *only* grant residence permits to victims who are co-operating with criminal proceedings per Article 14(1)(b), and not to those who are not so co-operating, but who nevertheless wish to remain in their country of residence per Article 14(1)(a).[49]

Finally, the obligations placed on States by the trafficking regime are both more complex and less clearly defined than the domestic violence rules considered in the previous chapter. It will be recalled that the trafficking regime establishes a process whereby victims are identified and, in certain (limited) circumstances, granted a period of reflection and then, again in certain (limited) circumstances, a residence permit. There is, in contrast, no process for the 'identification of victims of domestic violence' in either of the regimes considered in the previous chapter. No detailed consideration of the role (and status) that should be accorded to those victims of domestic violence who seek to have their perpetrator investigated or prosecuted. The ambiguity of some of the provisions in the trafficking regime, when taken with the discretion accorded to MS/States Parties in implementing them, has added to this complexity.[50] Consequently, whilst in the previous chapter, Naomi's case could be relied upon to found broader claims about, for example, the shortcomings of the EU's domestic violence rule, care needs to be taken in relying on Eleanor's case, which sets precedent in the *UK*, to develop analogous claims about the *European* trafficking regime. In addition to bearing this caveat in mind throughout the analysis that follows, it is also necessary to consider *how* the

49 Although GRETA has consistently encouraged States to provide permits in both sets of circumstances, an issue that is discussed further in section 5 below.

50 On one issue in one jurisdiction, the 'correct' definition of the criminal offence of trafficking in the UK, see Sexual Offences Act 2003, s57-59, *Queen v Matyas Pis* [2012] NICC 14, Michelle Madden Dempsey, Carolyn Hoyle and Mary Bosworth, 'Defining Sex Trafficking in International and Domestic Law: Mind the Gaps' (2012) 26(1) *Emory International Law Review* 137 and Stoyanova (n 19), chapter 4 section 1 (who argues that such definitional indeterminacy is one of the central problems of the trafficking regime).

European trafficking regime was incorporated into UK law (considered below). Just why the trafficking regime might be so complicated (and in some instances, contradictory) is an issue that will be returned to in this chapter's conclusion.

(c) The Incorporation of the Trafficking Regime into UK law

The UK opted-out of the EU Residence Permit Directive.[51] It ratified the CoE Trafficking Convention in 2008. The UK initially opted-out of the EU Trafficking Directive but later opted in, so that it was in force in the UK in October 2011.[52]

Trafficking was first defined and criminalised through amendments to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 and the Sexual Offences Act 2003. The Coroners and Justice Act 2009 then criminalised holding another person in slavery or servitude and requiring another to perform forced or compulsory labour. These offences were all then consolidated in the Modern Slavery Act 2015. The provisions of the trafficking regime that relate to victim identification and 'protection' were not incorporated through primary legislation, however, but by the adoption of policies and guidance which established a National Referral Mechanism (NRM).[53]

The NRM is currently a three-stage process which purports to identity and then offer protection to victims of 'modern slavery', modern slavery being defined as trafficking, slavery,

51 Protocol (No 21) on the Position of the UK and Ireland in Respect of the Area of Freedom, Security and Justice OJ C 202/296, Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (TFEU).

52 Commission Decision of 14 October 2011 on the request by the United Kingdom to accept Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

53 The current such guidance is Home Office, *Victims of modern slavery – Competent Authority guidance* (Version 7.0, 29 April 2019) Previous incarnations of this policy have been found by domestic courts to be, in fact, incompatible with the Trafficking Convention, Group of Experts on Action Against Trafficking in Human Beings (GRETA), *Report Concerning The Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom* (GRETA(2012)6, 2012).

servitude, forced and compulsory labour.[54] Potential victims are identified by certain 'first responders' who, with the (adult) victim's consent, refer their cases to a 'competent authority'.[55] Until 29 April 2019 there were two competent authorities: the National Crime Agency's Modern Slavery and Human Trafficking Unit (MSHTU) (formerly the UK Human Trafficking Centre) and UK Visas and Immigration (UKVI), which is part of the Home Office.[56] All referrals were sent to the MSHTU initially, with cases that involved someone who was subject to immigration control (both EU/EEA nationals and TCNs) being referred onward to UKVI. From 29 April 2019 a Single Competent Authority was established within the Serious and Organised Crime directorate of the Home Office to make all NRM decisions, regardless of the victims' nationality or migration status.

The competent authority (CA) is responsible for deciding whether or not there are 'reasonable grounds' for believing that the individual concerned is a victim of trafficking or, if not, another form of modern slavery. If an individual receives a positive reasonable grounds decision (RGD) she is granted a period of recovery and reflection for a minimum of forty-five days.[57] During or at the end of this period, the CA has to decide whether or not there are 'conclusive grounds' for believing that the individual is a victim of trafficking or another form of modern slavery.[58] Someone who has a positive conclusive grounds decision (CGD) *may* then be granted 'discretionary leave to remain' in the UK for one year, such permission to

54 The NRM for victims of trafficking was first established in 2009 as part of the UK's ratification of the Trafficking Convention. From 31 July 2015 the NRM was extended to all victims of modern slavery, following the implementation of the Modern Slavery Act 2015.

55 First responders include the UK Border Force, Social Services, the Gangmasters and Labour Abuse Authority, Police Services and specialist NGOs such as the Refugee Council. Different rules apply when the victim is a child.

56 Home Office, *Victims of Modern Slavery – Competent Authority Guidance* (Version 3.0, 21 March 2016).

57 The test the CA must apply is 'I suspect but cannot prove' that the person concerned is a victim of trafficking or another form of modern slavery, Home Office, *Victims of modern slavery – Competent Authority guidance* (n 53) 47-51.

58 The test the CA must apply is whether 'on the balance of probabilities' there are sufficient grounds to decide that the individual concerned is a victim of trafficking or another form of modern slavery, ibid, 51-59.

remain being renewable.[59] Someone with discretionary leave can access public funds (such as welfare benefits and housing assistance), receive medical treatment provided by the NHS and access the labour market. A negative RGD or CGD cannot be appealed against. However, applicants can ask for negative decisions to be reconsidered by the Home Office, and these reconsiderations can be challenged in Court via judicial review.[60] The Tribunal which hears appeals against immigration and asylum decisions may also make its own decision as to whether or not an individual is a victim of trafficking.[61]

2. What Kind of a Trafficking Sceptic Are You?

As the previous section has explained, trafficking has been criminalised by a number of international, regional and domestic legal instruments, including those that have influenced, and are part of, the European trafficking regime. Trafficking in the Libyan/Mediterranean context has even been characterised by the UN Security Council as a threat to international peace and security.[62] This 'migration control/criminal law' approach to trafficking has been justified by reference to the ever-increasing numbers of women (children and men) who are 'stolen' from or 'tricked' into leaving their homes and countries, subject to often extreme levels of violence, including sexual violence, and then imprisoned and exploited.[63] Trafficked

59 The relevant guidance states that discretionary leave will be granted where such leave is necessary for the UK to meet its obligations under the Trafficking Convention, Home Office, *Discretionary leave considerations for victims of modern slavery* (Version 2.0, 10 September 2018).

60 This is because trafficking decisions are not immigration decisions for the purposes of the Nationality Immigration and Asylum Act 2002, see further *AS (Afghanistan) v Secretary of State for the Home Department* [2013] EWCA Civ 1469, [2014] Imm AR 513, paras 17-19.

61 In certain circumstances, *Secretary of State for the Home Department v MS (Pakistan)* [2018] EWCA Civ 594.

62 Resolution 2240 Adopted by the Security Council at its 7531st meeting, on 9 October 2015 S/RES/2240 (2015).

63 For example, Salvation Army, 'Victims' Stories' (2018) <https://www.salvationarmy.org.uk/victims-stories> accessed 5 December 2018. See also Rutvica Andrijasevic, 'Beautiful dead bodies: Gender, migration and representation in anti-trafficking campaigns' (2007) 86 *Feminist Review* 24 and Isabel Crowhurst, 'Socio-Political and Legal Representations of Migrant Women Sex Labourers in Italy: Between Discourse and Praxis' in Sarah van Walsum and Thomas Spijkerboer (eds), *Women and Immigration Law: New Variations on Classical Feminst Themes* (Routledge Cavendish 2007).

individuals require 'rescuing' from such exploitation, perpetrators should be prosecuted and once this process has been completed, those who have been trafficked should return (or be returned) to their country of origin. Where possible, such abuses should be prevented from occurring in the first place, this being achieved by the adoption of (even more) border control measures and through increased international co-operation.

This framing of trafficking, and the legal instruments that have both emerged from and given substance to it, has attracted criticism from a variety of perspectives. At the risk of considerable oversimplification, two broad sceptical approaches can be discerned in the literature. The first is critically (and perhaps pragmatically) engaged with the trafficking regime, focussing on its potential to protect vulnerable, forced or coerced migrants from (further) harm. Whilst recognising that the 'true driving force' behind international efforts to 'respond' to trafficking are States' concerns with migration and 'security', Ann Gallagher, for example, has tentatively welcomed the emergence of an international legal response to trafficking.[64] Gallagher seeks to position and interpret this regime within a 'human rights-based approach' to trafficking which places victims' rights (and States' responsibilities to them) within a broader international human rights and refugee law framework.[65] Siobhán Mullally similarly draws attention to the 'normative re-emergence of protective categories' which 'do little to enhance women's autonomy, agency, or equality' and which are relied on to justify the 'coercive interventions' of States in relation to trafficking and migration control.[66] Mullally also, however, draws encouragement from rights-based responses to trafficking which may protect some victims from forced return and accord them certain rights via the *unconditional*

64 Gallagher argues that human rights should be the 'common thread' that guides State action and welcomes the Palermo Protocol's reference to international human rights, refugee and humanitarian law, Anne Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23(4) *Human Rights Quarterly* 975, 976-7.

65 ibid 1003-4.

66 Siobhán Mullally, 'Migration, Gender, and the Limits of Rights' in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (OUP 2014), 146.

granting of recovery periods and residence permits.[67] In contrast, James Hathaway questions the very assumption that 'trafficking' should be responded to, by or in, international law.[68] Hathaway notes that the premise that border control measures are an appropriate response to trafficking has been insufficiently examined, highlighting the 'significant collateral human rights damage' done by States to whom the trafficking regime provides a mandate for pursuing 'a border control agenda under the cover of promoting human rights'.[69] Bridget Anderson has also problematised the voluntary/forced migration binary and the creation of a regime which empowers States to 'protect' 'victims' by enforcing immigration control against them, including via the adoption of deterrence policies and other measures which suppress mobility and force return.[70]

Whilst Stoyanova may be correct in pointing out that those who advocate a human rights-based approach to trafficking have failed to account for, or disrupt the primacy of, the migration control/criminal law paradigm,[71] it is also the case that those who, like Stoyanova herself, position themselves in the second group of trafficking 'sceptics' discussed in the preceding paragraph, sometimes (to paraphrase Julia O'Connell-Davidson) mistake the trafficking discourse for the social phenomena.[72] As Carolyn Hoyle, Michelle Madden Dempsey and Mary Bosworth observe, the rhetorical use that 'ideal' trafficking victimhood is put to by States (and others) should not serve to deflect attention from trafficked women's real

67 ibid, 147, 151-156.

68 Hathaway (n 18).

69 ibid 26. See also Thomas Gammeltoft-Hansen and James C Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53(1) *Columbia Journal of Transnational law* 235.

70 Bridget Anderson, 'Trafficking' in Elena Fiddian-Qasmiyeh and others (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford University Press 2014) and Bridget Anderson, *Us and Them?: The Dangerous Politics of Immigration Control* (OUP 2013) (particularly Chapter 7).

71 Stoyanova (n 19), 5.

72 J O'Connell-Davidson, *Prostitution, Power and Freedom* (University of Michigan Press 1999), 114 as quoted in Carolyn Hoyle, Mary Bosworth and Michelle Dempsey, 'Labelling the Victims of Sex Trafficking: Exploring the Borderland between Rhetoric and Reality' (2011) 20(3) *Social & Legal Studies* 313, 315.

(and diverse) experiences of violence and exploitation.[73] I have written elsewhere about the gendered and potentially discriminatory nature of border control measures (including those justified by reference to anti-trafficking laws/practices) which illegalise women's journeys, deflect women into (more) irregular and dangerous migration pathways and contribute to women's deaths.[74] This thesis continues in this vein, Chapter 1's discussion of migration status serving to highlight the role of the State/EU in both discriminating against women and increasing women's vulnerability to violence. In this chapter, I draw, therefore, on sceptical approaches to trafficking which highlight the impact that its (deliberately?) misplaced concern with movement/migration has on those who seek to move within or across borders and/or who are subject to severe labour or sexual exploitation.[75] However, as the brief examination of the European trafficking regime undertaken in the previous section demonstrates, the migration control/criminal law paradigm has not gone unchallenged (even if it has not been displaced), and key protections for victims have been secured. Consequently, this chapter also draws inspiration from those who, like Mullally, believe that the 'ideological capture' of feminist and rights-based approaches to trafficking, and women's migration more broadly, is not complete.[76]

3. Encountering the Trafficking Regime

(a) Eleanor's Fight For Residence

Eleanor is a Tanzanian national who was trafficked into domestic servitude in the UK and then re-trafficked. Eleanor initially worked as a domestic servant for her first trafficker, Mrs Alibhai,

73 ibid.

74 Catherine Briddick, 'Some Other(ed) 'Refugees'?: Women Seeking Asylum Under Refugee and Human Rights Law' in Satvinder Singh Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019).

75 Anderson, for example has noted that the criminalisation of trafficking is akin to criminalising the slave trade rather than slavery, Anderson, 'Trafficking' (n 70), 359.

76 Mullally (n 66), 175.

in Dar-es-Salaam for two years, accompanying her to the UK in July 2006 on a domestic worker visa. The relevant facts pertaining to Eleanor's case were summarised by the Upper Tribunal as follows:

> 26. ….The appellant was tricked into accompanying Mrs Alibhai on a false pretence and was left in the United Kingdom with Mrs Alibhai's parents, Mr and Mrs Dhanji. She was required to work for them attending to all domestic duties and cooking all meals. She worked from 7am until around 10.30 at night. She was fed only stale food, scraps or leftovers and was required to sleep on a thin mattress on the kitchen floor, although there was an unused spare bedroom in the house. The mattress had to be rolled up each night and kept outside in a garage. The appellant received no wages from the Dhanji family and was only allowed out of their house to attend church on Sundays. The appellant's passport was kept by the Dhanji family. Although she asked to be allowed to return to Tanzania on a number of occasions she was told that she could not do so until at least July 2007. The appellant was on occasions unwell whilst living in the Dhanji household but was required to work nevertheless. She was told that there was no one she could complain to about her conditions and that if she went to the police to complain they would not help her.
>
> 27. In the summer of 2007, with the assistance of a lady she had met at church, the appellant ran away from the Dhanjis leaving all of her possessions behind. She was given accommodation at the house of a Mrs Miriam Kilumanga. After some time, and with the assistance of the Tanzanian Embassy, she recovered her passport from the Dhanjis. She then realised that her original visa had only been for a duration of 6 months and had now expired. Conditions at the Kilumanga household were little better than before. The appellant was manipulated by Mrs Kilumanga and required to work as a domestic worker for her. Again she was often required to sleep on a mattress on the floor. By early 2008 the appellant was aware that the poor health she had suffered from at the Dhanji household was worsening. She asked Mrs Kilumanga for help and was told that it was difficult for her to get medical attention without paying for it, as she did not have a visa. The appellant had no money. By the latter half of 2008 the appellant was aware of having real difficulties in breathing and sleeping on her left side. Her breathing was noticeably noisy. In September of 2008 she was taken by Mrs Kilumanga to see a solicitor in connection with her claim against the Dhanjis. Mrs Kilumanga interpreted for the appellant as she could speak very little English. The appellant understood the solicitor to have observed that she needed to go to a hospital or see a doctor. On her return home Mrs Kilumanga again insisted that it was very difficult for the appellant to obtain medical assistance as she did not have the correct paperwork. By early October 2008 the appellant was so ill that she was eventually taken to hospital as an emergency by Mrs Kilumanga and was admitted for a two week period. On her return to the Kilumanga household she was again put to work, despite her physically weak condition. She continued to attend for hospital appointments until July 2009. In March 2010, with the assistance of the organisation known as Kalayaan, the appellant was able to leave the Kilumanga household and was

> given accommodation by the Poppy Project. By this time her health was very poor...[77]

Eleanor became involved with Kalayaan in (around) March 2009 when they arranged for her to attend English classes.[78] Kalayaan, an NGO, and NRM 'first responder', referred Eleanor into the NRM in May 2010, at which point she also made a claim for asylum.[79] On 25 November 2010 Eleanor received a positive CG decision.[80] On 26 November (so just one day later) Eleanor's claim for asylum was refused and she was denied leave to remain (a residence permit).[81] The refusal letter Eleanor received did not engage with the UK's obligations under either Article 4 ECHR or the relevant provisions of the Trafficking Convention.[82] On 16 July 2010 the Secretary of State issued removal directions against Eleanor; she appealed this decision to the First-Tier Tribunal (Asylum and Immigration), an appeal which was refused.[83] Eleanor's legal representatives continued to challenge her removal, arguing that the Tribunal had erred in its approach to the relevant law, an argument that was accepted in part by the Upper Tribunal on 27th Feb 2012 ('the error of law determination').[84] The trafficking elements of Eleanor's case were finally adjudicated by the Upper Tribunal on 13 March 2013.[85]

77 *EK (Article 4 ECHR: Anti-Trafficking Convention) Tanzania* (n 4), paras 26-27.

78 ibid, para 32.

79 ibid, para 32. EK argued that she should be recognised as a refugee under the Convention Relating to the Status of Refugees (Geneva, 22 April 1954) UNTS 189 137 (CSR) and the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted OJ L 304/12. This part of EK's appeal was not successful on the grounds that such claims 'are a less easy fit' in the relevant refugee definition jurisprudence, *EK (Article 4 ECHR: Anti-Trafficking Convention) Tanzania* (n 4), para 5 and n 42.

80 *EK (Article 4 ECHR: Anti-Trafficking Convention) Tanzania*, para 60.

81 ibid, para 65.

82 ibid, para 65.

83 ibid, para 1.

84 *EK and the Secretary of State for the Home Department* AA/16743/2010 (27 February 2012).

85 *EK (Article 4 ECHR: Anti-Trafficking Convention) Tanzania* (n 4).

Eleanor did not only take legal action to seek to resolve her immigration position, she also initiated proceedings against the Dhanjis in an employment tribunal (ET). On 8 August 2008 the ET awarded her £58,585.80 for her unpaid wages and in recognition of the injuries she had suffered (an award that could not be enforced because the Dhanjis were in receipt of state benefits).[86] Eleanor also reported the Dhanjis' conduct towards her to the police on 17 March 2009; the Dhanjis were arrested and interviewed but not charged with any criminal offence.[87]

(b) Compounded Disadvantage

Eleanor's position as a subject of British immigration law compounded the disadvantage she experienced as a victim of violence. In this section, I unpack this disadvantage, the defining features of which are, following the analysis engaged in in Chapter 3, control, exclusion a perilous migration status and an intensified experience of violence. In doing so I focus on Eleanor's predicament from the time she left the Dhanji household (the summer of 2007) until her immigration position was finally determined by the Upper Tribunal (in 2013).

Imperilled Migration Status

It will be recalled that Eleanor entered the UK under British immigration law as a domestic worker. The rules that determined Eleanor's migration status were not those considered in detail in Chapter 1, but the pre-2012 ODW regime which, whilst restrictive, did enable domestic workers to change employers (but not employment type) and extend their permission to remain.[88] That Eleanor did not change employers or seek assistance is attributable to the

86 *EK and the Secretary of State for the Home Department* (n 84), para 33.

87 ibid (n 84), para 33.

88 See Siobhán Mullally and Cliodhna Murphy, 'Migrant Domestic Workers in the UK: Enacting Exclusions, Exemptions, and Rights' 36(2) *Human Rights Quarterly* 397 for a detailed history of the UK's ODW route and an evaluation of the changes made to it in 2012. The post-2012 route is the subject of Chapter 1.

conduct of her traffickers *in conjunction* with the Home Office's failure to follow the correct procedure for granting her permission to enter. As will become apparent, these factors combined to render Eleanor's position in the UK extremely perilous.

According to the relevant Home Office instructions, domestic workers seeking to enter the UK should be interviewed alone by an entry clearance officer to ensure that they wish to travel and that they understand and consent to the conditions of their employment.[89] Those granted permission as ODWs should then be given written information, in a language they understand, about the migration status they have been given and the rights they have whilst in the UK.[90] Such information includes the fact that a domestic worker's passport should not be taken from her without her consent.[91] Contrary to this guidance, Eleanor was interviewed by an entry clearance officer in the presence of Mrs Alibhai and was given no information about her migration status, her rights in the UK, the conditions of her employment or what to do if she needed assistance.[92] Mrs Alibhai was, therefore, able to 'trick' (to use the Tribunal's language) Eleanor into accompanying her to the UK and then to leave Eleanor with the Dhanjis, who in turn withheld her passport from her.[93] Eleanor was also not aware either of how long she had permission to remain or the (few) rights she had whilst here. Indeed, it was not until some months after she had escaped the Dhanjis that Eleanor's passport was returned to her and she discovered that her permission to remain had expired, rendering her detainable and deportable.[94]

89 Home Office, *Immigration Directorates' Instructions Chapter 5 Section 12: Domestic Workers in Private Households* (Dec 2006), para 3.2.

90 ibid.

91 ibid.

92 *EK (Article 4 ECHR: Anti-Trafficking Convention) Tanzania* (n 4), para 28.

93 ibid, para 26.

94 ibid, paras 27, 29 and 32.

Control

Eleanor's migration status and lack of knowledge about her rights were used as a source of control by Mrs Alibhai**,** her parents, Mr and Mrs Dhanji, and Mrs Kilumanga. Eleanor's migration status was used to both traffic her into the UK and prevent her leaving, the Dhanjis taking Eleanor's passport and informing her that her ODW status prevented her from leaving the UK.[95] The Dhanjis also sought to control Eleanor's status when they used 'underhand methods' to try and have her removed by the Home Office before she could bring her employment law claim against them or regularise her stay.[96] It is striking how similar these attempts by the Dhanjis to manipulate Eleanor's migration status are to Kafeel's conduct towards Naomi (as discussed in the previous chapter). In both cases the perpetrator(s) of violence sought to harness the coercive power of the State to both facilitate that violence and to evade being held responsible for it.

The Dhanjis also used the exclusions that Eleanor was subject to as a source of control, denying her medical treatment and informing her that she could not seek assistance from the police.[97] Significantly, Eleanor's perilous migration status and its attendant exclusions were also used by Mrs Kilumanga to 're-traffic' Eleanor and to secure Eleanor's labour in her home.[98] Mrs Kilumanga also denied Eleanor medical treatment, telling her that she could not access it without payment and mistranslating the information given to her by the professionals she was given access to.[99] The control exercised by both the Dhanjis and Mrs Kilumanga over Eleanor's access to medical treatment had profound consequences, as Eleanor had tuberculosis. By the time the Upper Tribunal heard Eleanor's case she had been hospitalised on more than

95 ibid, para 26.

96 *EK and the Secretary of State for the Home Department* (n 84), para 7.

97 *EK (Article 4 ECHR: Anti-Trafficking Convention) Tanzania* (n 4), para 26.

98 ibid (n 4) citing, at para 60, the unchallenged determination of the First-Tier Tribunal.

99 ibid, paras 44 and 57.

one occasion and her condition was such that an expert report concluded that without access to specialist medical treatment (such treatment not being available in Tanzania) she would have only a fifty per cent chance of surviving until the age of fifty.[100]

Exclusion

As discussed in detail in Chapter 3, while many migrants may be adversely affected by the restrictions that flow from the migration statuses they hold, women subject to violence experience a compounded disadvantage when these restrictions exclude them from those 'assets' which provide 'resilience' to violence.[101] While Eleanor had permission to remain as a domestic worker she had 'no recourse to public funds' (including accommodation from the local authority or welfare benefits) but full access to medical treatment provided by the NHS. Once Eleanor had 'overstayed' her permission to remain (even though she did so as a result of her traffickers' conduct) she was subject to all the no recourse rules described in Chapter 3, in addition to being excluded from certain forms of medical treatment provided by the NHS and the already very limited support available to migrants from local authorities. Significantly then, when Mrs Kilumanga told Eleanor that she could not receive medical treatment without paying for it she was not (entirely) misrepresenting Eleanor's situation. Similarly, whilst we do not know whether or not the Dhanjis' comments about the police to Eleanor included a threat that any report of their behaviour might result in her arrest, we do know of many cases where the police have arrested the victims of serious criminal offences, including rape, because they had an irregular migration status.[102] It is notable that when Eleanor did report the Dhanjis to the

100 ibid, para 52. In contrast, in the UK, Eleanor would have a ninety per cent chance of living into her seventies.

101 To draw once again on the terminology employed in Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) *Yale Journal of Law and Feminism* 1.

102 Natalie Bloomer, 'Woman reports rape to police - and is arrested on immigration charges' (*politics.co.uk*, 2017) <www.politics.co.uk/news/2017/11/28/woman-reports-rape-to-police-and-is-arrested-on-immigration> accessed 16th May 2018.

police, no action was taken against them. The failure of the police to investigate Eleanor's complaints was the subject of an application to the ECtHR. This application was only struck out when the UK offered to pay her damages and accepted, per Chapter 2's discussion of positive obligations, that:

> the relevant authorities could have done more to investigate the applicant's situation with a view to possible criminal prosecution and conviction of those involved in her domestic servitude in the United Kingdom. This amounted to a procedural violation of Article 4 of the Convention.[103]

Intensified Experience of Violence

The Home Office's failure to follow its policy facilitated Eleanor's trafficking into the UK and rendered her unaware of both her migration status and her 'rights', including her entitlement to hold her own passport and to the protections from exploitation and violence provided by relevant employment and criminal laws. Because Eleanor 'overstayed' her domestic worker visa she was excluded from, for example, the housing and homelessness assistance provided by her local authority and so was (potentially) faced with the choice of either living with and working for Mrs Kilumanga, or being homeless and destitute. The violence and exploitation that Eleanor experienced in the UK was not just intensified by her migration status but enabled by it.

4. EK (Article 4 ECHR: Anti-Trafficking Convention) Tanzania [2013]

(a) The Upper Tribunal's Decision in Eleanor's Case

The Upper Tribunal ruled that the Home Office's decision in Eleanor's case was not in accordance with the UK's obligations under Articles 12, 14 and 16 of the CoE Trafficking

103 *Kawogo v UK* App no 56921/09 (ECtHR, 3 Sept 2013), 4.

Convention (which, as discussed above, concern assistance to victims, the granting of residence permits and repatriation and return) taken with its positive obligations under Article 4 ECHR.[104] First, the Tribunal found that the Home Office's instructions concerning the proper procedure for granting domestic worker visas fell within the ambit of the UK's Article 4 ECHR obligations to take steps to prevent trafficking.[105] Second, the Tribunal found that the Home Office's failure to follow these instructions breached Eleanor's Article 4 rights, a breach that directly contributed to her ill-health.[106] The Tribunal rejected the Home Office's contention that Eleanor did not have rights under the CoE Trafficking Convention (because, it will be recalled, she entered the UK in 2006, before it was ratified) finding that she was entitled to assistance under the Convention no later than the point at which she received a positive CG decision under the NRM.[107] The Upper Tribunal also opined that Article 14 of the CoE Trafficking Convention had to be considered alongside Article 16 which, it will be recalled, requires States to return trafficked persons with 'due regard' for their 'dignity'.[108] Given that Eleanor's poor health was linked with the breach of her Article 4 ECHR rights, the Upper Tribunal found that Eleanor could not, following such a breach, be removed to a country where she would receive inadequate health care (and have reduced life expectancy as a result) with due regard for her dignity.[109] Consequently, the Upper Tribunal directed that Eleanor be granted permission to remain in the UK, such a grant being both *reparation* for the breach of

104 *EK (Article 4 ECHR: Anti-Trafficking Convention) Tanzania* (n 4), paras 65-66.

105 ibid, paras 35-39, the Tribunal drawing on *Rantsev v Cyprus and Russia* (n 6) in reaching this conclusion.

106 *EK (Article 4 ECHR: Anti-Trafficking Convention) Tanzania* (n 4), paras 42, 56-9.

107 ibid, 60.

108 ibid, paras 61-64.

109 ibid, para 64. Indeed, the Tribunal's analysis of what action would be reparative of the rights-violations that Eleanor experienced lends further support to Chapter 3's consideration of what is reparative of compounded disadvantage.

her Article 4 ECHR rights and *required* by Articles 12, 14 and 16 of the CoE Trafficking Convention.[110]

(b) How does the Trafficking Regime Respond to the Compounded Disadvantage Experienced by Trafficked Women?

As will be apparent from section 1, the UK has engaged with the European trafficking regime on a highly selective basis, opting out of the EU Residence Permit Directive as well as other measures that seek to improve the position of (amongst others) trafficking victims by, for example, enabling them to recover unpaid wages.[111] In assessing whether and how the trafficking regime responds to the compounded disadvantage experienced by trafficked women I will, therefore, evaluate the regime as implemented in the UK at the time Eleanor was recognised as a victim of trafficking, before considering whether her position would have been any different had she had recourse to either the EU Residence Permit Directive or the EU Trafficking Directive (the latter, it will be recalled, not being applicable to Eleanor's case because it was not in force in the UK at the relevant time).

The Trafficking Regime in the UK: Exacerbating or Remedying Compounded Disadvantage?

Eleanor sought permission to remain in the UK as a victim of trafficking. Six years after she left the Dhanjis (and was re-trafficked), and three years after the Home Office recognised her to be a victim of trafficking, she received it. Stoyanova draws on Eleanor's case in her assessment of the trafficking regime, relying on it to advance two separate strands of her thesis. Stoyanova first refers to the failure of the police to adequately investigate Eleanor's treatment

110 ibid, para 59, 63 and 67.

111 Per Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals OJ L 168/24 (which the UK has also opted out of).

in the UK to argue that one of the reasons why the trafficking regime is so problematic, is that its preoccupation with how people are recruited and moved serves to 'deflect' attention from the actual abuses that they are subject to.[112] (Stoyanova, it will be recalled, positions herself in the second group of trafficking sceptics discussed in section 2 above, for this and other reasons, some of which are discussed below.) The response of the police to Eleanor's situation certainly seems to bear this out. Because the Dhanjis had 'received' Eleanor and exploited her, rather than arranging her entry into the UK, the police appeared to conclude, incorrectly, that no action could (or should?) be taken against them.[113] The trafficking regime's 'migration control/criminal law' approach actually leaves Eleanor *without* the protection of the criminal law, its preoccupation with her entry into the UK (and the person responsible for it) obscuring the role of both the Dhanjis and Mrs Kilumanga in her exploitation. The Dhanjis tell Eleanor that if she goes to the police, they will not help her, *and this is true*.

This is not the only way in which the trafficking regime exacerbates, rather than remedies, the compounded disadvantage that trafficked women are subject to. That Eleanor was trafficked into, and then within the UK, does not appear to have been contested at any point in Eleanor's legal case(s). However, Eleanor's recognition as a victim of trafficking did not significantly improve her situation; indeed it initiated a process that culminated in the Home Office preparing to deport her. Whilst we do not know exactly what support Eleanor received and when, we may assume that once her case was referred to the NRM and she received accommodation from the Poppy Project, she would have been given access to health care and other support, in line with the UK's obligations under the Trafficking Convention.[114] During

112 Stoyanova (n 19), 310-311, and as also occurred in *CN v UK* App no 4239/08 (ECtHR, 13 November 2012).

113 *Kawogo v UK* (n 103), note that the lack of a specific criminal offence relating to 'forced labour' at this time formed part of a separate admission/discussion.

114 Council of Europe Trafficking Convention, Article 12 provides that victims should have access to medical treatment, counselling and information, psychological and material assistance etc.

this period of 'reflection and recovery', Eleanor would have had her immigration position temporarily regularised and would have been protected from any attempt to remove her.[115] However, just one day after she received a positive CGD, Eleanor was denied a residence permit and any other form of permission to remain in the UK. She was issued with removal directions soon after. Whilst the 'recovery and reflection period' provided Eleanor with a very brief period of respite from the compounded disadvantage she had been subject to, it did no more than that. The final outcome of being referred to the NRM was Eleanor's exclusion, once again, from a number of sources of support (including certain forms of medical treatment) and the imperilling of her migration status.[116] Whilst we do not know what impact the compounded disadvantage she was subject to had on Eleanor, we do know that by the time her case was finally concluded by the Upper Tribunal she suffered from a severe and complex form of PTSD complicated by a 'severe, chronic, major depressive disorder with an unspecified time of onset'.[117]

Eleanor was eventually granted permission to remain in the UK under Article 4 ECHR, taken in conjunction with Articles 12, 14 and 16 of the CoE Trafficking Convention. Although we do not know how long a period of leave she was granted, we can surmise that it will have been for a significant period of time.[118] With the granting of what should be a secure migration status, one which enabled Eleanor to receive the specialist medical treatment she needed, which entitled her to housing assistance, welfare benefits and full access to the labour market,

115 ibid, Article 13.

116 Under Article 13 of the Trafficking Convention victims are to be granted a recovery and reflection period during which their stay 'shall' be authorised and they are protected from expulsion proceedings. Once this period has ended someone like EK would no longer be lawfully present in the UK and whilst still entitled to emergency medical treatment under Article 12(1)(b), she would no longer he entitled to non-emergency medical treatment under Article 12(3). She would also no longer be protected from any attempt to remove her.

117 *EK (Article 4 ECHR: Anti-Trafficking Convention) Tanzania* (n 4), para 51.

118 ibid 66-68, given her prognosis it is difficult to see how Eleanor could ever be removed in conformity with Tribunal's interpretation of Articles 12, 14 and 16 of the Convention.

Eleanor's situation should have been transformed and the compounded disadvantage she had been subject to ameliorated.

Eleanor's case demonstrates that whilst being identified as a victim of trafficking and receiving a period of reflection and recovery may yield some benefits (by, for example, protecting victims from any *immediate* attempt to deport them), it is only the granting of a residence permit that has the *potential* to provide reparation for compounded disadvantage. The extent to which this potential may be realised is, however, determined by the length of time that a trafficked victim's stay is regularised. Whilst significant rights accrue to the holders of residence permits (in terms of material assistance and access to the labour market etc.) it is nevertheless a status that remains precarious; its length, the circumstances in which it can be renewed and under which its holder can (ever) receive permanent residence being determined by each State Parties' own immigration law.[119]

The EU Residence Permit Directive and EU Trafficking Directive: Could they have Ameliorated the Compounded Disadvantage Eleanor was subject to?

It remains to consider whether Eleanor's situation would have been any different had she had recourse to either the EU Residence Permit Directive or EU Trafficking Directive. Could she, for example, have been identified as a victim of trafficking earlier that she was, or have been granted a residence permit any sooner?

As the EU Residence Permit Directive does not address how victims are identified, it seems unlikely to have been able to facilitate Eleanor's identification or enable her to receive assistance any earlier than she did. Whilst the Directive does provide for a 'reflection period' (not a 'recovery and reflection' period), it does not require MS to regularise a victim's stay for

119 Council of Europe Trafficking Convention, Article 14(1), (3) and (4).

its duration, although it does protect them from removal.[120] Eleanor's treatment during any such period would not have been substantially different, therefore, had it been under the auspices of the EU Residence Permit Directive in addition to the CoE Trafficking Convention.

Even if Eleanor had received a recovery period under the Directive, the failure of the police to investigate Eleanor's allegations against the Dhanjis would have precluded her from receiving a residence permit, even though she wished to cooperate with criminal proceedings and indeed, did everything in her power to hold the Dhanjis responsible for their conduct. It is also highly unlikely that any permit that was granted under EU law would respond to the compounded disadvantage experienced by a trafficking victim. Whilst rights do accrue to its holder,[121] permits are only granted for a period of six months.[122] Permits may be renewed, but are in any event to be coterminous with the length of any relevant criminal proceedings.[123] Permits may also be withdrawn in a range of different situations, including when proceedings are discontinued, a situation completely beyond a victim's control.[124] Where a permit is not renewed or is withdrawn, the victim becomes subject to the relevant MS' ordinary immigration law, thus rendering her both detainable and deportable.[125] Permission to remain granted under the EU Residence Permit Directive is, therefore, significantly more restrictive and precarious than that granted under the CoE Trafficking Convention.

Whilst the EU Trafficking Directive has improved the position of those who have been trafficked into the UK by, for example, enabling them to challenge some of the exclusions they

120 EU Residence Permit Directive, Art 6(2), compare with Article 13(1) of the Council of Europe Trafficking Convention.

121 EU Residence Permit Directive, Articles 9, 11 and 12.

122 ibid, Article 8(3).

123 ibid, Articles 1 and 8(3).

124 ibid, Articles 13 and 14.

125 ibid, Art 13(2).

have been subject to (from receiving legal aid and compensation for example),[126] the disadvantage that Eleanor was subject to would not have been significantly affected by it. Eleanor required a secure migration status, one that would enable her to receive the long-term medical treatment necessary to treat her tuberculosis and trauma. The EU Trafficking Directive is not able to deliver this.[127]

5. Regime of Readmission or Regime of Exception?

The return of a victim of trafficking to her country of origin, involuntarily if necessary is, as Stoyanova and now I have argued, what States Parties/MS of the European trafficking regime envisage to be standard resolution of that individual's case, the regime operating, in most instances, as a readmission agreement rather than a regime of exception.[128] Eleanor's case is, therefore, exceptional in two ways: firstly in her being granted permission to remain at all; and, secondly, in her being granted such permission for a significant period of time. The second time that Stoyanova draws on Eleanor's case she does so to illustrate how the positive obligations in Article 4 ECHR, in combination with Article 13, might offer victims of trafficking greater protection and assistance than that provided for by the trafficking regime, by providing for non-removal as a form of relief.[129] In making this argument, however, Stoyanova pitches the assistance provided to victims under the European trafficking regime *against* the protections that might be available under the ECHR, arguing that the former

126 See, for example *Puthenveetil v Alexander and George* UKEATPA/0125/14/LA (14 Feb 2014) (which concerned legal aid in an employment case) and *C v Criminal Injuries Compensation Authority* CI011/15/00026 (2015) (which concerned the refusal to grant compensation to a victim of trafficking who stopped co-operating with the police).

127 EK might have been benefitted from Article 9 of the EU Trafficking Directive which requires MS to investigate and prosecute trafficking offences. Had the Dhanjis been investigated/prosecuted EK might then have been granted permission to remain per the Residents Permits Directive to facilitate this. However, this would not have ameliorated the disadvantage EK was subject to because of the precarity of any such permit granted.

128 Stoyanova (n 19), 132-133.

129 ibid, 421-423 in her discussion of 'Anna'.

inappropriately builds protection measures for victims within a criminal and migration law enforcement (rather than a human rights) framework.[130]

There are a number of problems with this argument, one which Stoyanova herself accepts. Firstly, as discussed in Chapter 2, whilst the ECHR can protect an individual from removal in certain circumstances, the ECtHR has not required States to grant those who cannot be so removed a migration status. Stoyanova acknowledges that this position may 'feed the precariousness of the migrant's situation'[131] but Marie-Bénédicte Dembour is surely more accurate when she characterises this stance as one that leaves migrants in a 'Kafkaesque stalemate' unable to live within, or leave, their country of residence.[132]

Secondly and more importantly for the arguments made in this chapter, Eleanor is granted a migration status not under *either* the trafficking regime *or* the ECHR, but as a result of *the interaction between the two*. Whilst a detailed comparison of States' obligations under the trafficking regime and ECHR is an extremely valuable exercise, it should not be engaged in without a recognition of the synergies between the two and the myriad of ways in which they interact and mutually reinforce each other, potentially for the benefit of those who have been trafficked. Eleanor's case is particularly interesting because it reveals the potential of these synergies to remedy some of the defects identified in *both* bodies of law (a preoccupation with migration control and criminal law on the one hand, a failure to grant status on the other). We may, of course, question whether the failure of the Home Office to follow its instructions in granting an ODW visa to Eleanor (the Article 4 ECHR breach) can bear the weight of all

130 ibid 185.

131 ibid 416.

132 Marie-Bénédicte Dembour, *When Humans Become Migrants: study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP 2015) 448-9 in her discussion of *Bonger v The Netherlands*, App no 10154/04 (ECtHR, 15 Sept 2005). The role that both domestic and European law plays in constructing illegality and holding people in such a legal/illegal limbo is also explored in detail in Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (OUP 2016).

that the Upper Tribunal attaches to it (Eleanor could have got her passport back, she would have understood her 'rights', she would have received medical treatment sooner). Such questions notwithstanding, the potential of the European trafficking regime to ameliorate and provide reparation for (rather than just brief respite from) the compounded disadvantage experienced by migrant women may depend on the extent to which these synergies are built upon. In this respect the decision of the ECtHR in *Chowdury and Others v Greece* [2017][133] augurs well. In this case, which concerned forced labour, the Court recognised that the applicants' migration status (or lack thereof) made them vulnerable to exploitation and other rights-violations.[134] It then ruled that States' positive obligations under Article 4 'must be construed in the light of' the Trafficking Convention, the Court being 'guided' in this respect by that Convention's interpretation by GRETA.[135] Significantly, the failure of the relevant authorities to have regard to Article 13 of the Trafficking Convention, which concerns the granting of recovery and reflection periods, was found by the Court to give rise to a breach of the Article 4 ECHR obligation to conduct an effective investigation.[136]

Whilst the Court in *Chowdury* [2017] does not go so far as to recognise that Articles 4 and 13 ECHR could/should give rise to a more general obligation to regularise victims' stay (in certain circumstances, for either the short or longer term), the judgement is, nevertheless, a significant step in this direction. The Court's reference to GRETA may be crucial here, as GRETA has consistently 'stressed the importance of ensuring that unconditional assistance is provided to victims.'[137] Such unconditional assistance includes the granting of residence

133 *Chowdury and Others v Greece* App no 21884/15 (ECtHR, 30 March 2017).

134 ibid, 95.

135 ibid, para 104.

136 ibid, para 121-2.

137 Group of Experts on Action Against Trafficking in Human Beings (GRETA), *8th General Report on GRETA's Activities covering the period 1 January to 31 December 2018* (Council of Europe, 2019), 6. See also Group of Experts on Action Against Trafficking in Human Beings (GRETA), *Fourth General Report on GRETA's activities covering the period 1 August 2013 to 30 September 2014* (GRETA(2015)1,

permits.[138] GRETA's position on unconditional assistance could, in future, be relied on by the Court to require States to have regard to the regularisation of victims' stay in a broader range of circumstances than is currently the case.

Conclusion

At the beginning of this chapter, I argued that the obligations placed on States by the trafficking regime are both more complex and less clearly defined than the domestic violence rules considered in the previous chapter. There are many different and potentially competing explanations for these differences. The one I want to draw attention to here is as follows: States' 'concern' about and response to trafficking is epiphenomenal of their concern about migration more broadly; the same is not true of their 'concern' (such as it is) about domestic violence. The focus on criminal law and migration control, the complexity of the regime and the flexibility accorded to States in fulfilling their obligations under it, reflects this epiphenomenalism. States would simply not engage with the regime if it did not enable them to prevent entry, prosecute traffickers and facilitate return.

This is not all the trafficking regime is or does, however. As a European trafficking regime has emerged, distinct from its Palermo progenitor, a shift towards a rights-based response to trafficking and its victims is identifiable. The tension between the European trafficking regime's criminal law and migration control strands and this rights-based approach cannot be resolved whilst States' desire to limit migration and to exclude, remains so central and contested an issue. This tension may sometimes, however, be resolved in an individual's favour; and, as the Upper Tribunal's decision in Eleanor's case, and the ECtHR's judgement

16 April 2015), 29: 'GRETA has urged 12 countries either to adopt legislation or to ensure that victims of trafficking can fully benefit from the right to obtain a renewable residence permit, including victims who for various reasons do not co-operate with the authorities.'.

138 Group of Experts on Action Against Trafficking in Human Beings (GRETA), *8th General Report on GRETA's Activities covering the period 1 January to 31 December 2018*, 41-44.

in *Chowdury* [2017] demonstrates, it may be resolved more positively for more people when general human rights standards are called on to bolster and develop the trafficking regime's own human rights approach (and vice versa). When this happens, the potential of the trafficking regime to respond to the compounded disadvantage experienced by migrant women subject to violence may, at least in part, be fulfilled.

CHAPTER 6: THE ISTANBUL CONVENTION, AN ALTERNATIVE APPROACH?

Introduction

The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (the Istanbul Convention)[1] has been in force since 1st August 2014 and has, at the time of writing, been ratified by thirty-four States (including Germany, Austria, Denmark, France, Italy, Ireland, Spain, Sweden and Turkey) in addition to being signed by others, including the UK and (to a limited extent, as we shall see) the EU. Adopted seventeen years after the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará), the Istanbul Convention is only the second international, legal instrument to focus on violence against women.[2] The Istanbul Convention is, as Kevät Nousiainen and Christine Chinkin have observed, 'unique' and 'innovative' in 'rooting'[3] in international human rights law (that concerned with discrimination and violence against women, as described in Chapter 2) and Council of Europe conventions (including the Trafficking Convention)[4] a holistic and predominantly gender-specific approach to violence against women.

This chapter examines the final regime of exception considered by this thesis, that created by Article 59 of the Istanbul Convention which imposes two distinct obligations: Article 59(1) requires Parties to grant victims, whose migration status is dependent on a spouse

1 Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul, 11th Oct 2011) CETS 210 (Istanbul Convention).

2 See the discussion in Chapter 2 on the 'soft law' instruments and General Recommendation 19 Violence Against Women (11th session, 1992) .

3 Kevät Nousiainen and Christine Chinkin, *Legal Implications of EU Accession to the Istanbul Convention* (Luxembourg, European Commission, December 2015), 39.

4 Council of Europe Convention on Action against Trafficking in Human Beings (Warsaw, 16.V.2005) CETS 197 (Council of Europe Trafficking Convention) and Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote 25.20.2007) CETS 201.

or partner, an 'autonomous residence permit' if certain conditions are met; whilst Article 59(3) requires Parties to grant victims of violence a 'renewable residence permit' in certain circumstances. Whilst the regimes considered in the previous two chapters were available to either victims of domestic violence or trafficking *only*, the Istanbul Convention's regime is significantly broader (as explained below), potentially benefitting victims of domestic violence, trafficking and other forms of violence against women including, for example, stalking, harassment and FGM.

This chapter commences with a brief discussion of the Istanbul Convention, establishing its objects, purposes and scope, before providing an overview of its main provisions. I then proceed to examine Article 59 and evaluate the extent to which the Convention responds to the compounded disadvantage experienced by women whose migration statuses are determined by EU or UK law.[5] To achieve this, I return, once again, to Naomi and Eleanor's cases. Naomi, it will be recalled from Chapter 4, was unable to rely on the EU's domestic violence rule to retain the right of residence she had previously derived from her EU Citizen husband, a right she lost when he departed from the UK. Eleanor, as discussed in the previous chapter, was able to rely on the European trafficking regime, read in conjunction with European human rights law, to receive a migration status when, having been trafficked into and then within the UK, she was left without permission to remain and in extremely poor health. Having deliberated on how Naomi's and Eleanor's cases might have been decided, had

5 In doing so I, once again, follow the standard rules of treaty interpretation, Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) UNTS 1155 331 (VCLT), Art 31.

they been able to rely on the Istanbul Convention, I conclude by considering whether the EU's or UK's *full* ratification of the Convention would improve the position of migrant women.

1. The Istanbul Convention: An Overview

The Istanbul Convention is ambitious, its purposes being to protect women from all forms of violence; contributing to the elimination of discrimination against women and promoting equality; creating a comprehensive framework to protect and assist victims; and, promoting co-operation between Parties and agencies to adopt an integrated approach towards, and even eliminate, violence against women and domestic violence.[6] The beneficiaries of the Convention's expansive set of rights and protections are 'victims', defined in Article 3(e) as 'any natural person who is subject to' that conduct set out in Articles 3(a) 'violence against women' and 3(b) 'domestic violence'. Both the Convention and its Explanatory Report makes clear that the former's 'large number of references to victims' should be understood as referring to both victims of violence against women and of domestic violence.[7] The word 'and' in Art 3(e) denoting the potential of the Convention's protections to be applied to two, potentially distinct, groups of beneficiaries: women and girls subject to any form of violence against women (including domestic violence) and victims of domestic violence (including, potentially, men and boys).[8] Without repeating Chapter 2's elaboration of this thesis' conceptual account

6 Istanbul Convention, Art 1.

7 Council of Europe, *Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence against women and Domestic Violence (CETS No. 210)* (2011), para 45.

8 Art 2(1) 'This Convention shall apply to all forms of violence against women, including domestic violence' and 2(2) 'Parties are encouraged to apply this Convention to all victims of domestic violence'. If the term 'and' was interpreted cumulatively, the Conventions' protections would be unavailable to women subjected to stalking, sexual harassment, sexual violence, forced marriage, honour-based violence and female genital mutilation where the relevant acts were committed by someone outside of a women's household or family (such as, in the case of sexual harassment for example, a professional colleague). That the word 'and' is used to denote two, potentially distinct beneficiary groups, 'victims of violence against women' and 'victims of domestic violence' (the former being only women and the latter potentially including men and boys) is confirmed by the reference to 'women victims' in cases where a particular right/protection is available only to the former group e.g. Article 18(3) which refers to the 'empowerment and economic independence of women victims of violence.' Similarly, where a right or protection is intended for victims of a particular subset of violence against women only, the relevant

of violence against women, the approach I adopt is consonant with the Istanbul Convention's definition of violence against women as encompassing a range of harms and involving both a violation of women's human rights and discrimination against women.[9]

In the preceding chapters, I have observed that European and international human rights law imposes a series of positive obligations on States which require them to respond to violence against women, domestic violence and trafficking appropriately and/or with due diligence. Precisely what is entailed by these obligations in different circumstances continues, however, to be the subject of litigation (as evidenced by the range of cases cited in Chapter 2), scholarly debate and, on the part of those who owe the obligation, States, obfuscation. In general (and as the previous chapter's discussion of the trafficking regime demonstrates) States have been quick(er) to accept legal obligations that give them greater enforcement powers, obligations that require the criminalisation of certain conduct, for example, than they have been to provide civil remedies to, and specialist support for, the victims of those offences. One of the significant contributions that the Istanbul Convention makes to human rights law is, therefore, the establishment of a comprehensive, clear and detailed framework of mutually reinforcing obligations which encompass policy, preventative, protective *and* prosecution-based responses to violence against women. These obligations include first, the adoption of integrated, co-ordinated and properly resourced policies and programmes to challenge gender inequality, monitor and respond to violence against women.[10] Second, the prevention of violence through education, training and awareness-raising.[11] Third, the protection and support of victims via a

article clearly limits its beneficiary group or scope to achieve this. For example, the ability to regain a lost migration status is available to victims of forced marriage only (Art 59(3)). Other measures are also only available in domestic violence cases, see Art 16(1) on 'perpetrator programmes' and Art 52 on the availability of emergency barring orders.

9 Although the approach I adopt is, or may be, more limited than that adopted by the Convention as Chapter 2's discussion of interpersonal (vs structural) violence demonstrates.

10 Istanbul Convention, Chapter II

11 ibid, Chapter III. Interestingly Art 12 of the Istanbul Convention (which focuses on the need to change attitudes and counter the stereotyping of, women replicates Convention on the Elimination of All Forms

range of non-legal *and* legal measures, including: providing services which empower victims,[12] criminalising various forms of violence[13] and adopting civil measures, such as protective orders.[14] Fourth, the Convention requires Parties to adopt measures which ensure the proper investigation, prosecution and punishment of offenders.[15] Centrally, the Convention is to be implemented without discrimination on *any* ground, including 'migrant or refugee' status.[16] The support and protections the Convention provides are, therefore, *available to all victims regardless of their migration status*. The consequences, or potential consequences, of this non-discrimination provision are discussed further below when we consider Naomi and Eleanor's cases.

2. The Obligations Imposed by Article 59

This section analyses the obligations imposed by Article 59, contrasting them, where illustrative, to those imposed by the regimes considered in Chapters 4 and 5 which provided 'inspiration' to the Istanbul Convention's drafters.[17] Whilst highlighting certain similarities in phrasing and approach between these regimes, it should be noted that Article 59 must be interpreted in accordance with the ordinary meaning given to its terms in light of the *Istanbul Convention's* objects and purposes.[18] Terms which have or have come to have a particular

of Discrimination against Women (New York, 18 December 1979) UNTS 1249 13 (CEDAW), Article 5, demonstrating further the interconnectedness of these instruments and an understanding of stereotyping, in and of itself, as a form of sex discrimination (something relevant to the discussions of stereotyping engaged in in Chapter 1).

12 Istanbul Convention, Chapter IV, including 'general' services usually provided by the State (health care, financial assistance, housing and education, Art 18) as well as specialist support services, including telephone helplines (Art 24) support for victims of sexual violence (Art 25), for women (Art 22(2)) and for child witnesses (Art 26).

13 ibid, Chapter V including stalking (Art 34), physical violence (Art 35), sexual violence (Art 36), forced marriage (Art 37), FGM (Art 38) and forced abortion and sterilisation (Art 39).

14 ibid, Chapter VI specifically Articles 52 and 53.

15 ibid, Chapter VI.

16 ibid, Art 4(3).

17 Council of Europe (n 7), 294.

18 VCLT, Art 31.

meaning in, for example, EU free movement law (with its focus on EU *Citizens'* rights) will not, therefore, have the same meaning when used in the context of the Istanbul Convention (and its object to, for example, eliminate discrimination and promote equality).

> Article 59 Residence Status
>
> 1. Parties shall take the necessary legislative or other measures to ensure that victims whose residence status depends on that of the spouse or partner as recognised by internal law, in the event of the dissolution of the marriage or the relationship, are granted in the event of particularly difficult circumstances, upon application, an autonomous residence permit irrespective of the duration of the marriage or the relationship. The conditions relating to the granting and duration of the autonomous residence permit are established by internal law.
>
> 2. Parties shall take the necessary legislative or other measures to ensure that victims may obtain the suspension of expulsion proceedings initiated in relation to a residence status dependent on that of the spouse or partner as recognised by internal law to enable them to apply for an autonomous residence permit.
>
> 3. Parties shall issue a renewable residence permit to victims in one of the two following situations, or in both:
>   a) where the competent authority considers that their stay is necessary owing to their personal situation;
>   b) where the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings.
>
> 4. Parties shall take the necessary legislative or other measures to ensure that victims of forced marriage brought into another country for the purpose of the marriage and who, as a result, have lost their residence status in the country where they habitually reside, may regain this status.

Article 59 adopts a four-fold approach to victims' 'residence status'.[19] Article 59(1) requires States to grant victims whose migration status is dependent on a spouse or partner an 'autonomous residence permit' in certain circumstances. Article 59(2) protects 'victims' whose migration status is, once again, dependent on a spouse or partner, from any expulsion proceedings initiated *against that spouse/partner*. Article 59(3) enables victims to be granted 'renewable residence permits' in certain circumstances, whilst 59(4) enables 'victims of forced

19 Council of Europe (n 7), para 299.

marriage' to regain any migration status held in their country of habitual residence and lost because of that marriage.[20] Although the possibility of regaining a 'lost' migration status is available to 'victims of forced marriage' only, subject to the other requirements of Article 59(1)(2) and (3) being met, Parties to the Istanbul Convention are required to grant residence permits to and protect from expulsion victims of violence against women and domestic violence (per the above discussion on the Convention's scope). Whilst the three regimes considered in the previous chapters were available to either victims of domestic violence or trafficking *only*, the Istanbul Convention's regime is significantly broader, potentially benefitting victims of domestic violence, trafficking and other forms of violence against women. As GREVIO has stated, Article 59's role within the Convention is to ensure that States' immigration laws:

> do not turn a blind eye to the realities of women living in abusive relationships *or* subjected to sexual violence and exploitation and other forms of gender-based violence.[21]

The potential implications of this breadth have yet to be fully explored by the limited literature that the regime has, thus far, generated; an omission that this chapter seeks to remedy.[22]

20 As Art 59(4) focuses on migration statuses held in the country of origin/habitual residence, rather than the host country it will not be considered in detail here.

21 Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), *GREVIO Baseline Evaluation Report Denmark* (24 November 2017), para 224 (emphasis added). In relation to trafficking specifically, the Convention's Explanatory Report states that its drafters decided that the Convention should 'avoid covering the same *conduct* already dealt with in other Council of Europe conventions', Council of Europe (n 7), para 154 (emphasis added). The only mention of trafficking or the Trafficking Convention in the Istanbul Convention is in its preamble, where it is referred to alongside the ECHR and other relevant human rights instruments. Of course, obligations imposed *by the Trafficking Convention* are not affected by those imposed by the Istanbul Convention, see Article 71 of the latter.

22 See Nousiainen and Chinkin (n 3) for example, which focuses on the potential impact of Art 59(1) on EU law but not that of Art 59(3) even though the latter is significantly broader in scope.

(a) Article 59(1) and Autonomous Residence Permits

States are required to grant an autonomous residence permit under Article 59(1) to victims who are dependent for their migration status on a spouse/partner. The reference to spouse/partner (when coupled with the Convention's non-discrimination provisions) enables those in same-sex and opposite-sex relationships, as well as those who are not married, to benefit from the provision. From the vantage point of a potential applicant in the UK, the reference to a 'dependent migration status' enables those who are married or in a relationship with someone who is British, an EU citizen or a third-country national (for example, the Japanese partner of a Japanese worker) to receive a permit. The scope of this regime is again, therefore, broader than its UK equivalent (which, it will be recalled, is only available to those who are in a relationship with someone who is British or settled here). Where the potential applicant is in a relationship with a migrant, Article 59(2) protects her from any expulsion proceedings that are taken against him (by suspending such proceedings, not by regularising her stay temporarily) to enable her to apply under Article 59(1). Like both the EU and UK domestic violence rules, Article 59(1) does not require the perpetrator of violence to *be* the person on whom the applicant is dependent for her migration status. Women who experience violence from other sources (harassment from other family members or from a work colleague) can rely on the rule if, for example, that violence contributes to the breakdown of the applicant's relationship with her 'sponsor'.[23] The violence also does not have to have *caused* the relationship to break down (in line with the EU's provisions and unlike the UK's domestic violence rule), the duration of the relationship itself also being irrelevant. This is important in

23 I advised a woman whose relationship with her husband broke down when it emerged that his brother had been filming her in their shared bathroom. When the woman concerned wanted to report this behaviour to the police her husband disagreed, arguing that such matters should be dealt with within the extended family. This position caused the relationship between husband and wife to breakdown and she, consequently, was forced to rely on the UK's domestic violence rule to remain in the UK. Women in this situation would also be able to benefit from the Istanbul Convention's regime.

cases where the cause and indeed timing of the relationship breakdown is unclear or contested, such issues not being 'questions of fact' but of the 'judgement of particular facts'.[24] Whilst the EU's domestic violence rule contains requirements which relate to the economic activity of both victims and perpetrators (like being a worker or self-employed) no such criteria are imposed here.

There are three elements of Article 59(1), the correct interpretation of which is less straightforward. The first is the rule's reference to 'particularly difficult circumstances'. This phrase appears to be drawn directly from the EU's domestic violence rule. In EU law it is used describe the type of factor that could result in a spouse retaining a right of residence when her relationship with an EU citizen has ended and the other potential grounds for retaining rights (those which concern the duration of a relationship, or the presence of children) are not met. According to the EU Citizens' Directive, in such cases where there are 'particularly difficult circumstances, *such as* having been a victim of domestic violence' rights may be retained.[25] The rationale for using this phrase in Article 59 is less clear. Vladislava Stoyanova argues that the phrase may be interpreted to add a 'severity threshold', in terms of the violence experienced (a focus on past harm) or the applicant's personal circumstances (potentially a prospective test, considering the impact of removal on 'small' children for example).[26] Stoyanova appears to welcome this approach, arguing that the definition of violence against women adopted by the Convention is 'far-reaching' and that:

24 *Balakoohi, R (on the application of) v Secretary of State for the Home Department* [2012] EWHC 1439 (Admin), paras 68 and 69.

25 European Parliament and Council Directive 2004/38/EC of 29 April 2004 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 OJ L 158/77, Art 13 (emphasis added).

26 Vladislava Stoyanova, 'A Stark Choice: Domestic Violence or Deportation? The Immigration Status of Victims of Domestic Violence under the Istanbul Convention' (2018) 20 *European Journal of Migration and Law* 53, 62

> If this definition is to be followed without any restraints imposed by the qualifying words 'particularly difficult circumstances', the beneficiaries of Article 59 might be extended to unreasonable limits.[27]

This 'severity threshold' interpretation would be inconsistent with the Istanbul Convention's objects and purposes for two reasons. Firstly, the Convention seeks to respond to all forms of violence against women, not just particularly harmful subsets or manifestations of it. The approach to violence against women and victimhood it adopts is, therefore, purposefully capacious to capture, and thereby enable a response to, the many and varied forms of violence that women are subject to (including violence that results in economic or psychological harm for example). Secondly, the Convention seeks to eliminate both inter and intra sex discrimination. Per Article 4(3), the rights and protections the Convention affords are to be secured without discrimination on any ground, including migration status. To interpret 'particularly difficult circumstances' as requiring a potential applicant to experience violence that is particularly severe, for example, is to discriminate against (if not unlawfully) *migrant* women, by imposing a higher eligibility threshold on them than must be met by 'normal' victims, before the relevant protection (in this case a migration status) is afforded.

Rather than interpreting 'particularly difficult circumstances' as *adding* a requirement to the others present in the rule, I adopt an interpretation that uses it to *link* the experience of violence with marriage/relationship dissolution and the subsequent loss of migration status. Without the imposition of such a link, the potential beneficiary group of Article 59(1) could, as Stoyanova correctly observes, be unreasonably large. Article 59 does not require, it will be recalled, a perpetrator of violence to *be* the spouse/partner on whom a woman depends for her migration status or for the violence to have *caused* the relationship breakdown for a residence permit to be granted. But why should, for example, an experience of sexual harassment

27 ibid, 62.

perpetrated by a stranger generate a right of residence if, entirely unrelated to that violence, the woman concerned subsequently divorces the partner on whom she depends for her migration status? The migration status of victims of violence who wish to remain in a particular jurisdiction while that violence is investigated/prosecuted is covered by a separate provision, Article 59(3) which requires Parties to grant *renewable* residence permits (discussed in the next section). This being the case, for which 'particularly difficult circumstances' is bestowing an *autonomous* right of residence the appropriate response? Being deterred from ending a violent relationship, because to do so may end your right to live in a particular EU MS, may be one such circumstance. Losing your migration status because you ended that relationship, or because the person on whom you depended for your status was imprisoned for their violence, may be two others.[28] Interpreting 'particularly difficult circumstances' to link the rule's substantive requirements enables its benefit, the granting of an autonomous migration status, to be bestowed in a range of situations where a victim's dependent one is jeopardized in some way because of that victimhood. Such an interpretation is entirely consistent with the phrase's ordinary meaning in light of the Istanbul Convention's objects and purposes.[29]

The second feature of Article 59(1) that requires more detailed consideration is its reference to victims 'whose residence status *depends* on that of the spouse or partner' (emphasis added). Must, therefore, a victim have a current, dependent migration status when she experiences violence, when her relationship ends, when she makes her immigration application or for all three? If Article 59(1) were interpreted as requiring a woman to have a current, dependent migration status at the time she makes her application, the potential

28 Per Case C-378/12 *Nnamdi Onuekwere v Secretary of State for the Home Department* ECLI:EU:C:2014:13 [2014], where the CJEU ruled that time spent in prison was not time legally residing in an EU MS, if an EU Citizen was imprisoned for his violence he would lose his right to reside. This could result in any family members who derived their rights from his also losing their rights, an issue that was discussed in Chapter 4.

29 Istanbul Convention, Art 1. See also Council of Europe (n 7), 303.

beneficiary group of the provision would be small; women who have overstayed their permission to remain because of their perpetrators' violence, for example, being excluded from its ambit. In its discussion of compounded disadvantage and Naomi and Eleanor's fight for residence, this thesis has demonstrated that perpetrators of violence routinely manipulate, or seek to manipulate, their victim's migration status. Barring women who no longer have a current dependent migration status from benefitting from Article 59 reinforces, rather than undermines, this control. Any perpetrator who became aware of his partner's attempts to seek protection from him, or gather evidence in support of an immigration application, could take action to have her leave curtailed, effectively depriving her of both.[30] An alternative interpretation, one which is responsive to these issues and, therefore, consistent with the Convention's objects and purposes could require the victim to have had a dependent migration status at the time *any* of the three factors the provision mentions arose, for example, at the time the relationship is dissolved or when the 'particularly difficult circumstances' *arose*. Such an approach would:

> allow victims to obtain the necessary protection from authorities without fearing that the perpetrator will retaliate by withdrawing or threatening to withdraw residence benefits under the perpetrator's control.[31]

The third element of Article 59(1) that requires attention is the migration status that Parties are required to grant under it; the duration and rights that such a status bestows being determined by Parties own (immigration or free movement) law. As we saw in Chapter 1, migration statuses can be of different durations, can be renewable (or not) and can bestow a variety of different rights (again, or not). Article 59(1) will only protect and assist victims if the migration status it provides is for a significant period of time (like the permanent residence given to victims of domestic violence in Chapter 4) and bestows rights that provide 'resilience' to

30 See for example, *SSHD v SP* [2016] UKAITUR IA013472015.

31 Council of Europe (n 7), 304.

violence, thereby ameliorating the disadvantage victims have been subject to (per Fineman's theorising and Chapter 3). Whilst the Convention's protection from discrimination should enable migrant women to benefit from the general and specialist support services Parties are required to provide to all victims, such protection will not provide holders of the permit with the right to work *if their migration status does not bestow it*, the right to work not being one that the Convention provides. The migration status that Parties are required to grant under Article 59 may have to be independent, but it will only be 'secure' and meet the Convention's purposes if, therefore, it is for a non-temporary period, like the five years suggested in Chapter 3, and bestows significant rights upon its holder, including the right to access welfare benefits, housing, health care, education and the labour market.

(b) Article 59(3) and Renewable Residence Permits

The personal scope of Article 59(3), which sets out when Parties should grant *renewable* residence permits under the Istanbul Convention, is broad. Like Article 59(1), any victim of violence against women (as defined by the Convention) may be eligible for a permit. Unlike Article 59(1), Article 59(3) does not impose any requirements concerning the victim's (or perpetrator's) migration status, thereby avoiding some of the complexities discussed above and ensuring that, for example, victims of violence who have overstayed their permission to remain (for whatever reason), or are undocumented, are eligible for a permit.

In delimiting the scope of Article 59(3), subsections (a) and (b) repeat, *almost* word-for-word, Article 14 of the Council of Europe's Trafficking Convention. Parties are required to issue permits where a victim's stay is necessary owing to their personal situation and/or to enable them to co-operate in criminal proceedings. There are, however, two central differences between the two regimes.

The first difference concerns the removal, from the text of Article 14 of the Trafficking Convention, the requirement that residence permits be granted 'in one *or the other* of the following situations, or in both' (emphasis added) so that under the Istanbul Convention, permits must be granted 'in one of the two following situations, or in both'. Stoyanova welcomes this change, arguing that it addresses a key deficiency of the trafficking regime whereby States may only grant residence permits to victims who are co-operating with criminal proceedings per Article 14(1)(b), and not to those who are not co-operating, but who nevertheless wish to remain in their country of residence per Article 14(1)(a).[32] Stoyanova argues that following the Istanbul Convention's 'reformulation' of the trafficking regime, Parties must legislate to provide for both options set out in Article 59(3)(a) and (b).[33] Whilst the wording of Article 59(3) is not as clear as Stoyanova suggests,[34] her interpretation is consistent with the Convention's objects and purposes (specifically, the creation of a comprehensive framework for the protection and assistance of victims) as its Explanatory Report, which refers to the provision as imposing 'two requirements', indicates.[35]

The second difference between the Trafficking and Istanbul regimes concerns not the wording of the provision itself, but its context. It will be recalled that the granting of residence permits under the trafficking regime operates as a narrow, usually temporary exception, to both the EU's and CoE's default position of 'return or be removed', the regime also requiring Parties to facilitate the re-documentation and removal of trafficking victims. The Istanbul Convention

32 Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European law* (CUP 2017), 134 and Stoyanova, 'A Stark Choice: Domestic Violence or Deportation? The Immigration Status of Victims of Domestic Violence under the Istanbul Convention' (n 26), 79. See, however, the preceding chapter's discussion of GRETA's role in championing the provision of unconditional assistance to victims.

33 Stoyanova, 'A Stark Choice: Domestic Violence or Deportation? The Immigration Status of Victims of Domestic Violence under the Istanbul Convention' (n 26), 79.

34 The provision could have required Parties to issue permits 'if *either* one *or* both of the following two situations apply…'

35 Council of Europe (n 7), 307.

does not contain any analogous provisions, so that victims who are ineligible under Article 59(3) (or indeed 59(1)) will not, at least, have their removal directly facilitated by the Convention and will continue to benefit from the other protections it provides on a non-discriminatory and unconditional basis (a further difference between the regimes, it will be recalled, is that under the trafficking regime certain protections were only available to certain victims, those who had been 'identified' or who were co-operating with criminal proceedings for example). Differences between the Trafficking and Istanbul Conventions in their approach to both the residence status of victims and to their protection and support needs are, consequently, much greater than an initial comparison of the relevant provisions in isolation might suggest. The trafficking and Istanbul regimes have the potential, therefore, to deliver markedly different outcomes in substantively similar cases, the number of such outcomes increasing as the number of States who are Parties to both increases, and more individuals in these States seek to benefit from the protections that they provide.

Returning to the material scope of Article 59(3) and 59(3)(a)'s requirement that a permit be granted to a victim where it is 'necessary owing to their personal situation', a victim's 'personal situation' is defined in the Convention's Explanatory Report as including any aspect of her health and welfare, encompassing, for example, her position in her country of residence and the circumstances she would have to confront if she were compelled to return to her country of origin.[36] Article 59(3)(b), which repeats, almost verbatim, Article 14(b) of the Trafficking Convention, may be subject to the same criticisms levelled at the latter (and to a greater extent, the conditional provision of permission to remain under the EU Residence Permit Directive) in the previous chapter. Of course, granting a residence permit to someone who is co-operating with criminal proceedings may assist that person (and the State) to hold a perpetrator to account

36 ibid, 307.

for their conduct. However, in making receiving a permit conditional on criminal proceedings, the State is, once again, bestowing a migration status that makes its holder dependent, not on a person or relationship this time, but a process over which the victim has no control. The police may not properly investigate a victim's allegations (as occurred in Eleanor's case), or the perpetrator may flee the jurisdiction once the police have become involved (as occurred in Naomi's). A perpetrator may be investigated but not prosecuted for their violent conduct, or their prosecution may be discontinued for a variety of 'good' reasons (because of the unavailability of other witnesses or evidence for example). All these factors may result in either an individual not receiving a permit, having permission to remain curtailed, or, not renewed, if she is not able to show, per Article 59(3)(a), that her stay is necessary for her personal circumstances.

Finally, the residence permit granted under Article 59(3) is, at least, *required* to be renewable. The migration status granted under Article 59(3) may, therefore, be more secure (and potentially enable settlement, for example) than that granted under Article 59(1), although the comments made above as to the duration and rights that this status should bestow (in terms of the right to access social assistance and/or the labour market) apply equally here.

3. Applying the Istanbul Convention in Theory: An Exercise of the Legal Imagination

(a) Naomi

When we left Naomi in Chapter 3, her attempt to secure permanent residence under the EU's domestic violence rule had failed, the CJEU ruling that Kafeel's sudden departure from the UK, which occurred before their divorce, extinguished Naomi's derivative right of residence

before she could apply to retain it.[37] The CJEU's decision left Naomi without a secure or independent migration status, dependent for her right of residence (under EU law) on her EU Citizen children remaining in education here.[38]

As a victim of domestic violence (and indeed one who could evidence that violence to the satisfaction of the Home Office) Naomi is a 'victim' per the Istanbul Convention and therefore entitled (in this exercise, if not in fact) to the rights and protections it provides. Had Naomi been able to rely on the Convention she might have sought help from the general and specialist support services States are required to provide *all* victims, regardless of their migration status, including health care, housing and financial support, counselling and legal advice.[39] Whilst we do not know what (if any) support Naomi received whilst her case progressed to the CJEU, we do know that Kafeel's departure might have led to her exclusion (legally and/or practically) from a range of 'assets' that provide 'resilience' to violence, including welfare benefits; local authority housing or homelessness assistance; and, (potentially) assistance from social services.[40] By prohibiting Parties from discriminating against migrant women in their provision of support services, the Istanbul Convention has the potential to transform Naomi's position in the UK, whether or not she is also eligible for the specific protections Article 59 provides.

Could Naomi benefit from Article 59's regime of exception? Turning first to Article 59(1): Naomi's migration status *did depend* (past tense) on that of her spouse, her relationship with him ending in divorce proceedings and his violence and abandonment of her and their

37 Case C-115/15 *Secretary of State for the Home Department v NA* ECLI:EU:C:2016:487 [2016], para 51.

38 Following the Court of Appeal's decision in Naomi's case she was also entitled to remain in the UK under Art 8 ECHR, the right to a private and family life.

39 Article 3 in conjunction with Articles 20, 22 and 57 for example.

40 Drawing once against on Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2013) *Emory University School of Law, Public Law & Legal Theory Research Paper Series, Research Paper No 10-130* and Chapter 3 and 4's discussion of compounded disadvantage and Naomi's potential experience of it.

(then) child giving rise to 'particularly difficult circumstances'.[41] The difficulty in Naomi's case arises from the requirement that the applicant 'depends' on another for her migration status as, as discussed in the preceding section, Naomi did not depend on Kafeel for her migration status *at the time* she made her immigration application. An interpretation of Article 59(1) that prevented women in Naomi's position from benefitting from it would replicate the deficiencies of the EU's domestic violence rule and strengthen, rather than counter, the control that perpetrators of violence exercise over their migrant partners. Such an interpretation would manifestly be contrary to the Convention's objects and purposes. I have argued for an interpretation of 'depends' that relates to a potential applicant's migration status at the time that *any* of the substantive requirements of the rule arise, when violence occurs, for example, or when the relationship is dissolved. Following this interpretation women who, like Naomi, lose their residence rights because the person who they derive them from depart (or cease work, or otherwise no longer meet the 'qualified person' requirements for example) would be eligible for an autonomous migration status under Article 59(1). To draw on and paraphrase Advocate General Wathelet: if being a victim of violence was regarded by the Council of Europe as a ground for converting a dependent migration status into one that is autonomous, the ability to do so cannot depend on whether the perpetrator of that violence chooses to remain in the relevant Party's territory.[42] Consonant with the Advocate General's arguments, this chapter has argued for an interpretation of 'depends' that relates to a potential applicant's migration status at the time she experiences violence (or when her relationship ends, or when the particularly difficult circumstances arise etc.). Under this approach Naomi and women who have, for

41 In forming this conclusion, I adopt the interpretation of 'particularly difficult circumstances' set out above (which uses the phrase to link the rule's substantive requirements: violence, dependency and marriage dissolution). Naomi's predicament at the relevant time (a victim of potentially criminal violence, pregnant and caring for another young child) would make her eligible for a migration status under Article 59(1) whether or not my or Stoyanova's 'severity threshold' interpretation is preferred.

42 Case C-115/15 *Secretary of State for the Home Department v NA* ECLI:EU:C:2016:259, para 76.

example, overstayed their permission to remain as a result of their partner's violent and controlling behaviour, would be eligible for an autonomous migration status under Article 59(1).

Naomi would not be able to rely on Article 52(2) to obtain the suspension of any expulsion proceedings initiated against her following Kafeel's departure, as the provision only provides protection from proceedings taken against the spouse or partner. This provision could, however, have benefited Naomi had Kafeel remained in the UK. Kafeel's conduct, it will be recalled, had come to the attention of the police. Had criminal and then immigration proceedings followed, Naomi's dependent migration status could have been affected. In such circumstances Article 52(2) could be relied on to protect the immigration position of a victim of violence who had yet, for a variety of legal or practical reasons, to seek an autonomous residence permit.

Naomi could seek a renewable residence permit under Article 59(3)(a) (in addition to, or instead of a permit under Article 59(1)) her stay being necessary owing to her personal circumstances. As Article 59(3) is silent as to the migration status of any potential applicant (or indeed, perpetrator) issues as to Naomi's dependency (or not) on Kafeel simply do not arise. Of course, the evidential requirements, application processes and leave granted under Article 59(1) or (3) are determined by Parties' own immigration law. Whether or not a woman applies for either an autonomous or renewable residence permit will, in practice, be determined by issues relating to these processes as well as the rights that attach to each form of permission granted. In both cases I have argued that, in line with the objects and purposes of the Convention, any leave granted must be non-temporary (particularly important given that leave granted under Article 59(1) may not have to be renewable) and must bestow significant rights, including the right to access sources of States support and the labour market.

(b) Eleanor

Unlike Naomi, Eleanor did eventually receive permission to remain in the UK under the European trafficking regime read with the positive obligations imposed by Article 4 EHCR. However, this permission was granted in 2013, seven years after she had first been trafficked into the UK (by Mrs Alibhai in 2006), six years after she had been re-trafficked (by Mrs Kilumanga in 2007) and three years after she was officially recognised as a victim of trafficking (in 2010, when her claim for asylum was also refused). Eleanor would have received services and support when, having been referred into the NRM (in 2010) she was recognised as a victim of trafficking and granted a brief 'recovery and reflection period'. However, before her formal identification (and indeed, potentially after it) Eleanor's migration status, 'an overstayer', left her excluded from receiving a variety of sources of State support, including welfare benefits and (potentially) NHS treatment.[43] These exclusions provided the Dhanjis with a crucial source of control over Eleanor. They also enabled, or at least facilitated, her re-trafficking (when she escaped the Dhanjis she was faced with the prospect of either being homeless and destitute or 'working for' Mrs Kilumanga) and contributed to her extremely poor physical and mental health (as Eleanor believed the potentially correct assertions of both the Dhanjis and Mrs Kilumanga that she would have to pay for any medical treatment she received).

Eleanor would also be considered a 'victim' under the Istanbul Convention and therefore entitled (in this scenario, again if not in fact) to the rights and protections it provides. By prohibiting Parties from discriminating against migrant women, the Istanbul Convention also has the potential to radically alter Eleanor's position. Not only might she have received support from the general and specialist support services States are required to provide *all* victims regardless of migration status (a greater array of which are available to victims under

43 Per Chapter 3 and the previous chapter's discussion of the disadvantage that Eleanor may have been subject to.

the Istanbul Convention than the trafficking regime),[44] the receipt of such support may have enabled her to escape the Dhanjis sooner and decreased her risk of being re-trafficked. In either scenario, the physical and mental health consequences of the Dhanjis' and Mrs Kilumanga's ill-treatment of Eleanor could have been significantly reduced, or even averted.

Eleanor would not be entitled to an autonomous residence permit under Article 59(1) of the Convention because she was not dependent for her migration status on a spouse or partner but on her employer. Eleanor also could not rely on Article 59(2) to obtain the suspension of any expulsion proceedings initiated against her (which, as we saw, the Dhanjis attempted to procure) as this protection is also limited to proceedings brought against a dependent victim's spouse or partner.

As Article 59(3)(a) of the Istanbul Convention repeats the provision of the trafficking regime Eleanor was eventually granted permission to remain under, she would, we can hypothesise, be entitled to a renewable residence permit under it. Whilst the relevant provision of the trafficking regime had to be taken with Art 4 ECHR to produce this result, the Istanbul Convention's focus on violence and its rights-based reparation (rather than the means by which someone enters the jurisdiction, per the migration control/criminal law approach to trafficking discussed in the preceding chapter) should produce such a result independent of any Article 4 ECHR claim the applicant also might have. The importance of the Istanbul Convention's requirement that States provide residence permits under both Article 59(3)(a) and (b) is also revealed by a consideration of Eleanor's case. She would not be entitled to a residence permit under Article 59(3)(b) as, despite her best efforts, no criminal proceedings were brought against those responsible for her ill-treatment.

44 See Article 3 in conjunction with Articles 20, 22 and 57, for example, and compare these with the rights provided by the trafficking regime, as summarised in the previous chapter.

(c) Could the Istanbul Convention Respond to the Compounded Disadvantage Experienced by Migrant Women?

The preceding discussion of Naomi and Eleanor's situations and their potential resolution under the Istanbul Convention was, of course, highly speculative. Assumptions were made as to how provisions might be incorporated into UK and/or EU law (directly, without being subject to change) and then interpreted (per the account given in section 2 above). The ability of this discussion to found clear conclusions as to the regime's ability to provide a remedy to victims that is reparative of compounded disadvantage, is consequently, significantly more limited than those reached in the preceding two chapters. Such limitations notwithstanding, this chapter demonstrates that the Istanbul Convention has the potential to transform the position of women who, like Naomi and Eleanor, are profoundly disadvantaged by both the migration status they hold and the violence they experienced. Consonant with the Istanbul Convention's 'rooting'[45] in European human rights law (rather than EU free movement or trans-national criminal law) and its objects and purposes, including the creation of a comprehensive framework to protect *all* victims (rather than to vindicate the rights of certain EU/UK Citizens) Article 59 establishes a regime which is broader in both personal and material scope than any of the other regimes considered. This breadth enables victims of violence to receive a migration status in a variety of different circumstances, whether or not they are dependent on a particular type of migrant or are able to support criminal proceedings. The protections and services the Convention requires Parties to provide to victims, in conjunction with its prohibition on discrimination, may prevent or reduce the likelihood of, exclusion from (and control of) those sources of support that enable women to escape and recover from violence. The Istanbul Convention may, therefore, provide reparation for or even avert,

45 Nousiainen and Chinkin (n 3), 39.

compounded disadvantage, even before a migrant woman seeks to rely on its regime of exception. The ability of the Convention to deliver on this potential in practice will depend first, on States and others assuming the obligations the Convention imposes by signing and ratifying it in full, and second, these obligations being discharged and enforced. It is to these issues that we now turn.

4. The Istanbul Convention in Practice: Ratification, Obfuscation and Enforcement

(a) Accepting the Obligations Istanbul Imposes

As the integrity of CEDAW's non-discrimination framework has been seriously undermined by the number and scope of reservations made to it, [46] the drafters of the Istanbul Convention sought to protect the holistic approach it adopts towards violence against women by limiting Parties' ability to selectively engage with it.[47] These attempts have, however, been met with resistance from both the EU and States.

The Istanbul Convention itself envisages EU accession, something that the EU can do to the *full* extent of its competences.[48] The procedure to be followed involves the Council, following a Commission proposal, adopting a decision which concludes the agreement. The agreement must identify the legal bases for the EU's accession, bases derived from the EU's legal competence (its ability or power) to act in a particular field. Subject to the consent of the

46 Pauw Marijke de, 'Women's rights: from bad to worse? Assessing the evolution of incompatible reservations to the CEDAW Convention' (2013) 29(77) *Utrecht Journal of International and European Law* 51 and Judith Resnik, 'Comparative (in)equalities: CEDAW, the jurisdiction of gender, and the heterogeneity of transnational law production' (2012) 10(2) *International Journal of Constitutional Law* 531.

47 Arts 78 and 79 limit Parties' ability to make reservations to the Convention and impose a (renewable) time limit on those that are made.

48 Istanbul Convention, Art 75 and Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (TFEU), Art 216.

European Parliament, this agreement is binding on the institutions of the EU and EU MS, to the extent of the competences involved.[49] The EU's competence in relation to violence against women is extremely broad, going far beyond its creation of a domestic violence rule or its contributions to the European trafficking regime. As discussed in Chapter 4, the EU has made a legal commitment to combat discrimination, including that based on sex, and to promote gender equality.[50] The legal bases under the Treaty on the Functioning of the European Union (TFEU) identified by the Commission in its *Proposal for the Council* on the conclusion of the Istanbul Convention are:

> Article 16 (data protection), Article 19(1) (sex discrimination), Article 23 (consular protection for citizens of another Member State), Articles 18, 21, 46, 50 (free movement of citizens, free movement of workers and freedom of establishment), Article 78 (asylum and subsidiary and temporary protection), Article 79 (immigration), Article 81 (judicial cooperation in civil matters), Article 82 (judicial cooperation in criminal matters), Article 83 (definition of EU-wide criminal offences and sanctions for particularly serious crimes with a cross-border dimension), Article 84 (non-harmonising measures for crime prevention), and Article 157 (equal opportunities and equal treatment of men and women in areas of employment and occupation).[51]

The issue that arises is whether all these legal bases should be relied on by the EU in ratifying the Istanbul Convention and if not, what the effect of selecting (and rejecting) particular legal bases might be. The Commission, relying on a decision of the CJEU, argued that it was appropriate to base a Council Decision which sought to accede to the Istanbul Convention on Articles 82(2) and 84 TFEU because the 'predominant purpose' of the Convention is to prevent crime and protect victims, the other provisions of the Convention being 'ancillary' to this

49 TFEU, Art 216(2) and Art 218, see further European Commission, *(A possible) EU Accession to the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)* (October 2015).

50 TFEU, Art 8.

51 European Commission, *Proposal for Council Decision on the Conclusion, by the European Union, of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence* (Brussels, 432016 COM(2016) 109 final 2016/0062 (NLE), 2016), 9.

purpose (according to the Commission, not the objects and purposes of the Convention itself).[52] Selecting these bases would still, however, enable the EU to 'exercise its competences over the entirety of the Convention'.[53] Accordingly, the Commission's proposed draft of a Council Decision refers to Article 82(2) and Article 84 of the TFEU and states, in its draft Article 1 that:

> The Council of Europe Convention on preventing and combating violence against women and domestic violence is hereby approved on behalf of the Union.[54]

The decisions that the Council made, however, diverge significantly from this. Rather than adopting one decision, the Council adopted two. The first refers to Article 82(2) and Article 84 TFEU but states in Article 1 that:

> The signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence *with regard to matters related to judicial cooperation in criminal matters is hereby authorised,* subject to the conclusion of the said Convention.[55]

The second identifies Article 78(2) TFEU (on the establishment of a common European asylum system) as its legal base, stating in its Article 1 that the signing of the Convention is '*with regard to asylum and non-refoulement'*.[56] These decisions limit the legal obligations the EU will accept in relation to the Istanbul Convention *only* to those that concern judicial cooperation in criminal matters and to asylum and non-refoulement. Accordingly, the EU is assuming the

52 ibid, 9-10 and CC-377/12 *Commission v Council* ECLI:EU:C:2014:1903 [2014] OJ C 282/3 para 34.

53 European Commission, *Proposal for Council Decision on the Conclusion, by the European Union, of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence* (n 53), 9-10

54 ibid.

55 Council Decision 2017/865 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters OJ L 131/11, emphasis added.

56 Council Decision 2017/866 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to asylum and non-refoulement OJ L 131/13, emphasis added.

obligations imposed by, for example, Articles 60 and 61 of the Istanbul Convention in relation to its asylum acquis, but not those imposed by Article 59 in relation to free movement law, *including the EU's domestic violence rule.* These decisions not only differ from the Commission's proposals, but also from the EU's ratification of the UN Convention on the Rights of Persons with Disabilities, the Council decision concerning which was based on non-discrimination and ratified the Convention in its entirety.[57]

Whether these decisions could enable the EU to engage with the Istanbul Convention in such a selective and partial way (*if* they are agreed by the European Parliament) is, at the time of writing, unclear. The European Parliament has stated that it 'regrets' the Council's approach because it raises 'legal uncertainties as to the scope of the EU's accession, as well as concerns regarding the implementation of the Convention'.[58] The Parliament has recommended instead 'a broad EU accession to the Convention without any limitations'[59] and has sought the CJEU's opinion on this matter to facilitate it.[60] The decisions could also be subject to direct legal challenge. The Commission has successfully challenged a Council decision to enter into a legal agreement with a third country on the grounds that it did not proceed on the correct legal bases.[61] A similar challenge, based on the arguments the Commission advanced in its *Proposal* (set out above) or, more persuasively in my view, on the grounds that the EU's legal response to violence against women should be based in its

57 Subject to one reservation, Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (2010/48/EC) OJ L 23/35, Art 1.

58 *European Parliament resolution of 12 September 2017 on the proposal for a Council decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence (COM(2016)0109 – 2016/0062(NLE))* (2017), para 2.

59 ibid, para 9(d).

60 *European Parliament resolution of 4 April 2019 seeking an opinion from the Court of Justice on the compatibility with the Treaties of the proposals for the accession by the European Union to the Council of Europe Convention on preventing and combating violence against women and domestic violence and on the procedure for that accession (2019/2678(RSP))* (4 April 2019).

61 *Commission v Council* (n 52).

commitment to combat sex discrimination, may well yield success.[62] The EU's approach to the Istanbul Convention could also be challenged by the Group that monitors the Convention (discussed further below) or another Party (if it were accepted that the EU was a Party) to it. Article 75 of the Istanbul Convention refers to the Convention *as a whole being* open for signature, not parts of it; Article 74 provides for a dispute mechanism to be created if Parties disagree over the application of its provisions. The response of the Council of Europe and Convention Parties to other attempts to circumvent its restrictive approach to reservations and evade the legal obligations they have assumed has, as I have observed elsewhere, been ambivalent at best.[63] This ambivalence sets a 'dangerous precedent' that weakens the Convention in the jurisdictions involved to the detriment of all women within those

62 For a critique of the legal bases for ratification selected by the EU see Sara De Vido, 'The Ratification of the Council of Europe Istanbul Convention by the EU: A Step Forward in the Protection of Women from Violence in the European legal system' 9(2) *European Journal of Legal Studies* 69.

63 Catherine Briddick, 'The EU's commitment to combatting violence against women: rhetoric or reality?' (*EU Law Analysis*, 18 Sept 2018) <http://eulawanalysis.blogspot.com/2018/09/the-eus-commitment-to-combatting.html> accessed 18 Sept 2018. See, for example, Sweden's response to Poland's 'declaration' that the Convention must be interpreted in accordance with its Constitution: Poland, *'Declaration handed over to the Deputy Secretary General at the time of signature of the Instrument on 18 December 2012 and confirmed in the instrument of ratification deposited on 27 April 2015' (2015)* <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/declarations?p_auth=odSJrFqi&_coeconventions_WAR_coeconventionsportlet_enVigueur=false&_coeconventions_WAR_coeconventionsportlet_searchBy=state&_coeconventions_WAR_coeconventionsportlet_codePays=POL&_coeconventions_WAR_coeconventionsportlet_codeNature=10> and Sweden, *'Objection contained in a Note Verbale from the Ministry for Foreign Affairs of Sweden, dated 15 February 2016, registered at the Secretariat General on 3 March 2016' (2016)* <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/declarations?p_auth=odSJrFqi&_coeconventions_WAR_coeconventionsportlet_enVigueur=false&_coeconventions_WAR_coeconventionsportlet_searchBy=state&_coeconventions_WAR_coeconventionsportlet_codePays=SWE&_coeconventions_WAR_coeconventionsportlet_codeNature=6>. Despite the potential incompatibility and, therefore, severability of Poland's reservation/objection, no Party has indicated that they will use the dispute mechanism provided by the Convention to challenge it.

jurisdictions.[64] It may also be relied on by the EU, when seeking to ratify its own highly selective approach to the Convention, to the detriment of migrant women in particular.

Whilst the UK was a relatively early signatory to the Convention, signing in June 2012, ratification has not followed so swiftly, despite the adoption of primary legislation (following a private member's bill) which seeks to expedite this process.[65] A Home Office report on the UK's 'progress' towards ratification asserts that it is 'compliant' with its putative Article 59 obligations, highlighting the UK's domestic violence rule, destitute domestic violence concession and the general power of the Home Secretary to regularise as evidence of this.[66] It does not appear, therefore, that the UK will enter a reservation to Article 59 even though this chapter has demonstrated that its compliance with the provision is far from as clear as the report suggests.[67] The report does, however, demonstrate the Home Office's failure to engage with the non-discrimination provisions of the Convention, including that concerning discrimination on the grounds of migration status, declaring them simply 'not applicable'.[68] How or why this

64 Ronagh J. A. McQuigg, *The Istanbul Convention, Domestic Violence and Human Rights* (Routledge 2017) 134-5.

65 Preventing and Combating Violence Against Women and Domestic Violence (Ratification of Convention) Act 2017. The UK is not the only State which has struggled to ratify the Convention, Magdalena Grzyb, 'Why Violence Against Women is such Politically Controversial Issue? The Polish Struggle to Ratify the Istanbul Convention' (2013) 20 *Biuletyn Polskiego Towarzystwa Kryminologicznego* 74.

66 Home Office, *Ratification of the Council of Europe Convention on Combating Violence Against Women and Domestic Violence (Istanbul Convention) – Report on Progress* (Home Office November 2017), 16, 40.

67 In comparison, at the time of writing Cyprus, Malta and Germany have all entered permissible reservations to Article 59. See, for example, Germany, *Reservation handed over by the State Secretary for Foreign Affairs of Germany to the Secretary General of the Council of Europe at the time of signature of the instrument, on 11 May 2011 - Or. Engl., confirmed and completed in a letter from the Federal Minister for Foreign Affairs of Germany, deposited with the instrument of ratification on 12 October 2017 - Or. Engl.* (11 May 2011).

68 Home Office (n 66), 25.

is the case, given the raft of restrictions and exclusions that the UK applies to migrants, is left entirely unexplained.

(b) Monitoring and Enforcement

As with the trafficking regime, the Istanbul Convention is monitored and enforced by a committee, the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), via a reporting and inquiry procedure.[69] Whilst the responsive nature of this procedure and GREVIO's ability to carry out country visits and receive information from a range of sources has been commended, concern has been expressed about its evaluation timetable and the potential for some Parties to remain unscrutinised for over four years following ratification.[70]

GREVIO's first evaluation reports have highlighted and advised Parties to respond to the disadvantage and discrimination that migrant women experience. The exclusions that women without a valid migration status are subject in Denmark, for example, have been described as 'counter to the spirit of the Convention', the Danish authorities being urged to ensure that the Convention is implemented in full without such discrimination per Article 4.[71] GREVIO has similarly called for Austria to remove barriers to services which are based on migration status.[72] In terms of the regime of exception itself, GREVIO has expressed concern about the Danish requirement that dependent spouses/partners demonstrate 'attachment' to Denmark in some way (through taking a language course for example) and the use of this

69 Istanbul Convention, Chapter IX.

70 McQuigg (n 64), 114-118.

71 Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) (n 21), 14.

72 Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), *GREVIO Baseline Evaluation Report Austria* (27 September 2017), 31-33

requirement to add 'to the power which abusive men in Denmark have over foreign brides/wives.'[73] The imposition of this requirement in 'domestic violence rule'/Article 59(1) scenarios is questioned by GREVIO, who invite the Danish Immigration Service to assess its imposition 'in the context of the limitations which domestic abuse and control place on the lives of foreign women in Denmark.'[74] Disappointingly, the Committee did not make any recommendation about the incredibly low number of permissions granted in Denmark under Article 59, or comment on the rights that are, or should be, attached to such grants of permission.[75]

(c) Could the Istanbul Convention Respond to the Compounded Disadvantage Experienced by Migrant Women?

The Istanbul Convention has the potential, in theory, to transform the position of women who, like Naomi, have their migration statuses determined by EU law and who experience violence. It does not appear that this potential will be realised, at least not in the near future. The EU's partial and highly selective engagement with the Convention, if it proceeds unchallenged in the manner described above, may successfully insulate swathes of EU law, including free movement law, from having to comply with the Convention. The EU's domestic violence rule and its contributions to the European trafficking regime will continue to operate in the manner described in Chapters 4 and 5, migrant women being denied the protections offered by Article 59 of the Istanbul Convention.

73 Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), *GREVIO Baseline Evaluation Report Denmark* (n 21), 56.

74 ibid, 56.

75 Only 27 residence permits were not revoked following divorce/separation from the sponsor, in 21 of these cases the independent residence permit was extended, ibid, 56.

The UK, in comparison, has signed the Istanbul Convention and signalled its intention to ratify it in full. This has already had a positive impact on the UK's domestic violence rule, as litigation that successfully challenged its narrow scope drew on Article 59 of the Convention to do so.[76] Following ratification, and depending on how the Convention is incorporated into UK law, similar challenges may be brought in order to bring the UK's domestic violence rule (further) in line with Article 59. The potential impact of the Convention's non-discrimination provisions is (even) harder to predict. It has already been observed that the UK operates a range of discriminatory rules which appear, on their face, to be incompatible with the Convention when applied to victims of violence. Parties to the Convention who have similar or analogous rules have faced censure by GREVIO. What is unclear is whether or not the Convention's monitoring process will produce substantive change in the jurisdictions concerned. The impact of GREVIO's engagement with countries like Denmark and Austria will, therefore, be illustrative in this regard.

Conclusion

The Istanbul Convention's regime of exception, taken with the holistic approach the Convention adopts to violence and discrimination, offers the most coherent and comprehensive response yet considered to the situation confronted by migrant women subject to violence. Given its commitment to eliminating inequality and its extensive powers in relation to non-discrimination and gender equality, the EU's attempt to 'pick and choose' its Convention obligations and, in doing so, its failure to recognise that violence against women is a cause and consequence of sex discrimination, is extremely disappointing. That the EU is seeking to evade the legal obligations imposed by Article 59 is of particular concern in view of Chapter 4's

76 In addition to domestic and European law prohibiting discrimination on the grounds of sex and migration status, *A v Secretary of State for the Home Department* [2016] CSIH 38.

criticisms of the EU's domestic violence rule. Whilst the UK has not yet ratified the Convention, its engagement with it has already benefited some women whose migration statuses are determined by British immigration law. It has the potential to benefit many more. What is less clear is the extent to which the panoply of discriminatory rules and practices discussed in Chapter 3 will be affected by the Convention's clear prohibition of them. The response of the Convention's monitoring body, GREVIO, to both the EU and other Parties, including (soon, it is to be hoped) the UK, will be crucial to ensuring that the Convention retains and fulfils its potential to both prevent and combat violence against women and to provide a reparative response to compounded disadvantage.

CONCLUSION

Five years (give or take some maternity leave and some part-time study) and eighty-five(ish) thousand words ago, I started this thesis by discussing the legal situation confronted by one of the last women I advised at the women's rights NGO where I practised law. She was, like many of the women who contacted us, dependent for her migration status on the person who was violent towards her, her husband, a highly-skilled labour migrant. She wanted to end their marriage and live with their two children in the UK. She had been told that there was an immigration rule, the 'domestic violence rule', which would enable her to do this. I advised this woman that whilst there was a rule that enabled *some* victims of domestic violence to receive an independent migration status and, therefore, to separate from their abusive partners and remain in the UK, the particular dependent migration status she held precluded her from benefitting from it. Having considered the other 'options' available to her, the woman concerned decided that she would remain with her husband. If and when her migration status was secure, she would divorce. Until then she would endure his violence, protecting and providing for their children as she did so.

My research has sought to unpick, examine and understand some of the different forms of disadvantage, discrimination and violence that determined and impacted upon this woman's situation. Drawing on Martha Minnow's theorising and advice to students, I have described the resulting thesis as a 'feminist'[1] 'recasting project',[2] as I have brought together four 'regimes of exception' from different areas of law and offered a new framework for their evaluation: the

1 Martha Minnow, 'Adjudicating Differences: Conflicts Among Feminist Lawyers' in Marianne Hirsch and Evelyn Fox Keller (eds), *Conflicts in Feminism* (New York: Routledge 1990), 161-2.

2 Martha Minnow, 'Archetypal Legal Scholarship: A Field Guide' (2013) 63(1) *Journal of Legal Education* 65, 66.

extent to which they offer victims of violence reparation for compounded disadvantage. Siobhán Mullally contends that the 'nexus between access to safe migration routes, obligations of due diligence, and compliance with human rights standards is rarely acknowledged by states.'[3] In constructing the legal and normative framework relied on in Part 2 to evaluate the regimes of exception, Part 1 explores this nexus, establishing in so doing States' obligations to end their discriminatory and disadvantageous treatment of migrant women and to provide reparation for it where it has occurred.

Chapter 1 established that discrimination on the grounds of sex is a pervasive feature of British immigration law. It did so by combining research on the number of men and women who entered the UK in particular categories with doctrinal legal analysis, demonstrating that women are unjustifiably disadvantaged and, therefore, unlawfully discriminated against, by the rules which create and distribute the migration statuses of 'wife', 'domestic worker' and 'skilled labour migrant'.

Having applied, in Chapter 1, the ECtHR's Article 14 jurisprudence to the UK's distribution of migration statuses, Chapter 2 started by exploring its application to a particular form of violence: domestic violence. I argued that the ECtHR's failure in *Opuz* [2009][4] to define and explain the relationship(s) between the two forms of discrimination it was concerned with, domestic violence itself and States (lack of) response to it, was indicative of a broader lack of conceptual and legal clarity as to the nature of violence against women and its place within the general and specialist human rights frameworks concerned with discrimination. To overcome this ambiguity, and to establish the types of violence this thesis was concerned with, I advanced a conceptual account of violence against women. Accordingly, 'violence against

3 Siobhán Mullally, 'Migration, Gender, and the Limits of Rights' in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (OUP 2014), 170.

4 *Opuz v Turkey* App no 33401/02 (ECtHR, 9 June 2009).

women' is interpersonal violence which discriminates against women on the grounds of sex/gender, such violence arising from, creating and/or perpetuating the subordination of women. Focussing on interpersonal, rather than structural violence, enabled the relationships and contexts that migration status particularly affects, intimate relationships and the workplace, to be placed at the centre of analysis revealing, for example, the increased risk of violence and other rights-violations that partners and domestic workers are subject to. An intersectional approach was similarly adopted to acknowledge and incorporate intra-sex differences and inequalities. Finally, Chapter 2 established States' positive obligations to women who experience this form of violence, obligations which include providing 'effective measures of prevention, protection, punishment and reparation'.[5]

The term 'compounded disadvantage' was used in Chapter 3 to capture a range of situations where a woman's migration status interacts with her experience of violence in particular, injurious ways. Whilst such interactions produce a constellation of different experiences, I argued that what these experiences share is control, exclusion, a perilous migration status and an intensified experience of violence. In exploring compounded disadvantage, I drew on Martha Fineman's theorising on vulnerability to highlight both the State's role in disadvantaging women and its ethical duty to remedy it. [6] This ethical duty was shown to be mirrored by a legal one. Whilst the 'assets' that the 'responsive' State should provide[7] can be mapped onto States' positive obligations,[8] so too can the different facets of compounded disadvantage, traced in Chapter 3, be relied on to chart States' failure to discharge

5 Rashida Manjoo, 'State Responsibility to act with Due Diligence in the Elimination of Violence against Women' (2013) 2(2) *International Human Rights Law Review* 240, 254.

6 Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) *Yale Journal of Law and Feminism* 1.

7 Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2013) *Emory University School of Law, Public Law & Legal Theory Research Paper Series, Research Paper No 10-130*, 31.

8 *Talpis v Italy* App no 41237/14 (ECtHR, 2 March 2017), para 115 and as discussed in Chapters 2 and 3.

these obligations to migrant victims of violence. Having ascertained that the State is both ethically and legally obliged to remedy its treatment of migrant women, Part 1 concluded by establishing the content of such an obligation. As the ECHR's right to a remedy offers victims of compounded disadvantage only very limited relief, I drew on gender-sensitive approaches to reparations to argue that migrant women victims of violence should be granted an independent, rights-bestowing migration status.

Part 2 analysed and drew on the legal cases that NA[9] and EK,[10] 'Naomi' and 'Eleanor', fought to remain in the UK to evaluate whether, and to what extent, the four regimes of exception provide victims of violence with a migration status that is reparative of compounded disadvantage.

Chapter 4 evaluated two regimes which determine the status of migrant victims of domestic violence: Article 13(2)(c) of the EU Citizens' Directive,[11] and DVILR of Appendix FM of the Immigration Rules.[12] Both regimes offer their beneficiaries permanent residence in the relevant jurisdiction (and with it the right to work, to claim benefits or access other forms of State support). Such a status, if granted, would be reparative of compounded disadvantage. The CJEU's restrictive interpretation, in Naomi's case, of an already very restrictive rule has, however, placed this reparative status beyond many victims' reach. Article 13(2)(c) excludes from its purview women who, like Naomi, are unable, for a variety of different reasons, to initiate divorce proceedings at the 'right' time, even though, as the chapter argues, Naomi's

9 Case C-115/15 *Secretary of State for the Home Department v NA* ECLI:EU:C:2016:487 [2016].

10 *EK (Article 4 ECHR: Anti-Trafficking Convention) Tanzania* [2013] UKUT 313 (IAC) (19 June 2013).

11 European Parliament and Council Directive 2004/38/EC of 29 April 2004 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 OJ L 158/77.

12 The relevant rules are paragraphs 289 A-D of the Immigration Rules; section DVILR, Immigration Rules, Appendix FM and Part 6 of Appendix Armed Forces (which covers the partners of those who are serving in the Armed Forces).

situation seemed to be precisely the kind the rule was designed to address. Article 13(2)(c) also excludes TCNs who (unlike Naomi this time) are unable to meet the requisite 'economic activity' criteria. In reaching these conclusions, the chapter foregrounded the disadvantage that accrues to women from an EU citizenship-status that has not shaken off its 'market' origins and which remains imbued with gendered, racialised and classed conceptions of work and economic activity more broadly. Applying Barmes'[13] insights on adjudication to the CJEU's judgement in Naomi's case revealed the role that judicial decision-making plays in obscuring the political and ethical issues raised by this citizenship-status, and EU law's distribution of both it and derivative residence rights, exposing the disadvantage that TCN women experience as a result.

Whilst the UK's domestic violence rule does not require individuals to end their relationships or be economically active at particular times, it is available only to those who have (or had) permission to remain in the UK as the spouse/partner of someone who is *British or resident here*. It excludes, therefore, those who are granted permission to remain as the partners of students or labour migrants, as well as those who are *actually* the spouses of UK citizens/residents but who do not have permission in this capacity. With both the EU's and UK's domestic violence rules, therefore, there seems to be a relationship of inverse proportionality between the migration status the regime bestows and its scope, the apparent 'munificence'[14] of the rules masking their inaccessibility. The regimes do offer a status that is reparative of compounded disadvantage, but they do so to only a very small proportion of those women who are affected by it. The consequences for those who are excluded from their purview are considerable. Women, like the woman whose case I described above, may remain

13 Lizzie Barmes, 'Learning from Case Law Accounts of Marginalised Working' in Judy Fudge, Shae McCrystal and Kamala Sankaran (eds), *Challenging The Legal Boundaries of Work Regulation* (Hart 2012), 320.

14 Drawing on Audrey Macklin, 'Dancing across Borders: 'Exotic Dancers,' Trafficking, and Canadian Immigration Policy' (2003) 37(2) *International Migration Review* 464, 495.

in a violent relationship (and, per Chapter 3, have an intensified experience of that violence) rather than forfeit their right to live, and potentially settle, in the UK (or relevant EU MS). Women may also be subject to immigration detention and deportation if their violent partner ends their relationship, or if they make the relevant immigration application and it is refused (an issue considered further below).

Chapter 5 evaluated the rules which require States to grant residence permits to some victims of trafficking under the 'European trafficking regime': the EU Residence Permit Directive,[15] the Trafficking Convention[16] and the EU Trafficking Directive.[17] Although space precluded me from subjecting the regime as a whole to detailed examination, the overview provided did explore the tension within it between an (emerging?) rights-based approach to trafficking and one that remains dominated by migration control and criminal law enforcement imperatives. This tension was shown to manifest itself in the regime's provision of 'rights' to victims that are, in many cases, less than that required by 'general' human rights law, such deficiencies in the European context being remedied, at least in part, by the more protective standards imposed by the Trafficking Convention.

Eleanor, unlike Naomi, was *eventually* granted a secure and rights-bestowing migration status in the UK. Notwithstanding this outcome, however, the UK's operationalisation of the trafficking regime *initially* exacerbated the compounded disadvantage she was subject to. First, it left Eleanor without the criminal law's protection, as the regime's focus on the means by

15 Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities OJ 261/19 (EU Residence Permit Directive).

16 Council of Europe Convention on Action against Trafficking in Human Beings (Warsaw, 16.V.2005) CETS 197 (Council of Europe Trafficking Convention).

17 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA OJ L 101/1 (EU Trafficking Directive).

which she entered the UK deflected attention from her exploitation within the jurisdiction and those responsible for it. Second, it failed to materially improve Eleanor's circumstances. Whilst Eleanor's referral into the NRM provided her with temporary protection from deportation (and access to services), this protection was only short-lived as the Home Office, almost simultaneously, recognised her as a victim of trafficking and sought to remove her.

Eleanor's case indicates that the trafficking regime *may* be able to provide a reparative response to compounded disadvantage. Whether and to what extend it will do so in a particular individual's case depends on a number of factors, including States' identification procedures, the (factual/legal) basis on which any residence permit is granted and the related question of its duration. Residence permits which are granted solely on the basis of a victim's cooperation with criminal proceedings (under either the Residence Permit Directive, or, to a lesser extent, the CoE Trafficking Convention) may be unavailable to many victims (like Eleanor) and may only regularise a victim's stay in the relevant jurisdiction for a comparatively short period of time. Whilst significant rights accrue to the holders of residence permits, it is nevertheless a status that remains precarious, the circumstances in which it can be renewed (or even revoked) and under which its holder can (ever) receive permanent residence, being determined by each State Parties' own immigration law. The granting of residence permits under the regime may, therefore, institute new relationships of dependency (on the continuation of criminal proceedings for example) thereby reinstating, rather than resolving or providing reparation for, compounded disadvantage.

Chapter 6 evaluated the final regime of exception this thesis considers: that created by Article 59 of the Istanbul Convention. The Istanbul Convention, it will be recalled, establishes a comprehensive and detailed framework of mutually reinforcing obligations which encompass policy, preventative, protective and prosecution-based responses to violence against women. Crucially, the rights provided by the Convention must be implemented without

discrimination.[18] Enabling migrant victims of violence to benefit from all the rights and protections the Convention provides, on a non-discriminatory and unconditional basis, may not just offer some measure of reparation for compounded disadvantage, it may avert it. Eleanor may not, for example, have been re-trafficked in the UK (or been made vulnerable to re-trafficking) had she been able to access safe, alternative accommodation. By prohibiting Parties from discriminating against *migrant* women in their provision of support services, the Istanbul Convention has the potential to transform the position of women like Naomi and Eleanor, whether or not they choose to apply for an autonomous or renewable residence permit.

Consonant with the Istanbul Convention's objects and purposes, Article 59 establishes a regime which is broader in both personal and material scope than any of the other regimes evaluated. Whilst the possibility of regaining a 'lost' migration status is available under this regime to 'victims of forced marriage' only, subject to the other requirements of Article 59(1)(2) and (3) being met, Parties to the Istanbul Convention are required to grant residence permits to and protect from expulsion victims of violence against women and domestic violence. Whilst the regimes considered in Chapters 4 and 5 were available to either the victims of domestic violence *or* trafficking only, the Istanbul Convention's regime may benefit victims of *both* and indeed, of *any* other form of violence against women, including, for example, stalking and harassment.

Chapter 6's application of Article 59(1) to Naomi's case reveals that, properly interpreted (as described in section 2(a) of that chapter) it has the potential to remedy, rather than repeat, the deficiencies identified in both the EU's and UK's domestic violence rules. Victims should not be required to divorce at particular times, or maintain particular types of economic activity, to benefit from this domestic violence rule. *All* victims who are dependent

18 Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul, 11th Oct 2011) CETS 210 (Istanbul Convention), Art 4(3).

on their spouse or partner for their migration status may apply to have that dependent status converted into one that is autonomous. Similar arguments can be made in relation to Article 59(3) and the Istanbul Convention's requirement that renewable residence permits be granted to victims who are co-operating in criminal proceedings *and* to those whose stay is necessary because of their personal situation. The Convention's focus on the provision of (again, non-discriminatory and unconditional) rights-based responses to violence against women (rather than immigration or criminal law enforcement) should enable such permits to be granted in a broader range of circumstances than is currently the case, either under the Trafficking Convention or out of it (e.g. where a labour migrant's status is jeopardised by sexual harassment experienced in the workplace).

Three additional conclusions can be drawn from Part 2's evaluation of the regimes of exception. Firstly, Chapter 4 and 5's appraisal of the domestic violence rules and trafficking regime respectively indicates that the regimes work, to the extent that they do, when they are interpreted in conjunction with the positive obligations imposed by the ECHR (or, in the EU law context, the CFREU). Eleanor's case is particularly interesting in this regard because it reveals the potential of the two bodies of law to provide a remedy for each other's defects. The trafficking regime's preoccupation with migration control/criminal law enforcement may be countered (and its own rights-based approach to victims strengthened) by, for example, the ECHR's focus on victims' safety and protection. Similarly, the ECtHR's failure to require States to regularise (rather than merely to protect from removal) may be mitigated by the mechanisms established by the trafficking regime which can/do regularise victims' stay, for either the short or long(er) term. In contrast to the Court's decision in Eleanor's case, the CJEU's failure to interpret the EU's domestic violence rule consistently with Naomi's CFEU protected rights, resulted in, or at least enabled, her being denied its benefit. This thesis has not

directly engaged with the literature on systemic integration.[19] A consideration of Eleanor's case and the ECtHR's judgements in *Chowdury and Others v Greece* [2017][20] and *Talpis v Italy* [2017],[21] (in which it referred to and drew on relevant provisions of the Trafficking and Istanbul Conventions respectively) indicates that such an investigation may be a fruitful area for future research.[22]

Secondly, it will be recalled that the regimes of exception are described as such in this thesis because they are exceptions to the conventional migration law position that a person who does not have permission to remain, or who no longer meets the conditions attached to that permission, should return, or be returned, to her country of origin. By carving out narrow exceptions to this position, rather than challenging it, the regimes normalise the denial of status to most victims of violence, even while they grant status to some. In *A v Secretary of State for the Home Department* [2016][23] the Court upheld the challenge brought by the wife of a refugee to her (then) exclusion from the domestic violence rule. As this case involved a discrimination law challenge to the rule's scope (per the framework set out in Chapter 1) the Court was not concerned with whether the State *should* provide a migration status to victims of violence, but that if it did so, that its potential beneficiary group was properly defined. The Court, in upholding the applicant's claim, ruled that refugee spouses[24] were comparable to the spouses of British Citizens/residents, *not* the spouses of workers and others:

19 See, for example, Violeta Moreno-Lax, 'Systematising Systemic Integration' (2014) 12(5) *Journal of International Criminal Justice* 907 and Anuscheh Farahat, 'Enhancing Constitutional Justice by Using External References: The European Court of Human Rights' Reasoning on the Protection against Expulsion' (2015) 28(2) *Leiden Journal of International Law* 303.

20 *Chowdury and Others v Greece* App no 21884/15 (ECtHR, 30 March 2017).

21 *Talpis v Italy* (n 8).

22 Although, for a more sceptical view see Adamantia Rachovitsa, 'The Principle of Systemic Integration in Human Rights Law' (2017) 66(3) *International and Comparative Law Quarterly* 557.

23 *A v Secretary of State for the Home Department* [2016] CSIH 38.

24 Although not all refugee spouses, see *R (on the application of T) v Secretary of State for the Home Department* [2016] EWCA Civ 801, [2017] Imm AR 330 which concerned an unsuccessful challenge

> A person admitted to the country as a student or for work is very clearly someone admitted on a limited and temporary basis, entirely at the discretion of the state. The status of refugee, as has been pointed out, is declaratory. Once it has been determined to exist the state has no discretion, in terms of its international and humanitarian obligations, but must grant asylum. The worker or student enters the country by choice; the refugee out of necessity. The circumstances in which refugee status may be lost are extremely limited, and can in no reasonable way be compared to the situation applying to a worker or student. Once refugee status is acknowledged, international obligations require the state to facilitate assimilation and naturalisation, again a situation quite different from that of a worker or student.[25]

Whilst the reasoning engaged in cannot be faulted for its recognition of the declaratory nature of refugee status (and the obligations on States which flow from this), the judgement enables, and indeed endorses, the denial of status to victims whose position in the UK is deemed (by people other than the women themselves), 'temporary'. This is the case even though migrant workers and their families may be granted residence in the UK for substantial periods of time and a significant proportion of them do settle permanently here.[26] The Court is, therefore, empirically incorrect to differentiate between the spouses of refugees and the spouses of workers because:

> One can readily see that the spouse of a worker or student can have no reasonable expectation of having their future life or a permanent home in the UK, and that they would not be expected to cut or loosen their ties with their country of origin.[27]

The Court, in A *v Secretary of State for the Home Department* [2016] included the spouses/partners of refugees by reinforcing the exclusion from the domestic violence rule of

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brought by a post-flight spouse to both the domestic violence rule/DDVC (although the case was argued very differently).

25 *A v Secretary of State for the Home Department* (n 23), para 66.

26 Scott Blinder, *BRIEFING: Non-European Labour Migration to the UK* (Migration Observatory briefing, COMPAS, University of Oxford, 14 June 2018); Scott Blinder, *Settlement in the UK* (Migration Observatory briefing, COMPAS, University of Oxford, 20 July 2018).

27 *A v Secretary of State for the Home Department* (n 23), para 66.

many women who *do* reasonably expect to have their life and home in the UK and who the UK, in turn, subjects to compounded disadvantage.

The regimes do not just normalise the denial of status to victims of violence, however, they also facilitate their return. As argued in Chapter 5, the return of a victim of trafficking to her country of origin, involuntarily if necessary, is what States Parties/MS of the European trafficking regime envisage to be 'standard resolution' of that individual's case.[28] Eleanor's identification as a victim of trafficking coincided, it will be recalled, with the Home Office deciding to deport her. Whilst this criticism is one that has been levelled at the trafficking regime on more than one occasion (as Chapter 5's discussion of the various different sceptical responses to it demonstrates) it may also be convincingly applied to the domestic violence rules. Naomi's attempts to secure a migration status in the UK were eventually successful (if not on the basis she sought) but her initial application under the EU's domestic violence rule will have brought her predicament to the attention of the Home Office and therefore, may have resulted in action being taken to secure her departure or deportation from the UK. Doctrinally and practically, therefore, the regimes of exception operate to normalise and enable the State's deportation of migrant victims of violence, an outcome which is a markedly inapposite response to compounded disadvantage. A consideration of the trafficking and domestic violence regimes taken together, reveals them to be the exceptions, to migration law's 'return or be removed' position, that both prove and enforce the rule.

Finally, in Chapter 3 I drew on the Istanbul Convention's Explanatory Report to discuss the construction of migrant women's vulnerability. The Report states that:

> fear of deportation or loss of residence status is a very powerful tool used by perpetrators to prevent victims of violence against women and domestic violence from seeking help from authorities … As a result many victims whose

28 Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European law* (CUP 2017), 132-133 and Chapter 5's analysis of the circumstances in which residence permits are/are not granted.

> residence status is dependent on that of the perpetrator stay in relationships where they are forced to endure situations of abuse and violence for long periods of time.[29]

What remains unsaid by the Report's drafters is, however, that this 'very powerful tool' is created by the Convention's *Parties* who then hand it to the perpetrators of violence to use against those they victimise. When, in Chapter 3, I traced the different facets of compounded disadvantage I stated that many migrant women were, because of their dependent migration statuses, only ever one letter away from having their permission to remain in the UK curtailed. Both Naomi and Eleanor faced this very situation, as Kafeel and the Dhanjis respectively, actually (or metaphorically, we don't know what 'underhand methods' the Dhanjis sought to use), wrote such letters.[30] By recognising the impact of migration status on an experience of violence, but not fully attributing responsibility for it, the Istanbul Convention provides a solution to what is, in effect, the 'wrong' problem. The Convention's 'regime of exception' seeks to mitigate the disadvantage caused by the creation and distribution of migration statuses which produce dependency, which are precarious and to which few rights accrue. It does so by requiring (some) women to be granted a status that is, or may be, less injurious than the one they hold rather than *prohibiting Parties from creating and distributing those disadvantageous migration statuses in the first place*.

The regime of exception created by the Istanbul Convention goes further than any of the three others considered in providing a response to compounded disadvantage that is, or has the potential to be, reparative of it (a fact that may not be unrelated to the EU's and UK's reluctance to fully ratify it). The regime may carve out a *broader* exception to the conventional migration law position discussed above than the other regimes, but it remains, nonetheless, an

29 Council of Europe, *Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence against women and Domestic Violence (CETS No. 210)* (2011), para 301.

30 Case C-115/15 *Secretary of State for the Home Department v NA* ECLI:EU:C:2016:259, para 14 and *EK and the Secretary of State for the Home Department* AA/16743/2010 (27 February 2012), para 7.

exception. The existence of rules that enable some (and it is hoped, an increasing number of) women who have experienced compounded disadvantage to receive a migration status that is reparative of it should not deflect our attention from those that create that disadvantage. In the absence of reforms to migration status of the kind outlined in Chapters 1 and 3, advocates seeking to improve the position of migrant victims of violence should not only challenge those rules which exclude victims from particular regimes' scope (per A *v Secretary of State for the Home Department* [2016]), they should also challenge those which increase women's vulnerability to violence and intensify their experience of it.

Where do the preceding paragraphs and chapters leave the woman whose case I started this thesis and conclusion with? At the moment – without an obvious remedy, with all that that entails for both her and her children. The Istanbul Convention does, however, offer women who are currently excluded from either the domestic violence or trafficking regimes of exception the *possibility* of regularisation. In the coming months and years, the ability of women, like the person discussed above, to secure an independent migration status and, therefore, to escape and recover from violence, will depend on how, and how quickly, the Convention is ratified and implemented *in full*. Given Chapter 6's discussion of the UK's and EU's troubled (and troubling) ratification processes, GREVIO's ability to hold its Parties to account (and appetite for doing so), may prove crucial to realising the Convention's potential to offer a reparative response to compounded disadvantage.

APPENDIX 1: TEMPLATE FOI REQUESTS

First FOI request:

> Dear FOI team (foirequests@homeoffice.gsi.gov.uk)
>
> Please could you provide me with information on the number of entry clearance visas granted in XXYY (year) in the following categories to men and to women (so the publicly available data disaggregated by sex):
>
> - Total Work
> - PBS - Tier 1 & pre-PBS equiv. Total (Main apps)
> - PBS - Tier 2 & pre-PBS equiv. Total (Main apps)
> - PBS - Tier 5 & pre-PBS equiv. Total (Main apps)
> - Non-PBS Domestic workers in private h/holds. (Main apps)
>
> Thank you,

All subsequent FOI requests (to ensure that the same methodology was used by the Home Office for each request):

> Please could you provide me with information on the number of entry clearance visas granted in XXYY (year) in the following categories to men and to women (so the publicly available data disaggregated by sex):
>
> - Total Work
> - PBS - Tier 1 & pre-PBS equiv. Total (Main apps)
> - PBS - Tier 2 & pre-PBS equiv. Total (Main apps)
> - PBS - Tier 5 & pre-PBS equiv. Total (Main apps)
> - Non-PBS Domestic workers in private h/holds. (Main apps)
>
> **Please could you use the same methodology to obtain this information that you used when responding to FOI request ABCDE (their ref) (date) which I have attached for your reference.**
>
> Thank you,

Appendix 2: Family Migrants[1]

Year	**FAMILY - TOTAL**	**Admitted as spouse or fiancé(e) - Total**	Husband of person settled in the UK	% those admitted as a spouse who are husbands	Wife of person settled in the UK	% those admitted as a spouse who are wives	Male Fiancé granted entry for marriage to a UK resident	% of those granted entry for marriage who are men	Female Fiancé granted entry for marriage to a UK resident	% of those granted entry for marriage who are women	**Civil and unmarried partners and proposed civil partners - Total**	**Children granted entry for a probationary period as dependants of persons settled**
2004	**44,300**	**35,300**	10,800	31%	21,400	61%	895	3%	2,240	6%	**90**	**4,260**
2005	**52,400**	**41,600**	12,700	31%	24,100	58%	1,540	4%	3,140	8%	**115**	**4,670**
2006	**61,700**	**47,100**	14,300	30%	26,700	57%	1,920	4%	4,230	9%	**395**	**5,780**
2007	**60,600**	**43,200**	13,300	31%	24,700	57%	1,780	4%	3,410	8%	**2,080**	**7,340**
2008	**52,500**	**36,900**	11,300	31%	21,400	58%	1,380	4%	2,730	7%	**2,280**	**6,310**
2009	**41,600**	**28,600**	8,040	28%	17,400	61%	1,120	4%	2,090	7%	**2,550**	**5,430**
2010	**43,400**	**28,100**	8,100	29%	17,200	61%	965	3%	1,850	7%	**3,110**	**6,180**
2011	**37,700**	**24,000**	6,540	27%	15,500	65%	725	3%	1,300	5%	**2,650**	**5,570**
2012	**31,700**	**20,900**	5,800	28%	13,600	65%	595	3%	995	5%	**2,200**	**4,130**
2013	**23,100**	**15,800**	3,650	23%	11,100	70%	360	2%	685	4%	**1,700**	**3,550**
2014	**21,800**	**15,900**	3,700	23%	11,300	71%	355	2%	595	4%	**1,760**	**3,050**
2016	**21,600**	**16,100**	3,520	22%	11,600	72%	345	2%	550	3%	**2,170**	**2,740**
2016	**20,300**	**16,000**	3,650	23%	11,500	72%	330	2%	585	4%	**1,560**	**2,240**
2017	**20,600**	**16,200**	4,030	25%	11,300	70%	340	2%	520	3%	**1,930**	**2,080**

[1] Adapted from Home Office, 'Immigration Statistics, Admissions tables ad_01 to ad_04_q, Table ad_03_f: Passengers given leave to enter the United Kingdom in family categories by country of nationality' (*Home Office*, 29 Nov 2018) <https://www.gov.uk/government/publications/immigration-statistics-year-ending-september-2018/why-do-people-come-to-the-uk-4-for-family-reasons> accessed 9 July 2019.

APPENDIX 3: LABOUR MIGRANTS[2]

Year	**Total Work**	Total work: men	% total men	Total work: women	% total women	**PBS - Tier 1 & pre-PBS equiv. Total (Main apps)**	PBS - Tier 1 & pre-PBS equiv. Total (Main apps): men	PBS - Tier 1 & pre-PBS equiv. Total (Main apps): % men	PBS - Tier 1 & pre-PBS equiv. Total (Main apps): women	PBS - Tier 1 & pre-PBS equiv. Total (Main apps): % women
2005	**243,466**	128,727	53%	114,684	47%	**7,486**	5,526	74%	1,958	26%
2006	**192,805**	110,140	57%	82,665	43%	**8,947**	6,262	70%	2,685	30%
2007	**170,089**	99,977	59%	70,112	41%	**11,552**	7,825	68%	3,727	32%
2008	**136,701**	90,666	66%	46,035	34%	**17,429**	11,540	74%	5,889	34%
2009	**113,265**	65,300	58%	47,965	42%	**18,854**	12,163	74%	6,691	35%
2010	**114,563**	65,453	57%	49,110	43%	**16,003**	10,479	65%	5,524	35%
2011	**105,842**	58,813	56%	47,029	44%	**8,656**	4,987	58%	3,669	42%
2012	**103,530**	57,629	56%	45,901	44%	**6,273**	3,229	74%	3,044	49%
2013	**109,337**	61,886	57%	47,451	43%	**1,901**	1,120	59%	781	41%
2014	**167,292**	81,928	49%	85,267	51%	**2,698**	1,383	51%	1,309	49%
2015	**122,383**	67,479	55%	54,904	45%	**1,619**	983	74%	636	39%
2016	**120722**	65927	55%	54795	45%	**2,024**	1228	61%	796	39%
2017	**119501**	64,534	54%	54,967	46%	**2,694**	1,619	60%	1,075	40%

2 Adapted from Home Office, 'Entry Clearence Visas granted outside the UK, Volumn 2, Table vi_06_q_w: Entry clearance visas granted by category and country of nationality: Work' (*Home Office*, 29 Nov 2018) <https://www.gov.uk/government/statistics/immigration-statistics-july-to-september-2014-data-tables> accessed 6 Feb 2019, the data disaggregated by sex (that which is not in bold) has been obtained by FOI request.

Year	**PBS - Tier 2 & pre-PBS equiv. Total (Main apps)**	PBS - Tier 2 & pre-PBS equiv. Total (Main apps): men	PBS - Tier 2 & pre-PBS equiv. Total (Main apps): % men	PBS - Tier 2 & pre-PBS equiv. Total (Main apps): women	PBS - Tier 2 & pre-PBS equiv. Total (Main apps): % women	**PBS - Tier 5 & pre-PBS equiv. Total (Main apps)**	PBS - Tier 5 & pre-PBS equiv. Total (Main apps): men	PBS - Tier 5 & pre-PBS equiv. Total (Main apps): % men	PBS - Tier 5 & pre-PBS equiv. Total (Main apps): women	PBS - Tier 5 & pre-PBS equiv. Total (Main apps): % women
2005	66,214	45,475	69%	20,724	31%	64,651	30,395	47%	34,248	53%
2006	73,531	51,112	70%	22,419	30%	53,272	25,429	48%	27,843	52%
2007	66,010	48,129	73%	17,881	27%	45,121	21,641	48%	23,480	52%
2008	56,418	42,041	75%	14,377	25%	41,001	19,008	46%	21,993	54%
2009	36,583	27,702	76%	8,881	24%	36,314	18,640	51%	17,674	49%
2010	40,148	30,361	76%	9,787	24%	36,525	17,984	49%	18,541	51%
2011	38,290	29,214	76%	9,076	24%	36,625	17,902	49%	18,723	51%
2012	39,351	29,998	76%	9,353	24%	36,932	17,915	49%	19,017	51%
2013	45,801	34,955	76%	10,846	24%	39,349	18,902	48%	20,447	52%
2014	52,501	39,119	75%	13,355	25%	42,197	19,741	47%	22,441	53%
2015	54,364	39,334	72%	15,030	28%	42,844	19,814	46%	23,020	54%
2016	54905	38796	71%	16109	29%	39,713	18,659	47%	21054	53%
2017	53,407	37,708	71%	15,699	29%	38,498	17,913	47%	20,585	53%

Year	**Non-PBS Domestic workers in private h/holds. (Main apps)**	Non-PBS Domestic workers in private h/holds. (Main apps): men	Non-PBS Domestic workers in private h/holds. (Main apps): % men	Non-PBS Domestic workers in private h/holds. (Main apps): women	Non-PBS Domestic workers in private h/holds. (Main apps): % women
2005	**16,939**	4,005	24%	12,929	76%
2006	**18,179**	4,316	24%	13,868	76%
2007	**16,802**	3,855	23%	12,947	77%
2008	**16,543**	3,749	23%	12,794	77%
2009	**15,134**	3,527	23%	11,607	77%
2010	**15,693**	3,515	22%	12,178	78%
2011	**16,440**	3,678	22%	12,762	78%
2012	**15,813**	3,768	24%	12,045	76%
2013	**16,651**	3,945	24%	12,706	76%
2014	**16,753**	4,046	24%	12,707	76%
2015	**17,365**	4,162	24%	13,203	76%
2016	**18568**	4418	24%	14150	76%
2017	**19,885**	4,646	23%	15,239	77%

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