

COMBATting OR ENABLING DOMESTIC VIOLENCE? EVALUATING THE RESIDENCE RIGHTS OF MIGRANT VICTIMS OF DOMESTIC VIOLENCE IN EUROPE

CATHERINE BRIDDICK* 

Abstract The treatment of third-country nationals (TCNs) under EU law falls far short of the EU’s commitments to eliminate gender inequality and to ‘combat all kinds of domestic violence’. Not only does Article 13(2)(c) of the EU Citizens’ Directive, as interpreted by the CJEU in *Secretary of State for the Home Department v NA*, fail to ‘safeguard’ the rights of TCNs, it may also enable domestic violence. When presented with an opportunity to remedy its disadvantageous treatment of TCNs by fully ratifying the Council of Europe Convention on Preventing and Combatting Violence Against Women and Domestic Violence (the Istanbul Convention), the Council of the EU chose instead to pursue a selective and partial ratification which leaves TCN victims without recourse to the very provisions designed to assist them. The European Parliament stated that it ‘regrets’ this approach, recommending instead ‘a broad EU accession ... without any limitations’. This article’s analysis of the EU Citizens’ Directive and Istanbul Convention supports this recommendation.

Keywords: public international law, domestic violence, violence against women, discrimination, third-country national, TCN, citizenship, Citizens’ Directive, Istanbul Convention, domestic violence rule, migration status.

INTRODUCTION

Many States have rules which enable the migrant partners of their citizens, permanent or long-term residents, to enter and remain in their jurisdictions. As is the case for the UK, such rules may grant migrant partners entry and a period of residence, subject to certain conditions. Whether a person is permitted to move from one State to another either with, or to join, their family is not determined solely by the relevant States’ immigration law. Within Europe, such issues are determined by States’ immigration laws,

* Martin James Departmental Lecturer in Gender and Forced Migration, Refugee Studies Centre, University of Oxford, catherine.bridnick@qeh.ox.ac.uk. I would like to thank Cathryn Costello and Henry Radice for their comments on various iterations of this article. I would also like to thank the anonymous reviewers and the editorial board for all their constructive suggestions.

European Union (EU) free movement law and international human rights law, which imposes limits on both States and the EU.

Domestic violence has been defined 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’.¹ Domestic violence affects one in five women in the EU.² Women are significantly more likely than men to experience domestic violence and when they do, are more negatively impacted by it and/or by particular forms of it.³ Following the landmark case of *Opuz v Turkey* by the European Court of Human Rights, domestic violence is recognised as a form of discrimination against women.⁴ The failure of a State to protect women from such violence not only breaches their right to the equal protection of the law but, depending on the nature and severity of the violence, can also breach the right to a private and family life, the prohibition of torture, inhuman and degrading treatment and the right to life (Articles 14, 8, 3 and 2 of the European Convention on Human Rights (ECHR)),⁵ and analogous provisions of the Charter of Fundamental Rights of the EU (CFREU)).⁶ Despite its devastating, even lethal consequences, domestic violence continues to go underreported. As a result, the needs of victims for protection and support frequently remain unmet.⁷

Migrant women who experience domestic violence may be particularly disadvantaged, however, when the person who perpetrates violence against them, a spouse or partner, is also the person on whom they depend for their migration status. A person’s migration status determines how long she or he may remain in a particular jurisdiction (a few months or permanently), on what basis (as a spouse/partner or worker) and under what conditions (whether or not she or he can work and has access to health care or welfare

¹ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (adopted 7 April 2011, entry into force 1 August 2014) CETS 210 (Istanbul Convention), art 3(b).

² European Union Agency for Fundamental Rights, *Violence Against Women: An EU-Wide Survey: Main Results Report* (Publications Office of the European Union 2014) 21.

³ EG Krug *et al.*, *World Report on Violence and Health* (World Health Organisation, Geneva 2002) Ch 4; M Tanha *et al.*, ‘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; European Union Agency for Fundamental Rights (n 2); and Office for National Statistics, *Domestic Abuse in England and Wales: Year Ending March 2018* (Statistical bulletin, 22 November 2018) 8.

⁴ *Opuz v Turkey* Appl No 33401/02, Judgement of 9 June 2009, paras 184–191.

⁵ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

⁶ Charter of Fundamental Rights of the European Union [2007] OJ C 303/01 (CFREU) arts 21, 7, 4, 2 and 1. In Case C-400/10 *PPU J McB v LE* ECLI:EU:C:2010:582 [2010] ECR I-08965 the CJEU ruled that where CFREU rights paralleled ECHR rights, the CJEU should follow the jurisprudence of the European Court of Human Rights (ECtHR), noting at para 53 that the meaning and scope of CFREU-protected rights were, *at minimum*, the same as those protected by the ECHR.

⁷ European Union Agency for Fundamental Rights (n 2) Ch 3.6.

benefits). Women who have a dependent migration status may be deterred, even more than citizen women are, from reporting violence to the police or from seeking other support, by the fear, often justified, that their migration status may be jeopardised if they do so, or, that immigration enforcement action may be taken against them.⁸

Some States have recognised that rules which enforce migrant women's dependency on a spouse or partner have particularly disadvantageous consequences for women experiencing domestic violence and have taken action to mitigate, or even eliminate, such disadvantage.⁹ One example of such mitigation is the adoption of rules which enable some migrant victims of violence who depend on another for their permission to remain in a particular jurisdiction to obtain an independent migration status.¹⁰ Article 13 (2)(c) of the EU Citizens' Directive¹¹ and Article 59(1) of the Council of Europe Convention on Preventing and Combatting Violence Against Women and Domestic Violence (the Istanbul Convention)¹² are examples of such 'domestic violence rules'. This article draws on the limited jurisprudence these rules have generated so far, to evaluate them by reference to the stated aims of the institutions and instruments which have established them.

Domestic violence is both a cause and consequence of women's inequality. The EU, which aims to eliminate such inequality,¹³ has committed 'to combat all kinds of domestic violence'.¹⁴ Article 13 of the Citizens' Directive was adopted to 'safeguard'¹⁵ the position of its migrant victims. It is argued here that the EU's response to migrant victims of domestic violence who are the nationals of non-EU States, that is, third-country nationals (TCNs), falls far short of these commitments. Not only does Article 13(2)(c), as interpreted by the Court of Justice of the EU (CJEU), fail to combat domestic violence when experienced by a TCN, it may actually enable it. The purposes of the

⁸ S Anitha, 'Legislating Gender Inequalities' (2011) 17(10) *Violence Against Women* 1260.

⁹ In April 2017 Immigration, Refugees and Citizenship Canada abolished a requirement that had made migrant spouses dependent for their status on their Canadian spouse for two years for such reasons, Immigration Refugees and Citizenship Canada (IRCC), *2017 Annual Report to Parliament on Immigration* (1 November 2017) section 4.

¹⁰ Like, for example, the US's U Visa, for an introduction to and evaluation of which see N Nanasi, 'The U Visa's Failed Promise for Survivors of Domestic Violence' (2018) 29(2) *Yale Journal of Law & Feminism* 271.

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 Istanbul Convention, art 59 of which takes a fourfold approach to victims' residence status.

¹³ Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (TFEU) art 8. See also arts 10 and 19.

¹⁴ TFEU, Declaration 19 on art 8.
¹⁵ 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) 14–15. See also EU Citizens' Directive, recital 15.

Istanbul Convention include establishing a comprehensive framework to protect *all* women from *all* forms of violence against women.¹⁶ To this end, it has a specific provision, Article 59, to assist migrant victims of such violence. The Istanbul Convention envisages that both States and the EU will accede to it, something that the EU can do to the full extent of its competences.¹⁷ The Council of the EU is, however, choosing to ratify only some of the Convention's provisions, excluding Article 59 from this process. Such a partial and selective engagement with the Convention leaves migrant victims of domestic violence whose statuses are determined by EU law, without recourse to the very provision designed to assist them.

To substantiate these claims, Section I establishes the legal framework that applies to a TCN family member of an EU citizen living in an EU Member State other than the State of his/her nationality.¹⁸ Section II introduces and evaluates Article 13(2)(c) of the EU Citizens' Directive. The first, and thus far, only case in which the CJEU has been called upon to vindicate the rights of a domestic violence victim, Case C-115/15 *Secretary of State for the Home Department v NA*,¹⁹ is discussed to demonstrate that the Court's restrictive interpretation of an already restrictive rule has almost entirely stripped it of its protective capacity. Section III establishes the obligations Article 59(1) of the Istanbul Convention imposes, drawing on the case of *NA* to explore the provision's potential to remedy some of the deficiencies of the EU's domestic violence rule. Section IV discusses the EU's and UK's engagement with the Istanbul Convention, scrutinising both ratification processes and their impacts on migrant victims of violence.

This article refers to a potential victim of domestic violence as 'she' and the perpetrator as 'he'. Doing so highlights women's and men's differential experiences of domestic violence, in prevalence, form and impact, situating it within the general and specialist frameworks concerned with discrimination, including the ECHR, the UN Convention on the Elimination of all Forms of Discrimination Against Women,²⁰ and the Istanbul Convention itself. Finally, migration law frequently distributes migration opportunities in ways which are directly or indirectly discriminatory, including on the grounds of race, sex and sexual orientation, and against those whose relationship or family status departs from the nuclear hetero-norm. Referring to a migrant victim of domestic

¹⁶ Istanbul Convention, art 1.

¹⁷ Istanbul Convention, art 75 and TFEU, art 216.

¹⁸ The framework that applies to, for example, the Australian wife (a TCN) of a Spanish citizen (an EU Citizen) who is living and working in France (an EU Member State other than his EU 'home State'). The framework that applies to the Australian wife of a Spanish citizen who is living and working in Spain is the latter's own immigration law.

¹⁹ Case C 115/15 *Secretary of State for the Home Department v NA* ECLI:EU:C:2016:487 [2016].

²⁰ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, in force 3 September 1981) 1249 UNTS 13 (CEDAW); CEDAW General Recommendation No 35 on Gender-Based Violence Against Women, Updating General Recommendation No 19 CEDAW/GC/35 (26 July 2017).

violence as ‘she’ is intended to highlight, not reproduce, the discriminatory nature of both the domestic violence and the rules that make victims dependent for their migration status on the person who perpetrates violence against them.²¹ Of course, women and men may both be victims of domestic violence and domestic violence may occur in same-sex and opposite-sex relationships. The EU’s domestic violence rule may be relied on by anyone who is married or in a registered partnership. The potential beneficiary group(s) of the Istanbul Convention’s protection for migrant victims of violence against women and domestic violence are discussed further below.

I. THE POSITION OF TCNS UNDER EU LAW

The migration status of a TCN may be determined by EU law when they are the family member of a particular type of EU citizen.²² Under the Citizens’ Directive, EU Citizens and their family members who enter another Member State have an initial right of residence that lasts three months.²³ Subject to conditions, after three months EU Citizens who are ‘qualified persons’ and their family members have an extended right of residence.²⁴ Qualified persons are those who are workers, self-employed, self-sufficient, job-seekers or students.²⁵ After five years of residence as a qualified person, EU Citizens and their family members acquire the status of permanent residents.²⁶ The rationale and justification of TCN’s rights in another Member State under EU law are the needs of her EU Citizen ‘sponsor’; *her* presence is necessary to enable *him* to exercise the rights that attach to *his* citizenship. As the CJEU stated in *Metock*, TCNs derive rights from such relationships 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.²⁷

As a TCN’s rights are derivative, they are *made dependent* on their EU Citizen family member. This dependency does not just extend to a TCN’s migration status and any application she might make in relation to it (for example, a TCN wife required her EU Citizen husband’s signature on *her* UK

²¹ C Briddick ‘Precarious Workers and Probationary Wives: How Immigration Law Discriminates Against Women’ (2020) 29(2) Social & Legal Studies 201.

²² Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (TFEU), arts 20 and 21 establish EU citizenship and the rights that pertain to it.

²³ EU Citizens’ Directive, art 6.

²⁴ *ibid*, art 7. These conditions include not becoming a burden on the social assistance programmes of a particular Member State and having comprehensive sickness insurance.

²⁵ *ibid*, art 7. Some statuses may be ‘retained’ even though the person concerned no longer fulfils the requisite criteria.

²⁶ *ibid*, art 16.

²⁷ Case C-127/08 *Metock* ECLI:EU:C:2008:449 [2008] ECR I-06241, para 62. For a discussion of this case see C Costello, ‘Metock: Free Movement and “Normal Family Life” in the Union’ (2009) 46(2) CMLRev 587.

immigration application),²⁸ but also to those rights that flow from it. This dependency is illustrated by the case of *Diatta*,²⁹ which concerned the residence rights of a TCN who was separated, but not yet divorced, from her EU Citizen husband. The Court held that TCNs *only* have residence rights *while* their EU Citizen spouse is economically active (for example, as a worker) in the country of residence and until the marriage is ended by divorce. Following *Diatta*, a TCN's derivative rights might be lost, or even deliberately extinguished, by the EU Citizen's ending of the marriage or departure from the host State. Such a loss of rights could leave a TCN subject to the relevant Member State's own immigration law. In a jurisdiction like the UK, where a person without the correct permission to remain may be denied the right to work or to receive a number of State services, losing a migration status may not only make someone liable to detention and deportation, it may also render them destitute and increase their risk of experiencing further violence.³⁰ Article 13 of the Citizens' Directive was adopted to respond to the TCN-rights-lacuna that *Diatta* revealed, by putting 'safeguards' in place which *should* enable a TCN to retain her derived EU law rights independently in certain circumstances, including where domestic violence occurred.³¹ Article 13 states that:

2. ... divorce, annulment of marriage or termination of the registered partnership ... 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 ...³²

²⁸ 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).

²⁹ Case C-267/83 *Diatta v Land Berlin* ECLI:EU:C:1985:67 [1985] ECR 00567.

³⁰ See C 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 for a discussion of some of the restrictions/exclusions that EU Citizens and their family members in the UK have been subject to. 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, Sheffield Safer and Sustainable Communities Partnership, *Learning from Domestic Homicide Review (DHR): Adult D* (January 2014) 1 and 3.

³¹ Per the references at (n 15).

³² EU Citizen's Directive, art 13 (edited, emphasis added).

This domestic violence rule purports, therefore, to ‘emancipate’ the derivative rights accorded to the family members of EU citizens, potentially enabling a TCN whose marriage ends because of domestic violence to retain an independent right of residence in the Member State in which she lives.³³ Article 13(2)(c) *should* enable a victim of domestic violence to access those services which may secure her safety and promote her recovery, end her relationship and live independently of her abusive EU Citizen spouse. Whether or not this is actually the case is the issue to which we now turn.

II. EVALUATING ARTICLE 13(2)(C): DOMESTIC VIOLENCE, DIVORCE AND DEPARTURE, BUT IN WHICH ORDER?

One of the issues raised by Article 13(2)(c) concerns the event which generates, or has the potential to generate, an independent right of residence for a TCN victim of violence. Is the ‘trigger’ for the retention of rights the domestic violence itself, or the point at which the relationship ends? Ascertaining the point at which rights may be retained is significant because (per *Diatta*, as discussed above) a TCN’s derivative rights may be extinguished by events beyond her control, by her EU citizen spouse ceasing to be economically active as a qualified person, for example, or suddenly departing from the EU Member State in which they live. In such circumstances, whether or not an independent right of residence is generated by the domestic violence itself, or by the termination of the relationship, will determine whether or not a victim of violence retains, or loses, her ability to remain in the EU Member State in which she lives. This issue, along with others, was considered by CJEU in the case of *NA*.³⁴ The CJEU’s decision on the domestic violence strand of *NA* is analysed here to evaluate the ability of Article 13(2)(c) to combat domestic violence and safeguard the residence rights of TCNs.³⁵

NA, who is Pakistani, was a TCN who derived her right to live in the UK (then a member of the EU) from that enjoyed by her EU Citizen husband, a dual German/Pakistani national.³⁶ *NA*’s husband was a perpetrator of domestic violence. He left the UK for Pakistan when, having assaulted *NA* (who was at the time pregnant with their second child), the police became aware of his conduct. Almost immediately after his return to Pakistan, *NA*’s

³³ Drawing on F 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) CMLRev 1373, 1384.

³⁴ *Secretary of State for the Home Department v NA* (n 19).

³⁵ See C Briddick ‘Case Comment: Secretary of State for the Home Department v *NA*’ (2016) 30 (4) Journal of Immigration Asylum and Nationality Law 367 for a complete discussion of the case, including the rights under EU law that *NA* had as the primary carer of two EU citizen children.

³⁶ The full facts of which are set out in Case C-115/15 *Secretary of State for the Home Department v NA* ECLI:EU:C:2016:259 paras 11–23 and B Asanovic, *Note on SSHD v NA Pakistan, C-115/15, AIRE Centre Intervening* (Document number 160732348, Resources for Members, Immigration Law Practitioners’ Association, 28 July 2016).

husband wrote to the Home Office, asking them to cancel her residence document and to be informed when they had done so. Following his departure, NA initiated divorce proceedings and obtained custody of the couple's (then) two children. She also applied for permanent residence under the EU's domestic violence rule. Her application was rejected, she appealed and the Court of Appeal subsequently requested a preliminary ruling from the CJEU on, amongst other things, whether or not under Article 13(2)(c), a TCN must be able to show that her spouse was present as a qualified person in the host Member State *at the time* of their divorce.³⁷ The CJEU answered this question in the affirmative. NA could *not* rely on Article 13(2)(c) because, at the time of her divorce, she had no derivative right of residence to retain, her rights being extinguished by her violent husband's sudden departure from the UK.³⁸

The CJEU starts its restrictive interpretation of Article 13(2)(c) from the premise that it can directly 'transpose'³⁹ to NA's case its reasoning in *Singh and Others*.⁴⁰ In *Singh*, the CJEU confirmed the *Diatta* position that where divorce proceedings are commenced *after* the departure from the host State of the EU Citizen, the TCN family member has no derivative rights in that State to retain. Following the logic of this judgment, TCNs should either 'divorce immediately or leave'.⁴¹ 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 and residence in other Member States while TCNs, generally, do not have such rights.⁴² The Court views Article 13(2)(c) as relevant only in 'exceptional cases', requiring a narrow, rather than purposive, interpretation.⁴³ In contrast, the Opinion of Advocate General Wathelet proceeds from the premise that it is important to provide NA and other victims of domestic violence with legal certainty about their migration status and the rights that pertain to it.⁴⁴ The Advocate General refers to *Singh*, but distinguishes it from domestic violence cases as victims may be deterred from initiating divorce proceedings because they fear further violence or are 'worn down' by their experiences.⁴⁵ The Advocate General is also aware that perpetrators (like, potentially, NA's husband) may seek to evade criminal sanction for their conduct by departing from the host State, 'effectively depriving' their spouse of their residence rights.⁴⁶

³⁷ *NA v Secretary of State for the Home Department* [2014] EWCA Civ 995, paras 21–22.

³⁸ *Secretary of State for the Home Department v NA* (n 19) para 51. Thankfully NA did not face removal from the UK following this decision per *Ahmed (Amos; Zambrano; reg 15A(3)(c) 2006 EEA Regs)* [2013] UKUT 00089 (IAC).

³⁹ *Secretary of State for the Home Department v NA* (n 19) para 37.

⁴⁰ Case C-218/14 *Kuldip Singh, Denzel Njume, Khaled Aly v Minister for Justice and Equality* ECLI:EU:C:2015:476 [2015].

⁴¹ Drawing once again on *Strumia* (n 33).

⁴² *Secretary of State for the Home Department v NA* (n 19) para 41.

⁴³ *ibid*, para 42.

⁴⁴ *Secretary of State for the Home Department v NA* (n 36) para 30.

⁴⁵ *ibid*, para 70.

⁴⁶ *ibid*, para 72.

Having focussed on domestic violence and its impacts, Advocate General Wathelet opines that a restrictive interpretation of Article 13(2)(c) would be ‘manifestly contrary’⁴⁷ to the provision’s protective objective:

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 perpetrator of those acts chooses to remain in the territory of the host Member State.⁴⁸

It is significant that in rejecting Advocate General Wathelet’s interpretation of Article 13(2)(c), the Court failed to engage with any of the specific arguments he made with regard to domestic violence.

The Court also justifies its restrictive interpretation of Article 13(2) by interpreting it in the light of another provision of the Citizens’ Directive: Article 12, which concerns the departure of an EU Citizen from the host Member State and which does *not* generally provide for TCN family members left in that State to retain their rights.⁴⁹ However, the fact that the Citizens’ Directive has a *general* provision for cases which involve departure does not ‘tell’ us anything about how its *specific* domestic violence provision should be interpreted. These provisions are not presented in the Directive hierarchically. The EU legislature has not, therefore, indicated which should take precedence should more than one have the potential to apply in any given set of circumstances. In the absence of such an indication, the correct approach should be to treat the specialist rule as having precedence over the rule of more general application. The Advocate General takes this approach, referring to Articles 12 and 13, but differentiating the former from the latter on the basis that Article 13(2)(c) concerns departure following domestic violence, *domestic violence* being the event which triggers the retention of rights, making it the relevant provision in such cases.⁵⁰

The Court does recall that the purpose of Article 13(2)(c) 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.⁵¹

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.⁵² This reasoning is

⁴⁷ *ibid*, paras 73 and 80.

⁴⁹ *Secretary of State for the Home Department v NA* (n 19) paras 43–44.

⁵⁰ *Secretary of State for the Home Department v NA* (n 36) para 62.

⁵¹ *Secretary of State for the Home Department v NA* (n 19) para 47.

⁵² *ibid*, paras 48–49.

⁴⁸ *ibid*, para 76.

incomprehensible. It is precisely because NA's rights are not protected following her violent partner's departure (before their divorce), that the point at which rights may be retained is so significant.

In this first and, thus far, only case in which the CJEU has been called upon to interpret Article 13(2)(c), the Court failed to ensure that the Citizens' Directive's safeguard for victims of domestic violence actually operates as such. NA sought permanent residence in the UK. Following the CJEU's judgment she had, under EU law, a precarious migration status valid only whilst her children were in education.⁵³ This 'positive outcome' to NA's case came ten years after her husband abandoned her; ten years during which her and her children's migration status was insecure and during which she may have been excluded from a number of sources of State and other support.

The Court's restrictive interpretation of Article 13(2)(c) renders its protections unobtainable to many TCN domestic violence victims. A brief consideration of the situations of those who may still be able to benefit from the provision illustrates this. Cases which benefit from the provision are those which fulfil the following requirements: firstly, the EU Citizen is still present in the host Member State as a qualified person in accordance with the relevant provisions of the Citizens' Directive (as a worker or self-employed person, for example). Secondly, the TCN spouse is able to start divorce/dissolution proceedings, both legally, because she meets the relevant requirements, and practically, because she has sought legal advice and can act on it.⁵⁴ Finally, to be able to obtain *permanent* residence under Article 13(2)(c) (rather than simply *retaining* a right of residence) the TCN herself also has to be economically active (or be a family member of someone who is).⁵⁵ This appears justifiable at first sight, as the Directive is requiring no more of TCNs than it does of EU Citizens, who need to be economically active in particular ways in order to benefit from certain rights. However, these requirements are problematic for those with caring responsibilities (caring not being considered to be 'work'), or for those whose experiences of violence may make them temporarily unable to take on employment.⁵⁶ Article 13(2) is, therefore, as Adam Weiss notes, of use to 'an absurdly discrete group'.⁵⁷ The rule becomes 'less effective as the vulnerability of the individual it is designed to protect increases'.⁵⁸ This group shrinks even further when we consider that

⁵³ See Briddick (n 35) for a discussion of these points.

⁵⁴ Divorce (and divorce at a particular time) is a 'gateway' requirement to the rule; this may be problematic in jurisdictions where the ability to divorce is restricted.

⁵⁵ EU Citizens' Directive, art 13(2) in conjunction with art 18, the latter enabling those who have retained rights under the former to acquire permanent residence after five consecutive years' lawful residence.

⁵⁶ As appeared to have been in the case for HC in *Sanneh & Ors v Secretary of State for Work and Pensions* [2015] EWCA Civ 49.

⁵⁷ A Weiss, 'Transnational Families in Crisis: An Analysis of the Domestic Violence Rule in E.U. Free Movement Law' (2009) 30(3) *MichJIntlL* 841, 853.

⁵⁸ *ibid.*

those in durable relationships (whether same-sex or opposite-sex) are entirely excluded from the ambit of the rule.⁵⁹

III. THE ISTANBUL CONVENTION

A. *A Rights-Based Response to Violence against Women and Domestic Violence*

When faced with the apparent ambiguity of Article 13(2)(c), the CJEU should have interpreted the provision in the light of NA's human rights, including her right not to be discriminated against and her rights to human dignity and integrity of the person (CFREU, Articles 21, 1, and 3). These rights can be relied on within the scope of EU law and were referred to in *NA*.⁶⁰ The CFREU and the ECHR are no longer the only instruments a victim may look to for protection from violence and discrimination. The Council of Europe's Istanbul Convention has been in force since 1 August 2014 and has, at the time of writing, been ratified by 34 States in addition to being signed by others, including the UK and the EU (even if only to a limited extent, as shall be seen). Article 59(1) of the Istanbul Convention enables some victims of violence who are dependent on a spouse or partner for their migration status to receive an autonomous status. *If* the EU, its Member States and the UK, ratified the Istanbul Convention *in full*, Article 59(1) could be relied upon by migrant victims of violence whose status was determined by *either* EU law or a Member State's/the UK's own immigration law. It is illuminating to contrast NA's case under EU law with the protections offered by the Istanbul Convention generally and Article 59(1) in particular, to determine whether, had she had recourse to the latter, her situation in the UK might have been any different.

The purposes of the Istanbul Convention include protecting all women from all forms of violence against women, contributing to the elimination of discrimination against women and promoting substantive equality.⁶¹ To achieve this, the Convention establishes a 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.⁶² Second, the prevention of violence through education, training and awareness-raising.⁶³

⁵⁹ EU Citizens' Directive, art 13 states that the rule is for the benefit of those whose *marriage or registered partnership* is terminated.

⁶⁰ *Ahmed (Amos; Zambrano; reg 15A(3)(c) 2006 EEA Regs)* (n 38) para 17 which referred to both the relevant provisions of the CFREU and the ECtHR's domestic violence jurisprudence. On the relationship between the CFREU and ECHR see *PPU J McB v LE* [2010] (n 6).

⁶¹ Istanbul Convention, art 1.

⁶² *ibid*, Ch II.

⁶³ *ibid*, Ch III.

Third, the protection and support of victims via a range of non-legal⁶⁴ and legal measures, including criminalisation⁶⁵ and the provision of protective orders.⁶⁶ Finally, Parties are required to adopt measures to ensure the proper investigation, prosecution and punishment of offenders.⁶⁷ Crucially, following Article 4(3), the Convention is to be implemented without discrimination on *any* ground, including ‘migrant or refugee status’. Compliance with these obligations is monitored by the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), via a reporting and inquiry procedure.⁶⁸

The beneficiaries of the Istanbul 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 Article 3(a) ‘violence against women’ and 3(b) ‘domestic violence’. Both the Convention and its Explanatory Report make clear that the ‘large number of references to victims’ in the Convention should be understood to mean both victims of violence against women and of domestic violence.⁶⁹ Article 2, on the Convention’s scope, in conjunction with the word ‘and’ in Article 3(e) denotes, therefore, the application of the Convention to two, potentially distinct, groups of beneficiaries: on the one hand, women and girls subject to any form of violence against women (including domestic violence); and, on the other hand, victims of domestic violence (potentially including men and boys).⁷⁰

B. Interpreting Article 59(1) of the Istanbul Convention

Article 59(1) imposes obligations on Parties to the Istanbul Convention to assist migrant victims of violence against women, including women in NA’s position.

⁶⁴ *ibid.*, Ch IV, including general services usually provided by the State (for example, health care and financial assistance, art 20) as well as specialist support services for women and children (arts 22–26).

⁶⁵ *ibid.*, Ch V, conduct criminalised includes stalking (art 34), physical and sexual violence (arts 35–36), forced marriage (art 37), FGM (art 38) and forced abortion/sterilisation (art 39).

⁶⁶ *ibid.*, Ch VI.

⁶⁷ *ibid.*

⁶⁸ *ibid.*, Ch IX.

⁶⁹ *ibid.*, art 2(1)–(2) and 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.

⁷⁰ On the scope of the Convention, compare art 2(1) ‘This Convention *shall* apply to all forms of violence against women, including domestic violence...’ with art 2(2) ‘Parties are *encouraged* to apply this Convention to all victims of domestic violence. Parties *shall* pay particular attention to women victims...’ (emphasis added). If the term ‘and’ in art 3(e) was interpreted cumulatively, the protections of the Convention would not be available to women subjected to, for example, stalking, sexual harassment and sexual violence where the perpetrator was someone outside of a women’s household or family. That the ‘and’ is used to denote two, potentially distinct beneficiary groups, ‘victims of violence against women’ and ‘victims of domestic violence’, the former being only female with the latter potentially including men/boys, is also confirmed by the reference to ‘women victims’ in cases where a particular right/protection is available only to the former group eg art 18(3) which refers to the ‘empowerment and economic independence of women victims of violence’. See further RG Römken, ‘Reflections on Domestic Violence as Gender-Based Violence in European Legal Developments’ in M Mohamad and SE Wieringa (eds), *Family Ambiguity and Domestic Violence in Asia* (Sussex Academic Press 2013).

The Istanbul Convention draws on, and repeats, elements of the EU's domestic violence rule. However, terms which have, or have come to have, a particular meaning in EU free movement law, with its focus on *Citizens'* rights, will not necessarily have the same meaning when used in the Istanbul Convention given its purposes to, for example, eliminate discrimination and promote equality. The Istanbul Convention must be interpreted in good faith, in accordance with the ordinary meaning given to *its* terms in the light of *its* object and purpose.⁷¹

Article 59(1) states:

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.

From the vantage point of a potential applicant in France (which has ratified the Convention), Article 59(1), which refers to dependent residence statuses, may enable migrant women who are married or in a relationship with someone who is French, an(other) EU citizen or a TCN to receive an autonomous residence permit. The reference to spouse/partner (when coupled with the Convention's non-discrimination provisions) could enable those in same-sex *and* opposite-sex relationships, as well as those who are not married/in a registered partnership, to benefit from the provision. Article 59(1) does not require the perpetrator of violence to *be* the person on whom the applicant depends for her migration status. The violence also does not have to have *caused* the relationship to have broken down. Whilst the EU's domestic violence rule contains requirements which relate to the economic activity of both perpetrators (that they be, for example, workers or self-employed) and victims (where permanent residence is sought) no such criteria are imposed by Article 59.

There are three elements of Article 59(1) which require more detailed discussion. The first is the 'particularly difficult circumstances' to which the provision refers, a phrase that appears to be drawn directly from the EU Citizens' Directive. The rationale for using these words in Article 59(1) is, however, unclear. Vladislava Stoyanova argues that they may be interpreted to add a 'severity threshold' to the provision, relating to the violence experienced (a focus on past harm) or the applicant's personal circumstances (potentially a prospective test, considering the impact of deportation/removal on 'small' children for example).⁷² Interpreting 'particularly difficult

⁷¹ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT), art 31.

⁷² V 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.

circumstances' as adding a 'severity threshold' to Article 59(1) would, however, be inconsistent with the purposes of the Istanbul Convention for two reasons. Firstly, the Convention does not focus on particularly harmful subsets or manifestations of violence against women. It aims to protect *all* women from *all* forms of violence (per Article 1(a)). The Convention's definition of violence against women and victimhood is, consequently, purposefully capacious, in order to capture and enable a response to the many and varied forms such violence takes. This does not, of course, mean that all those who fall within the Convention's definition of 'victim' are entitled to an independent migration status. It means that where the other substantive requirements of the rule are met (as discussed below) the type, duration or perceived severity of the violence experienced (to persons other than the woman concerned) are irrelevant. Secondly, the rights and protections the Istanbul Convention provides are to be secured without discrimination (per Article 4(3)). To interpret 'particularly difficult circumstances' as requiring a potential applicant to experience violence that is particularly severe, for example, is to discriminate against *migrant* women (intra-sex discrimination) by imposing a higher eligibility threshold on them than must be met by other, 'normal' victims, before the relevant protection (in this case, an autonomous migration status) is afforded.

Rather than interpreting 'particularly difficult circumstances' as *adding* a severity threshold to the rule, it should be interpreted as *linking* the experience of violence with marriage/relationship dissolution and the victim's subsequent loss of migration status. Without such a link, the potential beneficiary group of Article 59(1) could, as Stoyanova observes, be unreasonably large.⁷³ 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. But why should, for example, an experience of sexual harassment 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 or prosecuted is covered by a separate provision (Article 59(3) which requires States to grant *renewable* residence permits). For what 'particularly difficult circumstances' then, is bestowing an *autonomous* right of residence the appropriate response? Being deterred from ending a violent relationship because to do so may terminate a victim's right to live in the host State may be one such circumstance. A victim's loss of migration status because she ended her relationship, or because the person on

⁷³ *ibid.*

whom she depended for it was imprisoned for violence, may be two others.⁷⁴ Using ‘particularly difficult circumstances’ to link the rule’s substantive requirements means that its benefit, the granting of an autonomous migration status, is available in a range of situations where a victim’s dependent migration status is jeopardised in some way because of that victimhood. Such an interpretation is entirely consistent with the ordinary meaning of ‘particularly difficult circumstances’ in light of the Istanbul Convention’s purposes.

The second element 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’.⁷⁵ At what point in time must she depend on her partner for her residence status: when she experiences violence? When her relationship ends? Or, when she makes her application for an autonomous residence permit? 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 beneficiary group of the provision would be small. As demonstrated by the jurisprudence (including the case of *NA*) and a wealth of empirical evidence, perpetrators of violence routinely seek to exercise control over their partner’s migration status.⁷⁶ Barring women who no longer have a current, dependent, migration status from benefitting from Article 59(1) 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 act to jeopardise her migration status, effectively depriving her of both. An alternative interpretation, which is responsive to these issues and consistent with the Convention’s purposes, would require the victim to have had a dependent migration status at the time *any* of the factors the provision mentions arose, when for example, violence occurred, or when the relationship ended. 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.⁷⁷

The final element of Article 59(1) to consider is the migration status that States are required to grant, the duration and rights that such a status bestows being determined by States’/EU’s own (immigration or free movement) law.

⁷⁴ Per Case C-378/12 *Nnamdi Onuekwere v Secretary of State for the Home Department* ECLI:EU:C:2014:13 [2014], where the ECJ ruled that time spent in prison was not time legally residing in another EU Member State. ⁷⁵ Emphasis added.

⁷⁶ It will be recalled that *NA*’s husband sought to have her residence permit cancelled. For further information on the facts of the case consult the references at (n 36). For other examples of such conduct from the UK see *Balakoohi, R (on the application of) v Secretary of State for the Home Department* [2012] EWHC 1439 (Admin) and *SSHD v SP* [2016] UKAITUR IA013472015. For an introduction to the empirical research see S Anitha, ‘Immigration Status and Domestic Violence’ (*Open Democracy*, 14 September 2015) <<https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/immigration-status-and-domestic-violence/>> and Anitha (n 8).

⁷⁷ Council of Europe (n 69) para 304.

Migration statuses can be of different durations, can be renewable (or not) and can bestow a variety of rights (again, or not). Whilst the Convention's protection from discrimination should enable migrant women to benefit from the general and specialist support services States are required to provide to all victims, such protection will not enable the holders of an autonomous residence permit to work *if the status provided does not enable it*, as the Convention itself does not provide its beneficiaries with the right to work. The migration status that States are required to grant under Article 59(1) may have to be independent, but it will only meet the Convention's purposes if it is for a significant period of time (five years for example) and bestows upon its holder basic human rights, including the right to access welfare benefits, housing, health care, education *and* the labour market.

C. Evaluating Article 59(1): Dependency, Domestic Violence and Divorce, but in Any Order?

The potential of the Istanbul Convention to safeguard the rights of migrant victims of violence may be demonstrated with NA's case.⁷⁸ As a victim who could evidence the domestic violence she had experienced to the satisfaction of the Home Office, NA is a 'victim' under the Istanbul Convention, entitled to the rights and protections it provides. Had NA been able to rely on the Convention she could have invoked its provisions concerning the general and specialist support services States are required to provide to all victims, regardless of their migration status, including healthcare, financial support and legal advice.⁷⁹ Whilst we do not know what, if any, support NA received following her husband's sudden departure from the UK, that departure may have led to her exclusion from a range of services, including welfare benefits, housing support and, potentially, assistance from social services.⁸⁰ By prohibiting States from discriminating against *migrant* women when providing support services, the Istanbul Convention could transform the position of someone in NA's situation in the UK, in addition to any specific protections under Article 59(1) that may apply.

Turning to Article 59(1), NA's migration status *did depend* (past tense) on that of her violent spouse. NA's dependent status was jeopardised by his violence, her abandonment and subsequent divorce occurring after an assault which had involved the police, thereby giving rise to NA's 'particularly difficult circumstances'.⁸¹ The difficulty in NA's case arises from the requirement that she 'depends' on another for her migration status because, as discussed in Section II, NA did not depend on her husband for her

⁷⁸ This article considers NA's potential eligibility under art 59(1), but women in her situation may also be able to rely on art 59(3) on the grounds that their stay is 'necessary' owing to their 'personal situation.'

⁷⁹ Istanbul Convention, art 4(3) in conjunction with arts 20, 22 and 57.

⁸⁰ As discussed by O'Brien (n 30).

⁸¹ Asanovic (n 36).

migration status at the time she divorced. An interpretation of Article 59(1) that prevented women in NA's position from relying on 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 be manifestly contrary to the Convention's purposes. I have argued that the relevant point in time to assess dependency in relation to the migration status of a spouse should be when *any* of the substantive requirements of the rule arise, when violence occurs, for example, or when the relationship ends. Following this interpretation, women, like NA, who lose their residence rights because the person from whom they derive them abandons them (or ceases work, or is imprisoned), would be eligible for an autonomous migration status under Article 59(1).

IV. THE EU'S AND UK'S RATIFICATION OF THE ISTANBUL CONVENTION

At the time of writing both the EU and UK have indicated their intention to assume (at least some of) the obligations the Istanbul Convention imposes. The Istanbul Convention envisages EU accession; the EU can do so to the *full* extent of its competences.⁸² 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 European Parliament, this agreement is binding on the institutions of the EU and EU Member States, to the extent of the competences involved.⁸³ The EU's competence in relation to violence against women is extremely broad, following its commitment to combat sex discrimination and as discussed above.⁸⁴ 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, were:

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

⁸² Istanbul Convention, art 75 and TFEU, art 216.

⁸³ TFEU, art 216(2) and art 218, see further the discussion at (n 95), (n 97) and 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).

⁸⁴ See (n 13) and the accompanying text.

prevention), and Article 157 (equal opportunities and equal treatment of men and women in areas of employment and occupation).⁸⁵

The question prompted by the above 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 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, its other provisions being ‘ancillary’ to this purpose (according to the Commission, not, it should be noted, according to the purposes of the Convention itself).⁸⁶ However, selecting these bases would still enable the EU to ‘exercise its competences over the entirety of the Convention’.⁸⁷ 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.⁸⁸

The decisions (plural) 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 83(1) 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.⁸⁹

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*’.⁹⁰ 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 selecting and assuming the obligations imposed by, for example, Articles 60

⁸⁵ European Commission, *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* (Brussels, 432016 COM(2016) 109 final 2016/0062 (NLE) 2016) 9.

⁸⁶ *ibid* 9–10.

⁸⁷ *ibid*.

⁸⁸ *ibid* 11–13.

⁸⁹ 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).

⁹⁰ 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).

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*. Not all EU Member States have agreed to sign or ratify the Istanbul Convention.⁹¹ The EU's partial ratification of the Convention may, therefore, deny a TCN victim of domestic violence in an EU Member State which has not ratified it with the protections that Article 59 provides. These decisions not only differ from the Commission's proposals, but also from the EU's ratification of another human rights instrument, the UN Convention on the Rights of Persons with Disabilities.⁹²

Whether these decisions could enable the EU to engage with the Istanbul Convention in such a selective and partial way is, at the time of writing, unclear. The European Parliament has stated that it 'regrets' the Council's approach because it raises 'legal uncertainties' and 'concerns regarding the implementation of the Convention'.⁹³ The Parliament has instead called on the Council to 'urgently conclude the EU ratification of the Istanbul Convention on the basis of a broad accession without any limitations'⁹⁴ and has sought an advisory opinion from CJEU to facilitate this.⁹⁵ 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.⁹⁶ A similar challenge may well be successful, based on the

⁹¹ At the time of writing Bulgaria, the Czech Republic, Hungary, Latvia, Lithuania and Slovakia have all signed, but not ratified the Convention. A full list of signatures and ratifications is available on the Council of Europe's Treaty Office website. This lack of 'common accord' between Member States may have implications for the EU's proposed accession.

⁹² 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.

⁹³ *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.

⁹⁴ *European Parliament resolution of 28 November 2019 on the EU's accession to the Istanbul Convention and other measures to combat gender-based violence* (2019/2855(RSP)) (2019) para 2 echoing para 9(d) of its resolution of 12 September 2017. Parliament also called on the States listed in (n 91) to ratify the Convention 'without delay' on the basis that EU accession 'does not exempt Member States from national ratification'.

⁹⁵ *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) para 2 of which states: '... given the above questions as regards the choice of legal basis and the split into two decisions, there is also legal uncertainty as regards the compatibility with the Treaties of the practice of a "common accord" by the Council in its decision-making, which is applied in addition to or alternatively to the relevant decision-making procedure in the Treaties, and, in this context, as regards the application of the principle of sincere cooperation in the light of the expressed objective of the Union to conclude the Istanbul Convention'.

⁹⁶ *CC-377/12 Commission v Council* ECLI:EU:C:2014:1903 [2014] OJ C 282/3. See also S De Vido, 'The Ratification of the Council of Europe Istanbul Convention by the EU: A Step Forward in

arguments the Commission advanced or, more persuasively, on the grounds that the EU's legal response to violence against women should be based in its commitment to combat sex discrimination.⁹⁷

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 to expedite this process.⁹⁸ A Home Office report on the UK's progress towards ratification asserts that it is 'compliant' with its putative Article 59 obligations,⁹⁹ indicating that the UK does not intend to enter a reservation to it. The report demonstrates, however, 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 'N/A', not applicable.¹⁰⁰ How or why this is the case, given the raft of restrictions and exclusions that the UK applies to migrants, is left entirely unexplained.

The Istanbul Convention has the potential to transform the position of victims who, like NA, depend for their migration status on someone who is violent towards them. It does not appear that this potential will be realised 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 and Article 13(2) (c), from having to comply with the Convention.¹⁰¹ The UK, in comparison, has signed the Istanbul Convention and signalled its intention to ratify it in full, a move that has already benefitted some migrant victims of domestic violence.¹⁰² Following ratification, and depending on both the UK's relationship with the EU and how the Convention is incorporated into UK law, Article 59 may be relied on to protect the rights of *all* migrant women

the Protection of Women from Violence in the European Legal System' 9(2) *European Journal of Legal Studies* 69.

⁹⁷ In its *Request for an opinion submitted by the European Parliament pursuant to Article 218 (11) TFEU (Opinion 1/19)* Parliament adopted the former approach, its first question was: 'Do Articles 82(2) and 84 TFEU constitute appropriate legal bases for the act of the Council relating to the conclusion, in the name of the European Union, of the Istanbul Convention, or must that act be based on Articles 78(2), 82(2) and 83(1) TFEU, and is it necessary or possible to separate the decisions concerning the signature and the conclusion of the convention as a consequence of that choice of legal basis?'. The second question asked concerns whether or not the conclusion by the EU of the Istanbul Convention, in accordance with art 218(6) TFEU is correct, given the absence of agreement between Member States concerning their consent to be bound by it.

⁹⁸ Preventing and Combating Violence Against Women and Domestic Violence (Ratification of Convention) Act 2017.

⁹⁹ 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 and 40.

¹⁰⁰ *ibid* 25. See further V Atkins (Parliamentary Under-Secretary of State for Safeguarding and Vulnerability) *Istanbul Convention Ratification: 2019 Report on Progress: Written Statement – HCWS58* (31 October 2019) which records art 4(3) and 59 as 'under review'.

¹⁰¹ For a different perspective see V Stoyanova, 'On the Bride's Side? Victims of Domestic Violence and their Residence Rights under EU and Council of Europe Law' (2019) 37(4) *NQHR* 311.

¹⁰² *A v Secretary of State for the Home Department* [2016] *CSIH* 38.

who are dependent on a spouse or partner for their migration status, regardless of whether that spouse/partner is themselves British, an EU citizen or a TCN. The UK also operates a range of discriminatory rules which appear to be incompatible with the Convention when applied to victims of violence.¹⁰³ GREVIO has censured States who have similar, or analogous rules.¹⁰⁴ Whilst it is currently unclear whether or not such censure will produce substantive change in the jurisdictions concerned, the Istanbul Convention's prohibition on discrimination may significantly improve the position of migrant victims of violence, whether or not those victims choose to remain in the UK in the longer term.

CONCLUSION

Twenty-eight years ago Joseph Weiler criticised the then European Court of Justice 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 her rights.¹⁰⁵ This article demonstrates the continued relevance of Weiler's critique. In NA's case 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's* rationale for giving TCNs derivative rights, 'normal family life'¹⁰⁶ in the EU appears to include the right to move with your family and to abandon them, whichever is most convenient. Having decried TCNs' instrumentalisation, Weiler argues that the Court should vindicate, where necessary, the fundamental rights of TCNs whose residence rights are imperilled by changes to their family circumstances.¹⁰⁷ By refusing to engage with the domestic violence elements of NA's case and by failing to consider her fundamental rights, the CJEU did not merely instrumentalise NA, it dehumanised her.¹⁰⁸ This did not have to be the outcome of NA's case. Consistent with Weiler's critique, the Court could have adopted an approach to NA's situation which recognised and affirmed her CFREU-protected human rights, as the Advocate General's Opinion (albeit partially) demonstrates. Article 13(2)(c) will assist some TCN victims of domestic violence. The restrictive interpretation of a rule, the scope of which is already very limited, as we have seen, places that assistance beyond the reach of many

¹⁰³ See (n 30) and the accompanying text.

¹⁰⁴ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), *GREVIO Baseline Evaluation Report Denmark* (24 November 2017) 14; Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), *GREVIO Baseline Evaluation Report Austria* (27 September 2017) 31–3.

¹⁰⁵ JHH Weiler, 'Thou Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals - A Critique' (1992) 3(1) EJIL 65.

¹⁰⁶ *Metock* (n 27) para 62.

¹⁰⁷ Weiler (n 105) 90–1.

¹⁰⁸ Drawing on Weiler (n 105) 90.

such victims. The violence perpetrated against TCNs in this position will not be combatted by EU law. EU law may even enable it.¹⁰⁹

In contrast, the Istanbul Convention offers a comprehensive, rights-based response to migrant women's experiences of violence. That the EU is seeking to evade the obligations imposed by Article 59 is, consequently, of particular concern given this article's critique of Article 13(2)(c) and the CJEU's 'shameful' interpretation of it.¹¹⁰ In that way, this analysis supports the European Parliament's efforts to secure the EU's full accession to the Istanbul Convention. Finally, whilst the UK's ratification of the Istanbul Convention will significantly improve the position of *all* women within its jurisdiction, its prohibition of discrimination and its specific provisions on migration status are of particular importance to migrant victims of violence. These provisions may prove even more important following the UK's exit from the EU and the changes to UK immigration law that are anticipated to follow it.

¹⁰⁹ H Oosterom-Staples, 'Residence Rights for Caring Parents Who Are Also Victims of Domestic Violence' (2017) 19(4) *European Journal of Migration and Law* 396, 409 similarly argues that the CJEU's judgment 'serves the perpetrator' of violence.

¹¹⁰ S 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>>.