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UCC
University College Cork, Ireland
Coláiste na hOllscoile Corcaigh

CHAPTER I

INCOME REQUIREMENTS IN FAMILY REUNIFICATION REGIMES

CONTENT: 1. Introduction. – 2. The European Family Migration Framework. – 3. Income Requirements in Family Reunification Law and the Male Breadwinner Model. – 4. Limitations of an Anti-Stereotyping Understanding of Equality for Migrant Women's Access to Family Reunification. – 4.1. The ECtHR's Approach to Racial and Ethnic Stereotypes in Family Migration Law. – 4.2. Limited Potential of the Anti-Stereotyping Approach with Respect to Substantive Equality in the Field of Family Life. – 5. The Capabilities Approach and Migrant Women's Equal Access to Family Reunification. – 6. Income Requirements Under the Scrutiny of Domestic Courts. – 7. Concluding Remarks.

1. *Introduction*

In the European legal space, third-country national migrant women are not immune to the broader problem of unequal distribution of care and housework burdens between sexes. [1] They disproportionately bear the burden of unpaid care work within the household in comparison to migrant men. At the same time, in comparison to citizen women, they have fewer resources to rely on in order to alleviate such a burden. Moreover, as foreigners, they have restricted or no access to social assistance services. Living in a foreign country also prevents many migrants from enjoying the support of family networks that would be generally available in the country of origin. [2]

Migrant women can carry out such reproductive work exclusively or in combination with paid employment outside of the household. They share citizen wom-

[1] European Institute for Gender Equality, *Gender Equality Index – Time*, 2013 <http://eige.europa.eu/gender-statistics/gender-equality-index/2012/domain/time> accessed 26 July 2016.

[2] Fabrizio Bernardi and others 'The Recent Fast Upsurge of Immigrants in Spain and Their Employment Patterns and Occupational Attainment' (2011) 49 International Migration 148, 167.

en's difficulties in balancing care and work responsibilities,[3] and they experience with particular intensity the current European wage gap between men and women[4] because they concentrate in the lowest paid sectors of host countries' labour market.[5]

There is no doubt that the imposition of rigid economic thresholds as a necessary requirement to enjoy family life with one's children raises equality issues. The specific difficulties experienced by migrant women in satisfying these prerequisites relate to aspects of gender inequality such as labour market segregation, wage gap, disproportionate care burdens within the household, and so forth. At the same time, such difficulties also relate to their being foreigners and migrants, with limited possibilities to rely on family networks or social assistance services in order to alleviate these hurdles.

A central question with respect to migrant women's family life, then, concerns which notion of equality is best equipped to effectively respond to such difficulties. There is no univocal understanding of sex equality within Europe. The ECtHR jurisprudence itself adopts shifting interpretations of equality and non-discrimination. It is therefore not surprising that state practice within the European Union is very heterogeneous. This chapter will critically review different notions of equality currently enforced in the European legal space, resonating on their potential and shortcomings for migrant women's specifically. In doing so, it will touch upon two main critical aspects of European family reunification law.

First, in some cases EU and domestic norms in this realm embrace stereotypical and heavily gendered notions concerning migrant women's role within the family. These stereotypes can relate, for instance, to the distribution of productive and reproductive work within immigrant families and to women's aspirations and choices in this realm, or to normative expectations concerning the quality and type of their unpaid care work within the household. The normative embrace of such stereotypes – and their enforcement by implementing authorities – turns them into legal prerequisites to enjoy the fundamental right to family life in the host country by accessing family reunification. As a result, migrant women who fail to comply with these stereotypical notions are discriminated against in their enjoyment of such a fundamental right.

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[3] According to a research commissioned by the European Union Programme for Employment and Solidarity, women and particularly mothers are significantly more likely than men to work in part-time jobs and to reduce working hours in order to take care of young children (Rand Europe, *Gender Equality in the Workforce: Reconciling Work, Private and Family Life in Europe*, April 2014, 8-10, <http://ec.europa.eu/justice/gender-equality/files/documents/140502_gender_equality_workforce_ssr_en.pdf> accessed 24 July 2016).

[4] European Institute for Gender Equality, *Gender Equality Index – Money*, 2013 <http://eige.europa.eu/gender-statistics/gender-equality-index/2012/domain/money/1> accessed 24 July 2016.

[5] Elisabeth Robert 'A Gender Perspective on Migration, Remittances and Development: the UN-INSTRAW Experience'.

Second, indirect discrimination against migrant women can stem from a normative de-valuation of unpaid care work within the household by family reunification regimes. When the performance of productive work is considered by the letter of the law or by implementing authorities as a more deserving activity, or even as the sole gateway, for the purpose of enjoying fundamental rights in the field of family life, migrant women who carry out reproductive work are automatically disadvantaged. While in certain circumstances such a differential treatment may be reasonably justified, it is crucial to enquire on whether this is always the case in relation to certain rules of family reunification.

In the light of these issues, this chapter focuses on the disparate impact of EU and domestic family reunification law on migrant women who are carers of family members, especially children. It discusses whether and to what extent the discriminatory effects of certain norms of family reunification law have been revealed and corrected by supranational and domestic courts, and enquires on which role – if any – has been played by human and fundamental rights in this area.

In order to do so, it will first critically review the main sources of secondary EU law that regulate third-country nationals' access to family reunification. Critical aspects for migrant women's equal enjoyment of their right to family life in the host country, both as incoming family members and as prospective sponsors of family reunification, will be highlighted. Then, a specific attention will be paid to the discriminatory effects of the legal imposition of income requirements as a precondition to sponsor family reunification, and the indirect discrimination that such an emphasis produces on migrant women specifically.

After this analysis, this chapter will proceed to assess which judicial approaches and interpretations are best equipped to foster courts' awareness, recognition and correction of these discriminatory effects. A specific attention will be paid to the eventual role played by human and fundamental rights in fostering a valorisation of unpaid care work as a sufficiently valid ground to access sponsorship of family reunification. First, it will discuss the strengths and limitations of the anti-stereotyping approach currently embraced by the ECtHR to ensure migrant women's substantive equality in the field of family life. Second, interpretations carried out in this area by domestic courts within Italian, Spanish and British jurisdictions will be analysed. This examination will unveil the potential of a judicial consideration of migrant women's capabilities as well as their broader relational contexts as a tool to ensure their substantive equality in respect to family reunification.

2. *The European Family Migration Framework*

EU family migration law is currently characterized by a questionable reliance on a one breadwinner model that not only fails to accurately capture the current

structure of many immigrant families, but also implicitly endorses a heavily gendered distribution of reproductive and productive work within the household. If one indeed considers that migrant women still dominate family migration fluxes,[6] it appears clearly that the one breadwinner model enforced by EU family migration law is actually a male breadwinner model.[7]

First and foremost, several legal sources in this field require settled migrants who pursue to sponsor family reunification to show their capability of financially supporting their family members by themselves. Focusing on family reunification between spouses, it is possible to recall that Art. 7 of Directive 2003/86/EC[8] on the right to family reunification of third-country nationals allows Member States to require, among other things, that the sponsor has "stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned".[9] Only at the time of renewal of the family members' residence permits, does Art. 16(1)(a) of Directive 2003/86 establish that "the Member State shall take into account the contributions of the family members to the household income". Even in this case, this possibility is envisaged only when the sponsor is unable to comply with these income requirements alone.

The described economic requirements also apply to long-term residents' family members entering the Member State where their sponsor resides, pursuant Art. 16(5) of Directive 2003/109/EC[10] as well as to family members of highly qualified workers holding permits in accordance with the so-called Blue Card Directive.[11] The only source in this context that at least acknowledges that family members may be able to support themselves financially at the time of their first entry in their host country is Art. 16(4)(c) of Directive 2003/109. This provision regulates the

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[6] Eurostat, First Permits by Reason of Age, Sex and Citizenship, last updated on 08/12/2015, available at <http://ec.europa.eu/eurostat/web/products-datasets/-/migr_resfas> accessed 19 April 2016. Specifically on the United Kingdom, see Scott Blinder *Non-European Migration to the UK: Family and Dependents,* COMPAS (Oxford University March 2016).

[7] On the notion of the male breadwinner model, see Jane Lewis 'Gender and the Development of Welfare Regimes' (1992) 3 Journal of European Social Policy 159; Jane Lewis 'The Decline of the Male Breadwinner Model: the Implications for Work and Care' (2001) 8 Social Politics 152.

[8] Council Directive 2003/86/EC on The Right to Family Reunification [2003] OJ L251/12 (hereinafter Directive 2003/86).

[9] Ibid. 7(1)(c).

[10] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L16/44.

[11] Council Directive 2009/50/EC on The Conditions of Entry and Residence of Third-Country National for the Purposes of highly Qualified Employment [2009] OJ L155/17 (hereinafter Blue Card Directive). Art. 15 of the Blue Card Directive grants third-country nationals holding this permit with the right to family reunification as envisaged by Directive 2003/86 with several more favourable derogations that do not touch upon income requirements

very specific case in which long-term residents are accompanied by their family members – already residing in the Member State in accordance with Directive 2003/86 – when exercising their right to reside in a second Member State.[12] In this case, family members will still need to apply for a residence permit in the second Member State, but Art. 16(4)(c) explicitly refers to the possibility that income requirements established at domestic level in this context may be satisfied by family members themselves rather than by the sponsor. It indeed states that the second Member State may require, among other conditions, family members to provide "evidence that they have stable and regular resources to maintain themselves without recourse to the social assistance of the Member State concerned or that the long-term resident has such resources and insurance for them". In sum, Directive 2003/109 is the only legal source actually envisaging the possibility that family members may be able to support themselves from the very beginning of their movement rather than relying on their sponsor for subsistence, although exclusively in the case of movement of the long-term resident sponsor in another Member State. On the other hand, Directive 2003/86 – which still constitutes the general legal framework on third-country national's enjoyment of family unity – is heavily based on a one breadwinner model, whereby Member States may reasonably require sponsors to support their whole families by themselves.

Second, the discretional power left to Member States in relation to the possibility to limit access to the labour market for family members also reinforces the described normative embrace of a male breadwinner model. Art. 14(2) of Directive 2003/86, in particular, leaves Member States free to determine the conditions under which family members can exercise employed or self-employed activities. Furthermore, it allows Member States to prevent family members (and thus spouses) of third-country national sponsors from performing said activities for the first year of their stay according to "the situation of their labour market". The restrictive character of these rules is evident when compared to Directive 2004/38 on the right to free movement of Union citizens.[13] This source provides that family members of Union citizens who have the right of residence in a Member State "shall be entitled to take up employment or self-employment there" irrespective of their nationality.

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[12] Art. 16 of the Directive establishes a distinction between family members depending on whether the family was already constituted in the first Member State or not. In the latter case, Art. 16 (5) entirely refers to the rules established by Directive 2003/86. In the former case, Art. 16(1) establishes an obligation for the second Member State to authorise spouses and minor children – as defined by article 4(1) of Directive 2003/86 – to accompany or join the long-term resident, while the admission of other relatives is left by Art. 16(2) to the discretional power of the second Member State.

[13] Directive 2004/38/EC of the European Parliament and of the Council on The Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77 (hereinafter Directive 2004/38).

3. *Income Requirements in Family Reunification Law and the Male Breadwinner Model*

The described legal framework suggests a normative view of third-country nationals entering and residing in the EU on the grounds of residence permits issued for the purpose of family reunification as mere commodities of their sponsor, and as passive followers rather than as individuals with their own life plans and aspirations beyond the family realm. [14] In relation to this, the normative model of family that shines through the discussed legal provisions is one based on a rigid distinction between productive work – a task that sponsors are expected to carry out exclusively – and reproductive work – assigned to family members.

Because third-country nationals entering through family reunification schemes are still disproportionally women, this model carries heavily gendered implications and in fact undermines migrant women's equality. Such a male breadwinner model is discriminatory because it enforces a stereotypical and dated view of migrant women's families. This view negatively and disproportionally affects their freedom of choice in relation to productive and reproductive work, and forces them in a situation of socio-economic dependence. Allowing Member States to exclude a group mostly made up by migrant women from the national labour market, thus confining them in the private realm of the family, hampers their integration in the host country and increases their isolation. These legislative choices push migrant women towards performing unpaid care work within the household and limit their freedom of choice in this realm. As a result, "the right to family (re)unification is primarily construed as a right to reproduction". [15]

In this light, a contradiction within EU migration law emerges in respect to the role of holders of family reunification permits within their household. On the one hand, the possibility to exclude family members from the labour market during their initial stay pushes the latter towards unpaid care work within the household, while their sponsor carries out paid employment – along the lines of a rigid division of reproductive and productive work. In the light of the strong feminisation of family migration fluxes, the gendered character of such a division is apparent. On the other hand, the exclusive or predominant performance of unpaid care work within the household is discouraged among prospective sponsors, since Member States may well require the latter to show sufficient financial resources to support all of their reunited family members by themselves.

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[14] Eleonore Kofman and others, 'Migrant and Minority Women, Inequalities and Discrimination in the Labour Market' in Karen Kraal and others (eds) *Equal Opportunities and Ethnic Inequalities in European Labour Markets: Discrimination, Gender and Politics of Diversity* (Amsterdam University Press 2009) 63.

[15] Elisabeth Strasser and others, 'Doing Family' (2009) 14 The History of Family 165, 174.

On a broader level, economic requirements alone are disproportionally difficult to satisfy for migrant women. Especially in Southern Europe, the wage gap generally observable between citizens and non-citizens is indeed significantly wider for migrant women than for migrant men.[16] It is therefore harder for the former to comply with fixed economic thresholds. Moreover, the unequal distribution of care burdens between men and women also affects migrant families, with the aggravating factor of often being unable to rely on kin networks or accessible childcare in the host country. Such care burdens also undermine migrant women's capability to earn an income. Therefore, domestic family reunification rules that put a strong emphasis on economic thresholds as a precondition to sponsor family reunification produce a disparate impact on migrant women's enjoyment of their right to family life in their host countries.

Beyond Member States' individual choices in relation to their migration policies, the wide discretional power left to them in this field by EU family migration law[17] is problematic in itself. The low standards established at EU level in respect of financial preconditions to enjoy the right to family reunification allow for an uneven and heterogeneous regulation of family reunification within Europe.

The domestic jurisdictions examined in this book mirror such unevenness. On the one hand, the Italian and Spanish regime adopt a holistic view of migrant families, allowing prospective sponsors to rely on the income of other family members in order to comply with financial prerequisites. In Italy, Art. 29(3)(b) of the so-called *Testo Unico Immigrazione* (*T.U.*) specifically establishes that "for the purpose of determining income the total yearly income of the family members living together with the person applying for family reunification must also be taken into consideration".[18] In Spain, Art. 54(4) of *Real Decreto* (R.D.) 557/2011[19] includes

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[16] For instance, on Italy see Daniela Piazzalunga 'Is There a Double-Negative Effect? Gender and Ethnic Wage Differentials in Italy' (2015) 29 Labour 243; OECD, *Lavoro per gli Immigrati: l'Integrazione nel Mercato del Lavoro in Italia* (OECD Publishing 2014)73 –75 <http://www.oecd.org/els/lavoro-per-gli-immigrati-9789264216570-it.htm> accessed 19 April 2016. On Spain, see Concepción Carrasco Carpio 'La Vulnerabilidad Laboral de los Extranjeros en España' (2015) 8 Migraciones Internacionales 41; Hipólito Simón Pérez and Inés Murillo Huertas '¿Sufren las Mujeres Inmigrantes una Doble Penalización Salarial? Evidencia Para España' (2014) 87 Cuadernos Económicos de ICE 85.

[17] The wide discretion enjoyed by Member States as to income requirements was also highlighted in the European Commission's first report on the implementation of the Directive Commission, 'Report from the Commission to the European Parliament and the Council on the Application of Directive 2003/86/EC on the Right to Family Reunification' COM (2008) 610 final, 14.

[18] *Decreto legislativo* of 25 July 1998, No. 286, G.U. No. 191 of 18 August 1998, S.O. No. 139. Art. 29(3)(b) of the T.U. requires sponsors to show availability of a yearly income at least equal to the yearly amount of welfare cheques (5865 Euros for 2016), plus half of this amount for each family member pursuing family reunification.

[19] Real Decreto 557/2011, de 20 de abril, por el que se aprueba el Reglamento de la Ley Orgánica

in this assessment also the income "brought by the sponsor's spouse or partner, as well as by any other direct family member of first degree, provided that he or she resides in Spain and cohabits with the sponsor".[20] In both domestic orders, it is however unclear whether prospective sponsors may entirely rely on the income of other family members or they must show a certain income of their own. It is also unclear whether the economic thresholds established by Spanish and Italian law may be interpreted with a certain flexibility by implementing authorities.

The United Kingdom, on the other hand, envisages significantly stricter economic prerequisites for prospective sponsors. First, the right to reunification with a non-EEA family member is restricted to British citizens, persons settled in the UK and skilled workers residing in the country under the Points Based System.[21] Second, the financial requirements set by the British Immigration Rules[22] may not be satisfied by relying also on the income of others who live in the same household.[23] When applying this threshold, decision-makers may not exercise any discretion or flexibility.[24] The decision of the United Kingdom to opt out of Directive

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4/2000, sobre derechos y libertades de los extranjeros en España y su integración social, tras su reforma por Ley Orgánica 2/2009. According to Art. 54(1), sufficient economic means amount to a monthly 150% of a fixed income index (the IPREM), plus 50% for each additional family member. Furthermore, Art. 54(2) establishes that residence permits for the purpose of family reunification "will not be issued if it is ascertained beyond any doubt that there is no prospect of maintaining the economic means during the year following the submission of the application". This prospect "will be assessed by taking into consideration the evolution of the sponsor's means for the six months preceding the date of submission of the application".

[20] Art. 18(2) of Ley Orgánica (hereinafter, L.O.) 4/2000 requires prospective sponsors to have "sufficient economic means to provide for his or her needs as well as those of his or her family, once reunited". Pursuant the parameters established by Art. 54(1) of R.D. 557/2011, this sum for 2016 amounts to a monthly income of roughly 785 Euros, plus around 261 Euros for each additional family member for which reunification is pursued.

[21] The current Points Based System was introduced in 2008 and is based on three tiers. Tier 1 targets highly skilled workers such as graduate entrepreneurs and investors, while Tier 2 concerns skilled workers, intra-corporate transferees, ministers of religion and sportspersons. Lastly, Tier 5 targets various categories of temporary workers, including charity workers, creative and sporting workers, workers present under government authorised exchanges, international agreements and youth mobility schemes as well as religious workers. Tier 3, which had been envisaged to attract limited numbers of low-skilled workers to fill specific labour shortages, was never implemented. For an account of the Points Based System, see Georg Menz 'Theorizing About Change: The Promise of Comparative Political Economy for Migration Studies'in Anna Amelina and others (eds) *An Anthology of Migration and Social Transformation: European Perspectives* (Springer 2016), 51 –53.

[22] Immigration Act 1971, reformed by the Statement of Changes in the Immigration Rules 2012. S E-ECP.3.1. of the Act requires a gross annual income amounting at least to £ 18,600, plus additional sums in case of presence of non-EEA or non-settled children.

[23] See Immigration Directorate Instruction, *Family Migration: Appendix FM Section 1.7*, para 4.2.1.

[24] Ibid para 3.2.1.

2003/86 may not be seen as an explanation for its restrictive family migration regime. In fact, setting aside the mentioned restrictions as to their personal scope of application, the economic prerequisites established by its Immigration Rules would be perfectly in compliance with the standards set by the Directive.

The existence of heterogeneous family reunification regimes within Europe raises the question of the proportionality of normative measures that impose income thresholds as a precondition for the enjoyment of this right regardless of the individual circumstances and difficulties of prospective sponsors. More broadly, they involve the delicate balance of interests between the need for host states to ensure that incoming migrants will not excessively weigh on the national social assistance system and migrant families' willingness to live together in the host country. An exclusive focus on productive work and economic thresholds as the only way to satisfy preconditions for the enjoyment of family life in the host country bears disproportionate and negative effects on migrant women's possibilities to access family reunification as sponsors. It may not be realistic, in this context, to argue in favour of a state obligation to grant access to family reunification regardless of the prospective sponsor's financial resources. Nonetheless, the awareness that the balance of these interests may play out in a discriminatory way for migrant women is equally crucial, as it is to enquire on how to resolve this conflict while also ensuring respect of their right to equality and non-discrimination in relation to family life.

The rest of this chapter is devoted to answer this question. It will do so by focusing on specific barriers to migrant women's equal enjoyment of the right to family reunification and testing which interpretative approach is more likely to turn law and courts' attention to such hurdles.

4. *Limitations of an Anti-Stereotyping Understanding of Equality for Migrant Women's Access to Family Reunification*

The issue of the compatibility of normative stereotypes with the principle of equality and non-discrimination has been extensively examined in the European Court of Human Rights' (ECtHR) jurisprudence. The latter examined on multiple occasions domestic norms that more or less explicitly embraced and enforced a stereotypical model of family based on gendered distinctions between productive and reproductive work.

One of its first decisions in this field, the landmark case of *Abdulaziz, Cabales and Balkandali v. the United Kingdom*,[25] concerned precisely normative and stereo-

[25] *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (ECtHR) App no 9214/80, 9473/81 and 9474/81 (28 May 1985) (hereinafter *Abdulaziz, Cabales and Balkandali v. the United Kingdom).*

typical assumptions concerning the role of migrant women within their families. Here, the ECtHR deemed the imposition of stricter conditions only to women aiming to sponsor reunification with their husbands or fiancés (and not to male prospective sponsors) as incompatible with Arts. 8 and 14 ECHR. The justification advanced by the British Government for this rule related to the need to "[protect] the labour market at a time of high unemployment by curtailing 'primary immigration', that is immigration *by someone who could be expected to seek full-time work in order to support a family* [emphasis added]". [26] In the Government's view, indeed, "men were more likely to seek work than women, with the result that male immigrants would have a greater impact than female immigrants" [27] on the national labour market. Such a justification was openly rejected as outdated and inexact by the ECtHR, which recalled that "the impact on the domestic labour market of women immigrants as compared with men ought not to be underestimated". [28] In fact, even before the introduction of the 1980 Rules many migrant wives were economically active. [29]

Nonetheless, there are limitations to the deployment of the ECtHR's anti-stereotyping approach in the field of migration. First, the ECtHR has shown a certain judicial resistance to identify and rebuke stereotypical justification on the grounds of race and ethnicity within migration law. Only recently has the ECtHR abandoned its reticence with its judgment of *Biao v. Denmark*. [30] Second, and more broadly, the potential of this approach with respect to certain instances of indirect discrimination is doubtful. The next two paragraphs will respectively explore these limitations.

4.1. *The ECtHR Approach to Racial and Ethnic Stereotypes in Family Migration Law*

Already in *Abdulaziz, Cabales and Balkandali*, the ECtHR assessed that the imposition of stricter conditions to obtain leave to remain in the United Kingdom exclusively to "non-patrials" [31] were not "racist in character". [32] Their disparate

[26] Ibid 21.

[27] Ibid 75.

[28] Ibid 79.

[29] Ibid.

[30] *Biao v. Denmark* (ECtHR) App no 38590/10 (24 May 2016) (hereinafter *Biao v. Denmark*).

[31] For the purpose of the 1980 Immigration Rules, non-patrials were persons who neither were UK or Colonies citizens who had acquired citizenship at birth, adoption, naturalisation or registration in the British Islands (or were children or grandchildren of such persons) or who had been settled in the British Islands for at least five years, nor were other Commonwealth citizens who were

impact on certain ethnic groups was simply due to the fact that "among those wishing to immigrate, some ethnic groups outnumbered others".[33]

The judicial resistance by the ECtHR to rebuke stereotypical justification on the grounds of race and ethnicity within migration law was also observable in the 2014 Chamber judgment of *Biao v. Denmark*.[34] This case concerned an exception to the so-called "attachment requirement" adopted by the Dutch 2000 Aliens Act. Pursuant this requirement, only couples whose ties with Denmark are stronger than those with any other country are admitted to family reunification. The exception, named the "28-year rule", applies in case the prospective sponsor has been a Danish national for 28 years or is a non-Danish citizen who was born and/or raised in Denmark and has lawfully resided there for at least 28 years. Despite the presence of stereotypical justifications in the preparatory works to the Aliens Act,[35] the second section of the ECtHR deemed appropriate to frame the case at issue as one of differential treatment between persons who had been Danish nationals for more than 28 years and persons who had been so for less than 28 years. As a result, it concluded that the lamented exclusion from the exemption was not disproportionate to the aim pursued, namely to exempt Danish nationals who "seen from a general perspective, had lasting and long ties with Denmark so that it would be unproblematic to grant family reunion with a foreign spouse because it would normally be possible for such spouse to be successfully integrated into Danish society".[36] In their dissenting opinion, Judges Sajó, Vučinič and Kūris criticised such a conclusion, observing that "the impugned differentiation [reflected and reinforced], albeit indirectly, a negative stereotype"[37] and concluding that the more favourable treatment granted to Danish citizens by blood was not a very weighty reason to justify such a discriminatory approach.

The ECtHR's carefulness in distinguishing between nationality and ethnicity as two different discrimination grounds, focusing on the former while setting aside the latter, suggests an unwillingness to restrict the margin of discretion left to

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children of an UK or Colonies citizen by virtue of birth, nor were Commonwealth citizen women who were or had been married to a man falling in these categories.

[32] *Abdulaziz, Cabales and Balkandali* v. *the United Kingdom* 85.

[33] Ibid.

[34] *Biao v. Denmark* (ECtHR) App no 38590/10 (25 March 2014).

[35] Ibid 29. The explanatory notes to the Act referred to alleged difficulties of integration for families "where generation upon generation fetch their spouses to Denmark from their own or their parents'country of origin", as shown by "experience". The notes maintained that this "widespread marriage pattern" among resident aliens and Danish nationals of foreign extraction "contributes to retention of these persons in a situation where they, more than others, experience problems of isolation and maladjustment in relation to Danish society".

[36] Ibid 106.

[37] *Biao v. Denmark*, Joint Dissenting Opinion of Judges Sajó, Vučinič and Kūris, 16.

States Parties in the field of migration control. It has been rightly observed that the prioritisation of migration control in the European Union has also fostered "an extreme caution about conflating race with nationality in the sense of allowing anti-discrimination legislation to impact on nationality-based distinctions provided for by migration laws and policies".[38]

In 2016, however, the Grand Chamber reversed the assessment of the second section, identifying a disparate impact of the rules at issue on Danish citizens of non-Danish ethnic origin. Despite the unavailability of statistics on the allegedly disproportional prejudicial effect of the 28-year rule on this group, it established that it could be reasonably assumed that Danish citizens born and raised in Denmark would be of Danish ethnic origin – while those who acquired citizenship later in life would be of foreign ethnic origin. Thus, the 28-year rule indirectly favoured the former.

The ECtHR observed that the aim of the 28-year rule – as emerging from its preparatory works – was to allow Danish expatriates to return to Denmark and obtain family reunification there. Moreover, the extension of the attachment requirement to Danish citizens was justified in the preparatory works as a way to foster the integration of those among them who were originally of foreign extraction. In the Government's view, indeed, the latter showed a tendency to marry persons from their country of origin, and this in turn allegedly hampered their integration. Recalling the principles established in *Konstantin Markin*,[39] the ECtHR rejected such justifications as stereotypical. These biased assumptions therefore could not justify the difference in treatment at the disadvantage of naturalised Danish citizens. Since it was not possible to identify other very weighty reasons unrelated to race and ethnic origin, the ECtHR recognised a breach of Art. 14 in conjunction with Art. 8 ECHR.

Despite this important development, it remains to be seen whether this newly found judicial awareness of the indirectly discriminatory effects of racial stereotypes in family migration law will expand to instances of intersectional discrimination. In fact, in a series of inadmissibility decisions concerning transnational parents' access to family reunification with their children, the ECtHR enforced stereotypical notions concerning migrant families and parental roles within it. In particular, the ECtHR was repeatedly asked to assess whether the Dutch policy of rejection of family reunification applications – on the grounds that the involved children no longer "actually [belonged] to the family unit"[40] – breached Art. 8

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[38] Mathias Möschel and others (eds) *Fighting Discrimination in Europe: the Case for a Race-Conscious Approach* (Routledge 2013) 6.

[39] *Konstantin Markin v. Russia.*

[40] For a critical review of the Dutch Aliens Act in force at the time, see Sarah Van Walsum 'Against All Odds: How Single and Divorced Migrant Mothers were Eventually able to Claim their Right to Respect for Family Life' (2009) 11 European Journal of Migration and Law 295, 299.

ECHR. A critical comparison between decisions concerning single mothers [41] and single fathers [42] in this context reveals an implicit enforcement by the ECtHR of stereotypical views of immigrant men and women's parental duties and responsibilities. Despite the fact that all of such claims were deemed inadmissible, only the decisions concerning single mothers included a detailed and ultimately negative assessment of aspects such as their decision to emigrate leaving young children behind, the need of care of the latter, as well as the eventual opposition of a new partner to an earlier reunification. [43]

These features are also present in the recent inadmissibility decision of *I.A.A. v. the United Kingdom*, [44] where the ECtHR analysed the application of five Somali siblings – some of whom still minors – against the refusal of the United Kingdom to grant them entry in the State for the purpose of family reunification with their mother. In assessing whether the British Government had struck a fair balance of interests in the case at issue, the ECtHR focused on the question of whether the involved mother had always intended to have her children join her in the United Kingdom. In this context, it reprimanded her "conscious decision to leave her children in Somalia in order to join her new husband in the United Kingdom, knowing that he would not agree to the children joining them". [45] The ECtHR did not accept the argumentation submitted by the applicants whereby the mother had left Ethiopia to flee an armed conflict, and framed her emigration as a choice to pursue a new relationship over enjoying family life with her children in Somalia.

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[41] *Knel and Veira v the Netherlands* (ECtHR) App no 39003/97 (5 September 2000); *P.R. v the Netherlands* (ECtHR) App no 39391/98 (7 November 2000); *I.M. v the Netherlands* (ECtHR) App no 41226/98 (25 March 2003); *Chandra and Others v the Netherlands* (ECtHR) App no 53102/99 (13 May 2003); *Ramos Andrade v the Netherlands* (ECtHR) App no 53675/00 (6 July 2004); *Benamar and Others v the Netherlands* (ECtHR) App no 43786/04 (5 April 2005).

[42] *Ahmut v the Netherlands* (ECtHR) App no 21702/93 (28 November 1996); *Mensah v. the Netherlands* (ECtHR) App no 47042/99 (9 October 2001); *Lahnifi v the Netherlands* (ECtHR) App no 39329/98 (13 February 2001); *Adnane v the Netherlands* (ECtHR) App no 50568/99 (6 November 2001).

[43] The only successful case in this context, *Tuquabo-Tekle and others v. the Netherlands* (ECtHR) App no 60665/00 (1 December 2005) does not undermine this conclusion. It is indeed true that in this case the ECtHR recognized a violation of a single transnational mother's right to family life under Art. 8 ECHR, establishing that the national authorities had "failed to strike a fair balance between the applicants' interests on the one hand and [their] own interest in controlling immigration on the other" (Ibid 52). However, in doing so it did not abandon the described gendered and abstract model of "good mother". In fact, the ECtHR was able to reach this conclusion because the applicant mother involved in this case actually complied with such a model. She was a widow who had escaped a civil war in Ethiopia, who had experienced factual difficulties in knowing the whereabouts of her children left behind, and who had met her second husband only after applying for family reunification with them.

[44] *I.A.A. v. the Netherlands* (ECtHR) App no 25960 (31 March 2016).

[45] Ibid 13.

Accordingly, her two-year wait after the separation from her second husband was not considered as motivated by the need to gather the necessary financial resources to support a family reunification application for five children, but rather as a further indication of her lack of motivation. Lastly, the assessment of her reasonable prospects to relocate to Ethiopia did not give a decisive weight to her degree of integration in the United Kingdom.

In sum, the ECtHR has consistently rejected gender stereotypes concerning women's role within the family.[46] However, it has done so exclusively in respect to citizen women, implicitly reaffirming them in the field of family migration. Family reunification implies a certain degree of scrutiny by implementing authorities and judicial organs in the private realm of the family. Nonetheless, the imposition of a gendered model of proper parent on migrant women alone produces discriminatory effects on the intersecting grounds of sex, race/ethnic origin and migrant status. There is indeed no trace in the ECtHR jurisprudence of a similar model for immigrant fathers or for citizen women.

The intersectional character of the stereotypical views enforced by the ECtHR is key to explain why migrant women have so far not benefited from the anti-stereotyping notion of equality increasingly deployed by the ECtHR. Migrant women are placed at the intersection of many grounds of discrimination. This does not simply foster their socio-economic disadvantage, but it also influences the awareness and responsiveness of legislators and courts to such a disadvantage. More broadly, the ECtHR has so far shown a very limited engagement with issues of intersectional discrimination on the grounds of ethnic origin and gender, even beyond the issue of normative stereotyping.[47] In the cases of *Osman v. Denmark*[48] and of *C.N. and V. v. France*,[49] for instance, the ECtHR recognised violations of ECHR rights but failed to capture the intersections of age, gender and ethnic origin that grounded the abuse suffered by the applicants.[50]

4.2. *Limited Potential of the Anti-Stereotyping Approach with Respect to Substantive Equality in the Field of Family Life*

A second and more structural limitation of the ECtHR's understanding of equality as an anti-stereotyping norm concerns its effectiveness in respect of certain instances of indirect discrimination . Such an approach, indeed, is unequipped to cap-

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[46] *Marckx v. Belgium*; *Konstantin Markin v. Russia*; *Vrountou v. Cyprus*.

[47] Siobhán Mullally 'Migration, Gender, and the Limits of Rights' 172.

[48] *Osman v. Denmark* (ECtHR) App no 38058/09 (14 June 2011).

[49] *C.N. and V. v. France* (ECtHR) App no 67724/09 (11 October 2012).

[50] Siobhán Mullally 'Migration Gender, and the Limits of Rights' 172.

ture and correct discrimination that stems not from normative stereotyping, but from apparently neutral norms that fail to take into consideration the specific disadvantage of certain groups. Substantive sex equality, indeed, may require a different treatment of women – or of certain groups of women – in a different situation in order to remedy a disadvantage disproportionally experienced by them. In fact, a strict anti-stereotyping approach can preclude the recognition of such a disadvantage by barring broad judicial claims concerning women's needs and difficulties. [51]

These limitations have emerged in the few occasions where the ECtHR has dealt with claims concerning income requirements imposed by domestic laws as a precondition for the enjoyment of certain rights. The decision of *Haydarie v. the Netherlands*, [52] for instance, declared inadmissible a claim of violation of the right to family life under Art. 8 ECHR submitted by an Afghan woman against the decision of the Dutch authorities to deny her family reunification. Both the domestic authorities and the ECtHR assessed that the applicants' specific situation, as the carer of her disabled sister who refused the aid of strangers, did not constitute a special circumstance that could grant an exception to the rules at issue.

More recently, in the case of *Garib v. the Netherlands*, [53] the ECtHR established that the refusal of a housing permit to a Dutch woman (Ms Garib) due to her failure to meet income requirements constituted a proportionate measure and thus did not breach her freedom to choose her residence under Art. 2 of Prot. No. 4 ECHR. The ECtHR agreed with the Netherlands that Ms Garib's situation did not allow for any exemption. [54] The dissenting opinion of Judges López Guerra and Keller, on the other hand, highlighted that the applicant in this case was a single mother of two children entirely relying on social welfare benefits. In their view, the discussed income-based restriction did create "discrimination based on race and gender, since the people most gravely affected by unemployment are immigrants and single mothers". [55] They therefore assessed that the denial of a housing permit to Ms Garib was a measure neither necessary in a democratic society nor proportionate.

In the discussed cases an anti-stereotyping understanding of equality could not have prompted a wholesome judicial consideration of the obstacles and difficulties

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[51] Ruth Rubio Marín 'A New European Parity-Democracy Sex Equality Model and why it won't fly in the United States' 123.

[52] *Haydarie and others v. the Netherlands* (ECtHR) App no 8876/04 (20 October 2005) (hereinafter *Haydarie and others v. the Netherlands*).

[53] *Garib v. the Netherlands* (ECtHR) App no 43494/09 (23 February 2016) (hereinafter *Garib v. the Netherlands*).

[54] In the ECtHR's view, Ms Garib had failed to show that her situation fell within the scope of the so-called "hardship clause" of the Inner City Problems (Special Measures) Act, which allowed an exemption from income requirements whenever denying housing "would lead to iniquity of an overriding nature" (Ibid 18).

[55] *Garib v. the Netherlands*, Joint Dissenting Opinion of Judges López Guerra and Keller, 18.

experienced by the applicants, as single mothers with no income of their own and significant care burdens. On the other hand, a judicial consideration of the influence of these factors on the applicants' freedom of choice would have unveiled the indirectly discriminatory character of apparently neutral income requirements and prompted the ECtHR to consider possible violations of their right to substantive equality. These considerations point to the notions of equality as capability and of relational self, proposed within U.S. scholarship respectively by Martha Nussbaum and Jennifer Nedelsky. The next paragraph will examine the issue of migrant women's access to sponsorship of family reunification in the light of this theoretical background.

5. *The Capabilities Approach and Migrant Women's Equal Access to Family Reunification*

In the field of family reunification, a capabilities approach would not lead to a complete exclusion of financial considerations from the balance of the interests involved in decisions concerning admission to sponsorship. Similarly, it would not ensure the possibility for anyone to sponsor family reunification regardless of their capability to ensure decent standards of living to their incoming family members. Rather, it would support a judicial awareness of structural burdens affecting certain categories of prospective sponsors, encouraging as far as possible an extensive judicial interpretation of income requirements established by family migration law. This, in turn, can lead to the emergence of alternative models of "deserving sponsor" of family reunification, granting unpaid care work performed within the family with the same value of productive work while also respecting States' interest to protect their national social assistance systems.

A judicial interpretation considering migrant women as legal subjects in context rather than isolated individuals – and thus also as individuals whose freedom of choice and capability of self-determination is affected by relationships of care and responsibilities – is likely to foster a stronger judicial awareness of the disparate impact of norms that overlook their specific needs and difficulties. This is not to say that migrant women are exclusively devoted to reproductive work within the family. This argumentation should not be understood as a call for an exclusive judicial promotion of this type of activity at the disadvantage of other models, including one of economically active migrant woman. Rather, in order to fully realize substantive equality in relation to the right to family life, courts should also take into account unpaid care work and the related responsibilities in order to realize that certain norms that link access to rights to compliance with a rigid breadwinner model disproportionally and negatively affect women. Understood in this

sense, a judicial valorisation of unpaid care work as one of the possible gateways to access family reunification will benefit those devoted to this type of activity without taking away rights and entitlements from those migrant women who perform productive work – and push courts to device alternative solutions to balance the interests at play. In fact, such an approach is likely to benefit migrant women who aspire to sponsor family reunification regardless of whether they carry out unpaid care work, paid employment or a likely mixture of the two activities. The next section will further illustrate these points by critically reviewing meaningful judicial examples within the domestic jurisdictions of Italy, Spain and the United Kingdom.

Before moving on, however, it is important to clarify that considering migrant women in the context of their family relationships does not deny their individuality as legal subjects. The view proposed here does not share Nedelsky's criticism of Nussbaum, concerning the latter's supposed focus on the individualistic self. While it is true that Nussbaum emphasized the importance of considering the capabilities of each woman as an isolated entity, this proposition did not intend in my view to deny the centrality of her network of relationships and responsibilities. Rather, this choice stemmed from the consciousness that too often women had disappeared from the radar of social justice goals because they had been considered as fused with such networks rather than as individuals of their own. Let us consider, in this respect, Nussbaum's observations concerning the family, whereby:

> "(…) all too often, women have been denied the basic goods of life because they have been seen as parts of an organic entity, such as the family is supposed to be, rather than as political subjects in their own right (…), as reproducers and caregivers, rather than as ends in themselves". [56]

In fact, Nussbaum's capabilities approach – by encouraging a stronger consideration of the concrete circumstances that affect women's freedom of choice – inevitably pushes their relationships and care responsibilities to the foreground. One of her aims, indeed, was to enquire on how law and public policy shape and should shape families. In Nussbaum's view, "the capabilities approach (…) actually provides the best framework within which both to value care and to give it the necessary scrutiny", because it was "explicitly committed to a prominent place for love and care as important goals of social planning and as major moral abilities". [57] Disproportionate care burdens are still a reality for many migrant women, and the acknowledgment of this fact in judicial interpretation is crucial for the enjoyment of their right to family life in conditions of equality and non-discrimination.

At the same time, one must be aware of the possible pitfalls of linking migrant

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[56] Martha C. Nussbaum *Women and Human Development: the Capabilities Approach* 247.

[57] Ibid 244.

women's enjoyment of human and fundamental rights to their performance of unpaid care work within the household. Precisely because the aim of this proposed interpretative solution is to protect their right to equality and non-discrimination, it is crucial to avoid a consideration of reproductive work as the only gateway to the enjoyment of their right to family life. If that was the case, migrant women would be pushed into unpaid care work, with the result of narrowing their capabilities of choice in this realm and of marginalizing those who carry out productive work outside of the household.

6. *Income Requirements Under the Scrutiny of Domestic Courts*

As noted at the beginning of this chapter, Italian and Spanish family reunification laws allow prospective sponsors to rely on the income of other family members who cohabit with them in order to comply with financial prerequisites establishes therein. Such provisions reveal an interesting relational consideration of sponsors in the broader contexts of their families, and in turn a holistic view of their families as a unit where every member contributes to the general well-being. These norms, however, leave unanswered the question of whether subjects entirely devoted to unpaid care work could be admitted to sponsor family reunification by relying on the income of other family members.

Interestingly, this question was answered in the positive by Italian and Spanish courts even before the adoption of the current family migration schemes. In Spain, for instance, the *Tribunal Superior de Justicia* of Castilla y León [58] was asked to perform an extensive interpretation of Art. 18(2) of the *L.O.*, which at the time only provided for the possibility to rely on the income of a cohabiting spouse. The applicant in this case was a Colombian mother of four with three different jobs as domestic worker. Her total salary of 1,300 Euros per month had led to the rejection of her application for family reunification with her son on the grounds that she did not comply with income requirements. In this case, the *Tribunal* held that the constitutional principles of protection of the family and of minor children demanded an extensive interpretation of this norm, whereby the applicant could rely on the income of her cohabiting adult children to comply with income requirements. Significantly, such a conclusion was prompted by a judicial consideration of Ms Laura's family as "a fully organised and structured family unit with an actual rootedness in Spain". [59]

Italian jurisprudence, on its part, offers an array of judicial interpretations of in-

[58] *Tribunal Superior de Justicia de Burgos* (Judgment) 388/2012 (20 July 2012).

[59] Ibid.

come requirements through a more or less conscious approach based on capabilities. First, Italian courts have granted access to family reunification to migrant women who exclusively performed unpaid care work within the household. Such judicial interpretations confirm the existence of a strict link between the capabilities approach and the relational understanding of the legal subject. While Italian courts did not explicitly face the issue of capabilities in these cases, they did choose to consider the involved applicants in the broader context of their family relationships. This angle, in turn, turned the courts' attention towards the meaning of such relationships *vis-á-vis* the applicants' compliance with purely economic requirements.

In Italy, higher and lower courts have carried out such judicial interpretations ever since 1995. In this year, the Italian Constitutional Court assessed the case of a Brazilian woman (Ms. De Castro Carvalho) whose application for family reunification with her son had been rejected on the grounds of the fact that, "being a homemaker, she did not carry out any employed activity". [60] The applicable norms at the time indeed granted the right to family reunification to "third-country national workers". [61] The Constitutional Court assessed that the correct interpretation of this norm necessarily had to go beyond its literal text and consider the right to family reunification as also attributed to homemakers. Interestingly, this view was not simply grounded on the fundamental right to family life pursuant Arts. 29 and 30 of the Constitution, but also on the state obligation to "protect work in all its forms and practices" established by its Art. 35. This interpretative choice stemmed from the observation that work performed within the family, due to its social and economic value and notwithstanding its peculiarities, came under the scope of "all forms of work" protected by Art. 35. Indeed, care work

> "is a kind of working activity which has already been recognised as of social and economic value, also because of the undeniable benefits that the entire community draws from it and at the same time of the burdens and responsibilities that derive from it and that even at present time almost exclusively weigh on women (also due to widespread phenomena of unemployment)". [62]

As a result, the Constitutional Court assimilated care work with employment for the purpose of family reunification, allowing Ms. De Castro Carvalho to access family reunification with her children.

The commented Constitutional Court judgment also prompted a lower court – the Tribunal of Bologna – to reject as "unreasonable" a restrictive interpretation of domestic family reunification law excluding from its scope third-country national

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[60] Italian Constitutional Court (Judgment) 28/1995 (12 January 1995).

[61] *Legge* of 30 December 1986, No. 943 G.U. No. 8 of 12 January 1987. See in particular Art. 4(1).

[62] Ibid 1 of Legal Grounds.

homemakers with no personal income. In the Tribunal's view, such an interpretation would be discriminatory, since

> "it would appear to be constitutionally illegitimate to allow family reunification with children to the foreign woman who works outside of the home and to deny it to the foreign woman who carries out her homemaker activity, granting practical and material support to entire families". [63]

On a more general level, Italian jurisprudence offers plenty of examples of holistic consideration of third-country nationals within the broader context of their families and of the host society. The described judicial approach has indeed expanded beyond the family reunification realm, permeating areas such as access to citizenship and renewal of residence and work permits. Italian administrative tribunals (TARs) have for instance established that the evaluation of the economic capacity of prospective citizens should also take into account other factors. Thus, for instance, the eventual income gained after the submission of their application must be considered, in the light of "the difficulties experienced by foreigners in finding an appropriate source of income in their first years of residence". [64] Even more significantly, the *Consiglio di Stato* has reversed Italian authorities' rejection of citizenship applications submitted by third-country national women on the grounds that they did not have an independent income. Such decisions were indeed deemed illegitimate in the light of Art. 35 of the Constitution, due to the authorities' failure to recognise unpaid care work as actual work. [65] Lastly, in respect to renewals of residence and work permits, the *Consiglio di Stato* has consistently established that applications for this purpose must be assessed in the light of the personal and family situation of the permit's holder. [66] In its view, this contextual assessment is also demanded by Art. 8 ECHR. The adoption of this judicial angle has allowed the *Consiglio* to consider in this context not only the presence of children and spouses on the national territory, but also the presence of cohabiting family members who contribute financially to the family's well-being.

Differently than in Italy and Spain, in the United Kingdom the possible discriminatory effects of income requirements within family reunification law has been underexplored until recently. In the case of *MM and R v. the Secretary of*

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[63] Tribunal of Bologna (Order) (14 November 2002).

[64] *Tribunale Amministrativo Regionale* (hereinafter, TAR) Lazio (Judgment) 8663/2013 (7 October 2013); TAR Lazio (Judgment) 3587/2014 (1 April 2014).

[65] *Consiglio di Stato* (Judgment) 5207/2005 (3 May 2005); *Consiglio di Stato* (Judgment) 3306/2012 (5 June 2012).

[66] *Consiglio di Stato* (Judgment) 7200/2010 (29 September 2010); *Consiglio di Stato* (Judgment) 1233/2015 (10 March 2015); *Consiglio di Stato* (Judgment) 2699/2015 (29 May 2015).

State for the Home Department,[67] the England and Wales High Court was submitted, among other issues, with two key questions.[68] Both relate to the £18,600 income requirement imposed as a precondition to sponsor family reunification. First, one of the applicants – Ms. Javed, a British citizen of Pakistani origin – argued that as a British Asian woman, it was virtually impossible for her to satisfy the £18,600 threshold. Therefore, she argued that this income requirement was unjustifiably discriminatory, referring to socio-economic data that showed how this group experiences significantly lower rates of pay and employment than men. Second, two of the applicants (Ms. Javed and Mr MM, a Lebanese refugee) pointed out that the impossibility to rely on the incoming spouse's earning potential in the UK was also discriminatory and unjustified.

In respect to the first issue, the High Court held that the rules were not unlawfully discriminatory in the light of Arts. 8 and 14 ECHR. While the disproportionate impact of the economic threshold on certain categories of migrants – particularly women – was acknowledged,[69] it was ultimately assessed that it would be "both impractical and inappropriate" to make provision for such a differential impact in the law itself. On the other hand, the Court held that the impossibility to rely on the earning capacity of the admitted spouse for the first thirty months of residence in the UK was "both irrational and manifestly disproportionate in its impact on the ability for the spouses to live together".[70] Incidentally, the Court noted that – although it had rejected the claim of gender discrimination – "the discriminatory impact of the new rules would be significantly reduced if the earning capacity of the female sponsor's spouse could be taken into account".[71]

This High Court judgment was then overturned by the England and Wales Court of Appeal.[72] The latter confirmed the justified character of the indirect dis-

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[67] England and Wales High Court, *MM, R (On the Application Of) v The Secretary of State for the Home Department* [2013] EWHC 1900 (Admin) (05 July 2013) (hereinafter, *MM, R (On the Application Of) v The Secretary of State for the Home Department*).

[68] While the applicants in this case were two British citizens of Pakistani origin and a Lebanese refugee, the issues raised before the High Court touch upon relevant aspects for third-country national migrant women as well.

[69] *MM, R (On the Application Of) v The Secretary of State for the Home Department* 112.

[70] Ibid 137.

[71] Ibid 138. In consideration of the gender pay gap in the UK and of the greater use of part time work or flexible working arrangements to accommodate other family responsibilities, allowing women sponsors to rely on the earning potential of their husband would indeed help them satisfy the income threshold. Similarly, the Court observed that "the encouragement of a female spouse of a male sponsor to enter the workforce of the UK shortly after arrival is likely to make a positive contribution to the legitimate aim of better integration".

[72] England and Wales Court of Appeal, *MM & Ors, R (On the Application Of) v Secretary of State for the Home Department* (Rev 1) [2014] EWCA Civ 985 (11 July 2014).

crimination originating from the income threshold in the light of Art. 14 ECHR,[73] but held that it was not appropriate for a court to make determinations with respect to appropriate levels of income required to prospective sponsors.[74] It thus concluded that the High Court's finding of incompatibility of the minimum income requirements with Art. 8 ECHR was incorrect. It remains to be seen whether the Supreme Court – before which this case is currently pending[75] – will share this interpretation.

The discussed case law conveys the crucial and topical character of the issue of proportionality of financial requirements imposed as a precondition to enjoy family life in the host country. In the search of an equitable balance of interests in this matter, Spanish, Italian and British courts have stumbled upon key questions for migrant women's equal access to family reunification. Such questions involve the value that law must assign to unpaid care work within the family, and whether the latter should be recognised with the same value and dignity of productive work for the purpose of accessing rights and entitlements in the host country. Another key issue that emerges from the examined case law concerns the weight that should be given to socio-economic constraints that affect the earning capacity of certain groups in the assessment of the proportionality of income requirements. In particular, the objective difficulties in this area experienced by immigrants, ethnic minorities, women and single parents have been repeatedly brought to domestic courts' attention.

All of these aspects suggest the benefits of adopting a capabilities approach in judicial interpretation. When the considered domestic courts analysed income requirements through the lens of capability, the hurdles disproportionally experienced by migrant women in complying with them came to the fore. As a result, obstacles related to care burdens, labour market segregation and pay gaps were included in their assessment of the proportionality of said requirements. As shown by the High Court judgment of *M.M. and R.*, the latter did not always result in a recognition of the indirect discrimination stemming from income requirements. Nonetheless, at the very least it prompted judicial reflections on the possibility for extensive interpretations of family reunification legislation, so as to take into account structural disadvantage experienced by migrant women or women of immigrant origin.

Remarkably, in Italy the judicial consideration of migrant women as individuals in context led also to a valorisation of their unpaid care work as a gateway to enjoy rights and entitlements generally dependent on compliance with financial requirements. Differently than what occurred in the *Haydarie* case before the EC-

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[73] Ibid 155 – 159.

[74] Ibid 149 –153.

[75] United Kingdom Supreme Court, *R v. Secretary of State for the Home Department*, UKSC 2015/0011.

tHR, whether or not such work was performed as a choice became then irrelevant. The state obligation to protect work in all its forms established by Art. 35 of the Italian Constitution was indeed interpreted as including reproductive and productive work alike within its scope of application. As a result, the contribution of the involved migrant women to the well-being of their families and of Italian society was seen not only as a "major moral ability" (to quote Nussbaum)[76] but also as directly relevant from a strictly legal point of view.

7. *Concluding Remarks*

This chapter has analysed the discriminatory effects of the male breadwinner model that is currently predominant in EU family migration law. Migrant women in Europe have emerged as doubly affected by such indirect discrimination – both as sponsored family members and as prospective sponsors. This chapter has mainly focused on the latter. It has unveiled how strict income requirements imposed as a precondition for the enjoyment of family life in the host country indirectly discriminate against migrant women, because they fail to address common factors of structural disadvantage (such as labour market segregation, wage gap, and so forth). The low EU standards in this field allow for a great unevenness between Member States' domestic legislation on the matter. Diverging solutions therefore exist at domestic level concerning the balance between the state interest to migration control and migrants' interest to enjoy family life in the host country.

This chapter has explored different judicial interpretations at ECtHR and domestic level in order to understand which concept of sex equality is best equipped to ensure that such a balance of interest does not play out at the specific disadvantage of migrant women. On the one hand, it has discussed the limitations of the anti-stereotyping approach increasingly adopted by the ECtHR in respect to the goal of ensuring migrant women's equal enjoyment of family life in the host country. The very recent opening of the ECtHR to the recognition of racial stereotypes in the *Biao* case[77] does not overshadow the evident double-standards underlying its jurisprudence concerning migrant women. The ECtHR's case law on transnational mothers (including the latest *I.A.A.* judgment)[78] does not simply reveal its difficulties in identifying instances of intersectional discrimination, but also shows how courts themselves can enforce discriminatory stereotypes. More broadly, the anti-stereotyping approach appears unequipped to effectively tackle instances of

[76] Martha C. Nussbaum *Women and Human Development: the Capabilities Approach* 244 – 245.

[77] *Biao v. Denmark.*

[78] *I.A.A. v. the United Kingdom.*

substantive inequality such as those emerging from the cases of *Haydarie*[79] and *Garib*.[80]

On the other hand, an interpretation of equality as capability and of legal subjects as relational has been observed to produce fruitful results at domestic level, particularly within Italian jurisprudence. Regardless of the consciousness of the adoption of such an approach, this perspective allowed migrant women's specific difficulties and hurdles to emerge in judicial discourses, and thus unveiled the indirectly discriminatory character of norms that overlook such burdens. This, in turn, supported extensive interpretations of applicable rules which protect the host State's interest to preserve its social assistance system, without completely undermining migrant women's right to family life. In the Italian case, it is important to stress that the discussed interpretative processes often relied on constitutional rights (the right to family life under Arts. 29 and 30 of the Constitution, and most importantly the principle of protection of all forms of work under its Art. 35).

At the same time, the discussed approach promotes a judicial valorisation of unpaid care work beyond outdated and unrealistic tropes on motherhood. It skips legal judgments on the quality of transnational mothering – whereby the very act of emigration is considered as a suspect denial of a specific, desirable type of maternal care. Instead, the focus on capabilities shines a light on the socio-economic importance of unpaid care work within the household for the family as well as the host society's well-being. By doing so, this approach allows human rights to play a transformative role. It indeed turns an obstacle to compliance with legal prerequisites for the purpose of family reunification – i.e., disproportionate care burdens – into a ground to successfully argue against strict and indirectly discriminatory economic thresholds.

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[79] *Haydarie v. the Netherlands.*

[80] *Garib v. the Netherlands.*