



University  
of Glasgow



Economic  
and Social  
Research Council

## **POLICY BRIEFING**

# **Caring on the Move: The Forgotten Angle**

## **The Gender Care Gap and Intra-EU mobility**

Dr Nina Miller

University of Glasgow School of Law

August 2022

# **1. Introduction**

## **2. Context**

2.1 The Gender Care Gap

2.2 The Gender Care Gap and EU law

2.3 The Gender Care Gap and Intra-EU mobility

## **3. Background**

3.1 EU Free Movement of Persons Rules

3.2 EU Free Movement of Persons Rules and Unpaid Care

## **4. Research Methods**

## **5. Findings**

5.1 Individual rights - Gender and Care “In the Shadows”

5.2 Derivative Rights - Rights, Care and Family Relationships - Deepening Dynamics of Dependency

5.3 Mobilising Civil Society - Gender and Care and the Lived Experience of Union Citizenship

## **6. Recommendations**

## **7. About Dr Nina Miller**

## 1. INTRODUCTION

There are over 16 million EU citizens living or working in an EU Member State other than their country of citizenship. This policy brief addresses the question of whether women and men enjoy EU free movement equally. It does so by evaluating the free movement rules in the context of the gender care gap. The “gender care gap” refers to the disproportionate allocation of unpaid care work between women and men and its significance for amongst other things, the gender pay gap, gender employment gap and gender pension gap. The EU has shown leadership in taking measures intended to respond to the gender care gap however, these measures are largely restricted to rights in the workplace and to the field of EU Social Policy.<sup>1</sup> Caring needs and caring relationships occur throughout the life-course and they exist and are perhaps more challenging in the context of mobility where seeking formal and informal support can be more complex. The research outlined in this policy brief demonstrates that the free movement rules neglect the reality of care in the context of EU citizenship and that this has a detrimental impact on women’s ability to access free movement rights and protections. This is an urgent problem for millions of EU citizen families, both those with caring responsibilities and those being cared for, including children. The structure, interpretation and implementation of the EU free movement rules mean that when one’s circumstances involve caring responsibilities or a combination of unpaid care and economic activity, the quality of EU law rights and protections diminish.

The EU institutions along with an active EU civil society have demonstrated vision and leadership in creating the rights-based EU free movement regime which is a

---

<sup>1</sup> Through a combination of soft law measures and individual rights in the field of EU Social Policy the EU has played an active role in engaging with the gendered impact of the unequal distribution of unpaid care work. See for example, Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive, 2010/18/EU, O.J. L 188, 12.7.2019. See also, Busby and James, ‘Regulating Work and Care Relationships in a Time of Austerity: A Legal Perspective’ in Lewis S and others, *Work-Life Balance in Times of Recession, Austerity and Beyond* (2018); Caracciolo di Torella and Masselot, *Reconciling Work and Family Life in EU Law and Policy*, (Palgrave Macmillan, 2010); Caracciolo di Torella; Masselot, “*Caring Responsibilities in European Law and Policy Who Cares?*”, (2020, Routledge); Isailovic, ‘Gender Equality as Investment: EU Work-Life Balance Measures and the Neo-Liberal Shift’ (2021) 46 *Yale J Int’l L* 277.

core element of EU citizenship and a symbol of the EU project's success. However, the research discussed in this policy brief will demonstrate that currently EU citizenship, as far as it is manifested in the free movement rules, is upholding a regressive gender order. It entrenches the gendered roles associated with unpaid care and prevents women from benefitting from the full range of rights and protections associated with EU citizenship.

This policy briefing draws on research that is based on the lived experience of women with caring responsibilities who are exercising their free movement rights. It is intended to increase the visibility of the issues surrounding the gender care gap in the context of intra-EU mobility. It is also intended to mobilise stakeholders, including amongst others, EU civil society and the legislative and policy making institutions of the EU. It calls on the EU institutions and EU civil society to further develop the evidence base of the gendered dimension of EU free movement of persons. Ultimately, this policy brief recommends that - on the basis of further, co-produced evidence - a 'rights review' be conducted so that an action plan can be developed that will ensure the equitable enjoyment of Union citizenship between women and men.

## 2. CONTEXT

### 2.1 The Gender Care Gap

What is care? "Care work", as defined by the European Institute of Gender Equality (EIGE), means "all activities and occupations that directly or indirectly involve care processes and entail 'the provision of personal services to meet those basic physical and mental needs that allow a person to function at a socially determined acceptable level of capability, comfort and safety'".<sup>2</sup>

What is the Gender Care Gap? Data gathered by EIGE found that, taking the EU population as a whole, "almost all women in the EU (92 %) are regular carers (i.e.

---

<sup>2</sup> As defined by the European Institute of Gender Equality (EIGE), using Himmelweit's formulation. See European Institute for Gender Equality, "*Gender inequalities in care and consequences for the labour market*", (Luxembourg: Publications Office of the European Union, 2021), doi:10.2839/074, page 9.

provide at least one form of unpaid work at least several days a week) and 81 % are daily carers (compared with 68 % and 48 % of men, respectively)".<sup>3</sup> The impact of the unequal distribution of unpaid care work on women is complex affecting many aspects of women's lives.<sup>4</sup> Perhaps most overtly it impacts women's relationship with the labour market. Relative to men, women are employed less. In 2017, the employment rate of working aged women (20 - 64 years) in the EU was 11.5 percent lower than that of men.<sup>5</sup> The employment gap is notably greater for mothers and women with caring responsibilities, with parenthood having a negative impact on women's employment but boosting men's employment rate, in nearly all European countries.<sup>6</sup> The EIGE Gender Equality Index 2019 Work Life Balance report noted in this regard, that, "the disproportionate weight of care duties on mothers limits their participation in or forces their withdrawal from the labour market."<sup>7</sup>

## 2.2 The Gender Care Gap and EU law

The "Gender Care Gap" is enjoying a prominent place on the policy agenda of the EU institutions, signalled by *inter alia*, the adoption of the Work Life Balance Directive for parents and carers 2019/1158,<sup>8</sup> the Council Conclusions on "Tackling the Gender Pay Gap: Valuation and Distribution of Paid Work and Unpaid Care Work",<sup>9</sup> and the European Commission's Gender Equality Strategy 2020-2025 which focuses on "closing the gender care gap".<sup>10</sup> Quite how prominent the gender care gap currently is is remarkable, however the history of EU engagement with the

---

<sup>3</sup> EIGE "Gender inequalities in care and consequences for the labour market", note 2 p15.

<sup>4</sup> See for example, EIGE "Gender inequalities in care and consequences for the labour market", note 2; Davaki, "Differences in men's and women's work, care and leisure time", pp.15 - 28; Study for the FEMM committee, Directorate-General for Internal Policies of the Union (European Parliament), 2016, this document is available on the internet at: <https://op.europa.eu/en/publication-detail/-/publication/97c41fae-9440-11e7-b92d-01aa75ed71a1>.

<sup>5</sup> Eurostat, "Gender-employment gap", (online data code tesem060), (Eurostat, 2017).

<sup>6</sup> European Institute for Gender Equality (EIGE) "Gender Equality Index 2019 Work-life balance", available at <https://eige.europa.eu/publications/gender-equality-index-2019-work-life-balance> p. 33.

<sup>7</sup> EIGE, "Gender Equality Index 2019 Work-life balance" note 6, p. 33.

<sup>8</sup> Work Life Balance Directive (EU) 2019/1158

<sup>9</sup> 13584/20 Council Conclusions on Tackling the Gender Pay Gap: Valuation and Distribution of Paid Work and Unpaid Care Work, Council of the European Union, Brussels, 2 December 2020.

<sup>10</sup> COM (2020) 152 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A Union of Equality: Gender Equality Strategy 2020-2025. European Commission, Brussels, 5.3.2020.

issues surrounding the gender care gap is not new and is well known. It goes back several decades beginning with the principle of equal pay and gender equality in the Treaty of Rome<sup>11</sup> and the early case law of the Court of Justice of the EU (CJEU),<sup>12</sup> and culminates in Directive 2019/1158 on work-life balance for parents and carers.<sup>13</sup> The gender care gap, in the context of EU Social Policy continues to be debated widely across a range of stakeholders, which includes a large, wide-ranging and active alliance of civil society,<sup>14</sup> and the EU institutions continue to create measures that seek to alleviate the impact of the gender care gap through a combination of soft law measures and individual rights.<sup>15</sup> These measures are however largely restricted to EU Social Policy and to rights in the work place, the corresponding connection between gender, care, labour market participation and *EU mobility* has not been made.

### 2.3 The Gender Care Gap and Intra-EU mobility

The Gender Dimension of Geographic Labour Mobility in the European Union Report notes that the impact of the gender care gap on women exercising free movement rights has been “neglected” and that there is very little research on the subject.<sup>16</sup> The EU institutions currently do not routinely conduct or commission research or data collection on gender equality and intra-EU mobility. There is now an emerging debate within academic research on the gendered nature of EU citizenship and the

---

<sup>11</sup> Art. 119 Treaty of Rome (EEC). For commentary see eg. Barnard, *EU Employment Law*, 4<sup>th</sup> ed. (OUP, 2012); Busby and James, ‘Regulating Work and Care Relationships in a Time of Austerity: A Legal Perspective’ note 1 at 295-308; Caracciolo di Torella and Masselot, (2010) and 2020) note 1 and Caracciolo di Torella ‘An Emerging Right to Care in the EU: A “New Start to Support Work-Life Balance for Parents and Carers”’ (2017) 18 ERA Forum 187.

<sup>12</sup> Case C-43/75 [1976], *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, ECLI:EU:C:1976:56, para 53 - 5.

<sup>13</sup> Work Life Balance Directive (EU) 2019/1158.

<sup>14</sup> Eg see Social Platform contribution to the call for evidence on the European Care Strategy <https://www.socialplatform.org/wp-content/uploads/2022/03/Social-Platform-contribution-to-the-call-for-evidence-on-the-European-Care-Strategy.pdf> and for further examples <https://www.socialplatform.org/resources/>

<sup>15</sup> For example, Pregnant Workers Directive 92/85/EEC; Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC O.J. 1996, L 145. This was amended by Council Directive 97/75/EC of 15 December 1997 and then replaced by Council Directive 2010/18/EU O.J. 2010, L 188; Barcelona Child Care Targets Presidency Conclusions C/02/930, Barcelona European Council, 15-16 March 2002; Work Life Balance Directive (EU) 2019/1158.

<sup>16</sup> Ackers, Balch, Scott, Currie and Millard, “*The Gender Dimension of Geographic Labour Mobility in the European Union*”, Report requested by the European Parliament's Committee on Gender Equality, 2009, p.7, available at < <http://www.europarl.europa.eu/studies>>.

right to care however this developing evidence base needs to be supported and developed.<sup>17</sup>

What is possible to discern from existing research on intra-EU mobility is that male mobile Union citizen labour market participation is comparable to national male labour market participation whereas the rate of female mobile Union citizen participation in the labour market is not comparable to national levels and is much lower than national rates.<sup>18</sup> Research commissioned by the European Commission into the impact of non-economically active mobile Union citizens on Member States social security systems found that of those mobile Union citizen women, who are not economically active in the host state, half of those women are not working because of their childcare responsibilities.<sup>19</sup> The Gender Dimension of Geographic Labour Mobility in the European Union Report also notes that in the context of unpaid care, the challenges women face due to the unequal allocation of unpaid care are compounded when they move to another Member State of the EU as they face the added challenge of being “dislocated” from informal family networks which in most European welfare systems make up the “back-bone of care”.<sup>20</sup>

This policy brief responds to this forgotten angle and to the neglect in research on the gender dimension of EU citizenship and intra-EU mobility. It provides a

---

<sup>17</sup> Ackers, “Citizenship, Migration and the Valuation of Care in the European Union”, 30 (2), *Journal of Ethnic and Migration Studies* (2004), 373-396; Konsta, “Towards a Right to Care in EU Law - Issues of Legitimacy, Gender and Care” in *Legitimacy Issues of the European Union in the Face of Crisis* Papadopoulou, Pernice and Weiler (eds.) European Constitutional Law Network Series Vol.9; Miller, “Unpaid Care Work and Gender Equality in EU Law: Evaluating EU Social Policy and EU Free Movement of Persons Law” (PhD Thesis, University of Glasgow 2021 available upon request from this author); O’Brien, “I Trade, Therefore I Am: Legal Personhood in the European Union”, 50 *Common Market Law Review* (2013), 1643-1684; Shutes and Walker, “Gender and free movement: EU migrant women’s access to residence and social rights in the U.K.”, (2018), 44:1, *Journal of Ethnic and Migration Studies*, 137-153; Shaw, “Importing Gender: The Challenge of Feminism and the Analysis of the EU Legal Order”, 7 (3) *Journal of European Public Policy* (2013), 406-431.

<sup>18</sup> Ackers et al “*The Gender Dimension of Geographic Labour Mobility in the European Union*” note 16 **Error! Bookmark not defined.**, p.11.

<sup>19</sup> ICF GHK and Milieu Ltd, “Fact finding analysis on the impact on Member States’ social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence”, at p.60, Report for DG Employment, Social Affairs and Inclusion via DG Justice Framework Contract, 2013, available at <[https://ec.europa.eu/employment\\_social/empl\\_portal/facebook/20131014%20GHK%20study%20web\\_EU%20migration.pdf](https://ec.europa.eu/employment_social/empl_portal/facebook/20131014%20GHK%20study%20web_EU%20migration.pdf)> and; Ackers et al “*The Gender Dimension of Geographic Labour Mobility in the European Union*” note 16, p. 60.

<sup>20</sup> Ackers et al “*The Gender Dimension of Geographic Labour Mobility in the European Union*” note 16, p.85.

structured analysis of the gendered dimension of the EU free movement of persons rules, setting out clearly how the gender care gap intersects with the EU free movement rules and how the rules impact women.

### 3. BACKGROUND

#### 3.1 EU free movement of persons rules

The Commission notes that “alongside peace, EU citizenship is one of the most significant achievements of the European project and is unique in the world. EU citizenship rights, including free movement ... have had a transformative impact on Europe.”<sup>21</sup> The Free Movement *acquis* provides rights and protections for Union citizens and their families to move throughout the EU including the right of residence and right to equal treatment in the host state. It is enshrined in Articles 21 and 45 TFEU and in Article 45 of the Charter of Fundamental Rights of the European Union. Further conditions are set down by secondary legislation, in particular the Citizens Rights Directive 2004/38/EC, and the Workers Regulation 492/2011 and it continually evolves through interpretation by the CJEU. The Citizen’s Rights Directive, undertaken in order to “simplify and strengthen the right of free movement and residence of all Union citizens”<sup>22</sup> represents a set of “highly privileged mobility and citizenship rights”.<sup>23</sup> These rights include entry and residence for up to 3 months with no conditions or formalities (Article 6). For residence beyond 3 months, residence and equal treatment in the host state can be enjoyed by those who fulfil one of the categories set out in Article 7(1)(a)-(d), these include, workers 7(1)(a), self-employed persons 7(1)(a), those who have sufficient resources for themselves and their family members 7(1)(a) and, subject to certain further conditions, if they are students 7(1)(a). Family members, of such Union citizens, irrespective of nationality, can also enjoy “derived rights” of residence for this period 7(1)(a). After a period of continuous lawful residence, it is possible for Union citizens and their family members to achieve permanent

---

<sup>21</sup> COM (2020) 730 final p.1

<sup>22</sup> Citizens Rights Directive 2004/38/EC clause (3)

<sup>23</sup> Ackers et al “*The Gender Dimension of Geographic Labour Mobility in the European Union*” note 16, p. 7.



residence, set out in Article 16. Article 24 of the Directive affords equal treatment upon Union citizens and their family members. This is an important aspect of the Directive, and it applies during the second two phases of residence: longer than three months and, permanent residence. Benefitting from Article 24 means that the Union citizen and their family members are entitled to be treated equally to host state nationals in terms of, for example, access to work, education, housing, and all social and tax benefits.

### 3.2 EU free movement of persons rules and unpaid care work

The free movement *aquis*, is a set of rules that underpins one of the “core entitlements of the citizenship package”.<sup>24</sup> Yet despite the apparent universal nature of the rights suggested by the “citizenship” moniker of the Citizen’s Rights Directive, accessing the fullest set of rights and protections is subject to satisfying the definition of “worker” in Article 7 and as such an “economic profile that is not gender neutral”.<sup>25</sup> When placed in the context of the gender care gap this has gendered implications. “Work” is not defined by the Directive rather it has been developed by the CJEU and is a matter of “settled”<sup>26</sup> and “well-established”<sup>27</sup> case law.<sup>28</sup> Overall, the scope of the term is broad, the Court having taken an expansive view of the kinds of activities that satisfy the definition.<sup>29</sup> However the Court in C-44/88 *Achterberg-te Riele*,<sup>30</sup> C-77/95 *Züchner*<sup>31</sup> and C-31/90 *Johnson*,<sup>32</sup> established that unpaid care work is regarded as a non-economic activity and does

---

<sup>24</sup> Currie, “Pregnancy-related employment breaks, the gender dynamics of free movement law and curtailed citizenship: *Jessy Saint Prix*”, (2016), 53, CMLR, 543-562.

<sup>25</sup> O’Brien, “I trade, therefore I am: legal personhood in the European Union”, (2013) CMLR, 1643-1684 at p1671.

<sup>26</sup> Joined Cases C-22/08 & C-23/08, *Vatsouras and Koupatantze*, EU:C:2009:344, para 26.

<sup>27</sup> Case C-14/09, *Genc*, EU:C:2010:57, para 36.

<sup>28</sup> Case C-75/63, *Hoekstra (nee Unger) v. Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten*, ECLI:EU:C:1964:19.

<sup>29</sup> Case C- 66/85 *Lawrie-Blum v Land Baden-Württemberg*, EU:C:1986:284, Case C-53/81 *Levin v Staatssecretaris van Justitie*, ECLI:EU:C:1982:105, Case C-186/87, *Steymann v Staatssecretaris van Justitie*, EU:C:1988:475 and; Case C-294/06, *Payir and Others*, EU:C:2008:36 and; Case C-456/02, *Trojani v Centre public d’aide sociale de Bruxelles*, ECLI:EU:C:2004:488.

<sup>30</sup> Joined Cases C-48.88, C-106/88 and C-107/88 Case C-44/88 *Achterberg-te Riele and others v Sociale Verzekeringsbank* [1989] ECR 1963.

<sup>31</sup> Case C-77/95, *Züchner v Handelskrankenkasse*, ECLI:EU:C:1996:425.

<sup>32</sup> Case C-31/90 *Johnson v Chief Adjudication Officer* ECLI:EU:C:1991:100.

not qualify as work for the purposes of EU law.<sup>33</sup> The Court, in C-325/09 Dias, further maintains that periods of childcare between periods of employment should not be considered to be “lawful residence” and therefore should not count towards the accrual of permanent residence. Therefore, access to the fullest set of free movement rights and protections is premised on a notion of work that precludes unpaid care work, and one that appears to neglect the gendered dimension of care. Based on further legal analysis and empirical research, this policy brief discusses the consequences of this formulation of work and care and the impact this has on gender equality and the gendered experience of Union citizenship.

## 4. RESEARCH METHODS

The research is based on a combination of doctrinal legal analysis and semi-structured interviews held in person and on-line with members of seven civil society organisations based in Brussels, London and Glasgow in December 2016 and December 2019.

The doctrinal analysis evaluates the legal rules from the perspective of the gender care gap, foregrounding the reality of women’s care giving responsibilities as they arise throughout the life course. The doctrinal analysis is then tested and contextualised by the research interviews.

The organisations that were interviewed fell into two categories, one focused on access to legal rights and social welfare for migrants including advising EU migrants, and the second category focused on promoting women’s rights and equality between women and men at the EU level. The interviewees were asked to discuss from their relative perspectives if, how and in what ways the free movement rules intersect with the gender care gap and how this impacts women.

---

<sup>33</sup> See also Ackers, “Women, citizenship and European Community Law: The gender implications of the free movement provisions”, (1994), 16:4, *Journal of Social Welfare and Family Law*, 391-406; Busby, “Crumbs of Comfort: pregnancy and the status of ‘Worker’ under EU law’s Free movement provisions”, (2015) 44(1), *ILJ*, 134-145, and O’Brien, “I Trade, Therefore I Am: Legal Personhood in the European Union” note 17.

They were also asked about how visible the gendered dimension of EU free movement is in their work and in the legal and policy discourse. Finally, they were asked what barriers and opportunities there were to legal and policy reform in terms of progressing gender equality in the context of the free movement of persons rules.

## 5. FINDINGS

The findings, based on the doctrinal legal analysis of the rules and on interviews with civil society are structured around the following questions: Can a woman's unpaid care work contribute towards her status as a worker? How are a woman's rights affected when she combines paid work and unpaid care? What are the legal consequences for a woman's residence and associated rights if she does not qualify as a worker? Are the rights for family members sufficient to support women when they have caring responsibilities? And has the connection between gender, care and intra-EU mobility been made?

The Citizens Rights Directive provides for two kind of rights: autonomous, individual rights, and derivative, family-based rights. The first key finding looks at the autonomous rights, the second key finding looks at derivative rights and the third key finding looks at the visibility of and engagement of civil society with the gender dimension of intra-EU mobility. The findings point to problems embedded into the legal rules which mean that when one's circumstances involve caring responsibilities or a combination of unpaid care and economic activity, the quality of EU law rights and protections diminish. For women exercising free movement rights with their children or other dependents, this means that they are at an increased risk of legal and physical insecurity, poverty, and destitution due to the difficulty in accessing and maintaining EU law rights. The findings also point to a lack of visibility of the problem and the need to mobilise civil society on the matter.

## 5.1 Individual Rights - Gender and Care “In the Shadows”

This finding explores whether women are able to access autonomous EU free movement rights when they have caring responsibilities. Two scenarios are considered, when women have full time caring responsibilities and when women are combining paid work with unpaid caring responsibilities.

### 5.1.1 Full Time Caring Responsibilities

Women’s labour market participation is not perpetual, rather it takes place within the context of the care requirements of their dependents, and it is interspersed with absences due to unpaid care.<sup>34</sup> As noted above, unpaid care work is not regarded as work for the purposes of EU free movement law, therefore periods of full time caring responsibilities pose challenges for women accessing autonomous free movement rights under Article 7(1)(a)-(c) of the Citizen’s Rights Directive, which require either economic activity or economic self-sufficiency. Failing to qualify for residence rights means that women are denied the right of equal treatment and are therefore prevented from accessing social welfare benefits in the host state on equal terms of host state nationals.<sup>35</sup>

The reality for women with full time caring responsibilities, explained interviewees, is precarious. They are not entitled to an autonomous right of residence, nor are they entitled to the associated right of equal treatment and access to social welfare, which places them at an increased risk of poverty and destitution. Interviewees described circumstances where women who were not working because of their caring responsibilities, had no money for basic essentials and were unable to access crucial housing benefit. Interviewees described the

---

<sup>34</sup> European Commission, “European Semester Thematic Factsheet Labour Force Participation Of Women” at p. 4, 2015, available at < [https://ec.europa.eu/info/sites/info/files/european-semester\\_thematic-factsheet\\_labour-force-participation-women\\_en.pdf](https://ec.europa.eu/info/sites/info/files/european-semester_thematic-factsheet_labour-force-participation-women_en.pdf)> and; Ackers et al “*The Gender Dimension of Geographic Labour Mobility in the European Union*” p. 8.

<sup>35</sup> The only provision in the Citizens Rights Directive 2004/38/EC that confers rights upon economically inactive Union citizens for more than the first three months of residence is Article 7(1)(b) which provides for residence rights for Union citizens who can establish that they are economically self-sufficient.

precariousness as destabilizing and detrimental to the overall well-being of both the women and their child or children. For women with full time caring responsibilities there is no legal safety net. For nearly two decades there was the possibility of a legal safety net - on the basis of Union citizenship women could establish a right to equal treatment in the host following the case of C-85/96 *Martinez Sala*.<sup>36</sup> However, this safety net was dismantled by the Court in C-333/13 *Dano*, without an evaluation of the gender implications.<sup>37</sup>

### 5.1.2 Combining Work and Care

Combining work and caring responsibilities means that women's working life can take the shape of atypical styles of work.<sup>38</sup> The EU law definition of work for the purposes of free movement is broad and is capable of capturing different forms of work. Interviewees spoke of the "flexibility" of the term which whilst not motivated by a concern for women combining work and care, nevertheless, is important in this context. For example, it is possible to qualify as a worker through part-time work and therefore maintain the right to equal treatment and therefore access social welfare entitlements that can supplement an income and enable someone to support themselves and their children. However, interviewees explained that this lawful route to autonomous EU law rights is often frustrated through the application of national minimum thresholds for the assessment of worker status. This practice adopted by some Member States, takes the form of either explicit criteria or a case-by-case assessment that determines whether work is "genuine and effective" or "marginal and ancillary", the Court having not defined expressly what "marginal and ancillary" means. For example, Belgium and Denmark uphold the presumption that work of ten to twelve hours per week is marginal and ancillary, in the UK a case-by-case approach is adopted where a range of factors are considered, and where "genuine and effective" work is largely regarded as being work that has been undertaken for a minimum of three months

---

<sup>36</sup> Case C85/96, *María Martínez Sala v Freistaat Bayern*, EU:C:1998:217.

<sup>37</sup> Case C- 333/13, *Elisabeta Dano and Florin Dano v Jobcenter Leipzig*, ECLI:EU:C:2014:2358.

<sup>38</sup> European Commission, "European Semester Thematic Factsheet Labour Force Participation Of Women" at p. 4, 2015, available at < [https://ec.europa.eu/info/sites/info/files/european-semester\\_thematic-factsheet\\_labour-force-participation-women\\_en.pdf](https://ec.europa.eu/info/sites/info/files/european-semester_thematic-factsheet_labour-force-participation-women_en.pdf)> and Ackers "*The Gender Dimension of Geographic Labour Mobility in the European Union*", note 16 p.8.

and at the earning level where individuals start paying national insurance.<sup>39</sup> The reality, explained interviewees, is that whilst the EU law definition of work may be sufficiently broad to capture the kinds of part-time or atypical styles of work that enable women to combine paid work with their caring responsibilities, those with a low number of working hours or low earnings risk being excluded from worker status through the application of the national thresholds and their view was that these decisions, whilst they may ultimately be found to be incompatible with EU law if challenged, were rarely appealed.

Combining work and caring responsibilities also means that women's working life is often marked by periods out of full-time work. Since *C-507/12 Jessy Saint Prix* it is now possible to retain worker status during maternity leave for up to twelve months under Article 7(3) of the Directive. This ensures the autonomous right of lawful residence and equal treatment during this time.<sup>40</sup> The result is an improvement in women's ability to retain worker status during periods of care-based leave from the labour market, but it was described by interviewees as being long overdue and modest progress. Interviewees explained that they frequently see women fall through gaps in the rules during absences from the labour market due to caring responsibilities. The specific gap that interviewees identified occurs when children are of pre-school age, after the twelve-month *Jessy Saint Prix* maternity period ends (where worker status is retained) and before children start school. Once children (of a Union citizen worker) are in education, their primary carer may derive a right of residence without the requirement that the primary carer also be economically active.<sup>41</sup> During this pre-school period women who are

---

<sup>39</sup> See further, O'Brien, Spaventa, De Conink, "Comparative Report 2015 The concept of worker under Art. 45 TFEU and certain non-standard forms of employment", 2016, European Commission, FreSsco, Brussels.

<sup>40</sup> Case C-507/12, *Jessy Saint Prix v Secretary of State for Work and Pensions*, ECLI:EU:C:2014:2007. O'Brien, "I Trade, Therefore I Am: Legal Personhood in the European Union" note 17 at 1663 and 1667; Currie, "Pregnancy-related employment breaks, the gender dynamics of free movement law and curtailed citizenship: *Jessy Saint Prix*" note 24 at 546, Busby, "Crumbs of Comfort: pregnancy and the status of 'Worker' under EU law's Free movement provisions" note 33 at p.140. This omission did not affect women who remained employed during their maternity leave (Council Directive 92/85 /EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, Article 10) but it did affect women who, for example, had to stop working, leave jobs or were on temporary or atypical contracts.

<sup>41</sup> Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* EU:C:2002:493.

not able to be in paid work are regarded as economically inactive and, as discussed above, cannot access EU law rights and protections, and are therefore excluded from accessing social welfare during this time. This is regardless of whether they had worked before and intend to return to work once the child is in school or childcare. Interviewees described women who are leaving domestic abuse to be at particular risk of falling through this gap. They described challenging circumstances where women leave an abusive relationship with their small children. Women in these circumstances who are unmarried and not working, are often unable to access EU law rights, and they cannot access the housing benefit that would enable them to fund their stay in women's refuges. Therefore, an already physically precarious situation is intensified through the operation of the free movement rules.

This case law is of course limited to children, and interviewees pointed to the further problem of there being nothing within the rules or the case law that provides for people who need to take other kinds of care-based leave, to for example, care for a partner, disabled relative or elderly parent, care needs that are all also disproportionately met by women.<sup>42</sup>

## **5.2 Derivative Rights - Rights, Care and Family Relationships - Deepening Dynamics of Dependency**

This finding explores derivative rights. Two categories of beneficiaries are considered, family members and primary carers.

### **5.2.1 Family Members**

Family members of Union citizens may enjoy rights of residence and associated rights under the Citizens Rights Directive,<sup>43</sup> and these family member rights are regarded as an “important” means of providing residence status for women who

---

<sup>42</sup> EIGE “*Gender inequalities in care and consequences for the labour market*” note 2.

<sup>43</sup> Where the Union citizen meets the conditions of Article 7(1)(a)-(c)).

are not in employment in the host state due to meeting family care needs.<sup>44</sup> However there is a notable distinction in the quality of family members rights that interviewees explained, led to, in certain circumstances, difficulties for women and children. Unlike the rights that have so far been discussed which are autonomous rights and are set out in Article 7(1)(a)-(c), family member rights are derivative rights and are a kind of “parasitic” right; afforded to family members as a consequence of their relationship with a Union citizen.<sup>45</sup> The existence and enjoyment of the rights are dependent upon the Union citizen continuing to meet the conditions of Article 7(1)(a)-(c) and upon the continued relationship of the family member with the Union citizen. The result is that this form of family member right creates a *dynamic of dependence* between the family member and the qualifying Union citizen spouse or partner. Interviewees explained that the problem with the dynamic of dependence is immediately evident where there is a relationship breakdown. Challenges arise where couples separate, particularly when women leave abusive partners. This is because women must rely both on their former partner’s legal status and on his cooperation, potentially in situations where such contact may jeopardise her safety.<sup>46</sup> Interviewees said that they encountered women leaving abusive relationships who had attempted to access housing and welfare benefits and were refused because establishing their right relied upon evidence of their former spouse or partner’s worker status. Alternatively, the dynamic of dependency can inhibit women from exiting a relationship which in relationships that involve domestic violence, mean that women are faced with relying on an abusive partner for access to rights.

In contrast to this, women, whose partner or spouse is a national of the host state, (therefore not a *mobile* Union citizen) do not qualify for family member status under the Citizens Rights Directive because their partners are not exercising free movement rights. Such women who are not in paid work, are therefore excluded

---

<sup>44</sup> Ackers et al “*The Gender Dimension of Geographic Labour Mobility in the European Union*” note 16, p.8.

<sup>45</sup> Ackers et al “*The Gender Dimension of Geographic Labour Mobility in the European Union*” note 16 p.396

<sup>46</sup> Shutes and Walker, “Gender and free movement: EU migrant women’s access to residence and social rights in the U.K.” note 17 at p.147.



by the Directive from both worker status and family member status, reinforcing their dependency upon their partner.<sup>47</sup>

### 5.2.2 Primary Carers

Derivative rights are also enjoyed by primary carers of a Union citizen. The category of primary carer is not an established one in EU law, and has not been defined in the legislation, it is a category that has evolved through CJEU jurisprudence on EU citizenship and free movement. In fact, rather than being a singular category of beneficiary, the primary carer case law has in effect created three different categories of primary carer dependent on whether the source of law is Article 10 Workers Regulation 492/2011 as interpreted by *Baumbast*, Article 7 Citizen's Right Directive as interpreted by *Zhu and Chen* or Article 20 TFEU as interpreted by *Ruiz Zambrano*.<sup>48</sup> Each category provides some form of residence right to the primary carer of a Union citizen however, the scope and clarity of the rights are slightly different depending on each legal basis.<sup>49</sup> Fundamentally, as the right of primary carers is a derivative right, primary carers are subject to the same vulnerabilities as family members where the structure of the right creates a dynamic of dependence flowing from the holder of the autonomous right, in this case the Union citizen in receipt of care. However, primary carers residence is more precarious. It is an area where significant ambiguity persists as to the boundaries of the rights and further clarification from the Court is needed. This is particularly the case for *Ruiz Zambrano* primary carer rights because the preliminary references made to the Court to date have focused on the personal scope of the right and the material scope of the right has been largely neglected and remains unclear.<sup>50</sup> Furthermore, primary carers are not entitled to access the

---

<sup>47</sup> Shutes and Walker, "Gender and free movement: EU migrant women's access to residence and social rights in the U.K." note 17 at p.148.

<sup>48</sup> Case C-413/99 *Baumbast and R*; Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*, ECLI:EU:C:2004:639; Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* EU:C:2011:124.

<sup>49</sup> For a full explanation of the different categories of primary carer in the case law see Miller, "Unpaid Care Work and Gender Equality in EU Law: Evaluating EU Social Policy and EU Free Movement of Persons Law" (PhD Thesis, University of Glasgow 2021 available upon request from this author) pp120 -133.

<sup>50</sup> *Shirley McCarthy v Secretary of State for the Home Department*, ECLI:EU:C:2011:277; Case C-256/11, *Murat Dereci and Others v Bundesministerium für Inneres*, ECLI:EU:C:2011:734; Case C-40/11 *Yoshikazu Iida v Stadt Ulm*, ECLI:EU:C:2012:691; joined cases C-356/11, *O and S v Maahanmuuttovirasto and Maahanmuuttovirasto v L*, ECLI:EU:C:2012:776; Case C-133/15, H.C.

full range of rights and protections that family members can, for example, on the basis of Article 10 of the Workers Regulation and *Alarpe and Tijani* primary carers' lawful residence is terminated when the authorities deem the caring needs of the Union citizen child to no longer exist or when the child is no longer in education.<sup>51</sup> The primary carer then has no right to continue residing in the host country because, unlike family members under the Citizens Rights Directive, primary carers are not entitled to apply for permanent residence on the basis of their time spent in the host country, if that residence has been as a primary carer.<sup>52</sup>

Interviewees explained that the complexity and ambiguity surrounding primary carer rights meant that the rights for primary carers are hard to navigate, challenging to implement and very difficult for welfare authorities and welfare support agencies to administer. There is not a sufficient level of specialism within these bodies to engage with the intersection of complex EU law and domestic benefits law.<sup>53</sup> One of the consequences of this is that it increases the likelihood that first level decisions (about for example, a primary carer's access to social welfare benefits) are challenged. This can involve huge delays not only for the applicant in the case but for other similar cases which are stayed until there is an outcome to the original appeal. People are left "in limbo", sometimes for years. During this time primary carers and their children often need to rely on foodbanks, are at serious risk of destitution and exploitation and suffer from the toll this takes on their health and well-being.

---

Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others, ECLI:EU:C:2017:354. On persistent ambiguity of the material scope see also O'Brien, "Acte cryptique? Zambrano, welfare rights, and underclass citizenship in the tale of the missing preliminary reference", (2019) 56(6) *CML Rev* 1697-1732

<sup>51</sup> Case C-529/11, *Olaitan Ajoke Alarape and Olukayode Azeez Tijani v Secretary of State for the Home Department*, ECLI:EU:C:2013:290.

<sup>52</sup> Unless the primary carer can otherwise satisfy Article 7 of the Citizen's Rights Directive.

<sup>53</sup> For example, in the Netherlands, all third country national parents including *Ruiz Zambrano* primary carers, are entitled, under the Law on Social Assistance or under the Law on Child Benefit, to claim benefits if they have been granted a right of residence. Case C-133/15, *Chavez Vilchez*, para 12. In the UK, *Ruiz Zambrano* carers had been explicitly excluded from social assistance by domestic legislation, passed in 2012, regardless of their lawful residence (and regardless of whether they are economically active), Social Security (Habitual Residence) (Amendment) Regulations 2012 (SI 2012/2587) and related challenge, *HC v. SSWP* [2017] UKSC 73 and; O'Brien "Acte cryptique? Zambrano, welfare rights, and underclass citizenship in the tale of the missing preliminary reference" note 50.

Even when primary carers are able to access rights, interviewees described their reality as precarious. The rights, whilst providing a safety net for very vulnerable women, are so narrow and limited that, interviewees described, primary carers as being unable to fully and effectively support themselves and their children. This was particularly the case for Rui Zambrano primary carers where without access to social welfare, there is no, for example, entitlement to family welfare benefits that may provide or supplement an income or facilitate access to childcare. Furthermore, the precariousness is potentially indefinite as, depending on clarification from the Court, a primary carer is prevented from accruing permanent residence and the autonomous right of residence and equal treatment that could lead to better security.

### **5.3 Mobilising Civil Society - Gender and Care and the Lived Experience of Union Citizenship**

There is a need to increase the visibility of the impact of the free movement rules on women. However, there is widespread neglect of the issues associated with the gender care gap in the context of intra-EU mobility, this neglect is illustrated by the absence of research and data collection by the EU institutions, including EIGE the European Institute for Gender Equality. There is a need for more research on the lived experience of Union citizenship from a gender perspective that will illuminate the impact of the gender care gap in the context of intra-EU mobility. This is an opportunity for civil society, to represent the lived experiences of EU citizenship and amplify the issues however, to date there is little engagement by civil society on this and very limited knowledge and understanding of how the free movement rules are operating unequally, to disadvantage women.

Where there could be a natural collaboration between migration policy, EU citizenship, and gender equality organisations there is not. There appears to be an uninterrogated assumption that intra-EU mobility is unproblematic from a gender perspective. Neither the migration policy organisations nor the gender equality or family rights organisations that were approached to take part in this research had

work streams that included the gender dimension of intra-EU mobility. All of the organisations approached spoke of a lack of expertise on the matter and many spoke of having no understanding of how the free movement rules worked in the context of the gender care gap and how they impacted women.

There is therefore a gap in knowledge and in the activities of EU civil society with regards to how the gender care gap intersects with intra-EU mobility. This is a notable omission. Civil society have an influential role in policy formation in Brussels and on the subject of the gender care gap civil society have had significant success. This was highlighted by the efforts of the broad coalition of civil society organisations who campaigned for the withdrawal of the Pregnant Workers Directive which had stalled at the Council in 2015 and who then lobbied for a renewed commitment from the EU Commission on a more wide-ranging response to the gender care gap. The coalition of civil society organisations included gender equality groups such as the European Women's Lobby, family rights groups, Age Platform and those with concerns for long term care, informal carers, service providers and trade unions. This diverse coalition shared a concern for the issues surrounding care and the gender care gap and they communicated a clear message to the EU Commission that the gender care gap needed to be central to the EU's Social Policy agenda in a way that would make a meaningful difference to EU citizens lives. This effort contributed to the Work Life Balance Directive 2019/1158 which expanded the EU's response to the gender care gap and included EU rights for carers for the first time. An equivalent effort, in the context of free movement of persons, that involved a coalition of organisations from the fields of gender equality, family rights, migration policy and EU citizenship would have a key role to play in investigating and representing the lived experience of EU citizenship from a gender perspective, of raising awareness and in influencing the EU institutions and shaping the response to the problem. However, there is very little prospect of such a coalition without further engagement of civil society organisations on the gendered dimension of EU citizenship and the free movement rules.

## 6. RECOMMENDATIONS

- ❖ Mobilise the EU institutions and EU civil society on the intersection between the gender care gap and EU free movement law;
- ❖ Increase the evidence base on the gendered experience of Union citizenship;
- ❖ Co-produce a Rights Review and Action Plan on EU free movement from the perspective of women and children.

EU citizenship and free movement rights are not enjoyed equally between women and men. The impact the gender care gap has on women's ability to work and therefore qualify for rights and protections under EU free movement law mean that women are starkly disadvantaged when exercising their right to free movement. The findings discussed in this policy briefing demonstrate that when one's circumstances involve caring responsibilities or a combination of unpaid care and economic activity, the quality of EU law rights and protections diminish. The reality of this means that women are exposed to a disproportionately increased

risk of legal and physical precariousness, poverty, destitution and exploitation in the host state.

To a large extent the Court of Justice has driven this field of law through the Citizens Rights Directive itself which was a codification of the Court's case law and the continuing jurisprudence. However, the case law demonstrates that the Court remains reluctant to engage with the gendered dimension of the rules. Recent cases such as C-333/13 Dano, C-507/12 Jessy Saint Prix and the primary carer case law have provided opportunities for the gendered experience of the free movement rules to be highlighted and explored however the Court has neglected to scrutinize the rules from this perspective and the result has been to further reinforce the gendered disadvantage.<sup>54</sup>

The gendered impact of the free movement rules is entrenched, even with more engagement from the Court, the best response cannot and should not be fulfilled by a single institution. Progress towards a system of free movement rights that promotes gender equality and overcomes rather than entrenches the gendered roles associated with unpaid care should involve a full range of engaged actors, including amongst others, academia, civil society, the legislative institutions of the EU and Union citizens. What is needed now is the engagement of these actors. This policy brief makes three recommendations.

### ❖ A Rights Review of the Forgotten Angle

To enable women and men to enjoy EU citizenship and free movement equally there needs to be a review of the rights and protections that are engaged by women's lived experience in the free movement context. The review should reflect the rights and protections for both those with caring responsibilities and those being cared for. The ambition is that rights and protections of those with caring responsibilities and those being cared for should be equal to the rights enjoyed by the other beneficiaries of the Citizens Rights Directive. This means

---

<sup>54</sup> Case C-413/99 *Baumbast and R*; Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*, ECLI:EU:C:2004:639; Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* EU:C:2011:124.

ensuring that the structure, implementation and interpretation of the rights do not reinforce gender stereotypes or reinforce gendered disadvantages. Rights need to be individualized to ensure that dynamics of dependency are prevented. Rights should not diminish on account of having caring responsibilities. The maximum level of rights and protections should be enjoyed by those with caring responsibilities so that they may benefit from the full protection of EU citizenship and can fulfil their caring responsibilities without being exposed to precarity and an increased risk of poverty. This should include equal treatment and access to social welfare in the host country and the right to permanent residence.

A rights review would not be limited to EU citizenship and free movement law but would reflect on the full range of commitments that the EU has made in the context of EU law and policy and international human rights law, particularly on women's rights and children's rights. This is to make sure that EU citizens, their families and their children who are exercising their free movement rights enjoy the same standard of rights and protections as all EU citizens and are no longer a forgotten angle.

The rights review should be based on the lived experience of women and should be co-produced with EU citizens and the civil society organisations that represent their interests.

Ultimately, the rights review would lead to an action plan that seeks to respect, protect and fulfil all of the relevant rights, the implementation of which would then be reviewed and monitored.

### **❖ Increase the evidence base of the lived experience of Union citizenship from a gender and care perspective.**

The rights review must be based on further research. The EU institutions currently do not routinely conduct or commission research and data collection on gender equality and intra-EU mobility. The gendered experience of EU citizenship and the right to care is an emerging field of study in academic research however this

research needs to be supported by funding from the EU institutions and complimented by large scale data collected at EU level. Therefore, there is now a need to commit to a collaborative process between the EU institutions, civil society and academia to develop an evidence base of the lived experience of Union citizenship where gender and care are at the heart of the enquiry. This research should be fully participatory, where those who are directly impacted by the free movement rules are involved and where the lived experience of women exercising free movement rights is given full weight.

### ❖ Mobilise EU Civil Society

The rights review and subsequent action plan will be further strengthened by the mobilization of civil society who can build on their experience and expertise in the context of the gender care gap in the field of EU Social Policy. The coalition of civil society organisations who are engaged in the issues surrounding the gender care gap should expand their networks to include migration and EU citizenship organizations. By representing the diverse perspectives of a wide range of engaged stakeholders such a coalition will enhance the representation of the lived experience of Union citizenship, one that reflects the realities of the life cycle of care and the impact of the gender care gap. Civil society will thus contribute to ensuring that the free movement rules no longer embed a regressive gender order but rather that they become a set of rights that will transform the stereotypes associated with the gender care gap and promote gender equality and the equitable enjoyment of EU citizenship by women and men.



## **7. ABOUT Dr Nina Miller**

Dr Nina Miller is an ESRC Post-Doctoral Fellow at the University of Glasgow School of Law. She is an experienced socio-legal researcher with an established international profile in gender and migration, conducting significant, original and innovative funded research in the fields of UK and EU law with particular focus on social justice, gender equality and care, migration, citizenship, social security, Brexit and state responses to COVID-19. Dr Miller is also a qualified solicitor in Scotland and has worked in private practice and as a legal and policy analyst in the public sector and for domestic and international human rights organisations.

To contact the author: [nina.miller@glasgow.ac.uk](mailto:nina.miller@glasgow.ac.uk) and [lenina.am@gmail.com](mailto:lenina.am@gmail.com)

This work was supported by the ESRC under Grant [ # 1 number ES/W006618/1] and [ # 2 number ES/J500136/1].