INDIRECT DISCRIMINATION AND RACIST STEREOTYPES IN THE EUROPEAN COURT OF HUMAN RIGHTS' CASE LAW ON FAMILY MIGRATION

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ABSTRACT
Over the past few decades, the European Court of Human Rights (ECtHR) has adopted an incidental approach to migrant family life protection, applied on a case-by-case basis. In general, according to an instrumental interpretation of the open-ended phrase «or other status» contained in Article 14 of the European Convention on Human Rights, the ECtHR has sought to protect people and groups from discrimination on different grounds (age, sex/gender, national origin, place of birth and gender-based intrafamilial roles). However, in the *case of Abdulaziz, Cabales and Balkandali v. The United Kingdom and the case of Biao v. Denmark*, it remained silent regarding the States' discriminatory treatment of their own citizens or third-country nationals based on the specific role played by ethnic national origin and racist stereotypes. This article posits that there is an intersectionality gap in the ECtHR's case law which accounts for the obsolescence of duality between nationality and citizenship. It also seeks to clarify its complex, contextual intersection with racist stereotypes and gender (wrongly used as separate grounds for indirect non-discrimination).

Negli ultimi decenni, la Corte europea dei diritti dell'uomo (CEDU) ha adottato un approccio incidentale sulla protezione della vita familiare migrante, che è stato applicato caso per caso. Alla stregua di una interpretazione strumentale dell'articolo 14 e la clausola «o altre situazioni», la CEDU ha cercato di proteggere persone e gruppi contro la discriminazione per motivi diversi (età, sesso, origine nazionale, luogo di nascita e ruoli intrafamiliari basati sul genere). Nonostante ciò, nei casi *ABC c. Regno Unito* e *Biao c. Danimarca*, la Corte è rimasta in silenzio nel riconoscere e giustificare il trattamento discriminatorio degli Stati nei confronti dei propri cittadini o dei cittadini di paesi terzi sulla base del ruolo specifico svolto dalle origini nazionali etniche e dagli stereotipi razzisti. Questo articolo sostiene che ci sia un divario di intersezionalità nella giurisprudenza CEDU, che consente spiegare perchè è obsoleto il binomio nazionalità e cittadinanza e che chiarisce la sua intersezione complessa e contestuale con gli stereotipi razzisti e con il *gender* (usati erroneamente come motivi separati di non discriminazione indiretta).

KEYWORDS
discrimination, intersectionality, ECtHR, nationality, racist stereotypes

discriminazione, intersezionalità, CEDU, cittadinanza, stereotipi razzisti

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1. *Introduction*

Families around the world are changing, and migrant families are no exception. Both migrant and autochthonous families have seen changes to their internal structure, dimensions, and membership due to new parental and gender roles, but also to their social needs. However, migrants have also been externally forced to change as a result of increasing bureaucratic obstacles in the migration context, different care needs, and the supposedly "voluntary" reasons for them to leave family members behind. The emerging prominence of family migration and the situations of discrimination associated with human mobility have marked the scope of the protection standards applicable to migrant family life. Both have gradually transformed the judicial task of the European supranational and international courts over the past two decades. In the Luxembourg Court, the most controversial issues are frequently related to direct or indirect reverse discrimination cases concerning EU citizens' rights and the family unit (WALTER 2008); whereas in the Strasbourg Court, they are linked to cases concerned with the expulsion or separation of family members, the reasonable justification of different treatment, and the non-discrimination and extended protection of children's rights.

In the European Union there is a double prohibition of discrimination, which was firstly provided by EU non-discrimination law and later reinforced with respect to EU citizens. EU citizens residing in another Member State cannot be discriminated against on the grounds of nationality in any way that affects their fundamental rights and freedoms, especially those related to their family life[1]. Article 18 of Treaty on the Functioning of the European Union (TFEU) prohibits discrimination on grounds of nationality and enables the Council to take ap-

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[1] See Article 45.1 of the EU Charter of Fundamental Rights: «every citizen of the Union has the right to move and reside freely within the territory of the Member States», and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, *OJ*, L 158 of 30 April 2004.

propriate action to combat discrimination based on sex, race or ethnic origin, religion or belief, disability, age, or sexual orientation[2]. Despite this affirmation of the principle of non-discrimination of EU citizens, the European Court of Justice has shown a clear preference for the adoption of a more cautious approach, curtailing its positive application to protection in cases involving EU minors and third-country national parents under Art. 20 and 21 TFEU (Bernieri 2018, 290; Van Elsuwege, Kochenovb 2011; González Pascual, Torres Pérez 2017). Countries such as Germany, Austria, Belgium, the Netherlands, and the United Kingdom have opted to give less favourable regulatory treatment to family reunification when the applicant is a national of that Member State and has always resided there (Marin Consarnau 2019, 283). In these cases, the CJEU deliberately placed family life within the fundamental rights of EU citizens who actively exercise their – and their families' – right to free movement, consequently shaping a two-speed system (La Spina 2019). In fact, reviewing the differences between various categories of third-country migrants and EU citizens residing with their families in EU territory, there are some remarkable cases of inverse discrimination that have been resolved in favour of family unity, including *Chen* and *Rendon*[3] and *Zambrano*[4] and *Lounes*[5].

In contrast, Gerards (2013) and Dembour (2009) noted a particular deficiency in the ECtHR's case law. The Strasbourg Court has remained silent regarding States' discrimination against their own citizens for decades. This Court has advocated the circumstantial protection of family rights, extending the application of Article 8 but prioritising the migrant child's best interest and the goal of integration. Several circumstances could be considered in these cases, including the family's actual situation, the length of their stay in the country, the behaviour of the individual concerned, their grasp of the language and customs of the country from which they were to be expelled, as well as the level of difficulty involved in the parent-child separation (Desmond 2018, 263-265).

Consequently, as argued by Arnardóttir (2017, 150), the ECtHR's jurisprudential developments have painted a somewhat different picture of discrimination on grounds of nationality. On the one hand, the ECtHR reasoned that different treatment based on nationality required "very weighty reasons" in the case of *Gaygusuz v. Turkey* of 1996[6]. On the other hand, in the case of *Biao v. Denmark* of 2014[7], the ECtHR simply stated that different treatment based on nationality could only be allowed on the basis of «compelling or very weighty reasons». The Court has mostly restricted its case law on nationality (under Article 14 of the European Convention on Human Rights) to situations such as the one in *Gaygusuz v. Turkey*, where legally resident immigrants were denied social security benefits. Nowadays this is still a common practice in Europe. While the ECtHR continues to engage in discussions about other types of different treatment based on nationality[8] applied to third-country nationals residing in Member States, the

[2] For instance, *European Commission v. Hungary*, C-392/15, Judgment of 1 February 2017, ECLI:EU:C:2017:73 (exclusion of nationals of other Member States from the notarial profession).

[3] Among others, see *Alfredo Rendón Marín v. Administración del Estado* [GC], C-165/14, Judgment of 13 September 2016, ECLI:EU:C:2016:675 (refusal to grant a residence permit to an third-country national applicant with a criminal record, despite the fact that his son was an EU citizen). *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department*, C-200/02, Judgment of 19 October 2004, ECLI:EU:C:2004:639 (right of a child who was an EU citizen to reside in the EU with his or her parents).

[4] For instance, this is limited to EU citizens who move to or reside in a Member State other than that of their nationality, *Ruiz Zambrano v. Belgium*, C-34/09, Judgment of 8 March 2011, ECLI: EU: C: 2011:124. 2011

[5] *Lounes v. Secretary of State for the Home Department*, C-165/16, Judgment of 14 November 2017, ECLI: EU: C: 2017:862, the nonsensical situation of a Spanish citizen living in the United Kingdom who exercised EU mobility and wanted to reside with her husband, a third-country national, but when she became British she was still not covered by Directive 2004/38/EC.

[6] *Gaygusuz v. Austria*, Application No. 17371/90, Judgment of 16 September 1996, par. 42.

[7] *Biao v. Denmark*. Application No. 38590/10, Judgment of 25 March 2014, par. 7.

[8] For instance, the different treatment was reasonable and objective in *Bah v. the United Kingdom*, Application No. 56328/07, Judgment of 27 September 2011 (refusal of assistance to find accommodation due to conditional immigra-

Strasbourg Court usually decides if they could be considered to be discriminatory without providing "weighty reasons".

However, at present there are no ECtHR cases where Member States apply different treatment to their own citizens based on the "ethnic nature" of their nationality. Consequently, this "strong" prohibition of discrimination cannot be extrapolated from the *Biao* case under discussion, as the applicant for family reunification who was discriminated against was a national living in his own Member State. In fact, as argued by the ECtHR, «the preferential treatment of nationals of member States of the European Union [...] may be said to be based on an objective and reasonable justification, because the Union forms a special legal order, which has, moreover, established its own citizenship»[9]. Here the keystone is the «objective and reasonable justification» for the different treatment, without questioning the extent of the EU non-discrimination principle.

Moreover, Article 14 of the European Convention on Human Rights (ECHR) does not specifically prohibit discrimination between nationals of the same State, that is, the category of discrimination based on nationality. Article 14 does not have an "independent existence", and only applies "instrumentally" to the enjoyment of the rights protected by other rights within the ECHR (under Article 8, among others). Consequently, according to the open-ended clause "or other status", Article 14 can include any and all discrimination grounds under the ECHR and the Court can apply the concept of indirect discrimination (COLLINS, KHAITAN 2018). The general term "any other status" applies for «differences based on an identifiable, objective or personal characteristic, or "situation", by which persons or groups are distinguished from others»[10] but this is not «confined to personal characteristics, understood as those which are innate or inherent». For example, this may be implemented by referring to specific reasons for applying different treatment (having had citizenship for 28 years, as in *Biao*) instead of indirectly referring to the groups that are most disadvantaged by the rule or practice in question (persons from minority ethnic groups).

Undoubtedly, this is the least questioned aspect of nationality related to indirect discrimination and intersectional effects[11]. Moreover, the frequent intersection of sex, race, ethnic origin, and migrant statuses is different for migrant parents than for national relatives in family reunion cases. For instance, family reunion involves a certain degree of scrutiny of the circumstances attributed to the role of the migrant woman as a member of a family that is biased by stereotypes automatically assumed by authorities and judicial bodies. As shown in the legal reasoning of the ECtHR's case law over time, there is a certain resistance to identifying stereotyped justi-

tion status of her son and as a result of a free decision); *Gouri v. France* (dec.), Application No. 41069/11, Decision of 23 March 2011 (refusal of assistance to find accommodation due to immigration status). In contrast, there was discrimination on grounds of national origin without «weighty reasons» in *Koua Poirrez v. France*, Application No. 40892/98, Judgment of 30 September 2003 (refusal of a disability allowance on the grounds that the claimant was neither a national of the EU nor a French national); *Dhahbi v. Italy*, Application No. 17120/09, Judgment of 8 April 2014 (refusal of family allowance due to foreign nationality or temporary residence permit); *Rangelov v. Germany*, Application No. 5123/07, Judgment of 22 March 2012 (denial of access to a treatment programme for a foreign national). More examples in the European Court of Justice include *Servet Kamberaj v. Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others* [GC], C-571/10, Judgment of 24 April 2012, ECLI:EU:C:2012:233 (denial of housing benefits for third-country nationals).

9 *Ponomaryovi v. Ukraine*, Application No. 5335/05, Judgment of 21 June 2011, par. 54.

10 *Novnik and Others v. Russia*, Application No. 31039/11, Judgment of 15 March 2016 par. 90 and *Biao*, par. 89.

11 Among others, see the reference to multiple discrimination in *B.S. v. Spain*, Application No. 47159/08, Judgment of 3 July 2012 (the vulnerability of African women who are victims of prostitution and of racist actions by the authorities), *S.A.S. v. France* [GC], Application No. 43835/11, Judgment of 1 July 2014 (the prohibition of use of religious veil for muslim women), *Carvalho Pinto de Sousa Morales v. Portugal*, Application No. 17484/15, Judgment of 20 June 2017 (stereotypes about age and female sexuality for a woman in her fifties and a mother of two children. Such an assumption reflected a traditional understanding of female sexuality as being essentially linked to procreation and therefore ignored its physical and psychological relevance to women's self-realisation).

fication related to race and a different ethnic origin due to a «lens of formal equality» (TIMMER 2011, 711). On the contrary, extreme caution is often used when combining race with nationality, in the sense of allowing anti-discriminatory legislation capable of affecting the regulation of nationality (the last hegemonic stronghold of sovereignty), and the differences foreseen by immigration laws and policies.

This article briefly analyses two examples within the ECtHR's case law in order to review how jurisprudential argumentative terms have evolved and identify the dynamic role of stereotyped justification in the domains of race, nationality, and different ethnic origin within family migration standards. The paper is made up of two building blocks. Section 2 contains a brief description of discrimination factors concerning family migration in the evolution of ECtHR's case law, with emphasis on the facts of the *ABC* and *Biao* cases. The analytical approach under Article 14 proposed in the *ABC* case is a rather complex structure of discrimination (O'CONNELL 2009), which was summed up by the Grand Chamber in the *Biao* case.

Section 3 offers a reasoned analysis of the justification of indirect discrimination and stereotypes when combining race and nationality in migrant family cases. This analysis will apply some new critical contributions of the intersectional approach. Firstly, it will focus on the heterogeneity of the subject or subjects that are at the crossroads between different discrimination systems, whose experience of subordination cannot be explained by using isolated social categories. Secondly, it will consider the different discrimination factors operating simultaneously. And thirdly, it will criticise the paradoxical effects of analyses, interventions and public policies based on a single axis of discrimination (LA BARBERA 2016; BELLO 2015). The conclusion will summarise the findings and provide some brief considerations on the feasibility of intersectionality (CRENSHAW 1993; CRENSHAW 1991), and the advantages of incorporating the intersectional approach into the ECtHR's legal toolkit.

2. *Factors of discrimination allowed in migrant family case law: past and present*

The ECtHR's case law can be described as being protective of family rights, particularly of the closest family migrant member(s) legally residing in the EU territory under Article 8 of the ECHR (NICHOLSON 2018, 20; THYM 2008, 90). In fact, there have been many attempts to restrict unjustified State interference with family life, such as the expulsion of family members[12]. The Strasbourg Court has reiterated that some individuals arrive on a temporary visa or illegally, then start a family, and use this situation as a "*fait accompli*" in order to secure legal residence[13]. In some cases, however, the need to act in the child's best interest has decisively shifted the balance against the removal of a parent on the basis of exceptional circumstances[14]. Conse-

[12] Among others, see, for example, *Berrehab v. the Netherlands*, Application No. 10730/84, Judgment of 21 June 1988; *Moustaquim v. Belgium*, Application No. 12313/86, Judgment of 18 February 1991; *Cruz Varas v. Sweden*, Application No. 15576/89, Judgment of 20 March 1991; *Beldjoudi v. France*, Application No. 12083/86, Judgment of 26 March 1992; *Dalia v. France*, Application No. 11444/1985, Judgment of 19 February 1998; and *Ezzouhdi v. France*, Application No. 47160/1999, Judgment of 13 February 2001.

[13] *Boultif v. Switzerland*, Application No. 54273/2000, Judgment of 2 August 2001; *Yilmaz v. Germany*, Application No. 52853/99, Judgment of 17 April 2003; and *Jeunesse v. the Netherlands*, Application No. 12738/10, Judgment of 3 October 2014.

[14] In several cases, the Court found a violation of Article 8 ECHR, *Rodrigues de Silva and Hoogkamer v. the Netherlands*, Application No. 50435/99, Judgment of 31 January 2006; *Nunez v. Norway*, Application No. 55597/09, Judgment of 28 June 2011, par. 84, 59; *Butt v. Norway*, Application No. 47017/09, Judgment of 4 December 2012; and more recently, in *Said Mohamed Abokar v. Sweden*, Application No. 23207/16, Judgment of 6 June 2019: «When there could be no reasonable or legitimate expectations as to the possibilities for establishing a family life in the Contracting State, it was likely only to be exceptional circumstances that the removal of the non-national family member would constitute a violation of Article 8».

quently, respect for migrant family life frequently depends on an unequal balance between the general interest (excluding migrants' interests) and the range of criteria to be considered against removal under Article 8(2) ECHR. Despite this parallel development in the context of protecting a child's best interest, the ECtHR's case law provides a reasonable variety of relevant factors that contribute to the admission of family reunion (NICHOLSON 2018, 30) and to the different types of treatment meted out to expelled family members[15].

Beyond the relationship between parents and minor children, it is also worth discussing the unequal protection of the parent-child relationship in adult ages. This poses a serious risk of age discrimination and exclusion of modern forms of family life from the material scope of the right to family life under Article 8 of the ECHR. For instance, in the judgment of the case of *Senchishak v. Finland*[16], the Strasbourg Court allowed the deportation of a 72-year-old woman from Finland to Russia, even though the applicant lived with her Finnish-born daughter in Finland. The Court held that the reasons given were not sufficient to grant her the right to family life under Article 8 of the ECHR, especially considering that her adult children and their relatives had not lived together for some time[17]. This decision made a difference to the protection standards of family reunion between parents and children in adulthood, and interpreted the word "family" in a way that was foreign to the cohabitation that exists in multi-generational environments. In this judgment, the Court placed undue emphasis on the dependency requirement, the interpretation of which clashed with two-way health care and with the care of the elderly in their home.

However, the interpretation of the Strasbourg Court is more silent in other cases of discrimination based on national origin, place of birth, gender stereotypes, or a combination of these. Its judgments seem especially cryptic in cases of gender-based intrafamilial roles and stereotypes. For instance, in the case of *Ramos Andrade v. the Netherlands*[18], the Court presented a mother with an impossible choice (between her family and her personal life in her country of origin) as a natural sacrifice that would be expected of a good mother and wife, accepting that respect for the right to family life depended on this (STAIANO 2013). Whereas in other cases, taking into account the extent of individual family matters, the Strasbourg Court considered that granting residence to the applicant mother in the territory was the only appropriate way to respect the proper unfolding of family life. But this form of protection only imposes a mother's stereotyped caring role on female applicants[19], without considering the administrative status of the father.

A review of the case law on family reunification and stereotypes shows that there have been few relevant judgments concerning the effects of not effectively neutralising the factors of intersectional discrimination under Articles 8 and 14 of the ECHR. I have selected two cases that have been considered the most representative of this silent interpretation. One is the case of *Abdulaziz, Cabales, Balkandali v. the United Kingdom,* known as the *ABC* case (1985). The other is a more recent case where these issues resurfaced, *Biao v. Denmark,* in the first and second instances (2014-2016). After thirty years, in the case of *Biao v. Denmark*, an opportunity was missed to

[15] For instance, many are reflected in its jurisprudence on expulsion (NICHOLSON 2018, 20), which sets out a range of criteria according to the *Boulatif* and *Jeunesse* judgments.

[16] See *Senchishak v. Finland*, Application No. 5049/12, Judgment of 18 November 2014. For example, the comments of ASKOLA 2016, 370-372.

[17] This judgment logically follows from *Kwakye-Nti and Dufie v. the Netherlands*, Application No. 31519/96, Judgment of 7 November 2000, *Emonet and others v. Switzerland*, Application No. 39051/03, Judgment of 13 March 2008.

[18] See the decision of inadmissibility of *Ramos Andrade v. the Netherlands* (dec.), Application no. 53675/00, Decision of 6 July 2004.

[19] *Sen v. the Netherlands*, Application No. 31465/96, Judgment of 21 December 2001. *Tuquabo-tekle v. the Netherlands*, Application No. 60665/00, Judgment of 1 December 2005. *Darren Omoregie and Others v. Norway*. Application No. 265/07, Judgment of 31 July 2008, par. 57. *Rodrigues de Silva and Hoogkamer v. the Netherlands*, cit. *par.* 50 and *Jeunesse v. the Netherlands*, cit. par. 43.

tear things apart at the seams, to paraphrase DEMBOUR (2015, 99), in cases of discrimination based on national ethnic origin and racist stereotypes.

2.1. *(Un)learning lessons from the past: ABC v. the UK*

The case of *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, of 28 May 1985, was one of the first specific claims for admission of family members faced by the ECtHR. Although it has been generally believed to be the first precedent, in fact it is not, as argued by DEMBOUR (2015, 96), since there were two earlier cases where the applicants had requested the Commission to be allowed to be heard. These were the cases of *Alam and Khan v. the United Kingdom*[20] and *HS v. the United Kingdom*[21]. Neither of them was heard by the Court. They entailed family reunification applications that were refused, involving the parent and the child of an immigrant worker in the United Kingdom (although the children were of different ages). The child was a migrant minor in the case of *Alam and Khan*, whereas the child was of legal age in the case of *HS*. They were both the prelude to the *ABC* case, in which the ECtHR asserted the principle that States have the right to control the entry and residence of immigrants in their territory. This was somewhat equivalent to a prerogative to exclude members of the same family under the principle of sovereignty. However, as will be shown by the resolution of the case in connection with Articles 8 and 14 of the ECHR, there is a major difference between appealing to the sovereignty of the State and using full discretion when forcing the dislocation of migrant families to prevent family reunion in other countries[22].

The *ABC* case clearly included a stereotyping process related to migrant families, unlike the aforementioned precedents. Three legal residents in the United Kingdom (Ms Abdulaziz, Ms Cabales and Ms Balkandali) got married in their country of origin and their respective husbands were refused residence in the United Kingdom under the applicable immigration laws. Ms Abdulaziz (of Indian origin) and Ms Cabales (born in the Philippines) did not have United Kingdom citizenship, because neither they nor their parents had been born in that country. Ms Balkandali was a British citizen (even though she was born in Egypt). The applicants claimed that the refusal to allow them to reunite with their respective husbands impinged upon their right to family life, and therefore entailed unlawful interference by the authorities. UK family reunification rules for long-term residents maintained a stereotypical understanding of male and female roles in patriarchal societies, establishing different, stricter conditions for husbands to join their wives (of Asian descent). The ECtHR maintained that national immigration controls should be exercised in accordance with the ECHR. Under applicable immigration provisions, the applicants were allowed to enter the United Kingdom because they had lawfully, permanently settled in the country; but their respective husbands were not allowed to join them. This violated Article 14 taken in conjunction with Article 8 of the ECHR, as it infringed their right to have their family life respected. However, the Court did not consider that immigration measures involved discrimination on grounds of race or birth, nor did it believe that these measures were equivalent to inhuman or degrading treatment under Article 3 of the ECHR. As argued by DEMBOUR (2015, 104), in the cases of *Abdulaziz and Cabales* there were reasons to consider that there had been discrimination on grounds of racial origin, and not only on grounds of gender. Whereas in the case of *Balkandali*, there were grounds to hold that there had been discrimination between British nationals on grounds of birth, in addition to gender, due the specific role played by national origin at the intersection with gender (MORENO-LAX 2021, 59). It was

[20] *Abdulaziz, Cabales and Balkandali v. The United Kingdom*. Judgment of 28 May 1985. Series A No. 94. The ruling of the Court was unanimous.

[21] *Alam and Khan v. the United Kingdom*, Application No. 2991/65, Judgment of 17 December 1968.

[22] *H.S. v. the United Kingdom*, Application No.2992/66, Judgment of 15 July 1967.

for this reason that DEMBOUR (2009) described this leading case as a bittersweet achievement. Basically, the laws regulating immigration in the United Kingdom caused gender-based discriminatory treatment as a result of taking in conjunction the Article 8 with Article 14 of the Convention. This did not go beyond reasoning or warning about the risks of internal classifications in access to nationality and cases of inequality between members of the same family. This unresolved issue would later lead to legitimising ethnic-racial discrimination, as in the case of *Biao v. Denmark*.

If the logic used by the Court to resolve the case in the 1980s is analysed, it becomes apparent that it was completely different. It was basically limited to examining two preliminary questions about the content and scope of the positive obligations of the State under Article 8 ECHR. Firstly, the right to family life presupposes that a family exists and protects the right to create it. This requirement was questioned in the case. Since there was no family, its right to exist could not be recognised. However, the legal residence of a person was (indirectly) conditional upon the time factor involved in creating a family (in other words, upon that individual's single status). And, secondly, it was highlighted that Article 8 can in no case be interpreted as a general obligation of States to respect the choice of married couples regarding their joint place of residence and to accept the residence of non-national spouses. Two types of stereotypes arose from these interpretations regarding migrant workers as household heads and family members. It was presumed that they had caused or freely chosen the separation of their family, a decision and action for which they were responsible. And it was further assumed that even if family values were essential for migrant families, the whole family could return to their country of origin to avoid dislocation, unless there were insurmountable obstacles that prevented this or made it inadvisable.

Nevertheless, its argument with respect to other rights guaranteed by the ECHR was well established (MORENO-LAX 2021, 59; SANTOLAYA MACHETTI 2004, 92). It considered that the different treatment of men and women in terms of reunion with their spouses under UK law and practice was formally unequal and a clear violation of Article 14 ECHR. According to the legal grounds of the judgment, Article 14 does not have an "independent existence", and only applies "instrumentally" to the enjoyment of the rights protected by other rights within the ECHR. When the ECtHR finds a violation of a substantive right, it often does not go on to analyse an allegation of discrimination if this entails revisiting a virtually identical issue. According to the ECtHR, Article 14 specifically states that a difference of treatment is discriminatory if it «has no objective and reasonable justification». That is, if it does not pursue a "legitimate aim" or if there is no «reasonable relationship of proportionality between the means employed and the aim sought to be realised».

Therefore, the Court determined that the immigration regulations in question were discriminatory on the grounds of gender but not on the grounds of race. As it focused on a single ground, a contextual understanding of the interaction between race and gender was lacking, which revealed the limits of the equality-based reasoning. The immigration provisions did not contain any distinctions between persons based on their race or ethnic origin (either directly at first sight or in speculative terms), but ruled on which decisions were required to be taken without regard to these criteria. The Court considered that «the United Kingdom ancestry rule», which required that either the applicant's wife had been born or had a parent born in the United Kingdom, did not favour persons of a particular origin; rather, it was designed to benefit people with close connections to the United Kingdom and incidentally prevent so-called "bogus marriages". In the same vein, it was argued that there were «general persuasive social reasons for giving special treatment to those whose link with a country stems from birth within it». The objective justification for the provision was: (1) to protect the domestic labour market, where male immigrants may have a greater impact or pose a threat; and (2) to ensure domestic order, given the tension caused by immigration in society (ARTURO 2005, 19).

However, both "objective reasons" were aimed at imposing preventive control measures on the possible effects or risks arising from admitting these spouses into the country. In this case, the ECtHR more or less explicitly embraced and reinforced the stereotyped migrant family model, based on gender distinctions between the productive and reproductive roles in the family, but without taking into consideration the racist stereotypes attributed to possible "bogus" spouses. In fact, *Abdulaziz Cabales and Balkandi v. the United Kingdom* was based on normative assumptions about the roles of migrant women within their families, which were automatically attributed to them because they were women. Imposing stricter conditions only on women who requested to be reunited with their husbands or fiancées (and not on male applicants) justified non-compliance with the letter of Articles 8 and 14, by adducing the unsupported argument that «male immigrants would have a greater impact than female immigrants on the [domestic labour] market». In fact, according to the IOM[23], it is women who migrate alone first and may have a greater impact on the domestic labour market in those sectors of employment not covered by the indigenous population, such as home care or support. This argument, which is deemed to be disproportionate and anachronistic today, was based on a racist stereotype about gender roles. The real underlying reason for giving different treatment to family migrants and clear priority to one role over the other was fear that migrants would have access to the labour market and unemployment would rise among native-born people. Therefore, the views on the reunion of husbands with their wives by allowing the former into the country should be questioned because of their prejudiced assumptions. They raised doubt as to whether the true end pursued was to lead a married and family life in the country of origin of each of the applicant(s) as a "dependent", and not as a "productive" agent, because of their presumed gender roles.

2.2. *Thirty years later: the case of Biao v. Denmark (2014)*

The Second Section of the ECtHR heard a case on an application for family reunion lodged by the Biao family (spouse and son), who had been refused by Denmark (*Biao v. Denmark,* 25 March 2014)[24]. Their application had been refused because they were not related to persons who were native-born Danish citizens, and therefore they did not meet what is known as the "attachment requirement" under Danish regulations. The majority of the ECtHR found no violation of the prohibition of discrimination in relation to the right to family life. The Court did not consider that the refusal to grant the applicants a residence permit entailed a violation of Article 8 ECHR. Mr Biao was a naturalised Danish citizen born in Togo and his wife, Ms Biao, was a Ghanaian national. Both lived in Sweden with their 9-year-old son, who was a Danish national (by virtue of his father's nationality). Ms Biao had arrived in Denmark in 1993, after having spent 15 years in Ghana. Following 9 years of lawful residence in Denmark, Mr Biao was granted Danish nationality in 2002. Ms Biao applied for a residence permit in Denmark in 2003, one week after their marriage. Her application was refused by the Danish Immigration Authority for failing to comply with the requirement that a couple requesting family reunion should not have closer ties with a country other than Denmark (Ghana, in the case of the applicants). This is known as the "attachment requirement". This attachment presumption is clearly more quantitative than qualitative, since there are no empirical criteria to endorse that, the longer the time of residence, the closer the ties, and vice versa. A process of progressive integration is not

[23] The International Migration Organisation summarises key global migration trends based on recent statistics, providing 21 indicators in relation to 17 migration issues: labour migration, refugees, international students, remittances, migrant trafficking, migration governance, children, public opinion, among others. For 2020, these indicators and statistical data can be consulted in the [online] version, available at: https://publications.iom.int/system/files/pdf/wmr_2020.pdf.

[24] *Biao* (2014), cit. par. 76-102.

linear, nor is it chronologically measurable. This is a point of connection between this case and the *ABC* case, regarding the legitimacy of different treatment of United Kingdom citizens who were born and had resided in the country compared to non-UK born or non-UK-resident citizens. There was a presumption that the former had greater attachment to the country that their relatives aspired to become nationals of, but this was not validated (DEMBOUR 2015, 106).

The requirement provided by Danish regulations is the general rule to allow a Danish citizen and their foreign spouse to be together in Denmark; in other words, for family reunion to be granted. Danish regulations only allow for one exception to this requirement under the so-called "28-year rule", according to which family reunion is permitted if the Danish spouse has been a Danish citizen for at least 28 years. The 28-year-old rule also applies to people who are not Danish nationals but were born and raised in Denmark; or who went to the country as young children, were raised there, and have legally resided in the country for 28 years. The 28-year rule exception resulted in different treatment of two groups of Danish citizens, that is, those born as Danish nationals and those who became Danish nationals at a later stage in their life[25]. Statistically speaking, the latter are likely to have a different ethnic origin in most cases.

In this case, the Court was mainly focused on assessing whether different treatment of people in similar situations is discriminatory when it lacks objective and reasonable justification regarding nationality, a domain of state sovereignty. As in the case *of Abdulaziz, Cabales and Balkandali*, the ECtHR did not find that there was ethnic or racial discrimination in the case of *Biao*. In the Court's view, the wording of the 28-year-old rule did not distinguish between Danish-born people and those who became Danish nationals later in life. Nor did it differentiate ethnically Danish nationals from Danish nationals of other ethnic origins. Therefore, it concluded that the formulation of the 28-year-old was neutral, although it could not deny that, in practice, the 28-year rule gave unequal treatment to Danish nationals of an ethnic origin other than Danish. This can be described as a distorted perception of the notions of "neutral" and "real", given the greater social impact that this rule has on one minority group compared to others.

In the case of *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, the Court ruled that there was only gender discrimination involved and concluded that this was not sufficient to assume that the applicants were discriminated against on grounds of race and/or ethnic origin. However, in the Biao case, the Court held that the treatment given to the applicant who had been a Danish national for less than 28 years was different to the treatment given to those who had been Danish nationals for more than 28 years. The basis for this discrimination was the length of citizenship, but the different treatment was reduced to the category of discrimination on "any other grounds". This was a more indeterminate form of discrimination on the boundary area between discretion and arbitrariness. It allowed the State a wide margin to demonstrate whether a measure adopted on immigration matters where it held sovereignty was reasonable or not. It should be noted that a certain degree of discretion is not only compatible with legal certainty but is sometimes advisable. On the contrary, arbitrariness is close to abuse of process, which is characterised by decisions made or validated without providing any underlying reasons for them, and «shatters any attempt to give people security» (VILAJOSANA 2006, 284).

The argument on reasonableness and proportionality in the first instance is deconstructed below. The interpretative strategy of the ECtHR had a number of shortcomings:

a) It confusingly avoided examining national legislation in the abstract (not immigration regulations) and simplified the examination of proportionality and reasonableness. The Court took 2004 as a starting point and maintained that Mr Biao had only been a national for two years before he was refused family reunion, and that both Mr and Ms Biao had stronger ties with Ghana.

[25] Strictly in quantitative terms, Mr Biao, who became a Danish national when he was 31 years old under the 28-year rule, would only be eligible for family reunion when he turned 59, a completely different scenario to that faced by a Danish person who was born in Denmark but lived in Sweden while remaining a Danish national.

b) The Court did not consider the 28-year attachment rule to be disproportionate. In the Court's view, the rule was justified because it disregarded the fact that Mr Biao was Danish after 9 years of residence, despite the fact that his territorial ties had been discontinued due to his move to Sweden with his family.

c) The discrimination factor(s) were reframed by denying that there was racial discrimination and holding that there was only discrimination on grounds of national origin. Under Article 14 ECHR it was therefore possible to have second-class citizens, especially in terms of the rights granted under the Convention (such as those in Article 8). However, as argued by the dissenting opinion, this legislative measure had «disproportionately prejudicial effects on a particular group», as they would be unable to lead a family life in the country whose nationality Mr Biao's possessed, which would also affect his son[26]. This would undermine his rights, as he would not be considered to be a Danish citizen.

2.3. *The unexpected turn of events: the effects of discrimination in* Grand Chamber ECtHR Biao v. Denmark (2016)

On 24 May 2016 the Grand Chamber of the ECtHR revoked the judgment, and in the second instance, the Court went beyond the normative text regarding the 28-year rule. Along the lines of the dissenting votes, the Court analysed the legitimate purpose of the rule, and tried to explain whether it had had a disproportionate effect on a specific group of people. The Court noted that it was the State's obligation to prove the legitimate purpose of this different treatment. It observed that the 28-year rule resulted in indirect discrimination that favoured Danish-born nationals and had disproportionately prejudicial effects on those who had become nationals by naturalisation (Möschel 2017, 110).

In the second instance, the Grand Chamber[27] started to outline and take the first steps towards a stronger conceptual scope and the difference between direct and indirect discrimination regarding treatment based on ethnic origin. This "28-year attachment rule" clearly had a negative impact on naturalised Danish nationals who had a different racial or ethnic origin, because it meant they would have to wait longer to exercise that right. While the 28-year rule may seem to be a neutral condition, it would compromise their life and would affect them differently regarding their foreign spouses being able to join them in Denmark. Following the argumentative logic of the three dissenting judges, the Grand Chamber reviewed the ruling of the 2014 Judgment and concluded that there had been a violation of Article 14 taken in conjunction with Article 8 of the ECHR. However, according to the Strasbourg Court, there was no need to conduct a case review in relation to Article 8(2) of the Convention. In fact, section 2 of Article 8 has been traditionally obliterated to make immigration controls and integration measures compatible, even in cases of pseudo-citizenship. This is ultimately a way to save the State's prerogative of exercising its sovereignty on nationality as a means of regulating migration control and the degree of integration required. In my view, there is a contextual mistake when the ECtHR decided not to review Article 8(2), because this left the application of equal treatment under Article 14 unsolved. Specifically, in the light of unjustified discrimination, the "neutral" measure that qualified impact-based or indirect discrimination in this case did affect the exercise of the right to family life and integration conditions. A negative effect that wrongly rests on the basis of "social prejudice", rather than serving a social need or a State's material or immaterial interest. In fact, the integration requirement in the migrant family context is questionable as a social need, because in some cases it seems an ambiguous form of migration control policy. For in-

[26] See Joint dissenting opinion of Judges Sajó, Vučinič and Kūris, *Biao* (2014) cit. par. 8.

[27] *Biao v. Denmark* [GC], Application No. 38590/10, Judgment of 24 May 2016.

stance, the same integration criterion has been positively determinant in recognising the violation of Article 8 ECHR by Strasbourg jurisprudence[28].

3. *Exploring discrimination, racist stereotypes, and the intersectional approach*

There have been very interesting developments recently in relation to "new ways" of perceiving institutional discrimination. These include (through undifferentiation) the approach to discrimination from the standpoint of a State's positive obligations, the functional analysis of stereotypes, and the intersectional approach as one of the most cross-disciplinary contributions of feminist theory (MacKinnon, 2013, Bello, 2015, Morondo Taramundi 2016a, McCall 2005). Different schools of intersectionality (in the 1970s and 1980s) and different waves in intersectionality studies (in the 1990s and 2000s) have drawn attention to two elements, namely, identity and structure. They have emphasised the different complex constituents of the person, the importance of the context, and the systemic power relations underpinning institutions and human interactions. Intersectionality has dismantled the use of a single axis in the area of anti-discrimination law, by considering it to be lacking in cases where «discrimination on more than one ground is indiscernible (synergistic effect), or where the full effects of discrimination can be assessed only by taking into account the combination of two or more grounds (cumulative effect)» (Makkonen 2002, 9-14). The specialist doctrine has subdivided the multiple forms of discrimination into various categories: *direct, indirect, ordinary, additional, composite, cumulative, cumulative, and intersectional* (Collins, Khaitan 2018, Verloo 2006, Barrère, Morondo 2011). None of these forms has become a well-established category, either in terms of meaning or of their significance and scope. Precisely for this reason, Rey Martínez (2008) criticised the profusion of terms and the ambiguity of the concept of multiple/intersectional discrimination. He argued that their origin should be strongly criticised, given the multiple terms used and the terminological limitations caused by the lack of words (in languages other than English) that are equivalent to those used in Anglo-American legal systems. A criticism shared also by Makkonen (2002), who opted for the use of the terms "double" or "triple" rather than "multiple" discrimination in cases of cumulative discrimination, because of its greater quantitative connotations and, to a lesser extent, because of its necessary interaction.

Reviewing the ECtHR's case-law discussed here, the applicants in the Biao case (Mr and Ms Biao) were discriminated against on the basis of their "other status" for the purposes of Article 14[29]. The dissenting judges emphasised how indirect discrimination reinforced a negative stereotype about immigrants and their families. The Court argued that there was no racial discrimination, but discrimination on the grounds of national origin. It hastily affirmed that national origin is only «an ethnic criterion in the non-racist sense»[30]. However, the internal qualification of nationality in Denmark morphologically results in indissoluble ethnic-racial discrimination, which cannot be dissociated by denying its "non-racist" component. As interestingly argued by Arnardóttir (2017, 163), when the Grand Chamber found that there had been indirect racial discrimination vis-à-vis persons of non-Danish ethnic origin in the case of Biao (2016), it did not consider that this had caused vulnerability. A Danish citizen with ethnic origin was not regarded to be a member of a "vulnerable group" because the Court only used ethnic origin/race as grounds for discrimination in relation to Roma people[31].

[28] *Sen v. the Netherlands*, cit. *Tuquabo-tekle v. the Netherlands*, cit. *Darren Omoregie and Others v. Norway*, cit. par. 57 and *Rodrigues da Silva and Hoojkamer v. the Netherlands*, cit.

[29] Joint dissenting opinion of Judges Sajó, Vučinič and Kūris, *Biao* (2014), cit. par. 12

[30] Joint dissenting opinion of Judges Sajó, Vučinič and Kūris, *Biao* (2014), cit. par. 13 and par. 15.

[31] *D.H. and Others v. Czech Republic.* Application No. 57325/00, Judgment of 13 November 2007, parr. 181f.; *Oršuš and Others v. Croatia.* Application No. 15766/03, Judgment of 16 March 2010, parr. 147 f.

The burden of proof was transferred to the State, so it was for Denmark to prove that the different treatment was justified (CARRERA 2016, 9). It had to demonstrate that a given provision pursued a legitimate purpose and objective (non-evaluative) factors related to ethnicity, which had a different impact on citizens. It is not true that the difference in treatment was based only on the length of nationality, as argued by the Danish State. This criterion of family reunion was created in a self-serving way. It supported different treatment of citizens based on their different national or ethnic origin[32], since the requirement could be effectively less achievable for some nationals than for others, given the extensive period required. A 28-year period is more than half of the life and reproductive history of an individual with a dependent family aiming to acquire and exercise a second nationality option in adulthood. In this sense, three aspects will be briefly outlined below to further explore their connection with the intersectional approach and stereotypes.

3.1. *A two-level analysis of indirect discrimination: individual and general context-based*

Both the dissenting opinion and the Judgment of the Grand Chamber seemed to find that there had been indirect or impact-based discrimination. Therefore, direct discrimination was ruled out. However, ERSBOLL (2014, 16), among other authors, questioned the presumption that Danish citizens with migrant background and 28-year attachment had stronger ties than other Danish citizens with migrant background but attachment periods of under 28 years. For instance, a 10-year attachment is the most extended rule for acquiring citizenship in Europe. Although the 28-year rule applies to all citizens, the impact is different, as the "28-year attachment rule" directly (rather than indirectly) establishes different treatment for certain Danish citizens based solely on how and when they acquired citizenship; something that, as a matter of principle, is contrary to Article 5 (2) of the European Convention on Nationality[33]. Here again, the case of *Biao* differs and is disconnected from the previous case of *Abdulaziz, Cabales, Balkandali.* In the *ABC* case it was not established that there was direct discrimination or discriminatory treatment of citizens based on their place of birth; more specifically, this refers to the case of Ms Balkandali, because the other two applicants were lawful residents in the United Kingdom, but spouses of non-UK born citizens and children of non-UK born parents.

It is precisely in the general context where stereotypes about a minority group play a decisive role and two forms of inequality may intersect within the same individual. For example, this measure had a different impact on Ms Biao due to a gender stereotype as a "good mother" than on Mr Biao's son. In fact, the latter could be considered a Danish second or third generation citizen applying a migrant stereotype. And Mr Biao, a Danish national of Tongan origin, saw his ability to quantitatively integrate openly challenged, which had dissimilar consequences for his family members.

Some considerations should be made at this stage on the reasoning provided by the ECtHR.

(a) The different treatment of a group raises fundamental human rights concerns, especially if it reflects or reinforces the existing patterns of social stereotypes related to a "natural characteristic". It is unthinkable that the provisions in Article 14 ECHR would allow for second-class citizens to exist, especially in terms of the rights granted under the Convention (such as those contained in Article 8). For this reason, the Court's doctrine of indirect discrimination refers how a general measure has group effects, and not only individual impact: discrimination can occur when «a general policy or measure ... has disproportionately detrimental effects on a particular group»[34].

[32] Joint dissenting opinion of Judges Sajó, Vučinič and Kūris, *Biao* (2014) cit. par. 96.

[33] European Convention on Nationality, 6 November 1997, Council of Europe, European Treaties series No. 166.

[34] Joint Dissenting Opinion of Judges Villiger, Mahoney and Kjølbro, *Biao* (2016) cit. par. 8.

(b) There is a remarkable use of stereotypes in discrimination. The dissenting opinion in the Biao case underlined «the impugned differentiation reflects and reinforces, albeit indirectly, a negative stereotype»[35]. Referring to the Grand Chamber judgment of *Konstantin Markin v. Russia* in 2012[36], the dissenting judges reminded everyone that «the Court previously held that general assumptions or prevailing social attitudes in a particular country provided insufficient justification for a difference in treatment on the grounds of sex». The stereotype in question was that those immigrant nationals who marry a person from their home country are not well integrated. Throughout the judgment, Biao was portrayed as being a "poorly integrated immigrant", namely, a Danish expatriate who «speak[s] Danish at home, take[s] holidays in Denmark, read[s] Danish newspapers regularly and so on».[37]

(c) It is often expected or presumed that the key benefit of having citizenship is to be treated equally, which includes not being discriminated against (when compared with other nationals). The literature on immigration and citizenship has paid special attention to cases of discrimination between nationals and foreigners based on nationality (De Vries 2016, 12-14). However, it has done so without recording the increasing number of cases of discrimination of nationals on grounds of ethnic or national origin. There is a form of "unreal citizenship" (Costica 2015, 297 f.) attributed to an immigrant but not equivalent *a fortiori* when exercising a fundamental right, namely the right to family life. This challenges and rules out the traditional difference between nationals and foreigners by placing some citizens closer to the category of foreigners in the light of their assumed, attributed, or supposed otherness, and their distance from national identity or a national way of life (Carrera 2016, 12).

3.2. *Interactions and intersections between ethnic criteria, nationality, gender roles and racist stereotypes*

As Morondo (2016a, 480) critically argued by using an analytical perspective of anti-discrimination law, the main objective is to identify the interaction of the axes or systems of subordination of some social groups. It is precisely this conception that should emerge from the case of *Biao v. Denmark*, since the construction or protection of intersectional subjects *per se* prevents the discriminatory effects of stereotypes about Danish nationals of other ethnic origins from being neutralised. Categories, stereotypes, and classifications are true instruments of inequality. They are static and difficult to remove; they may exist or persist, but they are not the reason why they are there (Morondo Taramundi 2016b). The identity-based approach of intersectionality as the liberal conception of anti-discrimination law disregards the collective and structural dimension of oppression and discrimination, which Morondo and Barrère (2011) called forms of *subordiscrimination*.

There is only a minor link to intersectional discrimination in the areas of ethnic origin and gender in the ECtHR's case law, even in terms of normative stereotypes. For example, in the cases of *Osman v. Denmark* 2011 *and CN and V. France* 2012[38] the Court failed to capture the intersections of age, gender and ethnicity that aggravated the abuses suffered by the applicants (Staiano 2016, 13-20). The same applied to the *Biao* case, where the obvious double standard could not be concealed, especially with regard to Ms Biao, a migrant woman who saw her residence application

[35] *Biao* (2016) cit. par. 126. «General biased assumptions or prevailing social prejudice in a particular country do not provide sufficient justification for a difference in treatment on the ground of sex» (this should also be interpreted to mean on ethnic criteria).

[36] *Konstantin Markin v. Russia*, Application No. 30078/06. Judgment of 22 March 2012, par. 127.

[37] Concurring opinion Judge Pinto de Alburquerque, *Biao* (2016) cit. par. 9.

[38] *Osman v. Denmark*, Application No. 38058/09, Judgment of 14 June 2011. *CN and V v. France*, Application No. 67724/09, Judgment of 11 October 2012.

for family reunion refused with little explanation. Her "integration" was openly questioned, even more so compared with other cases, such as the case involving the children of Ms Sen, Tuquabo Tekel and Rodrigues[39]. Therefore, there are serious difficulties in identifying instances of intersectional discrimination in the ECtHR's case law. If they are not properly neutralised, they can even reinforce discriminatory stereotypes that have not been expunged.

For this reason, it would be necessary to go one step further in analysing the judgment of the Grand Chamber and see whether an intersectional approach can be operationalised. To do so, it is necessary to return to stereotyping processes. These processes are associated with Immigration Law and, in my view, they have only been consciously identified in part. They have been placed on hold to avoid exceeding the limit and questioning the margin of appreciation of States regarding their nationality or immigration laws, as well as their incompatibility with forms of ethnic-racial discrimination.

According to Judge Pinto de Albuquerque[40], establishing an "attachment" requirement to avoid "integration problems" would be a racist stereotype and constitute discriminatory treatment:

> «the stereotype that resident foreigners and Danish nationals of foreign extraction as helpless young people, who are either forced to marry persons from their country of origin or tend to engage in an odd widespread marriage pattern of a kind of cultural in-breeding, and later on build "unhappy" families, have "marital" problems, and do not integrate well in society».

This was set in opposition to «an idealised image of ever-faithful Danes, born in Denmark, who live outside the country».

The reasoning of the Grand Chamber gave the impression that the Court itself used a concept of ethnicity or "ethnic origin" that was merely statistical[41]. However, if there are no empirical grounds to account for those who have been naturalised by ethnic origin, the measures to identify any "stereotyping" processes by which a national of foreign extraction is socially or legally excluded are grossly flawed. This lack of redefinition of the «ethnic criterion in the non-racist sense» is not casual or random. Rather, it falls within the structural discrimination that results from those processes where the margins of appreciation/justification are neutralised in awkward areas.

Discrimination operates by generalising or applying negative stereotypes; in other words, by resorting to prejudice and ascribing characteristics to an individual merely based on membership of a given group (Rey Martínez 2017, 13). Stereotypes are characteristics of group membership that often cannot be changed by individual members, and thus do not depend on the free choice of the subject, their merit, or their individual life trajectory. Belonging to such a group (in this case, to the group of «naturalised nationals of foreign ethnic extraction») is not normally the result of a choice by its members. Moreover, they cannot change or remove stereotypes by themselves, regardless of whether the prescribed period is 28 years or even longer. The temporal factor does not reverse or minimise stereotypes. The criterion of ethnic origin, which is not racist according to the ECtHR, is a grey area where national identity and ethnic origin membership overlap. The ECtHR does not seem to have established a clear distinction between race and ethnicity. It has opted to maintain uncertainty regarding nationality in order to curb other avenues, as these may

[39] See *Sen v. Netherlands*, cit. *Tuquabo-tekle v. the Netherlands*, cit. *Rodrigues da Silva and Hoojkamer v. the Netherlands*, cit.

[40] Concurring opinion of Judge Pinto de Alburquerque, *Biao* (2016) cit. par. 18.

[41] In other cases, statistical data were considered not relevant, for instance, in *Abdu v. Bulgaria*, Application No. 26827/08, Judgment of 11 March 2014 (failure to effectively investigate racist violence); *D.H. and Others v. Czech Republic* [GC], cit. (schooling of Roma children in special schools); *Di Trizio v. Switzerland*, Application No. 7186/09, Judgment of 2 February 2016 (disability benefits for disadvantaged women); *Opuz v. Turkey*, Application No. 33401/02, Judgment 9 June 2009 (domestic violence).

reveal the incompatibility of "racism" with Article 14 beyond the context of migration. Thus, it is not included in the domain of citizenship/national identity (which is not open to scrutiny). In addition, clarity would involve gauging the proportionality and legitimacy of the reasons adduced by States to justify that racist stereotypes on some of their nationals have not been neutralised, and questioning the legitimacy of their legislation on nationality.

When analysing stereotypes as causes of structural discrimination, no consideration is given to the nature of pluralistic societies (such as Danish society), where it is precisely coexistence among different people that promotes the creation of different social categories. Categorisation is activated as a corollary of interpersonal interaction, especially when information about the "others" is scarce, restricted for self-serving reasons or simply non-existent. Once someone has been categorised, a set of norms, values and emotions seems to be inevitably triggered (TAJFEL et al. 2000, 51-54). This can distort perception and create biases between endo-groups and exo-groups (given the need to maintain social identity in the face of groups perceived as competitors or threatening social status) (TAJFEL et al. 2000, 58-60). Therefore, the danger of establishing certain categories is certainly not diminished.

These stereotypes are generally *descriptive* and can become essential. They may also become *prescriptive*, that is, they may refer to a set of characteristics that certain people "should have" (being a good migrant for the purpose of social inclusion). In principle, stereotypes as forms of categorisation are neither negative nor positive in themselves. But this does not mean that they are neutral; they may often involve prejudices or phobias, depending on the social group at which they are directed (DOVIDIO et al. 2010, 7 f.). Their field of action can be social practices, norms, habits, as well as judicial decisions. Basically, stereotypes affect the credibility of the persons concerned and, consequently, the interpretation or application of normative provisions or facts (CUSACK 2014, 20). The attribution of specific characteristics, roles, or functions to an individual simply because they belong to a certain social group becomes discrimination if it entails a disadvantage (COOK, CUSACK 2010, 9). Thus, they influence rule content and how equality criteria are formulated to avoid their negative effects (including an unreasoned or unproven analysis of a specific situation).

When the Grand Chamber held that the Biao family had indirectly been discriminated against due to an attachment rule which was neutral because of the "length" of nationality, in my view, it unveiled stereotypes that had been wrongly assimilated as neutral or static categories applied to a minority group in a general context. This had a clearly negative and disadvantageous effect on the members of that particular group. The impact of this "stereotyped" rule was different even for the different members of the Biao family (son and wife), as gender role stereotypes were also applied to them in their family reunion application. Ms Biao's status as an immigrant woman and Mr Biao's national status overlapped, instead of neutralising each other. This reinforced the negative stereotype about her dependent role related to childcare and upbringing, and led to her residence application being refused due to the lack of "attachment" of her Danish husband of foreign ethnic origin. The process might have been easier if she had requested that her minor child join her, or applied for a residence permit as the wife of a Tongan citizen rather than of a Danish national. The integration criterion or special protection of the child with respect to his parents would have been more effective or more evident, and it may have been easier to prove the racist stereotype. They were victims of unequal treatment by the ECtHR when compared to other transnational families or EU citizen's third country national families living in and moving to Denmark. Such ethnic or racist identities are neither objectively identifiable nor immutable categories; they are non-neutral, dynamic, and contextualised social constructions. Using an intersectional approach could therefore be useful in understanding their true scope and short- and long-term impact (DE VRIES 2016, 9).

Although stereotypes usually have a basic empirical basis, it is their exaggerated, indiscriminately general application to all the members of a given community that turns them into latent

prejudices (TAJFEL et al. 2000, 49-63). Misinterpretation occurs when they are generally extrapolated, persistent, and perpetuated over time, while the usual peculiarities and changes within any group and its members are deliberately ignored. This process is manifested as stereotypes (as cognitive elements) and prejudices (as affective elements), which are linked to different categories that can be constantly self-affirmed. They are difficult to change, even in the face of objective information to refute them. There is an irreversible shift towards prejudice as an attitude, and towards structural discrimination as a form of standard behaviour, even at the institutional level. Therefore, beyond the real or empirical basis that prejudices may have, the strategies of avoidance, externalisation or segregated origin of the threat have a strong impact. Paradoxically, these are articulated to reinforce some fragile and superficial constructions of national homogeneity, by relying on real but somewhat idealised grounds.

3.3. *An intersectional legal toolkit: contexts and comparability test*

MORONDO (2016b) recalled how Crenshaw's intersectionality has become a maxim of focus in feminist studies, a sort of "gold standard" (NASH 2008, 2), but his incursion into other spheres has not diminished the criticism of its complexity, ambivalence, and practical application, especially in relation to the Law (MCCALL 2005, 1771; BARRÈRE, MORONDO 2011; MACKINNON 2013). The intersectional approach makes sense in this context because it "enhances" and goes beyond the classical view that provides a partial, formalistic, or simplistic version of discrimination. According to this view, the various factors involved (gender, ethnicity, sexual orientation, personal and social conditions) operate separately on individuals, thus denying the existence of complex underlying inequalities. Moreover, through the intersectionality prism, the theory generates a «multidimensional, holistic account of subjectivity and whole-of-person/whole-of-world approach» to the interpretation of human rights (MORENO-LAX 2021, 55-59). As a legal toolkit, it captures the complex analytical levels and explains how they interconnect, separate, and link groups and persons along multiple axes of inequality. It also serves to «deconstruct and look behind and between» oversimplified and stratified categories or stereotypes (MCCALL 2005, 1771).

As highlighted by LA BARBERA (2017), this analytical perspective shows that inequalities are produced by the interaction of various social structures that are dynamic in time and space in relation to the social structures and discursive representations that make up social relations (LA BARBERA 2016). Intersectionality rediscovers a specific vulnerability that moves away from the explanatory models of the merely "additive or summative" vulnerability or even of the particular or special vulnerability resignified by this (LA BARBERA 2017; MORONDO 2016b). Nevertheless, according to these authors, case law has limited transformative effects because it does not always recognise that the different causes of discrimination interact and generate situations of overexposure to rights violations.

One of these causes are stereotypes, which create in- and out-groups and drive people to unite for or against them. Stereotypes make us blind to ethnic/national inequality. The members of a given group are not considered to be individuals but are automatically assessed on the basis of a pre-arranged membership. In the case of *Biao v. Denmark*, they were members of a group that caused an "integration problem" and triggered socio-political alarm. Racist stereotypes can harm citizens by either degrading their human dignity or otherwise marginalising them. For this reason, TIMMER (2011, 715, 721, 751) argued that the intersectional discussion needs to be furthered by analysing some of the contextual factors that help identify the underlying assumptions. Moreover, it is important to check their comparability, since such scrutiny is not appropriate for cases involving stereotypes and for cases of intersectional discrimination, as shown in the case of *Biao v. Denmark*.

Regarding the contextual factors that reframe stereotypes as structural causes of discrimination, it should be noted that ignoring the historical context can be a harmful stereotype[42]. The ECtHR should assess whether a group has been prevented from exercising a particular right in the past; and whether an analogy could be conceivably made between the current regulation and the historical rule that results in discriminatory practices.

Another context of analysis could involve the current impact. What are the effects of the contested rule on the family and the individual practices of a man and a woman? In order for the Court to ensure the adoption of an intersectional approach to discrimination, it must enquire about the repercussions for a particular group of men and women; for instance, women of a certain ethnic or religious group, of a certain age, who have a disability, and how they can demand that their right to family life be protected. To accept this difference in treatment, the validity of certain traditional gender roles has been considered immovable. These roles involved women being perceived as primary child carers, and men being perceived as the main supporters of the family. There was no consideration of how the racist stereotype unequally affects the autonomy of certain women and men. They were at a disadvantage because they did not depend on a comparison with a different group, as only they were taken into consideration. The applicants in this case were treated unacceptably and were deprived of a right, which undermined their personal and family autonomy.

Some aspects of the Grand Chamber ruling appear awkward to the observer.

It is difficult to understand why the Court examined so diligently whether the *de facto* difference in treatment between Danish nationals of Danish ethnic origin and Danish nationals of another ethnic origin (100%) had a reasonable and objective justification. Even more so after it was revealed that the preparatory work for the Immigration Act was largely marked by objectionable clichés.

The ECtHR, far from stating that the 28-year rule did not pursue a reasonable objective, first reiterated the principle that the difference in treatment on grounds of ethnic origin could only be justified for "very weighty reasons"; and second, provided no answer to the question of whether the 28-year requirement was a legitimate objective. This is a typical confusion between "legitimacy" and "legitimation", which the Court failed to probe deeper into. There is no doubt that the measure could be descriptively legitimate because it is socially accepted. However, it does not meet the justification criteria or objective legal standards that give ultimate meaning to a legal system: the principle of equality and non-discrimination. By carefully examining the preparatory materials of the law to seek an objective "weighty" justification, the ECtHR to some extent weakened the dogma that different treatment could be given depending on the situation. Adducing that someone's ethnic or a racial origin is different from that of the standard citizen can barely be justified under the Convention. The obsessive search for "objective factors" may not be intended to justify the difference in treatment, but rather to find "legitimate causes" unrelated to race to substantiate the different impact that the 28-year rule had on people of different ethnic backgrounds, regardless of their "racial origin". However, these "racist" reasons are objectively obvious, particularly as part of a legitimation strategy.

4. *Final remarks*

There is a significant time gap between the first initiative related to discrimination grounds in the controversial *ABC* case in 1985, and the second instance of discrimination in the ECtHR's case law regarding the *Biao* family. These cases, both then and now, serve to highlight the lack of interest in fully exploring the weight of racist stereotypes and the non-neutrality of certain sovereign control

[42] As critically pointed out by Judge Pinto de Albuquerque in Concurring opinion of Judge Pinto de Alburquerque, *Biao* (2016) cit.

measures of migration policies and nationality legislation. In these cases, racist stereotypes were associated with a family that had indirect migrant status, limiting their exercise of a fundamental right (family reunion). But this took place in two different normative scenarios. In the *ABC* case, it occurred within the strict scope of immigration control measures for relatives of non-British citizens married to foreigners/immigrants (except for Balkandali, who was a British citizen); in the case of *Biao*, it took place within the strict realm of nationality, as Mr Biao was a Danish national and his relatives were affected by the attachment rule.

Taking stock of the two, there is no doubt that the case of *Biao* went one step further, but rather clumsily and with poor credibility. This is in contrast to the CJEU's case law discussed above, applied to the protection of the family unity of EU citizens residing in their own country or in another Member State. The Grand Chamber still seemed cautious about its reasoning in terms of relating to stereotypes or to an approach based on vulnerable groups. In fact, it failed to clearly show how these stereotypes were socially constructed and consequently could not explain how it reproduced the problems of racial discrimination that it aimed to solve. Insurmountable forms of discrimination have clearly become institutionalised or standardised in migration. These include the constant denial of complicity with the total discretion of States in this area, and the difficulty in scrutinising the principle of reasonableness and proportionality. This seems to echo the nineteenth-century classic opposition between citizen and foreigner. An anachronistic way of understanding and regulating nationality at a time when complex categories of citizenship and membership are imbued with dynamism and heterogeneity.

It is true that case law both at domestic and European levels has evolved in interpretative terms to protect people and groups against discrimination on certain grounds, including sex/gender and race/ethnic origin. However, there is a lack of clear rules and consistent anti-discrimination filters. Only coherent filters would be able to ensure the identification of hidden cases of discrimination based on the confluence of nationality and racist stereotypes. The resolution of the case of *Biao v. Denmark* discussed here is certainly ambiguous regarding the role that nationality could eventually play as a ground for non-discrimination. This is particularly true considering that nationality is an element of personal identity and a key organisational principle of legal and political communities. Even more so if it has consequences for analysing whether pseudo-nationals versus immigrants are entitled to the same rights and benefits as other citizens; and whether they receive discriminatory treatment that is "legitimised" in a descriptive but not in a normative sense.

In the absence of reliable statistics, the Grand Chamber has been unambitious when deciding on the disproportionate and detrimental criteria of the 28-year rule applied for this minority group. The intention is to reduce its application to the minimal extent. Despite the important boost provided by the judgment in the case of *Biao v. Denmark* (2016), which offered a different perspective on indirect discrimination and the effects of racist stereotypes on nationality or family immigration laws, it remains to be seen if it could broaden the recognition of unresolved forms of intersectional discrimination.

Introducing the intersectional approach can reveal several factors or circumstances that are otherwise invisible and therefore tend to accumulate, giving rise to different discriminatory effects. If the complex inequalities and the intrinsic diversity of today's global societies cease to be analysed circumstantially (or as rare examples at the judicial level), it will be easier to capture the interactions between factors of discrimination (gender role, place of birth, stereotypes). The granting of nationality status to "pseudo-citizens" that is potentially curtailed in terms of equal rights brings to the fore an intention to alienate subjects to a single, exclusive category. Even though they are promised that they will be equal under the legal fiction of nationality, some subjects are forcefully labelled as different within that community. Some people are granted a form of infra-citizenship or pseudo-citizenship, in contrast to those who deserve full, unlimited nationality status, according to an ideal of authentic citizen or utopian cliché.

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